EQUITABLE ESTOPPEL: IS 'PALM TREE JUSTICE' BACK?

Scope

The Federal Court in *Boustead Trading Sdn Bhd v Arab-Malaysian Merchant Bank Bhd.*[1] (the *Boustead* case) ruled that detriment was not an integral part of the doctrine of equitable estoppel. This paper argues that detriment, a traditional feature of equitable estoppel, is an integral part of the factor of unconscionability in "The Duty to Ensure the Reliability of Induced Assumptions". It is further pointed out that detriment suffered by the promisee is an essential factor that the court ought to take into account when assessing the applicability of the doctrine of equitable estoppel. To this end, this paper examines: (a) the content of "the duty to ensure the reliability of induced assumptions"; and (b) the law on equitable estoppel in Malaysia prior to and with regard to the Federal Court decision in the *Boustead* case. In conclusion, this paper advocates the Spencian model of a structured and principled approach to the doctrine of equitable estoppel in general and to promissory estoppel in particular. Detriment is an essential feature of the Specian model.

1. The Duty to Ensure the Reliability of Induced Assumptions

The duty to ensure the reliability of induced assumptions is the moral basis upon which the doctrine of estoppel is grounded. In an equitable estoppel, one party has induced an assumption in the mind of another which induces the latter to rely upon that assumption. The parties are referred to as the inducing party and the relying party. The inducing party has the primary obligation as far as is reasonably possible to

[1][1995] 3 MLJ 331.

prevent harm to the relying party. The harm referred to here makes the relying party worse off due to the unjustified assumption. It is noteworthy that 'but for' the inducement, he would not have been worse off. The inducing party has to compensate the relying (and perhaps now, 'harmed') party. It is inducing the reliance and not inducing the assumption that attracts this duty. It is therefore important for a court to question whether reliance has been induced. If it has, then how strong has it been induced?[2]

It is uncertain as to whether the knowledge of an agent or of a stranger who knew of the original inducing party's breach of the duty to ensure reliability of induced assumptions or where the circumstances gave rise to a beneficial interest in the property can give rise to an estoppel or not. In Australia it has been suggested that the former

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[2]Three duties underpin the law of obligations. The moral basis of contract law is the duty to keep promises. The duty not to lie underpins the tort of deceit. A general duty to ensure the reliability of induced assumptions may have influenced the development of several common law and equitable doctrines. The justification of this duty lies in the general duty not to cause preventible harm. In Australia, this last duty has also had significant impact on the tort of negligent misstatement and on the duty a fiduciary has to exercise in the giving of advice under *Nocton v Lord Ashburton*. See Spence, M., *Protecting Reliance: the emergent doctrine of equitable estoppel* (Oxford: Portland – Oregon, 1999), at pages 1 and 2. However, new developments in Australia in the field of equity have brought significant change, for now the question is whether all three forms of estoppel have been integrated into a single doctrine. The term 'equitable estoppel' has had its fair share of problems given the arguments that there is no difference between estoppel in equity and estoppel, in common law. See Turner, A.K. (Editor), *Spencer Bower and Turner: The Law Relating to Estoppel by Representation* (Third Edition) (London: Butterworths, 1977), at page 12; contrast Meagher, R.P., Gummow, W.M.C. and Lehane, J.R.F., *Equity, Doctrines and Remedies* (Third Edition) (Sydney: Butterworths, 1992), at page 406. Spence has identified seven criteria in determining the strength of reliance induced, (1) based on the dealings of the parties; and (2) based on the relationship of the parties. See Spence, M., at pages 6-11.

should not give rise to an estoppel,[3] while the latter has given rise to an estoppel and has been approved.[4]

In *Halsbury's Laws of England*, the meaning of 'estoppel' is set out in these terms:

> There is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not. Estoppel or Conclusion as it was frequently called by the older authorities, may therefore be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. Estoppel is often described as rule of evidence but the whole concept is more correctly viewed as a substantive rule of law.[5]

2. Estoppel in Malaysia

The doctrine of estoppel in Malaysia comprises common law estoppel[6] and equitable estoppel. Common law estoppel is a rule of evidence. Equitable estoppel includes proprietary estoppel and promissory estoppel. Proprietary estoppel and promissory estoppel have had similar origins but it is believed that the similarity ends there. *High Trees*

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[3]See Spence, M., note 2, at page 49.

[4]See *Kintominas v Secretary, Department of Social Security* (1991) 103 ALR 82, at page 93, per Einfeld J; *Lee v Ferno Holdings Pty Ltd* (1993) 33 NSWLR 404, at page 408; *Dixon projects Pty Ltd v Masterton Homes Pty Ltd* (1996) 36 IPR 136; Spence, M., note 2, at page 49.

[5](Fourth Edition) (London: Butterworths, 1967), Volume 16, paragraphs 1501 and 1502.

[6]Estoppel, at common law is largely a rule of evidence. Should estoppel be pleaded before it can be raised? In Malaysia, the pre-*Boustead* position was that estoppel was a matter which was required to be pleaded under the rules of court. This was upheld in *Associated Pan-Malaysian Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287, at page 296. The operative rules are said to be Order 18, rule 8(1) and 7(1) of the Rules of the High Court 1980.

estoppel is also promissory estoppel. By raising questions of substance, the role of estoppel has seen further development in equity. The central feature of the relief in equity has been that it is discretionary. Accordingly, the remedies and effects of the two forms of estoppel also vary.

2.1 Basis

Snell's *Equity* explains that the basis of equitable estoppel is the *unconscionable or inequitable conduct* of a party.[7] This was endorsed by Oliver J (now Lord Oliver of Aylmerton) in *Taylors Fashions Ltd v Liverpool Victoria Trustees*[8] where the court held that the broad test was whether in the circumstances the conduct complained of was unconscionable.[9] The same view was endorsed in *Shaw v Applegate*,[9a] where Buckley LJ said that the real test was whether upon the facts of the particular case the situation had become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it.[10]

In Malaysia, the Supreme Court in the case of *Gan Tuck Meng & Ors v Ngan Yin Groundnut Factory Sdn Bhd & Anor* ruled:

> 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.
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> At the outset, it is to be borne early in mind the distinction between common law estoppel and equitable estoppel; the former is a mere rule of evidence and is subject to technicalities and rules, such as those seemingly laid down in s. 115 of the Evidence Act 1950, while the latter does give rise to substantial rights and remedies ... the

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[7] *Snell's Equity*, (Twenty-Ninth Edition) (London: Sweet and Maxwell, 1990), at page 569.

