IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 243/95

BETWEEN: MATAU LIUVAE of Leauvaa, School Teacher

Plaintiff

A N D: SAMOA CREDIT UNION LEAGUE a duly incorporated Credit Union

Defendant

Counsel: P A Fepuleai for plaintiff
C J Nelson for defendant

Hearing: 9 May 1997

Judgment: 22 May 1997

JUDGMENT OF SAPOLU, CJ

The defendant, which is the Samoa Credit Union League (SCUL), is an incorporated credit union. Its membership is made up of various local credit unions which are affiliated to SCUL as the main credit union body.

In 1994 SCUL decided to hold a raffle. Booklets of raffle tickets (raffle books) were printed and distributed to its local credit union members to sell. Each raffle book contained twenty raffle tickets and the price of each ticket was one tala. The prizes of the raffle were printed on each ticket. The fifth prize, which is the relevant prize for the purpose of this case, was shown as $3,000. The closing date of the raffle was scheduled for 15 December 1994 and the drawing date was 17 December 1994.

The Sagaga credit union which is an affiliated member of SCUL was given a number of raffle books to sell. The Sagaga credit union then gave out those raffle books to its individual members, which included the plaintiff, to sell. Four raffle books were given to the plaintiff to sell. As the raffle was to close on 15 December 1994 and drawn on 17 December 1994, I find as a fact that the raffle books which were given out by the Sagaga credit union to its individual members, including the plaintiff, were actually given out prior to December 1994.

As it turned out, SCUL encountered problems in collecting back all the raffle books from its local credit union members including the Sagaga credit union. The Sagaga credit union in turn encountered problems in collecting raffle books from its own individual members including the plaintiff. Having looked at the whole of the evidence, it is clear to me that the problems related to the collection back of the raffle books was the reason, or at least one of the reasons, for postponing the drawing date of the raffle which was originally scheduled for 17 December 1994. The raffle, as it happened, was not drawn until 3 June 1995. It also appears from the evidence that the problems related to the collection back of raffle books caused concern to SCUL and the Sagaga credit union.

On 27 April 1995 the Sagaga credit union held a meeting. It appears from the minutes of that meeting, which were produced in evidence, that the only subject which was discussed at the meeting was the question of raffle tickets which had not yet been returned by members of the Sagaga credit union. The plaintiff was present at that meeting. During the meeting, the president of the Sagaga credit union, without dissent from any of the members present, resolved that if by 11 May 1995 any raffle tickets had not been returned to the credit union, then the price of the non-returned raffle tickets would be deducted from the shares in the credit union of the members who have not returned their raffle tickets, or some other action would be taken by the board of the credit union.

Given the fact that the drawing date of the raffle had been postponed from 17 December 1994, and that by 27 April 1995 the Sagaga credit union had still not been able to collect all the raffle books back from its individual members, I am of the view that the resolution which was put by the president of the Sagaga credit union to the meeting of the credit union on 27 April 1995 is evidence of the concern the credit union held in respect of the raffle books which its members had not yet returned. Whether intended or not, that resolution also appears to have had the effect of putting pressure on the members who had not at that time returned their raffle books, to return those raffle books to the credit union, or the price of the raffle books would be deducted from the shares of the members concerned, or some other action would be taken by the board of the credit union. It is also clear that the resolution was expressed in the alternative rather than as a commitment to one course of action only, namely, that the price of the non-returned raffle books would be deducted from the shares of the members concerned.

Following the meeting by the Sagaga credit union on 27 April 1995, SCUL held a meeting of its own on 28 April 1995. Representatives from various credit unions, including the Sagaga credit union, attended that meeting. One of the subjects discussed at that meeting, as shown from the minutes of the meeting produced in evidence, was the raffle. The director and secretary of SCUL referred to the opinion of the president of SCUL regarding the great importance of reminding the representative of each credit union that they tried to collect the raffle books and the money as they were approaching the date on which the raffle would be drawn. That date as it is clear from other parts of the evidence was 3 June 1995. The director and secretary of SCUL also mentioned that the Sagaga credit union had returned only 45% of its raffle books. It was also explained at that meeting that the money for "lost raffle books" and their numbers should be given to SCUL. And if a credit union paid the price of a ticket, presumably a "lost ticket", then if such ticket won a prize at the raffle, the prize would be given to the credit union which paid for the ticket. It, therefore, appears from the wording of the minutes of the meeting of 28 April 1995, that the question of the raffle books yet to be collected was a matter of great importance to SCUL.

