The Present Parameters of Promissory Estoppel and Its Changing Role in the English, Australian and Malaysian Contract Law

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Abstract

As an equitable doctrine, promissory estoppel traditionally operates to prohibit a contracting party from going back on his earlier promise to suspend or alter his contractual right on the promisee, who has detrimentally acted in relianceon on such promise. Nevertheless, the continuing evolution of this doctrine after its formal promulgation in 1947 through the High Trees case has led to the changing role of promissory estoppel in contract law. It is presently being applied more flexibly through the compromise made on four of its traditional limitations, which have affected its parameters and resulted in the following phenomenon - the use of promissory estoppel as a sword; the negation of pre-existing contractual relationship; the less stringent requirement of unconscionability in lieu of detrimental reliance; and its extinctive effect. This paper comparatively speaks on the changing role of promissory estoppel in contract law due to its continuing evolution in three common law countries, namely England, Australia and Malaysia.

I. Introduction

Promissory estoppel is meant to prevent any occurrence of inequity or injustice caused by the action of the promisor in backing out from his promise, which had initially led the promisee to act to his detriment. Traditionally, as an equitable doctrine, the scope of the doctrine of promissory estoppel is subject to five

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limitations, which are collectively derived from the *High Trees*[1] and *Hughes*[2] cases - that promissory estoppel only operates as a shield and not as a sword; that there must be a pre-existing contractual relationship; that there must be a clear and unequivocal undertaking; that there must be a proof of detrimental reliance on the representation; and that there shall only be a temporary suspension of contractual obligations and rights.

The continuing evolution of the doctrine, however has seemed to compromise four of its traditional limitations, which is manifested from the following phenomena:

(a) the use of promissory estoppel as a sword;
(b) the negation of the requirement for pre-existing contractual relationship;
(c) the replacement of detrimental reliance by unconscionability; and
(d) the extinctive effect of promissory estoppel.

The above phenomena have significantly altered the parameters of promissory estoppel thereby resulted in the changing role of this doctrine in contract law. Mescher goes further to think that equity has, in some areas, even attempted to override contract law to enforce a promise.[3] This equitable doctrine, which was originally subject to five limitations, now appears to be an open and unlimited doctrine.

II. The Present Paramaters of Promissory Estoppel

On a general scale, courts in England, Australia and Malaysia have been relatively more than willing to develop this equitable doctrine by tailoring its application for the maximum achievement of justice. The development in the three countries has inevitably affected the present parameters of this doctrine.

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1 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.
2 *Hughes v Metropolitan Railway Co* (1877) 2 AC 439.
3 Mescher, Barbara, 'Promise Enforcement by Common Law or Equity'(1990) 64 *ALJ* 536, 543. Her view is shared by Wong Weng Kwai, who suggests in Wong, WK, 'Estoppel by Convention: A Cause of Action? (Pt I)' [1997] 1 MLJ I at p xxii, that according to some scholars, this doctrine has invaded territory formerly dominated solely by contract law. Also cited is Bagot, CHN, 'Equitable Estoppel and Contractual Obligations in the Light of *Waltons Stores v Maher*' (1988) 62 *ALJ* 926. Bagot, in light of the development in Australia, thinks that such invasion has led to the unclear conceptual boundary between the law of contract and the law of estoppel.

It cannot be divulged that such development, on its entirety, poses positive effect to this doctrine and the general contract law at large.[4] The negation of the requirement of pre-existing relationship, for instance, has caused the extension of this doctrine beyond the scope of contract law (which was the original domain of promissory estoppel) to, amongst others, gratuitous promise. Likewise, the permanent effect of this doctrine may relatively create a redundancy in Malaysia where waiver, which also permanently extinguishes a contractual right, has been expressly provided for under s 64 of its Contracts Act 1950.

This development, however, does conversely provide positive effects to this doctrine in the sense that firstly, its ability in fulfilling the objective of providing justice can now be further extended to all contracting parties since promissory estoppel may now be available to a plaintiff. Thus, a promisee, who has suffered from acting upon a promise, can now plead this doctrine as an alternative claim. Secondly, the recognition given to the newer notion of unconscionability in place of the requirement of detrimental reliance on the part of the promisee will, in the end, be able to give more room to justice and fairness in dealings.

A. *The Development in England*

Despite the earlier perception that the English courts are rather slow in developing this doctrine,[5] there are many instances showing the courts' willingness to develop this doctrine although with a certain degree of vigilance.

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[4] See Sir Alexander Turner's view in Spencer, Bower & Turner, *The Law Relating to Estoppel by Representation* (London: Butterworths, 3rd ed, 1977) at p 309, which forewarned that there appeared to be' serious dangers involved in any wider extension of the new estoppel', and those 'who placed value on the doctrine of consideration [might] think that some degree of caution [was] clearly indicated'.

[5] See Syed Misbahul Hasan, 'The Detriment Element and the Reinterpretation of Equitable Estoppel Doctrine in Malaysia', International Workshop on Estoppel (Kuala Lumpur), 1999 at p 2, where in comparing the position of promissory estoppel in England, Australia and Malaysia, he views that the application of this doctrine is more complicated in England because of the requirement of consideration. He believes that the judges in England are more concerned with certainty and security of commercial transactions rather than good faith and fairness.

1. *Promissory estoppel as a sword*

The inclination towards granting promissory estoppel to a plaintiff has begun to crystallise despite running at a slow pace.[6] The English courts have not dealt with the issue forthrightly by asserting that promissory estoppel or equitable estoppel 'can also be used as a sword' but they rather put it subtly in allowing a plea of estoppel by a plaintiff. Such instances come in a long list, which can be seen in the cases of *The 'Henrik Sif'*,[7] where promissory estoppel was allowed to the plaintiff to prove the existence of a contractual element that would give rise to a cause of action in place of other contractual elements such as the existence of an agreement, consideration *etc*; and *Spiro v Lintern*,[8] where estoppel was accepted as giving rise to a binding obligation by allowing the plaintiff purchaser to proceed against the seller's husband as the legal owner.

The most authoritative finding was made in *Crabb v Arun District Council*,[9] where the court allowed the claim by the plaintiff, who sold the northern portion of his land in reliance upon the defendant's representation that he would be able to retain the right of access to his land over the defendant's land, which existed through a gap at point A and gates at point B. However, the gates were subsequently removed by the defendants and the fence was extended across the gap causing the plaintiff's southern portion of the land, which he retained, to be inaccessible. The encouragement made by the defendants to the plaintiff

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6 See Furmston, MP, *Cheshire and Fifoot's Law of Contract* (London: Butterworths, 10th ed, 1981) where it was acknowledged that promissory estoppel could be used ... 'as a weapon of offence, at any rate as a means of obtaining the equitable remedy of equitable remedy of specific performance'. See also Mole, Bob, 'Promises Binding in the Absence of Consideration', http://uniserve.edu.au/law, where, in criticising the decision of Lord Denning in *Combe v Combe* [1951] 2 KB 215 that the promise could not have been intended to be acted upon because the wife has a larger income than the husband, he puts forward an interesting counter-argument to such decision by putting forward an instance that 'What if I attempt to use this argument to cease my car loan repayments to the bank or finance company? Well their income is certainly a good deal bigger than mine'.

7 [1982] 1 Lloyd's Rep 456.

8 [1973] 1 WLR 1002. See *Re Wyvern Developments* [1974] 1 WLR 1097 and *Taylor Fashions v Liverpool Victoria Trustees* [1982] QB 133. See also the House of Lord's prominent view on this issue in the public law case of *Regina v East Sussex County Council, ex p Reprotech* [2003] 1 WLR 348 at p 357 where it is reiterated that 'since estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed', estoppel can always be used as a cause of action.

9 [1976] 3 Ch 179. This step was subsequently followed in *Re Basham* [1986] 1 WLR 1498, where the plaintiff's claim for a right in his stepfather's estate was allowed on the reason that she had gratuitously worked for him for 30 years after having relied on the deceased's promises that she would inherit his estate and in *Johnson v Gore Wood & Co* [2001] 2 WLR 72.

which caused him to act to his detriment by selling the northern portion of his land without reserving a right of access, which sufficiently raised the equity in this case, was found through two distinct grounds:

(i) by leading the plaintiff, with the knowledge of the plaintiff's intention to sell his land in portion, to believe that he would be granted the right of access; and
(ii) by erecting gates and subsequently failing to disabuse him of his belief that he would continue to have access.[10]

In the hallmark case of estoppel by convention, *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd*,[11] Robert Goff J made a profound statement on this issue in relation to equitable estoppel, which included promissory estoppel, that:

> ... It is in my judgment not of itself a bar to an estoppel that its effect may be to enable a party to enforce a cause of action which, without the estoppel, would not exist. It is sometimes said that that an estoppel cannot create a cause of action, or that an estoppel can only act as a shield, not as a sword. In a sense this is true – in the sense that estoppel is not, as a contract is, a source of legal obligation. But, as Lord Denning MR pointed out in *Crabb v Arun District Council* [1976] Ch 179 at p 187, an estoppel may have the effect that a party can enforce a cause of action which, without the estoppel, he would not be able to do.[12]

This judgment by the first instance court was subsequently upheld on appeal to the Court of Appeal. Brandon LJ reflected a very strong inclination in favour of the use of estoppel, which included promissory estoppel, as an independent cause of action by suggesting that:

> This illustrates what I would regard as the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed.[13]

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[10] Anson, *Law of Contract* (Singapore: Oxford University Press, 26th ed, 1984). This development is in line with the prediction by Anson, who studied the trends followed by the common law courts since the formal enunciation of the doctrine by Lord Denning in 1947, that promissory estoppel may be held capable in itself of creating a cause of action in the future.

[11] [1982] 1 QB 84.

[12] *Id* at p 105.

[13] *Id* at p 131.

His Lordship's above words signified his willingness to avail this doctrine to a plaintiff as a cause of action where estoppel could be used as the foundation of an action, without which such an action would fail. Thus, it would not be an exaggeration to say that estoppel may be used as a sword in order to assist a plaintiff in enforcing a cause of action.

The equation between estoppel by convention, proprietary estoppel and promissory estoppel was also stressed at the appellate stage. Lord Denning MR was of the view that as equitable doctrines, these estoppels were of the same principles.[14] Thus, it may be safe to conclude that as far as the application of the decision in this case to the context of promissory estoppel, this remark from the man who was considered as the 'Father of Modern Equity' should not be overlooked in this discussion. There are a significant number of cases on proprietary estoppel that allow its use as an independent cause of action that can be used to analogously describe the development of promissory estoppel to this present stage, by virtue of Lord Denning's equation between the three types of equitable estoppel in the present case. Since proprietary and promissory estoppels are both equitable estoppels, it may not be necessary to say that the parameters of these doctrines are almost similar. The most, and perhaps the only, notable difference is that proprietary estoppel is strictly restricted to matters relating to real properties.

In *Baird Textile Holdings Limited v Marks and Spencer*[15] where although the majority of House of Lords were not in favour of allowing the use of estoppel as a sword, the judgment by Judge LJ, however, is very promising and serves as an indication of the English judges' willingness to adopt this newer conception. His Lordship was candid in voicing his reluctance to share the sceptical view of the majority on this issue by calling the attention of the courts and of those in the legal fraternity that there should now be room for change and development in the atmosphere where the question of 'whether equity can provide a remedy which cannot be provided by contract' seems to linger.

Albeit the absence of any positive assertion that promissory estoppel can be used as a sword, the facts that the courts in the above-discussed cases have been willing to award estoppels pleaded by the plaintiffs is sufficient to signify the move towards allowing promissory estoppel to be used 'aggressively' as a cause of action or to assist an independent cause of action. This development is aligned with Furmston's opinion that the maxim that 'promissory estoppel can

[14] *Id* at p 122.
[15] [2001] EWCA Civ 274.

only be used as a shield but not as a sword' does not limit the doctrine to a defendant alone. Furmston said:

> This striking metaphor should not be sloppily mistranslated into a notion that only defendants can rely on the principle. There is no reason why a plaintiff should not rely on it, provided he has an independent cause of action.[16]

2. *Pre-existing contractual relationship*

It has been viewed that the traditional argument that promissory estoppel has no application where parties do not stand in contractual relationship has now appeared to be insignificant.[17] There is a trail of English cases in support of this view such as *Durham Fancy Goods Ltd v Michael Jackson*,[18] where Donaldson J said that it was not necessary to have an existing contractual relationship when invoking promissory estoppel, provided there was a pre-existing legal relationship which could, in the circumstances, give rise to liabilities and penalties. This development propels the notion that the absence of a legally binding relationship is not tio be considered as an impediment to a plea of estoppel so long as there is evidence of 'sufficient legal relationship' that would cause inequity or injustice to the representee.

Instances where the English courts are found to be willing to extend the application of this doctrine beyond contractual relationships can be clearly seen in *Amalgamated Investment & Property Ltd (In Liquidation) v Texas Commerce International Bank Ltd*[19] where the requirement of contractual

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16 *Cheshire, Fifoot and Furmston's Law of Contract (Singapore and Malaysian Edition)* (Singapore: Butterworths, 1994) at p 181.

17 Matta, Ali Mohamad, 'The Development of Promissory Estoppel', International Workshop on Estoppel (Kuala Lumpur), 1999, at p 2. His view was made in reference to the House of Lords' decision in *Arun District Council*'s case, where it was held that promissory estoppel was created where a new legal relationship is to be brought into being and not limited to cases where the representation is intended to affect an existing contractual relationship.

18 [1968] 2 QB 839. See also *The 'Henrik Sif'*, where promissory estoppel was allowed as an alternative form of other contractual element such as the existence of an agreement, consideration *etc* to give rise to a cause of action, and *Evenden v Guildford City Association Football Club Ltd* [1975] 1 QB 917, where an estoppel was found on a promise made by a new employer to a new employee that he would be credited with his years of service for his ex-employer.

