
THE DEVELOPMENT OF PROMISSORY ESTOPPEL

The obsession of the common law courts with the doctrine of consideration delayed the development of the equitable doctrine of promissory estoppel. Gradually, the courts realised the harshness which resulted from the indiscreet adherence to the requirement of consideration in contracts, in their making and discharge. Eventually, promissory estoppel was born.

Requirements of Promissory Estoppel

Under the principle of promissory estoppel, a promisor would be estopped from going back on his representation whereby he has waived his legal rights against the promisee, in reliance upon which the latter has altered his position, so that it would be inequitable to change that position. The traditional requirements of promissory estoppel include the pre-existing contractual relationship between the parties, a clear undertaking that the legal rights under the contract would not be enforced or would be held in abeyance, alteration of the promisee's position in reliance upon the representation and the inequity that would result if the promisor is allowed to resile from his promise. The promissory estoppel is said to only avail as a defence and not as the sole cause of action. Further, the doctrine is said to apply to representations relating to the past or present events and not to the future events and that it only suspends the legal rights without extinguishing them.

The doctrine of promissory estoppel has gradually shorn itself of almost all limitations which were placed on it in its formative period.

Pre-existing Contractual Relationship

The argument of the traditionalists that promissory estoppel has no application where the parties do not stand in a contractual relationship is fortified by the fact that such relationship did exist in cases where the doctrine was applied.¹ However, this requirement appears to be no more essential. The House of Lords in *Crabb v Arun District Council*² said that promissory estoppel can be created where a new legal relationship is to be brought into being. It is not limited to cases where the representation is intended to affect an existing contractual relationship. In the Malaysian case of *Cheng Hong Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors*,³ the Supreme Court Judge, Edgar Joseph Jr. referred to *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd.* where it was stated that:

“... Although in *Hughes v Metropolitan Rly Co.*, the court of appeal assumed a pre-existing contractual relationship between the parties, this [was] not seen to be essential provided that there (was) a pre-existing legal relationship which could give rise to liabilities and penalties”.⁴

In *A.G. of Hong Kong & Anor v Humphrey's Estate (Queen's Garden) Ltd*,⁵ negotiations between the government and the plaintiff company for the transfer of a block of flats by the latter to the former and a

¹For example in *Jordan v Money* [1854] 5 HL Cas 185, there was the relationship of creditor and debtor; in *Hughes v Metropolitan Rly. Co* [1877] 2 App Cas 439 (HL) there existed the relationship of lessor and lessee and in *Central London Property Trust Ltd v High Tress House Ltd* [1947] KB 130 the parties stood as the lessor and lessee.

²[1976] Ch D 179, at page 189 per Denning MR, Lawton and Scarman LJ.

³[1993] 3 MLJ 352, at pages 402-403.

⁴[1968] 2 QB 839.

⁵[1982] AC 114, in 1986 McHugh JA of the New South Wales Court of Appeal expressed the opinion that estoppel applies to pre-contractual negotiations - *State Raid Authority (NSW) v Health Outdoor Ply Ltd* [1986] NSWLR 170, at page 193.

piece of land by the former to the latter reached a point of agreement in 1981 'subject to contract'. The possession of the properties was delivered to the respective parties who incurred huge amounts of expenditure in respect thereof. In 1983, the value of the land declined and in 1984 the plaintiff withdrew from the negotiations. The courts in Hong Kong noted the failure of the government to establish that the plaintiff had created or encouraged a belief or expectation that it would not withdraw from the agreement in principle and that the government relied on that belief or expectation. The appeal to the Privy Council raised the central issue of whether promissory estoppel applies to pre-contractual negotiations. The Privy Council confirmed the findings of the Hong Kong court regarding the failure of the government to establish the creation or encouragement of expectations and its reliance on such expectations.

The absence of a contractual relationship was apparently not considered as a bar to the application of promissory estoppel where a point of no return has been reached by the negotiating parties so as to estop them from denying that the contract had come into existence.

Finally, in the Australian case of *Walton Stores (Interstate) Pty Ltd v Maher & Anor*,⁶ the requirements of creation or encouragement of a belief or expectation by the promisor and the promisee's reliance on it, which could not be satisfied in *Humphry's Estate*, were found to be fully satisfied. In this case the negotiations began towards the end of 1983 between the lessor and the lessee for the lease of a piece of land on which the former undertook to construct a new departmental store building in place of the old one. The negotiations reached a point where the lessor demolished the old building and completed the construction of about 40% of the new store building in its place. A draft lease deed was prepared by the lessee which was executed by the lessor but not by the lessee when the lessee expressed his intention not to proceed with the lease. The lessee was held responsible for not removing the fallacious impression of the land owners that there was a binding contract. Thus promissory estoppel was applied to pre-contractual negotiations on which the promisee had formed a reasonable belief that the agreement of lease would be executed. After inducing

⁶[1988] 164 CLR 387.

the land owners to the assumption or expectation, it would be inequitable if the assumption or expectation was not fulfilled.