[8] [1981] 1 All ER 897.

[9] [1982] QB 133, at page 154.

[9a] [1978] 1 All ER 123.

[10] [1977] 1 WLR 970.

> well-known passage in *Ramsden v Dyson*[11] put the doctrine of equitable estoppel firmly on a pedestal. The passage was followed in a great number of cases, including the Privy Council case of *Plimmer v Mayor Councillors & Citizens of Wellington.*[12] These cases concerned expectations which were created, that were either falsified, or representations were made that were not made good.[13]

The court in this case also stressed that the principle of equitable estoppel need not be confined to cases involving land or an interest in land. The doctrine covers cases of expectations, acquiescence, conduct and relationship of the parties. In *Amalgamated Investment & Property Co Ltd v Texas Commercial International Bank*,[14] it was extended to a case of a letter of guarantee given to the defendant bank. The estoppel raised in this case was the conventional estoppel, a form which had come to the fore in recent years. The English Court of Appeal ruled that when parties in their course of dealing in a transaction, had acted upon an agreed assumption that a particular state of facts between them is to be accepted as true, each is to be regarded as estopped as against the other. It is not certain whether conventional estoppel is a matter of law or a matter of equity or what its precise boundaries are.[15] The equitable principles laid down in *Amalgamated Investment and Property Company Ltd. v Texas Commerce International Bank Ltd.* and *Taylor's Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.* were applied in the Singapore case of *Industrial & Commercial Realty Co Ltd v Merchant Credit Pte Ltd.*[16] Choor Singh J cited an extra-judicial opinion of Lord Denning:

> Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this: when a man,

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[11](1866) LR 1 HL 129.

[12](1884) 9 App Cas 699.

[13][1990] 1 MLJ 227. Approved *Crabb v Arun District Council* [1976] 1 Ch 170.

[14][1982] 1 QB 84.

[15]See *Victoria v Rossignole* [1983] 2 VR 1. In *Keen v Holland* [1984] 1 WLR 251, the principle was referred to as an equitable principle (contrast [1984] 1 All ER 75).

[16][1980] 1 MLJ 208, at page 209.

by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J put in these words:

> The principle upon which estoppel is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept, for the purpose of their legal relations.[17]

In *Perwira Habib Malaysia Bhd v Pengkalan Enterprise Sdn Bhd*,[18] the court followed the principle laid down by the Privy Council in *Dawson Band Ltd v Nippon Menkwa Kabushihi Kaish (Japan Cotton Trading) Co Ltd* in the grounding of an estoppel.[19] Lord Denning has contributed a great deal towards the doctrine by the many cases he decided, notably *Inwards v Baker*[20] and *ER Ives Investment Ltd v High*[21] where it was laid down that it was for the court to decide in each case how the equity that had arisen was to be satisfied.

2.2 Proprietary Estoppel

The interest of a representee in proprietary estoppel may be permanent which he can protect by a right of action. The representation may be of fact or intention. Proprietary estoppel had always been used as a shield. It is irreversible except according to the terms of the representation. Dependent upon the terms of interpretation, proprietary

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[17]*Ibid.*

[18][1991] 3 CLJ 2552.

[19]A statement, to be a ground of estoppel, must be clear and unambiguous: 3 Ch 82(1). But even if their Lordships were to accept the meaning attributed to the letter o.k. by the plaintiffs and the High Court, it would be impossible to hold that they constitute a representation which could ground an estoppel; for the meaning so attributed is not a representation of an existing fact but a representation of a future intention, which might or might not be enforceable in contract. See AIR 1935 PC 79, at pages 83-84.

[20][1965] 2 QB 29 (referred).

[21][1967] 2 QB 379 (referred).

estoppel may be used as a shield and as a sword. Though there need not be a subsisting legal relationship between the parties, it has its limitations such as:

(i) it should be based squarely on equitable fraud by the representor;
(ii) though not necessarily by bad faith; and
(iii) it is confined to representations with respect to property.

Proprietary estoppel has always been associated with two types of cases, namely, *Dillwyn v Llewelyn*[22] and *Ramsden v Dyson.*[23] *Dillwyn's* case relates to expenditure on the representor's property encouraged by some representation of benefit. *Ramsden's* case relates to expenditure with passive acquiescence by the representor. There is usually no offer and acceptance in situations of passive resistance. Modern English cases treat these two authorities as an application of a single principle.[24] Meagher, Gummow and Lehane are of the opinion that keeping the types of estoppel distinct leads to different forms of relief, for example in *Dillwyn's* case, the plaintiff's equity was satisfied when the defendant made good his representation. In a case of passive resistance, the plaintiff's equity is satisfied when the defendant is stripped of his unconscionable profit.[25]

The Federal Court in the *Boustead* case referred to the concept of proprietary estoppel as expounded in *Lim Teng Huan v Ang Swee Chuan*,[26] an appeal from Brunei Darussalam where the Privy Council held that the decision in *Taylor Fashion* demonstrated that in order to found proprietary estoppel, it is sufficient if in all the circumstances,

[22](1862) 4 De GF & J 517.

[23](1865) LR 1 HL 129.

[24]*Ward v Kirkland* [1967] 1 Ch 1914.

[25]Meagher, Gummow and Lehane, note 2, at page 418.

