ENFORCING BROKEN PROMISES IN EQUITY: ESTOPPEL IN AUSTRALIA, MALAYSIA AND BEYOND*

Introduction

The doctrine of estoppel has been one of the most discussed and debated doctrines for decades. One of the biggest issues for a long time was whether the doctrine could be used as a 'sword', or cause of action, or simply as a 'shield', a procedural device preventing a plaintiff from asserting certain facts. This debate first passed into history in Australia in 1988.[1] But the resolution of the issue of whether estoppel could operate as a cause of action raised many new questions. As a cause of action where does estoppel belong in a taxonomy of obligations? What are the elements required in order to make out this estoppel? And what should the response be to such a cause of action?

This paper examines the meaning and answer to each of these questions. The Malaysian Federal Court decision in *Boustead Trading* (1985) *Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*[2] (*'Boustead Trading'*) demonstrates the willingness of other courts to follow the Australian approach and recognise a cause of action for an estoppel. The theme of this paper is to attempt to answer these difficult questions in light of the theory and nature of an estoppel. This article argues that Australia has now accepted that the remedy for estoppel as a cause of action is the same as for a contract. This article is divided into two parts. After a short introduction to estoppel as a cause of action, the

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*This paper emerged from a presentation made at a conference on estoppel in Kuala Lumpur (International Workshop on Estoppel, 23-25 August 1999, Faculty of Law, *Universiti Malaya,* Kuala Lumpur) and in particular, from thoughtful and provocative attacks there upon the argument developed herein.

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

[2] [1995] 3 MLJ 331.

first part briefly explains the latest Australian recognition that as a cause of action, estoppel should be recognised as equity's contribution to the enforcement of promises. A comprehensive treatment and analysis of that case, *Giumelli v Giumelli*,[3] can be seen in a recent article in the Australian *Journal of Contract Law*.[4] The second part then considers the central thesis of the article; *why* the expectation-based remedy is the appropriate response to an estoppel as an equitable cause of action and what this will mean. This article examines the extent to which this approach should be adopted in countries such as Malaysia that have boldly followed the Australian recognition of estoppel as a cause of action with particular focus on circumstances of unilateral promises without reliance detriment.

Preliminary

An estoppel can operate in two different ways. The first is 'in the context of a pre-existing legal relationship'. In this context estoppel operates to prevent one party from denying the existence of that relationship.[5] Rights and remedies are governed by that relationship rather than the estoppel independently. Estoppel here operates as a 'shield' and not a 'sword'. This type of estoppel is effectively a procedural device. It can operate in fields such as administrative law as freely as it operates in contract law. On the other hand, an estoppel can also operate as a positive cause of action. In *Waltons Stores v Maher*,[6] Waltons had sought to avoid entering into a contract of lease by instructing their solicitors to slow down in the conveyancing stages of the lease. This was done despite the fact that Waltons were aware that the plaintiffs, the Mahers, were relying upon an assurance by the Waltons' solicitors that 'approval would be forthcoming' and that the

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[3](1999) 161 ALR 473.

[4]J. J. Edelman, 'Remedial Certainty or Remedial Discretion in Estoppel after *Giumelli*' (1999) 15 JCL 179.

[5]The notion (supposedly deriving from *Jorden v Money* (1854) 1 HLC 185) that it was only promises as to *existing facts* that could found an estoppel was first dispelled by Lord Denning MR in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

[6](1988) 164 CLR 387.

Mahers had proceeded to incur expense on that basis. Deane and Gaudron JJ held that the estoppel[7] had effect as a defence so that the Mahers were 'precluded from denying the existence of a binding agreement for lease'.[8] The rights of the parties were to be governed on the basis of the lease agreement as if it were in force. As Robert Goff J stated at first instance in *Amalgamated Property Co v Texas Bank*,[9] in this 'sense...estoppel is not, as a contract is, a source of legal obligation'. The source of legal obligation was the lease agreement and for Deane and Gaudron JJ damages were available on the basis of the contract as it could not be specifically enforced.

