Estoppel by Conduct and Election

The Hon KR Handley AO | Sweet and Maxwell, 2006

On 1 November 2006, his Honour Justice Heydon launched the most recent text on the prolific production line of Justice Ken Handley AO entitled *Estoppel by Conduct and Election*.

Justice Heydon also wrote the foreword to this text, observing that:

> During his many years of intense practice at the Bar, and his decade and a half on the New South Wales Court of Appeal, Mr Justice Handley has built up a high reputation as a legal scholar. From his earliest days at the Bar, he was wont to deflate many confident but loose assertions by others in the lift or the corridors by instant reference to contrary decisions. In court his elegantly composed and scholarly submissions, based on notes in the most neat and beautiful handwriting, are still well remembered. His learned, but succinct, judgments have been a valuable contribution to the law. The publication in 1996 of his third edition of Spencer Bower and Turner's *Res Judicata* and in 2000 of his fourth edition of Spencer Bower and Turner's *Actionable Misrepresentation* were signal events. This latest work on Estoppel is a worthy companion to those books. There is a full and rich coverage of the English and Australian position, and appropriate reference to authorities in many other common law jurisdictions. His long and deep experience as counsel and judge, and a resulting confidence and vigour of assertion, give unusual authority to his criticism, and to his observation of trends to and fro.

Justice Heydon has kindly consented to the publication of his remarks on the occasion of the Australian launch of *Estoppel by Conduct and Election.*

> It is not irrelevant to the launching of Ken Handley's latest book that his career at the Bar was extremely busy and successful. It is not an exaggeration to call that career glittering. He was amongst the cream of an outstanding generation. Over 14 years as a junior and 17 years as a silk he speedily built up a towering reputation across many fields of litigation, in many courts, and using many techniques of the barrister's craft. His fields of activity extended beyond equity and commercial work, into intellectual property and industrial relations as well. He appeared on numerous occasions in the High Court and the Privy Council. One great victory can be selected out of many: *Schaefer v Schuhmann* [1972] AC 572. It is striking in three ways. First, alone and without a leader, he successfully persuaded a majority of the Privy Council to reverse one of its own decisions – a rare event. Secondly, he got them to allow an appeal brought directly from a decision of Street J – a hard judge to overturn.

The authority of the prose stems from a lifetime's practical experience of solving the relevant problems in and out of court, as counsel and judge, and a lifetime's informed reflection on those problems.

Thirdly, he did this over the opposition of N C H Browne-Wilkinson, then one of the most prominent counsel in Lincoln's Inn – a formidable antagonist. Ken Handley was feared greatly by opponents – not just for his learning, his dedication and the pitiless precision of his addresses, but also for his first-rate skills as a cross-examiner of experts in recondite fields of knowledge. It was not only his opponents who feared him. He was also, it must be admitted, greatly feared by his juniors, with whom he habitually worked late into the night, sparing neither them nor himself.

Putting on one side the little matter of helping Di to raise four sons, it should be added that he coupled his professional labours with hard, important and time-consuming community work of various kinds – for the Bar, culminating in his presidencies of the New South Wales and Australian Bar associations; for the Presbyterian Church, in resolving disputes over property when some parts of it joined the Uniting Church; for the Anglican Church, in many roles, but particularly as chancellor of the Diocese of Sydney; for Cranbrook, on the council of which he served from 1974.

Ken Handley could only carry out all his activities by the most ruthless exploitation of any available opportunity to do something useful – whether it was reading the latest parts of the law reports on the ferry, or fighting the greenhouse effect by turning out any lights unnecessarily left on, or by spurning the lifts in favour of walking up the stairs of any building he entered, or walking about the city wherever possible.

When Ken Handley joined the Court of Appeal 16 years ago, one might have thought that he would relax from his labours. He did not. To put it rather euphemistically, he habitually tested counsel's arguments with extreme thoroughness.

Quite apart from his conscientious performance of judicial duties – and, then as now, the Court of Appeal has more than ample work to use up a lot of judicial energy, which in his case was dedicated to elegant and concise judgments of great learning – he continued as chancellor and in due course he became president of the Cranbrook Council. But he also developed a new line of activity.