19 [1982] 1 QB 84. See Robert Goff J's profound judgment at p 107 that:

> ... Where, as in cases of promissory estoppel, the estoppel is founded upon a representation by a party that he will not enforce his legal rights, it is of course a prerequisite of the estoppel that there should be an existing legal relationship

relationship was considered as unnecessary in the invalidity of the guarantee for the loan to the plaintiff because the representations and encouragements by the plaintiff, which led the defendant and the Bahamian bank to disburse loan to him, was deemed as sufficient to give rise to an estoppel. The above cases imply that the doctrine of consideration has started to deplete and has given way to gratuitous promise. The collapse of the two essential doctrines of Freedom of Contract *ie* 'consensualism' and 'individualism' may very well be attributed to the current trend in contract law as has been predicted by Atiyah.[20]

However, in the midst of applause and criticism to the effort shown by the English courts to extend the application of promissory estoppel beyond contractual relationships, the overall development in England has proven that its courts are beginning to open up to allow this doctrine even to non-contracting parties provided there exists sufficient legal relationship.

3. *The dichotomy between detrimental reliance and unconscionability*

The imposition of the requirement of 'detrimental reliance' has in fact contributed to a state of ambiguity of this doctrine. Cracknell, who believes that the ambiguity of the concept of promissory estoppel lies with this issue of detrimental reliance, whereby it would be inequitable to let the promisor resile from his promise because by believing or relying on the promise, the promisee has altered his position to his detriment. He puts forward a question - 'Is detriment necessary for promissory estoppel?', which he subsequently answers that -'Prima facie in

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between the parties. But where, for example, the estoppel relates to the legal effect of a transaction between the parties, it does not necessarily follow that the underlying transaction should constitute a binding legal relationship. In such a case the representation may well, as I have already indicated, give rise to an estoppel although the effect is to enlarge the obligations of the representor; and I can see no reason in principle why this should not be so, even if the underlying transaction would, but for the estoppel, be devoid of legal effect.

[20] Atiyah, PS, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979). An opponent to this development can be seen in Cracknell (ed), *Obligations: Contract Law* (London: Old Bailey Press, 3rd ed, 2001) at p 56, where he criticises Lord Denning's bold view above in Arun District Council's case that promissory estoppel could operate to prevent a person from insisting his strict legal rights arising under a contract, his title deeds or by a statute of law. He bemoans that Lord Denning has extended the doctrine far beyond its original context (as in the *Hughes*' case) whereby 'Lord Cairns was careful to confine his speech to instances where parties ... have entered into distinct terms involving certain legal results, certain penalties or certain legal forfeiture'. This view is also reflected from the decision of the Court of Appeal in *Baird Textile* case, where the Lord Chancellor had called for a reminiscence of Lord Denning's earlier view in *Combe v Combe* [1951] 2 KB 215 that a purely gratuitous promise is unenforceable at law or in equity.

High Trees there was none. Where is a detriment in paying half when one is liable for the whole?'[21]

Although it has been often said that the English courts are somehow reluctant to depart from the extreme requirement of detrimental reliance, the later development, however, has shown that they are starting to open up to a less stringent approach. Lord Denning, a strong proponent in the development of this doctrine, had himself viewed that the element of detriment had either not been insisted upon or had been rejected in applying promissory estoppel.[22] In his final work, Lord Denning had also agreed to the term 'unconscionable' used by the courts, which he considered as an application of the general principle of estoppel as he had originally stated.[23]

The scores of cases that propagate for the departure from the rigid requirement of detrimental reliance began with *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*[24] in which the House of Lords denounced the necessity of having to prove detrimental reliance on the part of the promise by holding that, while admitting that there was such equitable estoppel present between the parties, the appellants' counterclaim constituted sufficient notice of their intention to terminate the suspension of the compensation payment, which was the effect of promissory estoppel, although no date of termination was really specified. Lord Cohen particularly dealt with the issue of satisfying the equity in the present case by saying that the concession was merely a cessation of money payments and it was equitable for the appellants to subsequently revert to their original right by giving notice, which was sufficiently delivered as the counterclaim in the first action.

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[21] Cracknell (ed), *supra*, n 20 at p 57. See also Fuller and Perdue in 'Reliance Interest in Contract Damages' (1936) 46 *Yale LJ* 52, 69, who pointed out to the problem caused by such ambiguous state by proclaiming ' ... by leaving the matter of the controlling motive in this ambiguous state, we have unsettled questions of very considerable practical importance'. An instance showing this unsettled state is through Sir Alexander Turner's proposed test to determine what is 'detriment' in Spencer, Bower & Turner, *supra*, n 4 at p 111, which reads as follows:

> The test of detriment, in a word, is whether it appears unjust or inequitable that the representor 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.

[22] Denning, AT, *'Recent Development in the Doctrine of Consideration'* 15 *MLR* 1 at p 2.

[23] Denning, AT, *The Closing Chapter* (London: Butterworths) at p 257. His view is further supported by Hopkins who notes that from the trends of the English courts, they have appeared to be more than willing to accept unconscionability as the underlying concept in promissory estoppel. See Hopkins, Nicholas, 'The Limits to Estoppel; Flexibility and Unconscionability', International Workshop on Estoppel (Kuala Lumpur), 1999 at p 3.

[24] [1955] 1 WLR 761. There was an agreement between the parties authorising the respondents to manufacture under of a British letters patent owned by the appellants subject to a quota,

Following this case, the Privy Council had also denounced the necessity of proving reliance by simply declaring that 'the promisee altering the position' without mentioning 'detriment' in *Ajayi v Briscoe*.[25] This tendency of the English courts is further highlighted by Lord Denning in *WJ Alan & Co v El Nasr Export & Import Co* by pointing out the absence of any ruling that necessitated the proof of detriment as follows:

> I know that it has been suggested in some quarters that there must be detriment. But I can find no support for it in the authorities cited by the judge. The nearest approach to it is the statement by Viscount Simonds in the *Tool Metal* case ... that the other must have been led 'to alter his position', which was adopted by Lord Hodson in *Emanuel Ayodeji Ajayi v RT Briscoe (Nigeria) Ltd*. But that only means that he must have been led to act differently from what he otherwise would have done.[26]

Despite this development to adopt the newer notion of unconscionability, there are still a small quarter of English judges who were quite reluctant to move forward to this newer notion. This judicial attitude can be seen in *Woodhouse Ac Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd*,[27] but a deeper scrutiny on the fact of this case would show that the plea of

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by which Clause 5 of the agreement expressly compelled the respondents to pay compensation of 30% of the excess net value if the monthly aggregate quantity of contract material were to exceed a stated quantity. In 1942, pursuant to a discussion between the parties, the payments of compensation were suspended pending the formation of a new agreement. After the respondents refused to accept the proposed new agreement in 1945, they filed a suit for fraud and breach of contract, which prompted the appellants to counterclaim for payment of compensation under the agreement. The counterclaim failed on appeal on the equitable ground that the waiver was still continuing despite no allegation by the respondents of any equitable bar, or estoppel, in neither their statement of claim nor reply. Subsequently, the appellants filed the present action claiming payment of compensation alleged to be due, to which the respondents defended that the counterclaim in the first action did not sufficiently operate as a notice to terminate the equitable arrangements for the suspension of the payments. The claim succeeded at the first instance court but the decision was reversed on appeal.

[25] [1964] 1 WLR 1326. Lord Hodson, in delivering the decision of the Judicial Committee, expressly stated that one of the qualifications to this equitable relief was that 'the other party has altered his position'. Once again, the word 'detriment' was absent throughout the judgment, which implicitly suggest that it was not considered as a prerequisite in establishing promissory estoppel so long as the promise had altered his position by acting upon the representation by the promisor.

[26] [1972] 2 QB 189, 213. This new tradition was subsequently continued by eight other cases such as *The 'Henrik Sif'*, *The 'Vistafjord'* and the latest is *Johnson v Gore Wood* [2000] UKHL 65. On top of these cases, the court in the *London Borough of Hillingdon*'s case went on to regard detriment as only a component in unconscionability, which was considered a bigger factor.

[27] (1972) AC 741.

estoppel was disallowed because the representation relied on by the representee was found to be equivocal and thus the fourth requirement of promissory estoppel was not satisfied. Hence, the refusal to this plea was due to non-satisfaction of the requirement of detriment.

In the study on the dichotomy between these two extreme notions, an important discovery has been made that despite the English courts' willingness and unwillingness to move towards the newer notion of 'unconscionability', there was always a similar focal point shown by the courts. In almost every case cited above, the most central issue discussed was 'equitability'.[28] This discovery is supposedly not to be a bolt from the blue because as an equitable doctrine, it must be admitted that the utmost consideration to be given in any issue should be the question of 'equitability'.[29] The cases that clearly propagated for this moderate approach are *Taylor Fashions v Liverpool Victoria Trustees*,[30] *Amalgamated Investment & Property Ltd v Texas Bank*,[31] *Socie'te' Italo-Belge Pour Le Commerce et I'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The 'Post Chaser')*[32] and *Jean Milne-Berry Terence Madden v London Borough of Tower Hamlets*[33] where the courts' finding were mostly based on the notion of fairness and equitability. In *The 'Post Chaser'*,[34] Robert Goff J was satisfied that the acts of the seller, in relying upon the buyers' representation to arrange his affairs and tender the documents of goods to the buyer, were indeed inequitable to him. Such inequity

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[28] This is in line with Matta's view that the two opposing notions of detriment and unconscionability as too extreme. Matta, Ali Mohammad, 'Promissory Estoppel: The Unchained Doctrine' [1999] 2 MLJ lxviii at p lxxxvii. This discovery is also supported by Stone, Richard, *Principles of Contract Law* (London: Cavendish, 3rd ed, 1997) at p 67, who views that although 'reliance' does not need 'detriment', the presence of detriment would make it easier to establish inequitability.

[29] See also Cohen, 'Pre-contractual Duties: Two Freedoms and the Contract to Negotiate' in Beatson, J and Friedmann, D (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon, 1985) at p 31, where another notable discovery can be analogised from Cohen's proposition that another important notion in equity *in lieu* of detrimental reliance is 'good faith which was conceded by Halson, who notes that references to good faith is becoming a more common feature of English law Halson, Roger, *Contract Law* (London: Longman, 2001) at pp 112–113. The notion of good faith has received a fair consideration in equity; good faith and fairness have always been treated as important elements in the test of 'equitability'.

[30] [1982] QB 133.

[31] [1982] QB 84.

[32] [1982] 1 All ER 19, [1981] 2 Lloyd's Rep 695.

[33] [1997] EWCA Civ 1223.

[34] [1982] 1 All ER 19. In this case, the representation of the buyers came in the forms of their failure to protest to the vendor's earlier failure to make declaration of the ship in writing after it sailed with the cargo of palm oil and also their subsequent request to the seller to hand-over the documents of the goods to the sub-buyers. The seller, upon such

was found to exist in the sense that by relying on the buyers' representation and proceeded to act as such, the seller had missed the opportunity, which would otherwise be available to him, to get a better price for the documents if he were to sell it elsewhere. On the question of whether the buyer had waived their right to reject the documents, Robert Goff J did not explicitly use the test of detriment or prejudice. Even in his finding that promissory estoppel has been sufficiently raised against the buyers, the test used was 'whether it was equitable to allow the buyers to go back on his representation'. Robert Goff J had clearly adopted Oliver J's approach in the *Taylor Fashions* case[35] by reviving Lord Cairn's earlier words in the *Hughes*' case in articulating that the main object of the principle was not to allow the representor to enforce his rights where it would be inequitable to the representee due to the dealings that had taken place between the parties.

The cautious measures demonstrated by both Goff and Oliver JJ in applying this doctrine in the above cases, which can be seen from their disinclination to use the notion of detriment and the notion of unconscionability, had relatively spruced up a moderate notion - rather than going for any of these two extreme notions, they were determined that as an equitable doctrine, which inadvertently served to fulfil the objectives of equity, the applicable test should be 'equitability'. Goff J's words to such effect can be seen clearly in the judgment:

> But it does not follow that in every case in which the representee has acted, or failed to act, in reliance of that representation, it will be inequitable for the representor to enforce his rights for the nature of the action, or inaction, may be insufficient to give rise to the equity ...[36]

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representation, acted to the request but the documents were rejected two days later, which prompted the buyers to reject them instantly. As a result, the seller was forced to sell the palm oil to another buyer at a lesser price. His claim before the arbitrator was allowed and the buyers were ordered to pay damages.

[35] [1982] QB 133. See Oliver J's view at p 158, that it would '... be most inequitable that the defendants, having put forward Taylor's option as a valid option in two documents, under each of which they are the grantors, and having encouraged Olds to incur expenditure and to alter their position irrevocably, by taking additional premises on the faith of that supposition, should now be permitted to resile and to assert, as they do, that they are and were all along entitled to frustrate the expectation which they themselves created and that the right which they themselves stated to exist did not, at any material time, have any existence in fact'. The use of the words 'inequitable' along with 'unconscionable' in the above judgment may safely be inferred as Oliver J's implicit admonition to the unruly trend of the common law courts. This could also be taken as his preference to take a moderate stand rather than going for any of the two extremes of detrimental reliance and unconscionability.

[36] [1982] 1 All ER 19, 27.

Similarly in a recent case, *Collier v P&M J Wright Ltd*,[37] the Court of Appeal once again upheld a plea of promissory estoppel on the ground of equitability. It was held that where there was a compromise agreement, such agreement was binding, by virtue of the doctrine of promissory estoppel, if it was inequitable for the creditor to enforce his strict legal rights. The appellant, together with his two property development partners, took out a commercial loan with a creditor company. Following a settlement in the county court in April 1999, the appellant and his partners consented to an order that they pay jointly the firm's debts to the creditor company the sum of £46,800 by monthly instalments of £600. Initially, payment was made from the firm's joint account but in the same year, the appellant started paying £200 per month, which he continued doing for five years. The partnership ended in 2000 and the other partners became bankrupt in 2002 and 2004 respectively. In 2006, the creditor company served a statutory demand on the appellant for the balance of the judgment debt plus interest. The appellant alleged that at a meeting with the creditor company representative in 2000, it had been agreed that he should be severally liable for one-third of the debt and continue paying £200 per month and that the company would pursue the other partners for the balance of the debt. He also claimed that he had continued to pay the monthly instalments for five years until his one-third share in the sum of £15,600 was paid off. He consequently contended that the compromise agreement made in 2000 gave rise to genuine triable issues first, as to whether the agreement that the company would accept him as a debtor only for a one-third share of the judgment debt was binding or secondly, whether the creditor company was estopped from proceeding against him.

