THE DETRIMENT ELEMENT AND THE REINTERPRETATION OF THE EQUITABLE ESTOPPEL DOCTRINE IN MALAYSIA

1. Introduction

> "...the time has come for the courts to recognize that 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."[1]

The word estoppel comes from the French word 'estoup' which means plug or stopper.[2] In legal terms estoppel has been described by Lord Denning MR in *Moorgate Mercantile Co Ltd v Twitchings*[3] as a principle of justice and of equity. He said:

> "It comes to this: when a man by his words or conduct has led another to believe in a particular state of affairs, he will not be

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[1]Per Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd*[1995] 3 MLJ 331 (Federal Court).

[2]L, Brown, (editor) *The New Shorter Oxford English Dictionary on Historical Principles* (1993) Volume 1, at page 854.

[3][1976] 1 QB 225, at page 241. Lord Denning made references to the decision of Dixon J in *Grundt v Great Boulder Proprietary Gold Mines ltd* [1937] 59 CLR 641 where Dixon J stressed on injustice as the basis of the rule rather than a formal criteria.

> allowed to go back on it when it would be unjust or inequitable for him to do so...".[4]

The above loosely describes the different varieties of estoppel at common law and in equity, but does not go beyond to describe what is unjust or inequitable. It is a well-established fact that equitable estoppel has been the instrument through which courts have intervened for centuries to prevent fraud, unconscionable conduct and transactions. As a principle, it is closest to the notion of justice as perceived by the man in the street.[5]

The pronouncement by Gopal Sri Ram (JCA) that the "time has come" is an implicit declaration of a new phase in the application of the estoppel doctrine in Malaysia. It invites the question as to what the state of affairs was up to that point. As he himself pointed out in the paragraphs that followed, it has been used to achieve justice in many different circumstances.[6] Although most of the examples quoted were from other jurisdictions his Lordship however noted that Edgar Joseph Jr. J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor*[7] applied the doctrine of estoppel in a broad and liberal

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[4]*Ibid*, at page 241.

[5]Per Peh Swee Chin J (as he then was) in *Gan Tuck Meng & Ors v Ngan Groundnut Factory Sdn Bhd & Anor* [1990] 1 MLJ 227.

[6]The doctrine has been applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v Gopal Chunder* Laha LR 19 1A 203, *Amalgamated Investment and Property Co. Ltd (In Liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84; [1981] 3 WLR 565. It has operated to prevent a litigant from denying the validity of an option in a lease declared by statute to be invalid for want of registration (see *Taylor Fashions Ltd v Liverpool Victoria Friendly Society* [1981] 1 All ER 897; [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see *Waltons Stores' (Interstate) Ltd v Maher* [1988] 164 CLR 387) and to create binding obligations where none previously existed (see *Spiro v Lintern* [1973] 3 All ER 319). It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *American Surety Co of New York v Calgary Milling Co Ltd* [1919] 48 DLR 295; *Taylor Fashions (supra).*

[7][1989] 2 MLJ 202.

fashion to prevent a defendant from relying on the provisions of the Limitation Act 1952. He also noted that estoppel operated in *Commissioner for Religious Affairs Trengganu & Ors v Tengku Mariam bte Tengku Sri Wan Raja & Anor*[8] to prevent a litigant from denying the validity of an otherwise invalid trust. Did these decisions not represent the 'wide utility' and flexible rule that his Lordship envisaged? Have the courts hitherto taken a restrictive approach to estoppel to warrant such a pronouncement? One finds a trace of the caution that courts have hitherto exercised in the case of *Gan Tuck Meng & Ors v Ngan Groundnut Factory Sdn Bhd & Anor.*[9] Peh Swee Chin J (as he then was) in a judgment involving the transmission of shares in a will said:

> "By stating that 'it would be unconscionable or not equitable' for any of the executors of the estate of the deceased to exercise voting rights as based on $^1/_4$ of the 199,998 shares to which the plaintiff brother was entitled, I was not merely stating a catch-phrase, but the situation had caused me to contemplate as to the state of the principle of equitable estoppel from the cases with the limited resource of time available at my disposal. I therefore make no claim to any expertise in any way but merely seek to explain that part of my decision in this case for the consideration of others".

And at the conclusion of the case he said:

> "...the state of the doctrine as perceived and stated above may be highly vulnerable to criticism of creating uncertainty and a good many people may find it an 'unruly horse' of the worst type;...".

