
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 subsection. 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.

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.

1. Estoppel by Words

At common law, estoppel by representation may be divided into estoppel by words and estoppel by conduct. It may happen where the owner has by his words or conduct represented to the buyer that the seller is the true owner, or has the owner's authority to sell. Under this sub-heading, we are concerning ourselves with estoppel by words.

A case may suffice to illustrate how this aspect of estoppel works. In *Henderson and Co. v Williams*,² G & Co. were induced by fraud to sell goods to one F. G & Co. instructed the defendants, the warehousemen, to transfer the goods in their books to the order of F. F then sold the goods to the plaintiffs. Upon inquiry by the plaintiffs, the defendants twice issued a statement to the plaintiffs. The first statement assured the plaintiffs that they held the goods to the order of F and the second to the effect that they held the goods to the order of the plaintiffs. G & Co. then instructed the defendants not to deliver the goods to the plaintiffs but to themselves because they had not been paid by F. It was held that both G & Co. and the defendants were estopped from denying the plaintiffs' right to the goods. G & Co. were estopped because they had represented to the defendants that F was the owner by instructing the defendants to transfer the goods into F's name in their books. On the other hand, the defendants were also estopped because they had represented to the plaintiffs that they held the goods to their order.³

2. Estoppel by Conduct

In respect of estoppel by conduct, one thing at any rate for sure is that mere delivery of possession of the goods to another is not sufficient to raise an estoppel. In the case of a motor vehicle, delivery to another of possession of a car together with its registration book does not estop the true owner from setting up his title.⁴ Likewise, the return of railway

²[1895] 1 QB 521.

³See also *Shaw v Commissioner of Metropolitan Police* [1987] 1 WLR 1332.

⁴*Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371.

receipts by the pledgee to the pledgor in order to enable the pledgor to obtain clearance of the goods from the railway company did not constitute an estoppel against the pledgee where the pledgor had fraudulently pledged them with another bank in return for an advance from them.⁵ Estoppel could not be raised here because the possession of the railway receipts "no more conveyed a representation that the merchants (X) were entitled to dispose of the property than the actual possession of the goods themselves would have done". Thus, there must be something more than mere delivery of possession of the goods or documents of title. Such an estoppel can only be raised provided that there exists some act which positively misleads the buyer beyond merely allowing a non-owner to have possession of the goods.

Where the owner of the goods represents the seller to be the owner or enables the seller to represent himself to be the owner, and knows that the seller will or may sell the goods as an owner, it is immaterial that the seller sells the goods outside the ordinary course of business unless there is a lack of *bona fides* on the part of the buyer.⁶ But on the other hand, if a case is one of ostensible agency only, the position is not the same. It is usually implicit in such a case that an agent is only entitled to sell the goods in the ordinary course of business. If he does not do so, estoppel cannot be raised in favour of the buyer.⁷

3. Estoppel by Negligence

There is another distinct occasion where estoppel may also arise. An owner of goods, by his negligent failure to act, may allow the seller to appear as the owner or as having the owner's authority to sell. If a person negligently omits to inform another person of certain facts, he may be said to be representing to that other person that the facts calling for report do not exist. The representation here is in fact constituted by a negligent omission. It seems that negligence in the

⁵*Mercantile Bank of India v Central Bank of India* [1938] AC 287.

⁶*Lloyds and Scottish Finance Ltd. v Williamson* [1965] 1 WLR 404.

⁷*Motor Credits (Hire Finance) Ltd. v Pacific Motor Auctions Pty Ltd.* [1963] 109 CLR 87.

sense of a breach of duty must be proved. In relation to estoppel by negligence, the circumstances in which negligence on the part of the true owner may raise such a plea are narrowly confined by the English courts. Mere carelessness in entrusting possession of the goods, or the documents of title to the goods to another,⁸ or a careless failure to register an interest in a vehicle let on hire- purchase with the Hire-Purchase Information (HPI),⁹ will not by itself estop the true owner from recovering the goods from a person who has bought them without title, even though it could be said that it was the carelessness of the owner which has enabled the fraudulent seller to pass the goods off as his own. Mere neglect on the part of the true owner of what would be prudent conduct may not suffice to raise an estoppel.¹⁰

The Malaysian High Court, on the other hand, in *Syarikat Batu Sinar v UMBC Finance*¹¹ held that failure on the part of a finance company to register its ownership claim with the RIMV constituted estoppel by negligence as there is a legal duty to register the ownership claim. Amongst the grounds given by the court to substantiate the imposition of a duty on the finance company, a couple of them may be highlighted here. First, since the coming into force of the Road Traffic Ordinance 1958,¹² all buyers of second-hand cars in West Malaysia have always relied on the absence of any registered endorsement of ownership claim in the registration card as a green light to deal with sellers whose names appeared in the registration cards as registered owners or with their mercantile agents. By and large, a great deal of fraudulent "double-selling" has been avoided. Secondly, the aforesaid practice has been assisted by a system of registration under the relevant statutory provision.¹³ The decision of

⁸*Supra*, notes 4 and 5.

⁹*Moorgate Mercantile v Twitchings* [1977] AC 890.

¹⁰*Benjamin's Sale of Goods*, Fifth Edition, paragraph 7-015. For more details on how the doctrine of estoppel is used, see P.S. Atiyah, *The Sale of Goods*, Eighth Edition, at pages 322-332.

¹¹[1990] 3 MLJ 468.

¹²Now the Road Transport Act 1987.

