English Law of Contract: Promissory Estoppel

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Context & Basic Effect

• Context
  – Promissory estoppel concerns certain situations where a party to a contract promises something which is at variance with the original terms of contract and where the other party to the contract alters his/her behaviour in reliance of that promise. In such situations, English law will often prevent the former party from enforcing the original terms of the contract.

• Basic Effect
  – Estoppel restricts a person’s ability to “go back on” a belief or assumption that they induced in another person.
  – The doctrine has the effect of making some kinds of promises binding even where they are not supported by consideration.
Estoppel v. Waiver

- **Waiver** = suspension of contractual right
  - It has similar effect to promissory estoppel.
  - Also equitable in nature.
  - Practically, waiver primarily operates in relation to promises to accept delivery of goods or services later than originally agreed. It means that, subject to the usual principles of equity, such a promise can be enforced even if not supported by consideration.
    - *Charles Richards Ltd. v. Oppenheimer* (1959)
    - *Hughes v. Metropolitan Railway Co.* (1877)
  - Exact status and importance of waiver is nowadays unclear; some scholars (e.g. Treitel) suggest that waiver has now been merged with, or submerged under, the doctrine of promissory estoppel. Certainly, promissory estoppel seems now to be a more important and dynamic doctrine.
Estoppel types (1)

• Promissory estoppel is derived from equity:
  – It is one of several kinds of estoppel all of which can be said to be “mechanisms for enforcing consistency” (E. Cooke, The Modern Law of Estoppel, OUP, 2000, pp. 1-2)

• Examples of other kinds of estoppel:
  – Proprietary estoppel
    • Applies where person purports or promises to give but fails to effectively convey, property or an interest in property, to another person knowing that the latter will expend money or otherwise act to their detriment in reliance of purported or promised gift. See further Poole, section 4.9 and Crabb v. Arun District Council (1976).
Estoppel types (2)

• Examples of other kinds of estoppel (cont.):
  – Estoppel by representation of fact
    • “where one person (‘the representor’) has made a representation of fact to another person (‘the representee’) in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto.” (G. Spencer Bower, *The Law Relating to Estoppel by Representation*, London: Butterworths, 2004, 4th ed., para. 1.2.2)
Promissory estoppel in relation to contract

- Promissory estoppel (p.e.) basically prevents a party to a contract from acting in a certain way because they promised not to act in that way, and the other party to the contract relied on that promise and acted upon it.

  - *Hughes v. Metropolitan Railway Co.* (1877), as per Lord Cairns:
    - “It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties”.

  - These principles were applied in *Central London Property Trust Ltd. v. High Trees House Ltd.* (1947) by Denning J. (as he then was) to found the modern doctrine of p.e. Denning J. was attempting to arrive at a fair solution to the problem of part payment of debt, and, in doing so, to circumvent precedent created by *Foakes v. Beer* (1884).
Requirements of promissory estoppel (1)

1) There is a pre-existing contractual relationship.
2) One party to that contract makes a clear promise that they will not fully enforce their legal rights (under that contract).
3) The promisor intends that promise be relied upon and promisee does in fact rely upon it.
4) It would be inequitable for promisor to go back on (resile from) their promise.
   • Re (2), promise need not be express; it can be implied from circumstances (situation in *Hughes*).
Requirements of promissory estoppel (2)

- Re (3), it would seem that promisee’s reliance need not be detrimental in the sense that, if the promise were revoked, the promisee would be worse off than if promise had never been made.
  - It is sufficient that promisee has altered their position in reliance upon promise so that they would be prejudiced if promisor resiled from promise. “The nub is the promisee’s inability to resume his original position due to the reliance. The corollary is that if he can resume his original position, or can do so on reasonable notice (as in High Trees), there is no inequity in resiling from the promise either completely or for the future, as the case may be”. (M. Chen-Wishart, Contract Law, OUP, 2006, p. 175)

- Re (4), this overlaps with (3) but mere fact of reliance will not necessarily mean that inequity requirement is met.
  - Inequity = separate and independent requirement. Whether inequity would result, depends on assessment of all circumstances of case at hand. If promisee extracts promise through extortion and/or deception, then (4) would not be met. See e.g. D & C Builders v. Rees (1966)
Effect of promissory estoppel on promisee’s position (1)

• While promisee need not provide any consideration for promisor’s promise, they cannot sue on promise (they have not provided consideration for it). In other words, doctrine cannot be used as cause of action in itself; it does not confer or create new rights on promisee; it only operates to stop promisor from fully enforcing previous rights against promisee (i.e. doctrine operates as “shield but not as sword”).

• Concomitantly, doctrine can only be used where there is pre-existing contractual relationship (or other relationship creating legal rights), for which consideration will have been required. It cannot be used where one party promises to do more than what contract requires or to pay more than required.
Effect of promissory estoppel on promisee’s position (2)

- These limitations are exemplified by *Combe v. Combe* (1951).
- What is rationale for these limitations?
- In Australia, the limitations have been largely dispensed with *Waltons Stores (Interstate) Ltd. v. Maher* (1988). See further Poole, section 4.8.6.1. Focus of Australian courts is on preventing “unconscionable conduct” (vaguely defined).
Effect or promissory estoppel on promisor’s legal rights

- It suspends but does not fully extinguish the promisor’s strict legal rights.
  - *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* (1955); operation of rights may be resumed once reasonable notice given of intention to resume their operation and if promisee can resume their original position (*Emmanuel Ayodei Ajayi v. RT Briscoe Ltd.* (1964)). If latter condition cannot be met, effect of doctrine is to extinguish rights.

- Some terminological debate here:
  - Denning says the rights are extinguished even during the time they are suspended because, in reality, they cannot be claimed back for that period (even if they can be revived later).
Relationship of promissory estoppel to *Pinnel* and *Roffey*

- Relationship is complex and murky.
- Rule in *Pinnel’s Case* remains point of departure for promises to accept less. Promissory estoppel may come in to modify impact of *Pinnel* if all conditions for applying it are present. Estoppel does not necessarily destroy primary obligation (to repay debt).
- Note recent decision of CA in *Collier v. P & M J Wright (Holdings) Ltd.* (2008) 1 WRL 643: One judge (Arden LJ) prepared to use promissory estoppel to override the effect of *Pinnel’s Case*, but authority is weak.
- Estoppel not yet applied to promises to pay more. *Roffey* court did not consider promissory estoppel (!)
- Note somewhat uncertain status of promissory estoppel: Supreme Court (formerly HL) has yet to confirm existence of doctrine. But extremely doubtful it would not do so.