At the first instance court, although the trial judge found that there were genuine triable issues, the 2000 agreement was unenforceable because it was unsupported by consideration and further that there was no evidence showing that it would be inequitable for the creditor company to resile from it. The Court of Appeal allowed the appellant's appeal by finding that where there had been true accord under which a creditor voluntarily accepted a debtor's offer to pay part only of the amount he owed and relying on the creditor's acceptance, the debtor paid that part of the amount he owed in full, by virtue of promissory estoppel, the creditor would be obliged the accept the payment in full and final satisfaction of the whole debt. According to Arden LJ, the ground for granting promissory estoppel, as one exception of the Pinnel's rule, was equitability since for the creditor to resile from his promise would of itself be inequitable.[38]

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[37] [2007] ECWA Civ 1329, 643.
[38] *Id* at p 659.

In the end, it may be concluded that in the midst of the English courts's obvious willingness to depart from the rigid requirement of detrimental reliance, their vigilance in opting for the moderate view is well manifested from their preference for 'equitability', 'justice', 'fairness' as well as 'good faith'. This moderation may be safely taken to represent the English judicial attitude of trying to delimit this doctrine without going too far from its original parameters.

4. *The effect of promissory estoppel: suspensory or extinctive*

The traditional effect of this equitable doctrine has in fact been criticised that if the right of the promisor is only to be temporarily held back, which can be subsequently revived, it would render this doctrine as worthless as far as the promisee is concerned.[39] As a manifestation to this fiery view, the English courts have been found to be relatively open to treat the effect of promissory estoppel as extinctive although there were cases where courts were reluctant to move away from the suspensory nature of this doctrine. The latest development has shown that the English courts are 'slowly' giving way to this doctrine to operate permanently where the situation warrants for such option. One such instance is *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* where the House of Lords found the appellants as entitled to claim for the compensation due to them as from 1 January 1947 and their right to compensation under the contract was resumed after due 'notice' was served. Although this finding may reflect the House of Lords' intention to only give a suspensory effect to this doctrine, a hypothetical situation may be raised that if the appellants were to also claim the compensation during the wartime until 1 June 1945 as mentioned in the counterclaim in the first action or until 1 January 1947, the court would have decided that promissory estoppel had operated in this case to prevent the appellants permanently from insisting this strict legal right.

Similar judicial attitude is seen in *D & C Builders Ltd v Rees*,[40] where it was held that promissory estoppel could operate to extinguish a debt after part payment had been made. Nevertheless, it must be emphasised that the contractual right involved in this present case was in the form of a single lump sum and not in the form of periodical payments as those in the *High Trees* and *Tool Metal* cases. Thus whether estoppel was to act temporarily or permanently in this case was not really significant. Another finding by Lord Denning in giving a permanent effect of this doctrine can be seen in *WJ Alan & Co v El Nasr*

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[39] Cracknell (ed), *supra*, n 20 at p 59.
[40] [1966] 2 QB 617.

Export and Import Co[41] where the promisor's strict legal rights was clearly forbidden from being revived once it was found that it would be too late for the promisor to withdraw from his promise and it would cause injustice to the promisee. Another case reflecting the courts' willingness to give a permanent effect to this doctrine is *Ajayi v Briscoe*.[42] Even though the finding of the Privy Council in this case that promissory estoppel would only have a suspensory effect, Lord Hodson had made a clear exception where this doctrine still qualified to operate permanently if the promisee's position, which had been altered in reliance upon the promise made, could not be resumed.

It must be noted that in most cases, the issue of the effect of this doctrine was not specifically dealt with but inference could be drawn from the courts' orders indicating their willingness to treat promissory estoppel as both extinctive and permanent. Amongst these cases are *Pascoe v Turner*,[43] where it was held that the minimum equity to do justice to the defendant was to compel the plaintiff to give effect to the promises by ordering him to execute a conveyance of the property to the defendant, which reflected the permanent effect of promissory estoppel, and *JT Sydenham v Enichem Elastomers*,[44] where the landlord was permanently estopped from claiming the balance of the rent that had already been paid due to an error made vide the rent review, which set the rent at a very low amount. However, in a more recent case of *Collier v P&M J Wright Ltd*,[45] the Court of Appeal openly dealt with this issue by deciding that

[41] [1972] 2 QB 189. See Lord Denning's view at p 213 that:

> ... But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made.

[42] [1964] 1 WLR 1326. See also *Crabb v Arun District Council* [1976] Ch 179 where the defendants were permanently estopped from resiling from the undertaking made by its representative that there would be access to the plaintiff's land on the ground of unconscionability, injustice and inequitability that would result if the defendants were to be allowed to enforce its rights. In *Nippon Yusen Kaisha v Pacifica Navegacion SA (The 'Ion')* [1980] 2 Lloyd's Rep 245, Mocatta J specifically held for the permanent effect of this doctrine in this case by distinguishing the defendants' accrued right of pleading time bar under article 3, rule 4 of the Hague Rules from recurring obligations as found in the *High Trees*' case.

[43] [1979] 1 WLR 431.

[44] [1989] 1 EGLR 257. See also *Brikom Investments v Carr* [1979] 1 QB 467 where the claim against the first defendant for a contribution towards the repair cost was dismissed on the ground that the landlords were estopped from making any claim against her based on their earlier representation that they would repair the roof at their own expense and in *The 'Henrik Sif'*, the court ordered the first defendants to be estopped from denying liability on the cargo claim made by the plaintiffs, which was a one-off claim. See also *ER Ives Investment v High* [1967] 2 QB 379, *Avon County Council v Howlett* [1983] 1 WLR 605 and *Brikom Investments v Seaford* [1981] 1 WLR 863.

[45] [2007] ECWA Civ 1329, 643.

by virtue of promissory estoppel, the creditor, who voluntarily accepted the debtor's offer to pay only for the part he owed, was bound to accept that sum in full and final satisfaction of the debt. Arden LJ clearly stopped the creditor's strict legal right by proclaiming that:

> ... For him to resile will of itself be inequitable. In addition, in these circumstances, the promissory estoppel has the effect of extinguished the creditor's right to the balance of the debt.[46]

B. *The Development in Australia*

The continuing evolution of promissory estoppel in Australia has shown that the attack on the four limitations of this doctrine have been taking place rather significantly in this country. The Australian courts have been relatively enthusiastic to develop this doctrine for the maximum achievement of justice, which could be attributed to the development in the United States. In many instances, the Australian court had referred to the position in the United States in reaching their decisions. Due to such rigorous development, this doctrine has moved much farther ahead than in England. Starting with the *Waltons Stores*[47] case, the Australian courts have continued to be obtrusive to further develop this doctrine.[48]

1. *Promissory estoppel as a sword*

The development of promissory estoppel in Australia is more rigorous. This fact is conceded by Seddon, who declared that the old adage 'estoppel can only be used as a shield and not as a sword' has now been erased by the *Waltons Stores*' case, where estoppel had been used to impose a contractual obligation on Waltons, who had refused to signed the counterpart of a lease agreement.[49]

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[46] *Id* at p 659.

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

[48] See Halson, *supra*, n 25 at p 375 where he describes the development of promissory estoppel in Australia after *Legione v Hateley* (1983) 152 CLR 406 in 1983 has been dramatic where a number of cases 'have demonstrated one of the most fundamental challenges to the basis of the orthodox contract law'. Halson portrays the development in Australia as follows '...These recent cases evidence the weakening or removal of a number of the restrictive doctrines or maxims which have traditionally limited the operation of the doctrines of estoppel and thereby avoided an overt challenge to the primacy of the agreement intended to create legal relations and supported by considerations as a means of enforcing promissory obligations'.

[49] Seddon, Nicholas, 'Promises Binding in the Absence of Consideration', http://uniserve.edu.au/law.

The speedy progress in the Australian case law has appeared notably in favour of the plaintiffs except in *Austotel v Franklins Selfserve*[50] and *Giumelli v Giumelli*.[51] Amongst the cases that have shown strong inclination towards the use of promissory estoppel as a sword is the leading authority *Waltons Stores v Maher*. In this case Deanne J made a remarkable *ratio* to this point in the following words:

> It has often been said that estoppel can be used only as a shield and not as a sword. In so far as estoppel by conduct is concerned, that statement is generally true only in the very limited sense that such an estoppel operates negatively to preclude the denial of, or a departure from, the assumed or promised state of affairs and does not of itself constitute an independent cause of action. The authoritative expositions of the doctrine of estoppel by conduct ... to be found in judgments in this Court have been consistently framed in general terms and lend no support for a constriction of the doctrine in a way which would preclude a plaintiff from relying upon the assumed or represented mistaken state of affairs (which a defendant is estopped from denying) as the factual foundation of a cause of action arising under ordinary principles of the law.[52]

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[50] (1989) 16 NSWLR 582. in this case estoppel was denied on the facts of the case at the appeal stage. However, the decision in favour of the defendants was not made on the principle of equitable estoppel but on the facts of the case. It was found upon the fact that no agreement in respect of the rent for the larger area, which the defendants were to lease to the plaintiffs, was reached upon by the parties. In this case, there was a letter of intent exchanged, which were expressed to be 'subject to approval of the plans and store size and to all parties entering into a formal agreement for lease', between the defendants property developer and the plaintiffs, who were proprietors of a supermarket store, that were negotiating for the lease of a space in a new suburban property development under construction. In subsequent negotiations, the store size was increased but no agreement was reached on the rent in respect of the enlarged premises. Nevertheless, the plaintiffs continued to acquire special equipments and fittings and terminated their existing lease of premises in a nearby shopping centre. On the parts of the defendants, they also proceeded to construct and adapt the store premises to the plaintiff's specification. On the claim that there was already a binding contract between them, which was denied by the defendant, an order of specific performance in terms of the exchange of letters was nevertheless granted by the trial court on the reason that the defendants' action in its dealings with the plaintiff was unconscionable and gave rise to an equity. On appeal, the decision was reversed and the defendants were found as not estopped by equity. Kirby P related to the fact, which he deemed as the reason why equitable estoppel should be refused in this case, by exclaiming at p 585 that there was:

> ... a sort of cat and mouse game...going on between Franklins, Austotel and the financiers. Everyone [was] trying to put the other one in a corner yet reserve[ing] for himself the liberty to have an out.

[51] (1999) 196 CLR 101 where the plea of estoppel was allowed with reservation.

[52] *Supra*, n 47 at p 445.

This step was then followed in *Lee Gleeson v Sterling Estates*[53] where the plaintiff's claim, which was based on promissory estoppel against the second defendant bank, was allowed upon the finding that his action to complete work despite several apparent previous non-payments was led by the bank's promise. Brownie J specifically referred to the bank's promise as follows:

> ... Whilst it is true that the builder obtained the various other promises contained in the deed, and the various securities provided by the deed, it was the promise of the builder to complete the works within the specified time, and the fulfilment of that promise that enabled block A to be sold, and block B to be sold 'in one line', and the bank to promptly recover from the owner a debt, the payment of which would otherwise have been problematic; and it would be unconscionable for the bank to now deny the existence or the binding quality of its representation to the builder.[54]

In *W v G*,[55] the court was satisfied that both the defendant's promise and conduct, that she would act together with the plaintiff as parents of the children and ' ... would assist and contribute to the raising of these children for so long as this was necessary', was sufficient to give a right of action on the plaintiff against the defendant. In this case, the parties cohabited as lesbian partners for more than eight years. A few years after their cohabitation, the plaintiff told the defendant of her wish of having children, to which the defendant consented and agreed to share responsibility for the children's welfare. The defendant also helped the plaintiff in a course of artificial dissemination, which resulted in the plaintiff giving birth to two children. Subsequently, the parties separated prompting the plaintiff to seek compensation for the loss of the promised financial support on the ground of equitable estoppel.

Coming back to the *Austotel* case, it must be noted that although the plea of estoppel by the plaintiffs was denied on appeal, the decision in favour of the defendants, however, was not made on the principle of equitable estoppel but on the facts of the case. In this case, Priestley JA dissented by proclaiming that

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[53] (1991) 23 NSWLR 571.

[54] *Id* at p 583.

[55] (1996) 20 Fam LR 49. See also the case sof The *News Corporation v Lenfest Communications* (1996) 21 ASCR 553, where Giles J rejected the defendant's allegation that the plaintiff's claim for estoppel was deficient due to its failure to allege that the defendant was estopped from denying the existence of an otherwise accepted cause of action, and *Chamrich Properties v Baulkham Hills Shire Council* [2001] NSWSC 229, where the plaintiffs' claim for estoppel, based on the defendant's express and implied representations that it would pay compensation at market value for land dedicated as public reserve (as distinct from land dedicated as drainage reserve), should succeed in order to evade injustice to the representee.

equitable estoppel should be allowed in the case after the above elements have been fully satisfied. Of the three factors laid down by the judge in justifying his finding that the order for specific performance by reason of equitable estoppel awarded to the plaintiff should be retained, one was significantly based on the adoption of the *Plimmer*'s rule that 'the court must look at the circumstances in this case to decide in what way the equity can be satisfied'. Equity in this case, he believed, could only be satisfied if the plaintiff's plea for equitable estoppel was allowed.

2. *Pre-existing Contractual Relationship*

In Australia, promissory estoppel was relatively recognised as a general principle. It could operate in any legal relations, which do not necessarily involve contractual relations.[56] The argument that the requirement for a pre-existing contractual relationship between the parties has now been negated and has been replaced with a less stringent requirement of any legal relations resulting from pre-contractual negotiations[57] can be strongly supported with a long line of cases led by *Waltons Stores v Maher*.[58] Although both parties in this case admitted that no contract was duly executed since the appellants did not execute the exchange

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[56] Seddon, Nicholas, 'Australian Contract Law: Maelstrom or Measured Mutation?', http://uniserve.edu.au/law. See also the decision by the Supreme Court of the New South Wales in *Morris v Morris* (1982) 1 NSWLR 61 granted the plaintiff's plea for equitable relief, which was for a constructive trust but nonetheless, the finding was more on equitable estoppel. In this case, the plaintiff, sold his home and paid AUD28,000 towards the extension of the home jointly owned by his son and daughter-in-law, the first and second defendants, to provide accommodation for himself indefinitely as part of his son's family. After the breakdown of the defendants' marriage, the first defendant left the house to be followed with the plaintiff's own departure due to the breakdown of personal relationship between him and the second defendant. The plaintiff thereafter claimed proprietary interest in the house. In the court's finding on 'equitable estoppel', it was held that despite there was no inference for the intention to create a trust on the property, it would be unconscionable and inequitable for the defendants to retain the benefit of the plaintiff's expenditure on their property free from any obligation. The satisfaction of the equity in this case was granted in the form of an equitable charge over the property. McLelland J's words that can be considered as depicting an equitable estoppel can be seen at p 63, which read as follows:

> ... However, in my view wider equitable principles operate in the present case. The plaintiff spent money on the defendan's money in the expectation, induced and encouraged by the defendants that he would be able to live there indefinitely as a family member ... .