[26][1992] 1 WLR 113.

it is unconscionable for the representor to go back on the assumption which he permitted the representee to make.[27]

2.3 Promissory Estoppel

Promissory estoppel is also known as estoppel by representation or conduct. On promissory estoppel, Lord Scarman LJ in *Crabb v Arun District Council*[27a] held that if the plaintiff had any right, it was an equity arising out of the conduct and relationship of the parties. In such a case it was well-settled law that the court, having analysed and assessed the conduct and relationship of the parties, had to answer three questions. First, was there an equity established? Secondly, what was the extent of the equity, if one was established? And, thirdly, what was the relief appropriate to satisfy the equity? The equitable principle governing the doctrine of estoppel by conduct or representation was stated by Lord Cairns in the leading case of *Hughes v Metropolitan Railway Co*.[28] It followed that the first principle upon which all courts of equity proceeded, was that where parties who had entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent entered upon a course of negotiation which had the effect of leading one of the parties to suppose that the strict rights arising under the contract would not be enforced, or would be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights would not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.[29]

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[27]Per Lord Browne-Wilkinson, at page 117. The Federal Court moved away from the traditional position on American equity jurisprudence where the Supreme Court of the United States in *Dickerson v Colgrove* (1880) 100 US 578, at page 580 (Swayne J) held that the vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. This involves a change of position and fraud and falsehood, which the law abhors. It is to promote justice that the remedy is applied.

[27a][1976] 1 Ch 170.

[28][1877] 2 App Cas 439, at page 448.

[29]*Ibid.*

In *Cheng Hang Guan and 2 others v Perumahan Farlim (Penang),*[30] the Supreme Court in Malaysia was of a similar view as the court in *Hughes v Metropolitan Railway Co.* when it ruled that a pre-existing legal relationship which could give rise to liabilities and penalties between the parties was sufficient.

In *Birminghan and District Land Company v London & North Western Railway Company*, Bowen LJ, elaborating on the principle, stated that where persons who had contractual rights that would either not be enforced or would be kept in suspense or abeyance for some particular time, they would not be allowed by a court of equity to enforce the rights until such time had elapsed, without at all events placing the parties in the same position as they were before.[31]

2.3.1 Detriment in Equitable Promissory Estoppel

Some of the cases before *Boustead* have required detriment on the part of the plaintiff, for example, in *Bank Bumiputra Malaysia Bhd v Purana Industries Sdn Bhd.*[32] In this case, the High Court at Johore Bahru held that there had to be a representation (whether by words or by conduct) and a detriment, before an estoppel could arise. Though the doctrine can be used both as a shield and a sword, in Malaysia the preponderance of case-law points to the fact that it has always been used as a shield.

Other cases on equitable estoppel include *Cheah Kim Tong & Anor v Taaro Kaur,*[33] *Kewangan Usaha Bersatu Bhd v Makok Devpt Sdn Bhd,*[34] *Aw Yong Wai Choo and Others v Arief Trading Sdn Bhd,*[35] *Sim Siok Eng v Government of Malaysia,*[36] and *Majlis Amanah Rakyat (MARA) v Tam Seek Hong and 54 Others.*[37]

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[30][1993] 3 MLJ 352, at page 402-403; [1994] 2 AMR 25. *High Trees* Estoppel applied.

[31][1899] 40 Ch D 268.

[32](1990) BLD (January) 43.

[33](1990) BLD (January) 44 and 45.

[34][1991] 1 CLJ 760. Upheld the decision of *Hughes v Metropolitan Railway Company* [1877] 2 App Cas 439, at page 448.

[35][1992] 1 MLJ 166.

[36][1978] 1 MLJ 15. Approved and applied *Crabb v Arun District Council* and *Birmingham and District Land Company v London and North Western Railway Company.*

[37][1994] 2 AMR 25.

The *High Trees* Estoppel expounded by Lord Denning in *Central London Property Trust Ltd v High Trees House Ltd* states that where one party had, by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them, and to be acted on accordingly, then, once the other party had taken him at his word and acted on it, the one who gave the promise or assurance could not afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he had to accept their legal relations subject to such qualification which he himself had so introduced, even though it was not supported in point of law by any consideration, but only by his word.[38]

This doctrine has flourished greatly in New Zealand and to some extent in Australia. There are certain perceived differences between *High Trees* Estoppel and Promissory Estoppel by Representation. *High Trees* Estoppel is thought to be narrower because it applies to subsisting legal relations between the parties. It applies to representations of intention. It operates if the representee conducts his affairs on the basis of the representation irrespective of whether he suffered such a detriment or not. It does not have a permanent effect. The representor would be allowed to resile upon his promise, giving reasonable notice to the representee of his intention to do so, provided that the representee could resume his original position. On the other hand, the traditional view was that Promissory Estoppel by Representation required the representee to act to his detriment in reliance on the representations, so that he is worse off for doing so. Now that the detriment of the promisee is no longer a feature of this relief, the difference between *High Trees* Estoppel and Promissory Estoppel by representation varies according to the interpretation of the relationship between the parties concerned.

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[38][1947] 1 KB 130.

3. Estoppel According to the *Boustead* Case

3.1 Facts

Chemitrade Sdn Bhd (Chemitrade) was a company that sold and delivered goods to Boustead Trading Sdn Bhd (Boustead) for distribution to retail outlets. The goods were sold to Boustead on credit which meant that Boustead could pay after a period of time. At the time of the case, Boustead owed Chemitrade approximately RM45,000, a sum of money urgently needed by Chemitrade. To ease its financial constriction, on October 23, 1989, Chemitrade entered into a factoring agreement with the Arab-Malaysian Merchant Bank Bhd (the Arab-Malaysian Bank), to factor Chemitrade's book debts. Approximately four and a half months later, by a letter dated February 13, 1990, Chemitrade gave Boustead notice of the factoring arrangement with the Arab-Malaysian Bank. *Inter alia*, it recited that a total of RM45,000 was owing to Chemitrade by Boustead. The letter had a footnote which read:

> We acknowledge that we have notice of the above factoring arrangement between Arab-Malaysian Merchant Bank Berhad and Chemitrade Sdn Bhd and confirm that the above outstanding amount is correct.

The signature of an authorized officer of Boustead appeared below this footnote. Presumably, the concerned officer signed against the dotted line. The very next day, February 14, 1990, the Arab-Malaysian Bank wrote a letter to Boustead where it stated that there was an assignment of present and future debts and receivables from Chemitrade Sdn Bhd.

