

The Doctrine of Promissory Estoppel: As a Shield or Sword?

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Abstract: Promissory estoppel is a reasonable doctrine arising from the rule of equity where the principle of good faith is not accepted by common law as part of the law concerning contractual transactions. It is an equitable principle meant to prevent any occurrence of inequity or injustice caused by the action of the promisor in backing out from his promise, which initially led the promisee to act to his detriment. This concept paper discusses the basic principle of promissory estoppel with reference to landmark cases for better understanding towards its applicability in business transactions particularly in the contract transaction. It is not a sword, but a shield. It may not be used as a cause of action in English law as it can only be used as a defensive mechanism to safeguard anyone who may face arbitrary enforcement of strict legal rights. Promissory Estoppel is an advanced doctrine for 'Stop' people from taking that right he has promised to exclude or waive, or neglect to make a correct statement or fail to present correctly when such change occurs which affects his ability to fulfil the promise or part of it.

Keywords: Promissory Estoppel, Equitable Doctrine, A Shield, Not A Sword

1. Introduction

This proceeding paper will discuss the application of the doctrine of Promissory Estoppel in general and to further determine whether this doctrine will be applicable to parties in litigations with regards to a matter of shield, or a sword. Meaning that this paper will further discuss on the application by parties on this doctrine as a defence rather than as a weapon to bring the case as a plaintiff. To determine this concept that evaluate under the rule of equity which is one of the sources of the English legal system as adopted in Malaysia with as far as deeming permissible and suitable, the study will further analyse into decided cases in Malaysia, England and Australia and to analyse the limitation of this doctrine before it can be applied as a shield for defence by parties.

1.1 Research Background

This research is a concept paper research evaluating the reported cases in Malaysia, English cases and Australia case for the purpose of determining the application of the doctrine of Promissory Estoppel and to determine whether this doctrine can be applicable as a sword or as a shield in the legal proceeding in court.

1.2 Problem Statements

In day to day business transaction parties to the contract always came across a situation where some of decision or action made was based on the other parties promise or undertaking or such a word of mouth promise. Therefore such reliance of belief on that promise, sometime was based on mistaken belief of that promise and/or the counter parties was purposely intended not to act on that promise.

1.3 Research Questions

- (i) Whether this doctrine can be applied as a defense only or it also can be applicable as a sword by the Plaintiff.
- (ii) What is the limitation of this doctrine in order to use it in the legal proceeding?

1.4 Research Objectives

To answer the research question above as a legal solution to this problem and therefore to assist the litigant on this matters.

1.5 Significance of the Study

This study will assist parties in equity to prevent injustice caused by the action of the promisor in backing out of his promise which lead the promisee to his detriment.

1.6 Scope of the Study

Decided cases in Malaysia, English cases and Australian case.

2. Literature Review

Promissory estoppel is an equitable doctrine enunciated from the rule of equity as a result when common law reluctant to recognize the principle of good faith as applicable in determining the legality in the contractual transaction. It is an equitable doctrine used to deter any injustice occurrence as a result of the action of the promisor in backing out of his commitment or representation, which led the promisee to behave to his detriment initially (Wan Izatul Asma, 2012). Estoppel is a rule of proof or a rule of law, according to Oxford, which forbids a person from denying the validity of a statement he has made or denying evidence he has claimed to exist (Martin, 1986). Moreover, the fact must be one that has been relied on and acted upon by the other person to whom the argument is made, or one that has caused him to change his mind (Wan Izatul Asma, 2012).

Estoppel can be described as a legal principle that prevents a party from accusing facts contrary to a previous claim or action. Therefore, estoppel prevents a person from arguing something contrary to the claim made or the person's previous actions. Conceptually, Estoppel is intended to prevent people from being mistakenly mistaken for other people's words or actions. In precise word, this doctrine operates to assist injured parties to recover promises. Some common element required by law for a parties to litigation to use this doctrine: a promisor, a promisee, and a loss suffered by the offender. An additional prerequisite is that the party making the claim - the contractor - is totally dependent on that

promise. In other words, that promise is one of the most reasonable people you can rely on. Promissory Estoppel are usually granted only when the court determines that enforcing the promise is essentially the only way in which injustice to the person making the promise is justified.