[57] Seddon, Nicholas, 'The Decline of Offer and Acceptance', http://uniserve.edu.au/law.

[58] In *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at p 455, Dawson J pledged his total agreement with the finding in the *Waltons Stores* case that 'a pre-existing contractual relationship was held not to be a pre-requisite to the application of the doctrine of promissory

of the lease, which inevitably showed that no pre-existing contractual relationship nor any contractual relationship had ever existed between the parties, promissory estoppel was still granted based on the representation by the appellant during the course of negotiations that the store 'should be erected by mid-January 1984'.

The appellant's appeal to the High Court was unanimously dismissed but there were different approaches adopted by the judges with respect to this particular issue. Deanne and Gaudron JJ reasoned their finding that Maher, in taking the action to demolish the old buildings on his land, had assumed that a contract had already come into existence. Deane J based his reasoning on the ordinary practice of solicitors in New South Wales where physical exchange of the original or counterpart of the lease was deemed necessary. He also viewed that there was in fact a 'notional' exchange taking place between the solicitors when the respondent lessor's solicitor held both the original and counterpart for stamping. He proceeded to note as follows:

> In the context of that ordinary practice, there was nothing intrinsically unlikely about the finding that the Mahers believed that, notwithstanding the absence of a physical exchange, there was a binding agreement ...[59]

Brennan J made an important contribution to this doctrine through his explanation[60] that the object of equity is to prevent or to avoid the detriment to the person induced to act or to abstain from acting thereon, which will be suffered if the assumption or expectation is unfulfilled. In his vow that it is through this

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estoppel'. He further commented that this phenomenon is due to the role and nature of equitable estoppel *ie* to prevent unconscionable conduct and its discretionary nature respectively. He opined that '... the protection of the law of contract was seen to lie in the requirement of unconscionable conduct and the discretionary nature of the relief'.

[59] *Id* at pp 436-437. The Australian courts have also been vigilant to award equitable estoppel beyond contractual relationships in *Mobil Oil Australia Ltd v Wellcome International Pty Ltd (Lyndel Nominees Pty Ltd)* (1998) 81 FCR 475 and *Chanrich Properties Pty Ltd v Baulkham Hills Shire Council* [2001] NSWSC 229.

[60] *Id* at p 424. The above explanation by Brennan J may be safely surmised as a clear demarcating line between rights accruing under a duly executed contract and those created by equitable estoppel. Whilst a contractual right is created through agreement and supported with accord and satisfaction, a right under equitable estoppel may be created devoid of such elements. In addition to that, the performance of a contractual right is strictly governed by the terms of the agreement while satisfying an equity based on estoppel may be carried out according to what is necessary to prevent harm or detriment resulting from an unconscionable conduct. By making the above distinction, Brennan J can be safely said as explicating the views of the other Australian judges, who had previously initiated the move to apply this doctrine beyond contractual relationship.

object that non-contractual promises may be treated as equivalent to contractual promises, he laid down two necessary elements to materialise such equation as follows:

(a) the inducement made by the promisor with the knowledge or intention that the promisee will subsequently act or abstain from acting in reliance on the promise, which causes the promisee to assume that the promise is intended to affect their legal relations; and
(b) the actual act or abstinence from acting by the promisee causing him detriment.

Brennan J further drew three distinctions between a contract and an equity based on estoppel, which directly refer to promissory estoppel. These distinctions are:

(a) a contractual obligation is created by agreement whilst an equity based on estoppel may be created irrespective of any agreement;
(b) a contractual obligation must be supported by consideration whilst an equity based on estoppel may be established without any consideration; and
(c) a contractual obligation is measured according to the terms of the agreement and the circumstances to which it applies whilst an equity based on estoppel may be measured differently according to what is necessary to prevent harm or detriment resulting from an unconscionable conduct.

Even three years earlier, the tendency to grant estoppel in non-contractual relationships has already taken place in *Riches v Hogben*[61] where it was held by the Supreme Court of Queensland that the claim by the plaintiff based on equitable estoppel would have been allowed if the agreement between the parties were to be unenforceable. McPherson J expressed his enthusiasm to apply this equitable estoppel to a non-contractual relationship in the following words:

> ... However, in case I am wrong about the enforceability of the agreement between the parties, I think I should say that I am also persuaded that the same result can be reached in favour of the plaintiff on the basis of an equity of expectation ... That obligation attaches not because of the ownership but because of the expectation that she raised in the plaintiff and of his detrimental conduct subsequently encouraged by the defendant in reliance thereon.[62]

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[61] [1985] 2 Qd R 292.
[62] *Id* at pp 300 and 302. It can be safely inferred that this alternative finding is important to show that the Australian courts at this time were already prepared to grant equitable estoppel

In spite of this encouraging development, there are still some reservations made by the Australian courts. One such instance is *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*[63] where the appellants' plea of estoppel was refused on the ground that no estoppel by convention, as in estoppel by representation, could be granted unless there was an assumed state of affairs to be an assumed state of fact. Similarly, in *Johnson Matthey Ltd v Rochester Overseas Corp*,[64] the plea of estoppel by convention, which was alleged by the plaintiff to have arisen from pre-contractual negotiations for a possible joint enterprise between the parties to manufacture catalytic converters in Australia, was defeated by the operation of the parol evidence rule. In this case, independent from the existence of parol evidence, McLelland J had also rejected the notion that estoppel can be pleaded in pre-contractual relationships. His Justice's indifference to the inclination shown by the other Australian courts is manifested from his melancholic words as follows:

> It would be a serious threat to the stability of commercial relationships and dealings if parties who, after lengthy and intricate negotiations, deliberately recorded their agreement in permanent written form, were subject to the risk of having that permanent written record yield to the inherently less reliable evidence of oral statements made during the course of negotiations, given possibly many years after the event when the witnesses may have become unavailable, and when memories may have faded or become distorted by subsequent occurrences and changing perceptions of self interest.[65]

Before jumping into the conclusion that this view must be taken to represent the whole phenomenon in Australia that equitable estoppel should not be allowed in pre-contractual relationship, it must be noted that unlike other cases discussed above, most clearly the *Walton Stores* and *Austotel*'s cases, this particular case was concerned with a conflict between an allegation of a common assumption made during pre-contractual negotiations and the words of a written contract subsequently executed by the parties. It may be relatively said that McLelland J had vehemently protected the solemnity of a written contract where in such conflict, the court was of the view that no oral evidence should supersede the written term of a contract.[66]

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in the absence of a pre-existing contractual relationship. It must also be noted that this case would serve as both proprietary and promissory estoppel case; 'proprietary' because the claim is on a house and 'promissory' because the encouragement was partly by promise and partly by conduct.

[63] (1986) 160 CLR 226.

[64] (1990) 23 NSWLR 19

[65] *Id* at p 195.

[66] His standing may be considered as correct because the present discussion is concerned with the question of whether promissory estoppel can be invoked by a non-contracting party and

Despite some resistance to this development, the Australian courts have shown a stronger inclination to extend the application of promissory estoppel to pre-contractual relationships in view of the overall development of this doctrine. This development is supported by Seah's proposition that the pre-requisite element of contractual relationship has been negated thereby leading this equitable doctrine towards the same ground as where s 52 of the Trade Practices Act 1974 stands.[67]

3. *The dichotomy between detrimental reliance and unconscionability*

Despite the strong arguments supporting the reliance-based approach in estoppel,[68] it must be admitted that the newer notion of unconscionability has gained a strong foothold in Australia, especially as an underlying basis for equitable estoppel. This finding is aligned to the propositions made by Carter and Harland,[69]

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no dichotomy between the words of a written contract and a common assumption created during the negotiation stage is involved. See also *Skywest Aviation Pty Ltd v Commonwealth of Australia* [1995] 126 FLR 61 where the courts were faced with the dichotomy between a written contract and an allegation of equitable estoppel based upon pre-contractual negotiations and priority were given to the sanctity of the formal contract.

[67] Seah, Weeliem, 'Unfulfilled Promissory Contractual Terms and Section 52 of the Australian Trade Practices Act', http://www.murdoch.edu.au/elaw.

[68] Parkinson, P, 'Estoppel' in Parkinson, P (ed), *The Principles of Equity* (Sydney: LBC Information Series, 1996). See also Robertson, Andrew, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 *Melb ULR* 805 at p 807 for similar view. This view was reflected in cases such as *Chin v Miller* (1981) 37 ALR 171 where, before the *Waltons Stores* was decided by the Australian High Court, the Federal Court had expressed their preference on the requirement of detriment by holding that the appellants' appeal should fail because they had suffered no real or material detriment by relying on the respondents' solicitors' statement that the respondents had signed the contracts to purchase a motel and restaurant from the apellants. The appellants were also found to be fail to discharge the *onus* of proving their allegation by adducing sufficient evidence that the respondents had signed the contracts and that, despite the solicitors' statement, the respondents were not estopped from denying that they had signed the contracts. This finding on the validity of the solicitors' statement is in absolute contrast to the subsequent finding in the *Waltons Stores*' case (where Maher's reliance on the Waltons Stores' solicitors' assurance was given effect by the High Court). Nevertheless, this finding by the Federal Court could also be attributed to the fact that the court did not find that the detriment alleged to have been suffered by the appellant was 'real' and 'material' when it was held that the giving up of possession of the motel and restaurant was of mutual benefit to the parties and the appellants had returned to their original position by resuming possession after a month. This view was subsequently adopted by the Court of Appeal of the Northern Territory has nevertheless found differently when it decided in *Territory Insurance Office v Adlington* (1992) 109 FLR 124 that in establishing whatever estoppel relied upon, whether common law or equitable, the element of detriment must be proven.

who view that judicial precedents have established that unconscionability provides the basis for estoppel in Australia. The study on Australian cases has proven that the concept of unconscionability has become a significant theme in the Australian contract law since the past two decades,[70] when the doctrine was given a 'restatement and renewed vigour' by the Australian High Court in 1983 in the *Amadio* case[71] where the mortgage given by the defendants over their property to guarantee the repayment of a business loan made to their son's company was set aside on the ground of unconscionability.[72]

The line of Australian cases following the *Amadio* case that restated the continuing predominance of equitable estoppel was led by the famous *Waltons Stores* case,[73] where the appeal by Waltons Stores was rejected by the High Court, and Mason CJ and Wilson J manifested a vivid preference for a more lenient approach by suggesting that 'equitable estoppel has its basis in unconscionable conduct, rather than the making good of the representations'. Their Justices proceeded to make a summary statement as follows:

> The foregoing review of the doctrine of promissory estoppel indicates that the doctrine extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his

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[69] Carter, JW & Harland, DJ, *Contract Law in Australia* (Sydney: Butterworths, 3rd ed, 1996). See also Fung, DYK, *Pre-contractual Rights and Remedies: Restitution and Promissory Estoppel* (Petaling Jaya: Sweet & Maxwell, 1999) at p 73.

[70] Nevertheless, in DYK Fung, *id* at pp 72-73, it is viewed that the notions of unconscionability and justifiable reliance is interlinked and are both necessary to establish promissory estoppel. It is further viewed that 'the concept of unconscionability is used to justify the need for judicial intervention and formulation of remedy ... Hence the utility of a general principle [justifiable reliance], which is able to get at the idea of and is directly linked to the unconscioanbility on E's part, is required'.

[71] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 where the AustralianHigh Court, five year before *Waltons Stores*, had already decided that the mortgage, given by the defendants over their property to guarantee the repayment of a business loan made to their son's company, was set aside on the grounds of unconscionability. This case was considered as a turning point in restating the Australian law regarding unconscionable dealings.

[72] Harland, David, 'Unconscionable and Unfair Contracts: An Australian Perspective' (1993) *JCL* 134.

[73] DYK Fung suggests that this case reflects a wider doctrine of promissory estoppel where it involves the unconscionable departure from an assumption or expectation justifiably relies on. He views that 'the principle of justifiable reliance viewed in relation to the unconscioanbility of the party sought to be estopped offers sufficient guidance, explanation, and predictability for the legal response called estoppel'. See Fung, *supra*, n 69 at pp 71-72.

> position or suffering detriment, does not bring promissory estoppel into play. Something more would be required ...[74]

They proceeded to view that Waltons Stores was erroneous not to communicate their decision not to proceed with the negotiation upon receipt of the counterpart deed and upon learning on 10 December that Maher had started demolishing the old buildings on the property. Unlike Brennan J,[75] both Mason CJ and Wilson J did not base their findings on the point of fact that the respondent had acted to his detriment by relying on the appellant's promise, but opted to simply base their findings on the concept of 'reasonable expectation', which could have been based on the notion of unconscionability. This approach turned out to be the more popular and much sought after approach in like cases. The Justices described Waltons Stores' act, which they considered as unconscionable as follows:

> ... The appellant's inaction, in all circumstances, constituted clear encouragement or inducement to the respondents to continue to act on the basis of the assumption which they had made. It was unconscionable for it, knowing that the respondents were exposing themselves to detriment by acting on the basis of a false assumption, to adopt a course of inaction which encouraged them in the course they had adopted ... Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.[76]

Shortly after the *Waltons Stores* case, the Court of Appeal in *Silovi Pte Ltd v Barbaro and others*[77] followed the High Court's footstep in accepting unconscionability as the basis in dismissing the appeal from Powell J's decision to grant equitable estoppel pleaded by the respondents to preclude the appellant-

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[74] *Supra*, n 47 at p 406.