On the other hand, Mason CJ, Wilson and Brennan JJ treated the estoppel in *Waltons* (here turning to 'promissory estoppel' in equity) as a positive doctrine operating to 'enforce voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable'.[10] The nature of an estoppel in this sense as a positive cause of action or a 'sword' is what this paper is concerned with. However, the result between the two approaches in *Waltons* was the same. Where the estoppel operated as a defence the damages were for the breach of contract as specific performance was unavailable. Where the estoppel operated as a cause of action, the damages were identical as proprietary relief (akin to specific performance) was unavailable. This first part of this paper explains that the High Court has recently reiterated this view that estoppel as a cause of action should enforce promises in the same way as a contract. There will therefore be a neat symmetry between estoppel as a defence and estoppel as a cause of action and subtle distinctions which might lead to splits such as that in *Waltons* will not affect the result. The second and main part of this paper then seeks to defend the notion that estoppel should enforce promises.

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[7]Although the estoppel as such therefore was a 'common law estoppel' or estoppel *in pais*, in *Waltons* Deane J did not consider that there should be any difference between the doctrines of estoppel at common law or in equity: (1988) 164 CLR 387, at page 449.

[8](1988) 164 CLR 387, at pages 443 (Deane J) and 464 (Gaudron J).

[9][1982] 1 QB 84, at page 105.

[10](1988) 164 CLR 387, at pages 406 (Mason CJ and Wilson J) and 428-429 (Brennan J).

Part 1: Australian Recognition of Estoppel as Enforcing Promises

Giumelli v Giumelli

The recognition that estoppel operates in the same manner as a contract, by enforcing promises, can be seen in the recent Australia High Court decision in *Giumelli v Giumelli*[11] ('*Giumelli*'). For a case dealing with an area of law as confused as estoppel, the facts in *Giumelli* were fortunately quite simple. Robert Giumelli was the son of a family that owned a farming property in Dwellingup in Western Australia. Robert worked on the farm for his parents, Mr. and Mrs. Giumelli for many years. Although he was eventually made a partner, even as a partner he was only given a small maintenance described as 'pocket money'. In order to keep Robert working for the partnership, he was made three promises by Mr and Mrs Giumelli at various times. In 1974 he was promised part of the property on which he worked in exchange for continuing to work effectively without wages. In 1980 he was promised a part of the property on which he intended to build a house to encourage this construction and him to live in the house and continue to work for the partnership. In 1981 he was promised that the lot on which the house stood would be subdivided if he stayed on and did not accept a job elsewhere. The relationship between Robert and his parents later broke down and his parents sought to resile from these promises.

In the High Court it was held that Mr. and Mrs. Giumelli were to be held to their promises and Robert was given a monetary damages award which reflected the value of his expectation. The refusal by the court to grant specific proprietary relief was because Steven (one of the other sons) was also living on the property and an order conveying the property to him was said to be productive of injustice.[12] Kirby J, in his concurring judgment stated that to convey the property would be to 'exceed the requirements of conscientious conduct'.[13]

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[11](1999) 161 ALR 473.

[12](1999) 161 ALR 473, at page 485.

[13](1999) 161 ALR 473, at page 487.

Recognition of Expectation Loss

In making an award which represented the monetary value of the expectation the joint judgment in *Giumelli* stated that the expectation measure was 'the prima facie entitlement of Robert'.[14] The court held that the third promise led to an estoppel because 'the detriment suffered by [Robert] was the loss of the property which he worked to improve, not to obtain the immediate income from that exercise but to gain the proprietary interest'.[15] The detriment suffered was therefore defined as the failure to obtain the promised benefit; the expectation. If this is correct in *every* instance where an estoppel arises the measure of the detriment, as non-fulfillment of that promise, requires that it is the expectation loss and not the reliance loss that should be compensated.

The reasoning of *Giumelli* therefore appears to entrench an expectation award for an estoppel. This result, as a matter of practice, is not really that novel. It has been observed that 'in the five years following *Verwayen* ...in every reported case the courts had granted relief which had the effect of fulfilling the claimant's expectations, rather than simply reversing the detriment'.[16] Yet, in *Commonwealth v Verwayen*[17] it was only the decisions of Justices Deane and Dawson that expressly awarded an expectation loss on the basis of an estoppel. And their Honours also did so on the basis that the reliance loss which had been suffered by the plaintiff as a result of the promise not to plead the *Statute of Limitations* could not be measured in money.[18] The High Court in *Giumelli*[19] however took a broader view and stated that:

> "In our view, and consistently with the course of Australian authority since *Verwayen*, that decision is not authority for any such curtailment of the relief available in this case."

