5-2012

The Future of Promissory Estoppel in Singapore Law

Tiong Min Yeo
Singapore Management University, tmyeo@smu.edu.sg

Fifth Yong Pung How Professorship of Law Lecture[*]
Singapore Management University
16 May 2012

THE FUTURE OF PROMISSORY ESTOPPEL IN SINGAPORE LAW

Introduction

1. In the preface to the first Singapore and Malaysian edition of *Cheshire, Fifoot, Furmston's Law of Contract* in 1994, Yong Pung How CJ said: "The Singapore legal system should strive towards indigenous development, preferably by way of a rationalization of its basic laws in the first instance."[1] Singapore law has come a long way since then. In recent years we have seen significant restatements by the Singapore judiciary in diverse areas including contract law, tort law, property law, company law and the conflict of laws. This paper will examine a small but basic topic, promissory estoppel, where there have been some important recent developments in Singapore and elsewhere.

2. Although the doctrine of promissory estoppel is often discussed in contract law textbooks, strictly speaking it is not a doctrine of contract law at all. It is an equitable doctrine that operates at the fringes of the law of contract. It is not subject to the principles of contract law: the rules of offer and acceptance, consideration, and intention to create legal relations[2] do not apply. Although an unequivocal promise must be found it is not subject to the rigour of certainty that terms in a contract are tested for. In its traditional form, the remedy is not the enforcement of a promise but the restraint of the exercise of a legal right.

3. Promissory estoppel can be a powerful technique precisely because it is not subject to the same tests applicable to the enforceability of a contractual promise. A recurring concern in many jurisdictions about the role of promissory estoppel is the danger that if used too liberally it could undermine contractual doctrines, especially the doctrine of consideration. It is thus important to set out the background context of the doctrine of consideration in Singapore law in order to understand the potential future development of the doctrine of promissory estoppel.

Promissory Estoppel: the Traditional Doctrine

4. Promissory estoppel was brought into prominence in English law by Denning J in the famous case of *Central London Property Trust Limited v High Trees House Ltd*,[3] tracing its roots to

---

[*] The Yong Pung How Professorship of Law and the lecture series were made possible by a generous donation from the Yong Shook Lin Trust. More details about this lecture series can be found at: http://www.law.smu.edu.sg/yphdls/20120516/index.asp.

[1] Reproduced in A Phang, *Cheshire, Fifoot and Furmston's Law of Contract: Second Singapore and Malaysian Edition* (Singapore: Butterworths Asia, 1998) at v.

[2] But a clear objective intention not to be bound by the promise may defeat promissory estoppel: *Central London Property Trust Limited v High Trees House Ltd* [1947] KB 130 at 134, as it may for proprietary estoppel as well: *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752, [2008] UKHL 55 at [81], [85] and [91] (Lord Walker).

[3] Note 2 above.

the earlier case of *Hughes v Metropolitan Railway Co*.[4] The elements of the traditional doctrine of promissory estoppel[5] are that if within an existing legal relationship, *A* has made a promise to *B* not to exercise a strict legal right against *B*, and *B* has relied on that promise to his detriment, then equity will restrain *A* from resiling from that promise to the extent that it would be inequitable for *A* to do so. Three aspects of the traditional doctrine can be distilled from this formulation. First, the traditional role of the doctrine is to prevent harm to *B*. This is expressed in the requirement of *detrimental* reliance. Secondly, this protection from harm also explains why the remedy is not always the enforcement of the promise: the remedy for promissory estoppel is said to be *suspensory* generally (ie, *A* can enforce his legal right after giving reasonable notice to *B*),[6] and that it will extinguish *A*'s right only if subsequent events render it impossible for the *B* to perform his original obligation or render it highly inequitable for *B* to do so.[7] Thirdly, the requirement of a pre-existing relationship sets the context for the operation of the traditional doctrine. Promissory estoppel only works by restraining *A* from enforcing a pre-existing right against *B* and the doctrine does not and cannot create fresh rights against *A*. It is defensive and not offensive.

