LAND CONTRACTS AND ESTOPPEL: RELIEF WHERE NONE SHOULD BE GRANTED?

The Common Law and the Sale and Purchase Agreement [SPA]

In Hong Kong, the common law rule that time is of the essence in the performance of contractual time stipulations applies automatically to contracts for the sale and purchase of land unless there is an express term against the essentiality of time: *Luxebond Investment Ltd v Super Asian Investment Ltd*[1] and *Chong Kai Tai v Lee Gee Kee*.[2] The equitable rule, found in section 11 of the *Law Amendment and Reform (Consolidation) Ordinance*[3] reverses the common law rule unless the parties provide to the contrary and applies automatically to most other contracts. Essentiality of time in the SPA relates not only to a specific day but also to a specific time on that day; where the date only is essential, the 'midnight rule' applies: *Camberra Investment Ltd v Chan Wai-tak*.[4]

The innocent party can treat the breach of an express time stipulation either as a breach of a condition, or as an offer of repudiation. Breach of a condition results either in specific performance and perhaps damages for the delay, or in damages on the termination of the contract. Acceptance of an offer of repudiation by the innocent party terminates the contract, enabling the offeree to seek compensation. The choice of accepting or rejecting the offer may well depend on the state of the market, and the identity of the offeror. More usually the offeror is the purchaser, and the vendor accepts the offer. Unless the contract provides

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[1][1998] 2 HKC 108.

[2][1997] 1 HKC 359.

[3]Cap 23.

[4][1989] 1 HKLR 568: Law Society Circular 15/89.

otherwise, the repudiating party will lose all right to relief, and will be liable at least for damages: *Stickney v Keeble.*[5]

The usual essential time stipulation breached, in Hong Kong, is that of completion by the purchaser. Completion is by undertaking under which the purchaser is required to pay the balance of the purchase price on or before the due time on the due date. The vendor hands over the executed Assignment, and, subject to the terms of the contract, gives vacant possession. His solicitor gives an undertaking to produce the title deeds within a specific time: *Chong Kai Tai v Lee Gee Kee*[6] and *Kay Kam Yu v AIE Co Ltd,*[7] contrast with a contract by confirmation: *Wellfit Investments Ltd v Poly Commence Ltd.*[8]

The vendor's immediate action on acceptance of the repudiatory breach is to forfeit the deposit. A deposit of 10% of the purchase price is not a penalty, and in some cases an amount of 20% will also be forfeitable as a deposit: *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd*[9] and *Chu Kit Yuk v Country Wide Industrial Ltd.*[10] Often the vendor will have additional remedies. But under the usual SPA, on the vendor's repudiation, the purchaser will only be entitled to 1% of the purchase price as damages.

There is nothing improper with the vendor relying on his legal rights and forfeiting the deposit. The contract is consensual and the purchaser would have known, in advance, the possible result of default.

The New Equity

But common law contract terms are now in conflict with the new vogue equity. The nominate, identities under which this new equity functions, namely estoppel, unconscionability and restitution, would seem to have the same DNA which illustrates the acceptable role of equity as a system modifying the rigours of the common law despite the ad hoc forms and circumstances in which it operates.

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[5][1915] AC 386.

[6][1997] 1 HKC 359.

[7][1996] 1 HKC 239.

[8][1997] 2 HKC 236.

[9][1993] 2 All ER 370.

[10][1995] 1 HKC 263.

Where the parties are subject to a contract, there remains a niggling doubt whether this indulgent relief should be available. Unfair terms can be sidelined as for example with the *Control of Exemption Clauses Ordinance*;[11] indeed if interpretation of a clause:

> Would lead to extreme results, and on another view it would conform with the reasonable expectations of honest men, the court would incline towards the latter unless the words used compel the opposite conclusion. [*Bewise Motors Co Ltd v Hoi Kong Container Services Ltd*].[12]

Unfair situations in formation can cause avoidance of the contract because of the absence of consensus by reference to the usual vitiating factors, both legal and equitable. Indeed a good example of acceptable avoidance of contractual obligations is exemplified in the *Barclays Bank plc v O' Brien*[13] serial cases. Even to the common lawyer, the equitable defence in *O' Brien* is an example of *injustice,* not to the defendant but to the plaintiff simply because the recipient of financial assistance has been able to avoid his obligations on artificial grounds.