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[14](1999) 161 ALR 473, at page 485.

[15](1999) 161 ALR 473, at pages 479-480.

[16]A. Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 MULR 805. Contrast this with *Public Trustee v Wadley* (Unreported, Full Court of Supreme Court of Tasmania, 27 June 1997).

[17](1990) 170 CLR 394.

[18](1990) 170 CLR 394, at pages 448 (Deane J) and 461 (Dawson J).

[19](1999) 161 ALR 473, at pages 481-482.

Specific Performance of the Promise

As mentioned earlier, the specific enforcement of the promise in *Giumelli* was refused. However this approach was consistent with the approach taken by the law of contract in enforcement of promises. In *Giumelli* Robert had sought a proprietary award (in the form of a constructive trust) akin to specific performance. The joint judgment stated that such proprietary relief was not 'an immediate right to positive equitable relief in the same sense that a right to recover damages may be seen as consequent upon a breach of contract'.[20] The proprietary relief was barred due to circumstances which:

> "included the still pending partnership action, the improvements to the Promised Lot by family members other than Robert, both before and after his residency there, the breakdown in family relationships and the continued residence on the Promised Lot of Steven and his family."

This corresponds precisely to the refusal of specific relief in contract where performance would be difficult or productive of hardship.[21]

Indeed, in a Canadian case footnoted in the joint judgment, *Soulos v Korkontzilas*,[22] McLachlin J, delivering the judgment of the majority, referred to two reasons where a proprietary award would be 'inappropriate'. These reasons were the occurrence of later facts which made a proprietary award impossible (such as the interests of third parties)[23] or if damages are an adequate remedy so that there is no 'personal need' for a proprietary remedy.[24] This is precisely the approach taken to specific performance.

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[20](1999) 161 ALR 473, at page 476.

[21]*Ferguson v Wilson* (1866) LR 2 Ch App 77; *O'Connor v North* (1887) 9 LR (NSW) Eq 88; *Wroth v Tyler* [1974] 1 Ch 30; *Duncombe v New York Properties Pty Ltd* [1986] 1 Qd R 16.

[22][1997] 2 SCR 217.

[23]*Rawluk v Rawluk* (1990) 65 DLR (4th) 161. Contrast this with *Westdeutsche v Islington LBC* [1996] AC 669, at page 715 (Lord Browne-Wilkinson).

[24]This approach was precisely the reason for the proprietary award in *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, at pages 17 (Wilson J) and 49 (La Forest J, Lamer J agreeing).

An Obstacle to this Approach: Notions of Equitable Discretion and Flexibility

There is one obstacle to this approach. This is the constant and consistent use of the word 'discretion' or references to 'equitable flexibility' in relation to estoppel.[25] *Giumelli* is replete with such references to this discretion as is *Boustead Trading*.[26] The use of this nomenclature might suggest that estoppel is not a doctrine whose elements or response can be defined in any fixed manner. The argument would be that whether an estoppel exists and the response to an estoppel should depend upon notions of judicial discretion and not upon any pre-conceived formula. This cannot be accepted. These statements cannot be taken literally. If they were it would be a serious erosion of the rule of law. A former High Court Justice, John Toohey, writing recently on the role of judges made this point by quoting from a passage in the play *A Man for all Seasons* by Robert Bolt.[27] The passage concerned an exchange between the Lord Chancellor, Sir Thomas More and his son in law and later biographer, William Roper:

> **Roper:** So now you'd give the devil the benefit of law!
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> **More:** Yes. What would you do? Cut a great road through the law to get after the Devil?
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> **Roper:** I'd cut down every law in England to do that!
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> **More:** Oh? And when the last law was down, and the Devil turned round on you- where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast- Man's laws, not God's- and if you cut them down- and you're just the man to do it- d'you really think you could stand upright in the winds

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[25]See *Ramsden v Dyson* (1866) LR 1 HL 121, at page 171; *Plimmer v Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App Cas 699; *Voyce v Voyce* (1991) 62 P & CR 290, at pages 293 and 296; *Roebuck v Mungovin* [1994] 2 AC 224, at page 235; *Commonwealth v Verwayen* (1990) 170 CLR 394, at pages 446 and 454.

[26][1995] 3 MLJ 331, at pages 342 and 348.

[27]R. Bolt, *A Man for All Seasons* (1980), at pages 38-39.