The landmark case for this doctrine can be seen in the case of *Central London Property Trust Ltd v High Trees House Ltd. [1947] KB 130* (hereinafter referred as the High Trees Case). In this case, the plaintiff leased a block of flats for 99 years to the defendants at a rent of £2,500 in 1937. In 1940, due to the outbreak of war, the defendants found difficulty in letting out the flat units. Due to this prevailing war conditions, the plaintiff sent a letter to the defendants in which they agreed to reduced ground rent of the premises £2,500 to £1,250 only. In 1945, war ended and the flats full again. The plaintiff then sent a letter to the defendant again demanding continuation of payment of full ground rental of the premises. By this time the plaintiff had gone into liquidation and a receiver was appointed by the court to look after the plaintiff company's affairs. The plaintiff claimed for payment of the full rent £2,500 for the last two quarters of 1945 and for the future. Lord Denning J held that the reduction of the ground rent was only operative during wartime. The judge further explain in his obiter that had the plaintiff claimed full rent £2,500 pound from 1940 onwards, they would been estopped from doing that. Based on this landmark case, it is understood tht the promisor, who made the representtion to the promisee that he would not enforce his strict legal rights which the promisee relied and acted on to his detriment, would be estopped from renegeing on his promise (Adnan, 2018).

3. Research Methodology

The research methodology for this concept paper is totally on the qualitative method by evaluating and discussing the decided cases in Malaysia, England and Australia being reported in prominent Malaysian case law reporting sources such as Malaysian Law Journal (MLJ), Current Law Journal (CLJ) and Malaysian Law Report (High Court) (MLRH).

4. Discussion

4.1 Central London Property Trust Ltd v High Trees House Ltd. [1947] KB 130

Facts of the case:

A block of flats was rented by the defendants, High Trees, from the plaintiffs, Central London. Due to the outbreak of World War II in 1940, the property suffered from declining tenancy rates. As such, the parties decided to reduce rent by half.

At this new pace, the defendants proceeded to pay the rent. The war was over by 1945 and the flats were completely filled. From 1945 on, the plaintiffs sued High Trees for the full rent.

Legal Issues:

The defendants alleged that the plan to pay the rent at a discounted rate extended to the entire lease period. They alleged that the plaintiffs were prevented from arguing that the rent should be greater.

Held: The court reviewed the past case law, especially *Hughes v Metropolitan Railway Co (1877) 2 App Charge 439*, the House of Lords had held that parties should be estopped from revert back on a representation to exclude several rights.

Denning J argued that the cases demonstrated that, despite a lack of care, a commitment that the promisor knew was going to be carried on by the person to whom it was made was enforceable. The

moment had arisen to identify this as giving rise to an estoppel. Here, a contractual pledge was made by the complainants.

However, this waiver should be applied during the war only. Therefore, once the war ended, the defendants will be liable to pay for full payment of rent.

Summary of the case

In this High Court case, It was decided in the context of rental modification payment to the flat residential during World War II. However, the significant of the case were based on the statement of the principle of defamation dictated by Denning LJ, "the promise intended to bind, intended to act, and in fact act, bind as far as the term goes." Adopting this doctrine, Lord Denning argues that the promise of accepting a reducing amount of rent at the time of the war is binding on the landlord, notwithstanding of the fact that the tenant does not consider it. In principle, Lord Danning laid down some limitations must be met with this doctrine based from Lord Cairns judgment in the case of *Hughes v Metropolitan Railway Co (1877) 2 AC 439* and Denning LJ in the High Court case as follows:

1. The existence of a promise
2. There must be a clear intention of promise to modify the contractual obligation. The court presume intention objectively rather than accepting evidence on the person's state of thinking

4.2 D & C Builders v Rees [1966] 2 QB 617

Fact of the case:

D & C Builders (Plaintiff) requested payment from Rees (Defendant) for construction work and materials supplied for alteration and repairs that made at Rees's shop. Rees refuse to pay, instead of the work being proceeded and a second bill was claimed further. Builders having financial problem at the material time and asked for payment. The Defendant offered the Plaintiff at the same time reducing the amount of debt payments and stating that if they were not accepted, they would not be able to do anything. The cheque was released when the Plaintiff worried they would not receive a payment at all and the Defendant issued a receipt evidencing that the funds had been fully paid by the account. The Plaintiff commence a legal proceeding against the remaining sum unpaid and the Defendant filed a statement of defense alleging that the work was defective and the Plaintiff had signed a binding agreement.

