ESTOPPEL IN *BOUSTEAD'S* CASE: A MOVE AWAY FROM RELIANCE TOWARDS UNCONSCIONABILITY

The Federal Court's decision in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*[1] (hereafter referred to as "*Boustead's* case") has signified a new era for the doctrine of estoppel in Malaysia. The court adopted an expansive view that "the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case." This view was manifested in the court's rejection of the maxim that "estoppel may be used as a shield and not a sword." Further, the use of estoppel is not confined to representations of fact alone but is applicable also to representations of law and applies even when the encouragement comes in the form of silence. Finally, the court made *obiter* statements on two elements of estoppel: first, the effect which the representation or encouragement had upon the mind of the person relying upon the estoppel and second, the requirement that such a person should have acted to his detriment. It will be argued in this paper that the court's views, *albeit obiter*, are significant of the move away from the traditional notion of estoppel based on reliance and detriment towards a more flexible notion of unconscionability. The future ramifications of this wider approach will be briefly considered.

In addressing the above two elements of estoppel, Gopal Sri Ram JCA stated *obiter* as follows:

> The traditional view adopted by jurists of great learning is that a litigant who invokes the doctrine must prove that he was induced by the conduct of his opponent to act in a particular way. However, having undertaken a careful examination of the authorities, we are of the opinion that this requirement is not an integral part of the

[1] [1995] 3 MLJ 331.

> doctrine. All that a representee ... need to show is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's actings. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that 'his conduct was so *influenced* by the encouragement or representation ... that it would be unconscionable for the representor thereafter to enforce his strict legal rights' (per Robert Goff J in *Amalgamated Investment* [1982] 1 QB 84 at p 105).[2]
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> 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 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. In the resolution of this issue, a judicial arbiter would, when making his *assessment of where the justice of the case lies*, be entitled to have regard to the conduct of the litigant raising the estoppel. This may, but need not in all cases, include the determination of the question as to whether the particular litigant had altered his position, although such alteration need not be to his detriment.[3]

Before commenting on the Federal Court's views above, a consideration of the purposes of estoppel and in particular, the Australian approach would be helpful. Estoppel is said to have three competing purposes.[4] Estoppel may be used, first, to provide protection against detrimental reliance, second, to prevent unconscionable conduct and third, to make good expectations. Under the first heading, the purpose of estoppel is to protect promisees from loss caused by reliance on a promise. The basis of liability is the detriment caused to the representee and the relief granted is based on the representee's reliance interests. Under the second heading, the purpose of estoppel is to restrain injustice resulting from unconscionable conduct. Unconscionability is said to

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[2]Note 1, at page 347. Emphasis made by the court.

[3]Note 1, at page 348. Emphasis added by the writer.

[4]Robertson, Andrew, "Towards a Unifying Purpose for Estoppel" (1996) 22 *Monash LR* 1-29.

provide the basis for an estoppel which operates by reference to the representor's conscience as reflected by the knowledge and conduct of the representor. Under the third heading, estoppel is concerned with the enforcement of promises and relief is granted to fulfil the representee's expectations.

The traditional reliance-based approach to estoppel is best seen in the use of promissory estoppel[5] which requires a promise[6] which was relied and acted on by the promisee to his or her detriment.[7] However, the reliance-based approach has been challenged by the other two competing purposes of estoppel, especially the unconscionability approach. In Australia, this can be seen in two landmark cases on estoppel. In *Waltons Stores (Interstate) Ltd v Maher*[8] (hereafter referred

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[5]For the origins of promissory estoppel, see *Hughes Metropolitan Railways Co* (1877) 2 AC 439 and *Central London Property Trust v High Trees House Ltd* [1947] KB 130.

[6]The promise must be unequivocal, clear and unambiguous, see *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741.

[7]See *Ajayi v RT Briscoe (Nigeria) Ltd* [1955] 2 All ER 657. Contrast *WJ Alan & Co v El Nasr Export & Import Co* [1972] AC 741.

