EQUITABLE AND COMMON LAW ESTOPPEL DISTINGUISHED

The latest case respecting the doctrine of equitable estoppel is the opinion of Pearson J. in *Societe Franco Tunisienne D'Armement* v. *Siderman S.P.A.*[1]

The facts of the case were as follows: by a charterparty dated October 18th, 1956, the defendants chartered from the plaintiffs a vessel to convey a cargo of iron ore from an Indian port to Genoa. The usual route was via the Suez Canal. On November 9th, 1956, when the vessel was ready to load, the shipowners and charterers knew the Suez Canal was blocked. Nevertheless, notice of readiness to load was given, the cargo was loaded and on November 19th, 1956 the vessel sailed. On November 20th, 1956, however, the shipowners informed the charterers that the blockade of Suez had frustrated the contract. The matter was, then, referred to arbitration.

In the hearing before the arbitrator, the shipowners alleged that the charterparty dated October 18th, 1956 had been frustrated by the closure of Suez and claimed a reasonable remuneration for the carriage of the cargo via the Cape of Good Hope. The charterers, in answer, argued, *inter alia,* that the shipowners were estopped from contending that the contract was frustrated. The arbitrator found that the shipowners had not stated, by word or conduct, that the contract was not frustrated. He, then, stated a special case for the decision of the High Court. One of the questions of law submitted for the decision of the Court was whether the shipowners were estopped from contending that the charterparty was frustrated.

9. 15 T.C. 33. In this case the Court held that for a transaction to amount to an adventure in the nature of trade one of the following four conditions must be present: — (a) the existence of an organisation, or (b) activities which lead to the maturing of the asset to be sold, or (c) the existence of special skill, opportunities in connection with the article dealt with, or (d) the fact that the nature of the asset itself should lend itself to commercial transactions.

10. See G.S.A. Wheatcroft: "What is Taxable Income?" (1957) *British Tax Review* 310 at 314.

1. [1960] 2 A.E.R. 529.

The defendants attempted to rely on the equitable shield to guard against the possibility of the court finding that the contract was frustrated. They pleaded the estoppel in order to overcome the settled law that even where the parties to a contract contemplate and provide for a frustrating event, the court can still proceed to consider whether the contract was in fact frustrated.[2] Pearson J., when dismissing the defendants argument, said: [3]

> It is clear to my mind that there was no representation of fact such as could found estoppel at common law. The subject of equitable estoppel[4] is obscure and insufficiently developed.[5] ... In my view there has been no development of this comparatively new doctrine of equitable estoppel which is wide enough to cover this case. [6]

The learned judge appropriately confined himself to the facts before him and found that there was no equitable estoppel. His words, however, indicate his Lordship's doubt as to the existence of the doctrine of equitable estoppel. Moreover, it seems that the learned judge doubts whether there is any difference between common law and equitable estoppel.[7] These doubts are, it is submitted, well-founded for it seems that the two doctrines are very similar indeed, as will be shown hereinafter.

It is generally contended that there are two differences between common law estoppel and equitable estoppel. First, it is suggested that detriment, which has always formed part of the definition of common law estoppel, is not an essential for equitable estoppel. Secondly, it is said, common law estoppel applies only to representations of past or present fact, while equitable estoppel can apply also to representations of future intention. The cases, however, do not seem to support these contentions.

It is often stated on the authority of the House of Lords decision in *Jorden* v. *Money* [8] that only a representation of existing or past fact, and not one relating to future conduct, will give rise to common law estoppel. Equitable estoppel recognises no such distinction. However, there is authority to support the submission that common law estoppel, too, has been applied to representations of future intention. This is best illustrated in *Fenner* v. *Blake.* [9] In this case the defendant entered into an oral agreement with the plaintiff to surrender his tenancy at an earlier date than that on which the plaintiff could validly give notice. The plaintiff, subsequently, sold the premises with a right to possession on the date orally agreed to by the defendant. The plaintiff brought an action for ejectment when the defendant repudiated his oral agreement. With regard to estoppel, Channel B. said:

2. Tatem *Ltd. v. Gamboa* [1938] 3 All E.R. 135 *(per* Lord Goddard C.J. at p. 149); *Tamplin S.S. v. Anglo-Mexican, etc. Ltd.* [1916] 2 A.C. 397; *Jackson* v. *Union Marine Insurance Co.* [1874] L.R. 10 C.P. 125, and *Bank Line Ltd.* v. *Capel & Co.* [1919] A.C. 435.

3. [1960] 2 All E.R. 529 at pp. 545-46.

4. Pearson J. regarded equitable estoppel as identical with promissory estoppel, ibid, p. 529 note 50.

5. Pearson J. referred to the following authorities: 16 *Halsbury's Laws of England* (3rd edn.), p. 175; and to *Anson's Law of Contract* (21st edn.). pp. 103, 104 and 105. He also referred to: *Birmingham & District Land Co.* v. *London and North-Western Rly.* (1888) 44 Ch. D. 286; *Hughes v. Metropolitan Rly.* [1877] 2 A.C. 439. *Tool Metal Co.* v. *Tungsten Electric Co.* [1966] 2 All E.E. 667; and *Harnam Singh* v. *Jamal Pirhbai* [1951] A.C. 688.

6. At pp. 545 and 546.

7. He points out that in at least one case common law estoppel could have been granted in lieu of equitable estoppel: see pp. 545-46.

8. (1854) 5 H.L.C. 186.

9. [1900] 1 Q.B. 426.

