Equitable *Estoppel*

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During any contract, there will be negotiations and changes to the contract throughout its life. Any change to a contract requires, like the original contract, that both parties are enriched in some way—that is, each party must receive some form of consideration. On the other hand, a promise made by one party for which that party receives no consideration is said to be a *gratuitous promise*. By its very definition, not following through on a gratuitous promise will not cause a breach of contract.

Example

In the middle of a construction project, the owner asks a contractor to pile any excess bricks on one corner of the lot to simplify clean-up. The contractor agrees but because she is not receiving anything in exchange; it is a gratuitous promise. At the end of the construction project, if the contractor forgets to follow through with the promise, the owner cannot force her to follow through on that promise as part of the terms of the contract.

Now, if the owner had offered the contractor an additional $100 to pile to follow through with this request, it would now become an obligation of the contract. If she did not follow through with the agreed upon terms, the owner could find someone else to complete the task and if it cost more than $100, the owner could sue for the difference.

If, however, one party breaches terms within the contract as a result of a gratuitous promise made by the other party, the other party can no longer enforce those terms of the contract so long as there is a direct causal chain between the promise and the breach. The courts will *estop* the promising party from enforcing the terms in the contract based on the principle of equity. This action by the court may be said to be an *equitable estoppel* (pronounced *est-top-pal*).

Form the 2nd edition of ***American Jurisprudence***, an *estoppel* keeps

> "a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth...by his own deed, acts, or representations, either express or implied."

From the Oxford English Dictionary, an *estoppel* is "an impediment or bar to a right of action arising from a man's own act, or where he is forbidden by law to speak against his own deed." A contributor to wikipedia sums it up nicely: the promise must prove

1. there was a promise,
2. that promise was reasonably relied upon,
3. this reliance was legally detrimental to the promisee, and
4. equity or fairness (justice) requires enforcement of the promise.

We will look at a number of cases where the courts issued an *estoppel* against the giver of a gratuitous promise.

In the 1963 Supreme Court of Canada case ***Conwest Exploration Co. Ltd. et al. v. Letain***, The optionor, Letain, owned mining claims and the optionee, Conwest Exploration Co. Ltd. had to take certain steps including incorporation by a given date in order to exercise the options. Before that date, the optionor implied that the deadline could be extended. Upon this gratuitous promise (as it was offered without consideration), the optionee continued to take the steps towards incorporation. Afterward, the optionor attempted to revert to the strict date provided in the contract. The optionee applied for relief on the grounds of equitability.

The court found that that it would inequitable to revert to the strict interpretation of the contract and therefore *estopped* the optionor from enforcing the date specified in the contract.

References: Marston, pp.92-93.

LEXUM: https://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/7314/index.do

In the 1968 Supreme Court of Canada case ***John Burrows Ltd. v. Subsurface Surveys Ltd. et al.***, the contract specified that the defendant agreed to pay back a borrowed sum of $42,000 over nine years and 10 months at 6% annual interest in monthly payments. The contract had a clause that if a payment was more than 10 days late, the whole amount payable would become immediately due. Out of the following 18 months, eleven payments had been accepted more than ten days after they were due; however, on December 7th, 36 days after the November 1st payment was due, the defendants demanded full payment of the $42,000 with interest. At this point, the defendant set a registered letter indicating that the plaintiffs were in default and that the defendants were exercising the clause. The plaintiffs attempted to pay both the November and December payments, but this was refused.

The issue here is that in setting up a pattern of accepting late payments, defendants were essentially setting up a situation where the plaintiffs would fall into the habit of submitting late payments thereby allowing the defendants to enforce the default clause at their whim.

The court found this was not a question of equitability: not enforcing a term in a contract is not equivalent to a gratuitous promise not to enforce a term in a contract. The Supreme Court decision cites two quotes from lower court decisions:

> "It is my opinion, however, that for such a rule to apply, the plaintiff must have known or should have known that his action or inaction was being acted upon by the defendant and that the defendant thereby changed his legal position. I do not believe that John Burrows ever gave any consideration to the fact that in accepting late payments of interest on the note, he was thereby leading Mr. Whitcomb—as

> an officer of the defendant corporation—into thinking that strict compliance would not be required at any time.
>
> "It is a matter of regret that Mr. Burrows did not see fit to advise Mr. Whitcomb by letter or verbally of his intention to require strict adherence to the terms of the note; but be that as it may, it is my opinion that both defendants were always aware of the terms of P.1 and knew that default in payment of interest exceeding 10 days could result in the plaintiff demanding full payment, as the plaintiff has now done."

and

> "For estoppel to apply, I think we must be satisfied that the conduct of Burrows amounted to a promise or assurance, intended to affect the legal relations of the parties to the extent that if an interest instalment became in default for ten days the plaintiff would not claim the principal as due unless it had previously notified the defendants of its intention to do so or, if it had not so notified them, that notice would be given them the principal would be claimed if such instalment so in default were not paid. This is, I think, a great deal to infer."

References: Marston, pp.93-95.

LEXUM: https://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/4792/index.do

In the 1979 Ontario Court of Appeal case of ***Owen Sound Public Library Board v. Mial Developments Ltd. et al.***, the contract stipulated that the owner/plaintiff was to honour payment certificates issued by the architect within seven days. With one payment certificate, the plaintiff requested that a document supporting the payment certificate be sealed by the relevant sub-contractor. The defendant agreed (essentially making a gratuitous promise to obtain the seal) but did not obtain the seal until after the seven-day time limit passed.

The contractor attempted to claim a breach of contract and the plaintiff brought the case to court on a question of equitability. The count found that as it was the actions of the contractor which caused the owner to default, they *estopped* the defendant from enforcing the strict terms of the contract.

Reference: Marston, pp.95-96.

References

Donald L. Marston, B.Sc., P.Eng., LL.B., *Law for Professional Engineers*: *Canadian and Global Insights*, 4th Ed., McGraw-Hill Ryerson, Toronto, 2008.

LEXUM: https://scc.lexum.org/decisia-scc-csc/scc-csc/en/nav.do