

THE CONTINUING EVOLUTION OF
PROMISSORY ESTOPPEL

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DOCTOR OF PHILOSOPHY
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By

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By

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Under the

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**To my husband Saiffuddin, son Amir , daughters Husna and Hurin and in loving memory
of my late mother, Hajjah Saudah**

prevent injuria by the wrongdoer as a contracting party in going back from his promise and
to enforce his contractual right that had initially led the other party to act to his detriment.
First, the historical evolution of this doctrine is outlined. Secondly, its present parameters
in three common law countries - England, Australia and Malaysia - are examined due to
the continuing development of these countries affecting the traditional limitations of this
doctrine. The third focus of this study is the possibility of incorporating this doctrine into
the present Malaysian legislation in order to facilitate its wider application.

The continuing evolution of promissory estoppel starts with the first phase, which dates
back to as early as the 16th century under the notion of reliance as an acceptable element
of contract law. The reliance doctrine is shown to be a thriving alternative to the
contractual element of consideration. It is traced to the four cases studied and a fairly
attained recognition through the promulgation of promissory estoppel in the High Court
in 1877, complemented by the High Court case in 1947.

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Faculty : Economics and Management

In this research, three phases in the continuing evolution of promissory estoppel are examined. Promissory estoppel is an English equitable doctrine originally meant to prevent injustice by the action of a contracting party in going back from his promise not to enforce his contractual right that had initially led the other party to act to his detriment. First, the historical evolution of this doctrine is outlined. Secondly, its present parameters in three common law countries - England, Australia and Malaysia - are examined due to the continuing development in these countries affecting the traditional limitations of this doctrine. The third focus of this study is the possibility of incorporating this doctrine into the present Malaysian legislation in order to facilitate its easier application.

The continuing evolution of promissory estoppel starts with the first phase, which dated back to as early as the 16th century under the notion of reliance as an acceptable element of contract law. The reliance notion is shown to be a thriving alternative to the contractual element of consideration throughout the four eras studied and it finally attained recognition through the promulgation of promissory estoppel in the Hughes' case in 1877, complemented by the High Trees' case in 1947.

Through this study, it has also been revealed that the evolution of promissory estoppel did not end with its formal promulgation in 1947 but continues to be developed by the common law courts. Thus, a comparative study between three common law countries - England, Australia and Malaysia - has been carried out in order to determine the present parameters of promissory estoppel. It has been found that the common law courts in these countries have been more than willing to further develop this doctrine first laid out through the Hughes' and High Trees' cases, which has been affecting four of its traditional limitations, thereby causing its parameters to be unclear.

From this research, it has been revealed that the continuing evolution of this doctrine has also affected the application of promissory estoppel in Malaysia as capacitated by the provision of Section 3(1) of the Civil Law Act, 1956. This provision restrictively allows its reception subject to three qualifications: when there is loophole in the Malaysian law; when the circumstances of the states of Malaysia and their respective inhabitants permit; and as local circumstances render necessary. These restrictions, together with the present unclear parameters of promissory estoppel, have led to the restrictive interpretation and application of this doctrine, which in turn led to the study of the possibility of incorporating promissory estoppel into the Malaysian legislation. The findings of this particular study have revealed the positive effects of incorporating this equitable doctrine into the Malaysian statute law as follows: the parameters of this doctrine would be clearly defined, thereby leading to more certainty in litigation; and its application by the Malaysian courts would be facilitated after it is no longer be bound by the restrictive rules of equity and the statutory restrictions imposed by Section 3(1) of the Civil Law Act, 1956.

