

Case in Brief

Falling out of fashion: estoppel prevents operation of time bar

By Hannah Aziz

New South Wales Court of Appeal decision reminds parties that time bars are not enforceable where it would be unconscionable to do so

The facts

In the case of *Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No.2)*,¹ Valmont Interiors Pty Ltd (**Valmont**) entered into a contract with Giorgio Armani Australia Pty Ltd (**GA**) for Valmont to provide fit-out and construction works to a GA retail store at Sydney airport. The contract stated that GA would provide the joinery for the fit-out via a third party supplier, Sun Bright. Sun Bright could not supply the items in the specified time frame. GA directed Valmont to provide the joinery items instead. GA did not make this direction as a formal variation under the contractual variation provisions in the contract. Upon supplying the joinery items, GA refused to pay Valmont for the additional works as GA claimed that Valmont had failed to provide a notice of variation in accordance with the terms of the contract (clause 15). GA argued that Valmont's failure to do so meant that Valmont had waived any entitlement to claim additional monies from GA.

Valmont argued that GA was estopped from relying upon clause 15 because GA itself had not followed the agreed variation procedure in instructing Valmont to provide the joinery

items. There had also been a history of what Valmont claimed were documented variations to the contract which were not made by GA in accordance with the relevant variation terms of the contract. Valmont argued that given GA's conduct relating to these variations (including variations to works relating to the façade of the store), it had been led to believe that GA's formal approval was not required because such variations had not been directed in accordance with clause 15.

Valmont issued proceedings to recover the costs of supplying the joinery and additional items.

At first instance

The District Court held that GA was estopped from relying on the waiver and release provisions in the contract for costs incurred by Valmont prior to 11 April 2016. The Judge found that GA's conduct had led Valmont to believe that non-compliance with clause 15 was permitted and that it would be unjust to allow GA to retrospectively rely upon the terms of clause 15. 11 April 2016 was the date on which GA asserted to Valmont via email that it believed there were no variations on the project, thus making it clear that it relied on the variation notice requirements in the contract. Given this notice, the Judge held that this was a critical date as it served to confirm GA's reliance on the notice requirements. The majority of the works relating to the joinery all post-dated the 11 April 2016 email and therefore Valmont's claim in respect of the joinery was rejected. Valmont subsequently appealed.

¹ *Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No.2)* [2021] NSWCA 93.



On appeal

The Court of Appeal took a different view and held that the estoppel continued in respect of the joinery after 11 April 2016. The Court noted that GA had insisted on supplying the joinery itself but had actually failed to do so. As Valmont had been instructed to supply the joinery by GA when GA could not supply it, and in the absence of any clear indication from GA otherwise, Valmont's understanding that it was entitled to be paid for that work was correct. GA's email of 11 April 2016 failed to give any clear indication to depart from such an understanding, nor did any other correspondence it had exchanged with Valmont.

The Court also emphasised the need for notice of an intended departure from an assumption as to a state of affairs to be given within a reasonable time. In this instance, the assumption held by Valmont was that the contractual notice provisions would not be relied upon given GA's previous conduct in requesting and directing variations during the performance of the works.

The Court also held that notice of an intended departure from the contract is not effective (and therefore estoppel cannot be displaced) if it is given after the time in which the relevant party would have been required to give notice under the contract. This is because the party would have already suffered detriment as it would no longer be in a position to comply with the necessary contractual provisions. On this basis, even if GA's email of 11 April 2016 had been sufficiently clear, it would still be estopped from relying upon the time bar provision at clause 15.

Key takeaways

This case serves as a reminder to parties of some of the scenarios which could prevent the operation of a time bar when an estoppel argument is raised. In this case, the conduct of the parties in accepting a course of behaviour to conduct additional works outside the contractual variation norms, prevented GA from attempting to retrospectively rely upon such terms.

Time bars are therefore not always enforceable in circumstances where it would be unconscionable to do so. A promise to pay could also be seen as a direction to carry out work, in circumstances where such work requests clearly fall outside the scope of the agreed contract. The party giving the direction must ensure that the party undertaking the work is clear that it does not

assume it will be paid for carrying out any works outside of the scope of the contract.

During construction, directions and variations are not always agreed formally in accordance with the prescribed clauses in the contract. However, it remains vital that parties do record their intentions clearly in any exchange of communication, and that such communication is preserved in the event that this type of scenario arises.



ABOUT THE AUTHOR



Hannah is a commercial litigation solicitor by background and qualified in England and Wales. Hannah has experience advising clients across various sectors including energy, banking and retail and she also has experience in regulatory matters and IP litigation. Prior to moving to New Zealand, Hannah worked in house for a European insurer. She now works as a Knowledge Manager in NZDRC's Knowledge Management Team.

