

## THE THREATS TO THE LIMITATIONS OUTLINING THE PRESENT PARAMETERS OF PROMISSORY ESTOPPEL: A COMPARATIVE STUDY

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### Abstract

*Promissory estoppel is an equitable doctrine applicable in contract law, which applies when one party to a contract promises the other, by words or conduct, that he will not enforce his right under the contract. This doctrine was first promulgated to prevent any occurrence of inequity or injustice caused by the action of the promisor in backing out from his promise, which had initially led the promisee to act to his detriment. Traditionally, there are five limitations to this doctrine, which are derived from the High Trees and Hughes cases; that promissory estoppel only operates as a shield and not as a sword; that there must be a pre-existing contractual relationship; that there must be a clear and unequivocal undertaking; that there must be a proof of detrimental reliance on the representation; and that there shall only be a temporary suspension of contractual obligations and rights. Nevertheless, this doctrine continues to evolve that subsequently begins to affect its parameters. This paper provides an overview into the development of this doctrine in three common law countries i.e. England, Australia and Malaysia in order to determine how threats to the traditional limitations of this doctrine has seemed to affect its parameters.*

### INTRODUCTION

Promissory estoppel is an equitable principle meant to prevent any occurrence of inequity or injustice caused by the action of the promisor in withdrawing from his promise, which had initially led the promisee to act to his detriment. It was initially designed to stop a person from changing or altering his earlier representation, especially so if another person has, in reliance upon that representation, altered his position. According to Martin (1986), estoppel is a rule of evidence or a rule of law, which prevents a person from denying the truth of a statement he made or from denying facts he alleged to exist. Such fact must be one that the other person, to whom the statement is made, has relied and acted upon or the one that has caused him to alter his position. Promissory estoppel, which falls under the category of estoppel by representation, is applicable when one party to a contract promises the other, either by words or conduct, that he will not enforce his right under the contract wholly or partially. If the other party has acted in reliance of that promise, the person making the promise will be bound by it and pursuant to that, he will not be allowed to sue on the contract.

The meaning of promissory estoppel, as well as its origin, had been judicially explained by Lord Cairns in *Hughes v Metropolitan Railway Co.* (1877) 2 AC 439 at page 498 as follows,

“...It’s the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealing which has thus taken place between the parties.”

The modern promissory estoppel sprouted in the present case where it was decided that the opening of negotiations to purchase the premises in question amounted to a new promise. A six-month notice was served in October 1874 by the landlord on his tenant to repair the premises where failure to comply will result in the lease being forfeited. In November, the landlord started negotiations with the tenant for the sale of the reversion, which was subsequently broken off on 31 December. In the mean time, the tenant had done nothing to repair the premises and on the expiry of six months from the service of the notice in October 1874, the landlord claimed to treat the lease as forfeited and brought an action for ejectment against the tenant.

The House of Lords viewed that the opening of negotiations amounted to a new promise by the landlord that, as long as the negotiations continued, he would not enforce the notice. The tenant had indeed relied upon that promise when he had remained quiescent and therefore, the 6-month period for the repair was to run from the failure in negotiations i.e. from 31 December 1874. The tenant was thus entitled in equity to be relieved against the forfeiture. In 1947, the landmark case in modern promissory estoppel was eventually decided in *Central London Property Trust Ltd. v High Trees House Ltd.* [1947] KB 130, where the plaintiffs leased a block of flats to the defendants in September 1939 at £2,500 per annum. In January 1940, the plaintiffs agreed in writing to reduce the rent to £1,250 because there were many vacancies in the flats due to the war. From 1940 to 1945, the defendants paid the reduced rent and in 1945, when the flats were again fully occupied, the receiver of the plaintiff's company claimed for the full rent for both past and future. Denning J. (as he then was) decided that the promise in writing by the plaintiffs in January 1940 was meant only as a temporary expedient owing to the war. With the end of the 2<sup>nd</sup> World War, the promise had ceased to operate and therefore, the plaintiffs were entitled to full rent. However, the court refused to grant the plaintiff's retrospective claim for the period of 1940-1945.