[8](1988) 164 CLR 387. Also reported in (1988) 62 ALJR 110. In *Waltons Stores's* case, Maher, the owner of a commercial property had negotiated with Waltons Stores, a retailer, that Waltons Stores would lease a building to be built specially to suit its purposes and to meet its timetable. This included the demolition of an old building together with a new portion which Maher was reluctant to demolish unless it was clear that there were no problems with the lease. Negotiations were detailed and a form of Deed of Agreement for lease was sent by Waltons Stores' solicitors to Maher's solicitors stating that "[w]e shall let you know tomorrow if any amendments are not agreed to." Three days later when no disagreement had been indicated by Waltons Stores, Maher's solicitors forwarded the deed, now duly executed by Maher "by way of exchange" and Maher began to demolish the new part of the old building. Waltons Stores became aware of this a short time later. Construction of the new building was forty per cent complete when Waltons Stores informed Maher of its intention not to sign the proposed lease. Although there was no pre-existing legal relationship between Waltons Stores and Maher, the High Court held that there was a creation or encouragement on the part of Waltons Stores that a contract will come into existence. The majority of the Court (Mason CJ, Wilson and Brennan JJ) applied promissory estoppel and held that Waltons Stores was estopped from denying that a binding contract existed or that the contracts had been exchanged.

to as "*Waltons Stores's* case") and in *The Commonwealth of Australia v Vervayen*[9] (hereafter referred to as "*Vervayen's* case"), the High Court of Australia referred to both the reliance-based approach and the unconscionability approach in its judgments.

In *Waltons Stores's* case, Brennan J said that "estoppel or equitable estoppel ensures that a party who acts in reliance on what another has represented or promised suffers no unjust detriment thereby."[10] This view was adopted by Mason CJ in *Vervayen's* case who stated that "the fundamental purpose of all estoppel [is] to afford protection against detriment which would flow from a party's change of position if the assumption that led to it were deserted."[11] In both *Waltons Stores's* case and *Vervayen's* case, the elements of the representor's conduct inducing the representee to adopt an assumption[12] and of detrimental reliance of the representee[13] were highlighted.

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[9](1990) 170 CLR 394. In *Vervayen's* case, Vervayen, a member of the Royal Australian Navy, was injured when two warships collided in 1964. In 1984, he sued the Commonwealth for damages for negligence. The Commonwealth did not plead that the action was barred by limitation or denied that it owed a duty of care to Vervayen. The Commonwealth stated that its policy was not to contest liability and not to plead a limitation defence. Vervayen continued his action against the Commonwealth. In 1986, following a change of policy, the Commonwealth sought leave to amend its defence to raise the limitation issue and that it owed no duty of care to Vervayen. The High Court, by a majority (Mason CJ, Brennan and McHugh JJ dissenting), held that the Commonwealth was not free to dispute its liability to Vervayen. Of the majority, Deane and Dawson JJ held that the Commonwealth was estopped while Toohey and Gaudron JJ held that the Commonwealth had waived its right to rely on either defence.

[10]Note 8, at page 423.

[11]Note 9, at page 410.

[12]See *Waltons' Stores's* case, note 8, at page 407 *per* Mason CJ and Wilson J, pages 428-429 *per* Brennan J, page 453 *per* Deane J and page 458 *per* Gaudron J. See *Vervayen's* case, note 9 at pages 412-413 *per* Mason CJ, page 444 *per* Deane J, pages 460-461 *per* Dawson J, page 487 *per* Gaudron J and page 500 *per* McHugh J.

[13]See *Walton Stores's* case, note 8, at page 404 *per* Mason CJ and Wilson J and page 429 *per* Brennan J. See *Vervayen's* case, note 9, at page 413 *per* Mason CJ, page 429 *per* Brennan J, page 444 *per* Deane J, page 455 *per* Dawson J and page 500 *per* McHugh J.