The above statement was perhaps a reflection of the caution rather than unfamiliarity of the courts in the application of the broad approach at the time. The traditional approach to the doctrine has been to look at estoppel in its different forms both at common law and in equity. The categories had often been classified as being based on acquiescence, encouragement, promissory or proprietary. And for estoppel to apply, certain elements needed to be proved. There must be a representation

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[8][1970] 1 MLJ 222.

[9][1990] 1 MLJ 227.

whether by word or conduct or silence; there must be reliance on that representation either because of an encouragement or assurance of the representor, resulting in detriment to the representee.

2. Misconceptions and Corrections

Clearly in *Boustead Trading Sdn Bhd v Arab Malaysian Merchant Bank Bhd*[10] ('Boustead') Gopal Sri Ram JCA set out to clarify and to correct what his Lordship felt were certain wrong conceptions relating to the application of the estoppel doctrine. For instance, he emphasized that it was wrong to apply the maxim "estoppel may be used as a shield but not a sword" as limiting the availability of the doctrine to defendants alone. Plaintiffs may have recourse to it too.[11] Further, he said it was also "wrong to think that the doctrine is confined to cases where a representation of fact has been made" and that estoppel applies to representations of fact and of law.[12] And where any party has been actively encouraged by another to believe in the existence or in the non-existence of a fact, his Lordship went on to state that "we do not apprehend that the law to be different when the encouragement comes in the form of silence,"[13] for the representor who stands by in such a manner as to induce another to believe he assents to its being committed, cannot afterwards be heard to complain of the act.

His Lordship made a particular point to address two elements of the doctrine of estoppel which required "clarification and restatement". The first was the effect which the representation or encouragement had upon the mind of the person relying on the representation. On this point his Lordship challenged the view 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. That requirement, he declared, is not an

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[10]*Supra*, note 1.

[11]Quoting Lord Russel of Killowen in *Dawsons Bank v Nippon Menkwa Kaushiki Kaisha* LR 62 IA 100, at page 108.

[12]Quoting for instance the Privy Council case of *Sarat Chunder Dey (supra)* and the case of *American Surety Co of New York v Calgary Milling Co Ltd* (1919) 48 DLR 295.

[13]*De Busshe v Alt* (1878) 8 Ch D 286, at page 314; *MAA Holdings Sdn Bhd & Anor v Ng Siew Wah & Ors* [1986] 1 MLJ 170, per VC George J (as he then was).

integral part of the doctrine. All that a representee need do 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. It is also not necessary that the conduct relied upon was the sole factor which influenced the representee. He stressed that what is important is that "his conduct was so *influenced* by the encouragement or representation...that it would be *unconscionable*[14] for the representor thereafter to enforce his strict legal rights".[15]

The other matter that his Lordship sought to ameliorate was the understanding on the requirement of detriment as part of the doctrine of estoppel. In his words:[16]

> "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 a 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."

The last two points that he purported to clarify are underpinned by a broad doctrine of estoppel, based on unconscionability. This paper will deal mainly with unconscionability as a basis for estoppel as well as to consider the place of detriment within that approach.

A brief statement of the facts would be useful at this juncture as the principles would be best understood in the context of the case. In *Boustead*'s case the doctrine of estoppel was invoked to lend commercial efficacy to a factoring agreement.

The Facts of the Case

Chemitrade Sdn Bhd ('Chemitrade') sold and delivered goods to the appellants for distribution to retailers on credit. Chemitrade then entered into a factoring agreement with the respondent under the terms of which the respondent agreed to factor Chemitrade's book debts and

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[14]Emphasis added.

[15]Quoting Robert Goff J in *Amalgamated Investment* [1982] 1 QB 84, at page 105.

[16]*Supra*, note 1. Emphasis added.

notice of the assignment was given to the appellant. In a letter to the appellant, Chemitrade gave the respondent copies of the invoice in respect of each sale and delivery of goods to the appellant. The respondent then stamped the invoices with the indorsement that any objection was to be reported to the respondent within 14 days of its receipt. The appellant did not make any complaint about *any* of the invoices thus indorsed, nor challenge the respondent's right to impose the 14 days period by way of indorsement. The appellant paid on several invoices (for a period of 7 months) and then refused to pay on about 20 invoices sent by the respondent.

There were contemporaneous documents to suggest that the appellant, Chemitrade and the respondent proceeded upon the assumption that the factoring agreement was indeed a good and valid assignment. It was open at some stage for the appellant to dispute the construction which the respondent placed on that agreement but it did not do so. The court found that the conduct of the appellant influenced the respondent who paid out on those invoices. They would not have done so had the appellant protested. The appellant's attempt to question the validity of the indorsement some seven months later, well after the respondent had paid out its money to Chemitrade "must in our judgement be classified as unconscionable and inequitable conduct," and Chemitrade should therefore be estopped from asserting that nothing was due on these invoices.