### **The Parameters of Promissory Estoppel**

Traditionally, as an equitable doctrine, the scope of the doctrine of promissory estoppel is limited in much sense, which actually helps to draw its parameters. There were five limitations that can be drawn from the *High Trees* and the *Hughes* case. Those are: -

#### **(a) Promissory estoppel as a shield**

The full force application of the equitable maxim "estoppel only allows a litigant to use it as a shield and not as a sword" restricts the application of this doctrine to as far as only to provide a defence to a party and not to be used as a cause of action against another.

#### **(b) Pre-existing contractual relationship**

This limitation restricts the application of this doctrine to cases between the contracting parties, which means that there must be a legally binding contract before promissory estoppel can be invoked.

#### **(c) Clear and unequivocal undertaking**

The promise or representation must be "precise" and "unambiguous" although it does not mean that such promise or representation must be expressly made.

#### **(d) Detrimental reliance on the representation**

The proof of possible detriment or prejudice, which will materialise if the promisor is allowed to revert to his original promise, is required. This elementary composition of promissory estoppel has been the core and central topic of discussion in the evolution of the doctrine. Reliance, given a number of adjectives to describe its different taxonomy ranging from detrimental to reasonable, injurious, subsequent and mere reliance, has been recognised by the common law courts since the 16<sup>th</sup> century and survived throughout the Age of Freedom of Contract.

#### **(e) Temporary suspension of contractual obligations and rights**

This doctrine does not operate to completely extinguish the original rights of the parties accruing from the contract. It only provides for the suspension of such right, which can subsequently be revived after certain event or time. This final limitation to the scope of estoppel operates in the sense that the doctrine applies to representations relating to past and present events only by excluding the future events (executory promise).

The above limitations help to clearly outline its parameters. Therefore, traditionally, the application of the modern promissory estoppel must be subject to these limitations.

### ***THE THREATS TO THE LIMITATIONS: THE PRESENT POSITION IN ENGLAND, AUSTRALIA AND MALAYSIA***

Since this doctrine has evolved through many phases in contract law whereby its evolution did not stop with the *High Trees* case, the continuing evolution of the doctrine, particularly since the 1980s, has seemed to affect its parameters. The doctrine is presently being applied more flexibly than the time when it was first promulgated. Now that unconscionability is being the main focus (*in lieu* of detrimental reliance) in granting promissory estoppel, it seems that the courts in the three common law countries are more than willing to do as equity demands.

The reviews made in respect of this development have revealed a basic and pressing problem pertaining to the limitation to the application of promissory estoppel whereby the cases have shown that the traditional approach in applying the doctrine, as first set out in the Hughes and High Trees case, has been compromised. Such departure by the following common law courts is as specifically discussed below: -

**(a) England**

The traditional requirement of pre-existing contractual relationship had been religiously followed by the later courts in England until in 1968, the English courts had broken the chain in the Fancy Goods' case when it was decided to the effect,

“...Although in Hughes and Metropolitan Railway Co., the Court of Appeal assumed a pre-existing contractual relationship between the parties, this [did] not seem to be essential provided that there (was) a pre-existing legal relationship which could give rise to liabilities and penalties.”

The more significant departure by the English courts can be seen under the third limitation, which requires the presence of detrimental reliance, where the current inclination is holding towards unconscionability. One such instance is the case of Instance Societe Italo-Belge Pour le Commerce et l'Industries SA v Palm & Vegetable Oils (Malaysia) Sdn Bhd, (The Post Chaser) [1982] 1 All E.R. 19.

