

COMMENTS

COMMENTAIRES

Promissory Estoppel: Analogy to the Doctrine of Waiver

The doctrine of promissory estoppel has received a much-needed re-examination in two recent cases which illustrate two basically different types of situation in which the doctrine has been applied. Although the argument was successful in both cases, it is submitted that only in *Alan v. El Nasr*¹ was the doctrine properly applied. That case involved a gratuitous promise or representation that presently existing legal rights would not be enforced. However, in *Watson v. Canada Permanent Trust Co.*² Anderson, J. of the British Columbia Supreme Court, induced by a desire to prevent an undeserving plaintiff from acting unconscionably, applied the doctrine to a promise which purported to confer new rights. Yet many of the best known formulations of the doctrine express it to operate only where the parties have entered into definite contractual terms and one party is led by the other to suppose that the strict rights under the contract will not be enforced or will be kept in abeyance.³ Admittedly, there are decisions⁴ and dicta⁵ in which this has not been a prerequisite. But if the doctrine does apply only in this type of situation, conceptual analysis is greatly facilitated because the close analogy to the doctrine of waiver becomes clear.

¹ [1972] 2 All E.R. 127 (C.A.).

² (1972), 27 D.L.R. (3d) 735 (B.C. S.C.).

³ *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439, 448 (H.L.) per Lord Cairns, L.C.; *Birmingham & District Land Co. v. London and North Western Railway Co.* (1888), 40 Ch. D. 268, 286 per Bowen, L.J., and in *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co. Ltd.* (1970), 12 D.L.R. (3d) 247, 252 (S.C.) per Martland, J.: "This principle assumes the existence of a legal relationship between the parties when the representation is made. It applies where a party to a contract represents to the other party that the former will not enforce his strict legal rights under it."

⁴ *Robertson v. Minister of Pensions*, [1949] 1 K.B. 227 per Denning, J. (representation that the plaintiff's injuries had been accepted as attributable to military service): *Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods)*, [1968] 2 All E.R. 987 per Donaldson, J. (promise not to enforce s.108 of the *Companies Act*).

⁵ E.g., per Denning, L.J. in *Combe v. Combe*, [1951] 2 K.B. 215, 220 (C.A.).

It is submitted that the House of Lords⁶ and the superior courts of other common law jurisdictions should one day acknowledge that promissory estoppel and waiver are co-terminous.⁷ English law is well on the way to this position as a result of the decision of the Court of Appeal in *Alan v. El Nasr*. As a result, promissory estoppel would not be involved in cases such as *Watson v. Canada Permanent Trust Co.*

In *Alan v. El Nasr* the plaintiff sellers contracted with the defendant buyers for the sale of certain shipments of coffee from Kenya. Payment was to be by a confirmed irrevocable letter of credit in Kenyan shillings. However, the letter of credit established by the buyers in favour of the sellers did not conform to the contract in several respects; in particular, the credit was for payment in sterling. The sellers raised no complaint but drew on the credit in respect of shipments made. At the time of formation of the contract there was parity between sterling and Kenyan currency, but before payment was made for the last shipment sterling was devalued. The sellers nevertheless sent an invoice for that shipment and were paid in sterling. When it became known that Kenyan currency was not going to be devalued, they made a claim against the buyers for the amount which they had lost in Kenyan shillings because of the devaluation. The Court of Appeal held that their claim failed because they had irrevocably waived their right to have payment by means of a letter of credit in Kenyan currency.

Lord Denning, M.R. reiterated the view (which he previously had expressed in *Charles Rickards Ltd. v. Oppenheim*⁸) that the doctrine of waiver was a particular application of the much wider principle first enunciated in *Hughes v. Metropolitan Railway Co.*⁹ and rescued from oblivion in *Central London Property Trust Ltd. v. High Trees House Ltd.*^{9a} This principle has of course become known as promissory estoppel. He then defined the doctrine of *waiver* in terms

⁶ *Woodhouse AC Israel Cocoa Ltd. S.A. v. Nigeria Produce Marketing Co. Ltd.*, [1972] 2 All E.R. 271, 282 (H.L.) *per* Lord Hailsham, L.C.:

...the time may soon come when the whole sequence of cases based on promissory estoppel since the war, beginning with *Central London Property Trust Ltd. v. High Trees House Ltd.*, may need to be reviewed and reduced to a coherent body of doctrine by the courts... we are not in a position to carry out that exploration here.