Gopal Sri Ram JCA said that for a litigant to invoke the doctrine of estoppel, all that he (a representee) need do is to show "his conduct was so influenced by the encouragement or representation...that it would be unconscionable for the representee thereafter to enforce his strict legal rights." He need not show that he was induced to act in a particular way so long as he acted on the encouragement and was influenced by the representor. He went on to say that estoppel might assist a 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. His argument was buttressed in the wide doctrine propounded by Lord Denning in *Amalgamated Investment & Property Co. Ltd (In liquidation)*

v Texas Commerce International Bank Ltd[17] as well as the Privy Council case of *Lim Teng Huan v Ang Swee Chuan.*[18]

By that decision Gopal Sri Ram propounded a doctrine of estoppel - similar to what was expressed by Priestly JA in *Austotel Pty Ltd v Franklin Selfserve Pty Ltd*[19] and the decision of the Australian High Court in *Walton Stores (Interstate) Ltd v Maher*[20] where the original formulation of estoppel was modified such that the requirement of a precontractual relationship was abandoned. The effect of the court's decision was that promissory estoppel was permitted to be used as a sword rather than merely as a shield, and the criterion upon which the court exercised its jurisdiction was unconscionability.

3. Unconscionability: the Broad (Unified) Approach

Simply stated, the unified approach based on unconscionability incorporates both common law and equitable forms of estoppel by conduct, and states that the equity raised by estoppel may be enforced by the court in whatever way is necessary to do justice between the parties, sometimes by holding the representor to the representation but not as a matter of course.

It is not in dispute that the historical basis of equity's concern with unconscionability is the prevention of fraud. Unconscionability has been described as a "universal talisman in many fields of equity".[21] The notion of unconscionability considers whether it is fair or just to allow estoppel to be raised either as a defence or to found a cause of action - moving away from an inflexible approach of a preconceived

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[17][1982] 1 QB 84, at page 105.

[18][1992] 1 WLR 113. There Lord Browne-Wilkinson quoted from *Taylor Fashion*: "...in order to found a proprietary estoppel, it is not essential that the representor should have been guilty of unconscionable conduct in permitting the representee to assume that he could act as he did; it is enough if, in all the circumstances, it is unconscionable for the representor to go back on the assumption which he permitted the representee to make."

[19](1986) 16 NSWLR 582, at page 610.

[20](1988) 164 CLR 387.

[21]Mason, A., "Themes and Prospects" in Finn, P.D. (editor), *Essays in Equity*, Law Book Co. Sydney, 1985, at page 244.

formula. Would it be unconscionable for a party to deny that which knowingly or unknowingly, he encouraged another to assume to his detriment? What is unconscionable should be understood in the sense of referring to what one party "ought not" in conscience as between the parties be allowed to do.[22] Such a liberalised approach was used in *Shaw & Anor v Applegate*[23] and later in the case of *Taylors Fashion Ltd v Liverpool Victoria Trustee Co Ltd.*[24] Robert Goff J also adopted that approach in *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd.*[25] He emphasized the flexibility of the estoppel doctrine and rejected any rigid over-categorization. Lord Denning in the same case summed it up in these words:

> "The doctrine of estoppel is one of the most flexible and useful in the amoury of the law. But it has become overloaded with cases. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estopped by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. *All these can now be seen to merge into one principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.*" (emphasis added)

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[22]See, Story, *Commentries on Equity Jurisprudence*, 2nd English Edition (1892), paragraph 219.

[23][1977] 1 WLR 970, per Buckley LJ.

[24][1982] QB 133, per Oliver J.

[25][1982] 1 QB 84.

This broad approach based on unconscionability has now been accepted by the House of Lords,[26] the Privy Council[27] and generally by other courts in the commonwealth.[28] There is an emergence of one "overarching doctrine of estoppel rather than a series of independent rules".[29] Unconscionability is said to be the 'touchstone'[30] in the doctrine of estoppel and functions as a 'balancing item' through which the unconscientious conduct would dictate availability of relief, rather than any strict element formulation. The stress is on injustice as the basis of the rule rather than any formal criteria. This undoubtedly was the flexibility that was espoused in *Boustead*'s case, a decision that purported to be grounded in the conscience of the court to do justice through estoppel. It was unjust for the appellant to suggest that the respondent ought not to have paid Chemitrade on the invoices and the respondent should therefore be estopped from asserting that nothing was due on the invoices. As they had proceeded on the assumption that the factoring agreement was a valid assignment, it would be unjust and unconscionable to permit the appellant to now challenge the meaning, which the parties gave to the document. The law should not allow for an unjust departure by a party from an assumption of fact, where he has allowed another party to adopt or accept for the purpose of their legal relations.