In 1996 he published the third edition of *The Doctrine of Res Judicata*. That work had first appeared in 1924 from the pen of a scholarly Inner Temple barrister, George Spencer Bower, then aged 70. The second edition had been prepared by a most distinguished New Zealand lawyer, Sir Alexander Turner, President of the New Zealand Court of Appeal, and

had been published in 1969. Principles associated with the types of estoppel which can arise from prior judgments – res judicata, issue estoppel, the *Anshun* doctrine, autrefois convict, autrefois acquit, and so forth – present formidable difficulties of comprehension. There were two particular difficulties which the new editor had to face. The first arises from the fact that the task of preparing an edition of a work which was originally written by another is hard, particularly when many years have passed and yet another editor has intervened. It is hard to reconcile different styles and different approaches. The second stems from the attempts of an author based in Australia not only to deal with the Australian authorities, but also to expound the law of England and Wales fully – for as the common law becomes more Balkanised, it becomes harder to see unifying themes in it. But these are challenges which Ken Handley triumphed over. He presented a most lucid, comprehensive and masterly survey.

Four years later, he revised another of Spencer Bower's books, *Actionable Misrepresentation*. The first two editions, in 1911 and 1927, were prepared by Spencer Bower; the third, in 1974, by Sir Alexander Turner. The fourth edition reached the same standard as *The Doctrine of Res Judicata*.

Tonight we witness the breaking of new ground. Ken Handley has now prepared a third book. He has done so independently of any precursor. *Estoppel by Conduct and Election*, of course, does have affinities with *The Doctrine of Res Judicata* because that too rests on estoppel principles; and it has affinities with *Actionable Misrepresentation* because in part it deals with the effects of representations. What is more, perhaps it would have been close to impossible for a sitting judge to have written the third book without having passed through the refining fires experienced while preparing the first two. However that may be, the publication of these three works is an achievement which must be regarded as unique, in the strictest sense, for a sitting judge. There are examples of judges who wrote distinguished books before their appointment: one thinks of the recently deceased and lamented Sir Robert Megarry. Some have published both before and after appointment: our own Justice Hodgson is an excellent example. But I cannot at present recall any whose literary career did not begin until after appointment to the Bench, and certainly none who, after appointment, produced a trilogy of the quality attained by these three books.

There are, I think, two fundamental reasons for the quality of these books, and in particular for the quality of that which is being launched tonight.

The first is that although the author cites many authorities, and immerses himself in the detail of close analysis, he does so with a peculiar masterfulness and trenchancy of assertion – with a striking authority of manner. It is seen both in his elucidation and explanation of fundamental propositions, and in his criticism of the wrong turnings which some courts have taken. The authority of the prose stems from a lifetime's practical experience of solving the relevant problems in and out of court, as counsel and judge, and a lifetime's informed reflection on those problems.

The second fundamental reason for the quality of the book is the author's intellectual rigour. It is something he shares with the Australian judge he admires most, Dixon CJ. One remembers how in the Court of Appeal the cry would go up from our author, as counsel cited some case for a particular proposition: 'Yes, yes, that's all very well, but isn't there something better from the Dixon court?' And, usually in a short time, with his extraordinary recall of case law, rivalled in our days only by McHugh J, Ken Handley would remember the name and volume number of some better case from the Dixon court, and have it brought from chambers. Now rigour in legal analysis is at a discount in the 21st century for many reasons. It survives in Australia perhaps better than in England, where imprecision flows inevitably from the Human Rights Act and the Strasbourg jurisprudence, the 'principles' of which seem to seep into areas quite remote from their primary fields of operation. Rigour certainly survives in this book. For that reason, the author has been able to point in modern case law to various instances of unhistorical reasoning, fusion fallacies, erroneous reductionism, category confusion and other types of loose thinking – even in the minds of the most exalted.

Let me conclude by warmly recommending this thoughtful and powerful work. It should be on the shelves of every barrister – and on the shelves of every judge. What is more – and I acknowledge here the influence of Justice Kirby, who recently, in launching a book, went to considerable lengths to praise its beauty – it is a volume which is both handsome and compact. It has a pleasing weight in the hand. It is easy to carry on public transport. If it cannot be described, in Oscar Wilde's words, as something sensational to read on the train, it is certainly highly stimulating in many ways.

With great pleasure, I launch it upon what I hope will be a career even more successful than those of its two predecessors.

At the launch, Justice Handley acknowledged Justice Heydon for agreeing to launch the book and penning the foreword, and thanked the state of New South Wales for granting sabbatical leave to its judges, noting that, without that privilege, none of his books would ever

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have been written. In his speech, Justice Handley explained the genesis of his extra-judicial activity and provided an enticing insight into the content of his latest work. His Honour's remarks are reproduced below.