Should the defaulting party require more opportunities for relief than those provided by the contract? It is true that the court will not force the parties to act in good faith in the performance of their obligations; absent an express term to this effect, no obligation will be implied in the contract. By a large stretch of imagination, it could be said that the absence of good faith equates to unconscionability, even though common law is not concerned with motives nor the morality of particular types of behaviour.

But in recent years, dissatisfied repudiating purchasers have gone outside the contract to seek indulgent, equitable relief, justifying this by the behaviour of the vendor.

The Relief Offered by the New Equity to the Defaulting Party

As a general principle, an express, contractual time stipulation was considered to be a denial of the possibility of equitable relief to the

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[11]Cap 71.

[12][1998] 4 HKC 377.

[13][1993] 4 All ER 417.

repudiating party because his failure to be 'ready, willing and able' to perform his contractual obligations represented a discretionary bar to relief: *Steedman v Drinkle*[14] and *Rawson v Hobbs.*[15] Hong Kong had followed *Steedman,* and had declined to accept *Kilmer v British Columbia Orchard*[16] which had permitted relief in certain circumstances.

Traditionally, some relief was available where the repudiating purchaser could excuse his failure to perform because the vendor had waived the time stipulation, or had prevented performance. Equity would also consider an alternative source of relief where there had been 'fraud, accident, surprise or mistake'.

In recent years, courts of equity have added to these traditional excuses a vague concept of unconscionability. Thus a vendor, who had exhibited sharp practices or trickiness, cannot enforce his common law rights because his behaviour had been unconscionable, causing the purchaser to default; so the latter should not be subject to the common law consequences of such default.

There was little examination of the elements of this unconscionability; often its presence seemed to depend on a subjective, judicial interpretation of what constituted improper behaviour. It was used as a general catch-all for new equity. It underlined the new forms of estoppel which had now become a sword as well as a shield: it was unsuccessful in *AG v Humphreys Estates*[17] but *Waltons Stores (Interstate) Ltd v Maher*[18] aggressively exhibited its availability. It could also be found in converting the old defence of unjust enrichment, with input from quantum meruit into restitution: *Pavey & Matthews Pty Ltd v Paul.*[19]

Hong Kong had followed these developments in appropriate cases where the trigger for relief was the unconscionability: *Keung Shiu*

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[14][1916] 1 AC 275.

[15](1961) 107 CLR 466.

[16][1913] AC 319.

[17][1987] AC 114.

[18](1988) 76 ALR 513.

[19](1987) 60 ALJR 150.

Tang v DH Shuttlecocks Ltd;[20] *Cheung Yun-Ho v Wong Kwan-Cheung*[21] and *China Pride Investment Ltd v Silverpole Ltd*.[22]

But in 1997, the Privy Council considered that unconscionability as a source of relief was inappropriate because this would have contravened *Steedman* and there was no reason to overrule that decision simply because the Hong Kong courts had been too much swayed by the High Court of Australia:[23] *Union Eagle Ltd v Golden Achievement Ltd*.[24] Instead, it was suggested that if the repudiating party deserved relief, then the source of that should be either estoppel or restitution. Of these, only estoppel will be considered here.

The Modern Estoppel

Estoppel would seem to represent an amalgamation of traditional:

(i) proprietary estoppel: which, as either a defence or a cause of action prevents unconscionable insistence on strict legal rights by a landholder who had made a representation or acquiescence against those rights: *Dillwyn v Llewellyn*;[25] *Ramsden v Dyson*;[26] *Plimmer v Mayor of Wellington*;[27] *Inwards v Baker*[28] and *Taylor's Fashions v Liverpool*;[29]

(ii) promissory estoppel which requires a representation which the representor intends the representee to act upon, action by the

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[20][1994] 1 HKC 286.

[21][1995] 2 HKLR 90.

[22][1994] 2 HKC 341.

[23]This recalls the advice of the Privy Council in *Haji Abdul Rahman v Mohamed Hassan* (1915) FMSLR 12 where it would seem that the Board misunderstood the concept of a jual janji.

[24][1997] 3 HKC 173.

[25](1862) 4 De GF & J 517.