However, the unconscionability basis of estoppel also commands considerable support in Australia which is also evident in both *Waltons Stores's* case and *Vervayen's* case. In *Waltons Stores's* case, Mason CJ and Wilson J held that "equitable estoppel has its basis in unconscionable conduct, rather than the making good of representations."[14] Brennan J held that the element which "both attracts the jurisdiction of a court and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity."[15] In *Vervayen's* case, Deanne J stated that "the doctrine of estoppel by conduct is founded upon good conscience".[16]

There are many academic writings in Australia on the proper basis of estoppel. Robertson argues that estoppel in Australia must be seen as operating to protect against detrimental reliance,[17] rather than to prevent unconscionable conduct or to fulfil expectations.[18] He argues that the detrimental reliance approach provides the best balance between the competing factors of individual liberty and communitarian values of preventing harm resulting from reliance on the conduct of others. Further, the notion of reasonableness of reliance assists in the court's exercise of discretion in granting relief.[19] However, Carter and Harland are of the view that the authorities have established that unconscionability provides the basis for estoppel in Australia.[20] The

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[14]Note 8, at page 405.

[15]Note 8, at page 419.

[16]Note 9, at page 440. See also Brennan J's judgment at pages 428-429.

[17]Parkinson also supports a reliance-based approach to estoppel. See Parkinson, P., "Estoppel" in Parkinson, P. (Editor), *The Principles of Equity* (Sydney: LBC Information Series, 1996), pages 226-227.

[18]Robertson, Andrew, "Satisfying The Minimum Equity: Equitable Estoppel Remedies After *Vervayen*" (1996) 20 *Melb ULR* 805-847.

[19]See Robertson, Andrew, "Situating Equitable Estoppel Within the Law of Obligations" (1997) 19 *Syd LR* 32-64, at pages 61-62 in response to criticisms of the reliance-based approach by Barnett, Randy E., "A Consent Theory of Contract" (1986) 86 *Colum LR* 269-321, at pages 274-276.

[20]Carter, J.W. & Harland, D.J., *Contract Law in Australia* (Sydney: Butterworths, Third Edition, 1996) 133, n. 254 and the cases cited therein.

essence of equitable principles is to prevent unconscionable behaviour[21] and the justification for estoppel is said to be found in the court's concern to disallow unfair dealing.[22] Many other writers also share this view.[23]

In contrast to the reliance-based and unconscionability approaches, the expectation-based approach to estoppel has received little support in Australia.[24] In both *Waltons Stores's* case and *Vervayen's* case, there were statements by members of the court seeking to distance equitable estoppel from the expectation-based approach to estoppel.[25] However, it is pertinent that an examination of Australian cases show that Australian courts have granted relief for estoppel based on the expectation approach rather that the reliance-based approach.[26] Further, the predominant reliance-based approach in *Vervayen's* case has not

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[21]Parkinson, Patrick & Loughlan, Patricia, "History and Nature of Equity" in *Laws of Australia:Equity*, Volume 15 (Melbourne: The Law Book Co Ltd, 1993) par. 16.

[22]Parkinson & Loughlan, note 21, par. 5.

[23]See Halliwell, Margaret, "Estoppel: Unconscionability as a Cause of Action" (1994) 14 *Legal Stud* 15-69; Bagot, Charles N.H., "Equitable Estoppel and Contractual Obligations in the light of Waltons v Maher" (1988) 62 *ALJ* 926; Finn, P.D., Equitable Estoppel" in Finn, P.D. (Editor), *Essays in Equity* (Sydney: The Law Book Company Limited, 1985) 59-94. See also Clark, E., "The Swordbearer has Arrived: Promissory Estoppel and Waltons Stores (Interstate) Ltd v Maher" (1987-89) 9 *U Tas LR* 68-76 and "Promissory Estoppel - A Sword Unsheathed" [1990] 64 *Law Institute J* 1054; Getzler, J., "Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention" (1990) 16 *Mon ULR* 283-326; Lunney, M., "Towards a Unified Estoppel: The Long and Winding Road" [1992] *Conv* 239-251; Arjunan, K., "Waiver and Estoppel - A Distinction Without a Difference" (1993) 21 *ABLR* 86-110; Rossiter & Stone, "The Chancellor's New Shoe" [1988] 11-14 *UNSWLJ* 11.

[24]However, this approach is better received in the United Kingdom and the United States. For the English position, see Atiyah, P.S., *An Introduction to the Law of Contract* (Oxford: Clarendon Press: Fifth Edition, 1995) 137-141. For the American position, see Yorio, Edward & Thel, Steve, "The Promissory Basis of Section 90" (1991) 101 *Yale LJ* 111-167.

