

**Equitable estoppel by encouragement –
How not**

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Advisers are in the midst of it

- *Walton Stores v Maher* (Au)
- *Ramsden v Dyson* (Eng)
- Even when they didn't make a representation: *Avondale Printers* (NZ)
- Mitigating risk – best we can do
- How?



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Ground rules

- Who is the client
- Sacking the family - or sacking members of the family – ASCR 10.2
- Favouring your competitors – gentle art of referral
- Paying for advice
- Paying for the kids' advice
- Not a 'family' matter – this is business
- Selecting a method and staffing it – eg rural family facilitator?



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Inviting people to a family facilitation

- What do you want from it? (Only do this if serious.)
- How formal?
- How confidential?
- Information gathering or deal-making?
- Set expectations at the start – this invitation letter will be kept forever:
 - ‘No reps’ letter
 - ‘No reliance’ warning
 - ‘No agreements unless in writing’ disclaimer



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Facilitator’s Deed

- Facilitation not representation
- Mere commission of a facilitation is not encouragement to act
- No representations on which party can act unless agreement in writing
- Degree of confidentiality
- This deed should be worthy of being kept long-term. So negotiate it.



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Instructions – all the way


- We can only mitigate risk:
 - You could be in a witness box – recording instructions all the way
 - Facilitator must observe instructions – confidentiality, proposals put



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How to proceed at the meeting


- As advisor to the property-owner:
 - take proposals on notice to get instructions
 - point out where tax, financiers, or co-dependence of business assets make immediate decisions difficult
 - no promissory language
 - openness to suggestions: but to get instructions & understand proposals
- As facilitator:
 - open questions
 - testing proposals so they are accurately conveyed
 - clear that not able to make a promise



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Dealing with proposals

- Only make or accept proposals you intend to abide by
- Be clear about proposals you cannot yet accept – buy time with the tax and financial issues, which will be complex anyway
- Do not encourage even by silence – acquiescence
- Managing expectations
- Have an intended end-point if nothing else is resolved



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Post facilitation

- *Outro* letter
 - Hoose down reliance on any potential representation not yet matured into agreement – general terms
 - Reminder of confidentiality
 - Any next steps
- Again, make it a letter you really will want to keep



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Other contexts and observations

- How does this work in family offices?
- How to improve communication skills within families
- How the suggestions today feed into mitigating your risk of a claim or of being a witness



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Questions and Discussion

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