5. It has been said that promissory estoppel can only work as a shield and not as a sword. This does not mean that only the defendant can raise promissory estoppel. It means that a plaintiff cannot rely exclusively on promissory estoppel to sue. Relying on an independent cause of action, the plaintiff can use promissory estoppel to prevent the defendant from denying an element of the claim or from asserting an element of a defence. In contrast, the law as developed in the separate historical strand of proprietary estoppel allowed the plaintiff to rely on defendant's promise as a cause of action.

The Doctrine of Consideration

6. It is axiomatic that a contractual promise will be legally enforced only if it is supported by consideration. There are deep controversies about the nature and scope of the doctrine of consideration. One major theory is the bargain theory, ie, promises must be "bought" to be legally enforceable. This appears to have been accepted by the Singapore Court of Appeal with the observation that the benefit/detriment analysis is the application of such a theory. But the technical nature of the doctrine has come under increasing criticism, and the Singapore Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter*[8] ("*Gay Choon Ing*") has suggested that reform of the doctrine may be timely. However, it may go too far to say that this case has spelt the beginning of the end of the doctrine of consideration in Singapore, as has been suggested by one author.[9] A more realistic reading of the case is that it signals a

[4] (1876-77) LR 2 App Cas 439.
[5] For a concise restatement, see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 810.
[6] *Central London Property Trust Limited v High Trees House Ltd*, note 2 above, at 136; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761 (HL); *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 (HL) at 399.
[7] Sir Guenther Treitel, "Contract: In General", in A Burrows (ed), *English Private Law* (Oxford: OUP, 2nd ed, 2007) at [8.54].
[8] [2009] 2 SLR(R) 332, [2009] SGCA 3. See M Chen-Wishart, "Consideration and Serious Intention", [2009] SJLS 434; ZH Wu, "A Probable Reform of Consideration" [2009] SJLS 272; ZX Koo, "Envisioning the Judicial Abolition of the Doctrine of Consideration in Singapore" (2011) 23 SAcLJ 463.
[9] M Chen-Wishart, "A Bird in the Hand: Consideration and Contract Modifications", A Burrows and E Peel (eds), *Contract Formation and Parties* (Oxford: OUP, 2010) 89 at 107-108.

dilution of the doctrine of consideration,[10] not its outright abolition. The Court's provisional conclusion – after a broad survey of the arguments of the conservative position to preserve the doctrine, the radical arguments to abolish it entirely, and the *via media* solution of abolishing it in the context of contract modifications – was that the most pragmatic solution was the application of a dilute form of consideration with broad recourse to peripheral doctrines like promissory estoppel, economic duress, undue influence and unconscionability.[11]

7. The dilution of consideration, apart the doctrine of practical or factual consideration in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[12] ("*Williams v Roffey*") which has already been accepted in Singapore law,[13] may be illustrated by the recent Court of Appeal case of *Rainforest Trading Ltd v State Bank of India Singapore*[14]("*Rainforest Trading*") in the affirmation and restatement of the doctrine of past consideration. Endorsing the statement of VK Rajah JC (as he then was) in *Chwee Kin Keong v Digilandmall.com Pte Ltd* that the "modern approach in contract law requires very little to find the existence of consideration",[15] the Court of Appeal then applied its own observations in *Gay Choon Ing* on past consideration. The main conceptual difficulty with past consideration, of course, is that the benefit had not been requested at the time of the promise, and had already been conferred by that time. According to the Court, one has look at the substance and not the form, and avoid taking a strict chronological approach, for the "element of request establishes a link between the consideration and promise which results in what is in substance one single contemporaneous transaction between the parties."[16] The affirmation of the doctrine of "past consideration" within the law of contract is significant because the early supporting authorities[17] could have been rationalised on the alternative basis of the law of restitution to maintain the purity of the doctrine of consideration. The practical difference between the contractual and restitutionary analysis is remedial. In a simple case, the restitutionary analysis leads to a *quantum meruit* award which value is pegged by the sum agreed *ex post facto* by the parties. The contractual analysis leads to the full range of contractual remedies for the breach of the promise.