After the SCUL meeting on 28 April 1995, the Sagaga credit union held another meeting of its own on 11 May 1995. The plaintiff did not attend that meeting. From the minutes of that meeting, which were also produced in evidence, the president of the Sagaga credit union, after explaining the resolutions by SCUL, resolved, without dissent, that the Sagaga credit union would pay for the non-returned raffle books, but the board of the credit union would decide later on what to do with regard to the raffle books which had not been returned. A list of the members who had not returned their raffle books was complied and a Sagaga credit union cheque was prepared and sent to SCUL to pay for the price of those non-

returned raffle books which included the raffle books which had been given to the plaintiff but she had not returned. It is also clear from the evidence that the Sagaga credit union did not make any deduction from the plaintiff's shares for her non-returned raffle books.

Then on 3 June 1995, the raffle was drawn and the ticket which won the fifth raffle prize of $3,000 was a ticket in one of the raffle books which had been given by the Sagaga credit union to the plaintiff to sell, but which the plaintiff had never returned. In fact, according to the evidence given by the secretary of the Sagaga credit union, the plaintiff had still not, by the time of the hearing of this case, returned the raffle books. On 7 June 1995, the results of the raffle were published in the Samoa Observer newspaper. The winner of the fifth raffle prize was shown to be the plaintiff with ticket number 029731. It appears from the evidence that the winning numbers of the raffle were drawn by the use of a bingo device. And the name of the holder of the ticket that won the fifth prize was obtained from the list of names of those members of the Sagaga credit union who had not returned their raffle books.

On 8 June 1995, the Sagaga credit union held another meeting. From the minutes of that meeting, which were also produced in evidence, it is clear that the secretary of the credit union mentioned at that meeting that there was a ticket which had won the raffle prize of $3,000. That ticket had never been returned, and it had been paid for with a cheque of the Sagaga credit union. The plaintiff was asked about her raffle tickets, and she replied they had been taken by a school teacher from Savaii to sell. The treasurer of the Sagaga credit union then explained the resolution which had already been made by the Sagaga credit union regarding the raffle books.

Now the evidence by the plaintiff was that she is a school teacher and a member of the Sagaga credit union. She said that she was given four raffle books by the Sagaga credit union to sell. Because of the resolution by the Sagaga credit union that the price of any unsold tickets would be deducted from the shares in the Sagaga credit union of the member with the unsold tickets, she decided not to sell the raffle books given to her but to keep them as she thought that the price of her unsold raffle books would be deducted from her shares. So she kept the raffle books without paying for any of them. As one of the tickets in the raffle books she kept had won the fifth raffle prize, she said she was entitled to that prize as she had been led to believe the prize of unsold tickets would be deducted from the shares of the members concerned.

In cross-examination, the plaintiff said that she gave the raffle book which contained the ticket that won the fifth raffle prize to a school teacher from Savaii to sell. That raffle book was not returned to her until after the raffle was drawn on 3 June 1995. None of the tickets in the raffle book was sold. She then filled in the stubs of the raffle tickets in the book with various names with her name on the ticket that later turned out to have won the fifth raffle prize. She said that when she filled in the stubs of the raffle tickets including the ticket that won the fifth raffle prize, the raffle had already been drawn. But she did not know at that time which were the winning tickets. Then about a week after the raffle was drawn, she sent her mother with the ticket whose number was published in the newspaper to have won the fifth raffle prize to claim that prize. However, her mother was told by SCUL that the prize money had been paid to the Sagaga credit union.

I must say I have not been impressed with the plaintiff's evidence. From what she said, it sounded as if at the time the four raffle books were given to her to sell, the Sagaga

credit union also resolved that the price of any unsold raffle tickets would be deducted from the shares of a member with unsold raffle tickets. She therefore placed reliance on that resolution and took no action to sell the raffle books but simply held on to them. That evidence is entirely not borne out by other evidence adduced in this case.

It is clear that the raffle was originally scheduled to close on 15 December 1994 and to be drawn on 17 December 1994. The raffle books must therefore have been given out by the Sagaga credit union to its members, including the plaintiff, prior to December 1994 to sell. The meeting of the Sagaga credit union in which the resolution mentioned by the plaintiff was made, was only held on 27 April 1995. It follows that from the time the raffle books were given to the plaintiff in 1994 to sell until 27 April 1995, she could not have been acting in reliance upon the resolution that was only made at the meeting of the Sagaga credit union held on 27 April 1995. If from the time the plaintiff was given the raffle books in 1994 until 27 April 1995 she had not sold any raffle books but simply held on to them, then her action or inaction could not have been on the basis of the resolution she claimed the Sagaga credit union to have made.

