Lexcray Pty Ltd v Northern Territory of Australia [2001] NTCA 1

PARTIES:	LEXCRAY PTY LTD v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 22 of 1999 (9303729)
DELIVERED:	18 January 2001
HEARING DATES:	5 - 21 June 2000
JUDGMENT OF:	GALLOP, ANGEL and BAILEY JJ

CATCHWORDS:

Appeal from a judgment of the Supreme Court – role of the Court of Appeal – findings of fact founded on questions of witness credibility – Appeal Court to respect such findings of fact – findings of fact must not be 'glaringly improbable' or 'contrary to compelling inferences'

Walsh v Law Society of NSW (1999) 73 ALJR 1138, applied
State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) and Others (1999) 160 ALR 588, considered
Edwards v Noble (1971) 125 CLR 296, considered
Devries v Australian National Railways Commission (1993) 177 CLR 479, considered

Torts – negligent misrepresentations – were such representations made – question of fact – factual conclusion disposing of cause of action – conclusion based on credibility of witness – no basis for Appeal Court to intervene

Torts – duty of care to inform, advise or warn – factual determination – respondent never acted in the capacity of advisor – no such duty of care was owed

Contract – existence of contract concluded from findings of fact – no ground for Appeal Court to interfere with such findings – no contractual relationship outside the written agreement

Fiduciary duties – acting for, on behalf of or in the interests of another – relationship between Government departments administering industry scheme and those involved in that scheme not fiduciary in nature – public policy considerations to counter such a relationship

Hospital Products Ltd v United States Surgical Corps (1984) 156 CLR 41, applied

Estoppel – representation, reliance, unconscionability – factual conclusion that no such representations were made

The Commonwealth of Australia v Verwayen (1990) 170 CLR 394, considered
Walton Stores (Interstate) Limited v Maher (1998) 164 CLR 387, considered

REPRESENTATION:

Counsel:

Appellant:	Mr M Maurice QC with Mr A Lindsay
Respondent:	Mr J Reeves QC with Mr S Southwood

Solicitors:

Appellant:	Cridlands, Northern Territory Lawyers
Respondent:	Solicitor for the Northern Territory

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lexcray Pty Ltd v Northern Territory of Australia [2001] NTCA 1
No. AP22 of 1999 (9303729)

BETWEEN:

LEXCRAY PTY LTD
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: GALLOP, ANGEL and BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 18 January 2001)

[1] THE COURT: This is an appeal by an unsuccessful plaintiff in an action for damages in the Supreme Court of the Northern Territory. The appeal is against the entry of judgment for the defendant (respondent).

[2] The trial proceedings arose out of the implementation of a national program known as BTEC on a cattle station known as Nutwood Downs which is located in the Gulf region of the Northern Territory, south east of Katherine.

[3] The Dunbar family, through its company Lexcray Pty Ltd (Lexcray), purchased Nutwood Downs from the Vestey's Group in 1984. The claim by Lexcray in the Supreme Court was that it sustained loss and damage as a result of misrepresentations, breaches of contract and breaches of fiduciary

duty by employees of the Northern Territory prior to purchase and during the implementation of BTEC on Nutwood Downs. Lexcray's claims total approximately $9.7 million including approximately $2.9 million for market value compensation for cattle destocked under BTEC and $4.9 million for the alleged loss of value in Nutwood Downs and interest.

BTEC

[4] The Brucellosis and Tuberculosis Eradication Campaign (BTEC) was a cooperative exercise undertaken by the Australian cattle industry, the Commonwealth and the Territory which, in the short term, required the contribution of resources by the Commonwealth, the Territory and the cattle industry with the objective of producing benefits for individual pastoralists (including the appellant) and the cattle industry as a whole, which benefits were expected to exceed the cost to individual pastoralists.

[5] The aim of BTEC was to eliminate Brucellosis and Tuberculosis from cattle and buffalo in Australia. At the time of its implementation it was the largest animal disease eradication program ever conducted in Australia. It cost in excess of $700 million to implement BTEC in Australia. The total costs of BTEC in the Northern Territory between 1983 and 1992 were in excess of $90 million. Approximately 260 cattle stations were affected by BTEC in the Northern Territory.

THE CALLEY PLAN

[6] The Northern Territory Department of Primary Production (DPP) was responsible for the implementation of BTEC in the Northern Territory. In 1983 the DPP produced its "plan for eradication of Brucellosis and Tuberculosis from cattle and buffalo in the Territory" which became known as "The Calley Plan", so named after one of its main authors, Dr Graham Calley, Senior Veterinary Officer within the DPP. He was in charge of the BTEC program.

HOW BTEC WAS IMPLEMENTED

[7] In the Northern Compensation Region of the Northern Territory, where Nutwood Downs was located, the major problem was Tuberculosis. The primary test used for the eradication of Tuberculosis was the Caudal Fold test. In the Northern Territory, eradication of Tuberculosis was achieved by destocking uncontrolled (unfenced) cattle and the implementation of test and slaughter programs along with aged destocking of controlled cattle on each cattle station in the Northern Territory. Destocked cattle are those cattle mustered to be sent to abattoir for slaughter as part of the eradication program in accordance with an order issued by the Chief Veterinary Officer. Each pastoralist, in cooperation with the DPP, developed an individual eradication program for the respective station.

THE COMPENSATION PROVISIONS

[8] To obtain compensation for cattle that were either destroyed or destocked under BTEC on a cattle station it was necessary for the pastoralist to enter into an Approved Program (AP) and Destocking Compensation Agreement (DCA). An AP was a forward program of eradication activity on a station. Such programs were recorded in a standardised manner and were signed by the station owner. The actual operation of the programs involved bringing all cattle under control (fencing) followed by the mustering and testing of all cattle in controlled areas on a repeated basis. It was also desirable that older animals (over six years) be destocked as much as possible since it was in this older group that Tuberculosis was the most common and most difficult to detect by testing. To the extent that cattle could not be brought under control and remain in bush areas they were destocked.

[9] A DCA was a standard form agreement that contained the terms and conditions upon which compensation was paid to individual pastoralists under BTEC. Lexcray was entitled to compensation for various categories of stock at rates determined by the Minister pursuant to the terms of its DCA with the DPP. The compensation was paid to pastoralists for cattle showing a positive reaction to the Caudal Fold test (reactors), cattle that could not be mustered for testing or destocking (unmusterables) and cattle sold under the normal operations of the station (destocked cattle excluding normal turn-off).