After this correspondence, for seven months Chemitrade sold and delivered goods to Boustead. The factoring arrangement was put into operation. It worked as follows: with each sale, Boustead issued a purchase order to Chemitrade which in turn invoiced Boustead, indicating a credit period of two months from the date of the invoice. Chemitrade handed a copy of the invoice to the Arab-Malaysian Merchant Bank who sent it to Boustead after having stamped it with the following endorsement:

Notice of Assignment

Payable to Arab-Malaysian Merchant Bank Bhd, 23rd floor, Bangunan Arab-Malaysian, No. 55 Jalan Raja Chulan (P.O. Box 11471, 50746 Kuala Lumpur) who has purchased this account. Remittance is to be made directly to them. Any objection to this bill or its terms must be reported to them within 14 days after receipt (when making payment, please make cheque to AMMB Factoring).

3.2 The Issue

Boustead neither complained about any of the invoices that the Arab-Malaysian Bank sent to it within the 14 day period prescribed by the endorsement nor about the imposition of the 14 day period for repayment. Boustead paid the Arab-Malaysian Bank on several of the invoices, except for the impugned 20. These 20 unpaid invoices form the subject-matter of the present dispute. Why did Boustead refuse to make payment on these 20 invoices? This was because Boustead's purchase orders to Chemitrade contained the following cautionary statement referred to as 'Remark':

> **Remark: Cost of these stocks will be contra against cost of stocks returned to Chemitrade from BTSB W/hse for banding on 2 pcs. Lux Soap Promotion.** (emphasis added)

The effect of this cautionary statement, had the Factoring Department of the Bank seen it and acted upon it, would have been that the cost of these stocks need not be factored by the Arab-Malaysian Bank. In other words, there were no book-debts to be factored on these 20 invoices. Therefore, counsel for Boustead contended that:

(1) Nothing was due from it to Chemitrade upon the purchase orders that bore this cautionary statement;
(2) The Arab-Malaysian Bank had a copy of each of the purchase orders that contained the cautionary statement when the Bank served upon Boustead the invoices carrying the endorsement;
(3) The Arab-Malaysian Bank was therefore, at all material times aware, that no payment was due from it to Chemitrade on these invoices; and

(4) Since the Arab-Malaysian Bank paid Chemitrade on these invoices knowing that nothing was due on them from Boustead, the loss must be borne by the said Bank.

3.3 Evidence Faced by the Court: Silence of the Appellant

The Federal Court was faced with the following evidence:

(a) Boustead did not challenge the validity of the impugned invoices within the 14 day prescribed period;
(b) As a result of the above conduct, the Bank was "led to assume or to believe that all was well with the invoices";[39]
(c) The Bank acted upon that assumption and factored the invoices;
(d) By factoring these impugned invoices, Chemitrade was paid;
(e) "It would not have done so but for the appellant's silence";[40] and
(f) It was not required to interfere with the task of evaluation of the evidence or conclusions of fact arrived at by a trial judge.

3.4 New Circumstances

It was to prevent Boustead from denying the effect of their silence on the 14 day period that the court seems to have adopted the 'new posture' on estoppel. The Federal Court neither delved into the issue of the cautionary statement nor expounded the factoring laws and the rights and duties of the Bank in so far as factoring arrangements are concerned. The only new circumstance therefore, was the equity that had to be fulfilled in favour of the Bank based on the court's interpretation of the facts.

3.5 Decision

The Federal Court ruled in favour of the Arab-Malaysian Bank. The Court proffered no explanation as to the legal status of an express cautionary statement that appeared on the 20 impugned invoices. The

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[39]*Supra* note 1, at page 340.

[40]*Supra* note 1, at page 340.

Federal Court, after having undertaken an independent review of the material, both printed and documentary, was satisfied that there was not a shred of evidence to suggest that the respondent, the Bank had knowledge of the purchase orders or of the cautionary statement appearing thereon, when it sent the endorsed invoices to the appellant. The Federal Court dismissed the cautionary statement in the 20 invoices.

The rationale for the decision is as follows. The Federal Court was of the view that the expenses incurred by the appellant, that is Boustead, for the purpose of promoting the sales of Chemitrade's products, entitled the appellant to set-off against moneys due from it to Chemitrade. If Chemitrade had brought an action to recover these items, then the appellant would have been entitled to maintain its set-off. The respondent, that is the Arab-Malaysian Bank, as assignee, could not place itself in a better position than the assignor, which was Chemitrade. The Arab-Malaysian Bank must take the assignment subject to all rights of set-off which the appellant as debtor may have against the assignor. This is a pure question of fact. The Federal Court dismissed the case stating that it was devoid of merit. It was this decision that left the issue of detriment in the cold. The Arab-Malaysian Bank was the assignee and therefore, it could not have better rights against the assignor, which was Chemitrade in a case for set-off. Equitable estoppel was applied in this factoring arrangement but it left a number of unsettled issues.

3.6 Unsettled Issues

Some of the unsettled issues include :

1. It is rather puzzling as to why the cautionary statement was not paid any weight at all. It remains a mystery as to why the Arab-Malaysian Bank did not take any notice of the express cautionary statement when it could and should have been questioned;
2. There was no discussion whatsoever on the cautionary statement even though the parties met on two occasions, and corresponded even after the meetings. Surely the standard of care and scrutiny expected of a factoring department of a bank must be fairly high, perhaps even higher than the standard of a trustee. Could not such

concern have overridden the assignor-assignee argument of the court?

3. Is not the Factoring Department of the Bank in a fiduciary position with respect to the parties in a factoring agreement that they have entered into?
4. Why did Boustead offer no explanation on the cautionary statement? Why was the Factoring Department of the Bank not estopped from:
   (i) denying the existence of the cautionary statement; or
   (ii) denying the effect of an actual notice of the cautionary statement that it served as an express and actual notice to the Bank; and
   (iii) denying the validity of the cautionary statement?
5. It could be said that such conduct on the part of the Bank should estop it from acting to the contrary, for the Bank ought to be deemed to be aware of the express contents of the actual notice; and
6. The pecuniary detriment suffered by Boustead after serving such express notice on the Bank was not taken into consideration by the court.