[26](1886) LR 1 HL 129.

[27](1884) 9 App Cas 699.

[28][1965] 2 QB 29.

[29][1982] QB 133.

representee in reliance of that representation and the inability of the representee to resume his former position. It acts as the equivalent of consideration in the waiver of pre-existing contractual obligations: *Central London Trust v High Trees House*;[30] and

(iii) legal estoppel: based on the presence or absence of consideration: *Jorden v Money*.[31]

The 'new estoppel' can be used when and in whatever form as necessary. Thus it is a flexible concept able to be relied upon:

(i) as consideration for the waiver of pre-existing contractual obligations, as in *High Trees* as 'a shield and not a sword': *Legione v Hateley*[32] where the statement was not clear enough to act as a representation;

(ii) in the formation of a contract as something akin to evidence of 'intention to be bound: *Waltons Stores v Maher*[33] and *Foran v Wight*,[34] contrast with *AG v Humphrey's Estates*.[35] In this guise estoppel, apparently promissory estoppel although referred to merely as estoppel, is totally antipathetic to *High Trees*; and

(iii) as a negative representation where there is a pre-existing contract: *Foran v Wight*.[36] Often this form supports relief against forfeiture of deposit against a repudiating purchaser.

Estoppel, in this latter form, was relied upon in *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd*[37] where the

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[30][1947] KB 130.

[31](1854) 10 ER 868.

[32](1983) 152 CLR 406.

[33](1988) 76 ALR 513.

[34](1989) 64 ALJR 1.

[35][1987] AC 114.

[36](1989) 64 ALJR 1.

[37][1997] 3 HKC 440.

vendor's unconscionability led to the repudiating purchaser obtaining specific performance, not the more usual relief against forfeiture.

In *Pacific South*, the purchaser had paid a requisite initial deposit and was to pay a further deposit on the signing of the formal SPA. The purchaser's solicitor sent the signed SPA to the vendor's solicitor with the purchaser's personal cheque for the further deposit. The draft SPA went backwards and forwards between the solicitors. No immediate complaint about the type of cheque was made but later, after some 'toing' and 'froing' of the cheque, the vendor's solicitor returned it claiming the contract had been rescinded. The purchaser sought specific performance which the trial court granted. The vendor unsuccessfully appealed. In a 2:1 judgment, the Court of Appeal considered the behaviour of the vendor had been unconscionable, and wary of the words of the Privy Council identified estoppel as the source of relief, and that relief as specific performance.

This estoppel was not based on a positive representation but on negative factors. The tender of the personal cheque was good tender because the vendor's solicitor had deluded the purchaser into thinking there was no objection to it, until it was too late. Thus:

> What the vendor's solicitors thought they were playing at I do not know; but in the absence of any explanation otherwise, it seems to me that the only possible inference to be drawn from their conduct is that they deliberately set up the purchaser's solicitors, with a view to enabling the vendor to call off the contract without giving the purchaser any real opportunity to make a proper tender.
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> The judge took a dim view of the vendor's solicitors' conduct. So do I. They led the purchaser's solicitors into a trap. Their failure to particularise any grounds for their objection to the tender led the purchaser's solicitors into thinking that the tender was objected to on the grounds of prematurity. The purchaser's solicitors were entitled to expect that the vendor's solicitors would have corrected them if their belief as to the vendor's objection to the tender was mistaken. Where one party to a transaction perceives that the other party is labouring under a mistake as to some essential matter, he comes under an obligation to undeceive the other party as the omission to do so will foster and perpetuate the delusion. In such a case silence is in effect a misrepresentation that the facts are indeed as the other

> mistakenly believes them to be; and the first party is estopped from asserting otherwise. In our case, the vendor's solicitors knowing that the purchaser's solicitors believed that the objection to the tender was on the ground of its prematurity, came under an obligation to undeceive the purchaser's solicitors, an obligation which disgracefully, they failed to discharge.[38]

Why did the purchaser's solicitors' not simply ask what the problem was? In the circumstances, silence was to the advantage of their client.