[75] *Id* at p 419. Despite his earlier agreement to the notion of unconscionability, that the element attracts the jurisdiction of the court as well as shapes the remedy to be given is 'unconscionable conduct on the part of the person bound by the equity', Brennan J had also exercised some caution from going beyond the prescribed limitation of the doctrine by sticking to the detrimental reliance notion through his subsequent statement at p 423 that 'estoppel ensures that a party who acts in reliance on what another has represented suffers no unjust detriment thereby'.

[76] *Id* at pp 407-408.

[77] (1988) 13 NSWLR 466. See also *Collin v Holden* [1989] VR 510 for similar tendency. More recent illustrations are *GPG Pty v GIO Australia Holdings and Australian Competition* (2001) 117 FCR 23 and *Consumer Commission v Samton Holdings* (2002) 117 FCR 301 where in the latter case, it was proclaimed that under the rubric of unconscionable conduct, equity will set aside a contract or disposition resulting from the knowing exploitation by one party of the special disadvantage of another.

purchasers and the owners of the land from completing the sale of the land until the expiry of the lease on 31 August 1992. The appellate court considered that if the land was to be registered in the appellants' name, it would, as it had threatened the respondents, evict the respondents from the land and that amounted to unconscionable conduct on the owners' part into entering the sale contract with the appellants. Priestley JA said to the effect:

> The application of the foregoing propositions to the facts found by Powell J leaves me in no doubt that the present case is properly generalised as one of equitable estoppel where there has been unconscionable conduct on the part of the owners in entering into a contract the carrying through of which would, on the assumption adopted by all parties and the trial judge, enable Silovi to defeat the assumption encouraged by the owners in the plaintiffs that they had rights entitling them the use and occupation of the land until the agreed date in 1992.[78]

In *Austotel P/L v Franklins Selfserve*,[79] albeit a different finding, the court had also shown its tendency to apply the notion of unconscionability through the dissenting judgments of both Priestley and Kirby JJ. In *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*,[80]

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[78] *Id* at pp 472–473. His Justice further viewed that the owners' unconscionability, arising from the assumed fact that the contract they entered into would permit the purchasers to put the respondents off the land once it were registered as proprietor, gave rise to equitable estoppel, which was sufficient to prevent the later equitable interest of the purchaser acquired under the contract of sale. Although there were threats of future loss on the respondents' part if the purchasers were registered as proprietors of the land, no material or real detriment had been suffered by the respondents. The court solely based its finding of equitable estoppel on unconscionability of the owners' conduct, in the mere presence of possible detriment, which it considered suffice to give rise to the doctrine. After making comparison between the English and American (under Article 90 of the United States Second Restatement of Contract suggests a more lenient approach that the principle is to be expressed in terms of a reasonable expectation on the part of the promisor that his promise will induce action or forbearance by the promisee) approaches on this issue, their Justices chose the later approach by proclaiming their standing on the issue *ie* the appellant should be held liable to their promise, which had induced the respondent to demolish the old building and to subsequently start erecting the new store.

[79] (1989) 16 NSWLR 582. For an opposite view, see Mason CJ's dissenting view in the *Verwayen* case by adopting Brennan J's approach in the *Waltons Stores*' case. In the present case, the Chief Justice reverted back to the traditional limitation of 'detrimental reliance' by proclaiming that all the estoppels share the same fundamental purpose *ie* 'to afford protection against detriment which would follow from a party's change of position if the assumption that led to it were deserted'. Nevertheless, it must be emphasised that his stride is laced with a more pragmatic approach when he continued to make a distinction between the narrow concept of detriment and the broader concept of detriment, which is the real detriment, to support his proposition. In support of his proposition, he proceeded to quote the judgment

the Australian court had moved forward, from determining the dichotomy between detrimental reliance and unconscionability, to explore the meaning of the notion 'unconscionability' especially on its role in equitable estoppel. In this case, which was concerned with the application of s 51AA of the Trade Practices Act 1974 that provides 'a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories', Kirby J was trying to explain how the notion worked as a broader principle by putting the criterion 'the gross inequality of bargaining power' in the definition of 'unconscionability'.[81]

From the overall development in Australia, it can be said that the issue of the dichotomy between the two notions is settled. The Australian courts have relatively shown that their preference is no longer to decide between these competing notions but to step forward in exploring the meaning, scope and application of unconscionability. This valiant attempt by the Australian courts can be inferred from the recent insertion of s 51AA into the Trade Practices Act, which allows a party to invoke the application of unconscionability in the unwritten laws that may also include equitable estoppel. The root of the provision was in *Blomley v Ryan* and *Amadio*.[82]

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of Dixon J in *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641 that reads '... 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'. Despite his adamant standing that the underlying reason of estoppel is to avoid the detriment, he also acknowledged at p 407 that '... The prevention of unconscionable conduct has been identified as the driving force behind equitable estoppel'. Such precautious step can be seen as an attempt to keep pace with the development in his home country. He continued to connect the relationship between these two notions at page 411 in the following words:

> Equity was not concerned to make good the assumption, but to do what was necessary to prevent the suffering of detriment...To do more would sit uncomfortably with a general principle whose underlying foundation was the concept of unconscionability.

[80] [2003] HCA 18.

[81] *Ibid* at para 111. It is important to note that the incorporation of unconscionability into the Trade Practices Act 1974 has been shadowed with the overwhelming needs to protect unfairness and injustice to the Australians when dealing with traders. Another attempt to explain this notion and its equitable function can be seen in *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* where Gyles J viewed at page 77 that unconscionable or unconscientious conduct is only one element of the doctrine of equitable estoppel.

[82] This fact can be supported with the explanatory memorandum promulgated with the Bill for the Act to insert Pt IVA that reads 'The provision embodies the equitable concept of unconscionable conduct as recognised by the High Court in *Blomley v Ryan* (1956) 99 CLR 362 and *Commercial Bank of Australia v Amadio*.

4. *The effect of promissory estoppel: suspensory or extinctive*

After the *Waltons Stores*, where Mason CJ and Wilson J clarified that Waltons was prevented through equitable estoppel from completely retreating from its implied promise to complete the contract, the position of the effect of this doctrine in Australia is now clear enough.[83] This indicates that promissory estoppel in Australia has been, in a way, accepted as to completely extinguish a contractual right. Nevertheless, the Australian courts were not bold enough in other cases to declare that promissory estoppel was to operate permanently.

Most Australian cases did not specifically dwell on the effect of this doctrine other than *Forbes v Austn Yachting Federation*[84] and the *Waltons Stores* case. Alas, as in the above situation in England, inferences can safely be drawn from the orders made by the court, which naturally show that the courts, in most cases, did not resist the idea proposed by the two judges in the *Waltons Stores*' case. One such inference can be clearly seen in the *Verwayen*'s case[85] where, from the order made by the court that the defendant was not free to dispute its liability to the plaintiff after having stated its policy not to contest liability and not to plead a limitation defence relating to claims arising out of the collision. Deanne J explicitly viewed that as an emanation of the general doctrine of estoppel by conduct, promissory estoppel operates to effect representations about future facts, which in this case was concerned with the defendants' decision based on its policy not to contest liability nor plead a limitations defence. The order made by the court that the defendant was estopped, based on its earlier representation, from contesting liability may safely be considered as a clear inference of the court's intention to treat the effect of promissory estoppel as permanent.

Similar inference may also be made from *Commonwealth of Australia v Clark*[86] where the court held that the plaintiff's claim for damages for negligence, which was instituted after having relied on the Commonwealth's assurance through its solicitor that it would not rely on the limitations and combat

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[83] Sutton, Kenneth, 'Contract by Estoppel' (1988-89) 205 *LQR* 63.

[84] (1996) 131 FLR 241.

[85] (1990) 170 CLR 394. Another inference can also be made from the teaming up of Toohey and Gaudron JJ to preclude the defendant from exercising its original rights to contest liability and to plead a limitations defence on the ground of waiver, which is clearly extinctive. By relying on both promissory estoppel and waiver to preclude the defendant from exercising the rights, the four judges can be safely taken as attempting to equate the effect of both these two doctrines where the rights of the defendant in this case was not merely suspended but was totally extinguished.

[86] [1994] 2 VR 333.

defences, should succeed; and *Collin v Holden*[87] where the defendant was estopped from insisting his statutory right against the plaintiff and from retreating from the settlement terms recorded in court by the solicitors of both the parties in their presence. In *Riches v Hogben*,[88] inference to the permanent effect of this doctrine can be drawn when the defendant mother was estopped from denying the plaintiff son's title to the Brisbane property after the plaintiff and his family had sold certain possessions at lesser value and incurred other detriments in order to meet her departure date upon the defendant's representation that she would buy him a house if they would immigrate to Australia with her.

A very illuminating account to the inference of the permanent effect of promissory estoppel can be seen in *Silovi v Barbaro* when the sale of the land was prevented from being completed until the expiry of the lease on 31 August 1992. Although the operation of estoppel in this case was only until the specified date, which may be superficially seen as suspensory, it must be cautioned that the rights sought to be protected by the respondent lessees were the 10-year lease, which was by no means perpetual, and the action of the court to exclude the conclusion of the conveyance until after the expiry of the lease period may strongly be taken that the right of the owners to sell the land during such period was completely extinguished.

Nevertheless, despite the strong indication of the Australian courts' willingness to treat the operation of this doctrine extinctively, the Supreme Court of the New South Wales in *Forbes v Austn Yachting Federation* took a different stand when it merely ordered the defendant to provide monetary compensation for the financial detriment suffered by the plaintiff after the change of selection criteria, on which the plaintiff relied, was made rather than ordering for a re-selection for the yachting team. The refusal of the court to give a permanent effect to equitable estoppel is reflected in Santow J's proclamation

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[87] [1989] VR 510.

[88] Similar inference can be seen in *W v G*, where the court ordered for only a lump sum maintenance of AUD200,000 after finding that it was unconscionable for the defendant not to contribute to the upbringing of the children conceived artificially by the plaintiffs and with the defendant's assistance. See also *Foran v Wight* [1989] 168 CLR 385, where the court acknowledged the validity of the purchasers' notice to rescind the contract and treated the contract as permanently nullified by ordering for the return of the deposit to the purchaser and *S & E Promotions v Tobin Brothers* (1994) 122 ALR 637, where the court's order for the renewal of the lease, based upon the finding that the sublesses had acted in reliance on the assumption created by the sublessors, had completely extinguished the sublessors' right under the lease.

that 'equitable estoppel does not extinguish, but generally only suspends, rights'. Similar judicial attitude can be seen in *Moris v Morris*,[89] where instead of being ordered to convey the property, the defendant was merely ordered to create an equitable charge on the property in favour of the plaintiff to secure the expenditure amount incurred in the extension on the property. This order clearly indicates the court's intention to treat this doctrine as merely having a suspensory effect.

From the overall observation, which is mainly derived from inferences drawn from the courts' order, it can be surmised that the Australian courts have been willing, in most instances, to give permanent effect to this doctrine.

C. *The Development in Malaysia*

Despite the persisting arguments about the reception of promissory estoppel as an English equitable doctrine in Malaysia in the presence of s 64 of the Malaysian Contracts Act 1950, this study has revealed the continuing preference of the Malaysian courts to apply, as well as to develop, this doctrine keeping its progress abreast with the development in the other common law countries. The development of this doctrine in Malaysia may be construed to be even more rigorous than England and in some aspects, the Malaysian courts have been found to be exceptionally valiant where this doctrine is considered as a doctrine of wide utility and is therefore applicable in any circumstances in order to achieve justice.

1. *Promissory estoppel as a sword*

This doctrine may provide a way for 'the 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'.[90] Under certain circumstances, equity may act to give effect to a voluntary promise, which may not be available under the law.[91] Although the development of promissory estoppel in Malaysia can be

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[89] [1982] 1 NSWLR 61.

[90] Matta, *supra*, n 17 at p 7. He also concedes to Anson's prediction that 'in the future the promissory estoppel may be held capable in itself in creating a cause of action in contract'.

[91] Wong, WK, 'Estoppel by Convention: A Cause of Action? (PtII)' [1997] 1 MLJ xxv, p xlvii. He goes on to explain that:

> The promissory estoppel may in some circumstances extend to the enforcement of a right not previously in existence where the defendant has encouraged in the plaintiff the belief that it will be granted and has acquiesced in the action taken by the plaintiff in that belief.

clearly seen in the *Boustead*'s case[92] in 1995, the Malaysian courts have been, even prior to that, liberal enough to employ this doctrine to the plaintiff's side. This phenomenon has been taking place in Malaysia from as early as 1984 in *MAA Holdings Sdn Bhd & Anor v Ng Siew Wah & Ors*[93] where the court allowed the plaintiff's alternative plea of estoppel by condemning the act of the defendants of remaining in silence while the purchasers paid money to them. VC George J allowed the plaintiffs' plea of estoppel and an order of specific performance was granted to them. On the issue of estoppel, the judge vehemently pointed out as follows:

> Having silently stood by and allowed the purchasers to find and pay the balance of the purchase price and then wait for another 38 days before insisting on compliance of the requirement to apply to the FIC although the parties had expressly agreed that whether FIC approval was obtained or not was not to have any effect is I think the height of inequity ...[94]

Although the judge did not specifically dwell on the limitation of only allowing the use of 'estoppel as a shield', the fact that he accepted the plaintiff's plea of estoppel is enough to imply the court's readiness to 'transgress' such limitation so long as the object of equity, that is to prevent injustice, is served.

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[92] *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

[93] [1986] 1 MLJ 170. In this case, there was an agreement made between the second plaintiff, who was acting on behalf on the first plaintiff, an undisclosed principal, and the defendant to purchase their full shares in Leong Land Sdn Bhd for RM8.1 million. RM2 million were paid at the time of the execution of the agreement while the balance was to be paid within the extended time according to the agreement. The purchasers were also obliged to obtain approval from the Foreign Investment Capital [FIC]. However, under the agreement, it was agreed that late approval or non-approval from the FIC would not affect the sale. Under the agreement, the defendants were obliged to hand over all share certificates together with transfer deed in escrow to the solicitors as stakeholders to the purchaser. The defendants, nevertheless, failed to hand over the share certificates to the solicitors prompted the plaintiffs to claim for specific performance of the contract. In their reply to the defendants' defence, the plea of estoppel was raised that the defendant's conduct, of silently stood by allowing the purchasers to find and pay the balance of the purchase price and waited for another 38 days before insisting the plaintiffs to apply to FIC, was such that they were estopped from alleging that the second plaintiff had breached clause 2 of the agreement to obtain the approval from the FIC.