Promissory Estoppel in Singapore: From Detriment to Benefit

[10] This approach appears to be consistent with the pluralistic conception of contracting discussed in L Trakman, "Pluralism in Contract Law" (2010) 58 Buffalo L Rev 1031.
[11] Note 8 above, at [118]. A flanking attack has been mounted against this case on the basis that the Court of Appeal had erred in departing from the holding of the High Court that the compromise agreement was vitiated by an antecedent breach of fiduciary duty to disclose material information relating to the value of and dividends payable on certain shares alleged to have been held on trust: M Chen-Wishart, "Consideration and Serious Intention", [2009] SJLS 434 at 435-436. However, the very existence of the trust (and any fiduciary duty arising therefrom) was centrally in dispute between the parties and was the subject of the compromise.
[12] [1991] 1 QB 1 (CA).
[13] *Sharon Global Solutions Pte Ltd v LG International (S) Pte Ltd* [2001] 3 SLR 368; *Sea-Land Sevice Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250, [1994] SGCA 103 (accepted as law but not applicable on the facts).
[14] [2012] SGCA 21.
[15] Ibid at [38], referring to [2004] 2 SLR(R) 594 at [139].
[16] Ibid at [37], applying *Gay Choon Ing*, note 8 above, at [83]-84].
[17] *Lampleigh v Braithwait* (1615) Hob 105; 80 ER 255; *In re Casey's Patents* [1892] 1 Ch 104.

8. The expansion of the doctrine of promissory estoppel is illustrated in *Lam Chi Kin David v Deutsche Bank AG*[18] ("*Lam Chi Kin*"). The dispute centred on whether *A*, a bank, could be held to a promise given to *B*, its private client, to give a 48-hour grace period for *B* to respond to a margin call before *A* would close out *B*'s positions on certain foreign exchange trading contracts. The Court of Appeal held that on the facts, promissory estoppel was made out. It then found in the alternative (it had not been pleaded) that the promise was actually supported by consideration on the facts, and thus there was a valid variation of the original agreement. To remove any doubt, it spells out in its conclusion that its decision on consideration was only *obiter*,[19] thus reinforcing the primacy of its reasoning on promissory estoppel as the basis for its decision.

9. The High Court had found against *B* on the promissory estoppel point on the basis that there had been no detriment proven on the facts. The High Court surveyed the law on detrimental reliance, noting the "broad" and "narrow" views of detriment, and warned against taking too technical an approach. In the view of the court:[20]

> The overarching principle in each of these categories is that the doctrine has consistently been held to apply in circumstances when it was inequitable either in the narrow or broader sense of "detriment" for the promisor to resile from his promise and to enforce his strict legal rights.

10. The High Court took the view that there should be a causal connection between the reliance and the detriment.[21] The court proceeded on the basis that *B* had not been prejudiced by *A*'s failure to keep its promise because *B* would not have been able to raise adequate collateral to prevent the closure of his trading positions even if *A* had given him the promised extra time. The Court of Appeal reversed the decision, finding detrimental reliance on the evidence, as *B* had changed his position in giving *A* additional business in obtaining a very substantial credit line and by providing collateral to continue trades which *B* might not have entered into if there had been no promise of the grace period. Thus *A* could not go back on its promise.

11. The decision of the Court of Appeal on the promissory estoppel point is notable in two aspects. First, the Court of Appeal thought that High Court had taken an "overly narrow view of detrimental reliance" in the context of promises made by bank officers when soliciting business from private banking clients.[22] In such a case, the starting point was that the bank's promises should be kept.[23] The approach of the High Court and the Court of Appeal are thus philosophically opposed. The High Court took the more traditional view of estoppel as playing the role of preventing or removing harm arising from reliance.[24] The analogy of the methodology is with tort, with the general remedy being to put the promisee in the position as

---

[18] [2011] 1 SLR 800, [2010] SGCA 42.
[19] Ibid, at [48].
[20] [2010] 2 SLR 896, [2010] SGHC 50 at [57].
[21] Ibid, at [65]-[66].
[22] Note 18 above, at [35].
[23] Note 18 above, at [35] and [40].
[24] See JD Davies, "Promises in Equity" [2000] SJLS 162. See also *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 425: "the measure of an equity created by estoppel varies according to what is necessary to prevent detriment resulting from unconscionable conduct" (Brennan J). A Robertson, "Reliance and expectation in estoppel remedies" (1998) 18 LS 360. *Cf* AS Burrows, "Contract, Tort and Restitution – a Satisfactory Division or Not" (1983) 99 LQR 217 at 243-244 and 262.

if the promise had not been made. On the Court of Appeal's approach, the promissory estoppel is more analogous to a contractual remedy.[25] It is a tool to assist in the enforcement of promises. It brings promissory estoppel a step closer to being a substitute for consideration.