THE DUNBARS, NUTWOOD DOWNS AND BTEC

[10] In 1983, Mr Bob Dunbar, his wife Loris Dunbar and their son Rod Dunbar (the Dunbars) came to the Northern Territory from Queensland where they owned and operated two large cattle stations. Bob Dunbar and Rod Dunbar were experienced and able cattlemen who came here to purchase a cattle station because of drought, disease and pest problems which they were encountering on their Queensland properties.

[11] In 1983 and 1984 the Dunbars sold their Queensland properties for about $1 million. Lexcray purchased Nutwood Downs for about $990,000 on 20 March 1984. At the time of the purchase of Nutwood Downs the Dunbars believed they were getting a windfall as it was sold to them on the basis that there were 8,000 head of cattle on the station when in reality there were more likely to be 10,000 to 12,000 head of cattle on the station.

[12] In June 1984, after acquiring Nutwood Downs, Lexcray entered into an AP and a DCA. The AP was reviewed annually and the DCA was amended in 1988. However, as the trial judge found, the Dunbars failed to cooperate in the test and slaughter program for Nutwood Downs and this eventually led them to elect to destock the whole station in 1990.

[13] Notwithstanding their failure to cooperate, Lexcray was paid approximately $1.4 million by way of compensation under BTEC. It now owns a property (Nutwood Downs), which was conservatively valued prior to the trial at in excess of $4.75 million.

THE MEETINGS AND OTHER SIGNIFICANT EVENTS

[14] Central to the appellant's case at trial are two meetings held in Darwin in the lead up to Lexcray's purchase of Nutwood Downs. The first meeting was held between Bob Dunbar and Dr Calley on 30 June 1983 and the second meeting was held between Bob Dunbar, Rod Dunbar and Dr Calley on 5 January 1984. In the period between these two meetings, Lexcray was incorporated and it signed a contract to purchase Nutwood Downs. The only other relevant contact between the Dunbars and officers of the NT before the purchase of Nutwood Downs was settled was a letter dated 17 February 1984 from the NT Department of Lands to the Dunbars' solicitors advising that Nutwood Downs may require relatively severe destocking.

[15] Before proceeding to the role of this Court in the hearing of appeals from the Supreme Court at first instance, it is necessary to refer to our interlocutory judgment in which we granted an extension of time to the appellant within which to institute the proceedings in the Supreme Court.

[16] The writ of summons was issued on 23 February 1993. Pursuant to s 44 of the *Limitation Act*, there was endorsed thereon an application for an extension of time to commence the action. By its defence the respondent raised the time limits and put the appellant to proof of its case for an extension of time in relation to the claims in tort and in contract. The equitable claims were not statute barred. That bar to the appellant's case was never resolved by his Honour. He embarked upon the hearing of the case and left the application for an extension of time unresolved.

Ultimately, because he had entered judgment for the respondent, he did not find it necessary to resolve the application for an extension of time which the appellant needed.

[17] We decided to hear that application ourselves and we gave judgment on that matter on 15 June 2000 during the hearing of the appeal – see *Lexcray Pty Ltd v Northern Territory of Australia* [2000] 9 NTLR 213. We granted the extension of time which the appellant needed in respect of the tort and contract claims.

[18] The appellant's case was very extensively pleaded and some of the causes of action were eventually abandoned. There remained for decision a six-fold negligent misrepresentations case, a two-fold estoppel case said to be a back-up to the negligent misrepresentations case, a three-fold breach of contract case and a breach of fiduciary duty case.

[19] All six misrepresentation claims failed at trial because his Honour found the evidence of the appellant's two main witnesses, Bob and Rod Dunbar, to be unreliable. It also failed on the first of its three contract claims because his Honour did not accept the evidence of the Dunbars that any such agreement was made. He rejected the other two contract claims because he did not accept the appellant's construction of the contract. He also rejected the appellant's claim for breach of fiduciary duty on the ground that no such duty existed.

[20] It was submitted on behalf of the respondent on the hearing of the appeal to this Court that the appellant must fail again in relation to the negligent misrepresentation claims and the first of the three contract claims unless the appellant can persuade this Court that it should interfere with his Honour's findings on the credibility of the Dunbars. Further, in relation to the two breaches of contract causes which involve a construction of the contract contended for by the appellant, likewise it was submitted that the appellant must fail.

THE ROLE OF THE COURT OF APPEAL

[21] We turn now to the role of this Court on the hearing of appeals from the Supreme Court at first instance.

[22] It is not unusual for this Court to be asked by way of appeal to disturb conclusions of fact which have been reached at first instance. An appellant seeking to disturb findings of fact made by a trial Judge faces a substantial burden especially where the findings were based on the credibility of witnesses. The hearing of this appeal, which took many days, required the re-examination of a large amount of primary facts and conclusions drawn by the learned trial Judge.

[23] The thrust of the appellant's case on appeal was that the modern law upon the role of an appellate court is the reverse of stressing the obligations of restraint out of recognition of the advantages expressed or necessarily inferred which the trial Judge has enjoyed and which the appellate court has

not. Senior counsel for the appellant relied upon the recent case of *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) and Others* (1999) 160 ALR 588 wherein some Judges of the High Court appeared to have jettisoned for all time the principles enunciated by Barwick CJ in a number of cases terminating in *Edwards v Noble* (1971) 125 CLR 296. They favoured what Kirby J described as the "traditional" view which is,

> "[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it. These principles, we venture to think, are not only sound in law, but beneficial in their operation."

[24] Kirby J went on to say (at p 615),

> "There is no warrant for returning to that position (ie *Edwards v Noble).* In my view, it should be firmly resisted. It cannot stand with the duty imposed on appellate courts by statute to make up their own mind; to conduct appeals on the facts by way of rehearing; to draw inferences from the facts for themselves; to give the judgment and make orders that should have been given at trial; and in exceptional circumstances, even to admit fresh evidence into consideration."

[25] But the majority adhered to what had been said in *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479,

> "More than once in recent years, this court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that

finding of fact (see *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 62 ALR 53; *Jones v Hyde* (1989) 85 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage' (*SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47) or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable' (*Brunskill v Sovereign Marine & General Insurance Co Ltd* (supra)."