[94] *Id* at p 176. It may be safe to say that such inequity might have been caused if the defendants were to be allowed to be excused from their silence and indifference, before and after the payments of the balance of the purchase price, which had led the plaintiffs to believe that everything was fine with the defendants. His Lordship went on to support his findings by quoting the illuminating *ratios* of Robert Goff J in *Societe Italo-Belge v Palm Oils* and Lord Denning in *W.J Alan & Co v El Nasr Export & Import Co.*

Similar judicial attitude is seen in other cases such as *Alfred Templeton & Ors v Low Yat Holding & Anor*,[95] where the first defendant was estopped from pleading limitation due to both his conducts and words, which were gathered from his silence and the offers made to purchase the plaintiffs' remaining lots. Edgar Joseph Jr J applied the Australian case of *Grundt v Great Boulder Pty Gold Mines Ltd*[96] and declared his liberal approach to allow the use of estoppel by a plaintiff in this case by declaring that '... the so-called equitable proprietary estoppel has been expanded to create a cause of action. In other words, it can be used not just a shield but also as a sword'.[97]

In the most outstanding Malaysian case on promissory estoppel, *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*,[98] the Federal Court made an astounding discovery on promissory estoppel by dismissing both the appeal and cross-appeal *inter alia* on the grounds that:

(i) the respondent had reasonably assumed that the appellant had agreed to the imposition of the 14-day period as it did not merely remain silent (by not objecting to it) but had in fact made payment on some invoices; and
(ii) the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. The maxim that estoppel can only be used as a shield and not as a sword does not limit the doctrine to defendants alone.

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[95] [1989] 2 MLJ 202.

[96] (1937) 59 CLR 641.

[97] *Supra*, n 95 at p 244. Although he specifically mentioned 'proprietary estoppel', it may be avowed that the basis of equitable estoppels that are based upon representation, either of conducts or words, qualifies promissory estoppel to also share the same status. It must be emphasised that in England, Oliver J in the *Taylor Fashions*' case had in fact insinuated that there had been a virtual equation between these two equitable doctrines. Similar inference to the effect can be seen in Lord Denning's proclamation in *Amalgamated*'s case that, as equitable estoppels, these estoppels were of the same principles. In addition to that, the facts of this case had also indicated that the first defendant was estopped due to both his conducts and words, which were gathered from his silence and offers made to purchase the plaintiffs remaining lots. It can well be said that the estoppel referred by His Lordship in this case was equally proprietary and promissory.

[98] In this case, the appellant bought goods on credit from Chemitrade Sdn Bhd (CSB), who then entered into a factoring agreement with the respondent. Under the agreement, the debts owed by the appellant to CSB was assigned to the respondent whereby the Notice of Assignment was duly sent to the respondent. Pursuant to the factoring agreement, CSB handed over copies of the invoices in respect of each sale and delivery of goods to the appellant, which were endorsed by the respondent that any objection was to be reported within 14 days of its receipt before the invoices were sent to the appellant. Neither complaint nor challenge on the respondent's right in making such indorsement was put forward by the appellant within the period stated. The appellant had in fact made several payments to the

Estoppel may therefore be used to assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact, which would destroy a cause of action. Gopal Sri Ram JCA made a profound finding to the development of this doctrine 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.[99]

In the subsequent case of *Chong Yoong Choy v UOL Factoring Sdn Bhd*,[100] it was *inter alia* held by the Court of Appeal that under the doctrine of estoppel, it would be entirely inequitable and unconscionable to permit the appellant to assert that his promise (to play the role of surety and principal debtor, upon which the respondent acted by entering into the factoring agreement with PPP) was unenforceable. Gopal Sri Ram JCA, in delivering the judgment of the court, applied his expounded finding in the *Boustead*'s case in the present case by pronouncing that:

> ... The facts of the present case also come within the broad purview of that doctrine, and we are of the view that a different principle does not apply merely because the appellant is the guarantor of the debt and not the debtor himself.[101]

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respondent but subsequently refused to make payment on 20 invoices ('the invoices') on the reason that nothing was payable on the invoices due a statement ('the statement') on the appellant's purchase orders that the amounts stated were to be offset against the cost of stocks returned to CSB. The respondent, denying knowledge of the statement, argued that since the appellant did not object the validity of the indorsement made on the invoices, it was entitled to assume that the appellant had accepted it. At the first instance court, the trial judge found for the respondent. On appeal to the Federal Court, the appellants raised 3 grounds:

(i) the respondent had no right, as an assignee, to unilaterally impose the 14-day limit;
(ii) the factoring agreement was not a valid assignment; and
(iii) the respondent's argument that the failure of the appellant to protest about the validity of the indorsement had entitled the respondent to assume the appellant's acceptance to it was in essence an estoppel, which was not pleaded by the respondent and therefore, the trial judge had erred in relying on it. The respondent also cross-appealed against the refusal of the trial judge to enter judgment on two other items claimed for amounting to RM 95,000.

[99] *Id* at p 344.
[100] [1996] 1 MLJ 421.
[101] *Id* at p 424.

The Malaysian Courts continued to allow the use of promissory estoppel by a plaintiff in the subsequent case of *Cheng Hang Guan & Ors v Perumahan Farlim (Penang)*,[102] where it was held that although the defendants had alleged that the assurance made by the Khoo Kongsi or its agent had no effect to the claim, to which Khoo Kongsi was not a party, the court was resolute that such assurance or promise was admissible by virtue of s 18(3)(a) and (b) of the Evidence Act 1950. This had consequentially allowed the admission of statements from persons having proprietary interest or persons from whom the parties to the suit had derived their interest in the subject-matter of the suit, *ie* the plot of land concerned. It was also held that even though the doctrine of promissory estoppel did not provide a cause of action, its effect might be used to enable a party to enforce a cause of action, which would not exist without such estoppel. It can thus be asserted that by allowing the plea of promissory estoppel by the plaintiffs based upon the assurance given by Khoo Kongsi, the court was trying to imply that this equitable doctrine could be used as a sword in instituting his claim against the defendant.

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[102] [1993] 3 MLJ 352. In this case, the plaintiffs claimed that they were lawful tenants and were, thus, entitled in law and equity to possession of the plot concerned, which belonged to Khoo Kongsi and had been occupied by their families for more than 100 years. The first plaintiff occupied a house built by the second plaintiff's grandfather [Cheong] on the plot concerned in 1963 [House No. 259H] whilst the second plaintiff occupied another house [House No 258K], which had been on the plot concerned before 1938, after he took over the management of the farm upon Cheong's death. In 1972, both the plaintiffs were registered as tenants in place of Cheong. It was alleged that Cheong's family had converted the plot concerned from a swampy jungle land into a productive farm. It was only after 1976 and in 1981 respectively that the rent receipts of the plot concerned and the dwelling houses were endorsed with conditions, which included a stipulation that a period of one month's notice would be sufficient to terminate the tenancy. However, being illiterate farmers, both the plaintiffs could not understand the conditions that were written in English. Some time in 1972, the second plaintiff was informed by a visiting trustee of the Khoo Kongsi that it was not necessary to change the tenancy into her name and that she could continue planting vegetables as long as she wished provided that she paid rent. Cheong had also informed the second plaintiff that the Khoo Kongsi had given the same assurance to him and that, upon his death, the tenancy was to continue to benefit his family so long as they continued to pay rent and cultivate the farm. After receiving such assurance, the plaintiffs invested RM12,000 in installing a sprinkler system and for more than 50 years, the plaintiffs' families stayed on the land without any interference. However, after the Khoo Kongsi had entered into a joint-venture agreement with the defendants, a one month's notice of termination was served on the plaintiffs. In their claims for exemplary damages and permanent injunctions, the plaintiffs pleaded *inter alia* for promissory estoppel and proprietary estoppel on the ground that they had been assured by the Khoo Kongsi that they would be allowed to remain in possession of the plot concerned provided they paid rent and that they had consequently acted in reliance of such assurance. The promise or assurance alleged by the plaintiffs was in fact admitted by the trustee of the Khoo Kongsi during trial.

Subsequently, in *Gan Tuck Meng & Ors v Ngan Yin Groundnut Factory Sdn Bhd & Anor*,[103] Peh Swee Chin J laid down a very interesting account of his preference to associate his finding on equitable estoppel in allowing the plaintiff's claim that:

> 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 has caused me to contemplate as to the state of the principle of equitable estoppel ... 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.[104]

In the Court of Appeal case of *Teh Poh Wah v Seremban Securities Sdn Bhd*,[105] Gopal Sri Ram JCA went on to quote the words of Lord Russell of Killowen in *Dawsons Bank v Nippon Menkwa Kabushiki Kaisha*,[106] which he considered as reflecting the true nature of this doctrine, that although estoppel is not a cause of action, it may be used to assist a plaintiff in enforcing a cause of action. Sri Ram vehemently declared that:

> ... it is wrong to apply the maxim 'estoppel may be used as a shield but not as a sword' as limiting the availability of the doctrines to defendants alone. Plaintiff too may have recourse to it.[107]

It must be noted that in most of the cases discussed above, equitable estoppel was not even pleaded by the plaintiffs. Nevertheless the Malaysian courts in these cases found it 'necessary', in order to prevent inequity and injustice, to shove this doctrine into the plaintiffs' hands. This judicial attitude, as manifested from the above-discussed cases, may safely be considered as an indication of the Malaysian courts' willingness to treat this doctrine as capable of being used as a sword by a plaintiff.

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[103] [1990] 1 MLJ 227. Nevertheless, or a more benevolent exercise of discretion by Sri Ram JCA, see *Lai Yoke Ngan & Anor v Chin Teck Kwee* [1997] 2 MLJ 565 where the plaintiffs' plea of estoppel was disallowed on the ground of unconscionability.

[104] *Id* at p 232.

[105] [1996] 1 MLJ 701.

[106] LR 62IA 100.

[107] *Supra*, n 105 at p 707.

2. *Pre-existing contractual relationship*

Although in the beginning the Malaysian courts have been reluctant to move away from this requirement,[108] the case of *Abdullah bin Mamat v Pengarah Hutan Negeri Trengganu & Anor*[109] serves as a sign to the Malaysian courts' willingness to open the door of promissory estoppel to non-contractual relationship. In the case it was found that since the requirement of licence to collect and remove timber was imposed by law and was not a matter of free choice, the application of such licence and its approval could not be regarded as having created contractual rights and obligations between the parties. Thus, the subsequent revocation of the approval for the logging licence was not to be treated as a breach of a contract. Although the plaintiff based his whole claim on contract and equitable estoppel was not even pleaded, Salleh Abbas FJ was ready to grant equitable estoppel to a non-contracting party. The claim was allowed as far as for the money expended to clear the boundaries of the approved area prior to the revocation of the approval. His Lordship clearly put the claim in the present case under the realm of equity by deciding that:

> In this case in so far as the plaintiffs' claim was based on contract it must fail, but their statement of claim did not so specify and was wide enough to cover whatever right or interest created by the grant or intended grant of a licence... This paragraph is wide enough to cover other grounds as well. It is clear that the plaintiffs had spent $21,700 because of the approval. The subsequent cancellation of the approval had wasted all these expenses and justice demands that compensation should be given therefor. The case therefore falls squarely within the principle of equity arising out of the expenditure of money commonly referred to as equitable estoppel.[110]

The above decision of Salleh Abbas FJ was sufficient to show that equitable estoppel, in particular promissory estoppel, had slowly gained its foothold in the absence of any contractual relationship in Malaysia. Although the word 'legal relationship' was not explicitly mentioned in the above passage, it may safely be inferred from the circumstances of the case that the position of the parties, which involved an application of licence as required by the law, was sufficient to constitute a legal relationship between them.

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[108] One such instance can be seen in the High Court's decision in *S Pathmanathan v Amaravathi & Ors* [1979] 1 MLJ 38, where the plea of promissory estoppel was denied by the court in the absence of a contractual relationship. In delivering his judgment, Gunn Chit Tuan J proclaimed at p 41 that the doctrine did not apply as 'there was no contractual relationship between the parties'.

[109] [1982] 1 MLJ 342.

[110] *Id* at p 344.

In *Cheng Hang Guan & Ors v Perumahan Farlim (Penang)*,[111] which involved a number of issues including promissory estoppel and proprietary estoppel, the plaintiffs' plea of promissory estoppel was granted along with the plea for proprietary estoppel, which was permanent in effect and, thus, justified the award of permanent injunction to the plaintiffs. It must be emphasised that these pleas of equitable estoppels were allowed as against the defendants despite the absence of any contractual relationship between the parties. Edgar Joseph Jr SCJ had in fact proclaimed that the assurance given by the Khoo Kongsi's trustee had given rise to an estoppel in a legal relationship that was considered sufficient to award promissory estoppel. This case, along with the proclamation by Gopal Sri Ram in the *Boustead*'s case that equitable estoppel applies to any circumstances in order to meet justice, can be seen as a sign of the Malaysian courts' willingness to treat this doctrine in a very flexible manner. The most prominent finding by Edgar Joseph Jr SCJ[112] can be seen where the judge followed the English decision in *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd*,[113] by deciding that promissory estoppel may apply ' ... provided that there [was] a pre-existing legal relationship which could give rise to liabilities and penalties'. This was the sort of legal relationship, which existed between the parties in the present case, that the court was satisfied to grant equitable estoppel.

The courts' readiness to extend the application of this doctrine beyond contractual relationship can also be seen in *Teh Poh Wah v Seremban Securities Sdn Bhd* where the appellant, who gave signed blank cheques to her husband, was estopped from denying the contractual relationship with the respondents. The appellants' defence, which *inter alia* alleged that there was no contractual relationship between her and the respondents and that she had neither signed

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[111] His Lordship went on to proclaim that the promise made by the Khoo Kongsi's trustee was binding, as it was intended to be, where he directly quoted the words of Lord Denning in *Evenden v Guildford City Association Football Club Ltd* [1975] QB 917 at p 924, that '... Promissory estoppel ... applies whenever a representation is made...which is intended to be binding, intended to induce a person to act upon it and he does act upon it'.