> I undertook new editions of Spencer Bower's books on *Res Judicata* and *Actionable Misrepresentation* because these projects were manageable and three months sabbatical leave would be enough for each book. I always had in mind in due course that I would attempt a new edition of Spencer Bower on *Estoppel by Representation*, but I knew that such a book would take several years. It had to be attempted last.
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> When I lined up for a new edition of *Estoppel by Representation* I discovered that Butterworths had let the contract eight years before and were not interested. I had to take the courageous and arduous course of writing a first edition and starting from the beginning.
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> Many estoppel and election cases have come my way over the years but I was surprised to find how much I did not know. I will only give three examples. I discovered that an estoppel in pais, which was part of the land law in the time of Lord Coke, means an estoppel in the country, pais in Norman French, pays in modern French. It referred to conduct which was notorious in the district such as a livery of seisin, or an entry.
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> I discovered that estoppel by representation, outside the land law, was not a legal doctrine which equity dutifully followed, but an equitable doctrine dating from 1683, that was adopted by the common law, without acknowledgement, in *Pickard v Sears* in 1837. Its equitable ancestry was reviewed by Kay LJ in *Low v Bouverie* in 1891 and was mentioned by Lord Macnaghten in 1902. It was referred to in the first edition of Ashburner the same year, and was discussed by Holdsworth in his *History of English Law*. It was not judicially noticed again in England until the judgment of Potter LJ in *National Westminster Bank v Somer International* in 2002.

The equitable ancestry of estoppel by representation and its adoption by the common law were noticed by Sir Frederick Jordan in 1935, and again by Sir Anthony Mason and Sir William Deane in 1983. Unfortunately those same judges forgot this history when writing their judgments in *Waltons Stores v Maher* in 1988, and the *Commonwealth v Verwayen* in 1990.

This history is not an arcane irrelevancy. It should inform the modern law. It leaves no scope for equity to trump such an estoppel because, for example, the remedy is thought to exceed the detriment. It also leaves no scope for the introduction of a further requirement of unconscionability because this is already subsumed within the elements of the estoppel.

I had previously accepted the statement of Denning LJ in *Combe v Combe* in 1951 that a promissory estoppel was not a cause of action but I discovered that it was. The speeches in *Hughes v Metropolitan Railway* in 1877 and the judgment of Bowen LJ in the *Birmingham Land* case in 1888 would themselves suggest that Denning LJ must be wrong, but the judgments in *Hughes* in the Court of Appeal settle the issue.

In that case the landlord had enforced a forfeiture and obtained judgment in ejectment at law, but the company applied for a stay on equitable grounds under the provisions of the Judicature Acts which had just come into force. James LJ said, in a judgment that was approved in the House of Lords: 'This case must be treated in the same way as if a bill in equity had been filed for relief against the forfeiture after a judgment had been obtained at law'. A bill could only be filed in Chancery if the plaintiff had an equity or equitable cause of action.

I have always been a great admirer of Sir Owen Dixon, whose long career on the High Court culminated in his term as chief justice from 1952 until 1964. I had the privilege of appearing before him in 1963. He tried me in Greek, then in Latin. I was clearly no classicist and lost but for other reasons.

His great contribution to estoppel by representation was his judgment in *Grundt v Great Boulder Mines* in 1938, which has frequently been approved overseas. It was the basis of the 1982 decision of the English Court of Appeal in the *Texas Bank* case which upheld an estoppel by convention that could trump the contractual text. I believe that some of the implications of his judgment in *Grundt* have not yet been fully accepted. It has a lot to say about the attempts in recent years to graft unconscionability into estoppel by representation and estoppel by convention.

Professor Maitland said that English judge-made law was developed by the application of strict logic and high technique. This was Sir Owen Dixon's judicial method. His famous lecture at Yale in 1954 'Concerning Judicial Method' published in the ALJ and 'Jesting Pilate', examined the potential for development offered by estoppel by convention 30 years before the *Texas Bank* decision. It remains instructive today.

When I began this project I had a general knowledge of the three decisions of the Mason Court dealing with estoppel *Waltons Stores v Maher, Foran v Wight, and Commonwealth v Verwayen.* I accepted them at face value and was satisfied that the actual decisions were correct. I had argued *Foran v Wight* for the appellant.

I left these three cases to last because of the length and complexity of the judgments, particularly the 110 pages of *Verwayen*. Thus when I came to study them I had a working knowledge of the earlier case law. As I read and reread these judgments I had increasing misgivings.