LIST OF STATUTES

Malaysia:

Bank and Financial Institutions Act 1989
Civil Law Act 1956
Companies Act 1965
Consumer Protection Act 1999
Contracts (Malay States) Ordinance 1950
Contracts Act 1950
Evidence Act 1950
Franchise Act 1998
Housing Development (Control and Licensing) Act 1966
Limitation Act 1953
Money Lenders' Act 1951
National Land Code 1965
Partnership Act 1981
Sale of Goods Act 1957
Trade Descriptions Act 1972

England:

Consumer Protection Act 1967
Contracts of Employment Act 1972
Factors Act 1993
Fair Trading Act 1973
Housing Act 1961
Sale of Goods Act 1979
Trade Description Act 1968
Unfair Contract Terms Act 1977

Australia:

Builder Licensing Act 1971
Building Services Corporation Act 1989
Commercial Tenancy Act
Consumer Affairs and Fair Trading Act 1990
Instruments Act 1958
New South Wales Consumer Credit Administration Act 1995
New South Wales Fair Trading Act 1987
Tasmanian Fair Trading Act 1990
Trade Practices Act 1974

Other countries:

Central Bank of Kenya Act 1966
The United States Uniform Commercial Code
The United States Second Restatement of Contract
Fijian Native Land Trust Act

Abstrak tesis yang dikemukakan kepada Senat Universiti Putra Malaysia
sebagai memenuhi keperluan untuk ijazah
Doktor Falsafah

EVOLUSI BERTERUSAN *PROMISSORY ESTOPPEL*

Oleh

Wan Izatul Asma Wan Talaat

Oktober 2005

Pengerusi : **Profesor Shaik Mohd Noor Alam S.M. Hussain, PhD**

Fakulti : **Ekonomi dan Pengurusan**

Kajian ini mengenal pasti evolusi berterusan doktrin ekuiti Inggeris *promissory estoppel* melalui tiga fasa. Fasa pertama ialah mengenai sejarah evolusi doktrin ini manakala fasa kedua ialah kajian perbandingan ke atas parameter doktrin ini di antara tiga negara *common law* iaitu England, Australia dan Malaysia berdasarkan kepada evolusi *promissory estoppel* di ketiga-tiga negara ini. Fasa ketiga kajian ini ialah untuk mengenal pasti kemungkinan untuk menggubal doktrin ini ke dalam undang-undang bertulis Malaysia bagi memudahkan penggunaannya.

Pada fasa pertama, kajian ini telah mendapati bahawa sejarah evolusi doktrin ini bermula sejak abad ke-16 lagi di bawah konsep *reliance* yang ketika itu telah diterima sebagai alternatif kepada balasan, salah satu elemen terpenting dalam kontrak. Sepanjang empat era yang dikaji, didapati bahawa konsep *reliance* ini telah berjaya bersaing sehinggalah ia akhirnya diperakui apabila doktrin *promissory estoppel* mula diperkenalkan melalui kes *Hughes* pada tahun 1877 dan akhirnya diperlengkapkan melalui kes *High Trees* pada tahun 1947.

Kajian ini juga mendapati bahawa evolusi *promissory estoppel* tidak berakhir pada tahun 1947 yang mana ia terus diperkembangkan oleh mahkamah-mahkamah *common law*. Oleh yang demikian, satu kajian perbandingan di antara England, Australia dan Malaysia telah dijalankan di mana hasil penemuan kajian tersebut telah mendapati bahawa mahkamah-mahkamah *common law* di ketiga-tiga negara ini amat cenderung untuk terus mengembangkan doktrin ini yang telah memberi kesan kepada empat syarat-syarat yang telah ditetapkan oleh kes-kes *Hughes* dan *High Trees* dan akhirnya telah menyebabkan parameter *promissory estoppel* menjadi tidak jelas.

Dari kajian ini juga telah didapati bahawa evolusi berterusan doktrin ini yang telah memberi kesan kepada parameternya telah menyekat dan menjejaskan pemakaian doktrin ini terutamanya di Malaysia di mana pemakaian doktrin Inggeris ini hanya boleh dilakukan melalui peruntukan Seksyen 3(1) Akta Undang-undang Sivil, 1956. Pemakaian *promissory estoppel* hanya dibenarkan sekiranya; terdapat *lacuna* di dalam undang-undang Malaysia; apabila keadaan negeri-negeri di Malaysia dan penduduknya membenarkan; dan dirasakan perlu dan bersesuaian dengan keadaan tempatan. Oleh yang demikian, dari kajian ini, satu usul telah dibuat untuk menggubal *promissory estoppel* ke dalam undang-undang Malaysia untuk memudahkan penggunaan doktrin ini oleh mahkamah-mahkamah di Malaysia.