> . . . it seems to me that in this case the facts raise an ordinary case of estoppel, . . . [because the landlord had] . . . thereby rendered himself liable to an action at the suit of the purchaser.[10]

The fact that the tenant's statement was one of future intention did not hinder Channel B. from deciding that the tenant was estopped at common law.

The similarity between common law estoppel and equitable estoppel becomes evident on an examination of the *dictum* in *Lyle-Meller* v. *A. Lewis & Co.*[11] Here there was an agreement between the plaintiff and the defendants whereby the defendants were permitted to use the plaintiff's patents on their gas-filled lighters and refills. The defendants agreed to pay royalties as soon as British letters patent were granted to the plaintiff. The defendants, however, continued to use the patents and pay royalties although no letters patent had been granted. Subsequently, the defendants stopped payment and the plaintiff sued. The plaintiff succeeded as the Court of Appeal held that the defendants were estopped from denying that their inventions embodied the plaintiffs patents.

All the Lord Justices of Appeal came to the conclusion that the facts gave rise to an estoppel. Denning L.J. came to the same conclusion by relying on equitable estoppel. He said:

> . . . this assurance was binding, no matter whether it is regarded as a representation of law or of fact or a mixture of both and no matter whether it concerns the present or the future. It may not be such as to give rise to an estoppel at common law, strictly so-called . . . but we have gone beyond the old common law estoppel now. We have reached a new estoppel.[12]

Morris and Hodson LL.J., on the other hand, decided that facts of the case gave rise to a common law estoppel and that in spite of the fact that the representation was one of future intention.

Thus it seems that one of the alleged differences between equitable and common law estoppel is unwarranted. Future intention will, in both, amount to a sufficient representation. The other alleged difference, *i.e.* that equitable estoppel unlike common law estoppel can arise without detriment to the promisee, appears to be equally unwarranted.

The problem of detriment first arose as a result of the decision of Denning J. (as he then was) in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[13] Denning J. laid down the doctrine of equitable estoppel in the following words:

> I prefer to apply the principle that a promise intended to be binding, intended to be acted on, and in fact acted on, is binding . . .[14]

The basis of this principle, in Denning J.'s opinion, were four earlier decisions.[15] However, a close study of all four cases shows clearly that the mere fact that a person made a promise (or statement) to refrain from enforcing his strict legal rights

10. At p. 428.

11. [1956] 1 All E.R. 247.

12. At p. 250: Hodson L.J., however, said that ". . . there is no question of having to carry the doctrine of estoppel what I might perhaps describe as the ancient field":

13. [1947] 1 K.B. 130.

14. *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] 1 K.B. 130 at p. 136.

15. *Fenner* v. *Blake* [1900] 1 Q.B. 426; *Re Wickham* (1917) 34 T.L.R. 158. *Re William. Porter & Co.* [1937] 2 All E.R. S61: and *Buttery* v. *Pickard* (1945) 174 L.T. 144.

will not in itself give rise to equitable estoppel. Only when the promisee acting on that promise or statement changes his position to his detriment, is the promisor estopped from going back on his promise.

Thus, the first case quoted by Denning J. is *Fenner* v. *Blake.*[16] The detriment suffered by the landlord was, however, stressed by Channel B. The second case quoted by Denning J., *Re Wickham,*[17] was a case where a creditor wrote a letter to the debtor saying that the security held by him was sufficient. The debtor was declared bankrupt. The creditor did not prove his debt at the bankruptcy proceedings. Subsequently, when the debts were being brought up, the creditor tried to show that the security was insufficient. Coleridge J. (as he then was) held that the creditor was estopped because "Mr. Wickham (the debtor) had acted on it in a way that he would not have done had he known . . ."[18] Similarly, in the remaining two cases detriment is evident.[19] Mr. Guest in his edition of *Anson's Law of Contract* appears to agree that detriment is an essential ingredient of equitable estoppel.[20]

It is submitted, that there is no line of demarcation between common law estoppel and equitable estoppel.[21] Neither common law estoppel nor equitable estoppel can form the basis of a cause of action. Both are rules of evidence and can only be used as protective shields and not as swords.[22] The alleged differences do not exist and their creation has only led to unnecessary confusion. Recognition of the similarity between the two doctrines will remove most of the difficulties concerning common law and equitable estoppel.

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16. [1900] 1 Q.B. 426.

17. (1917) 34 T.L.R. 168.

18. *Re Wickham* (1917) 34 T.L.R. 158 at p. 159.

19. *Re William Porter & Co.* [1937] 2 All E.R. 361 and *Buttery* v. *Pickard* (1945) 174 L.T. 144.

20. Mr. Guest is the editor of *Anson's Law of Contract*. (21st edn.). 1959. He cites *John Odlin & Co. Ltd*. v. *Pillar* [1952] Gaz. L.R. 601 (N.Z.) in support of the proposition that detriment is essential to equitable estoppel. If it is a necessary requirement of estoppel it follows, therefore, that it will also establish the existence of consideration: *Currie* v. *Misa* (1875) L.R. 10 Ex. 153 at 162. Between consideration and detriment the difference, if any, appears to be that consideration applies to promises and detriment concerns statements of fact. But the one can easily be Interpreted to be the other; as Denning J. (as he then was) did in *Central London Property Trust* v. *High Trees House Ltd*. [1947] 1 K.B. 130 at 134.

21. Or quasi-estoppel or promissory estoppel as it has been called.

22. *Low* v. *Bouverie* [1891] 3 Ch 82 at p. 106. *Combe* v. *Combe* [1951] 2 K.B. 215.