Be that as it may, the stress on injustice has however given rise to some ambiguity about the role of detriment in estoppel.

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[26]*Kenneth Allison Ltd v AE Limehouse & Co (a firm)* [1991] 3 WLR 671.

[27]*AG of Hong Kong & Anor v Humphreys Estate (Queen's Garden) Ltd* [1982] AC114.

[28]The succession of cases that followed mostly accepted the doctrine as stated by his Lordship, including the Australian case of *Walton Stores (Interstate) Pty Ltd v Maher* (1988) 164 CLR 389, the Singapore Court of Appeal case of *Pan Asian Services Pte Ltd v European Asian Bank AG* and *Quah Poh Hoe Peter v Probo Pacific Leasing Pte Ltd* [1993] 1 SLR 14; in Malaysia, the case of *Alfred Templeton & Ors v Low Yat Holdings* [1989] 2 MLJ 201, and more recently *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; *Hong Leong Leasing Sdn Bhd v Tan Kim Cheong* [1994] 1 MLJ 177; *Holee Holdings (M) Sdn Bhd v Chai Him & Ors* [1997] 4 MLJ 601, are among the many who have now taken the broader approach.

[29]Per Mason J in *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, at page 410.

[30]Bagot, C.N.H., "Equitable Estoppel and Contractual Obligations in the Light of Waltons v Maher", *ALJ*, November 1988, Volume 62, at page 95.

4. The Detriment Element

Perhaps the most critical part of the decision in *Boustead's* case was the pronouncement that "the element of detriment is not part of the doctrine of estoppel."[31]

Detriment may be referred to in varied terms, such as "material disadvantage"[32] or "significant disadvantage"[33] and may take the form of forgone opportunities in reliance on a promise,[34] or even emotional distress (in appropriate cases).[35] The question in each case is what type of conduct can be regarded as detrimental to a claimant? A case example of such a detriment may be found in *Grant v Edwards*[36] where a claimant was denied a previously promised interest in the home. Nourse LJ said that for conduct to be detrimental, it must be conduct on which the claimant could not reasonably have been expected to embark unless she was to have an interest in the home. And if detrimental conduct is established, a rebuttable presumption arises that it was performed in reliance on the assurance previously given, and the party denying the claim must prove an absence of reliance. Sir Alexander Turner suggested a test of detriment in the following terms:[37]

> "The test of detriment, in a word, is whether it appears unjust or inequitable that the representer should now be allowed to resile from his representation, having regard to what the representee has done, or refrained from doing, in reliance on the representation."

This appears to equate detriment with the non-fulfilment of the representation when the circumstances would make it unconscionable, indicating that the remedy lies in preventing the representor from resiling

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[31] *Supra*, note 1, at page 348.

[32] *Thompson v Palmer* (1933) 49 CLR 507, at page 547, per Dixon J.

[33] *Commonwealth v Verwayen* (1990) 170 CLR 394.

[34] *Foran v Wight* (1989) 168 CLR 385.

[35] *Loc. cit.*

[36] [1980] Ch 638.

[37] Spencer Bower and Turner, *The Law Relating the Estoppel by Representation*, Third Edition, 1977, Butterworths, London.

from the representation.[38] The detriment or harm, from which the law seeks to give protection, is that which would flow from the change of position if an assumption were destroyed that led to it. In his discussion of estoppel, Dixon J in *Grundt v Great Boulder Proprietary Mines Ltd*[39] commenting on the detriment that a person estopped must suffer, said that:

> "...the basal purpose of the doctrine [of estoppel] is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it."[40]

Gopal Sri Ram JCA in the *Boustead's* case opined that when invoking the doctrine it was not necessary for one to prove that he relied upon his opponents' conduct and in consequence acted to his detriment. Accordingly, all that need be shown is that in the particular circumstance of the case, it would be unjust to permit the representor or encourager to insist upon his legal rights. Further, when a judicial arbiter makes his assessment of where justice of the case lies he must have regard to the conduct of the litigant raising the estoppel. This may but need not in all cases include the determination of whether the particular litigant had altered his position, although such alteration of position need not be to his detriment.

