David W Marks KC
Barrister-at-Law

Inns of Court
16th Level 107 North Quay
Brisbane Qld 4000

(07) 3236 5477
dmarks@qldbar.asn.au
www.davidwmarks.com

Equitable Estoppel by Encouragement – How not

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1 The adviser's role

1. The great transfer of wealth to the next generations is being planned by the current advisers.

2. Estoppel is not something that happens to other people.

3. Advisers can be there when it happens.

4. It can happen to the best.

5. The leasing solicitor in *Walton Stores* was the man whose words and actions were in question.

6. He had said:[1]

> *… he had received verbal instructions from Waltons that amendments which had been suggested by Mr. Elvy were acceptable, and that he would send Mr. Elvy an amended copy of the lease. He said that in the meantime he would get formal instruction from Waltons. On the same day Mr. Roth sent Mr. Elvy an amended lease with a covering letter stating that he would let him know next day whether Waltons disagreed with any of the amendments incorporated in the redraft. Neither on the next day nor at all did Mr. Roth inform Mr. Elvy that Waltons disagreed with any of the amendments.*

7. This was no inexperienced clerk. The late Mr Stanley Roth AM,[2] then a property partner at Dawson Waldron, acting carefully, properly, and on his client's instructions, nevertheless found himself a witness in a trial.

8. His client implemented a "go-slow", and then reneged.

9. Mr Roth was left in an impossible position.

10. Even the most experienced and principled adviser is exposed.

11. It is not this case alone. *Ramsden v Dyson* involved the letting agent.[3]

12. So how do we guard against it?

13. We can only mitigate the risk.[4]

14. What steps do we take?

15. I will take you to a hypothetical family conference. It is convened using an expert in rural, family facilitation.

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1 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 390.
2 Mr Roth died 28 December 2025. See obituaries at news.com and australianjewishnews.com.
3 (1866) LR 1 HL 129.
4 Risks can be mitigated, not eliminated. The solicitor, Mr Wood, seems to have made no relevant representation in *Avondale Printers & Stationers Pty Ltd v Haggie* [1979] 2 NZLR 124, but was still a witness. There is no suggestion he did anything wrong. He was not present at the critical meeting at an Ōtāhuhu coffee shop.

2 The family conference

16. A rural couple in their 70s have three children, in the early 50s.

17. They run rural businesses over a spread of land, through various vehicles.

18. Assets and business vehicles have varied over time.

19. The children have different family commitments, and different engagement historically with the land.

20. The eldest child is most engaged with the rural business.

21. She has been asking that there be clearer commitment by her parents to her succession to the business.

22. The other children historically worked on some of the properties. Both now work in town for separate rural businesses. They regularly come back to the family properties for mustering, harvesting, and the like. They are not content to see the bulk of the family properties go, ultimately, to their elder sister.

23. The parents' solicitor senses this tension. The solicitor proposes to the parents that a rural family facilitator be engaged, to help the family map out the future.

24. The solicitor says it is just a matter of agreeing dates, booking the conference rooms at the RSL Hall, and seeing what can be agreed.

25. Without commenting on the optimism and planning involved here, let us see what might be done by the parents' advisor and the facilitator to avoid a misunderstanding that leads to litigation.

3 Ground rules

3.1 Client identification

26. A family will grow used to a professional adviser, and refer within the family.

27. To avoid misunderstanding, about who an adviser is acting for, be prepared to exit for the transaction.

28. There may be a need to do that. Your conduct rules are your friend. ASCR rule 10.2 says:[5]

> *A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter …*

29. Articulate who, if anyone, you are acting for.

30. Articulate who you are not acting for.

31. Positively encourage separate legal and accounting representation.

32. This is not a 'family' negotiation.

33. This is a business decision.

34. So, approach it like a business sale and purchase.

35. Yes, the pay-off may be years down the track. Tax and stamp duty, and the absence of death duties, may drive timing.

36. But the objective is to reduce misunderstanding and mitigate risk. A waiver given by a party who is adequately represented is more likely to stick. A qualification by a party, to a statement made, is more likely to be accurately processed by another party who is represented.

37. You cannot force a person to retain an adviser. You can exclude from a voluntary meeting someone who does not engage an adviser. Or you can manage that person differently.