[26] Most recently, McHugh, Kirby and Callinan JJ said in *Walsh v Law Society of NSW* (1999) 73 ALJR 1138 at 1148,

> "Some aspects of the appellate procedure will remain the same where the appeal is conducted solely on written materials, whether those materials be technically evidence in a de novo hearing or the record under consideration in an appeal under s 75A of the *Supreme Court Act*. In either case, the appellate court will be bound generally to defer to any conclusions on the questions of credibility formed by the court or tribunal from whom the appeal is brought where the latter has seen and heard the witnesses (*Uranerz (Aust) Pty Ltd v Hale* (1980) 54 ALJR 378 at 381; cf *McCormack v Federal Commissioner of Taxation* (1979) 143 CLR 284 at 323-324). In particular circumstances, it will be open to an appellate court to reach conclusions contrary to those of the court or tribunal below, notwithstanding a credibility finding (see, for example, *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at 321 [63-64], 331-332 [93], 340 [146]). Sometimes it will be authorised to reject those findings where they are 'glaringly improbable' (*Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844) or 'contrary to compelling inferences' of the case (*Chambers v Jobling* (1986) 7 NSWLR 1 at 10; cf *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at 331-332 [93]). But the caution required of all appellate courts in such matters has long been recognised and frequently upheld in decisions of this Court."

[27] This court is, of course, bound to decide this appeal by the application of those principles so recently restated by the High Court. It is still the law

that an appellate court must respect findings of fact founded on questions of credibility unless some or other of the circumstances referred to in the passage in *Walsh v Law Society of NSW* (supra) prevail. The appellant did not contend otherwise on the hearing of this appeal. It submitted, however, that to succeed on this appeal, the appellant does not need to disturb any finding of primary fact. It submitted that the trial judge was not entitled to ignore important admissions made by the respondent in its defence about information and advice given by Dr Calley to the Dunbars at the June 1983 meeting.

[28] By its notice of appeal, the appellant seeks judgment for the appellant on the claims for misrepresentation in 1983 and 1984, the claims based on estoppel, the claims based on contract and the claim for breach of fiduciary duty. The various grounds of appeal set out in the notice of appeal do not, in general, attack the findings of primary fact by the trial judge, rather they generally contend that, having made his findings of fact, the trial judge erred in failing to find the ultimate facts necessary in respect of each of the appellant's causes of action.

[29] Indeed, in his opening to this appeal, senior counsel for the appellant said that he would not be asking this Court to disturb any of the primary findings of fact made by the trial judge, an approach to which he did not totally adhere.

NEGLIGENT MISREPRESENTATIONS

[30] The appellant's case at trial hinged very largely upon alleged negligent misrepresentations made by Dr Calley at the two meetings referred to above. Counsel for the appellant had opened the case at trial with a statement to the effect that his Honour would decide the case by reference to the misrepresentations claim and by reference to the contract claim "and the other esoterica and exotica will largely fall by the way".

[31] Likewise, on the hearing of the appeal to this Court, most of the appellant's case was directed to the alleged negligent misrepresentations. They are alleged to have been made at the two meetings with Dr Calley. The alleged representations as pleaded in the statement of claim were,

<u>The 30 June 1983 meeting</u>

(1) the operation of the BTEC on Nutwood Downs "would not be a financial burden" – see sc para 6(c)(i);

(2) Lexcray would be "no worse off and no better off financially" – see sc para 6(c)(ii);

(3) that compensation would be paid at "replacement value" – see sc para 6(c)(iii);

(4) there was "no great quantity" of TB cattle on Nutwood Downs – see sc para 6(c)(iv); and

(5) the caudal fold test "worked well" and would identify all animals that were diseased – see sc para 6(c)(v).

The 5 January 1984 meeting

(6) that compensation would be paid at rates equal to 'market value – see sc para 8;

(7) that BTEC would be of advantage to Lexcray in three ways – see sc para 9(c)(i);

(8) the operation of the BTEC on Nutwood Downs would not be a "financial burden to the plaintiff" – see sc para 9(c)(ii);

(9) further information and advice about the BTEC and its operation on the property was already contained in the Calley Plan – see sc para 9(c)(iii);

(10) the plaintiff "would be no worse off or any better off" after the BTEC on Nutwood Downs was completed – see sc para 9(c)(iv);

(11) BTEC on Nutwood Downs would "primarily involve a test-and-slaughter programme" – see sc para 9(c)(v);

(12) the testing system [the 'caudal fold' test] for identifying diseased animals was "a good system" – see sc para 9(c)(vi);

(13) the indications were "that there was no great quantity" of diseased cattle on Nutwood Downs, and destocking was only required "if

significant amounts of disease" were discovered on testing – see sc para 9(c)(vii);

(14) testing would be once per year – see sc para 9(c)(viii);

(15) testing could be carried out with "normal mustering operations" – see sc para 9(c)(ix).

[32] The appellant consolidated the representations pleaded into what it called "the core representations" as follows,

1. The respondent would pay pastoral lease holders compensation for cattle destocked under an approved program at rates based upon the on-farm value of an equivalent disease free animal valued at the use to which the destocked animal was put.

2. The caudal fold test for TB was reliable if repeated several times over a number of years.

3. The respondent would be prepared to enter into an approved program with the company for Nutwood Downs the principle elements of which would be test and slaughter and destocking of aged cattle.

4. The Calley Plan would tell them all they needed to know.

[33] The respondent argued that those core representations were not the representations that had been pleaded and that for the purposes of this appeal they have been taken by the appellant from the trial judge's findings

of fact. They were not denied by the respondent as having been made but in a well presented set of documents the respondent demonstrated how the representations had changed from what was pleaded to what the appellant was relying upon on the hearing of the appeal in the form of core representations.

[34] Nevertheless, it was submitted on behalf of the respondent that the appellant must fail on the subject of negligent misrepresentations because of the trial judge's finding that the representations were never made.

[35] It is apparent from the terms of the judgment that the trial judge carefully considered all the evidence about the alleged misrepresentations and the credibility of those involved at relevant times. He found that the representations allegedly made at the June 1983 meeting between Dr Calley and Mr Bob Dunbar had not been made. In doing so he said in relation to the credibility of Dr Calley,

> "Dr Calley in his evidence had no recollection of the June 1983 meeting or of what he said thereat; I consider that this was to be expected after the lapse of such a long period of time, no notes of the meeting or what was discussed thereat having been made, and no follow-up correspondence having resulted from it. I found Dr Calley a transparently honest witness, a careful person of complete integrity. I consider that Mr Bob Dunbar was also an honest witness, in the sense that he spoke what he now believed to be the truth; however, I consider that his memory of the detail of what he alleges was said at the June 1983 meeting was in fact very far from reliable. On the evidence, I am satisfied that Dr Calley informed Mr Bob Dunbar at that time that if the plaintiff purchased Nutwood Downs it would be asked to participate in the BTEC administered by the defendant and that further information or advice in relation thereto could be sought from him or from the DPP."