12. This philosophy of contract enforcement was reinforced in the second notable point of the Court of Appeal decision. The Court held that, even if there was no detrimental reliance on the facts, *B* could rely on promissory estoppel against *A* on the basis that *A* had received a *benefit* from *B*'s reliance on *A*'s promise.[26] Thus, benefit received by the promisor is an *alternative* requirement to detriment suffered by the promisee. The technique is reminiscent of the benefit/detriment analysis of the doctrine of consideration; the key difference is that there is no need for *request* in promissory estoppel.[27] For this proposition the court relied on a passage in Piers Feltham, Daniel Hochberg and Tom Leech (eds), *Spencer Bower: The Law Relating to Estoppel by Representation*:[28]

> However, even adopting such a broad definition of detriment, an exception may be suggested to the rule that detriment is required. It is strongly arguable that a representor may be estopped from denying a representation because it is inequitable for the representor to resile from it, although the representee has suffered no detriment, where the representor has obtained an *advantage* by the reliance of the representee on the representation, as has been held in relation to constructive trusts, by reasoning equally applicable to the doctrine of estoppel. [Original emphasis, footnote omitted].

13. There are two difficulties with this passage. First, there is no authority supporting a benefit-based estoppel. The traditional intervention of equity was to protect detrimental reliance.[29] Secondly, the text in the footnote to the passage shows a conflation of authorities on constructive trusts with those on estoppel. There is a superficial resemblance between the two concepts in that both are founded on unconscionability, and both involve stopping the defendant from denying something. A constructive trust arises when it is unconscionable for the defendant to deny the beneficial interest of the plaintiff in property legally owned by the defendant. A party is estopped from denying a subject matter when it would be inequitable (unconscionable) for him do so. However, unconscionability is the basis of all equitable intervention, and the question is what unconscionability means in each context.[30] Sometimes, the remedy in (proprietary) estoppel is a constructive trust. But a constructive trust can arise in many different circumstances; estoppel is only one of them. The passage relies principally

---

[25] *Cf* PLG Brereton, "Equitable Estoppel in Australia: the Court of Conscience in the Antipodes" (2007) 81 ALJ 638: "But equity's concern is to prevent unconscientious insistence on strict legal right, not the avoidance of detriment".

[26] Note 18 above, at [40].

[27] A request could lead to a bilateral contract supported by consideration, or could constitute an offer of a unilateral contract where the performance of the request is both the acceptance and the consideration for the promise.

[28] London: Tottel Publishing, 4th ed, 2004, at [V.5.17].

[29] Note 24 above, at 163.

[30] *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 (PC, Brunei). In KR Handley, "Recent developments in equitable estoppel" <http://www.goodlawyers.com.au/legal-questions-and-answers/84-recent-developments-in-equitable-estoppel, last accessed on 30 April 2012>, "unconscionability" in the context of equitable estoppel was described as "a mere vituperative epithet which adds nothing and can safely be discarded". See also A Phang, "Undue Influence Methodology, Sources and Linkages" [1995] JBL 552 at 569 (footnote 64) where different conceptions of "unconscionability" are impliedly acknowledged.

on the case of *Banner Homes plc v Luff Developments Ltd*.[31] This case applied the *Pallant v Morgan* equity,[32] which has been explained by the House of Lords to be confined to the context of a constructive trust arising from the acquisition of property by one party who had agreed to hold the property jointly with another; it has nothing to do with estoppel.[33]

14. The source may be historically doubtful, but the Court of Appeal has thought it correct to as a matter of principle to take this route.[34] The principle is not to make good the harm caused. At some abstract level, the principle against unjust enrichment may be operating, but the remedy is not the reversal of the enrichment. The principle is simply that a promisor who "has obtained an advantage from giving a promise to the promisee … should not be allowed to resile from his promise".[35] If equity prevents *A* from resiling from its promise because it would be contrary for *A* to take advantage of the benefit contrary to its promise, then so long as the benefit has accrued, the promise cannot be resiled from. Promissory estoppel will generally be extinctive from the point of acquisition of the benefit. For this reason, where it is available this line of argument may prove more advantageous to the promisee than detrimental reliance. This novel approach to promissory estoppel nudges the doctrine closer to performing the role of a substitute for consideration to enforce a promise.