The Indian Courts have taken a liberal view of the requirements of promissory estoppel. The Supreme Court of India described promissory estoppel as a promise intended to create legal relations or affect a legal relationship, intending it to be acted upon, and in fact acted upon creating estoppel against the promisor, irrespective of whether there is any pre-existing relationship between the parties or not.⁷

In America, the position appears to have improved much earlier when under article A-90 of the American Restatement of the Law of Contract 1932, the element of inducement of action or forbearance though a promise was stressed without any mention of the requirement of a pre-existing contractual relationship for the enforcement of a promise.

Detrimental Alteration of the Promisee's Position

In the formative years of promissory estoppel, the promisee could succeed only when he had suffered detriment by his action or inaction in reliance on the representation made to him by the promisor. However, notwithstanding the presence of the element of detriment, generally, in cases where promissory estoppel has been applied, the representation, relied on by him may not always result in detriment to the promisee. In *High Trees*, the lessor's promise to reduce the rent from £2500 to £1250 put the lessee in a more advantageous position than he would have been, had the rent not been reduced. The same would be the case where the promisee has been promised non-institution of legal proceedings against him or where the time for repayment of the debt has been promised to be extended, or, even where the non-insistence on the observance of the strict terms of the covenant has been promised.

⁷*Union of India v Godfrey Philipps India Ltd* [1985] 4 SCC 369. These views were reiterated by the Orisa High Court in the recent case of *Mangalam Timber Products Ltd v State of Orissa* AIR 1996 Ori 13, at page 16. In 1975 the liberal view was expressed in *B Subramanyam & Co v State of AP* AIR 1975 AP 126, at page 134.

The inequity would result in such cases in the event of withdrawal of the representation by the promisor as the promisee would lose the advantageous position he was placed in through the representation. Nevertheless, a change is discernible in later cases where the element of detriment has either not been insisted upon or has been rejected as a requirement for the application of promissory estoppel.⁸ The approach of both traditionalists and the modernists appears to be tilted towards extremity. The real test in cases of promissory estoppel is not the detrimental sufferance by the promisee in acting on the faith of the promise, nor is the requirement of detriment absolutely superfluous. What is important is that it should be inequitable for the promisor to go back on his promise. The test of detriment is, therefore, to be applied in the event of withdrawal of the promise by the promisor rather than at the time of action or inaction on the part of the promisee in reliance on the promise. This view is in consonance with the purpose of promissory estoppel which is solely to remove any inequity which is likely to occur in case the promisor backs out from his promise. In *Boustead Trading*, the Federal Court of Malaysia expressly ruled out the requirement of detriment, holding that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying fact situations to achieve justice.⁹ This approach can be traced back to the New Zealand case of *P v P*.¹⁰ The English courts

⁸See Denning AT, "Recent Developments in the Doctrine of Consideration", 15 Mod LR 1, at page 2; also see Lord Denning in *W.J. Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, at page 213. In *Delhi Cloth and General Mills Ltd v Union of India* [1987] 3 SCJ 328, at page 335, the Supreme Court of India held that it is not necessary to prove any damage, detriment or prejudice to the party asserting the estoppel. The only requirement is the alteration of position by the promisee in reliance on the representation made by the promisor.

⁹*Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Ltd* [1995] 3 MLJ 331.

¹⁰[1957] NZLR 854 where Mc Gregor J of the Supreme Court of Palmerston North scrutinised the authorities on promissory estoppel to ascertain and identify its requirements. The requirement was found to be the inducement by one party and the action or inaction by the other party in reliance on the inducement. Then it is for the court to decide whether it would be inequitable to allow the party seeking to do so, to enforce the strict legal rights which he induced the other party to believe will not be enforced.

appear to have lately adopted a similar approach.¹¹ The same approach can be traced in many Indian cases where emphasis is on the requirement of reliance by the representee on the representation and the injury that would visit him if the representation is allowed to be retracted.¹² The Australian courts also do not differ from this approach.¹³

The prevention of unconscionable conduct has been identified as the driving force behind equitable estoppel.¹⁴ The doctrine, particularly, the requirement of detriment has been broadly restated. The global question which the court must ask itself is whether a particular litigant, against whom the estoppel is raised, should succeed, given the totality of the facts and circumstances of the case. If the answer to the question is in the affirmative, estoppel does not bite; if the answer is in the negative, then it bites.¹⁵

Promissory Estoppel: A Cause of Action

Traditionally, promissory estoppel is considered to avail only as a defence without furnishing an independent cause of action.¹⁶ The principle does not create new causes of action. It may be part of a cause of action but not a cause of action in itself. However, these traditional rulings do not oust the plaintiff from the benefit of the

¹¹See for instance *Soci'ete' Italo-Belge Pour Le Commerce et l'Industries SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd, the Post Chaser* [1982] 1 All ER 19 (QBD) (Commercial Court), at page 26.