⁷ For this argument, see Campbell, *Gratuitous Waiver of Contractual Obligations*, (1964) 1 N.Z.U.L.R. 232.

⁸ [1950] 1 K.B. 616, 623.

⁹ (1877), 2 App. Cas. 439.

^{9a} [1947] K.B. 130 *per* Denning, J.

which bear a striking similarity to the various formulations of the doctrine of *promissory estoppel*:

... if one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not be allowed to insist on the strict legal rights when it would be inequitable for him to do so.¹⁰

Megaw, L.J. might be said to have gone even further in equating waiver and promissory estoppel. He thought there was a valid variation of the contract with regard to the currency of account, *i.e.*, supported by consideration moving from both sides. But he added "if there were no variation the buyer would still be entitled to succeed on the ground of waiver. The relevant principle is, in my opinion, that which was stated by Lord Cairns, L.C. in *Hughes v. Metropolitan Railway Co.*"¹¹ Stephenson, L.J. appears to have agreed that there was a valid variation but was less committed to the analogy to waiver.

If promissory estoppel and waiver are to be assimilated in this way, or if the former is a larger category which includes the latter, then several modifications have been made to the scope of these doctrines. The balance of opinion until now seems to have favoured the view that promissory estoppel was subject to the following qualifications:

- (1) the promisee had changed his position;
- (2) the promisor could resile from his promise on giving reasonable notice enabling the promisee to resume his position; and
- (3) the promise only became final and irrevocable if the promisee could not resume his position.¹²

Contrariwise, the doctrine of waiver applied where a gratuitous concession was granted by one party to a contract whereby the other was relieved of his obligation of strict performance of a contractual provision. There was no need to show detriment or change of position for the waiver to be binding, but the party waiving compliance could normally re-assert his strict legal rights upon giving reasonable notice.

¹⁰ *Supra*, f.n.1, 140.

¹¹ *Ibid.*, 144.

¹² *Ajayi v. R.T. Briscoe (Nigeria) Ltd.*, [1964] 1 W.L.R. 1326 (P.C.); *Tool Metal Manufacturing Co. Ltd. v. Tungsten Co. Ltd.*, [1955] 1 W.L.R. 761 (H.L.); *Commissioner of Inland Revenue v. Morris*, [1958] N.Z.L.R. 1156; *P. v. P.*, [1957] N.Z.L.R. 854 (N.Z. S.C.).

Following *Alan v. El Nasr* it appears that there is sufficient "change of position" or detriment if the promisee has acted on the belief induced by the other party so that it would not be equitable now to deprive him of the benefit of the promise.¹³ It seems that the doctrine is still suspensory but that, in ill-defined circumstances, the promise or waiver becomes irrevocable. Both Lord Denning, M.R. and Megaw, L.J. thought that the obligation to pay in Kenyan currency was irrevocably waived on the facts before them. Lord Denning stated that:

There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it... Nevertheless the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf or otherwise making it plain by his conduct that he will thereafter insist on them... But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that event he is bound by his waiver.¹⁴

Lord Denning does not give any indication of what situations fall within that part of promissory estoppel which does not encompass waiver. Certainly the facts of *Watson v. Canada Permanent Trust Co.* would have to fall within this category (if indeed it is a proper illustration of promissory estoppel). There was nothing there in the nature of a waiver.

In that case a gratuitous option to purchase shares was held binding despite lack of consideration because the optionor knew that the optionee intended to act on the promise by taking steps to revive the company, and he did so act to his prejudice. In these circumstances the optionor was estopped from repudiating his promise or acting inconsistently with it. Clearly if the optionee had brought the action himself, the judge would have been obliged either to refuse the claim or to adopt the United States doctrine¹⁵ and discard the cases where it has been said that promissory estoppel can only be used as a shield, not as a sword.¹⁶ However, the action was brought by the optionor against his own trustee for refusal to deliver up the shares to which the plaintiff claimed to be entitled. The trustee argued that the plaintiff was bound by the option. Superficially it might appear that the doctrine was used as a shield

¹³ *Supra*, f.n.1, 147. Stephenson, L.J. leaves the point open but thinks that the buyer did in any case act to his detriment.