**(b) Australia**

Although Sutton (1989) views that the acceptance towards promissory estoppel was initially not smooth, it finally attained legitimacy with the recognition of the full High Court of Australia in Legione v Hateley (1983) 152 CLR 406. From that point, the Australian courts did not look back in recognizing this doctrine until in the Walton Store v Maher (1988) 164 CLR, the Australian High Court made a major breakthrough in this doctrine by deciding that promissory estoppel alone could be used as a cause of action against the defendant even in the absence of any contractual relationship. From the facts, it is clear that there was no pre-existing contractual relationship between the parties and in fact, no contractual relationship had ever existed. The contract was never concluded because the appellants did not execute the exchange of the lease. Nevertheless, promissory estoppel was granted based on the representation by the appellant during the course of negotiations that the store should be erected by mid-January 1984.

Another manifestation of such departure in Australia can be seen from Deane J.'s judgment in The Commonwealth of Australia v Verwayen (1990) 170 CLR 394, who opined that,

“...the fundamental purpose of all estoppel [is] to afford protection against detriment which would follow from a party's change of position if the assumption that led to it were deserted”

Nevertheless, prior to this development, the introduction of Section 52 of the Australian Trade Practices Act 1974 has already posed as revolutionary to the traditional parameters of promissory estoppel. The section reads,

S. 52 (1) – A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

The phrase “engaging in conduct” is defined by the Trade Practices Act as to include “doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or engagement.”

Even five years before the Walton Store case, the Australian High Court in Commercial Bank of Australia Ltd v Amadio (1983) 151 C.L.R. 447 had already decided that the mortgage, given by the defendants over their property to guarantee the repayment of a business loan made to their son's company, was set aside on the grounds of unconscionability. This case was considered as a turning point in restating the Australian law regarding unconscionable dealings (Harland, 1993), which is lately being argued as one of the elementary compositions of promissory estoppel *in lieu* of detrimental reliance.

**(c) Malaysia**

The departure from the traditional approach in applying promissory estoppel, as seen in both Australia and England, can also be traced from the attempts showed by the Malaysian courts to relax the limitations of the doctrine.

The most outstanding Malaysian case on the matter is *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 where estoppel was considered as a doctrine of wide utility that must be resorted to in varying fact patterns to achieve justice.

In this case, the appellant purchased goods on credit from Chemitrade Sdn Bhd (CSB), who then entered into a factoring agreement with the respondent. Under the agreement, the debts owed by the appellant to CSB was assigned to the respondent whereby the Notice of Assignment was duly sent to the respondent. Pursuant to the factoring agreement, CSB handed over copies of the invoices in respect of each sale and delivery of goods to the appellant, which were endorsed by the respondent that any objection was to be reported within 14 days of its receipt before the invoices were sent to the appellant.

Neither complaint nor challenge on the respondent's right in making such indorsement was put forward by the appellant within the period stated. The appellant had in fact made several payments to the respondent but subsequently refused to make payment on 20 invoices ("the invoices") on the reason that nothing was payable on the invoices due a statement ("the statement") on the appellant's purchase orders that the amounts stated were to be offset against the cost of stocks returned to CSB.

The respondent, denying knowledge of the statement, argued that since the appellant did not object the validity of the indorsement made on the invoices, it was entitled to assume that the appellant had accepted it. At the first instance, the trial judge found for the respondent. On appeal to the Federal Court, the appellants raised three grounds i.e.: -

- (i) The respondent had no right, as an assignee, to unilaterally impose the 14-day limit;
- (ii) The factoring agreement was not a valid assignment; and
- (iii) The respondent's argument, that the failure of the appellant to protest about the validity of the indorsement had entitled the respondent to assume the appellant's acceptance to it, was in essence an estoppel, which was not pleaded by the respondent and therefore, the trial judge had erred in relying on it.