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[5] It is not necessary to discuss the exceptions, and indeed further aspects of this rule, here. Rule 10.1 requires avoidance of conflict.
Note rule 95(a) of the *Barristers' Conduct Rule* is stricter, as it is not qualified by "and detrimental to the interests of the former client if disclosed". It need only be material to the present client's case, whether or not disclosure would be detrimental.

38. Tell the parents to be generous if asked to contribute costs of independent advice. Cap time and money generously. Niggardly spending now has its own 'reward'.

3.2 Invitation

39. Set the ground rules in writing, requiring written acknowledgement:-

    (a) Discussions are confidential.[6]

    (b) Discussions will not be repeated outside the conference.

    (c) No statements made are to be taken as representations of current intention or about future conduct.

    (d) No one is allowed to rely on a statement made by someone else at the meeting.

    (e) No agreements will be reached unless signed by all.

40. The purpose is to nip in the bud an allegation of –

    (a) a representation; or

    (b) reliance.

41. This kind of anti-representation document has been around for some time. I saw it first as a deed accompanying the signing of a franchise agreement. It is not foolproof.[7] It is mitigatory.

3.3 Adviser to the person with the property

42. In matters which I have had, the mere fact of repeated invitations to family facilitations has been pleaded as relevant to inducing reliance on more specific representations as to future transfer of property.

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6 It may be premature to make a conference "without prejudice" absent a dispute to be settled.

7 The related topic under the Australian Consumer Law is dealt with in *2026 Miller's Australian Competition and Consumer Law Annotated*, [ACL 18-465]. Though concepts and context differ to a degree, it is a useful discussion, when applied carefully to the ideas involved with estoppel. See *Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd* [2019] FCA 676; (2019) 371 ALR 396, [33].

43. The invitation and negotiation of arrangements therefore should be done in a way that does not induce any expectation.

44. It might be promoted as a family "town hall meeting".

45. It might be said to gauge interest in any opportunities to work within the family business for a wage.

46. How ever it is introduced to other members of the family, it must not be taken as, in itself, a representation (or reinforcement of a representation) about future transfer of property.

47. Families that have better communication and more frequent contact seem to be able to manage this better. Not every family can afford a "family office" with the skilled professionals that come with that. But some effort can be put into improving the quality of communication.

3.4 Solicitor or adviser issuing invitation

48. How ever the facilitation is organised, the solicitor or advisor should be acting on written instructions to issue invitations in the way it is done.

49. Doing this informally, and without a discussion with the property-owning members of the family, is a recipe for miscommunication.

50. Recall that the leasing solicitor in *Walton Stores*, Mr Roth, was always able to say that he was acting on instructions. He conveyed his instructions to the other side.

3.5 Facilitator's agreement

51. I have never met one of these people, who do the difficult task of rural family facilitation. Naturally, I have met quite a few solicitors who are very good at it, but they tend to act on the dispute, which is late in the day in terms of trying to avoid a dispute.

52. If possible, the adviser to the property-owning parties should spend some hours with the facilitator discussing the family's affairs, before any invitations are issued or other steps taken.

53. This is to sound out whether the facilitator can meet some basic expectations, which I have occasionally seen disappointed in practice:

    (a) Facilitation, not representation - The facilitator should not be making representations. The facilitator should be gathering information and working out if there are proposals to be put.

    (b) Confidentiality – I have heard of facilitators who have shared with one sibling the aspirations and position of another sibling. Unless that is part of the game, and expressly allowed under something signed by all participants, this is not possible.

54. The one qualification to the latter point is that the facilitator should be expressly allowed to communicate proposals when expressly permitted by the proposer.

55. In a way, this is not so different from the deed most Queensland mediators use, under which the parties promise and are assured confidentiality.

56. It may be that the facilitator is asked to gather information so that the property-owning parties are in a better position to assess the needs and aspirations of the other parties. That should be explicitly permitted under the facilitation deed, if it is intended.

57. It goes without saying that there should be a facilitation deed.

58. The facilitation deed should be kept, and for the long term, by the adviser to the property-owning parties. Whilst it is not possible to prevent another party misconstruing an arrangement, early provision to that other party's representatives of the facilitation deed may induce a new appraisal of prospects of advancing anything in relation to the conduct of a family facilitation.

4 Conduct of Facilitation

59. It is difficult to be prescriptive. A facilitation might occur over a period, in different locations, and be flexible.

60. Nevertheless, the facilitator (and the adviser to the property-owning parties) should make a study of asking open questions. They should not provide information or advice, even implicitly.