¹⁴ *Ibid.*, 140.

¹⁵ *Simpson on Contracts* 2d ed. (1965), 112 ff.

¹⁶ *Supra*, f.n.5.

although the defendant was shielding himself behind a promise made to another. But it is submitted that in substance the doctrine was improperly used as a sword in that case, albeit by the defendant.¹⁷ Even if this is not so, it is absurd, when the merits clearly lay with the optionee, that his success should turn on the fortuitous circumstance that the optionor had vested his shares in a trustee.

In fact this case, and others which have been said to involve promissory estoppel but which cannot be reformulated in terms of waiver, should be resolved by a more assiduous search for consideration. Justice is normally thought to favour the promisee if he has changed his position, prejudiced himself or incurred a detriment by acting in reliance on the promise. It would do little violence to orthodox doctrine to recognise the act whereby the promisee changed his position as consideration for a unilateral contract. The only bar to this development would be the series of cases in which an express or implied request to do the act is said to be necessary for the formation of a unilateral contract.¹⁸ But the cases are not unanimous on this point¹⁹ and in fact the argument has been forcefully put that there is a more sound historical foundation for the view that any act done *in reliance* on the promise is sufficient consideration.²⁰

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¹⁷ Similarly, cases can be imagined where the promisee would be using the doctrine as a shield even though he is a plaintiff; see *Chitty on Contracts*, Vol. I, 23d ed. (1968), 139.

¹⁸ *Supra*, f.n.5.

¹⁹ See cases collected in Cheshire and Fifoot, *Law of Contract* 2d Aust. ed., 185-8.

²⁰ Atiyah, *Consideration in Contracts: A Fundamental Restatement* (1971), especially at page 53 *et seq.*

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Professional Negligence: Contract or Tort?

In *Carl M. Halvorson Inc. v. Robert McLellan & Co. Ltd.*,¹ the plaintiff construction company had taken over the erection of an aerial tramway at Jackson, Wyoming from a company which had withdrawn from the project. Arrangements were then made for the provision of engineering services by McLellan & Co. and for the supply of skilled personnel and special equipment by Wrights' Canadian Ropes Ltd. The erection of the tramway required the installation of four heavy cables. When it was discovered that a suitable winch could not be found, a winch designed for a much shorter but thicker cable was purchased and modified according to the directions of McLellan & Co. Although two cables were successfully hauled up, the winch drum broke twice before the hauling of the third cable was completed. It gave way again when the fourth cable was being hauled, causing delay and expense.

Halvorson Inc. sued both McLellan & Co. and Wrights' (who had supplied the winch) for negligence. The action was dismissed and the plaintiff's appeal to the British Columbia Court of Appeal was unsuccessful. The plaintiff then appealed to the Supreme Court of Canada.

The claim against Wrights' received short shrift. Relying on the findings of the trial judge, Pigeon, J., who delivered the judgment of the court, concluded that the only part that Wrights' had played in the matter was as agent for Halvorson Inc. in the purchase of the winch. Wrights' had not recommended the winch nor had they taken any part in the design and implementation of the modifications. On the other hand, the Court upheld the appeal against McLellan & Co. The engineering firm had designed the modifications for the winch, including a larger winch drum of "unproven and unusual design".² McLellan & Co. by its own admission was not experienced in winch drum design and was unable to calculate the exact stresses on the components and flanges. After a re-examination of the expert evidence, Pigeon, J. concluded:

An exhaustive analysis has driven me to the conclusion that a clear preponderance of evidence shows that the failure of the winch is traceable to negligence on the part of McLellan & Co.³

¹ (1972), 29 D.L.R. (3d) 455.

² *Ibid.*, 464.

³ *Ibid.*, 468.