Promissory Estoppel in English law: From Detriment to Reliance

15. In *Lam Chi Kin*,[36] the Singapore Court of Appeal made no reference to the English case of *Collier v P & M J Wright (Holdings) Ltd*[37] ("*Collier v Wright*") though it was mentioned in passing in *Gay Choon Ing*.[38] One cannot make too much of this case because all it decided was that there was a triable issue on the facts, ie, promissory estoppel was arguable on the facts.[39] Nevertheless, it is an important case because it casts some light on the current thinking of the English judiciary. Pared to its bare facts, *B*, with two partners, owed money

[31] [2000] 1 Ch 372(CA).
[32] Originating from *Pallant v Morgan* [1953] 1 Ch 43.
[33] *Cobbe v Yeoman's Row Management Ltd*, note 1 above at [33] (Lord Scott, with agreement from Lord Hoffmann, Lord Brown, and Lord Mance). See also Lord Neuberger of Abbotsbury, "The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity" [2009] CLJ 537 at 549. Separately, the *Pallant v Morgan* equity has also come under severe criticism for undermining contract law in the equitable enforcement of agreements not otherwise complying with legal requirements for enforceability: Sir Terence Etherton, "Constructive trusts and proprietary estoppel: the search for clarity and principle" [2009] Conv 104, 123; J Uguccioni, "Buyer beware: failed joint venture negotiations and involuntary business partnerships" [2011] JBL 160.
[34] For earlier academic views that detriment should not be seen as a strict requirement, see A Phang, *Cheshire, Fifoot and Furmston's Law of Contract: Second Singapore and Malaysian Edition*, note 1 above, at 202-205 and LA Sheridan, "High Trees in New Zealand" (1959) 22 MLR 321 at 322.
[35] Note 18 above, at [40]. B McFarlane, "Promissory Estoppel and Debts", in A Burrows and E Peel (eds), *Contract Formation and Parties* (Oxford: OUP, 2010) 115 at 122-128 argues for a sub-version of promissory estoppel which is benefit-based. It is argued to arise when *A*'s promise to *B* not to exercise a certain right has induced *B* into a course of conduct (or omission) which gives rise to that same right; equity seeks to restrain *A* from taking advantage of his right contrary to his own promise. However, in *Lam Chi Kin*, the High Court found no causal link between *B*'s reliance and *A*'s right to close out the trading positions, and the Court of Appeal found detrimental reliance on a more general basis.
[36] Note 18 above.
[37] [2008] 1 WLR 643, [2007] EWCA Civ 1329. See A Trukhtanov, "*Foakes v Beer*: Reform of Common Law at the Expense of Equity" (2008) 124 LQR 364.
[38] Note 8 above, at [103].
[39] Following this case, the Hong Kong Court of First Instance similarly considered the same point to be arguable: *Re Kwong Ka Wai* [2010] HKCFI 309 at [12].

jointly to *A*. *A* agreed to hold *B* liable severally for a third of the debt and *B* paid up the amount in instalments over a period of some years. The issue was whether *A* could then enforce the balance of the debt against *B*. This raises a peculiar problem for the English Court of Appeal because it was bound by the House of Lords decision in *Foakes v Beer*[40] which had held that the part payment of a debt cannot be good consideration for the discharge of the debt, and its own previous decision in *Re Selectmov Ltd*[41] had held that the practical benefits reasoning in *Williams v Roffey*[42] could not apply where *Foakes v Beer* governed. As noted above, *Williams v Roffey* has been accepted in Singapore law. The status of *Foakes v Beer* in Singapore is less clear, but in principle, there is "no legal impediment from the perspective of precedent preventing the Singapore courts from extending the reach of *Williams* to such a situation as well, should it be minded to do so".[43] Be that as it may, the English Court of Appeal was driven to apply the doctrine of promissory estoppel or nothing.