Moreover, the drawing date of the raffle had been postponed once from 17 December 1994; by 27 April 1995 there were still a number of raffle books which members of the Sagaga credit union had not returned; and the Sagaga credit union must have known at that time that the raffle would be drawn on 3 June 1995. If the minutes of the meeting of SCUL held on 28 April 1995 is anything to go by, it is clear that by 28 April 1995 the Sagaga credit union had only returned 45% of the raffle books which had been given to it by SCUL to sell. That fact could not have been unknown to the leaders of the Sagaga credit union when it met the day before, that is, 27 April 1995. In fact the only subject which was discussed at that

meeting was the question of non-returned raffle books by members of the Sagaga credit union. So the resolution that was put at that meeting by the president of the Sagaga credit union without dissent from other members present, that if by 11 May 1995 any raffle tickets had not been returned the prices of those raffle tickets would be deducted from the shares of the members concerned or some other action would be taken by the board, must have clearly conveyed to the members the concern of the Sagaga credit union regarding the raffle books which had not been returned. It also appears that the tone and effect of the resolution was to put some pressure on members to return the raffle books. Given the tone of the resolution and the context in which it was made, it cannot, in my view, be said that the resolution was a complimentary or congratulatory gesture to the members of the Sagaga credit union for having made a good effort in selling the raffle books or for work well done. It is also clear that notwithstanding the plaintiff's knowledge of the resolution by the Sagaga credit union that if by 11 May 1995 any member had not returned his or her raffle tickets the credit union would take action, she nonetheless failed to appear at the meeting held on 11 May 1995 or at least inform the credit union about the situation regarding the raffle books she kept.

It seems to me that the plaintiff, who was present at the meeting of 27 April 1995, did not appear to have taken seriously the concern of her credit union. She did not return the raffle books; she held on to the raffle books, for whatever reason I do not know; up to the time of the hearing of this case she was still holding on to the raffle books; and she never paid for them. Instead she seized on one part of the resolution that was made and said, that it justified her in not returning but holding on to the raffle books and in claiming a prize if one of the tickets in those raffle books turned out to win a raffle prize.

I would have thought that the credible thing for the plaintiff to have done after she attended the meeting of 27 April 1995 was to return the raffle books to the Sagaga credit union and to tell them she had been unable to sell any tickets, but deduct the total price of her unsold raffle books from her shares. In that way, she would have satisfied the concern of her credit union and at the same time achieve her purpose of placing reliance on the representation made by her credit union that the price of any unsold tickets would be deducted from the shares of the members concerned.

There is one other matter I want to refer to here. That is, can it be said that the winning raffle ticket held by the plaintiff was a valid raffle ticket when it was only filled in after the raffle was drawn. Counsel did not place any weight on that question, or address it in their submissions. I, therefore, express no view on it.

Legal issues:

Counsel for the plaintiff raised two very important legal issues, namely, estoppel and remedial constructive trust. He also asserted that the raffle which was held was beyond the statutory objects and powers of SCUL. I will turn to these issues now and deal with them in the order they were raised by counsel for the plaintiff.

Estoppel:

As I understood the way counsel for the plaintiff raised the issue of estoppel in this case, he relied on two representations. The first was that, he claimed that the representation made by the Sagaga credit union that the price of unsold raffle tickets would be deducted from the shares of members with unsold tickets, induced in the plaintiff the belief that the price of the unsold raffle tickets in the books she held would be deducted from her shares in the

Sagaga credit union. She therefore held on to the raffle books, on the basis of that belief, without selling any of the raffle tickets in those books. The second estoppel asserted for the plaintiff is founded on the newspaper publication of the results of the raffle. Those are the two estoppels which I understood counsel for the plaintiff to be asserting for the plaintiff. In my view it would be necessary to consider the question of estoppel in this case under the heading of estoppel by conduct.

Estoppel by conduct:

Estoppel by conduct, which is also known as estoppel in pais, originated at common law, but later came to prevail both at common law and in equity. In ***Legione v Hateley (1983) 152 CLR 406*** where the High Court of Australia accepted the doctrine of promissory estoppel as part of the law of Australia, Mason and Deane JJ in their joint judgment said at p.430 :

> "Estoppel in pais includes both the common law estoppel which precludes a person "from denying an assumption which formed the conventional basis of a relationship "between himself and another or which he has adopted against another by the assertion "of a right based on it and estoppel by representation which was of later development "with origins in Chancery. It is commonly regarded as also including the overlapping "equitable doctrines of proprietary estoppel and estoppel by acquiescence or "encouragement".