> that would blow then? Yes, I'd give the devil the benefit of law, for my own safety's sake.

There are a number of reasons why the idea of discretion in a doctrine or in its remedies are very unattractive. These reasons were powerfully captured by McHugh J recently in *Perre v Apand*:[28]

> "attractive as concepts of fairness and justice may be in appellate courts, in law reform commissions, in the academy and among legislators, in many cases they are of little use, if they are of any use at all, to the practitioners and trial judges who must apply the law to concrete facts arising from real life activities. While the training and background of judges may lead them to agree as to what is fair or just in many cases, there are just as many cases where using such concepts as the criteria for duty would mean that "each judge would have a distinct tribunal in his own breast, the decisions of which would be as irregular and uncertain and various as the minds and tempers of mankind"[29] ... Furthermore, when legislatures and courts formulate legal criteria by reference to indeterminate terms such as "fair", "just", "just and equitable" and "unconscionable", they inevitably extend the range of admissible evidentiary materials. Cases then take longer, are more expensive to try, and, because of the indeterminacy of such terms, settlement of cases is more difficult, practitioners often having widely differing views as to the result of cases if they are litigated. Bright line rules may be less than perfect because they are under-inclusive, but my impression is that most people who have been or are engaged in day-to-day practice of the law at the trial or advising stage prefer rules to indeterminate standards."

Instead of viewing these references to flexibility or discretion as an invitation to an unrestrained judicial conscience, they should instead be seen as references to the need to incrementally develop a system of rules to govern doctrine and remedy. The use of the language of discretion really reflects the fact that historically, not hamstrung by the now defunct declaratory theory of the common law,[30] incremental

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[28](1999) 164 ALR 606, at page 625.

[29]*Donaldson v Beckett* (1774) 2 Brown 129 per Lord Camden cited in 'The Judge and Case Law' in Devlin, *The Judge* (1979), at page 180.

[30]See *Kleinwort Benson v Lincoln* [1998] 3 WLR 1095.

development of judge-made law in equity was seen not only as necessary but as desirable. The Chancellor's conscience, as Lord Nottingham stated, was not his 'natural and private conscience but a civil and official one'.[31] It was a development based in rules but the references to discretion and flexibility were recognition of the early acknowledgement that Chancery judges did make law unlike their common law counterparts that declared it. Thus, the language of discretion was not used in contradistinction to a system of application of 'rules' but as an acknowledgement of the judicial power to develop the law. So as Harman LJ remarked, 'since the time of Lord Eldon...equitable jurisdiction is exercised only upon well-known principles.'[32] Thus in discussing the 'discretionary' jurisdiction to compel specific performance, it is said that although this jurisdiction had 'always been treated as discretionary [it is] confined within the well-known rules'.[33] Or in relation to the jurisdiction to grant an injunction: 'the discretion is not one to be exercised according to the fancy of whoever is to exercise the jurisdiction of Equity'.[34]

The development of a coherent law of estoppel thus requires that these notions of equitable discretion and flexibility not be taken to mean that the doctrine or its remedy are not subject to a prescribed rule. In relation to the doctrine itself, this is relevant to the meaning of 'unconscionability'. Although it is often said that unconscionability is a term which cannot be described,[35] without description of it a coherent and predictable model of estoppel is impossible. In *Commonwealth v Verwayen*[36] Deane J remarked that what is unconscionable 'must be resolved not by reference to some pre-conceived formula... but by reference to all the circumstances of the

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[31]*Cook v Fountain* (1672) 3 Swanst 585, at page 600.

[32]*Bridge v Campbell Discount Co Ltd* [1961] 2 WLR 596, at page 605

[33]*Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, at page 126.

[34]*Doherty v Allman* (1878) 3 App Cas 709, at pages 728-729.

[35]*Taylor Fashions v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, at page 154; *National Westminster Bank v Morgan* [1985] 2 WLR 588 at 602; Sir Anthony Mason 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238, at page 255.