Legal Issue:

Whether the agreement was a valid contract?

Held:

Appeal by the Defendant was not granted by the court. The agreement was invalid because there was no consideration in favour of the Plaintiff in reducing the amount owed by Defendant. The case of *Foakes v Beer (1884) 9 App Charge 605* has been used in the fact that the payment by check does not make a difference to the principle that late payment of a smaller amount does not satisfy the amount owed. Builders have been persecuted to accept the reduced amount due to their financial position which Rees was aware of and took advantage of. Acceptance arising from threats is not reasonable.

Summary of the case

It is argued by the debtor that the builder who is in financial difficulties, having agreed to accept payment for a lower amount, cannot claim the difference. The debtor then argued that the builder had stopped claiming arrears. Lord Denning explains that the principle of estoppel does not work where a

solution has been obtained by (economic) intimidation. It should be noted that these principles can be applied, not only to suspend strict legal rights but also to prevent their enforcement.

4.3 Hughes V. Metropolitan Railway Company (1877)2 App Case 439

Facts of the case:

Property owned by Thomas Hughes is leased to the Metropolitan Railway Company at 216 Euston Road. Hughes has the right to force the tenant to repair the building within six months of the notice given under the lease. Notice was given on October 22, 1874, from which the tenant was until April 22, 1875, to complete the repairs. On November 28, the tenant train company sent a letter proposing to buy the building from Hughes. Negotiations begin and continue until December 30, where nothing has been finalized. When six months had passed, the landlord sued the tenant for breach of contract and tried to evict the company. The tenant completed the repairs in June.

Legal Issues:

Was there an implied promise that six-month term would be suspended during the negotiations?

Held:

Cairns a legal counsel of plaintiff, submitted that it was not fair for the plaintiffs to take unreasonable profit from the defendants by discussing with them and stopping them, intentionally given six months to end and then suing them. However, he found that this was not the case. They do not intend to take advantage of the defendant; they only think that six months are over. The judge stated that through their dealings both parties made it unbalanced to count the negotiation period as part of a six-month period.

Summary of the case

Hughes had been blaming but had been rejected on appeal. The defendants relied on this pledge to hold them liable in this action, because that would be unreasonable. The implied commitment is adequate to allow for the application of promissory estoppel. In negotiations, if a commitment is implied and one party depends on that commitment, then it is inequitable to allow the other party to behave as if the promise is not.

4.4 Combe v Combe [1951] 2 KB 215

Facts of the case:

A husband promises to pay his wife £ 100 a year for a fixed maintenance payment during the divorce proceeding. The wife is aware that the husband is not in good financial condition and does not demand this payment. A few years later, she took action to claim arrears bound by their agreement.

Legal Issue:

Based on previous case enunciated in ***London Property Trust Central London Limited v High Trees House Limited***, who held that the litigant have no right to return the previous agreement. Therefore, the court in this case is required to determine whether the husband can withdraw from his earlier promise to pay his wife a sum of money. It is important for the court to determine whether the wife is considering a return for her husband's promise and whether she can claim the amount previously promised, considering the fact that she has not demand the money for many years.

Held:

The court held that the wife could only enforce her agreement for payment promised by her husband if he had given her judgment. The court found no consideration was given by the wife as she did not consent to the maintenance promised by her husband. The husband does not ask the wife not to pay maintenance fees and therefore the wife cannot claim the money.

Summary of the case

The wife failed in her claim. There was no pre-existing agreement which was than being modified by a promise. The wife attempt to use promissory estoppel as sword and not as a shield. Thus, the wife used as a cause of action against her ex-husband not as defense herself. After several years the wife makes a sudden decision to claim for maintenance. This shows that the wife has a good life and there is no avail to the wife. In the present case, the Promissory Estoppel principle cannot eliminate the need for consideration when it is an essential part of the cause of action

Promissory Estoppel is act a shield is not a sword. While the estoppel by convention cannot be used as a sword (not as a shield), further analysis is needed to determine whether it is used as a sword. Specifically:

1. There is no presumption raised by the fact that the claimant estoppel was a claimant from the defendant, or vice versa.
2. The party could not find the cause of action on the Estoppel

4.5 *Waltons Stores (Interstate) Ltd v Maher [1988] 164 CLR 387*

Facts of the case:

Walton negotiated with Maher for a few months to give a lease on the property owned by Maher. It was known that Maher would demolish an existing building for Walton to occupy and erect a new one. Walton demanded that the plans be prepared to meet his requirements.