It appears that the aggregate position according to his Lordship is: (a) detriment is not as essential element that needs to be proved; (b) there must be encouragement or representation; (c) there also must be an acting or reliance on such encouragement; (d) it is unjust to allow the encourager to insist on strict legal rights having regard to the conduct of the litigant; (e) a change in position may or may not have happened; and (f) detriment need not accompany the change of position.

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[38]Parkinson, P., "Equitable Estoppel: Developments After *Walton Stores (Interstate) Ltd v Maher*", JCL, Volume 3, 1990-91, at page 58.

[39][1937] 59 CLR 641.

[40]*Grundt v Great Boulder Proprietary Mines Ltd* [1937] 59 CLR 641, per Dixon J.

As the learned judge himself noted, that declaration goes against the general Malaysian equity jurisdiction. For instance, in *Wong Juat Eng v Then Thau & Anor*,[41] where the inference from the evidence is that the sub-lessor waived compliance by the sub-lesee with the strict terms of the covenant and the latter acted to her detriment, equity will not permit the sub-lessor to exercise her right to forfeiture based on those transactions. Similarly in *Alfred Templeton*,[42] *Cheng Hang Guan v Farlim Perumahan (Penang) Sdn Bhd & Ors*[43] and in *the* recent High court case of *Holee Holdings (M) Sdn Bhd v Chai Him*,[44] the courts have emphasized on the requirement of detriment as a necessary element. The claimant must establish that he relied on an assurance of a representor to his detriment.

Gopal Sri Ram's stand could be supported in part by the fact that some earlier common law authorities do not speak of the requirement of detriment. In *Combe v Combe*[45] and later in *Moorgate Mercantile Co Ltd v Twitching*[46] it was sufficient if the promise was intended to be acted upon and was in fact acted upon; the gist of the equity lies in the fact that one party had by his conduct led the other to alter his position. In the Privy Council case of *Emmanuel Ayodeji Ajayi v RT Briscoe (Nigeria) Ltd*,[47] Lord Hodson stated that all that was required was that the other party has altered his position. In the case of *ER Ives Investment Ltd v High*,[48] a person entitled to estoppel must show he has suffered a past detriment *or* other change of position. The court appeared to equate a change of position with detriment. Then in *Greasely v Cooke*,[49] Lord Denning accepted that what was required was that the assumption be adopted, without the need to show detriment (or expenditure of money) in such circumstances that it would be

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[41][1965] 2 MLJ 213.

[42]*Supra*, note 7.

[43][1993] 3 MLJ 352.

[44][1997] 4 MLJ 601.

[45]Per Asquith LJ.

[46]*Supra*, note 3.

[47][1964] 1 WLR 1326, at page 1330.

[48][1967] 2 QB 379, per Win LJ.

[49][1980] 3 All ER 710, at pages 713-714.

unjust and inequitable for the party making the assurance to go back on it. Interestingly, these authorities were not discussed in *Boustead*. His Lordship however referred to the case of *MAA Holdings Sdn Bhd & Anor v Ng Siew Wah & Ors*[50] where VC George J (as he then was) alluded to Robert Goff J's statement in *Societe Italo-Belge v Palm Oils*[51] where he said:

> "The fundamental principle is . . . that the representor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings between the parties. *To establish such inequity, it is not necessary to show detriment;* indeed the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights."

Here as in the earlier cases, the emphasis was on the inequity between the parties, rather than any element of detriment. It was 'unconscientious conduct' that gave rise to the estoppel.

It is perhaps churlish to say that those statements about estoppel and detriment in *Boustead* were merely *obiter*. The emphatic note and the clarification in furtherance of the broad approach to estoppel based on unconscionability cannot easily be dismissed without consideration. Even if the statements were *obiter dicta*, the approach has since been reiterated in a number of appeal cases following *Boustead*. Among them are *Chor Phaik Har & Ors*[52] and *Teh Poh Wah v Seremban Securities Sdn Bhd*.[53] In the latter, the Court of Appeal resolved the case by reference to the doctrine of estoppel. There a wife by her actings would have led a reasonable man to believe that she had given her husband a *carte blanche* to act on her behalf. The undisputed facts reasonably supported an inference that the respondent was influenced by the conduct of the appellant to such a belief, and it would therefore be unjust and inequitable to suffer the appellant to assert facts that would now contradict her earlier conduct.

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[50][1986] 1 MLJ 170.

[51][1982] 1 All ER 19, at pages 26-27. Emphasis added.

[52][1996] 2 MLJ 206.

[53][1996] 4 CLJ 16.