61. The facilitation deed should disclaim provision of any legal or other professional advice. It should also discount the ability of a party to use a representation as a hook to build reliance and detriment.

4.1 Dealing with the proposals

62. It is likely that a family facilitation will generate a number of proposals.

63. Some care must be taken to avoid creating a situation where a proposal, which the property-owning parties intend to reject, might nevertheless be said to have been encouraged by silence. Acquiescence is treated as a separate head, but the ideas are related to cases of positive encouragement.

64. Some form of words must be found politely to reject proposals which are unacceptable. And this must be done before the point is reached where the person making the proposal can rely on silence and begin to act to that party's detriment.

65. The content to be communicated is along these lines:

    (a) we have welcomed all the ideas generated, as it gives us information for more informed thinking on our part.

    (b) this has provided us with a lot of information that we will need to digest.

(c) at the moment we do not intend to act on any particular proposal, but might explore individual proposals further to see if they are consistent with the future health of the family businesses.

66. A final rule at any mediation, and also a facilitation, is that there is to be no binding legal agreement unless it is signed. It is more difficult to control expectations that might come out of representations made during a facilitation. But that kind of clause needs to go into the facilitation agreement.

4.2 Dealing with information and proposals

4.2.1 Clarity – professional level

67. At a professional level, the most important things are:

(a) permitted information-flow; and

(b) instructions.

68. Instructions to provide information to another participant should be clear. If not set up in the facilitation deed, it should be plainly done on a case-by-case basis.

69. Any proposal, or reaction to a proposal, must also be on instructions. The advisor formulating the proposal needs sign-off. The facilitator needs instructions which are clear, to make or react to the proposal.

70. In this way, those advising and facilitating can at least say they were acting on consciously given instructions.

71. But this does not deal with the result of conveying the information or the proposal.

4.2.2 Clarity – expectations management

72. This is difficult in practice, since in the example at heading 2, the eldest daughter may be living on the same property. She is at least seeing her parents every week, if on a nearby

property. And she is working all the hours God sends, while her siblings work off-farm in more comfortable conditions.

73. So, her expectation of taking the property on her parents' demise will be high. Perhaps that is justified, but it is not our function to judge of that.

74. Her proposal for a lifetime transfer of the property she is living on will be at odds with her siblings, who each propose a three-way split of the sale proceeds, on death of the parents.

75. Dealing with lumpy assets is one of the classic problems in these facilitations. But it is much more than the assets themselves being lumpy:

    (a) They may be cross-collateralised.

    (b) They may be in different ownership.

    (c) They may be co-dependent – breeding here, fattening there, growing feed-crops elsewhere, and farming unrelated crops on a fourth property for diversification.

76. I would suggest that it is pointless having a family facilitation, unless you are serious.

77. Where the rubber hits the road is discussing the bank, the equipment hire, and how different businesses and entities interact. This is where generation of ideas can occur.

78. The complexity is also your friend.

79. As advisor, you can genuinely say, at the end of the day, that ideas generated can be examined with the financiers and the tax advisers. Until a landing is reached, people have to 'cool their jets'.

5 Post-Facilitation

80. The follow-up, or *outro,* communication should also disarm estoppel.

81. Even if words, actions, or even inactions, have been taken as some form of representation or encouragement, the reasonableness of reliance on that can be undermined.

82. This is a letter to keep with the facilitation deed so that it can be produced many years hence.

83. It will thank participants for provision of information and proposals to the facilitator. It might acknowledge that, with the permission of participants, some of those proposals have been passed on to other participants in the facilitation.

84. It might remind everyone of the confidentiality necessary to have an effective facilitation, in the context of the tight-knit rural communities in which people live.

85. And it might remind everyone that no decisions have been taken. People should conduct their affairs on the basis that they should not rely on anything they have taken from the facilitation process. In due course, the solicitors or advisers for the property-owning parties might contact one or more of the other parties, if there is a specific proposal which should be considered. Until then, it should be assumed that there is no accepted proposal.[8]

86. What people then do in their own communications within the family is a matter for them. The focus of my consideration here is on keeping the professional adviser out of the witness box.

6 Family Offices

87. We rarely see litigation arising from well-managed family offices. This may be because the kind of wealth dealt with means that there are fewer disputes, though I doubt that.

88. Rather, the commitment to having a family office, with the expense it involves, naturally shows a willingness of family members to communicate frequently and more openly.