The object of estoppel by conduct was stated by Dixon J in two cases which have often been referred to by the High Court of Australia in recent times. The first of those cases was ***Thompson v Palmer (1933) 49 CLR 507*** where Dixon J said at p.547 :

> "The object of estoppel in pais is to prevent an unjust departure by one person from an "assumption adopted by another as the basis of some act or omission which, unless the "assumption be adhered to, would operate to that other's detriment. Whether a "departure by a party from the assumption should be considered unjust and "inadmissible depends on the part taken by him in occasioning its adoption by the "other party. He may be required to abide by the assumption because it formed the "conventional basis upon which the parties entered into contractual or other mutual "relations, such as bailment; or because he has exercised against the other party rights

"which would exist only if the assumption were correct, as in *Yorkshire Insurance Co "v Craine [1922] 2 AC 541*; cp. *Cave v Mills 158 ER 740; Smith v Baker (1873) LR "CP 350; Verschures Creameries Ltd v Hull and Netherlands Steamship Co [1921] "2 KB 608;* and *Ambur Nair v Kelu Nair (1933) 60 IA 266;* or because knowing the "mistake the other laboured under, he refrained from correcting him when it was his "duty to do so; or because his imprudence, where care was required of him, was a "proximate cause of the other party's adapting and acting upon the faith of the "assumption; or because he directly made representations upon which the other party "founded the assumption. But, in each case, he is not bound to adhere to the "assumption unless, as a result of adopting it as the basis of action or inaction, the "other party will have placed himself in a position of material disadvantage if "departure from the assumption be permitted".

In the second case of ***Grundt v Grant Boulder Pty Gold Mines Ltd (1937) 59 CLR 641***, Dixon J at pp 674-675 of his judgment said :

"The purpose is to avoid or prevent a detriment to the party asserting the estoppel by "compelling the opposite party to adhere to the assumption upon which the former "acted or refrained from acting. This means that the real detriment or harm from "which the law seeks to give protection is that which would flow from the change of "position if the assumption were deserted that led to it. So long as the assumption is "adhered to, the party who altered his position upon the faith of it cannot complain. "His complaint is that when afterwards the other party makes a different state of affairs "the basis of an assertion of right against him then, if it is allowed, his own original "change of position will operate as a detriment. His action or inaction must be such "that, if the assumption upon which he proceeded were shown to be wrong and an "inconsistent state of affairs were accepted as the foundation of the rights and duties of "himself and the opposite party, the consequences would be to make his original act or "failure to act a source of prejudice".

At pp 675-676 of that same judgment, Dixon J went on to say :

"The justice of an estoppel is not established by the fact in itself that a state of affairs "has been assumed as the basis of action or inaction and that a departure from the "assumption would turn the action or inaction into a detrimental change of position. It "depends also on the manner in which the assumption has been occasioned or induced. "Before anyone can be estopped, he must have played such a part in the adoption of "the assumption that it would be unfair or unjust if he were left free to ignore it. But "the law does not leave such a question of fairness or justice at large. It defines with "more or less completeness the kinds of participation in the making or acceptance of

"the assumption that will suffice to preclude the party if the other requirements of "estoppel are established".

It would appear from what was said by Dixon J in ***Thompson v Palmer (1933) 49 CLR 507*** and ***Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641*** that in considering the question of estoppel in pais (estoppel by conduct), the conduct of the person who has occasioned the assumption or state of affairs, on the basis of which the other person has acted or refrained from acting, has to be taken into account apart from the element of reliance and any detriment that would result to that other person, if the person who occasioned the assumption or state of affairs is permitted not to adhere t it. One may ask, however, whether it is necessary in every case to show detriment, or whether it is sufficient to show that it would be unconscionable for the person who had occasioned the assumption upon which the other person had acted, to be allowed to resile from that assumption. After all in ***Foran v Wight (1989) 168 CLR 385*** Deane J said at p.435 that it is the notions of good conscience which inspire the doctrine of estoppel, and in ***The Commonwealth v Verwayen (1990) 170 CLR 394*** Mason CJ said at p.407 that the prevention of unconscionable conduct has been the driving force behind equitable estoppel. It may further be asked whether there is that much difference in the difficulties associated with defining the concept of unconscionability as with defining the concept of detriment. However, no question of unconscionability was raised in this case, so it is needless to say any more about the questions posed here.

It is also clear from ***Thompson v Palmer (1933) 49 CLR 507*** that the common law estoppel in pais (estoppel by conduct) included estoppel by representation. The restriction which hampered the development of estoppel by representation as part of the common law estoppel by conduct, was the concern that to extend the application of estoppel to

representations (or promises) unsupported by consideration would outflank and undermine the doctrine of consideration in the law of contract. It was not until the birth of the doctrine of promisory estoppel in ***Central London Property Trust Ltd v High Trees [1947] KB 130*** that further progress was made in this area.