¹³S. 10 of the Road Traffic Ordinance 1958.

the High Court to impose a legal duty of care in *Syarikat Batu Sinar* is not something new. In fact, it is to be welcomed. The minority in *Moorgate Mercantile's* case, that is, Lord Wilberforce and Lord Salmon, also shared the same view. Lord Wilberforce pointed out that in practice everyone in the motor business relied greatly on the registration of the hire-purchase agreements with the HPI and it would seem reasonable that a duty to register arose in the circumstances. And also in *Syarikat Batu Sinar* it does not seem harsh to impose a legal duty to register on a finance company dealing in hire-purchase transactions in the course of their business. In such a case, the finance company certainly is aware of the importance of registration. Besides, it has all the necessary resources to effectuate the required registration with the relevant authority and should, therefore, be more aware of the need for registration and the danger of an omission to register.¹⁴ Another matter which must be pointed out here is that in the case of *Moorgate Mercantile*, there was an unwillingness on the part of the majority to extend the duty of care to the factual situation of the case in question whereas the High Court in *Syarikat Batu Sinar* was ever willing to impose such a duty of care in a similar-fact situation.¹⁵

II. Section 13(1) of the Sale of Goods Act 1957

An effect similar to promissory estoppel¹⁶ is also seen at work in section 13(1) of the Sales of Goods Act 1957:

Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition ...

¹⁴And to aggravate matters, the possession of the vehicle was also left with the fraudulent dealer.

¹⁵*Industrial Resources v United National Finance*. Civil Appeal No. 2/86 in the Court of Appeal. Unreported. Cited in *Syarikat Batu Sinar*. Another case to note is *Ng Nat Siang v Arab-Malaysian Finance & Anor* [1988] 3 MLJ 319.

¹⁶*Hughes v Metropolitan Railway Co* (1877) 2 AC 439.

Although time is *prima facie* of the essence in the matter of delivery of goods, buyers do not usually refuse to accept delivery merely because the delivery is late. An actual acceptance of late delivery or even an agreement to accept late delivery will usually be binding on the buyer irrespective of consideration. It seems immaterial that such a waiver or estoppel is regarded as binding at common law¹⁷ or under section 13(1) of the Sale of Goods Act 1957.¹⁸ The promise or waiver must be clear and unequivocal although it need not be express. A buyer who does not complain of the relevant breach at the time when it is committed, but who at that stage appears to be willing to continue with the contract, may be held to be bound by the waiver or estoppel so as to be precluded from raising that breach subsequently. The victim of a breach of condition has alternative remedies: he may either treat the contract as terminated or affirm it, but he must choose between the two. He cannot, by claiming to 'reserve his rights', demand the right to affirm the contract while keeping in reserve the possibility of treating it as terminated. It is not entirely settled whether a waiver or estoppel must be acted upon to the prejudice or detriment of the party who breaches the contract before he can rely upon it. In general, it seems that this is necessary because a bare waiver or representation which is instantly withdrawn before it is acted upon is unlikely to be held to be binding on the victim.¹⁹

¹⁷*Charles Rickards Ltd. v Oppenheim* [1950] 1 KB 616 on the ground of promissory estoppel.

¹⁸*Hartley v Hymans* [1920] 3 KB 475.

¹⁹*Societe Italo Belge v Palm and Vegetable Oils* [1982] 1 All ER 19. For more information on this heading, see Atiyah, *The Sale of Goods*, Eighth Edition, at pages 99-103.

III. Effect of Estoppel

It seems that the effect of estoppel may in some cases relating to the sale of goods operate to pass the title in the goods.²⁰ However, the same is not the case where the goods concerned are unascertained goods.²¹

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²⁰*Eastern Distributors Ltd. v Goldring* [1957] 2 QB 600.

²¹*In re London Wine Co. (Shippers) Ltd.* (1986) PCC 121. The other view is that estoppel is a rule of evidence which bars a person from adducing certain evidence in court. According to this view, the 'real' legal position remains unaffected by the estoppel.

EQUITABLE ESTOPPEL: IS 'PALM TREE JUSTICE' BACK?

Scope

The Federal Court in *Boustead Trading Sdn Bhd v Arab-Malaysian Merchant Bank Bhd.*¹ (the *Boustead* case) ruled that detriment was not an integral part of the doctrine of equitable estoppel. This paper argues that detriment, a traditional feature of equitable estoppel, is an integral part of the factor of unconscionability in "The Duty to Ensure the Reliability of Induced Assumptions". It is further pointed out that detriment suffered by the promisee is an essential factor that the court ought to take into account when assessing the applicability of the doctrine of equitable estoppel. To this end, this paper examines: (a) the content of "the duty to ensure the reliability of induced assumptions"; and (b) the law on equitable estoppel in Malaysia prior to and with regard to the Federal Court decision in the *Boustead* case. In conclusion, this paper advocates the Spencian model of a structured and principled approach to the doctrine of equitable estoppel in general and to promissory estoppel in particular. Detriment is an essential feature of the Spencian model.

1. The Duty to Ensure the Reliability of Induced Assumptions

The duty to ensure the reliability of induced assumptions is the moral basis upon which the doctrine of estoppel is grounded. In an equitable estoppel, one party has induced an assumption in the mind of another which induces the latter to rely upon that assumption. The parties are referred to as the inducing party and the relying party. The inducing party has the primary obligation as far as is reasonably possible to

¹[1995] 3 MLJ 331.