¹²See for example *Motilal Padam Sugar Mills Co. Ltd v State of UP* AIR 1979 SC 621, at page 635; *Delhi Cloth and General Mills v Union of India* [1987] 3 SCJ 328; *Unions of India v Godfrey Phillips India Ltd* [1985] 4 SCC 369; *AP State Electricity Board & Ors v M/s Sarade Ferro Alloys Ltd* AIR 1993 SC 1521 and *Mangalam Timber Products Ltd v State of Orissa & Ors* AIR 1996 Ori 13.

¹³For instance, see Dean J in *Read v Sheehan* [1982] 56 FLR 206, adopting Dixon J's dictum in *Thompson v Palmer* [1933] 49 CLR 506, at page 547; *Legione v Hately* [1983] 57 ALJR 292 per Mason and Dean JJ, at page 297.

¹⁴*Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, at page 407 per Mason CJ.

¹⁵See for Federal Court of Kuala Lumpur in *Lai Yoke Ngan v Chin Teck Kwee* [1997] 2 MLJ 565, at page 585 per Gopal Sri Ram JCA.

¹⁶*Combe v Combe* [1951] 1 All ER 767 (CA); *High Tress*, *supra*, note 1.

doctrine of promissory estoppel. The plaintiff may espouse his cause by defending himself from a plea taken by the defendant which would be available to him but for the representation made by him. The estoppel may assist the plaintiff in enforcing a cause of action by preventing the defendant from denying the existence of some fact which would destroy the cause of action.¹⁷ These authorities appear to be only of academic value now. Anson's prediction that in the future promissory estoppel may be held capable in itself of creating a cause of action in contract, notwithstanding that the promisee has provided no consideration for the promise,¹⁸ appears to have come true. The Australian High Court in *Walton Stores*¹⁹ granted a claim based solely on promissory estoppel where nearly none of the traditional requirements of the doctrine were satisfied. In this landmark case there was no pre-existing contractual relationship between the parties, no cause of action other than the conduct of the lessee, representing that the lease would be executed. It was a stage of pre-contractual negotiations when the court allowed the representation to furnish a just cause of action, since the lessor had reasonably relied upon the lessee's representation and acted to his detriment.

In India promissory estoppel has, much earlier, been held to be capable of creating new rights and generating an independent cause of action.²⁰ It has been viewed as substantive law entitling the promisee to enforce the promise.²¹

Historically also the doctrine of promissory estoppel appears to be rich in its use as a cause of action. In 1649 the cause of action was based on estoppel.²² In 1897 Vaughan Williams LJ stated that "that the Common law doctrine of estoppel is of a very personal nature and only exists between parties to the transaction. It is a part of the law of evidence and is not the same as the equitable doctrine. You cannot

¹⁷*Boustead Trading, supra*, note 9 applied by the Court of Appeal in *Chong Yoong Choy v UOL Factoring Sdn Bhd* [1996] 1 MLJ 421.

¹⁸A.G. Guest, *Anson's Law of Contract* (25th Centenary Edition), at pages 120-21.

¹⁹*Supra*, note 6.

²⁰*Subramanyam & Co v State of AP* AIR 1975 AP 126, at page 134.

²¹*Union of India v Afgan Agencies* AIR 1968 SC 718.

²²*Hunt v Carew* [1649] Nels 46.

found an action on it as you can in equity".²³ The argument against the use of promissory estoppel as a cause of action has been countered by reference to the general principle which enables the court to give whatever remedy is appropriate, including a cause of action, if need be.²⁴

Promissory Estoppel: Whether Extinctive or Suspensory

In the context of its scope, it is sometimes asked whether the promissory estoppel results in the complete extinction of the promisor's legal rights or merely in their suspension so as to be revived after the stipulated time or event. The position, it appears, has not been rightly represented. Actually, it would depend on the nature of the representation made between the parties which would determine its consequences through promissory estoppel. In case the promisor represents to give up his rights against the promisee permanently, the right gets extinguished for the future.²⁵ On the contrary, if the rights are represented to be only suspended temporarily, then these can be received after reasonable notice. In *Tool Metal*,²⁶ the case which is heavily relied upon in support of the suspensive nature of promissory estoppel, the promise was made to merely suspend the legal rights, which could, therefore, be rightly revived after reasonable notice. In *High Trees*,²⁷ the right of the lessor to claim full rent for the past was extinguished, whereas it was only suspended for the future after the war had ended. This view was clearly reiterated by Raja Azlan Shah FJ in *Sim Siok Eng v Government of Malaysia* when he vividly brought out the difference between the two situations, one of forbearance to claim and the other of the variation

²³*William v Princkeney* [1897] 67 LJ Ch. 34.