The other requirement of a common law estoppel by conduct or representation, which also applies to promissory estoppel, is that the representation (or promise) relied upon to ground the estoppel must be clear and not left to argument. In ***Legione v Hateley (1983) 152 CLR 406***, Mason and Deane JJ in their joint judgment said at pp 435-436 :

> "[It] has long been recognised that a representation must be clear before it can found "an estoppel in pais (***Law v Bouverie [1891] 3 Ch 82, 106***; ***Newborn v City Mutual "Life Assurance Ltd (1935) 52 CLR 723, 738***; ***Woodhouse v Nigerian Produce "Marketing Co. Ltd [1972] AC 741, 755-756***. 'Every estoppel, because it concludeth "a man to alledge the truth, must be certaine to every intent, and not to be taken by "argument or inference' ***(Coke's Littleton,*** 352 (b)). In ***Western Australian "Insurance Co Ltd v Dayton (1925) 35 CLR 355, 375***, Isaacs ACJ, referring to the "requirement that a representation must be 'unambiguous' if it is to found an estoppel "in pais said :
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> " 'The word 'unambiguous' is explained by Kay LJ in ***Low v Bouverie [1891] 3*** " ***'Ch 82, 113***, the word and its explanation occurring in the same page. The " 'Lord Justice said : 'It is essential to show that the statement was of such a " 'nature that it would have misled any reasonable man, and that the plaintiff was " 'in fact misled by it'. Bowen LJ says at [p.106] 'It must be such as will be " 'reasonably understood in a particular sense by the person to whom it is " 'addressed. This is confirmed in George Whitchurch Ltd v Cavanagh [1902] " 'AC at p.145 by Lord Brompton and in Bloomenthal v Ford [1897] AC at " 'p.166'.
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> "The requirement that a representation must be clear before it can found an estoppel is, "in our view, applicable to any doctrine of promissory estoppel".

Deane J in ***Foran v Wight (1989) 168 CLR 385*** again reiterated that for a representation to found an estoppel it must be clear. His Honour at pp 435-436 said :

"A representation can found an estoppel by conduct only to the extent it is clear. It "can, however, be reduced to what is clear by discarding so much of its content as is "equivocal or ambiquous".

It is also to be noted that traditionally, common law estoppel by conduct could only be founded on a representation as to existing fact; a representation as to future conduct was not sufficient. A representation as to law was also not sufficient. That position has been changed, and a representation as to future conduct and as to law may now ground a common law estoppel as well as an equitable estoppel In ***Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387*** Deane J at p.482 of his judgment expressed the opinion that :

"***Legione v Hateley*** must be seen as establishing that earlier decisions to the effect that "the doctrine of estoppel by conduct could not be applied at all in relation to a "representation or assumption of future fact (e.g. ***Jorden v Money*** and ***Chadwick v "Manning [1896] AC 231***) are no longer good law in this country. The doctrine of "estoppel by conduct must now be accepted as applying to preclude departure from a "represented or assumed future state of affairs in at least some categories of case. That "is much to be said for the view that this Court should, in the interests of clarity and "simplicity of the law, immediately take the final jump to the conclusion, which Lord "Denning MR informs us was reached by Sir Owen Dixon some forty years ago, that "the doctrine of estoppel by conduct should be generally extended 'to include an "assumption of fact or law, present or future" : see ***Moorgate Ltd v Twitchings [1976] "QB 225, 242***. If it were necessary to consider such a general extension of the "doctrine, my present inclination would be to accept it. It is not, however, necessary to "resolve the matter for the purposes of the present case".

The opinion expressed by Deane J in ***Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387*** was finally confirmed by His Honour in ***Foran v Wight (1989) 168 CLR 385*** where it is said at p.435 :

"I am now prepared to take the step which I refrained from taking in ***Waltons Stores "(Interstate) Ltd v Maher (1988) 168 CLR 387, 452*** and to accept that the doctrine of

"estoppel by conduct extends, as a matter of general principle, to a representation or "induced 'assumption of fact or law, present or future' (Cf ***Moorgate Mercantile Co "Ltd v Twitchings [1976] QB 225, 242)***. Once it is recognised that promissory "estoppel is properly to be seen as no more than an emanation of the general doctrine of "estoppel by conduct (see ***Waltons Stores (Interstate) Ltd v Maher (1988) 168 CLR "387, 451-452)***, there remains no valid reason in principle why that general doctrine "should be inapplicable to a case where the representation relates to the state of the law. "In that regard, the distinction between a representation of fact and a representation of "law is, in the context of the principles constituting the doctrine of estoppel by "conduct, essentially illusory unless one subscribes - and I do not - to the view that law "has no factual existence at all".

