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SUPREME COURT OF QUEENSLAND — FULL COURT

POTTER PARTNERS LIMITED v BALANDA**Thomas, Shepherdson and Williams JJ****30 June 1989****EVIDENCE – ESTOPPEL BY CONDUCT – MONEY PAID UNDER MISTAKE OF FACT – SPENT BY RECIPIENT ON OVERSEAS TRIP – TRIP TAKEN SOONER THAN PLANNED – WHETHER DETRIMENT OR BENEFIT – WHETHER DEFENCE OF ESTOPPEL MADE OUT.**

PP Ltd took proceedings to recover money paid to B. under mistake of fact. At the hearing, B. raised the defence of estoppel by conduct and said that he had spent the money on taking an overseas trip (earlier than planned) and as a result had altered his position to his detriment. The court rejected the defence and made an order for the sum claimed. Upon appeal—

HELD: Appeal dismissed.

The onus of establishing the defence of estoppel by conduct is upon the party raising it, in this case B., and he was required to show that upon receipt of the money, he changed his position to his detriment. Although B.'s change of position was that he advanced the time of his overseas trip, he was unable to show that he was worse off by reason of his taking the trip sooner rather than later, and accordingly, it was open to the court to conclude that the defence was not made out.

THOMAS J: This is an appeal by a defendant against a judgment against him in the District Court requiring him to repay \$11,441.49 to the plaintiff. There is no contest about the fact that the appellant owed the money which had been paid to him under two separate mistakes of fact. The appeal is against the rejection by the learned trial Judge Forno DCJ, of the defence of estoppel. The appellant had spent the money on an overseas trip very soon after the overpayments, and the appellant claimed that he would not have made those expenditures had he not erroneously believed that he was richer than he really was.

The defence is that the plaintiff is estopped from advancing the claim because, in making the payments, it represented that the appellant was entitled to the moneys, and acting on that representation in good faith the appellant changed his position in such a way as to place him in a position of detriment if he were now obliged to repay the money (compare *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58; (1937) 59 CLR 641, 674-675).

The onus of establishing such a defence to a lawful claim is upon the party raising it, that is to say the appellant (*Thompson v Palmer* [1933] HCA 61; (1933) 49 CLR 507, 547; 40 ALR 47.). The learned trial Judge found that the giving of notice of credits to the appellant and the paying of cheques to him amounted to a representation that he was entitled to the money, and that the appellant acted upon that representation in good faith without notice of the respondent's claim. He further found that the appellant expended moneys in reliance upon the representation to the extent that he took an overseas trip earlier than he otherwise would have done. The evidence showed that soon after receipt of the moneys he and his girlfriend made a booking and took the trip between May and September 1987. Upon their return his account was no longer in credit; in fact it was debit to the extent of about \$2,000.00. The learned trial Judge also found that the appellant took the trip in consequence of a long-term plan to do so. His Honour concluded:-

"This defendant has shown he has expended moneys on an overseas trip but in the circumstances I am unable to infer that this has been detrimental in the sense to be derived from the cases; further I am unable to infer that he had altered his mode of living in the sense required."

It may be noted that a reason given by the appellant for the earlier postponement of his intentions to make an overseas trip had been that he had "promised his mother" not to go overseas until he had first purchased some real estate and had something to come home to. Why the sudden appearance of a positive balance induced him to purchase an overseas trip instead of

real estate was not explained and it would be difficult to attribute such a change of priorities to the act of the defendant. Whilst not making an express finding on this point, His Honour seems to have assumed it hypothetically in favour of the applicant, and to have regarded it as insufficient, observing -

"What is being alleged is that he varied his initial plan by going overseas without having the security of real estate at home."

and going on to find:-

"I cannot understand how I can find in these circumstances that this has been a detriment to him, nor that he has changed his mode of living in the necessary sense."

This area of the law has produced a series of factual situations which either expose or fail to expose a detriment that will make it inequitable to allow a plaintiff to recover his money. These include instances where a man has spent more freely than he would have done but for the mistaken belief, and he no longer has the money to meet the claim (*Holt v Markham* (1923) 1 KB 504; [1922] All ER 134; *Avon County Council v Howlett* (1983) 1 WLR 605, (1983) All ER 1073); where the money has been unwisely invested or where it can no longer be recovered by the defendant (*Deutsche Bank (London Agency) v Beriro and Co* (1895) 1 Com Cas 123, 255); and where the defence failed in circumstances where the defendant has used the money wisely, or at least has conducted his affairs in such a way that there is nothing inequitable in requiring him to pay the money back (*United Overseas Bank v Jiwani* (1976) 1 WLR 964, 968-969). Empirically, it would seem that the more reckless or uncharacteristic the expenditure the better the chance that the recipient will retain the benefit of the payment. But I do not think any useful formula exists which will embrace all the cases, and think it fair to say that the present case is near the borderline.

Here the change of position was not that he spent the money on an overseas trip which he otherwise would not have taken at all, but that he advanced the time of the trip. There is no process of logic or inference which automatically brands such a change as a detriment or a benefit. Quite simply no evidence was led and no attempt was made to demonstrate that the appellant was worse off by reason of having made this particular trip instead of the one that he was planning in the longer term. The speculative factors (qualitative and quantitative) in such an exercise would tend to make the comparison highly artificial if not farcical, although the possibility is not to be denied. The mere fact that he spent the money and that he might have to make other arrangements to raise money to be in a position to repay the debt is by no means the end of the matter.

It was submitted on behalf of the appellant that His Honour did not address the right question, in that His Honour asked whether the trip had been a detriment to the appellant rather than whether there had been a change of position in a way which would make it inequitable to require him to repay the money. His Honour's comments included -

"It was not alleged that by reason of going earlier, rather than later, he was disadvantaged in any way, nor was any disadvantage pleaded. ... No altered mode of living was pleaded or proved. It was for him to show that he has been disadvantaged or that he had altered his mode of living and I cannot speculate what disadvantage or alteration, if any, the plaintiff's representation caused him."

Whilst His Honour did not state the full test on all occasions, I do not think that the shorthand references to the question whether the expenditure of the moneys on the overseas trip was detrimental reveals a misdirection, and read in context, it is clear that the correct question was ultimately addressed. The findings were made in the context of the plea that in the circumstances it would be inequitable to allow the respondent to resile from its representations. His Honour obviously approached the question with some circumspection, which I would observe is by no means amiss in cases where a party claims to retain a windfall on the footing that he has been a victim of a misrepresentation as to his own financial position. The present case is very different from one where a person incurs obligations which he would not otherwise have chosen to incur at all. It is pure speculation in the present case whether the decision to advance the trip was a detriment or a benefit, and in those circumstances I respectfully agree with His Honour's conclusion that the defence was not made out. The appeal should be dismissed with costs.

SHEPHERDSON J and **WILLIAMS J** agreed with the reasons and orders made.
[Judgment supplied courtesy of the Chief Stipendiary Magistrate, Brisbane, Queensland].