3.7 Revised Law on Estoppel

The Federal Court laid down the revised law on estoppel as follows:

1. It is regarded as sufficient if counsel were to plead the material facts giving rise to estoppel, without actually using the term "estoppel";[41]
2. The object of modern pleadings is to prevent surprise and to enable disputes to be litigated in an orderly fashion;[42]
3. What requires to be pleaded are the relevant facts which a litigant claims to give rise to an estoppel;[43]
4. There is no special formula in *staccato*;[44]

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[41]See *Lal Somnath Singh & Ors v Ambika Prasad* AIR 1950 All 121 R P 131.

[42]*Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308, at page 320.

[43]*Laws Holdings Pty Ltd v Short* (1972) 46 ALJR 563, at page 571.

[44]*Ibid*, at page 571.

5. Where there is failure to set out the material facts but it occasions no surprise to the opponent,[45] the court may in the interest of justice permit the point to be taken;
6. Where estoppel is not pleaded, but without objection, a body of evidence to support the plea of estoppel is let in, and argument was directed upon the point, it is the bounden duty of a court to consider the evidence and submissions and come to a decision on the issue;[46]
7. Though the general rule is that a party is bound by its pleadings[47] and a judge has the duty to strictly decide a case upon and only upon the issues raised in the pleadings and not upon an unpleaded case,[48] the discretionary prerogative of the presiding judge permits the judge to allow a party to raise an estoppel as an issue on rare occasions in the interests of justice;

[45]*Coppinger v Norton* [1902] 2 *IR* 232, at page 243; *Co-operative Town Bank v Shanmugam Pillay* AIR 1930 Rang 265, at page 268; *Laws Holdings*. Useful reference may also be had to the instructive judgment of Edgard Joseph Jr. J in *Rosita bte Baharom & Anor v Sabedin bin Salleh* [1992] 1 MLJ 379, affirmed by the Supreme Court in [1993] 1 MLJ 393.

[46]*Oversea-Chinese Banking Corp Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1; *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650.

[47]*Haji Mohamed Dom v Sakiman* [1956] MLJ 45 and *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22.

[48][1995] 3 MLJ, at page 342.

8. It is axiomatic that the justice of the case should be the overriding consideration;[49]
9. Estoppel is both a sword and a shield.

The Federal Court pointed out that the doctrine of estoppel was used in Malaysia in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1953;[50] to enlarge or reduce the rights or obligations of a party under a contract;[51] it has operated to prevent a litigant from denying the validity of an otherwise invalid trust;[52] or the validity of an option in a lease declared by statute to be invalid for want of registration;[53] to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent;[54] to create binding obligations where none previously

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[49][1993] 1 MLJ 182. The reference to the Macmillan Duty and the Greenwood Duty in Banking Law in the case of *United Asian Bank Bhd. v Tai Soon Heng Construction Sdn. Bhd* was not adopted. The Privy Council in this case held that:

> ... unless conduct can be interpreted as amounting to an implied representation, it cannot constitute an estoppel; for the essence of estoppel is a representation (express or implied) intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss. Greenwood's case per Lord Tomlin, at p 57.

The Federal Court did not overrule this case but merely said that the Privy Council in *Tai Hing* was deciding a case of estoppel by representation in circumstances in which there was no duty to speak and the plaintiff had merely remained silent. The Federal Court believed that the PC would have decided differently on the question of estoppel if the customer had encouraged the bank to believe that the cheques were not forged.

[50]*Alfred Templeton & Ors Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, at page 244.

[51]*Sarat Chunder Dey v Gopal Chunder Laha* LR 19 IA 203; *Amalgamated Investment and Property Co Ltd (In liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565.

[52]*Commissioner for Religious Affairs, Terengganu & Ors v Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222.

[53]*Taylor Fashions Ltd v Liverpool Victoria Friendly Society* [1981] 1 All ER 897; [1981] 2 WLR 576.

[54]See *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

existed;[55] it may operate to bind parties as to the meaning or legal effect of a document or clause in a contract which they have settled upon;[56] and/or which the party to the contract has represented or encouraged the other to believe as the true legal effect or meaning;[57]

10. The doctrine does not merely cover cases of representations of fact and encouragement in the belief of the existence or non-existence of a fact;
11. The law is no different when the encouragement comes in the form of silence;[58] and
12. Where the traditional view was that a litigant who invoked the doctrine had to prove that he was induced by the conduct of his opponent to have acted in a particular way, it is no longer so required.

The Malaysian Federal Court in *Boustead* to a large extent followed the Australian decision, namely, *Walton Stores (Interstate) Ltd v Maher*[59] and the English case, *Amalgated Investment and Property Co Ltd (In liquidation) v Texas Commerce International Bank Ltd.*[60]

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[55]*Spiro v Lintern* [1973] 3 All ER 319; [1973] 1 WLR 1002.

[56]See the *Amalgamated* case.

[57]*American Surety Co of New York v Calgary Milling Co Ltd* (1919) 48 DLR 295; *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330; *Taylor Fashions.*

[58]See VC George JCA (as he then was) in *MAA Holdings Sdn Bhd & Anor v Ng Siew Wah & Ors*, per Thesiger LJ in *De Bussche v Alt* (1878) 8 ChD 286, at page 314, where the defendant remained silent while the purchaser had paid moneys to him, see [1986] 1 MLJ 170, per VC George (then JCA), where the judge relied upon the judgment given by Robert Goff J in *Societe Italo-Belge v Palm Oils* who said that to establish inequity, it is not necessary to show detriment.

[59](1988) 164 CLR 387. In the *Waltons Stores* case the court allowed estoppel to be pleaded to set up a cause of action in respect of pre-contractual representations. Mason, Wilson and Brennan JJ merged proprietary estoppel and *High Trees* Estoppel into a single principle of equitable estoppel. In the *Verwayen* case (1990) 170 CLR 394, Dean J drew a distinction between estoppel by conduct (including promissory estoppel) and proprietary estoppel. Meagher, Gummow and Lehane are of the view that the direction of future development of the doctrine is still uncertain. See Meagher, Gummow and Lehane, note 2, at pages 418 and 419.