The plaintiff's appeal against McLellan & Co. was therefore allowed.

Although the judgment is almost entirely taken up with what Pigeon, J. himself described as "an exhaustive analysis" of the expert evidence, the case is important in light of the implications behind the following passage:

... Halvorson's only possible claim is against McLellan & Co. for negligent performance of its contract for erection services, not in tort...⁴

It appears that counsel for Halvorson Inc. addressed his arguments against McLellan & Co. only in tort although the pleadings were wide enough to include contract. Pigeon, J. rejected the argument that a contract existed between Halvorson Inc. and Wrights', but was equally convinced that a contract did exist between Halvorson Inc. and McLellan & Co. It therefore followed that Halvorson Inc. was entitled to sue McLellan & Co. for breach of that contract. But why was liability limited to contract?

The relationship between consultant engineer and client is undoubtedly one in which the engineer undertakes to exercise by contract his professional skill. He may therefore be compared to a stockbroker,⁵ a solicitor⁶ and an architect.⁷ In a case concerning the last-mentioned profession, the relationship between such persons and their clients was described as arising out of contract:

... and not otherwise. The complaint that is made against them is of a failure to do the very thing which they contracted to do. That was the relationship which gave rise to the duty which was broken. It was a contractual relationship, a contractual duty, and any action brought for failure to comply with that duty is ... an action founded upon contract ... upon contract alone.⁸

Diplock, L.J. followed these words with a discussion of what he described as "status obligations",⁹ which included public callings such as common carriers, innkeepers, bailors and master and servant, all of whom were placed under a duty of care not dependent upon the existence of a contract. They were consequently subjected to liability in both tort and contract. His Lordship however chose to distinguish these public callings from professional relationships such as that between architect and client. In so doing, his Lordship relied on a distinction which would seem to draw more support from history than from logic. It is nonetheless a distinction which offers

⁴ *Ibid.*, 461.

⁵ *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399.

⁶ *Clark v. Kirby-Smith*, [1964] Ch. 506.

⁷ *Bagot v. Stevens Scanlan & Co.* [1966] 1 Q.B. 197.

⁸ *Ibid.*, 204, *per* Diplock, L.J.

⁹ *Ibid.*, 206.

at least one explanation for the words of Pigeon, J. in the case under discussion.

There is, however, little to be gained from knowing that one is either obliged to sue in contract and not tort (or indeed vice-versa) or has the opportunity of choosing between the two, unless the result of suing in one rather than the other can be shown to have significantly different consequences. Such differences are not difficult to find. For example, the choice may affect costs,¹⁰ limitation of actions,¹¹ service of originating process outside the jurisdiction¹² and, more generally, the question of damages.¹³ One aspect of damages particularly relevant to liability for professional advice is that concerned with recovery of economic loss. In the most recent authority on the subject, Winn, L.J. remarked:

... apart from the special case of imposition of liability for negligently uttered false statements, there is no liability for unintentional negligent infliction of any form of economic loss which is not itself consequential upon foreseeable physical injury or damage to property.¹⁴

Had there been no contract between Halvorson Inc. and McLellan & Co., would the principle quoted above have prevented Halvorson Inc. from recovering damages from McLellan & Co.? The answer would depend on whether there existed between the parties a "special relationship" of the sort envisaged by the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*¹⁵ The modifications to the winch would have to have been made with the

¹⁰ *Jarvis v. Moy, Davies, Smith, Vandervell & Co., supra*, f.n.5.

¹¹ *Bagot v. Stevens Scanlan & Co., supra*, f.n.7.

¹² *Mathews v. Kuwait Bechtel Corporation*, [1959] 2 Q.B. 57.

¹³ E.g., remoteness of damage: *Koufos v. Czarnikow, Ltd.*, [1967] 3 W.L.R. 1491.

¹⁴ *S.C.M. (United Kingdom) Ltd. v. W.J. Whittal & Son Ltd.*, [1971] A.C. 337, 352. Cf. *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*, [1973] 1 Q.B. 27.