[36] His Honour then considered the evidence in relation to each alleged representation and concluded that none of the representations had been made in the form in which they were pleaded. He commented upon the respective credibility of Dr Calley and of Mr Bob Dunbar. As to the credibility of Dr Calley he said,

> "I note that Dr Calley despite his lack of memory of what he said to Mr Bob Dunbar in June 1983 denied that he would have told Mr Dunbar what he has alleged to have said in sc paras 6(c) (i) (ii) (iii). In my opinion it is quite competent for him to give evidence to that effect. He did not believe those things, and he was aware that he would not have lied about them to Mr Bob Dunbar. Clearly they were not views which he held in 1983 about the operation of the BTEC…I am satisfied he had no reason to mislead Mr Bob Dunbar about those matters, and did not do so."

[37] He went on to particularise the "convincing explanation" for Dr Calley not to have made the representations that he allegedly made at the meeting at June 1983. Later he said,

> "On the evidence I say immediately that I consider that the probabilities are that Dr Calley's testimony accurately reflects what he had in fact told Mr Bob Dunbar at their June 1983 meeting".

[38] In dealing with the credibility of Mr Bob Dunbar his Honour said that the conclusion contended for by the plaintiff could not reasonably have been drawn by Mr Bob Dunbar from what Dr Calley probably said.

[39] His Honour said that he considered that Mr Dunbar's evidence relating to the representations was largely his own reconstruction a creation probably coloured by his subsequent acrimonious dealings with the DPP.

[40] The relationship was characterised by the plaintiff as “long and poisonous” with “fear and loathing on both sides” as found by his Honour.

[41] In disposing of the plaintiff’s case that the representations as pleaded were made in the June 1983 meeting his Honour said that he did not consider that Mr Bob Dunbar’s evidence of his discussions with Dr Calley in June 1983 was reliable – very far from that. He finally concluded that he was not satisfied that the representations which he alleged were then made by Dr Calley were in fact made as alleged and concluded that that factual conclusion disposed of the plaintiff’s cause of action for negligent misrepresentation insofar as it was founded on the June 1983 representations.

[42] In relation to the misrepresentations allegedly made at the January 1984 meeting, the trial judge, being of the same opinion about the reliability of Mr Bob Dunbar as a witness, likewise rejected the assertion that the representations had been made.

[43] He went on to say that that factual conclusion disposed of the plaintiff’s causes of action for negligent misrepresentation.

[44] His Honour looked at all the surrounding circumstances and considered the probabilities. He concluded that the many things deposed to by Bob and Rod Dunbar did not accord with reality or did not “ring true”. He found that

much of their evidence did not make sense because what they described was not the sort of thing that was likely to have happened.

[45] It was submitted on behalf of the respondent that his Honour's findings about the lack of reliability and the credibility of the Dunbars were therefore neither glaringly improbable nor contrary to compelling inferences. Accordingly, it was submitted that his Honour's findings, based on the credibility of the Dunbars, to the effect that the representations pleaded were never made, must stand.

[46] We agree with that submission. There is no basis upon which this Court, in accordance with the binding authorities, can intervene. That disposes of the grounds of appeal directed to the negligent misrepresentations. It is unnecessary in the circumstances to consider the other aspects of the appellant's case. If the representations cannot be proved, the causes of action fail.

[47] His Honour nevertheless went on to consider the other matters which the plaintiff would have been required to prove to establish the cause of action based upon the June 1983 representations. The first matter that he dealt with was reliance and referred to *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act* (1986) 162 CLR 340 at 366 per Brennan J.

[48] In our opinion it was unnecessary for his Honour to consider the element of reliance in the light of his findings of fact that the representations relied upon were never made. Nevertheless in disposing of the reliance by the Dunbars as not having been proved his Honour gave more reasons why the Dunbars ought not to be believed. He said on the subject of reliance,

> "As to this, it is sufficient to say that having considered the evidence, I consider it probable that Mr Bob Dunbar and Rod Dunbar, both very experienced cattlemen, obviously confident of their own abilities and judgment in that business, decided at a very early stage to buy Nutwood Downs. Their decision to do so was not affected by what Dr Calley in fact said to Mr Bob Dunbar in June 1983; as I noted earlier I am not satisfied that any beliefs which Mr Bob Dunbar says he had in relation to the impact of the BTEC on Nutwood Downs rationally arose from what Dr Calley in fact said on that occasion."

BREACH OF DUTY OF CARE TO INFORM, ADVISE OR WARN

[49] Because he did not find that the representations as pleaded were made, it was probably unnecessary for the trial judge to consider whether the appellant had established that the respondent owed the appellant a duty of care, based on its role of adviser to the appellant so as to attract a liability in tort for economic loss. He held that even if the duty existed the appellant had failed to establish any breach thereof. Nevertheless the plaintiff pleaded the tort as an alternative to its negligent misstatement case and the trial judge's rejection of the case in tort is contested on appeal to the court.

[50] Having pleaded that the defendant, as advisor to the plaintiff in relation to the BTEC campaign on Nutwood Downs, owed to the plaintiff certain fiduciary duties, the plaintiff went on to plead in the alternative that,

> "As advisor to the plaintiff in relation to the operation of the BTEC campaign on Nutwood Downs owed the plaintiff a duty of care in and about the giving of advice to the plaintiff and in and about the making of the June 1983 representations."

[51] His Honour dealt with that allegation and the evidence in support of it, and against it, and particularised the plaintiff's claim as being founded on a contention that the defendant was its advisor on the BTEC on three bases; that the defendant in the circumstances had effectively held itself out as having the role of advisor; that it had affirmatively assumed the role of advisor, by responding to inquiries by the Dunbars; and that it had assumed the role of advisor by reason of a special interest of its own that the Dunbars purchase Nutwood Downs.

[52] His Honour rejected the contention that the defendant had acted as advisor to the plaintiff on any basis. He rejected that the defendant was an advisor on the first basis by finding that the plaintiff, like all pastoralists, always had a choice whether or not to enter into a BTEC scheme by way of an approved program (which provided inter alia for compensation subsidies, low rental leases and free professional assistance and testing). Further he rejected the contention on the basis that while to enter into an approved program was the only commercially sensible thing to do, the choice whether or not to do so was a matter for the plaintiff. In this respect he accepted the arguments put on behalf of the defendant.