In the same case, ***Foran v Wight***, Mason CJ at pp 411-412 of his judgment said :

"There is a long line of authority to support the proposition that in order to ground a "case of common law estoppel by representation, the representation must be as to an "existing fact, a promise or representation as to future conduct being insufficient : "***Legione v Hateley [1983] 152 CLR 407, 432***; ***Waltons Stores (Interstate) Ltd v "Maher (1988) 164 CLR 387, 398***. In ***Waltons Stores***, Wilson J and I pointed out that "if there was a basis for holding that common law estoppel arises where there is a "mistaken assumption as to future events, it was to be found in reversing ***Jorden v "Money (1854) 5 HLC 185 [10 ER 868]*** and in accepting the powerful dissent of Lord "St Leonard's in that case. In the absence of argument we declined to embark on that "course and instead decided the case by reference to promissory estoppel which "extends to representations or promises as to future conduct : see ***Legione v Hateley "(1983) 152 CLR 407, 432; Waltons Stores v Maher (1988) 164 CLR 387, 399, 451-"452, 459***. On further reflection it seems to me that we should now recognize that a "common law estoppel as well as an equitable estoppel may arise out of a "representation or mistaken assumption as to future conduct. To do so would give "greater unity and consistency to the general doctrine of estoppel. Moreover, the clear "acceptance by the Court in ***Waltons Stores*** of the doctrine of promissory estoppel "makes this course inevitable. After all, it was the apprehension that representations "as to future conduct, unsupported by consideration, would invade the territory of "promises for valuable consideration that led to the confinement of common law "estoppel to representations of existing fact. Given the recognition of promissory "estoppel and the fact that the doctrine may preclude the enforcement of rights at least "between parties in a pre-existing contractual relationship, the dam wall has fractured "at its most critical point with the result that we should accept that a representation or "a mistaken assumption as to future conduct will in appropriate circumstances create a "common law estoppel as well as in equitable".

I turn now to the important question whether estoppel generally can be used as a cause of action. With one exception, the traditional position is that estoppel cannot be used as a cause of action. It may, however, be used in a defensive way to resist a cause of action. The position is sometimes expressed in the words that estoppel can be used only as a shield and not as a sword. The one exception is proprietary estoppel which is sometimes called estoppel by encouragement or acquiescence.

The question whether estoppel can be used as a cause of action has arisen because of the assertions on the plaintiff's behalf of estoppel against SCUL. It was asserted for the plaintiff that the conduct of SCUL in publishing the results of the raffle in the newspaper which showed the plaintiff as having won the fifth raffle prize estopped SCUL from now denying that the plaintiff did not win the fifth raffle prize. That clearly suggests that the plaintiff was using estoppel as a sword rather than as a shield. SCUL has not sued the plaintiff or counterclaimed against the plaintiff so that the plaintiff cannot be said to be using estoppel ina defensive way to resist an action or claim by SCUL. In a similar way, the plaintiff also asserted estoppel against the Sagaga credit union even though the Sagaga credit union is not a party to the present proceedings. Be that as it may, the question of whether estoppel can be asserted as a cause of action has been raised and I will turn to it now.

With the exception of proprietary estoppel by encouragement or acquiescence which I have mentioned, common law estoppel by conduct or representation, promissory estoppel, or equitable estoppel generally has traditionally not been used as a cause of action. However, there are indications that the position may be changing. Whether it will in fact change, and to what extent is not entirely clear at this stage. Those indications of change may be found in the facts of ***Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387*** and the joint judgment

of Mason CJ and Wilson J as well as that of Deane J in that case, and in the facts of ***Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd [1989] 1 NZLR 356*** and the judgments of the New Zealand Court of Appeal in that case.

In a paper entitled : ***The Place of Equity and Equitable Doctrines in the Contemporary Common Law World : An Australian Perspective***, published in ***Equity, Fiduciaries and Trusts (1993)***, edited by DWM Waters, Sir Authory Mason also stated at p.20 :

> "In ***Verwayen (1990) 170 CLR 395, 411-413***, I suggested that there is no reason why a "cause of action cannot be founded on estoppel. It seems to me to be artificial to say "that you are not using estoppel as a cause of action when your success on the "particular cause of action pleaded depends upon your capacity to use an estoppel to "establish the very basis of your claim".

The law is still developing in this area with the High Court of Australia at the forefront of that development. But that development has not settled, it is still in motion. The assertion of estoppel for the plaintiff in this case as a sword against SCUL has taken us right up to the frontier of that development. In the absence of legal arguments, it will not necessary to decide in this case whether estoppel, including common law estoppel by conduct and equitable estoppel, can now found a cause of action and be used as a sword, instead of continuing to be used purely in a defensive role.

