THE COMMUNICATIONS AND MULTIMEDIA ACT 1998: ROOM FOR ESTOPPEL?

Introduction

In 1998, Malaysia passed the Communications and Multimedia Act 1998. This Act regulates the communications and multimedia industry which consists of three traditionally distinct industries of telecommunications, broadcasting and Information Technology (IT). Preceding the CMA 1998, two pieces of legislation governed the telecommunications and broadcasting industries. The Telecommunications Act 1950 governed the telecommunications industry and the Broadcasting Act 1988 governed the broadcasting industry. The IT industry which is now under the ambit of the CMA 1998 used to be, or prefers to refer to themselves as being highly 'unregulated'.

As of 1 April 1999, the CMA 1998 repealed the Telecommunications Act 1950 and the Broadcasting Act 1988.[1] One of the policies of the CMA 1998 is to promote a civil society where information-based services provide the basis of continuing enhancements to the quality of work and life.[2] This may be achieved through the emphasis placed by the Government on self-regulation. By self-regulating the industry, the industry players will be able to determine with better efficiency the need of the consumers. The industry players will not be subjected to rigid, non-flexible rules and policies laid down by the government. Industry players will have better knowledge and

[1]Section 273.

[2]Section 3(2)(b).

information on the needs of the consumers. The CMA 1998 emphasises self-regulation by providing a requirement for the development of voluntary industry codes.[3]

Voluntary Industry Codes

Chapter 9, Part V of the CMA 1998 specifically deals with voluntary industry codes. Industry codes promote self-regulation in an industry and under the CMA 1998, the voluntary industry codes are supported by fallback regulatory safeguards in the event the codes fail. In other words, the Act provides for intervention on the part of the authority in cases where industry self-regulation failed to achieve the overall objects of the Act.

Before an industry code can be established; the Commission[4] may designate an industry body to be an industry forum.[5] Once an industry forum has been established, the industry forum may prepare a voluntary industry code dealing with any matter provided for in the Act either on its own initiative or upon request by the Commission.[6] A voluntary industry code will only be effective[7] and applicable to a particular person or class of persons after it has been registered.[8]

Section 98(1) states that compliance with a registered voluntary industry code is not mandatory. On the other hand, should a person comply with a voluntary industry code, this compliance will be a defence against any prosecution, action or proceeding of any nature, whether in a court or otherwise, regarding any matter dealt with in that code.[9]

Estoppel under the CMA 1998

---

[3]Chapter 9, Part V.

[4]'Commission' refers to the Malaysian Communications and Multimedia Commission.

[5]Section 94(1).

[6]Section 95(1).

[7]Section 95(2).

[8]Section 97(1).

[9]Section 98(2).

The question that is in issue is, does section 98 of the CMA 1998 imply the application of estoppel? In other words, is section 98 estoppel under the CMA 1998? If so, in what way? There are three kinds of estoppel:

(a) estoppel by record;
(b) estoppel by deed; and
(c) estoppel by conduct.

However, it is the third kind of estoppel which might be relevant to the CMA 1998. How is section 98 similar to estoppel?

Compliance with section 98 is not mandatory but it will be a defence against future prosecutions, actions or proceedings taken against the person who is under the ambit of the code. Therefore, if we look at section 98 from the customer's side of things, any person who does not comply with a voluntary industry code is estopped from relying on the Act as a defence. For example, an industry code on advertising requires A, a licensee to register with the Commission the types of advertisement that A wants to advertise and this procedure enables A to get protection against any action taken against him. Therefore, should A choose not to comply with this requirement, then if B (a customer) is not satisfied with A's advertisement in one way or another, A is estopped from relying on section 98 as a defence because he has elected not to comply with section 98.

In *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.*,[10] it was stated:

> "The time has come for this court 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

[10][1995] 3 MLJ 331.

[11]Gopal Sri Ram JCA, at page 344.

> been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless."[11]

Section 98 does not specifically state that it is a section on estoppel but it has the effect of estoppel when one does not comply with the industry code. Hence, an industry player could not rely on section 98 if he does not comply with the code. Therefore, the customer can say that the person (example, licensee) is estopped from applying section 98 if he does not comply with the industry code.

Conclusion

Estoppel is indeed a doctrine of wide application. In fact, the word 'estoppel' may not even be used in certain circumstances but has the effect of an estoppel. This is seen in the CMA 1998. Section 98 does not refer to the application of the doctrine of estoppel. In fact, if we look at section 98 from the licensee's point of view, there may not even be an estoppel but if we examine the section from the customer's point of view, the effect of the section is the application of estoppel.

Safinaz Mohd. Hussein*

* Lecturer
Faculty of Law
Universiti Kebangsaan Malaysia

ESTOPPEL AND ILLEGAL CONTRACTS

1. Introduction

Illegality is recognised as a difficult area of the law which sometimes produces harsh results. A few cases, however, seem extreme even by the standards of this field: innocent parties who have been tricked into illegal bargains and have transferred goods or paid money to rogues seem to end up with no recompense. The seeming injustice naturally spawns creative attempts to offset the perceived rigour of the doctrine of illegality and estoppel is frequently mentioned as a possible means to do this, though it is never explored more than cursorily. This paper attempts to outline the considerations relevant to estoppel in illegality and to sketch the bounds of its possible use, using the (relatively) familiar case of *In re Mahmoud v Ispahani*[1] to anchor the discussion.

2. In *Re Mahmoud*

In August 1919, an order was in force which provided that: "a person shall not either on his own behalf or on behalf of any other person buy or sell or otherwise deal in, any of the articles specified in the schedule ... except under and in accordance with the terms of a licence...". The parties entered into negotiations for the sale of linseed oil, a substance included in the schedule. The plaintiff had a licence; the defendant did not but said that he had applied for one. Later, the defendant told the plaintiff that he had acquired a licence for himself personally and for the company of which he was a director; the latter was true but the former was a deliberate lie. The parties contracted for the delivery of

[1] *In re Mahmoud v Ispahani* [1921] 2 KB 716 (CA) (hereafter "*Mahmoud*").