[60][1982] 1 QB 84, at page 122.

3.8 Detriment in Estoppel

The Federal Court pointed out that the traditional view on detriment in the equity jurisprudence of Malaysia was that one who relied upon an estoppel had to prove that he relied upon his opponent's conduct and in consequence, acted to his detriment.[61] The modern view on the element of detriment is that it does not form part of estoppel. 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 the case, it would be unjust to permit the representor or encourager to insist upon his strict legal rights.

The court in the instant case departed from the earlier decisions in Malaysia where detriment was an important part of the law on estoppel. With regard to the law on detriment, the question is whether proof of detriment is a requisite for all forms of estoppel including promissory estoppel.

Should detriment be defined narrowly as in an estoppel by representation where the detriment is narrowed down to a loss suffered "even before the relevant assumption had proved unjustified detriment flowing from the action or inaction in reliance itself"[62] or broadly as in promissory estoppel defined by Spencer, Bower and Turner where detriment "consisted in any loss that the party arguing the estoppel suffered because the assumption upon which he had relied proved unjustified (but not including where the relevant assumption was that a particular benefit would be granted, the loss of the expected benefit *per se*)"?[63] Should it be confined to pecuniary or non-pecuniary damages? The broader interpretation of detriment in estoppel expounded in the *Waltons Stores* and *Verwayen* cases of Australia followed the Spencer, Bower and Turner approach which in turn found strong support in *Thompson v Palmer*[64] and *Grundt v Great Boulder Pty Gold Mines*

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[61]See, for example, *Wong Fuat Eng v Then Thaw En & Anor* [1965] 2 MLJ 213. The former requirement, namely, that there ought to have been reliance was explored by the decisions in *Amalgamated Investment, Taylor Fashions, Societe Italo-Belge* (sub nom *'The Post Chaser'*) and *Lim Teng Huan.*

[62]Spence, M., note 2, at page 44.

[63]Spence, M., note 2, at page 44.

[64](1933) 49 CLR 507, at page 547, per Dixon J.

Ltd.[65] In *Verwayen*, even non-pecuniary detriment such as psychiatric damage was recognised.[66] Following the decision in *Thompson v Palmer*, detriment had to be proven by the party who sought estoppel.[67]

3.9 Weaknesses of Boustead?

There are three main weaknesses in the *Boustead* case:[68]

1. The *Boustead* decision did not place emphasis upon the element of detriment. All that was required was to show that in the particular circumstances of the case it would be unjust to permit the representor or encouragor to insist upon his strict legal rights. But the question remains as to why it would be unjust to do so unless the court was referring to a very broad interpretation of detriment? Even under an extraordinarily broad interpretation of detriment, the following limitations should apply:

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[65](1937) 59 CLR 641, at pages 674-675, per Dixon J; Spence, M., note 2, at page 45.

[66]*Verwayen*, at page 448.

[67]Spence, M., note 2, at page 45.

[68]The Seven Strengths of Boustead are listed below:

1 Estoppel Unified: though *Boustead* did not specifically speak of merger of the various forms of estoppel, such an effect may be gathered when the Federal Court ruled that the time has come for this court to recognise 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. See [1995] 3 MLJ, at page 344. If the Federal Court was speaking of the unified doctrine of estoppel then it has to be welcomed for two reasons; in *Boustead, Waltons, Verwayens* and several other Malaysian court decisions, the slow but steady abandonment of the distinction between assumptions as to fact and assumptions as to the future means that the courts are taking a step towards their unification, see Spence, M. in Turner, note 2, at page 29. The second reason is that equitable and common law estoppel apply in the same fact situations. Therefore, the remedy to be applied was uncertain and often produced different results. The unified doctrine of estoppel enables the abandonment of the concept of a pre-existing legal relationship between the parties. The legal relationship between the parties refers either to contractual relationships at page the extreme to a relationship of tortfeasor and victim or relationship of plaintiff and defendant, see Spence, M. in Turner, note 2, at page 32. All that a

representee needs 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 acting's. 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, see per Robert Goff J in *Amalgamated Investment* [1982] 1 QB 84, at page 105.

2 The unified doctrine of estoppel enables the doctrine to be used as a shield and as a sword which means that for example, estoppel can give rise to liability in a breach of trust and a negligence situation and can remove certain defences in a case of negligence. See Spence, M. in Turner, note 2, at page 31. See *New Corporation Ltd v Lenfest Communications Inc.*(1996) 21 ACSR 553. Both plaintiffs and defendants could avail themselves of the maxim that equity may be used as a shield and a sword, following the decision of Lord Russell of Killowen in *Dawsons Bank v Nippon Menkwa Kabushuki Kaisha*. See LR 62 1A 100, at page 108 as follows:

> "Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denving the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action." See LR 62 1A 100, at page 108, where the Federal Court in *Boustead* upheld the ruling of Lord Russell of Killoween in *Idawsons Bank v Nippon Menkwa Kabu Shiki Kaisa*.

3 A natural consequence of a unified doctrine would be that privies could perhaps benefit from an estoppel and be bound by it too. In *Verwayen*, the unified doctrine of estoppel enabled the privies to take the benefit of an estoppel and they were also liable to be bound by an estoppel. See Spence, M. in Turner, note 2, at page 33; per Deane J in *Verwayen*.

4 The particular assumption based on the estoppel and raised by the party seeking it would in turn raise issues of specificity of the relevant assumption and an honest belief in the truth of the assumption that a contract will come into existence or a promise be performed. See Spence, M. in Turner, note 2, at pages 34-38. Widely induced assumptions are also covered based on cases like *Ramsden v Dyson* (1866) LR 1 HL 129, *Inwards v Baker* [1965] 1 QB 29 and *Crabb v Arun District Council* [1976] Ch 179. The narrower the assumption, the easier it will be to prove unconscionability.