Two other points should be noted here. The first is that it is clear from the judgments involving Mason CJ and Deane J in ***Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387; Foran v Wight (1989) 168 CLR 389***; and ***The Commonwealth v Verwayen (1990) 170 CLR 384*** that the law of estoppel is evolving into a single doctrine of substantive estoppel

which unifies the various classes of common law estoppel and equitable estoppel. Mason CJ has called it a doctrine of substantive estoppel. Such a development seems to have been foreshadowed by Lord Denning MR when in ***Amalgamated Investment & Property Co Ltd v Texas Commerce International Ltd [1981[3 All E R 577, 584-585*** he said :

> "The doctrine of estoppel is one of the most flexible and useful in the armoury of the "law. But it has become overloaded with cases. That is why I have not gone through "them all in this judgment. It has evolved in the last 150 years in a sequence of "separate developments : proprietary estoppel, estoppel by representation of fact, "estoppel by acquiescence and promissory estoppel. At the same time it has been "sought to be limited by a series of maxims : estoppel is only a rule of evidence; "estoppel cannot give rise to a cause of action; estoppel cannot do away with the need "for consideration, and so forth. ***All these can now be seen to merge into one general "principle shorn of limitations***". (italics mine)

Whether or not a single unified doctrine of estoppel 'shorn of limitations' will finally be worked out in the future remains to be seen.

Application of principles to facts:

The first estoppel which was relied upon for the plaintiff was the representation made by the Sagaga credit union that the price of unsold raffle tickets would be deducted from the shares of the members with unsold tickets, induced in the plaintiff the belief that t he price of the unsold tickets in the raffle books that she held, would be deducted from her shares in the Sagaga credit union. The first difficulty with that estoppel is that, there is no evidence that the representation made by the Sagaga credit union at its meeting on 27 April 1994 to its members including the plaintiff, was made with the knowledge or authority of SCUL. There is also no evidence that the Sagaga credit union, although a member of SCUL, was acting as agent for SCUL so that the representation made by the Sagaga credit union could be binding on SCUL

as principal. For the representation alleged to have been made by the Sagaga credit union to be binding on SCUL so that common law estoppel by conduct or some equitable estoppel could arise against SCUL, the Sagaga credit union must first be shown to have acted as agent for SCUL.

The second difficulty is that the representation must be clear. It should be unambiquous. The actual resolution that was made by the Sagaga credit union was that if by 11 May1995 any raffle tickets had not been returned, the price of the non-returned raffle tickets would be deducted from the shares of the members with non-returned raffle tickets or some other action would be taken by the board of the credit union. The resolution was therefore expressed in the alternative. I do not see the wording of the resolution as a definite commitment by the Sagaga credit union to any one particular course of conduct. As a result, I am of the view that the plaintiff cannot rely on one part of the resolution to found a common law estoppel by conduct or representation, and exclude the other part of the resolution. The whole resolution must be looked at in its totality. In fact after the meeting on 27 April 1995, the Sagaga credit union met again on 11 May1995 and at that meeting the Sagaga credit union made the resolution that the credit union would pay for the unsold tickets of its members and did pay for those tickets after a list of its members who had not returned their raffle books was complied. That course of action appears to me to have been still open to the Sagaga credit union under the second part of its resolution of 27 April 1995 which said "or some other action would be taken by the board" of the credit union. It is also clear from the evidence that the Sagaga credit union never deducted the price of the raffle books which the plaintiff failed to return from her shares in the credit union.

One must also bear in mind the context in which the meeting of 27 April 1995 was held by the Sagage credit union. The drawing date of the raffle which had been originally scheduled for 17 December 1994 had been postponed. The Sagaga credit union was encountering problems in collecting raffle books from its members. By 27 April 1995 only about 45% of those raffle books had been returned. But the raffle was to be drawn on 3 June 1995. The Sagaga credit union must therefore have been concerned and frustrated with its members, including the plaintiff, for not returning their raffle books. As I have said already, the wording and tone of the resolution made at the meeting of the Sagaga credit union on 27 April 1995, in which the question of non-returned raffle tickets was the only subject that was discussed, appears to have been motivated by the concern of putting pressure on the members of the credit union to return their raffle books. I do not see the resolution as a "normal" representation. The resolution had overtones of mild coercion. The resolution, as it appears to me, was almost tautamount to the Sagaga credit union saying to its members, return the raffle books you have not yet returned, or else the credit union would deduct their price from your shares or take some other action.

So even if there was evidence to show that the Sagaga credit union was acting as agent for SCUL, there are those other difficulties to which I have referred, which would make it difficult to treat any representation that the Sagaga credit union made at its meeting of 27 April 1995 as a foundation for a common law estoppel by deduct against SCUL.

That brings me to the second estoppel which was relied on for the plaintiff. It was asserted that the publication of the results of the raffle in the newspaper showing the plaintiff as winning the fifth raffle prize, estopped SCUL from denying that the plaintiff had won that prize. The first difficulty here is that estoppel was being asserted as a cause of action.