The respondent had also cross-appealed against the refusal of the trial judge to enter judgment on two other items claimed for amounting to RM 95,000/=. The Federal Court dismissed both the appeal and cross-appeal *inter alia* on the following grounds: -

- (i) The respondent had reasonably (and entitled to) assume that the appellant had agreed to the imposition of the 14-day period as it did not merely remain silent (by not objecting to it) but had in fact made payment on some invoices;
- (ii) The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. The maxim that estoppel can only be used as a shield and not as a sword does not limit the doctrine to defendants alone. It was considered as a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Estoppel may therefore be used to assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact, which would destroy a cause of action.
- (iii) Since there was no evidence of the respondent's knowledge of the statement, the respondent was therefore entitled to assume that the invoices were good for payment because the appellant had not informed it otherwise. It is, thus, unjust for the appellant to suggest that, firstly, the respondent should not pay Chemitrade on the invoices and, secondly, the respondent should be estoppel from asserting that nothing was due on the invoices.

Gopal Sri Ram JCA's description of promissory estoppel as an open and flexible doctrine by which justice is done according to the circumstances of the case is extremely alarming.

Misbahul (1999), in comparing the position of promissory estoppel in England, Australia and Malaysia, views that the application of this doctrine is more complicated in England because of the requirement of consideration. He believes that the judges in England are more concerned with certainty and security of commercial transactions rather than good faith and fairness.

## **THE AFTERMATH**

From the threats shown by the common law courts as discussed above, the traditional parameters of this doctrine has appeared to be compromised. This compromise and departure from the traditional parameters of promissory estoppel is manifested from the following phenomenon: -

### **(a) The Use of Promissory Estoppel As a Sword**

According to Furmston (1981), a plaintiff should also be able to rely on the doctrine so long as there is an independent cause of action. If upon the facts in Hughes' case, the landlord had gone into possession, the tenants would be put into the position of a plaintiff with the lease as the cause of action and estoppel would operate to negate a possible defence by the landlord that he was entitled to forfeit. In England, the English courts are slowly recognising the use of promissory estoppel as a sword although not as an independent cause of action but rather as "supporting" means to facilitate an existing cause of action. Nevertheless, the Australian courts have been more valiant in their efforts to treat the use of promissory estoppel as a sword, as compared to their English counterparts. Starting with the case of Jackson v Crosby (No. 2) (1979) 21 SASR 280, the Australian courts did not look back in trying to make this doctrine as also available to a plaintiff. This study has also revealed that the Malaysian courts are almost on par with its Australian counterparts when Sri Ram JCA declared in the Boustead's case that this doctrine is no longer restricted to defendant but "plaintiff too may have recourse to it".

### **(b) The Negation of the Requirement for Pre-Existing Contractual Relationship**

Despite a strong manifestation to restrict the application of promissory estoppel to pre-existing contractual relationship in England, there is a fair share of English judges who dared to extend its application to a non-contracting party provided there is sufficient legal relationship already in existence. In Fancy Goods Ltd v Michel Jackson (Fancy Goods) Ltd., for instance, it was decided that promissory estoppel may apply "...provided that there (was) a pre-existing legal relationship, which could give rise to liabilities and penalties."

Similarly, yet on a larger scale, the Australian courts have been contented to allow the application of this doctrine to a non-contracting party provided there is a pre-existing legal relationship between the parties, which makes it unconscionable for the court to simply ignore its existence. The Walton Stores case has definitely set a trend in Australia where a non-contracting party may seek refuge under promissory estoppel if the other party has failed to fulfill its promised obligation. The plaintiff's claim was allowed even though no contract was actually formed. The plea of promissory estoppel succeeded so long as there existed a legal relationship. The judgment of Brennan J. illustrates such position as follows,

"A non-contractual promise can give rise to an equitable estoppel only when the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting and the promisee would suffer detriment by his action or inaction if the promisor were not to fulfill the promise. When these elements are present, equitable estoppel almost wears the appearance of contract, for the action or inaction of the promisee looks consideration for the promise..."