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[8] Perhaps there is a better way of putting this, and again this may be more or less difficult with different families who have different communication skills and techniques.

89. Nevertheless, there will have to be ground rules for communication, and expectations need to be managed. Whether this is called a "family constitution" or something else, it will likely be:

    (a) long on generalities, albeit benign and genuinely-meant generalities – such as involving younger members of the family in the business and, as they become more experienced with the business, decision-making;

    (b) open about communication techniques and what parties can take from such communications.

90. The successful running of a family office function requires the office to finesse difficult issues about its clientele, potential conflicts, and confidentiality of information. This is seemingly done effortlessly on a day-to-day basis by the most successful family offices, but there must be a degree of technique about it.

7 Communication Skills

91. What I will say here may be able to be applied more or less, depending on the family and personalities involved. Further, if there are issues of disability in the family, it may be more difficult to manage this.

92. Personal experience has shown that openness in communication within a family reduces surprise and manages expectations. It can even obtain tacit consent to family decisions, where consent is strictly unnecessary but is highly desirable.

93. On a personal note, I recall two telephone calls with my mother, as my parents' thinking about their estates evolved. I do not think she was looking for my consent, but rather was laying out some reasons, to do with fairness and obvious need within the family. Once it is laid out in those terms, the family members are left in no doubt about the degree of

regard in which individual members of the family are held, and can feel brought into the decision-making about how wealth might best be directed.

94. There is nothing more potent than a lurking thought that a family-member has been disregarded through lack of affection. Of course, I acknowledge that open communication is not always possible. But it may be possible. And it may defuse such thoughts.

8 Summary

95. The purpose of this paper is to explore ways in which risk to the advisory professions can be reduced, focusing on risk arising from estoppel by encouragement.[9]

96. We have seen how to guard against the making of a representation. We know that, for a representation to be successfully pleaded, it must be clear and unequivocal. It must be in the form of a promise made by the party said to be estopped, to the party seeking to rely on the promise. Usually, it will relate to future conduct.[10]

97. We have seen how the communication, particularly be a facilitator or professional adviser, should eschew statements about present intentions. There should be overarching documentation, such as the invitation to a facilitation, and the facilitation deed, watering down the effect of language – so that no representation is made. And so none is taken as a representation having that clear and unequivocal promissory nature.

98. The kind of communication I have recommended also attacks a second limb of any successful estoppel case here. In such a case, the expectation or intention, to be gauged, is that of a reasonable person in receipt of the promise. The question is whether such a

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99 To some extent the suggestions and comments above also address estoppel by acquiescence.

10 *Kramer v Stone* (2024) 281 CLR 484, [37].

reasonable person would rely upon the promise by acting, omitting to do something, or a course of conduct.[11]

99. Whilst the invitation to a facilitation, the communication during the facilitation, and the actual words used by parties in dealing with each other can be important, the *outro* communication, described above, also has a role in reducing the likelihood that one of the parties could, acting reasonably, act on anything said, done, or left undone during the event.

100. The third limb of a successful case is reliance upon the alleged promise, by acting (or omitting to act) in the general manner that would have been expected in response to such promise.[12] Here it would generally be shown, by a successful party, that the person in receipt of the promise would not have acted (or omitted to act) in the absence of the promise. It is not usually sufficient simply to point to the promise as <u>one</u> factor.

101. It is not possible to prevent a family member from taking some action (or omitting to do something). And they may do so privately without further consultation.

102. To the extent that this becomes known, naturally remedial action might be possible. Failure to take remedial action might amount to some form of acquiescence, leading to estoppel. But to acquiesce in something requires knowledge.

103. And this later reliance is not necessarily going to come to the notice of the professional advisor. There is only so much we can do for our clients.

104. But the advisor might advise the property-owning parties to monitor potential reliant behaviour, after a family facilitation. If necessary, a party can be taken to one side and asked about the wisdom of making long term commitments, when no decisions have been made. That of course should be at least diarised.

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11 Ibid, [38].
12 Ibid, [39].

105. Linked to this is the final element of detriment. Once the party has got to a point of suffering detriment based on anything that can be pointed to as a representation encouraging reasonable reliance, we are in serious trouble. The comments as to reliance, in the previous paragraph, are thus apt.[13]
106. We cannot prevent a party making an allegation at a later point in time.
107. We can have written evidence available, to deploy against such a party, to discourage a case being pressed.

David W Marks KC
Chambers
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13 Ibid, [40].