In Canada the Supreme Court has decided in *Rivtow Marine Limited v. Washington Iron Works and Walkem Machinery and Equipment Ltd.*, [1973] 6 W.W.R. 692 that physical harm or damage to property is unnecessary. In that case the plaintiff chartered a crane which was manufactured and designed by the first defendant and distributed by the second defendant. After hearing of a fatal accident on another barge caused by the same type of crane supplied by the same defendants, the plaintiff withdrew his crane from service. On examination, he found it structurally defective and carried out extensive repairs on it. He could not use the barge for three months and sued for the loss of profits resulting from the withdrawal of the barge and for the cost of repairing the crane. The Court held that the plaintiff could recover for the loss of profits: [1973] 6 W.W.R. 692, 709-711.

¹⁵ [1964] A.C. 465. In *Rivtow Marine Limited v. Washington Iron Works and Walkem Machinery and Equipment Ltd.*, [1973] 6 W.W.R. 692 the Supreme

expectation that the plaintiff would rely on the engineer's expertise. A difficulty might arise where a modification was designed for one building contractor but used by another, unknown to the designing engineer. Would the engineer be liable if the second contractor suffered loss? It could be argued that the duty owed by the engineer would extend to any building contractor who put the modified design to the use intended. But this concept of duty may well exceed the narrow ambit of the "special relationship". The duty would depend not on the supply of advice in the form of such design to some other person knowing that he will rely on it, but on the mere circulation of a negligently prepared design.

Suppose that Wrights' had been approached by Halvorson Inc. to supply the winch and Wrights' in turn had requested McLellan & Co. to advise them on designing a suitable piece of machinery. If the winch, modified to McLellan's design, were subsequently supplied by Wrights' to Halvorson Inc. and then failed to do the job required of it, could Halvorson Inc. sue McLellan & Co. in tort? If any physical damage was caused to the cable or other property of Halvorson Inc., there would be no difficulty. But if Halvorson Inc. complained only of financial loss caused by the collapse of the winch drum, that would be another matter. Financial loss will not be recovered unless the relationship between plaintiff and defendant can be brought within *Hedley Byrne v. Heller*.¹⁶

But is this financial loss or something else? The winch in this hypothetical case has proven unfit for the purpose for which it was intended, leaving Halvorson Inc. with a piece of machinery which has inflicted no harm, but is as good as useless itself. Until recently a confident answer could have been given: tort law has for a long time maintained a distinction between the dangerous article and the inferior or defective article. The possession of the latter can give rise to an action only for financial loss. Then came *Dutton v. Bognor Regis Urban District Council*.¹⁷ Having considered the liability of a negligent building inspector who had failed to notice that the

Court held that a manufacturer-designer has a duty to warn of known defects or dangers in its products: *ibid.*, 707 *per* Ritchie, J. However, Laskin, J. (dissenting in part) would have extended the liability of the manufacturer-designer by placing him "under an anterior duty to prevent injury which foreseeably would result from its negligence in the design and manufacture of this piece of equipment": *ibid.*, 712. Thus he would have added the costs of repairing the defective crane to the majority's award for loss of profits.

¹⁶ *Supra*, f.n.15.

¹⁷ [1972] 2 W.L.R. 299.

foundations of a house were on an old rubbish tip, Lord Denning, M.R. said:

I would say the same about the manufacturer of an article. If he makes it negligently with a latent defect (so that it breaks to pieces and injures someone) he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair.¹⁸

Stamp, L.J. was more circumspect. He described this aspect of the case as "the most difficult point for decision"¹⁹ and preferred to restrict his conclusion to the particular duty imposed on the local council by statute.

Earlier cases have shown that it is an easy step from manufacturer to designer.²⁰ Is it then only one further step, with the help of *Dutton v. Bognor Regis U.D.C.*, to a position in which a consulting engineer such as McLellan & Co. may find himself liable outside contract and outside the "special relationship" of *Hedley Byrne v. Heller*?

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¹⁸ *Ibid.*, 312.

¹⁹ *Ibid.*, 329-30.

²⁰ *E.g.*, *Voli v. Inglewood Shire Council* (1963), 110 C.L.R. 74 (Aust. H.C.).

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