5 Assumptions under the unified doctrine cover both assumptions as to the future and asumptions as to the present. See Spence, M. in Turner, note 2, at pages 38-41.

6 The party induced must have either acted or refrained from acting pursuant to the reliance placed on the induced assumption. See Spence, M. in Turner, note 2, at pages 41-42.

7 It encourages reliance upon the induced assumption.

(i) detriment had to be that of the party seeking to establish estoppel and not that of a third party;[69]
(ii) detriment in equitable estoppel has to be grounded in "the activity of the party estopped in inducing an assumption and reliance upon it";[70]

2. The plaintiff cannot rely upon the knowledge of the agent or third party of the inducing party's breach of reliability on the induced assumption. Though equitable estoppel can arise in the context of the equitable interest of a beneficiary, it is not necessary that such an equitable interest exists;
3. 'Inducement of an assumption' means:

> 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 acting's*. 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.[71]

The Malaysian cases hold that estoppel applies to represenations of fact and law following the decision in *Taylor Fashions Ltd v Liverpool Trustees Co.*[72] The Federal Court held that it was erroneous to believe that the doctrine was confined to cases where a representation of fact was made or where a party was encouraged by another to believe in the existence or in the non-existence of a fact. It also applies to representations of law.[73] The wide-reaching effect of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment*

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[69]Spence, M., note 2, at page 47.

[70]Spence, M., note 2, at page 47.

[71]Per Robert Goff in *Amalgated Investment* [1982] 1 QB 84, at page 105. Emphasis added.

[72]*Taylor*, at pages 150-151.

[73]*Sarat Chunder Dey* and the *Calgary Miling Co* (among others) to which we have referred earlier concerned cases involving representations not of fact but of law.

case.[74] Where one party induces the creation or encouragement in the mind of the other, the former will not be allowed to resile from that assumption when it would be unfair or unjust to do so. The court did not state what constituted such inducement? Are both direct and indirect[75] inducements included? Do we need the clarity required in the law of contracts in the case of an offer of a contract or do we require an intention to effect legal rights or alternatively do we shy away from contractual intention in the field of equitable estoppel?[76] Or could we apply the 'but-for' rule in causation cases in tort to say that but for the reliance placed by the other party on the induced assumption, such party would not have suffered the unfairness or the injustice?[77] Does it only refer to spoken words or does it include "a nod, a wink, a shake of the head or a smile and silent conduct?"[78] When would silent conduct be communicative enough to be treated as inducement of a particular

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[74](1982) 1 QB 84, at page 122; [1981] 3 All ER 577, at page 584; [1981] 3 WLR 565, at page 575 as given below:

> "The doctrine of estoppel is one of the most flexible and useful in the armoury 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, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At page 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 general 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).

[75]See for instance *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 111 ALR 649, at pages 668-669, per Hill J where it was implied that it might be available in this circumstance, Spence, M., note 2, at page 52.

[76]Spence, M., note 2, at page 51.

[77]Spence, M., note 2, at page 53.

[78]In *Walters v Morgan* (1861) 3 De GF & J 718, at page 724 per Lord Campbell LC it was held that these amount to an inducement of assumption.

assumption? Does the court recognise a duty to speak in silent communication?[79] In *Verwayen*, Deane J ruled that a party against whom the estoppel was raised had to speak when "it [is] his duty in conscience to do so".[80] Or is silence to be interpreted as endorsement of a particular assumption in all the circumstances as a whole? By silence can one party lull another into a sense of false security?[81] To curtail unbridled liability, it is important to establish the nexus between cause and effect.[82]

The other question relates to the interpretation of the terms **'Unfairness' or 'Injustice'**. The court made no mention of the former party causing preventable harm or failing to ensure the reliability of the assumption. However, it is submitted that unfairness or injustice cannot exist in a vacuum. It has to be tied in with detriment to the party raising etoppel. In fact it could be argued that this is what the court intended to do.

Coming back to the facts of the present case, Boustead suffered a detriment that totaled up to RM45,000. Since detriment was not an integral feature of equitable estoppel, the court found in favour of the Bank. Boustead suffered a pecuniary loss after having given a written instruction to the Factoring Department of the Bank. It is submitted that even if Boustead did not raise the issue of detriment, the court had a duty to do minimum justice between the parties. This line of argument has created uncertainty in the law. If 'Detriment' was an essential feature of the doctrine of equitable estoppel, this point would not have been missed. Chemitrade and the Bank had a duty to ensure the reliability of their factoring arrangement. Boustead acted upon and within the terms of the factoring arrangement. Such a turn of events occasions a great deal of surprise. It is important to ascertain the elements of equitable of estoppel, such that there is no element of surprise.

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[79]Spence, M., note 2, at page 53.

[80]*Verwayen*, at page 444. Another case that included a duty to speak in a context where no assumption had been raised was *Ramsden v Dyson*.

[81]Spence, M., note 2, at page 54. See *S & E Promotions v Tobin Brothers Pty Ltd* (1994) 122 ALR 637 where an equitable estoppel was established.

[82]Spence, M., note 2, at page 54.

4. Spencian Model

4.1 Unconscionability and the Principled Spencian Posture on Estoppel

The cautionary statement in the instant case is tied in with issues of detriment and unconscionability and the fulfillment of an equity. It is a question of fact. The issue of the cautionary statement is of fundamental importance, for it is the fulcrum of the case.

The Federal Court in this case missed the window of opportunity to point out the elements of unconscionability or summarise the fundamental and basic features of the doctrine of equitable estoppel. Detriment on the part of the promisee is no longer insisted upon. What matters to the court is that it would be inequitable for the promisor to resile from his representation to the promisee since the promisee has altered his position as a result of the promisor's representation or promise.