[112] *Id* at pp 402-403.

[113] [1968] 2 QB 839. It this case, the appellant's husband, who was imposed with a Mareva order, entered into a contract with the respondents' stockbroker by using the appellant's name and carried all the transactions in the appellant's name. Although there was no evidence to show the appellant's knowledge of her husband's doing, the High Court granted the respondents' application to strike out the appellants' defence, which *inter alia* alleged that there was no contractual relationship between her and the respondents and that she had neither signed the agreement nor operated the share account.

the agreement nor operated the share account, was struck off by the Court of Appeal. Gopal Sri Ram JCA held that:

> In our judgment, this appeal may quite satisfactorily be resolved by reference to the doctrine of estoppel. It is a flexible doctrine by which courts seek to do essential justice between litigating parties ... The doctrine may be applied to enlarge or reduce the rights or obligations of a party under a contract ... It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent ...[114]

This inclination did not fade and continued to flourish in subsequent cases. In the most illuminating Malaysian case on promissory estoppel, the *Boustead*'s case, the Federal Court made a remarkable finding to this effect, where promissory estoppel was treated as an open doctrine and applicable in all circumstances and in all relationships. The words of Gopal Sri Ram JCA that it is a doctrine of wide utility that may be resorted to in numerous fact patterns in order to achieve justice and that ' the circumstances in which the doctrine may operate are endless'[115] may safely be inferred as a strong indication of the Federal Court's willingness to apply promissory estoppel at a pre-contractual stage. His Lordship's bold expression above may also indicate that the Malaysian courts are willing to treat equitable estoppel in a very flexible manner in order to meet the ends of justice by allowing its use in any relationships, which is not limited to the English and Australian's move of granting equitable estoppel to pre-contractual stage.

Prior to that, Peh Swee Chin J had allowed the use of equitable estoppel in non-contractual relationship in the case of *Gan Tuck Meng & Ors v Ngan Yin Groundnut Factory Sdn Bhd & Anor*,[116] where it was held *inter alia* that it would be quite outrageous or unconscionable or inequitable for the voting rights of the first plaintiff's beneficial share to be exercised against the beneficial owner himself. His Lordship had in fact based his whole findings on granting the injunction on equitable estoppel.

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[114] *Supra*, n 105 at p 706.

[115] *Supra*, n 92 at p 344.

[116] *Supra*, n 103. It must be noted that by acknowledging the use of equitable estoppel as an instrument through which courts have intervened for centuries to prevent fraud, unconscionable conduct and transactions and its function as a principle '...closest to the notion of justice as perceived by the man in the street', his Lordship proclaimed at p 233 that the relationship of the parties and the circumstances of the present case, which was clearly not a contractual one, has justified the court's finding based on equitable estoppel.

The above discussion shows that the Malaysian courts have been bold in their stride to extend the application of promissory estoppel beyond contractual relationship.[117] In some instances, the application of this doctrine has also been allowed very flexibly, in order to meet the ends of justice, to any relationship and not limited to just pre-contractual relationship.

3. *The dichotomy between detrimental reliance and unconscionability*

Despite the view that Malaysia is still lagging behind in the developments and transformations into a modern approach to equitable remedies,[118] the study on this dichotomy has pointed otherwise. The line of cases dealing directly on this issue, though scanty, has shown the Malaysian courts' readiness to explore the newer notion of unconscionability in the equity realm, which was in accordance with another view that the Malaysian courts are trying their best to keep up with their common law counterparts.[119] Sharing her view is Wong Weng Kwai, who specifically refers to the *Boustead*'s case when suggesting that '[it] seems that reliance by the representee may not need to be proven.'[120]

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[117] This bold stride may be considered as more valiant compared to its English and Australian counterpart since the objective of the Malaysian courts in determining the circumstances where the doctrine applies is aimed at, to borrow Sri Ram's words, providing 'essential justice between litigating parties'. See *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 at p 706.

[118] Malik Imtiaz Sarwar, 'Equity and Commerce: An Alternative Perspective' [1997] 3 MLJ cxlix at p clxxvii.

[119] Bulan, Ramy, 'The Detriment Element and the Reinterpretation of Equitable Estoppel Doctrine in Malaysia', International Workshop on Estoppel (Kuala Lumpur), 1999, at p 4. Even as early as in *Chait Singh v Budin b Abdullah* [1922] 1 FMSLR 348, unconscionability had been raised by the Malaysian court as the underlying notion in contractual fairness. In this case, Innes J opined that since good collateral for the loan had been provided, an interest charge at 36% on an illiterate man gave rise to the presumption of unconscionability and ordered for the interest rate to be reduced to 18%.

[120] Wong, WK, *supra*, n 91at p xliii. Despite the early recognition of this notion in Malaysia through *Budin bin Abdullah*, the Malaysian court was nevertheless not enthusiastic to further develop it and unconscionability continued to receive lukewarm attention in Malaysia through *Wong Juat Eng v Then Thaw Eu & Anor* [1965] 2 MLJ 213, where the requirement of detrimental reliance was recapped by the Federal Court as one of the limitations to promissory estoppel. The parol evidence that the appellant had obtained verbal permission from the previous owner to sublet rooms on the premises she rented was admitted by the Federal Court, despite a covenant in the memorandum of sublease that prohibited her and other co-tenants from sub-leasing the premises without written permission. It was based on the admission of the parol evidence that the court found on the grounds of equitable estoppel. Sufian J [as he then was] held at p 215 that:

> ...here, the appellant, having relied on the words of the then landlord that she had permission to sub-let, etc., and then having acted to her detriment by doing something which might lose her the sublease, it would be unreasonable that the present landlords should be allowed to take advantage of her breach.

The line of Malaysian cases that show the emergence and survival of this newer notion starts with *Siew Soon Wah v Yong Tong Hong*,[121] where the term 'unconscionable conduct' was implicitly implanted in the judgment of the Privy Council when it was found that equitable estoppel had been successfully raised despite the absence of any detriment due the respondent acting upon the appellants' father's promise. The dichotomy between detrimental reliance and unconscionability can be said as to have inaugurated four years later when the Ipoh High Court had taken a more valiant approach in *Gan Tuck Meng & Ors v Ngan Yin Groundnout Factory Sdn Bhd & Anor*. Peh Swee Chin J, on the grounds of unconscionability and inequity, disallowed the defendant to exercise the voting rights of ¼ of the share, to which the plaintiff was beneficially entitled. It may be safe to say that, by quoting Lord Kingsdown's passage in the century-old case *Ramsden v Dyson*,[122] which was considered as succeeded in putting 'the doctrine of equitable estoppel on a pedestal', the judge had manifested a heroic attempt to look into the development of equitable estoppel. Peh Swee Chin J continued to make his own remarkable passage in the following words:

> 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 ¼ of the 199,998 shares to which the plaintiff brother was entitled, I was not merely catching a catch-phrase, but the situation had caused me to contemplate as to the state of the principle of equitable estoppel from the cases ...[123]

Similarly, in *Aw Yong Wai Choo v Arief Trading Sdn Bhd*,[124] unconscionability of the extraordinary situation was considered as the ground

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[121] [1973] 1 MLJ 133. The Privy Council affirmed the Federal Court's decision (that the agreement was for the grant of as long a lease as the law allowed *ie* for 30 years) on the ground that, in the circumstances of the case, there arose in the respondent's favour an equity or equitable estoppel protecting his occupation for the said period of 30 years. Although the judgment did not specifically mention the term 'unconscionable conduct' on the part of the appellants or their father, it may be said that the notion was in fact embedded in the rationale of the Judicial Committee in finding that equitable estoppel was raised since the respondent's act, upon the appellants' father's promise, did not cause any detriment to her.

[122] (1866) LR 1 HL 129.

[123] *Supra*, n 103 at p 232.

[124] [1992] 1 MLJ 166. See also Cheong, MF, 'Estoppel in *Boustead*'s case: A Move Away From Reliance Towards Unconscionability', International Workshop on Estoppel (Kuala Lumpur), 1999. Based on this case, Cheong May Fong forwards a suggestion that there should be an alternative approach to contractual fairness *ie* to apply estoppel in a flexible manner without requiring proof of the traditional elements of representation, reliance and detriment in cases, which appear to be unfair.

for the finding of equitable estoppel. This approach would work through the recognition of the flexibility of estoppel and the potential of using it through the notion of unconscionability. This suggestion is also in line with the view that unconscionability is 'representative of the discretionary realm of equity'.[125] Peh Swee Chin J found in favour of the plaintiffs intuitively, by virtue of s 71 of the Contracts Act 1950 and alternatively on equitable estoppel, by withholding the indemnity sought by them against the second defendant as a set-off against the plaintiffs' own claim provided for under their agreements with the first defendant.[126] His Lordship further dictated the words of Buckley LJ in *Shaw v Applegate* that:

> ... the real test, I think, must be whether upon the facts of the particular case, the situation has become such, that it would be dishonest or unconscionable for the plaintiffs or the persons having the right sought to be enforced to continue to seek to enforce it.[127]

In the *Boustead*'s case, the Federal Court made an outstanding discovery on this issue where Gopal Sri Ram JCA firmly held that there should be no limit in applying this doctrine because as an equitable principle, it was ultimately aimed at achieving justice.[128] It was noted in this case that the later development of this doctrine such as in *The 'Post Chaser'* has shown that 'the detriment element does not form part of the doctrine of estoppel'. It can be inferred that

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[125] See Malik Imtiaz Sarwar, *supra*, n118 at p cl.

[126] The alternative finding on equitable estoppel was based on the reasoning that there were extraordinary situation, which came under a web of all the relevant factors, that it would unconscionable for the plaintiffs to insist on strictly enforcing the obligation for late delivery. The web of all relevant factors came in the forms of all the relevant incidents of the case, including any written or verbal agreement, the conduct of the parties at all times and all surrounding circumstances. His Lordship further declared that, due to the extraordinary situation especially of the fact that the plaintiffs had gained and enjoyed the benefit of the more expensive specifications used by the second defendant in buiding the houses, the plaintiffs were estopped from further claiming for indemnity for late delivery.

[127] [1977] 1 WLR 970, 978. The above dictation made can be safely considered as a reiteration of his earlier findings in *Ngan Nyin Groundnuts*' case. By proclaiming that unconscionability should be the real test in determining whether there arise an equity by estoppel, His Lordship had really made a statement in the development of equitable estoppel in Malaysia.

[128] [1995] 3 MLJ 331, 348. This approach was continued in *Sia Siew Hong v Lim Gim Chian* [1995] 3 MLJ 141 where the Court of Appeal referred to the notion of unconscionability to thrive, along with injustice and inequitability, under equitable estoppel. In *Lai Yoke Ngan v Chin Teck Kwee @ Chin Teck Kwi* [1997] 3 AMR 2458, the test of 'unconscionability' in this case was stretched to the fullest when it was also applied to the person raising the plea of estoppel.

the appellant's unconscionable conduct in this case was reflected from the fact that it did not merely remain silent as contended. It must be restated from the facts of this case that upon receipt of the invoices bearing the rubber stamped indorsement specifying the 14-day limit for the objections, the appellant had an option to dispute the imposition of the time limit. The appellant, however, did nothing to show its disagreement to the indorsement and it certainly did not merely remain silent by actually making payments on those invoices without any protest. His Lordship further criticised the appellant's act as unconscionable and inequitable in the following manner:

> A reasonable man similarly circumstanced as the respondent would have been entitled to assume, as the respondent did, that the appellant was agreeable to the imposition of the 14-day limit. Influenced – and we use that term deliberately - by the conduct of the appellant, the respondent paid out on those very invoices. This the defendant would not have done had the appellant protested. The appellant's attempt to raise this point some seven months later, ... must, in our judgment be classified as unconscionable and inequitable conduct.[129]

On the other hand, this study has also revealed instances where the courts were reluctant to go beyond the limitation set out through the *Hughes'* and *High Trees'* cases. Such cases are *Wong Juat Eng v Then Thaw Eu*[130] and *Tenaga Nasional Bhd v Perwaja Steel*,[131] where the defence of promissory estoppel was allowed based on the finding that there was detrimental reliance. Similarly, in *Holee Holdings v Chai Him*,[132] it was decided that the claimant must prove that he relied on the assurance to his detriment. The scepticism shown by the courts in the above cases reflected the caution that the doctrine of unconscionability must be carefully developed, judicially or statutorily, in order to guarantee certainty in commercial relations.[133]

In studying this dichotomy, one cannot avoid from noticing a sideline and moderate view taken by the Malaysian courts, which may be said as due to the influence by its English counterparts. Rather than opting between the two extreme notions of unconscionability and detrimental reliance, the courts in the following cases had based their findings on the notion of fairness, justice and

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[129] [1965] 3 MLJ 331, 348.
[130] [1965] 2 MLJ 213.
[131] [1995] 4 CLJ 670.
[132] [1997] 4 MLJ 601.
[133] Cheong, MF, *supra*, n 124 at p 5.

equitability. One such case is *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor.*[134] It was held by the court that the claim of specific performance by the plaintiffs should succeed on a number of grounds including promissory estoppel. PS Gill J allowed the oral evidence on the first defendant's undertaking on the basis that such admission was not meant to contradict, vary or add to or substract from the terms of the agreement but was meant to prove the existence of a separate contractual provisions. The court in this case invoked its equitable jurisdiction to enforce specific performances of the contract based on the pre-contractual statement made by the first plaintiff. The judge clearly pronounced his preference on the moderate notion of 'equitability' as follows:

> ... It would be inequitable, in view of the dealings which had taken place between the parties, to allow the defendants to enforce their strict legal rights against the plaintiffs after they have led the plaintiffs to believe that hey had no intention to enforce such rights.[135]

A notable finding on this issue can be seen more clearly in *Bencon Development Sdn Bhd v Yeoh Cheng Heng*[136] where Abdul Hamid Mohamed J suggested that courts ought to treat the application of this doctrine objectively, instead of 'blindly' following the path popularised by the *Boustead*'s case. It was viewed that the concept of justice and fairness under equitable estoppel must be tailored according to the circumstances of each case by taking into account all the relevant factors.[137]

In conclusion it may safely be said that the Malaysian courts have adopted an almost similar approach to the English courts. Rather than going for any of the two extremes of detrimental reliance and unconscionability, the Malaysian courts have been found to be more vigilant from its tendency to choose the moderate view of equitability, justice and fairness.