²⁴Denning, "The Closing Chapter" (1982) Butterworths London, at page 256.

²⁵In *William Toes' House & Estate Agencies v Chan Eng Swee* [1965] 2 MLJ 98, the defendant debtor successfully raised the defence of promissory estoppel against the plaintiff's claim for the balance amount after having accepted a smaller sum in full settlement of the original claim. Also see *Tiun Eng Jin v Wong Sie Kong* [1975] 2 MLJ 34.

²⁶*Tool Metal Manufacturing Co Ltd v Tungsten Electric Co. Ltd* [1955] 2 All E.R. 657.

²⁷*Supra*, note 1.

of the claim, depending on the intention of the parties.²⁸ Lord Denning issued a caution when he stated:

“But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that even he is bound by his waiver. He will not be allowed to revert to his strict legal rights...”²⁹

This exposition of the principle has received wide acknowledgement and has been followed in Malaysia.³⁰

Conclusion

Equitable estoppel has evolved to bring about justice where a party to a contract after promising that his strict legal rights would not be enforced, turned back and insisted to enforce those rights resulting in inequity to the promisee. In its process of development the doctrine has shorn itself of the traditional requirements. The promises now bind even in the absence of a pre-existing contractual relationship. The requirement of detrimental alteration of the promisee's position is no more insisted upon. It suffices that the promisee has altered his position in reliance upon the promisor's representation and the court is convinced that it would be inequitable for the promisee to allow the promisor to go back on his promise. Further, the conduct of the representee in altering his position may not derive its origin from, or, only from the representation of the other party, but may have its origin in some other source. In such cases it is sufficient that the other party's representation contributed to, influenced or encouraged the conduct of the representee.

²⁸[1978] 1 MLJ 15 (PC).

²⁹*WJ Alan & Co Ltd v El Nasr Export and Import Co.*, *supra*, note 8, at page 213.

³⁰See for example *Plenitude Holdings Sdn. Bhd v Tan Sri Khoo Teck Puat & Anor* [1992] 2 MLJ 68 affirmed by the Supreme Court in *Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113.

The scope of equitable estoppel is no more confined to its role as a defence but has been thrown open to plaintiffs not only as a defence but also as an independent cause of action. Promissory estoppel stands liberated from its shackles. The present day promissory estoppel is in tune with the spirit of the Islamic law under which we are exhorted to fulfil all our obligations in order to prevent injustice. With the prevention of unconscionable conduct as its driving force, the equitable doctrine of promissory estoppel has brought about substantial changes in the modern law of contract.

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*It is to be noted that the enlarged version of this paper has been published after the workshop in the Malayan Law Journal. See 'Promissory Estoppel: The Unchained Doctrine' [1999] 2 MLJ lxviii-cii.

ESTOPPEL AND SUBSTANTIVE LEGITIMATE EXPECTATION - PARALLEL DOCTRINES IN PUBLIC LAW?

1. Introduction

Estoppel¹ is premised on the notion that justice prevails over truth. Thus, a person who makes some statement or representation which induces another to act to his detriment in reliance on the truth of the statement or representation, is not allowed to later deny the truth of it, notwithstanding that the same may have been wrong. The recent decision in *Boustead Trading (1985) Sdn. Bhd. v Arab-Malaysian Merchant Bank Bhd.*² depicts the giant stride made by estoppel in private law. In the realm of public law, however, estoppel has only succeeded in finding a limited niche. On the other hand, public law in England and Malaysia have witnessed the emergence of a new doctrine, hailed as substantive legitimate expectation. The purpose of this paper is to examine the ambit of the operation of both these doctrines in public law and to highlight the parallels that appear between them.

¹*Coke on Littleton* has defined three kinds of estoppel, i.e., estoppel by record (which corresponds in modern times to *res judicata*), estoppel in writing (which corresponds to the modern estoppel by deed) and estoppel in pais (which corresponds to common law estoppel by representation). Coke's third classification of estoppel has given rise to another species of estoppel, known as equitable or promissory estoppel. The main difference between common law estoppel and equitable estoppel is that the former relates to a representation as to an existing fact whilst the latter arises out of an assurance as to the future. In this paper, references to estoppel are confined to equitable or promissory estoppel.

²[1995] 3 MLJ 331.