[25]See *Waltons Stores's* case, note 8, at pages 400-401 *per* Mason CJ and Wilson J, pages 423-427 *per* Brennan J; see *Vervayen's* case, note 9, at pages 439-440 *per* Deane J, page 453 *per* Dawson J and page 501 *per* McHugh J.

[26]See Robertson, "Satisfying The Minimum Equity: Equitable Estoppel Remedies After *Vervayen*", note 18.

been fully followed in subsequent cases decided in the five years after the said decision.[27]

The *obiter* views expressed by the Federal Court in *Boustead's* case and the changing emphasis from detriment and reliance to a threshold test of the justice of the case is reflective of the tension between the reliance-based approach and the unconscionability approach in the doctrine of estoppel in Australia. In many ways this tension is unavoidable. As Robertson concedes, the three competing purposes of estoppel are not mutually exclusive. It is arguable that the purpose of estoppel is to prevent unconscionable conduct by making good the assumptions adopted by those who have relied on them to their detriment.[28] In Australia, the doctrine of unconscionability has become a useful tool in equity generally[29] and also in dealing with the issue of contractual unfairness and unconscionable conduct.[30] While issues of contractual unfairness cannot be fully resolved using the doctrine of estoppel, one approach of the Malaysian courts is to apply estoppel without requiring proof of the traditional elements of representation, reliance and detriment to decide cases which appear to be unfair.[31]

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[27]*Ibid.*

[28]See Robertson, Andrew, "Towards a Unifying Purpose for Estoppel", note 4, at page 2.

[29]Sir Anthony Mason, the former Chief Justice of the High Court of Australia has suggested that "the underlying values of equity centred on good conscience will almost continue to be a driving force in the shaping of the law." See Mason, Anthony, "The Role of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *LQR* 238-259, at page 258.

[30]See for example, the development of the equitable doctrine of unconscionability in the High Court decision of *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. For the development of the statutory doctrine, see for example, sections 51AB, 51AA and 51AC of the Trade Practices Act 1974 (Cth) and see also the Contracts Review Act 1980 (New South Wales).

[31]See for example, *Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor* [1992] 1 MLJ 166. The court held that based on the extraordinary situation in this case, it would be unconscionable for the plaintiffs to insist on the strict performance under the contract. This was the second ground relied upon by the court, the first being based on restitution.

Thus, a recognition of the flexibility of estoppel and the potential of using it through the doctrine of unconscionabilty can provide courts with a workable tool towards alleviating contractual unfairness to some extent and towards the development of equitable remedies generally. However, the doctrine of unconscionability has to be carefully developed, whether judicially or statutorily, so as to ensure that the interest of certainty in commercial relations is not affected, while cognisance is given to the interests of justice and fairness.

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ENFORCING BROKEN PROMISES IN EQUITY: ESTOPPEL IN AUSTRALIA, MALAYSIA AND BEYOND*

Introduction

The doctrine of estoppel has been one of the most discussed and debated doctrines for decades. One of the biggest issues for a long time was whether the doctrine could be used as a 'sword', or cause of action, or simply as a 'shield', a procedural device preventing a plaintiff from asserting certain facts. This debate first passed into history in Australia in 1988.[1] But the resolution of the issue of whether estoppel could operate as a cause of action raised many new questions. As a cause of action where does estoppel belong in a taxonomy of obligations? What are the elements required in order to make out this estoppel? And what should the response be to such a cause of action?

This paper examines the meaning and answer to each of these questions. The Malaysian Federal Court decision in *Boustead Trading* (1985) *Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*[2] (*'Boustead Trading'*) demonstrates the willingness of other courts to follow the Australian approach and recognise a cause of action for an estoppel. The theme of this paper is to attempt to answer these difficult questions in light of the theory and nature of an estoppel. This article argues that Australia has now accepted that the remedy for estoppel as a cause of action is the same as for a contract. This article is divided into two parts. After a short introduction to estoppel as a cause of action, the

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[1] *Waltons Stores v Maher* (1988) 164 CLR 387.

[2] [1995] 3 MLJ 331.