[36](1990) 170 CLR 394, at page 445.

case'. In *Muschinski v Dodds*[37] Deane J (with whom Mason J agreed) acknowledged that the reference to unconscionability was not to 'some mix of judicial discretion'[38] but to a 'principle of law'. The problem though is that without definition, the phrase 'unconscionability' inevitably means that the decision of what is or is not unconscionable is left to judicial discretion and vague, subjective conceptions of justice.[39]

Secondly, if equitable *doctrine* is not subject to these notions of discretion why should equitable *remedy* be any different? It is no better for legal certainty if a judge cannot say "I deny you a cause of action in my discretion" if the judge can make the same statement ("I deny you a remedy in my discretion") in relation to remedy. To suggest that judges have either an unlimited remedial discretion or that they can make a remedial *choice* based on discretionary considerations misconceives the operation of equity.

Part 2: When Estoppel Operates to Enforce Promises

The first point that might be observed from *Giumelli* is that the definition of detriment in a broad sense as the failure of a promised benefit could potentially mean that a promise might be enforced in equity without *reliance* detriment. This might be placing a great deal of weight on the statement in the joint judgment in *Giumelli* that 'the detriment suffered by [Robert] was the loss of the property which he worked to improve, not to obtain the immediate income from that exercise but to gain the proprietary interest'.[40] This is especially the case as the joint judgment went on to state that 'for that Robert gave up the opportunity of a different career path'.[41] However, the joint judgment, under the heading

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[37](1985) 160 CLR 583.

[38](1985) 160 CLR 583, at page 616.

[39]This has been acknowledged on several occasions where the search for a principled basis for unconscionability has been advocated: *Collin v Holden* [1989] VR 510, at page 516; *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, at page 585. See A. Robertson, 'Knowledge and Unconscionability in a Unified Estoppel' (1998) 24 Mon ULR 115.

[40](1999) 161 ALR 473, at pages 479-480. I am grateful to Malcolm McCusker QC for alerting me to this point.

[41]*Ibid.*

'Detriment' also suggested that there were two alternative routes to finding detriment. The first basis was dependent only upon the conduct of the promisor and not upon any reliance detriment, the second combined elements of both. The joint judgment stated that:

> "In *Olsson v Dyson,*[42] Kitto J observed that the judgment of the Lord Chancellor in *Dillwyn v Llewelyn* seemed to contain two concurrent lines of reasoning. One was that, assuming there was no contract, nevertheless the conduct of the father was such as to bind him in conscience to make the legal situation correspond with the implication and the encouragement given the son to lay out the money. The other was that the father's conduct in encouraging the son to build the house on the footing that the land would be his, *when acted upon by the son*, created an equity which bound the father to make good the son's expectation."[43]

Although this point might seem controversial and a surprising interpretation of *Giumelli*, in Malaysia the point is beyond doubt. The Federal Court of Malaysia in *Boustead Trading*[44] expressly eschewed the notion of a requirement of detriment in estoppel. The Federal Court there stated that:

> 'We take this opportunity to declare that the detriment element does not form part of the doctrine of estoppel. In other words it is not an essential ingredient requiring proof before the doctrine may be invoked'.[45]

The effect of not requiring reliance detriment could only make one possible, but major, difference. This difference is in the one circumstance where reliance is not present at all. A unilateral promise that is not relied upon. An estoppel that does not require reliance detriment might mean that unilateral promises could sometimes be enforced. A makes a unilateral promise to B intending that B rely

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[42](1969) 120 CLR 365, at page 378.

[43]*Giumelli* (1999) 73 ALJR 547, at page 554.

[44][1995] 3 MLJ 331.

[45]*Boustead Trading* [1995] 3 MLJ 331, at page 348.

upon that promise. Before B does so A seeks to resile from the promise. B seeks the value of her expectation as an estoppel. The basic elements of an estoppel appear to be present. There is a representation made with intent that it be relied upon.

Does this mean that all unilateral promises can or will be enforced? No. This is because there is an additional element of *unconscionability*. Firstly, it is said that mere 'failure to fulfil a promise does not of itself amount to unconscionable conduct',[46] something 'more will be required'.[47] As Mason CJ stated in *Verwayen v The Commonwealth* "[t]he breaking of a promise, without more, is morally reprehensible, but not unconscionable in the sense that equity will necessarily prevent its occurrence or remedy the consequent loss". This is because the promisee 'may reasonably be expected to appreciate that he cannot safely rely upon [the gratuitous promise]'.[48] In *Waltons Stores* Brennan J stated that:

> "Something more will be required. *Humphreys Estate*[49] suggests that this may be found, if at all, in the creation and encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that that other party relied upon that assumption to his detriment to the knowledge of the other party".[50]

This additional element of 'unconscionability' is remarkably elusive. Meagher, Gummow and Lehane have remarked that 'it would be a bold lawyer who would assert knowledge of what the law of estoppel was today in Australia'.[51] It seems that at a minimum, there is a further requirement beyond merely breaking a promise that 'the party who induces the adoption of the assumption or expectation knows or intends that the party who adopts it will act or abstain from acting in reliance

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[46]*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, at page 404 ('*Waltons*').