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[134] [1992] 2 MLJ 68. On appeal to the Supreme Court, the defendants contention that the trial judge had erred in his findings was dismissed and Gunn Chit Tuan CJ (Malaya), in delivering the grounds of judgment of the court, declared that the appeal court did not find any misdirection by the learned judge. Similar findings can also found in other cases such as *Teh Poh Wah v Seremban Securities Sdn Bhd* and *Tsoi Ping Kwan v Medan Juta Sdn Bhd* [1996] 3 MLJ 367.

[134] [1992] 2 MLJ 68, 84.

[136] [1996] 4 CLJ 25.

[137] See Matta, *supra*, n 28 at p lxxxvi, where this notion of good faith and fairness, which are the important element in the test of the more moderate 'equitability', is strongly supported by Matta, who considers that the two opposing notions of detriment and unconscionability as too extreme.

4. *The effect of promissory estoppel: suspensory or extinctive*

The alternating use of promissory estoppel and waiver in Malaysia has always been more rampant. It has also been expressly viewed that the question of whether the effect of promissory estoppel is permanent or extinctive depends on the nature of representation made between the parties,[138] which was clearly illustrated in *Sim Siok Eng v Government of Malaysia*.[139] Raja Azlan Shah FJ drew a demarcating line between two situations, which shows that the effects of promissory estoppel are based on the intention of the promisor in making the promise or representation. The two effects are forbearance and variation, where the former operates to completely extinguish the right to claim whilst the latter merely suspends or alters the right to claim.

An instance where the promisor's rights were completely waived is seen in *William Toe's House & Estate Agencies v Chang Eng Swee*,[140] where the court allowed the plea of promissory estoppel raised by the defendant debtor against the plaintiff's claim for the balance of the debt after a smaller sum had been accepted as full settlement of the debt. In this case, it can be said that the right to recover the balance of the said debt was permanently extinguished when the plaintiff accepted the payment as full.

A similar effect can be seen in *Tiun Eng Jin v Wong Sie Kong*.[141] The Kuching High Court proclaimed that an agreement signed between the parties, whereby the plaintiff agreed to accept certain goods and articles from the defendant and to withdraw the whole matter from the court, was sufficient to constitute an accord and satisfaction of a full claim for $36,871.54. The grounds for the finding were based on two principles that act as exceptions to the *Pinnel*'s case *ie* part payment of a debt and promissory estoppel.

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[138] Matta, *supra*, n 17 at p 8.

[139] [1978] 1 MLJ 15.

[140] [1965] 2 MLJ 89 and in the *Alfred Templeton*'s case, a decree for an order of specific performance against the defendant, ordering that the appropriate relief suitable to satisfy the equity arose in favour of the plaintiffs was in the forms of a long list of mandatory injunctions, which included the construction of a single metalled access road from lot 48 to the public highway and the creation of easeway in perpetuity through the execution of Form 17A prescribed under s 288(b) of the National Land Code, was an affirmation of the court's inclination to treat the effect of this equitable doctrine as extinctive.

[141] [1975] 2 MLJ 34. See also *Wong Juat Eng v Then Thaw Eu & Anor*, where the Federal Court admitted the parol evidence produced by the appellant that she had obtained verbal permission from the previous owner to sublet the premises despite a covenant prohibiting such action, as evidence of waiver. Although no mention of equitable estoppel in this case, since the basis of accepting the parol evidence was on equitable ground that the sublessor had waived

BTH Lee J explicitly stated his view that the operation of promissory estoppel in this case was to completely extinguish the plaintiff's right to claim the full amount in the following words:

> Applying the principles set out there is no doubt in my view and I am satisfied upon all the evidence that the defendant allowed the plaintiff to transport all the items mentioned in the Agreement from his store, and handed the plaintiff the ignition keys of the two motor vehicles on the faith of the representation and assurance given by the plaintiff that he had agreed to withdraw the whole case from the court and was in fact acted upon and which I hold and so find.[142]

It can be safely inferred from the above words that by allowing the plaintiff to rely on the representation and assurance of the defendant to withdraw the whole case from the court, the judge had intended that promissory estoppel was to take effect permanently. By disallowing the defendant to subsequently withdraw from such assurance, this doctrine may be safely said as to operate extinctively to extinguish the defendant's original right.

The preference to treat the effect of this doctrine as permanent can be inferred from a number of cases including *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor*[143] where the issue of waiver was treated as equivalent to promissory estoppel through the court's acceptance of the plaintiffs'

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compliance by the appellant of the strict terms of the covenant and the appellant had consequently acted to her detriment, it can safely be inferred that promissory estoppel and waiver were treated as 'similar' doctrine, despite waiver being a common law doctrine. Another inference to the intention of the court to treat the 'equitable waiver' in its judgment as promissory estoppel can be safely drawn from Wylie CJ's words, which had in fact referred to the facts and principles of the *High Trees*' and the *Hughes*' cases in saying that the parol evidence was admissible as evidence of waiver although it would be inadmissible as evidence of a variation of terms of the sublease.

[142] *Id* at p 37.

[143] *Supra*, n 133. Other inferences to the permanent effect given by the Malaysian courts to this equitable estoppel include *Cheng Hang Guan & Ors v Perumahan Farlim (Penang)*, where the defendants were estopped from disclaiming that the plaintiffs were rightfully entitled to defend their possession, despite the absence of circumstances that would justify the grant of a specific performance, and the *Boustead* case, where the respondent was entitled to assume that the invoices were good for payment since the appellant had not informed it otherwise and that the appellant was estopped from asserting that nothing was due on the invoices. See also *Tenaga Nasional Berhad v Perwaja Steel*, where the plaintiff was estopped from imposing the full amount of the bill as from 1 January 1990 until the date of a letter issued by the plaintiff informing the 20% discount withdrawal, *Chor Phaik Har v Choong Lye Hock Estates* [1996] 4 CLJ 141, where the appellants were estopped from denying that the

submission that time was no longer the essence of the contract in view of the many oral assurances and representations made by the resident director of the second defendant that the first and second defendants would not terminate the agreement. By quoting Lord Denning's definition of waiver in *WJ Alan v El Nasr*, which was used interchangeably with promissory estoppel, PS Gill J was indeed trying to equate waiver with promissory estoppel. Similar inference to the court's intention to treat the application of this doctrine as permanent is reflected from the following passage:

> The defendants by their indulgence in granting the plaintiffs a series of extensions to complete the terms of the agreement have lulled the plaintiffs into a false sense of security ... It would be inequitable, in view of the dealings which had taken place between the parties, to allow the defendants to enforce their strict legal rights against the plaintiffs ...[144]

It can be safely concluded that the above cases have clearly shown that the Malaysian courts have been more than willing to treat this doctrine as extinctive where in most cases, promissory estoppel have been frequently treated as equivalent to waiver with a taste of equity. In cases where the findings were clearly based on promissory estoppel without any reference to the effect of this doctrine, inferences were thus made from the courts' decrees and in most cases, it was found that the court had always given a permanent effect to this doctrine.

III. Conclusion

This comparative study on the present parameters of promissory estoppel, due to the threat faced by four of the traditional limitations this doctrine, is indeed revealing. On a general scale, it can be said that the common law courts studied, namely the English, Australian and Malaysian courts, have been willing to develop this equitable doctrine and to tailor its application for the achievement of justice.

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deceased had an interest in the said land based upon their conduct pointing to an admission that the Otaheitte Estate formed part of the deceased's estate, and *Teh Poh Wah* case, where the appellant was estopped from denying that she had given her husband *carte blanche* to act on her behalf and was to be treated as the party who entered the contract with the respondents thereby giving her all the rights and obligations accruing from it.

[144] *Id* at p 84.

The comparative study on the first issue has revealed that in England, the English courts are slowly recognising the use of promissory estoppel as a sword although not as an independent cause of action but rather as a 'supporting' means to facilitate an existing cause of action. The Australian courts, in contrast, have been more valiant in their efforts to treat the use of promissory estoppel as a sword. Starting with the case of *Jackson v Crosby*,[145] the Australian courts did not look back in trying to make this doctrine as also available to a plaintiff. This study has also revealed that the Malaysian courts are almost on par with its Australian counterparts when Gopal Sri Ram JCA declared in the *Boustead*'s case that this doctrine is no longer restricted to a defendant but a 'plaintiff too may have recourse to it'.

The study on the second issue has also revealed that despite a strong manifestation to restrict the application of promissory estoppel to pre-existing contractual relationship in England, there is a fair share of English judges who are brave enough to extend its application to a non-contracting party provided there is sufficient legal relationship already in existence. Similarly, yet on a larger scale, the Australian courts have been content to allow the application of this doctrine to a non-contracting party provided there is a pre-existing legal relationship between the parties, which makes it unconscionable for the court to simply ignore its existence. The *Waltons Stores*' case has definitely set a trend in Australia where a non-contracting party may seek refuge under promissory estoppel if the other party has failed to fulfil its promised obligation. In Malaysia, the words of Gopal Sri Ram JCA in the *Boustead*'s case that this doctrine is of both wide utility and flexibility, which may be applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent, as reiterated in *Teh Poh Wah*'s case, are strong indication to the Malaysian courts' readiness to extend the use of promissory estoppel to non-contracting parties. It is understood that since the objective of the Malaysian courts in determining the circumstances where the doctrine applies is aimed at, to borrow Gopal Sri Ram's words, providing 'essential justice between litigating parties', it may be said that the Malaysian courts, as compared to its English and Australian counterparts, are more valiant to apply this doctrine beyond its traditional scope to any kind of relationships.

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[145] (No 2) (1979) 21 SASR 280.

The study on the third issue, *ie* the dichotomy between the traditional notion of detrimental reliance and unconscionability, has also been very instructive. In both England and Malaysia, in the midst of choosing between these two extreme notions, the courts have been found to be in favour of a sideline and moderate view by opting to base their findings on the notion of fairness, justice and equitability. It has also been found that despite the pre-conceived idea that the English courts are somewhat reluctant to depart from the extreme requirement of detrimental reliance, this study has shown that they are starting to open up to the notion of 'unconscionability'. The study on both Australia and Malaysia, except for some reservations shown by some judges, has also confirmed the idea that unconscionability has relatively been accepted as the ground of granting a plea of promissory estoppel.

On the final issue, this study has exposed a strong affirmation to the view forwarded by Matta that this doctrine has dual effects, which may depend on the nature of the representation or the intention of the representor at the time. The study in all the three countries have definitely proven that these common law courts have been relatively more open to treat the effect of promissory estoppel as also extinctive depending on the representation or the intention of the representor at the time as well as the nature of the rights involved. In most cases, the issue of the effect of this doctrine was not specifically dealt with but inferences may be drawn from the courts' orders that the courts are now willing to treat promissory estoppel as a both extinctive and suspensory doctrine.

The continuing development of promissory estoppel in the three countries studied has definitely affected the parameters of this doctrine, which has consequentially changed its role in contract law. It cannot be totally admitted that such development poses positive effect to this doctrine and the contract law at large. With the negation of the requirement of pre-existing relationship, the application of this doctrine can now extend to gratuitous promise which goes beyond the scope of contract law, thereby affecting the significance of the doctrine of accord and satisfaction and certainty that stand amongst the elements of a valid contract. Similarly, when this doctrine operates to permanently estop a representee from exercising his contractual rights, it would relatively create a redundancy in countries like Malaysia where waiver, which has a permanent effect, has been provided for under s 64 of its Contracts Act 1950. Nevertheless, it must also be noted that with the negation of the second limitation that consequently extends the application of promissory estoppel beyond contractual relationship, such 'redundancy' may appear to be immaterial.

This development does have its bright side. Now that promissory estoppel is made available to a plaintiff, its objective of providing justice can be further extended to all contracting parties. A promisee, who has suffered from acting upon a promise, can now seek redress from the court rather than wait until a claim is filed against him. The positive effect brought by the development of this doctrine can also be found by the recognition given to the newer notion of unconscionability in place of the requirement of proof of detrimental reliance on the part of the promisee thereby giving more room to justice and fairness in dealings. Needless to say, the sideline and moderate view manifested by some English and Malaysian judges, whose preference are 'fairness', 'justice' and 'equitability', may be seen as providing a check and balance to the development of this doctrine.

In the end, it can be said that the continuing development of promissory estoppel has inevitably affected the roles played by this doctrine in contract law in these three common law countries. The fact that this equitable doctrine continues to evolve after its formal promulgation in the *High Trees* case may signify its unruly application more particularly when the notion of 'Freedom of Contract' has now been replaced with a more just, yet pragmatic, notion of 'Fairness of Contract'.

Choice of Law, Forum and Procedure in Conflict of Laws in Transnational and Cross-border Commercial Disputes: Are Kenyan Judicial Decisions Veering Off to the Sidewalk?

Gilbert Nyamweya*

Abstract

This article attempts to unravel the mystery surrounding the interpretation of choice-of-law, choice-of-forum and choice-of-procedure clauses in international trade. Most international contracts contain these clauses. The occurrence of disputes in these contracts is inevitable owing to the exigencies that pervade the environment in which they are performed. It is upon the backdrop of this stark reality that such contracts invariably incorporate dispute resolution mechanisms which take the shape of jurisdiction, choice-of-law and procedural clauses. How courts interpret these clauses determines how parties define their affairs within the text of their contracts. The determination by courts as to which law or procedure is to apply or which country's courts have jurisdiction often makes a significant difference in the determination of the substantive rights and obligations of the parties. The analysis of the approach and rhythm of courts around the world in the rigours of application and interpretation of these clauses is, therefore, the propelling force behind this article. The analysis of Kenya's judicial decisions have, in the hope of bringing to the fore Kenyan courts' approach in the arena of private international contract law, been considered along with judicial decisions from other jurisdictions.

I. Introduction

A. *Definitions*

A choice-of-law clause is a clause in a contract that identifies the applicable law in the event of a dispute arising thereunder. A forum-selection clause is a

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