One of the clearest reiteration of that position is illustrated in *Lai Yoke Ngan (p) & Anor v Chin Teck Kwee @ Chin Teck Kwi & Anor.*[54] Once again Gopal Sri Ram JCA in delivering the judgement of the Federal Court applied the estoppel doctrine to litigation as an illustration of the broader proposition. He said:

> "With one qualification that I shall state in a moment, the passage above-quoted - from the opinion of Lord Templeman in *Meng Leong*, and the speech of Lord Bridge in *Langdale* - reflect the consequences that flow upon an application of the doctrine of estoppel to the conduct of litigation. The qualification I make is this: The approach to the doctrine of estoppel, in particular to the requirement of there having to be 'a detriment', has, by the flow of authority that has come after the decisions in *Langdale* and *Meng Leong*, including the decision of this court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 AMR 49:2871; [1995] 3 MLJ 331, been re-stated in broader terms to accurately reflect the true nature of the doctrine.
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> Accordingly, the global question which a court must ask itself is this: is it just and equitable that the 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 that question is in the affirmative, estoppel does not bite: if the answer is in the negative, then it does.
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> In the present case it was argued that it is not open to the defendants; they having encouraged the plaintiffs to believe that the action will not be contested, to challenge any judgement entered in the proceedings, however irregular that judgement may be."[55]

What the plaintiffs did in that case offended their conscience. They could have done something about it, but they did not - and therefore were guilty of unconscionable conduct. This had the effect of releasing the defendants from any estoppel that may have held then in its grip.

The impact of these decisions appears to bring all the cases under a principle akin to the general doctrine of estoppel by conduct. The

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[54][1997] 3 AMR 2458.

[55][1997] 3 AMR 2458, at page 2478.

ensuing approach emphasizes flexibility based on the justice of each situation[56] and purports to discard the requirement of proving the traditional element of detriment. There appears to be no contrary arguments that have been advanced concerning detriment as stipulated in the *Boustead*'s case. What then is the essential link between detriment and unconscionability?

5. Relationship between Unconscionability and Detriment

Arguably the court in its inherent equity jurisdiction would be able to exercise its discretion, taking into account the detriment as the injustice that needs to be corrected or avoided. Such an approach would be tenable if one considers unconscionability as a wide 'net' which would take into account the narrower concept of detriment and the need to prevent harm to a party asserting the estoppel. Be that as it may, it is submitted with respect that unconscionability as an element of estoppel, however important, cannot be viewed in a vacuum. Unconscionability and detriment are not merely cumulative requirements but are also interdependent in that the extent of the detriment will ordinarily have a bearing on whether departure from an assumption should be described as unconscionable and thus call for a remedy.[57] It is the detriment that creates the relevant equity[58] and it is the element of detriment, which renders it unconscionable for the legal owner to insist on his legal right.[59]

Even where the broad test of unconscionability is accepted, the element of detriment remained an express requirement for estoppel to be invoked in some jurisdictions. Starting at our own doorstep, in

[56]See also *Ho Weng Leong v Ng Kee Chin* [1996] 2 MLJ 139; *Teguh Consolidated Sdn Bhd v Talam Corporation Bhd (Malayan Banking Bhd, Third Party)* [1996] 5 MLJ 664 for application of estoppel by conduct.

[57]See *Commonwealth v Verwayen* (1990) 170 CLR 394, at page 445, per Deane J.

[58]*Thomas v Palmer* (1933) 49 CLR, at page 547, per Dixon J.

[59]Dunn LJ, *Watts Ready v Spenser* (1984) 134 631, NLJ.

Holee Holdings,[60] Augustine Paul in the High court maintained that the traditional elements, including detriment must be satisfied. The learned judge in a lucid treatment of the development of estoppel through the Malaysian courts expounded on the broad test of unconscionability as postulated in *Taylors Fashion* and *Amalgamated Investments*. Interestingly, there was a deafening silence with regards to the Federal court decision of *Boustead*. The learned judge instead made references to the Privy Council case of *Hongkong v Humphreys Estate (Queen's Garden) Ltd*.[61] Whilst recognizing the trend away from any strict application of rigid criteria towards a more flexible test of unconscionability, the Board nevertheless held that the three elements of assurance, reliance and detriment had to be satisfied.