[47]*Waltons* (1988) 164 CLR 387, at page 406 (Mason CJ and Wilson J).

[48]*Waltons* (1988) 164 CLR 387, at page 406 (Mason CJ and Wilson J).

[49][1987] AC 114.

[50](1988) 164 CLR 387, at page 433.

[51]R.P. Meagher, W.M.C. Gummow, J.R.F. Lehane *Equity Doctrines and Remedies* (3rd ed, 1992), at page xi.

upon the assumption or expectation'.[52] As Brennan J suggests, it might also be that reliance is necessary, or at least an important element, in order for the conduct to be unconscionable. Thus reliance is not necessarily irrelevant.

But to elevate reliance to a requirement *in itself* of the cause of action does not make sense in a doctrine with an expectation-oriented remedy. This can be seen with an example from where estoppel is used as a defence or shield. In *Avon County Council v Howlett*,[53] the plaintiffs sought return of money overpaid as a result of a mistake. The defendant however, had changed his position by spending part of the money.[54] The trial judge held that the remedy of money had and received for money paid by mistake of fact could only be maintained to the extent of the money that remained. This was because estoppel was held to operate as a defence *to the extent of the reliance*. The Court of Appeal disagreed. In the Court of Appeal the estoppel was held to operate *pro tanto* as a defence to the *entire claim*. It did not matter that not all the money might have been spent.[55] It would be strange to insist upon reliance only to then ignore it when determining the remedy to be granted.

In the result, the determination of when an estoppel arises will depends upon the meaning of what is 'unconscionable'; a term courts have been loath to define. However, discretionary or 'flexible' idiosyncratic notions of unconscionability are inappropriate. Courts

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[52]*Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871, at page 875; *Crabb v Arun District Council* [1976] Ch 179 at 188; *Waltons* (1988) 164 CLR 387, at pages 406, 423 and 462. See also *Olsson v Dyson* (1969) 120 CLR 365 where the action for an estoppel failed as there was no evidence that 'the deceased ever adverted to the question' of whether the promise might be relied upon.

[53][1983] 1 WLR 605.

[54]In fact by the time of the hearing all of it had been spent but counsel declined an invitation to amend pleadings to reflect this.

[55]This result has however been criticised and might be inconsistent with *Lipkin Gorman (A Firm) v Karpnale Ltd* [1991] 2 AC 548. See also *RBC Dominion Securities Ltd v Dawson et al* (1994) 111 DLR (4th) 230, at page 237; Key, 'Excising Estoppel by Representation as a Defence to Restitution' [1995] CLJ 525; G. Jones, *Goff and Jones: The Law of Restitution* (1998), at page 829.

will have to define the notion by incremental development having regard, *inter alia*, to notions of:

1. any reasonable reliance and the extent of any *reliance detriment* suffered;
2. whether the promisor intended that the promise be relied upon;
3. whether the promisor's intention in making the promise was vitiated or qualified in any way (such as by a mistake or by duress); and
4. knowledge by the promisor of the promisee's reliance.

Each of these notions affects whether an estoppel is recognised. Indeed Australian courts are already showing signs of adopting a similar approach to the question of 'practical benefit' in cases concerning consideration through contractual variations.[56]

Objections from Contract

(a) Objections that Parts of Contract Law will be Undermined

There are however objections to the idea that equity can enforce promises. This is because contract law has over a process of hundreds of years developed a system of determining which promises should be binding and which should not based on notions of principle. The objection is that these principles are undermined by such a broad doctrine of estoppel.