In view of the powerful estoppel found to apply, one disturbing aspect of this decision is that no mention, even inferentially, was made of the nature of the solicitor/client relationship. What responsibility does the client have for his solicitor's actions where those actions relate to the solicitor acting correctly in a professional capacity? Nazareth VP thought that it was 'inconceivable' that the vendor's solicitors would have acted as he did without instructions, and that:

> The overwhelmingly probable reason for their studious suppression of their reason for rejecting the purchaser's tender was the vendor's objective apparently not merely to escape its obligations under the contract, but to do so while forfeiting the purchaser's deposit.[39]

But there was no evidence offered to show such instructions. On the surface the solicitor acted professionally, yet the client was adversely affected by that action. It would seem that the court was attempting to classify the action of the solicitor rather than those of the client as unconscionable and attributing that behaviour to the vendor.

Conclusion

There are three aspects of *Pacific South* which seem to require further consideration. First, whose 'unconscionable' behaviour was it? Could it be said that the fault was in the failure of the vendor's solicitor to ensure that the purchaser's solicitor acted as a sharp conveyancer would act? The vendor's solicitor was not found to have acted unprofessionally.

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[38] *Ibid*, at pages 447-448.

[39] Ibid, at page 449.

Yet there was silence about the purchaser's solicitor's professionalism. Why should the vendor suffer for this? Was the vendor being punished because the purchaser's solicitors did not ask what was wrong with the cheque?

Secondly, does this approach have any effect on agency? Throughout the judgments unconscionability of solicitor and vendor merged. Presumably, the vendor was in a relationship of agency with his solicitor. Of course various other relationships existed also such as a fiduciary relationship. Similar relationships existed between the purchaser and his solicitor. Does the finding of unconscionability leading to estoppel against the vendor as principal, represent a new feature of agency? Here, the vendor, as principal, had to take responsibility for his agent's actions because the principal's motives were suspect, although not proven, even though the agent could have pointed to practice to indicate that he had acted professionally. On the other hand, the purchaser as principal in another agency relationship, gained a benefit from his agent's failure to take action. What is the interaction between estoppel against the principal, for actions by the agent which were **not** contrary to his mandate, and which are not **improper**? Does the decision really mean that agency per se is being re-appraised or is it only the relationship of solicitor and client that is being affected? The effect of estoppel in such cases would seem to require more examination. Where motive is involved, when does the agent become responsible?

Thirdly, the remedy granted was that of specific performance. In the past, unconscionability has led to relief against forfeiture. Does converting unconscionability into estoppel thereby enhance the available remedies?

A final word: is the DNA of the new equity dominant where the conscience of the court is tweaked? Even where, rightfully, there may be no twinge in the conscience of the actors?

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EQUITABLE ESTOPPEL: UNPACKING A DOCTRINE

1. Introduction

The aim in this article is to float an idea. It is that the time has come to discard completely the notion of equitable estoppel - or, more particularly, to discard the notion that there is a 'doctrine' of equitable estoppel. Instead, we should dig a little deeper and ask what exactly the law is doing in these 'estoppel cases' and why it sees fit to do it. On examination, the estoppel cases do not appear to be united by a common theme or doctrine. Rather, they seem to be discrete examples of equitable intervention into the law of obligations - interventions into the law of contract, unjust enrichment and tort. If this is true, then acknowledging it outright would simplify legal analysis and improve remedial predictability. The potential for unpacking the doctrine of equitable estoppel in this way is the focus of this article.[1]

As undergraduates, the received wisdom was that equitable estoppel (and perhaps common law estoppel too) was a 'doctrine'. This made the area sound as if it had parallels with the 'doctrine of contract'. Equity's aim, in line with its general role, was seen as being to prevent representors (E in this article) from relying on their strict legal rights when it is against conscience to do so. Put succinctly, it seemed that equity would intervene whenever E was somehow responsible for the fact that a representee (C in this article) would suffer some detriment if E insisted on his or her strict legal rights. Estoppels could be classified

[1]The idea is not completely new, although previously it seems only to have been suggested in the context of individual cases or limited groups of cases: see, example, Allen, D.E., 'An Equity to Perfect a Gift' (1963) 79 LQR 238, Atiyah, P.S., 'When is an Enforceable Agreement Not a Contract? Answer: When it is an Equity' (1976) 92 LQR 174, Gardner, S. 'Rethinking Family Property' (1993) 109 LQR 263.