In contrast with the stand taken by the Malaysian Federal Court, the Australian courts in recent decisions have taken a clear view that a claim of estoppel will fail if detriment cannot be demonstrated.[62] They take the view that if there is no detriment, it is difficult to see where the injustice of permitting a person from resiling from his representation would lie.[63] For in addition to establishing a reasonable reliance upon a clear and unequivocal representation, the representee must establish that he or she relied on the promise so that detriment would be suffered if the representor were allowed to depart from the representation.[64] Clearly the High Court was concerned that the use of estoppel may undermine the law of contract. They overcame this by

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[60]*Supra*, note 44. Augustine Paul JC (as he then was) quoted Mark Pawlowski in his book entitled *The Doctrine of Proprietary Estoppel*, at page 127 thus:

> "It has been commented by Westead (1995) Conve 61 at p 63 that the elements of proprietary estoppel have now been condensed into essentially:
>
> ... two interlinked requirements distilled from Oliver J's broad test of unconscionability postulated in *Taylors Fashions*. First, there must be conduct, express or tacit, on the part of the landowners, relating to the acquisition of rights in or over his or her property. Secondly, the claimant of the equity must prove a detrimental alteration of position in reliance on a belief engendered by the landowner's conduct.

[61][1987] 2 All ER 387.

[62]Parkinson, P., Estoppel in *The Principles of Equity*, LBC Information Services, 1996.

[63]*Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101, at page 106, per King CJ.

[64]*Legione v Haterley* (1983) 152 CLR 406.

stressing the principle of unconscionability underlying estoppel and spelling this out to mean that estoppel does not enforce promises without more. It does so only where there has been a detrimental reliance upon them.[65]

Mason CJ considered the precise role of detriment within estoppel in *Commonwealth v Verwayen*.[66] Mr. Verwayen had commenced proceedings in negligence against the government, his former employer, seeking damages for personal injuries sustained while he was a member of the armed forces. He did so outside the limitation period, relying on the government's assurance that it would not use the limitation defence. Later there was a change in policy and the defendant obtained leave to amend their pleadings to plead limitation. Mason CJ's explanation bears reproduction:

> "...there is no reason to doubt the respondent's assertion that he made the assumption [that limitation would not be pleaded] and continued his action against the Commonwealth in reliance on it. The element of detriment presents more difficulty. Of course the respondent would suffer detriment in reliance on the assumption if the Commonwealth were to depart from it, at least in the sense that he would fail in his action for damages. However the question of detriment is not so simple as such an answer would suggest, and is closely related to the other elements of the claim of estoppel.
>
> When a person relies upon the correctness of an assumption, which is subsequently denied by the party who has induced the making of the assumption, two distinct types of detriment may be caused. In a broad sense, there is the detriment that would result from the correctness of the assumption upon which the person has relied. In the narrow sense, there is the detriment that the person has suffered as a result of his reliance upon the correctness of the assumption.
>
> ...cases of equitable estoppel have been concerned to grant relief where detriment would be suffered if the assumed state of affairs upon which reliance had been placed was held not to exist. But as we have seen, the relief which equity grants is by no means necessarily

[65]*Walton Stores (Interstate) v Maher* (1988) 164 CLR 387, per Mason CJ and Wilson J, at page 406.

[66]*Supra*, note 57, at page 415.

> to be measured by the extent of that detriment. So while detriment in the broader sense is required in order to found an estoppel...the law provides a remedy which will often be closer in scope to the detriment suffered in the narrow sense."

Whatever form the detriment may take, the object of equity is not to compel the party bound to fulfil the assumption or expectation. It is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or abstain from acting thereon.[67]

Where does this lead to in terms of the position to be adopted by the courts in Malaysia? Would a "united substantive doctrine of estoppel"[68] simplify the issue? While it may solve the problem of over categorization of estoppel into defined categories like estoppel by acquiescence, encouragement, promissory or proprietary estoppel, to categorically state that "detriment does not form part of the doctrine of estoppel...not an essential ingredient requiring proof before the doctrine may be invoked" could pose a problem on the proper or adequate compensation to be given to the claimant. As Pont and Chalmers[69] have suggested, the object of estoppel is the avoidance of detriment. Thus the principle upon which this detriment is calculated is critical to the remedy available to the representee.

6. Conclusion

What seems clear from the authorities discussed above is that where a court invokes the doctrine of estoppel acting upon the conscience of the owner, if there is no detriment suffered or there has not been any prejudice in any significant way by the representation, "it will not ordinarily be against conscience to allow the plaintiff to resile from his promise...".[70] The general approach that the Australian courts have taken for instance as illustrated in the case of *Commonwealth v*

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[67]Per Brennan J in *Walton Stores* (*supra*).

[68]The Australian approach as described by G Dal Pont & Chalmers in *Equity and Trusts in Australia and New Zealand*, LBC Services, 1996, at page 198.