One of these principles is said to be that promisors that make unilateral promises, perhaps not really intending them to be performed or making them rashly, are not bound by those promises at common law. Consideration must be given to make the promise binding. Perhaps one basis for consideration was that to depart from a bargained for promise is a more serious act which the law should not countenance. Promisors are likely to think more about making rash promises when receiving something in exchange. However, it should be noted that consideration was not always a widely accepted doctrine of the common

[56]*Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723.

law. In its early stages Lord Mansfield did not favour the concept. Lord Mansfield viewed the concept simply as *one means* of proving an intention to be bound or to create legal relations.[57] The recognition of the broad, expectation based, cause of action for an estoppel in equity would return to that position. Further, in *equity* these factors, demonstrating an intention to be bound by the promise would be examined as *one basis* to show that it would be unconscionable to depart from the promise referred to above. Thus contract law in this area is not being undermined but in fact its very policy is used in informing a different question: when departure from a promise in equity is unconscionable.

Another part of developed contract law which, it is claimed, would be avoided is the requirement of writing in contracts such as those for the sale of land.[58] The problem in the estoppel cases is that without acts of part performance pointing unequivocally to a promise, how can an estoppel avoid the danger of perjury and fraud that is one of the purposes of the *Statute of Frauds*? However, the *Statute of Frauds* was often avoided in equity. The statute could not be relied upon by a defendant where the plaintiff had performed acts of part performance which were unequivocally referable to the contract. It has been a received doctrine since *Maddison v Alderson*[59] that such acts of part performance give rise to an 'equity' to specific performance notwithstanding the *Statute of Frauds*. Again, in estoppel the protection of the policy underlying the legislation is in the definition of *unconscionability*. By requiring that the promisor prove more than simply that the representation or promise had been made, these additional requirements (of which the 4 above are the minimum content) go towards demonstrating the affirmative existence of the promise. For it will be very difficult for a plaintiff to show reliance, knowledge of that reliance or an intention to be bound by a promise that was never in fact made. This approach is quite consistent with the early English

[57]*Pillans v Van Mierop* (1765) 3 Burr 1663; 97 ER 1035.

[58]For example, all those provisions deriving from *Statute of Frauds* (1677) (Imp), section 4.

[59](1883) App Cas 467, at page 476 (Lord Selborne).

cases, which recognised that equity could enforce induced expectations that were relied upon although not in the form of a contract.[60]

(b) Objections that Promises are the Exclusive Province of Contract Law

The second argument against recognition of the ability of a cause of action for estoppel to enforce promises is more general. It assumes a clear demarcation in doctrine that has never existed. The argument is simply that even if equitable estoppel's enforcement of promises would not conflict with contractual goals the doctrines should not be allowed to co-exist. This type of argument cannot stand either.

To begin with, the doctrines are quite different. An executory contract is binding from the moment of formation and before any party has relied upon the contract or has acted to any detriment.[61] Estoppel requires the elusive element of 'unconscionability' which might arise *ex post* the promise. As a separate doctrine, with separate elements there is no competition between contract and estoppel. The argument that one should give way to the other misconceives the nature of concurrent liability. In *Hill v Van Erp*,[62] in responding to this argument, Gummow J quoted from Professor Francis Reynolds that 'rivalry between principles...is unlikely to be productive. We are used to such interaction of the principles of restitution with contract and...equity. We should accept it also in the case of tort'.[63]

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[60]This early jurisprudence simply died out in the late 19th century: *Hammersley v De Biel* (1845) 12 Cl & Fin 45, at pages 62 and 88; 8 ER 1312, at pages 1320 and 1331; *Prole v Soady* (1859) 2 Giff 1; 66 ER 1; *Loffus v Maw* (1862) 3 Giff 592; 66 ER 544; *Stephens v Venables (No 2)* (1862) 3 Beav 124; 49 ER 48; *Thomson v Simpson* (1870) LR 9 Eq 497.

[61]Although proponents of the 'reliance theory of contract' would argue that the law has been wrong in this respect: See P.S. Atiyah, 'Contracts, Promises and the Law of Obligations' (1978) 94 LQR 193, at pages 220-221; B. Coote 'The Essence of Contract' (1988) 1 JCL 91, at page 106.

[62](1998) 188 CLR 159.

[63](1998) 188 CLR 159, at page 231. See also at page 182 (Dawson J).

It is the same argument that restitution should give way to contract[64] or that a duty of care in tort should not be imposed when a contract exists (and the plaintiff is not privy to that contract), arguments now conclusively rejected.[65] In *Henderson v Merrett Syndicates Ltd*,[66] Lord Goff, giving the leading speech in the House of Lords rejecting this argument, stated:

> "...given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him".[67]

The question then, should not be whether an estoppel should be allowed where a contractual remedy would not. Instead, it should be asked whether reasons of policy should *prevent* such a result.