Agreement on terms and rent was reached. On 21 October, Walton's solicitor sent a draught lease to Maher's applicants, with several changes being addressed and approved by Walton. The amended lease was sent to Walton by Maher. Maher told Walton in November that demolition work had started in order to conclude the lease quickly before Christmas. Walton began to have some reservations later in November and (having been told that it was not bound by the agreement) instructed applicants to go slow'. Maher started construction at the beginning of January, but Walton told Maher later in the month that he did not wish to proceed; construction work was 40 percent complete. To implement the deal, Maher appealed to the court.

Legal Issue:

Whether Maher entitled to rely upon Waltons Stores' representations in order to enforce an agreement between the parties, even though no written contract had been concluded.

Held:

The High Court held that, even there is no formal contract had been agreed between the parties, Maher was permitted to believe that any formal contracts were only a matter of formalities. As such Maher could rely on "promissory estoppel".

As such according to the Australian decided case, promissory estoppel can be applied in two ways as both a "sword and shield".

Summary of case

The majority held that, although the formal contract was not interchangeable, Maher had the right to presume the changes of terms between parties was a mere formality. Maher may depend on the estoppel of broad promises to represent or promise for future behavior. In Australia promissory estoppel can operate as 'sword and shield'. It can be operate to make a promise with the following reasons:

1. The promisor made an appointment
2. The Promoter creates or promotes the assumption that the contract will exist or that the promise will be fulfilled
3. Promisee relies on this to its detriment; and
4. It cannot be denied, taking into account the seller's conduct, for the seller to disregard the promise.
5. In this case equity intervenes because it would be an unseen act on the part of the Waltons to ignore that assumption.

In this case, while the sole legal right to not exchange contracts is uncertain, there are two additional elements that make Waltons' conduct undeniable:

(a) Immediate element; and

(b) Maher is implemented and submitted on 11/11 and assumes that implementation by Walton is a formalization

In such cases, Walton is responsible for communicating with Maher in a reasonable and definitive manner upon hearing of the demolition. It did not happen and his inability to do so encouraged a clear impetus or urge for Maher to continue. As a result, the Waltons have been released from their pledge to settle.

4.6 Bousted Trading Sdn. Bhd. V Arab-Malaysian Merchant Bank Bhd [1985] 3 MLJ 331

The applicability and the flexibility of this doctrine can be seen in the judgment of Gopal Sri Ram JCA in the Malaysian Federal Court case of ***Bousted Trading Sdn. Bhd. V Arab-Malaysian Merchant Bank Bhd [1985] 3 MLJ 331*** "The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless".

Promissory Estoppel, to say, is a shield, not a sword. It acts as a cause of action under English law.

Therefore acts only as a defensive mechanism to defend anyone who might suffer arbitrary enforcement of strict legal rights. As agreed in *Combe v Combe* [1951] 2 KB 215, it is not capable of establishing new rights or of expanding the scope of existing rights, because the original contract formed between the parties was merely changed. It can be described as "swords" to create new acts of action where rights are enforced never existed.

It can be used as a cause of action in other countries, such as Australia, as seen in *Waltons Stores (Interstate) Ltd v Maher* [1988] 76 ALR 513. However, like the comments of Lord Denning on the case of the High Tree, this may go beyond the line of concern and affect the creation of contracts.

5.0 Conclusion

This doctrine is very important to the parties in litigant and it is widely applied as a shield during the legal proceeding arising from the dispute in a business transaction more particularly in contract law dispute. It is one of the doctrines used in preserving the rights of parties in compromised by the strict application of the contractual terms in the agreement.

However there is a different approach made by the Australian court pertaining to this issues without departing to the basic principle of common law. According to the Australian Court case decided above, this doctrine also applicable both as a shield and sword depend of the facts and circumstances of the case as per discussed above.

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