[69]*Ibid.*

[70]Per Slade J in *Stevens v Stevens*, 3 March 1989 (unreported).

Verwayen[71] is to seek to provide a remedy which is the minimum necessary to prevent detriment resulting from the claimant's reliance. In cases in which reliance loss is difficult to calculate, the only way to ensure that reliance is fully protected is to fulfil the claimant's expectation.[72] In the words of Deane J:

> "Ultimately the question whether departure from the assumption would be unconscionable must be resolved not by reference to some pre-conceived formula framed to serve as a universal yardstick but by reference to all of the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption if departure from the assumed state of affairs were permitted".

With the unified approach, the equitable doctrine has broken free of its confines of promissory and proprietary estoppel. Flexibility as advocated by *Boustead* allows for justice to be meted in a spectrum of cases ranging from company law,[73] civil litigation,[74] contract,[75] assignments and factoring agreements,[76] trusts and wills[77] based on the

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[71] *Supra*, note 56.

[72] The issue of whether the remedies should be based on the reliance loss or the expectation loss is the subject of another discussion. Suffice it is to say here that the court can protect the reliance in an estoppel case by compensating the claimant for the loss suffered as a result of his or her reliance on the relevant promise or representation. Alternatively, the court can protect the claimant's expectation interest, by providing a remedy which puts the claimant in the position he or she would have occupied had the relevant promise been fulfilled. It is not possible to grant one type of remedy in all cases given that in certain cases the reliance interest cannot be quantified or that circumstances will make it impossible to fulfill the claimant's expectations. See A. Robertson, "Reliance and Expectation in Estoppel Remedies", *Legal Studies* (1998), Volume 18, No. 3, at page 360. See also L.L. Fuller and W.R. Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52.

[73] *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 430.

[74] *Lai Yoke Ngan (p) & Anor v Chin Teck Kwee* [1997] 3 AMR 2458.

[75] *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 (Court of Appeal).

[76] *Chong Yoong Choy v UOL Factoring Sdn Bhd* [1996] 1 MLJ 421 (Court of Appeal).

[77] *Gan Tuck M & Ors v Ngan Yin Groundnut Factory Sdn Bhd & Anor* [1990] 1 MLJ 227 (High Court).

"totality of the facts of the circumstances"[78] of the case. The particular applications are but manifestations of a wider principle and contain statements that are relevant to their peculiar facts.[79]

Gopal Sri Ram JCA was quick to point out that it was erroneous to apply the doctrine to the facts as though it were some form of straitjacket. There is a caution that it could involve a "judicial sleigh of hand".[80] Dealing with whether conduct is or is not unconscionable in the circumstances, would necessarily involve "a real process of consideration and judgement"[81] in which settled rules may be applicable but may be inadequate. It would have to involve an element of value judgement on what is unreasonable, or oppressive or what affronts the ordinary standard of fair dealing. The question is whether the current trend would lead the court back to the "measure of the chancellors foot?" The dilemma for the courts is to formulate a principle consistent with the flexible notions of equity, but which does not invite "resort to a kind of palm tree justice according to which the answer to a critical question in every future case will reside only in the breast of the judge".[82] In order to cope with the uncertainties of the situation, discretion is necessary to interpret the imprecision of words, expectations and conduct and then to decide which of the available legal mechanisms will most effectively give the appropriate remedy. The discretion of the judge is crucial. Perhaps the words of Peh Swee Chin J (as he then was) in *Gan Tuck Meng*[83] would provide some assurance to any untoward alarm. He said "the present state of the doctrine of equitable estoppel as perceived and stated above may be highly vulnerable to criticism of creating uncertainty and a good many people may find it

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[78]*Chor Phaik Har & Ors* [1996] 2 MLJ 206.

[79]See also *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650.

[80]Patrick Parkinson, "Equitable Estoppel: Development After *Walton Stores (Interstate) Ltd v Maher*," *JCL*, Volume 3, 1990-91.

[81]Contrast, *Harry v Kentziger* (1978) 95 DLR (3d) 231, at page 240.

[82]*Bobko v Commonwealth* (unreported, Supreme Court of Victoria, Fullagar J, 22 April 1988). A similar apprehension was expressed in the New Zealand case of *Westland Savings Bank v Hancock* [1987] 2 NZLR 21, at page 36.

[83]*Supra*, note 2.

'an unruly horse' of the worst type; they can however take comfort in the great fund of self restraint of judges in deploying it to prevent a person from enforcing his strict legal rights where it would be unconscionable and therefore inequitable to do so." The hallmark of equitable jurisdiction after all is that it is discretionary.

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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.