The words of Gopal Sri Ram JCA in the Boustead case that this doctrine is of both wide utility and flexible applicable to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent, which was subsequently reiterated in Teh Poh Wah case, are strong indication to the Malaysian courts' readiness to extend the use of promissory estoppel to non-contracting parties. It is understood that since the objective of the Malaysian courts in determining the circumstances where the doctrine applies is aimed at, to borrow Sri Ram's words, providing "essential justice between litigating parties", it can be said that the Malaysian courts, as compared to its English and Australian counterparts, are more valiant to apply this doctrine, beyond its traditional scope, to any kind of relationship.

### **(c) The Dichotomy between Detrimental Reliance and Unconscionability**

Detrimental or injurious reliance has always been the central discussion in promissory estoppel where reliance-based interest was already seen as the alternative form of consideration during the 16<sup>th</sup> and 17<sup>th</sup> centuries.

Under the modern doctrine of promissory estoppel, the promisee must have relied and acted (or omitted to act) upon the promisor's representation causing him detriment or sufferance if such promise is subsequently retracted by the promisor.

This traditional requirement to promissory estoppel has now been replaced by a more extreme one where the court no longer asks "whether the promisee's action or inaction, in reliance upon the promisor's representation, was detrimental or prejudicial to him?". According to Matta (1999), the important question now is "whether it is equitable for the promisor to go back on his promise?".

Although there have been a substantive number of contract theories developed throughout the last five centuries, the fact shows that the questions of reliance, good faith and conscionability have always remained vital. Good faith or *bona fide* has always been the underlying concept in the law of contract particularly now, when the main question presently posed by lawyers and legal academia is "whether the conduct in question is conscionable or in good faith?" According to Carter (1994), the views of the courts are changing from traditional to modern where the courts have come to realise the need to police negotiation and enforcement of commercial contracts in a more positive way i.e. by harnessing good faith, fairness and unconscionability. In both England and Malaysia, in the midst of choosing between these two extreme notions, the courts have been found to be in favour of a sideline and moderate view by opting to base their findings on the notion of fairness, justice and equitability. It has also been found that despite the pre-conceived idea that the English courts are somewhat reluctant to depart from the extreme requirement of detrimental reliance, this study has shown that they are starting to open up to the notion of "unconscionability". The study in both Australia and Malaysia, except for some reservations shown by some judges, has also confirmed the idea that unconscionability has relatively been accepted as the ground of granting a plea of promissory estoppel.

In England, for example, the court in *The Post Chaser* case also adopted a similar approach where the applicable test is on the question of unconscionability. The concept of good faith and fair dealing is the current trend manifested in the European contract law. Unconscionable bargain, misleading conduct and unjust enrichment are among the factors that are being shunned away from the present law of contract (Harrison, 1997). A like phenomenon can be found in Australia in the cases of *Read v Sheehan* [1982] 56 FLR 206 and *Legion v Hateley* [1983] 57 ALJR 292. The following ratio of Brennan J in *Walton Stores*' case can also be referred at this point,

"Differences between a contract and such an equity – these relate to estoppel may apply irrespective of whether the party bound agrees. The equity does not need consideration. The contract depends on terms, and the equity on what is necessary to avoid that, which is unconscionable."

In the following case of *Verwayen*, Deanne J. said explicitly on the matter at page 444 that,

"...the central principle in the doctrine of estoppel by conduct is that the law will not permit an unconscionable – more accurately, unconscientious – departure by one party from the subject matter of 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 party's detriment if the assumption be not adhered to for the purpose of the litigation."

In the *Boustead* case, the Malaysian Federal Court explicitly ruled out the requirement of detriment by holding that promissory estoppel is a flexible principle where justice is done according to the circumstances. Gopal Sri Ram JCA justified that the utmost importance in litigating this doctrine is the achievement of justice itself. In the event of inequity, if the promisor is allowed to retract his representation because the promisee has altered his position by relying upon that representation, the court must allow the plea of estoppel. He totally excluded the requirement of detrimental reliance by pronouncing the following words,

"We take this opportunity to declare that the detriment element does not form part of the doctrine of estoppel. In other words, it is not an essential ingredient requiring proof before the doctrine may be invoked. All that need to be shown is that in the particular circumstances of a case, *it would be unjust* to permit the representor or encourager to insist upon his strict legal rights."