Notwithstanding that there are indications that the law of estoppel is developing in the direction where estoppel may found a cause of action, that development has not yet settled. If, however, we do proceed on the basis that common law estoppel by conduct may now found a cause of action, the other difficulty in this case is whether the plaintiff would suffer any detriment if SCUL is not made to adhere to the representation that it made through the publication of the results of the raffle in the newspaper. It is clear that the plaintiff did not sell any of the raffle books which were given to her by the Sagaga credit union to sell. She did not even pay for any raffle tickets or returned any raffle books. The price of the raffle books which she did not return were also not deducted from her shares in the Sagaga credit union. She, therefore, cannot claim that she would suffer any detriment if SCUL does not adhere to any representation which was made through the publication of the results of the raffle in the newspaper.

In all circumstances of this case I am also of the view that it would not be unjust for SCUL to depart from any representation it made through the publication of the results of the raffle in the newspaper, as far as such representation concerned the plaintiff : see what was said by Dixon J in ***Thompson v Palmer*** and ***Grundt***.

It follows that the present claim as far as it relies on estoppel is dismissed.

Constructive trust:

Constructive trust was raised as a remedy against SCUL as defendant. It is clear that the plaintiff was seeking to obtain from SCUL the prize money she had claimed to have won at the raffle by asking the Court to impose as a matter of equity a constructive trust. That

means the Court should make SCUL as constructive trustee of the money claimed by the plaintiff, for the benefit of the plaintiff. The problem is that a constructive trust must have a subject matter in respect of which some person may be held as a constructive trustee for the benefit of another. In ***Muschinski v Dodds (1985) 160 CLR 583***, Deane J said at pp613-614 :

> "The constructive trust shares, however, some of the institutionalized features of "express and implied trust. It demands the staple ingredients of those trusts : subject "matter, trustee, beneficiary (or, conceivably, purpose), and, personal obligation "attaching to the property".

And in ***Jacobs' Law of Trusts in Australia 6th ed*** by Meagher and Gummow, it is said at p.306 :

> "[The] constructive trust demands the staple ingredients of the express and resulting or "implied trust : subject matter, trustee, beneficiary and personal obligation attaching to "the trust property".

In this case the subject matter of the constructive trust which the plaintiff has sought to impose is the raffle prize money the plaintiff said she had won. But that money is no longer in the hands of SCUL; it was paid out to the Sagaga credit union after the raffle was drawn. Therefore there is no subject matter in the hands of SCUL in respect of which a constructive trust may be imposed against SCUL. To highlight the point, I will take a brief citation from the judgment of Gault J in the important case of ***Liggett v Kensington [1993] 1 NZLR 257*** where His Honour said at p.281 :

> "A remedial constructive trust may be imposed in the absence of a fiduciary duty. ***The "cases to date have held that course justified in certain circumstances when it would "be unconscionable for the party into whose hands the property came to retain it "against the claimant...***". (italics mine)

As I have already indicated, the fifth prize money is no longer in the hands of SCUL. So SCUL is not retaining that money against the plaintiff as claimant. To further highlight the point, I would also refer to another passage in the judgment of Deane J in ***Muschinski v Dodds (1985) 160 CLR 583*** where His Honour said at p.614 :

> "Viewed in its modern context, the constructive trust can properly be described as a "remedial institution which equity imposes regardless of actual or presumed agreement "or intention (and subsequently protects) ***to preclude the retention or assertion of "beneficial ownership of property to the extent that such retention or assertion "would be contrary to equitable principle***". (italics mine)

It is clear that SCUL no longer retains in its hands the fifth prize money of the raffle or asserting beneficial ownership to that money. The money, as I have said, had already been paid out into the hands of the Sagaga credit union. It follows, therefore, that a constructive trust cannot be imposed against SCUL for such money. Accordingly the claim for a remedial constructive trust is also dismissed.

Ultra vires:

On the final question whether the raffle that was held was beyond the statutory objects and powers of SCUL, the raffle would be ultra vires the objects and powers of SCUL if it was not authorised by its objects and powers. Assuming that the raffle was ultra vires SCUL as alleged, that would necessarily take us back to the issue of estoppel. The question which would then arise is whether, notwithstanding that the raffle was ultra vires the objects and powers of SCUL, SCUL should still be estopped from resiling from that raffle as it had created assumptions on which those persons who had bought raffle tickets had acted. I have

already dealt with the question of estoppel and found against the plaintiff. I do not need to repeat here what I have already said on that issue.

In all then the claim is dismissed.

TFM Lafoke

CHIEF JUSTICE