[53] As to the second basis his Honour held that having chosen to respond to the Dunbars BTEC inquiries Dr Calley was in the circumstances under a duty

not intentionally to mislead them but this duty did not extend to any role as an advisor.

[54] He concluded that Dr Calley did not affirmatively assume the role of advisor to Bob Dunbar in June 1983 as alleged and did not accept the plaintiff's contention as to what Bob Dunbar made known to Dr Calley in June 1983.

[55] He rejected the third basis that the defendant assumed the role of advisor because it had its own special interests that the plaintiff purchase the property. He said that in the result he rejected the allegation that the defendant was the plaintiff's advisor in relation to the BTEC operation on Nutwood Downs and accordingly it owed no duty of care as an advisor.

[56] On the hearing of this appeal, the appellant has been critical of the trial judge's reasoning in that he appears to have reached his conclusion on the basis that Dr Calley was not "in some technical sense an advisor" and submits that this is not determinative of the duty of care issue.

[57] It is to be noted however that the allegation of breach of duty of care against the defendant was specifically pleaded as arising from the defendants position "as advisor to the plaintiff in relation to the operation of the BTEC campaign on Nutwood Downs" see para 6H of the Statement of Claim.

[58] We can find no reason to interfere with his Honour's rejection of the appellant's claim that the DPP was acting in an advisory capacity to

pastoralists. The conclusion that the DPP was implementing in the Northern Territory by the Calley Plan the eradication of bovine tuberculosis, a goal agreed to by the cattle industry Australia – wide in the States and Territories with the participation of the Commonwealth, was correct on the evidence. Likewise his conclusion that the respondent was not the appellant's adviser in relation to the BTEC operation on Nutwood Downs and owed no duty of care as such to the appellant was correct on the evidence.

[59] Once his Honour had found no duty of care by reason of the role of advisor, there was no need for him to deal with the alleged falsities of the information given or the obligation to give information. He went on to do so but it seems to us that was an unnecessary exercise.

[60] The respondent made a number of submissions on appeal based upon public policy and other considerations why no duty of care should be imposed in the circumstances. In our view it is unnecessary to deal with those submissions, although we think they are correct.

LEXCRAY THREE CONTRACT CLAIMS

[61] The plaintiff alleged that the defendant entered into three agreements with it as follows:

(1) an agreement made on the 5th January 1984 to pay compensation at rates equal to "market value";

(2) an agreement made in late August 1994 (the written part being DCA) to pay compensation at rates equal to "market value" which value would be determined by the Minister;

(3) in the alternative to (2) above, an agreement made in late August 1984 (the written part being the DCA) to pay compensation at rates which the defendant, by the Minister, acting fairly to the plaintiff, considered it would be reasonable to pay the plaintiff, having regard, inter alia, to the extent of destocking proposed on Nutwood Downs, the financial ramifications thereof to the plaintiff, the aims and the objectives of the BTEC, and the terms of compensation required by the Commonwealth/Territory BTEC Agreement, or the amount of compensation was to be a fair and reasonable amount, equal to the market value of each mustered animal destocked plus a rate as determined by the Minister in respect of each unmusterable animal.

[62] In relation to the first contract claim the trial judge found that the Northern Territory did not enter into a contract on that day to pay compensation at rates equal to "market value". He did not accept Bob Dunbars evidence that during their meeting on the 5th January 1984 Dr Calley made such an agreement with him on the ground that that would not have been in accordance with the methodology of the Calley Plan, a copy of which Dr Calley had handed to the Dunbars at their meeting on the 5th January 1984.

[63] His Honour's reasoning as disclosed by the terms of the judgment began with paragraph 2.2.5 of the Calley Plan which provided

> "the basis of compensation for all categories of stock except unmusterables is the on farm value of an equivalent disease-free animal valued at the use to which the slaughtered animal was put plus freight and slaughter levy and less any residual value of the diseased carcass".

[64] The plaintiff alleged that the words of paragraph 2.2.5 meant "market value" and that the plaintiff was therefore entitled to be compensated on the basis of market value. Based on the evidence of Dr Calley his Honour rejected this contention and found instead that there was a distinction between "market value" and the "on farm value of an equivalent disease free animal valued at the use to which the slaughtered animal was put" because of the use of the qualifying words "the use to which the slaughtered animal was put" in paragraph 2.2.5.

[65] His Honour further relied on the evidence of Dr Calley that there were three practical reasons why it was impossible to pay straight saleyard prices for destocked cattle. He therefore concluded that the Calley Plan did not provide for market value.

[66] Dr Calley gave Bob Dunbar a copy of the Calley Plan at their 5th of January 1984 meeting. Accepting the evidence of Dr Calley, he had not said anything to the Dunbars at that meeting that was inconsistent with the Calley Plan. Accordingly he rejected the evidence of Bob Dunbar that

Dr Calley made an agreement at the 5th of January 1984 meeting to pay market value compensation.

[67] It was submitted on behalf of the respondent that as his Honour's finding of no contract was based upon his assessment of Bob Dunbars credibility and there is nothing in the evidence to lead to any suspicion that his Honour's conclusion was glaringly improbable or inconsistent with the facts in - controvertibly established by the evidence. This Court should defer to his Honour's conclusion on the matter.

[68] It was further submitted on behalf of the respondent, and there is much force in this submission in our opinion, that the plaintiff asserted that an agreement was made for the first time when the proceedings were instituted in 1993, some nine years after the event. Furthermore, in the meantime, namely in June 1984, the plaintiff had entered into the AP and DCA which clearly provided for compensation at rates to be fixed by the Minister.

[69] In our opinion, no ground has been shown for interfering with the trial judge's findings of fact nor his conclusions. His finding that no contract of the first type alleged was made cannot be disturbed.

[70] We turn to the second contract claim and its alternative ie the third contract claim. His Honour held that the second contract claim was essentially an issue of construction of the destocking compensation agreement. This was entered into by the parties on the 8th of June 1984. It contained the following clause:

> "CLAUSE 31
>
> The parties hereby expressly agree that this agreement is intended to cover all things or actions arising from related to or flowing from the approved program and that this agreement contains the whole of the agreement between them."