The court's point on this matter, *albeit obiter*, is important to illustrate the moving away from the traditional approach of promissory estoppel based on reliance and detriment towards a more flexible notion of unconscionability (Cheong, 1999).

**(d) Promissory Estoppel can now be Permanent and Extinctive**

The final limitation of the doctrine i.e. temporary suspension of contractual obligations and rights have also been affected where promissory estoppel can now act permanently to extinguish the promisor's legal right under a contract. Treitel (1999) regards the doctrine of promissory estoppel as having closer affinities with the common law rules of waiver in the sense of forbearance. He also opines that in many later cases, both "waiver" and promissory estoppel" are treated as substantially similar doctrines and these two expressions are often used interchangeably. This is a strong affirmation to the view forwarded by Matta (1999) that this doctrine has dual effects, which may depend on the nature of the representation or the intention of the representor at the time.

The study in the three countries have definitely proven that these common law courts have been relatively more open to treat the effect of promissory estoppel as also extinctive depending on the representation or the intention of the representor at the time as well as the nature of the rights involved. In most cases, the issue of the effect of this doctrine were not specifically dealt with but inferences were drawn from the courts' orders that the courts are now willing to treat promissory estoppel as both extinctive and suspensory doctrine. In England, Lord Denning's had earlier predicted, in *WJ Alan & Co Ltd v El Nasr Export & Import Co.* [1972] 3 SCJ 328, at p. 335 that,

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

The position in Australia is almost clear on this matter where in the *Walton Store's* case, Mason CJ and Wilson J explained that, through equitable estoppel, *Waltons* was prevented from completely retreating from its implied promise to complete the contract (Sutton, 1989). This issue is particularly related to the question of reception of promissory estoppel in Malaysia *albeit* the presence of a clear statutory provision of Section 64 of the Malaysian Contracts Act that specifically provides for waiver. It is, specifically, a question of whether promissory estoppel is correctly being applied by the Malaysian courts whereby Section 3 and 5 of the Civil Law Act only allow the application when there is no such provision in our law. Andrew Phang (1998) views that the provision of Section 64 of the Malaysian Contract Act has dispensed with the rule in *Pinnel's* case, which exceptions warrant satisfaction of consideration by part payment accepted as full satisfaction of the original debt. Sinnadurai (1986) shares the same view by saying that Section 64 is wide enough to include all the exceptions to the general rule under the English law.

**CONCLUSION**

The threats to the limitations of promissory estoppel, manifested from the continuing evolution of promissory estoppel, may pose turbulence in contract law and open the flood gate to litigation. This equitable doctrine, which originally acts as an exception to the doctrine of accord and satisfaction and is subject to five limitations, now appears as an open and unlimited doctrine.

The attempts to depart from the traditional approach set by the *Hughes* and the *High Trees* cases have caused the parameters of promissory estoppel to be no longer an established and well-settled area leaving behind the following questions: -

- (a) Whether, in the interest of equity and justice, promissory estoppel can also be used independently by a plaintiff as a cause of action?
- (b) Whether promissory estoppel can be granted to a plaintiff who has no pre-existing contractual relationship with the defendant?
- (c) Whether the proof of unconscionable conduct supersedes the proof for detriment suffered by the promisee as a result of reliance made on the promisor's representation?
- (d) Whether promissory estoppel can permanently extinguish the promisor's contractual rights?

This array of questions leads to the big question mark, which may pose a huge problem to the development of contract law as a whole that is "[W]hether, with the threats to the limitations to the doctrine of in promissory estoppel as seen in England, Australia and Malaysia, the parameters of this doctrine can presently be clearly defined?"

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