Evaluation and Conclusion

This article has made several arguments. In the first part it argued that Australian law has moved to the position where equity can enforce promises through the action of an estoppel. In the second part it was argued that there is nothing wrong with this approach and its implications are not that startling. Equity, in fact, had enforced promises up until the end of the 19th century. To allow equity to again do so is not inconsistent with contract law and is consonant with accepted current theories of concurrent liability. Roman law also referred to these promises, not arising from contract but 'natural obligations', the parties being bound by a 'tie of conscience': *Is natura debet quem jure*

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[64]P. Birks, *Inconsistency between Compensation and Restitution* (1996) 112 LQR 375, at pages 378; E. McKendrick, *Total Failure of Consideration and Counter-Restitution: Two Issues or One?* in P. Birks (ed.), 'Laundering and Tracing' (1995), at pages 217 and 229-230; K. Barker, *Restitution of Passenger Fare* [1994] LMCLQ 291, at page 295; Treitel, *The Law of Contract* (1995), at page 850.

[65]*Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761, at page 787 (Lord Goff); *Hill v Van Erp* (1998) 188 CLR 159; *Rowlands v Collow* [1992] 1 NZLR 178. See also C. French, *The Contract/Tort Dilemma* (1984) 5 Otago LR 236.

[66][1994] 3 WLR 761.

[67]*Ibid*, at page 787.

gentium dare oportet, cujus fidem secuti sumus.[68] Nor are the implications radical. The extent to which a voluntary promise, even unrelied upon, will be enforced will depend upon the content of the element of unconscionability. Some suggestion as to how it can incrementally develop and factors to be considered were made but the result cannot be clearly predicted until the courts indicate the relative weights to be placed upon those factors.

The reader might note though that the case boldly promised in the title of the paper was never *positively* made. It was never shown that estoppel *should* operate to enforce promises alongside contract. It was argued that it has now been recognised that it *does* and that there is nothing wrong or inconsistent with such recognition; no reason why it *should not*. In the end however the question of whether it *should* is the same as the unanswered question of how far equitable estoppel will go in enforcing unilateral promises even those unsupported by reliance. The answer depends upon the content of the notion of unconscionability which requires a moral judgement of the value of a promise. The extent to which other countries such as Malaysia should follow this Australian lead will depend on this moral judgement. Malaysia has already recognised this in *Boustead Trading* by acknowledging that the content of an estoppel will inevitably turn upon a court's determination of what is meant by the notion of unconscionability: All that need be shown is that in the particular circumstances of a case, it would be unjust to permit the representor or encourager to insist upon his strict legal rights'.[69] The time is now ripe for the courts of both countries to decide the value equity is prepared to place upon a promise.

James Edelman*

* Magdalen College
Oxford

[68]Justinian's Digest D 1.17.84.1.

[69]*Boustead Trading* (1985) *Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, at page 348.

THE USE OF ESTOPPEL IN THE SALE OF GOODS

An attempt is made in this paper to look at the use of the doctrine of estoppel in the area of the sale of goods. First, estoppel is used in section 27(1) of the Sale of Goods Act 1957 as an exception to the general principle of *nemo dat quod non habet.*[1] Secondly, an effect similar to estoppel is also seen at work in section 13(1) of the Sale of Goods Act 1957. The discussion on the operation of these two aspects of the doctrine of estoppel will be attempted in the light of English and Malaysian case law.

I. Section 27(1) of the Sale of Goods Act

The first part of section 27(1) gives effect to *nemo dat* whereas the second part of the same has it that:

> ... unless the owner of the goods is by conduct precluded from denying the seller's authority to sell.

Estoppel in the above context has been understood to refer to (a) estoppel by words, (b) estoppel by conduct, and (c) estoppel by negligence although only the word *'conduct'* is used in the said sub-section. There are certain requirements which need to be satisfied before the plea of estoppel may be allowed - *viz.*, that the representation must be one of fact, that it must be unambiguous, that it must be acted upon and that it must be voluntary.

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[1] Where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or consent of the owner, the buyer acquires no better title to the goods than the seller had.