These cases are discussed over a number of chapters in the book. This does not matter elsewhere but it would have been useful here if the discussion could have been brought together. This has been done in an article which will appear in the November issue of the ALJ.

The estoppel and negligence tides were in full flood in the Mason era but both are now ebbing here and in England. It seems to me that the result in *Waltons Stores v Maher* is best supported today on an orthodox proprietary estoppel by encouragement, that *Foran v Wight* is best supported on an orthodox estoppel by representation, and that *Verwayen* is best supported on an orthodox estoppel by convention.

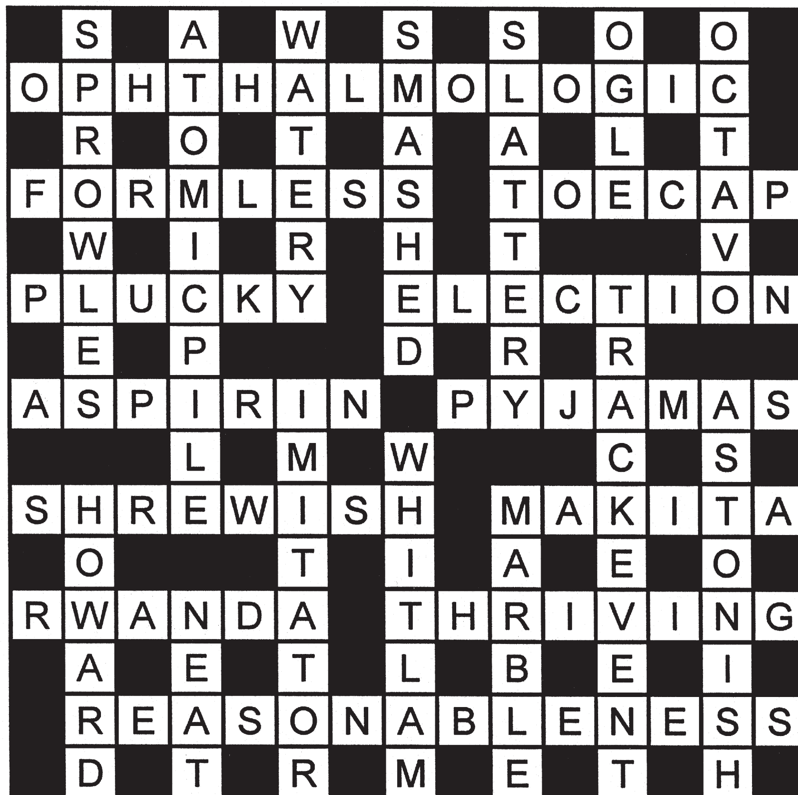
Savigny, the great civil lawyer, said in 1815: 'The purpose of legal scholarship was the adaptation and rejuvenation of inherited legal materials, creating an indissoluble community with the past, and fostering organic legal development.'

This is even more important in our system of judge made law.

This book attempts to keep one foot on the other side of the Channel and one on the ground here. This carries the risk of failure in both places. Hopefully it will facilitate an exchange of ideas and encourage consistent development.

My generation at the New South Wales Bar practised under a pre-Judicature Act system until 1972 when we made the great leap forward to 1875. For 12 years before the change the 3rd edition of Bullen & Leake 1868, and the 5th edition of *Daniell's Chancery Practice* 1871, which were matters of legal history elsewhere, were part of my tools of trade. The book reflects something of the experience of practising under both systems.

An author does his or her best and fashions a baton which others can take up. They may run further, and faster, and in different directions but if the author has done a passable job they can start where the author finished instead of at the beginning.



How Can You Appear for Someone You Know is Guilty?

Bar News notes that its distinguished restaurant critic, John Coombs QC, has turned author. Under the title *How Can You Appear for Someone You Know is Guilty?* his book was launched in the Bar Association by Chief Justice Gleeson on 21 November 2006. According to its publisher, '*How Can You Appear for Someone You Know is Guilty?* fits somewhere between a legal textbook, selected memoirs and an autobiography. This is a book of memories of 40 years as a barrister and QC, told in a charming and unaffected way. It is a delightful read.'

The book tracks John Coombs's career as a barrister, includes memories of his famous father HC 'Nugget' Coombs, and surveys a range of his forensic experiences, from the serious to the hilarious. As Coombs QC himself would say, enjoy this book on your Christmas vacation, accompanied by some pan-seared seafood washed down with a bottle of chilled New Zealand sauvignon blanc, followed by a tarte *tartin* and a Rutherglen sticky!!