[71] Clause 17 was in the following terms:

> "The amount of compensation payable to the owner shall be in accordance with the rates determined from time to time by the Minister for the categories of cattle referred to in item 4 of the schedule and shall be the rate or rates applicable on the day the order for movement or the certificate of destruction is issued by an inspector".

[72] Notwithstanding those clear provisions, the plaintiff contended that the destocking compensation agreement obliged the defendant to pay replacement value compensation for cattle destocked up to 1989, when it is common ground that the agreement was superseded by a new agreement dated 3 November 1989.

[73] The DCA encompassed the cattle destocked in 1984 and 1985 up to and including destocking pursuant to two orders to destock issued by Dr Ainsworth on the 8th August 1985 as well as cattle destocked under two orders issued by Dr deWitte on the 6th March 1987.

[74] At the trial the defendant contended that the amount of compensation payable was in the discretion of the Minister controlled only by a duty to act honestly and reasonably.

[75] The trial judge considered the submissions on behalf of the plaintiff, including a submission that the recitals to the DCA set out the factual matrix against which the agreement was entered into and is to be construed. To that contention the defendant replied that recitals cannot control clear words in the operative part of an instrument.

[76] It is unnecessary to traverse in detail the arguments put before the trial judge and his careful analysis of them. It is sufficient to observe that his conclusion that there was no contract of the second or third type alleged was entirely consistent with the general approach to the construction of a contract. The terms of clause 31 were such that the DCA contained the entire contractual relationship between the parties and the plain and ordinary meaning of clause 17 was that the amount of compensation payable was to be in accordance with the rates determined from time to time by the Minister.

[77] We can find no ground for interfering with his Honour's conclusion that no contractual relationship existed other than that contained in the DCA.

BREACH OF FIDUCIARY DUTY

[78] The plaintiff's claim for breach of fiduciary duty was very expansively pleaded in the statement of claim. It was in the following terms:

> "31. Further or alternatively by reason of the matters in paragraphs 4A, 4B, 6(a), 6(b), 9(a), 9(b) 10 and 12 and further by reason of the matters in paragraph 19 and having regard to the nature and the terms of the arrangements in paragraphs 18(a), 22(a), 22(b), 22(c), 25(a) and 26 the Defendant owed to the Plaintiff a

fiduciary duty in and about the operation of the BTEC Campaign on Nutwood Downs whereby the Defendant would:

(a) disclose to the Plaintiff any circumstances leading to a conflict of interest between the Plaintiff in connection with its operation of Nutwood Downs and the Defendant in its conduct of the BTEC Campaign on Nutwood Downs including assessment by the Defendant of compensation;

(b) provide the Plaintiff with all financial and other material information of which it was aware in respect of the BTEC Campaign on Nutwood Downs insofar as such information affected the Plaintiff's financial operation of Nutwood Downs and its financial capacity to carry out such operations advantageously to the Plaintiff;

(c) not take advantage of circumstances and information of the said nature and description which the Defendant knew or ought to have known was not within the perception or possession of the Plaintiff;

(d) act in good faith towards the Plaintiff;

(e) act with reasonable skill and care and with due regard to the interests of the Plaintiff;

(f) account to the Plaintiff for benefits obtained in circumstances where there was a conflict or significant possibility of conflict between its fiduciary duties to the Plaintiff and the interests of the Defendant;

32. Further or alternatively, by reason of the matters referred to in 4A, 4B, 6(a), 6(b), 9(b), 10, 12, 18(a), 19, 22(a), 22(b), 22(c), 25(a) and 26 the Defendant was under a duty to deal fairly and in good faith with the Plaintiff in relation to the conduct of the BTEC Campaign on Nutwood Downs and the effect thereupon the financial operations of the Plaintiff of Nutwood Downs.

33. In breach of the said fiduciary duty and/or duty of good faith and/or duty of care, the Defendant:

(a) prior to the entry into the arrangements referred to in paragraph 18(a), and at all material times thereafter, including prior to the events in paragraphs 22(a), 22(b), 22(c), 25(a) and 26 failed to inform and advise the Plaintiff.

(i) of the existence of the Commonwealth/Territory BTEC Agreement and of its terms in relation to compensation;

(ii) that compensation at rates equal to Market Value was the fair and reasonable amount to be obtained by the Plaintiff for breeding cows and herd bulls destocked in accordance with the operation of the BTEC Campaign on Nutwood Downs;

(iii) that the Defendant had informed the Commonwealth Government that the new flat rate scheme of compensation for cattle destocked under the BTEC Campaign proposed in about May 1984 would only be implemented at rates acceptable to pastoralists, including the Plaintiff;

(iv) that it knew that the rates of compensation it was offering to the Plaintiff were very substantially less than Market Value;

(b) on the occasions referred to in paragraphs 15, 19D, 20 and 23 wrongly advised the Plaintiff that it had no choice but to accept the compensation rates offered;

(c) prior to the events in paragraphs 22(a), 22(b) and 22(c) failed to inform the Plaintiff of the DPP Market Value Estimates;

(d) prior to the events in paragraphs 25(a) and 26 failed to inform the Plaintiff of the BTEC Recommendations, the Northern Territory Intention to Change to Market Value and the AAC Resolution.

33A. In further breach of the said fiduciary duty and/or duty of good faith and/or duty of care, the Defendant in respect of the operation of the BTEC Campaign on Nutwood Downs in the 1984, 1985, 1986, 1987 and 1988 cattle seasons:

(a) failed to ensure that the Plaintiff received compensation for all cattle destocked pursuant to the Approved Program at rates equal to the Market Value or alternatively at rates not less than the Southern Region Rates;

(b) failed to ascertain or pay any or any sufficient regard to the fact that the rates of compensation for cattle destocked on Nutwood Downs did not reflect the on-farm market value of such stock according to the use to which such stock were put on Nutwood Downs;

(c) failed to ascertain or pay any or any sufficient regard to the fact that the rates of compensation for cattle destocked on Nutwood Downs did not reflect the use and quality of such cattle on Nutwood Downs;

(d) failed to ascertain or pay any or any sufficient regard to the fact that the rates of compensation for cattle destocked on Nutwood Downs significantly under compensated the Plaintiff for the loss of the value and use of such cattle on Nutwood Downs;

(e) failed to ascertain or pay any or any sufficient regard to the fact that the conduct of the BTEC Campaign on Nutwood Downs without payment of compensation at rates equal to Market Value would or could threaten the viability of the Plaintiff's pastoral operations on Nutwood Downs;

(f) failed to ascertain or pay any or any sufficient regard to the fact that the conduct of the BTEC Campaign on Nutwood Downs without payment of compensation at rates equal to Market Value would have a serious detrimental affect on the financial returns of the pastoral operations on Nutwood Downs and on financial position.