4.2 Unconscionability

Unconscionability is a factor that could limit the compensation for detrimental reliance. According to Spence, there are eight criteria that a court must use to determine unconscionability and unconscionable conduct. These are:

1. How was the assumption and reliance upon it induced between the parties? This has been elaborated at length by Deane J in *Verwayen* which basically resolves itself by considering all the circumstances of the case;
2. The content of the relevant assumption;
3. The relative knowledge of the parties which covers present knowledge and knowledge which the party ought to have known, that is knowledge by one party that the other would rely upon that assumption or suffer injustice, unfairness or simply harm;

4. The interest of the parties in the relevant activities in reliance, the importance of which was stressed in *Waltons*;[83]
5. Attention must be paid to the nature and context of the parties relationship, that is, is it a commercial or a consumer relationship?[84]
6. Assessment of the parties relative strength of position,[85] that is how much stronger is one than the other?
7. The history of the parties relationship; and
8. Finally, whether the party who has induced the assumption has taken any step to ensure that he has not caused any preventive harm especially whether there has been an unequivocal and effective communication of notice on this issue.[86]

What would be the nature of remedy that the court would give if it finds that the conduct of the party gives rise to unconscionable conduct? The relief sought is usually to compensate the reliance which may include either personal, proprietary or monetary relief. It is not the function of remedies in equitable estoppel to enforce expectations *per se* or reverse the detriment caused.[87] The concept that influences the court is "minimum equity to do justice between the parties".[88]

Spence is of the view that the *Verwayen* case need not have been handled as an estoppel case at all but one relating to an abuse of process, that is, it relates to a judge's discretion to grant or refuse leave to amend a defence. Spence concludes that the fact that it was decided as an estoppel case shows how important the doctrine had become in Australia. These two cases have enabled Spence to formulate the doctrine of equitable estoppel as follows:

1. Equitable doctrine is a single doctrine of common law and equity,[89]
2. able to be used as either a cause of action or defence

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[83]Spence, M., note 2, at page 62.

[84]Spence, M., note 2, at page 63.

[85]Spence, M., note 2, at page 63. This point has been explained in *Verwayen*, at pages 440-441.

[86]Spence, M., note 2, at pages 64-66; See *Australian Broadcasting Commission v XIVth Commonwealth Games* (1988) 2 BR 318 compared with the *Waltons* case.

[87]Spence, M., note 2, at pages 68-77.

[88]Spence, M., note 2, at pages 66-67.

[89]See *Silvoi v Barbaro* (1988) 13 *NSWLR* 466, at page 472 per Priestley JA; Spence, M., note 2, at page 26.

3. between two parties not necessarily in any kind of pre-existing relationship;
4. To establish an estoppel one party, A, (or his privy),
5. must show that he has held an assumption
6. regarding the present or the future, of fact or of law,
7. and that he has acted or refrained from acting
8. in reliance upon that assumption,
9. To his detriment. The detriment which A must show is that he is in a worse position because the assumption upon which he has relied has proved unjustified, than he would have been had he never held it.
10. A must also show that the other party, B, (or his privy),
11. induced the relevant assumption,
12. and that, having regard to a number of specified considerations, it would be unconscionable for B not to remedy the detriment that A has suffered by relying upon that assumption;
13. When these things are established, the court may award a remedy sufficient to reverse the detriment that A has shown; and
14. Defences.[90]

By adopting the Spencian Model, there is greater certainty in the doctrine of equitable estoppel. This leads to:

> ...a satisfactory and principled structure for this emergent doctrine for it could equip the law better to handle many fact situations that have proved unyielding to legal analysis; ...equitable estoppel is not a panacea for hard cases; ...it can be given a major role in the protection of reliance; ...elements of equitable estoppel need proof; ...the doctrine is to be constrained from being the kind of palm tree justice that many fear only as long as the courts take seriously the proof of its various elements.[91]

The Spencian model of equitable estoppel is believed to be of tremendous service in the civil law of obligations. The doctrine has utility in contract, work undertaken in anticipation of a contract that

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[90]Spence, M., note 2, at page 25.

[91]Spence, M., note 2, at pages 139 and 140.

does not materialise, the battle of forms, firm offers and variations of contracts unsupported by consideration.[92]

5. Conclusion

The facts in the *Boustead* case are fairly clear and had the element of detriment been retained, it would have saved Boustead the loss of RM45,000. The detriment which Boustead suffered shows that this company was in a worse position, because the assumption upon which the company had relied had proved unjustified, than the company would have been had there not been such a factoring arrangement.

Courts have been known to leave detriment out as a feature of equitable estoppel. What is important is that justice must not only be done, but must be seen to be done. It is submitted that in this case, unfortunately, by leaving out the element of detriment, justice has not been effectively meted out to Boustead. This could lead us back to 'palm tree justice'. The court in *Boustead* did well to unify the doctrine of estoppel. All it had to do was to retain the element of detriment as highlighted in the Spencian model.

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[92]Spence, M., note 2, at page vi.

THE LIMITS TO ESTOPPEL: FLEXIBILITY AND UNCONSCIONABILITY

This paper advises caution in giving the doctrine of estoppel too broad a scope. The flexibility and wide utility of estoppel, referred to by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*,[1] make it essential to define the limitations to the doctrine. This need for caution will be highlighted by considering the role of unconscionability in estoppel claims and by defining the circumstances in which estoppel is the appropriate response to unconscionable conduct. As a preliminary point, it should be noted that unconscionability is being discussed here in connection with the *creation* of rights. This is conceptually different to the other use of unconscionability as a factor vitiating an existing contractual agreement.[2] The role of unconscionability will be discussed primarily by reference to English claims to the species of estoppel traditionally referred to as proprietary estoppel. The paper is divided into three parts. The first part provides a historical overview of the development of proprietary estoppel. Second, the role of unconscionability is discussed. Thirdly, the paper considers the correct division between estoppel and restitution, which provides an alternative response to one type of unconscionable conduct. Before considering these, it is necessary to explain the substantive context in which the research for this paper has been conducted.

Proprietary estoppel is one of a number of rules by which rights in land can be acquired without compliance with the usual formality requirements which are imposed in relation to land transactions. It has recently been described by the English Law Commission as "one of

[1][1995] 3 MLJ 331, at page 344.

[2]Nicholas Bamforth, "Unconscionability as a Vitiating Factor" [1995] L.M.C.L.Q. 538, at page 542.