

**Estoppel by convention
after *Tinkler***

Nicholas Macklam

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Estoppel by convention: origins

- Now considered to be an equitable doctrine
- *Thompson v Palmer* (1933) 49 CLR 507

"... to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations"

Estoppel by convention: origins

- *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641

"the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations. This is, of course, a very general statement. But it is the basis of the rules governing estoppel."

Estoppel by convention: origins

- *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84
- Parties had acted on the basis of an agreed assumption as to the effect of a guarantee (whether it covered certain debts)
- Lord Denning MR:

*"... the parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between them, and are bound by it. ... **When the parties to a transaction proceed on the basis of an underlying assumption** - either of fact or of law - whether due to misrepresentation or mistake makes no difference - **on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.**"*

Estoppel by convention: origins

- *Spencer Bower and Turner on Estoppel by Representation* (3rd ed), cited by Eveleigh LJ and Brandon LJ in *Amalgamated Investment*:

"This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth from the statement of facts so assumed."

Estoppel by convention: development (1 of 2)

- *Keen v Holland* [1984] 1 WLR 251 – whether tenant estopped from alleging that a tenancy agreement fell within the protections of the Agricultural Holdings Act 1948 – no estoppel as not possible to contract out of the Act
- *The August Leonhardt* [1985] 2 Lloyd's Rep 28 – whether party estopped from denying that an extension of time had been agreed for limitation purposes – no estoppel as both parties made the same assumption for different reasons so nothing crossing the line between them
- *The Vistafjord* [1988] 2 Lloyd's Rep 343 – whether party estopped from denying entitlement to commission on ticket sales on the basis of a common mistaken assumption about terms of agency agreement – Court of Appeal accepted estoppel argument

Estoppel by convention: development (2 of 2)

- *Kenneth Allison Ltd v A. E. Limehouse & Co* [1992] 2 AC 105 – whether party estopped from denying valid service of claim form – Lord Goff would have accepted estoppel argument
- *The Indian Endurance* [1998] AC 878 – whether party estopped from relying on Civil Jurisdiction and Judgments Act 1982 – no estoppel on facts
- *Johnson v Gore Wood & Co* [2002] 2 AC 1 – whether party estopped from arguing that a claim was an abuse of process – estoppel upheld (obiter)

***HMRC v Benschdollar Ltd* [2010] 1 All ER 174**

- HMRC sought to obtain acknowledgements from a large number of employers of claims for NICs while tax tribunal appeals were ongoing
- Purpose: avoid having to issue protective proceedings to avoid claims being time-barred under the Limitation Act 1980
- Acknowledgements did not operate as intended: limitation period not extended
- Issue: were the employers estopped by convention from arguing that HMRC's claims were time-barred?

Benchdollar – Briggs J's summary

“In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings ... are as follows.

(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly **shared between them**.

(ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have **assumed some element of responsibility for it**, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

(iii) The person alleging the estoppel must in fact have **relied** upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(iv) That reliance must have occurred in connection with some **subsequent mutual dealing** between the parties.

(v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it **unjust or unconscionable** for the latter to assert the true legal (or factual) position.”

***Blindley Heath v Bass* [2017] Ch 389**

- Whether parties bound by a common assumption that there was no restriction on the transfer of shares
- All parties had forgotten about a shareholders' agreement with pre-emption rights
- Estoppel argument succeeded

Blindley Heath

“79. **The essence of the principle is that the parties have conducted themselves on a conventional basis which is, wittingly or unwittingly, different from the true basis.** Whether the true state of things has been misappreciated, misremembered or forgotten should make no difference to whether the parties have in the event mutually adopted a common assumption.”

“90. The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. **Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it.**”

Benchdollar principles as amended in Blindley Heath

“(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. **The assumption must be shown to have crossed the line in a manner sufficient to manifest an assent to the assumption.**

(ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it.

(iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.”

***Tinkler v HMRC* [2021] 3 WLR 697**

- Preliminary issue: whether HMRC had validly given notice of enquiry into a tax return in 2005
- HMRC's enquiry notice sent to a former address, with a copy to accountants
- Accountants responded to the copy letter, noting that "*the [tax return] is now the subject of a section 9A TMA 1970 enquiry*"
- Enquiry deadline was in 2006
- HMRC concluded their enquiry in 2012
- In 2015 Mr Tinkler alleged that no valid enquiry had been opened

***Tinkler* - FTT and UT**

- FTT – Mr Tinkler was estopped:
 - HMRC and the accountants (as agent for Mr Tinkler) shared a mistaken assumption (that an enquiry had been opened)
 - The assumption of responsibility ingredient was satisfied
 - HMRC relied upon the common assumption in connection with subsequent mutual dealings
 - It was unconscionable for Mr Tinkler to resile from it now that the deadline had passed
- UT – Mr Tinkler was not estopped
 - No room for the doctrine to operate in this statutory context
 - Assumption of responsibility and unconscionability ingredients absent

Tinkler - Court of Appeal

- Mr Tinkler was not estopped:
 - No assumption of responsibility
 - No unconscionability

"69. This is a case in which HMRC have only themselves to blame for what occurred. They were at fault in sending the notice of enquiry to the wrong address. They misled BDO into assuming that an enquiry had been validly opened. BDO did nothing to cause the adoption of the mistaken assumption. In all the circumstances of the present case, any acquiescence by BDO in HMRC's mistaken assumption is insufficient to found unconscionability."

***Tinkler* - Supreme Court**

- Mr Tinkler was estopped: reserved the Court of Appeal and reinstated the FTT's conclusion on the estoppel argument
- Approved the *Benchdollar/Blindley Heath* formulation of the ingredients in the non-contractual ([53]) and contractual ([78]) context
- Held it was "*largely irrelevant*" that HMRC were responsible for initiating the common assumption ([56])
- Held that, in replying to HMRC as they did, the accountants endorsed or affirmed HMRC's mistaken assumption and HMRC relied (as expected and intended) on that affirmation ([57])
- Held that it would be unconscionable for Mr Tinkler to resile from the common assumption ([64]-[65])

Tinkler – conclusion (Lord Burrows)

"85. Standing back from the detail, what Mr Tinkler and his advisers have done is to take at a late stage what can fairly be described, on the facts of this case, as a technical point (that the notice of enquiry was sent to the wrong address) even though that has not caused Mr Tinkler any prejudice. It is entirely satisfactory that, by reference to estoppel by convention, the law has the means to avoid such a technical point succeeding."

Recent decisions

- *Kodric and anor v Bitstamp Holdings NV* [2022] EWHC 210 (Ch) – estoppel by convention relied upon successfully to establish a party was a permitted transferee of shares, despite a “no oral modification” clause
- *Various North Point Mall Purchasers v 174 Law Solicitors Ltd and anor* [2022] EWHC 4 (Ch) – estoppel by convention relied upon successfully as a reason why solicitors not liable for releasing purchasers’ deposits
- *LLC Agronefteprodukt v Ameropa AG* [2021] EWHC 3474 (Comm) – estoppel by convention relied upon successfully as another ground for defeating an argument that an arbitration had not been validly commenced
- *Musst Holdings Ltd v Astra Asset Management UK Ltd and anor* [2021] EWHC 3432 (Ch) – estoppel by convention relied upon successfully to prevent defendants from denying that introduction fees were payable under a contract

Radcliffe Chambers

Nicholas Macklam

Radcliffe Chambers 11 New
Square Lincoln's Inn
London WC2A 3QB

T: 020 7831 0081
F: 020 7405 2560
DX: 319 London
clerks@radcliffechambers.com

www.radcliffechambers.com