(g) failed to ascertain, and deal with the Plaintiff on the basis, that Nutwood Downs was in the Southern Region;

(h) sacrificed the interests of the Plaintiff in preserving and maintaining the viability and profitability of its pastoral operations on Nutwood Downs in the interests of financial advantage to itself;

(i) failed to account to the Plaintiff for the savings it made in not paying the Plaintiff equal compensation at rates equal to the Market Value in spite of the circumstances referred to in (i).”

[79] By its defence the defendant denied that it owed the plaintiff a fiduciary duty.

[80] The way in which his Honour resolved the contest about fiduciary duty and the breaches thereof by the defendant was to traverse the effect of the pleadings and the written submissions he had received and then to accept the submissions of the defendant which were in the following terms:

“FIDUCIARY DUTIES

23. The defendant repeats and relies upon its submissions on the law relating to this issue.

24. At no time did the defendant undertake to act on behalf of or in the interests of the plaintiff in a sense which would give rise to any special duty to the plaintiff. The defendant was administering a scheme involving the payment of funds contributed by others, it would not have an obligation to the plaintiff which conflicted with its duty to administer the scheme according to the requirements of the scheme. It was a matter for the plaintiff whether or not it entered the scheme and it made its own decision in that regard. The extent of its duty to the plaintiff (which was consistent with its duty to all others) is to act fairly towards those with whom it deals at least in so far as

this is consistent with its obligations to serve the public interest, *Hughes Aircraft Systems v Airservices Australia.*

25. Amongst the alleged breaches Mr Durack identified the failure of the defendant to inform the plaintiff of the Commonwealth/Territory Agreement. Again we say the plaintiff had no interest in this. If this be wrong, to the extent that it could have had an interest it could only have centered upon the basis upon which compensation was to be paid. The Calley Plan contained precisely the-same information as appears in the agreement in this regard – see para 2.2.5.

26. As to the remaining so-called breaches the defendant refers to and repeats the submissions made in the primary submissions at pages 35 to 39."

[81] He did not consider that the defendant owed the plaintiff any fiduciary duties and accordingly that the causes of actions for breaches of fiduciary duties had not been established.

[82] The grounds of appeal on this issue, likewise, were expansively pleaded in the following terms:

"25. The trial judge erred in failing to find that the respondent was under a fiduciary of duty and/or contractual duty of good faith and fair dealing to inform the appellant of:

a. the levels of destocking that would be required on Nutwood Downs;

b. the serious limitations of the caudal fold test;

c. of the respondent's intended approach to setting rates of compensation for cattle destocked from Nutwood Downs;

d. the likely effect of the respondent's BTEC requirements on the financial operation of the station;

e. the provisions in the Commonwealth/Northern Territory agreement concerning payment of compensation; and

f. the Commonwealth resolution prior to entry into the 1988 Approved Program the Northern Territory amend its compensation scheme to reflect the principle of on-farm value.

26. In considering whether there was a breach of duty by the respondent referred to in grounds 25 c, d, e and f above, the trial judge erred in failing to:-

a. consider and accept Mr John Kerin's evidence to the effect that payment of compensation to ensure pastoralists received on-farm value of an equivalent disease free animal according to the use to which the animal was put was the golden thread running through the BTEC program in Australia; and

b. find, particularly in view of Mr John Kerin's evidence, that if the matters referred to in grounds 25 c, d, e and f above had been disclosed to the appellant, it would in all likelihood have obtained on-farm value or (if there is any difference) the market value for the cattle destocked, or that it lost a valuable opportunity to negotiate for and obtain such level of compensation."

[83] On the hearing of the appeal to this Court, the appellant relied upon very expansive submissions in written form. The main thrust of those submissions, however, was directed to what the defendant should have disclosed to the plaintiff on the assumption that a fiduciary duty existed.

[84] As to the existence or otherwise of a fiduciary relationship the appellant relied on certain indicia which were:

1. The Northern Territory's superior position of power over individual pastoralists and their property;

2. The Northern Territory's control of critical information;

3. The relationship of trust and confidence; and

4. The Northern Territory as promoter of BTEC.

[85] It was submitted that the above are classic indicia of a fiduciary relationship.

[86] The submissions of the respondent on hearing of the appeal were the same submissions as had been made to the trial judge.

[87] As to relationships of trust and confidence the respondent submitted that a fiduciary duty arises where there is a relationship of trust and confidence between two persons, alternatively, where a person is entitled to trust another, whether the other is actually trusted or not.

[88] Trust and confidence mean much the same. Relationships between partners, between agents and principals, trustees and beneficiaries, companies and directors, employers and employees and solicitors and clients are all examples of the trusting relationship. One party to the relationship assumes an obligation to act in the others interests. The critical feature of these relationships is that the fiduciary undertakes, or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion, which will affect the interests of that person in a legal or practical sense.

[89] The relationship between the parties therefore is one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

[90] There are some categories of relationships that generally carry a fiduciary duty. One is agency, although it is clear that not all agents are fiduciaries. Other relationships of a fiduciary nature acquire ascendancy or influence by one party, or dependence or trust by the other party, such as some aspects of the doctor – patient relationship.

[91] Beyond those relationships mentioned above, relationships are not normally characterised as fiduciary relationships and do not create a fiduciary duty owed by anyone, government included.

[92] As to the allegation that the defendant was a promoter and therefore under a fiduciary duty, it was submitted on behalf of the respondent that the expression "promoter" is very wide indeed and it is not every promoter who is placed in the position of owing a fiduciary duty. Generally, a promoter will attract such a duty when he is the promoter of some business venture. The term promoter is a term not of law, but of business, usually summing up in a single word, a number of business operations familiar to the commercial world by which a company is generally brought into existence.

[93] It was submitted on behalf of the respondent that no fiduciary duty was owed by the defendant to the plaintiff. The first submission was that

whatever the relationship was, it did not fall within any of the recognised categories of relationships which give rise to fiduciary duties. The relationship between a government department administering a government and/or industry scheme, and a pastoralist involved in that scheme, is not one of the recognised categories of relationships giving rise to fiduciary duties. It is not even remotely similar to any of the recognised categories. This is the real basis upon which his Honour decided the issue adversely to the plaintiff.

[94] It was further submitted that Dr Calley and the other NT officers were at all times obligated to act in the public interest in implementing BTEC. They were required to do that within the budgetary and other constraints set by the Northern Territory and the other governments involved in the scheme.

[95] The NT's officers did not at any time agree to act, assume the responsibility to act, or conduct themselves in a way where they should be required by law to act in Lexcray's personal interests.

[96] Neither the NT or its officers stood to gain any personal benefit for administering the BTEC scheme. In fact, on the crucial issue of the compensation available under BTEC, the public interest in the efficient and equitable distribution of public funds was always realistically likely to be in competition with the Dunbars' personal interests in maximising the amount of those funds or compensation they received.

[97] BTEC was not a commercial or business venture. The NT was not promoting BTEC in any commercial or business sense that might give rise to a fiduciary obligation as promoter. There was no profit motive involved for the NT or any of its officers. No partnership, joint venture or similar situation existed between the NT and the Dunbars. Indeed in almost every aspect BTEC was the exact opposite for those situations.

[98] Further, it was submitted that the NT and Lexcray were never in a relationship of trust and confidence where the NT was in the superior position, or Lexcray was in an inferior position, or where the NT was acting for the benefit of and in the interests of Lexcray and not the wider public interests. In fact, the relationship between Dr Calley and the officers of the NT and Lexcray was almost the antithesis of the relationship of trust and confidence necessary.

[99] It was further submitted that in determining whether a fiduciary relationship existed between the NT and Lexcray, regard will have to be had to public policy considerations. Those considerations counter any conclusion that a fiduciary relationship existed between the NT and Lexcray.

[100] Having considered the authorities cited and those parts of the evidence relevant to the existence or otherwise of a fiduciary relationship, we are not persuaded that his Honour was in error in finding that no fiduciary relationship existed. Of fiduciary relationships, Mason J (as he then was) in

Hospital Products Ltd v United States Surgical Corps (1984) 156 CLR 41 at 97, said:

> "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other in a legal or practical sense."

How can it be said that the respondent had agreed or undertaken to serve the interests of the appellant in relation to BTEC? BTEC was a co-operative exercise undertaken in the public interest by the Australian cattle industry, the Commonwealth and the respondent with the objective of producing benefits for individual pastoralists (including the appellant) and the cattle industry as a whole. The proposition that the respondent had bound itself to act in the appellant's interests rather than the interests of the cattle industry and the public generally has only to be stated to demonstrate it cannot be sustained.

We agree with the learned trial judge that there was no fiduciary relationship between the parties.

ESTOPPEL

[101] The plaintiff brought two claims based on alleged estoppels and the relief sought was that as a result of the representations made by the defendant, the defendant is estopped from denying that it was obliged to pay compensation at market value rates.

[102] The plaintiff sought an order for payment of the difference between what it should have received, based on those rates, and what it actually received. The defendant's response at trial was that there were no such representations as alleged to found the estoppel pleaded.

[103] His Honour had already found that no representations as alleged were made, and that disposes of the plaintiff's claims for estoppel. It is necessary however to refer to the law on the subject and his Honour's reasoning.

[104] The law will not permit an unconscionable, more accurately, unconscious departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission, which would operate to that other parties' detriment, if the assumption be not adhered to for the purposes of litigation. *The Commonwealth of Australia v Verwayen* (1990) 170 CLR of 394, *Walton Stores (Interstate) Limited v Maher* (1998) 164 CLR of 387, Carter and Harland, Contract Law in Australia para 365 to 370, 374 to 378, 386 and Cheshire and Fifoot, Law of Contract, Seventh Australian Edition, para 2.16.

[105] The elements of estoppel are present when a promise, representation or conduct of one party, leads another to assume that the first party will follow a certain course of action, and the other acts on that assumption in some material way, so that it would be unconscionable for the first party to go back on the promise or representation. (Cheshire and Fifoot para 2.2).

[106] The assumption may be of fact or law, present or future, (*Verwayen* per Deane J at 445.4) but there is one doctrine of estoppel:

> "which provides that a court of common law or equity may do what is required, but no more, to prevent a person who has relied upon an assumption as to the present, past, or future state of affairs (including a legal state of affairs) which assumption the party estopped has induced him to hold from suffering detriment in reliance upon the assumption as a result of the denial of its correctness."

Verwayen per Mason CJ at 413.2.

[107] The remedy will be the minimum to do justice by preventing detriment from being suffered by reliance on the assumption *Verwayen* at 413 (Mason CJ), 430 (Brennan J), 454 (Dawson J), 475 (Toohey J), 501 (McHugh J). These are the principles that were cited and relied upon by his Honour in finding that there was no estoppel.

[108] It was submitted on behalf of the appellant that by giving the Dunbars the Calley Plan with advice it would tell them all they needed to know.
Dr Calley represented to the appellant that if it purchased the station and entered into a DCA it would receive rates of compensation based on the on-farm value of equivalent disease free animals, valued at the use to which the slaughtered animals had been put. Based on the representation the appellant had an expectation that it would receive rates of compensation based on on-farm value.

[109] His Honour had already found in his reasons that the representations alleged were not made and, as we have said above, that disposed of the estoppel claims.

[110] Secondly, after referring to the submissions made by the parties his Honour accepted the submission on behalf of the defendant that "para 2.2.5 of the Calley Plan does not embody 'replacement value' or 'market value' compensation". He concluded that there was no foundation for any belief in the plaintiff that it would receive market value.

[111] It was submitted on behalf of the respondent that his Honour's findings on the estoppel claim were findings based on the credibility of the Dunbars and that neither of these findings involves a situation where his Honour's conclusions on credibility are "glaringly improbable" or inconsistent with the facts incontrovertibly established by the evidence or "contrary to compelling influences". Thus, it was submitted that all of the conclusions of his Honour must stand.

[112] It was further submitted that the appellant would not be entitled to equitable relief because it had not itself done equity. Furthermore, there had been substantial delay. The writ of summons in the matter was not issued until 1992 and the estoppel claim was in respect of events in 1983 and 1984.

[113] In our opinion the submissions of the respondent are compelling and no case of estoppel can be made out. His Honour was correct in rejecting the claims based upon estoppel.

CONCLUSION

[114] Notwithstanding the vigour and intensity of the presentation of the appellant's case, we are of the opinion that the appeal can not succeed on any basis. The appeal should be dismissed with costs.