16. Arden LJ, who gave the most detailed judgment, did not think that the application of promissory estoppel was inconsistent with *Foakes v Beer* (presumably on the basis that it was not considered in that case[44]). Counsel had argued that there could be no detrimental reliance because all *B* did was to pay what he was already liable to pay. Arden LJ relied[45] principally on a dictum of Lord Denning MR in *D & C Builders Ltd v Rees* to hold that there was an arguable case for promissory estoppel:[46]

> Where there has been a true *accord*, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor *acts upon* that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. [Original emphasis].

17. On Arden LJ's view, the accord (ie, agreement) and the reliance (by performing what was due) was sufficient to support a case of promissory estoppel, and the effect could be to extinguish, and not merely suspend, the right to the balance.[47] With respect, the approach of Lord Denning MR (Danckwerts LJ agreeing) in the passage above conflates the principles of promissory estoppel with the principles of contract law. As Winn LJ pointed out in the minority judgment, the majority's reference to accord and satisfaction is a contractual doctrine and there can be no accord and satisfaction if there is no binding agreement at law.[48]

18. Longmore LJ agreed substantially with Arden LJ's reasoning, significantly reiterating[49] Arden LJ's observation[50] that promissory estoppel could substantially achieve in practical

---

[40] (1884) 9 App Cas 605.
[41] [1995] 1 WLR 474 (CA).
[42] Note 12 above.
[43] *Gay Choon Ing*, note 8 above, at [106]. See also A Phang, "Acceptance by Silence and Consideration Reined In" [1994] LMCLQ 336.
[44] Note 37 above, at [30].
[45] Note 37 above, at [39].
[46] [1966] 2 QB 617 (CA) at 625.
[47] Note 37 above, at [42].
[48] Ibid, at 632.
[49] Note 37 above, at [48].
[50] Note 37 above, at [5].

terms the recommendation of the Law Revision Committee of 1937[51] to abolish the requirement of consideration in contract. Mummery LJ did not agree or disagree with the other two other judgments, and was content to rest his decision on the basis that there was a real prospect of success on the promissory estoppel issue. The practical effect of this judgment is similar to *Lam Chi Kin*[52] to the extent that it promotes the use of promissory estoppel as a substitute for consideration to enforce promises. Reliance may be a condition for enforcement, but the interest protected appears to be the expectation engendered by the promise, not the harm ensuing from reliance.

19. Compared to *Lam Chi Kin*, it is arguable that *Collier v Wright* goes just a little farther to undermine the doctrine of consideration. The use of reliance (without any further investigation of benefit or detriment) to justify the enforcement of an accord (agreement) practically eliminates the need for consideration at least in the context of modification of contracts. This is the *de jure* position in the United States where the Uniform Commercial Code[53] applies. Further, New Zealand[54] and Canada[55] may well be nudged judicially in a similar direction. The development of promissory estoppel in this context invites the question whether it is preferable to abolish consideration altogether in the limited context of the modification of contracts.[56] The advantage of the latter position is greater legal certainty as the rules of contracting (minus consideration) are more certain, and the outcomes are more certain. Promissory estoppel, not being subject to any rules of contract law, is perhaps a more flexible tool, but there is greater uncertainty. While the two developments are not mutually exclusive, the focus on one is likely to eclipse the potential of the other.

Promissory Estoppel as a Cause of Action?

20. Neither *Lam Chi Kin* nor *Collier v Wright* raised the question whether promissory estoppel could be used offensively to raise an independent cause of action. While the traditional doctrine (which applies in Singapore[57]) does not go so far, the doctrine as applied in the United States as encapsulated in section 90 of the *Restatement (Second) of the Law of Contracts*[58] clearly allows such a promise to be enforced as a cause of action. Within the Commonwealth, the High Court of Australia had allowed the use of promissory estoppel to

---

[51] Law Revision Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (Cmd 5449, 1937).
[52] Note 18 above.
[53] §2-209(1): "An agreement modifying a contract within this Article needs no consideration to be binding".
[54] *Antons Trawling Co Ltd v Smith* [2003] NZLR 23 (CA); B Coote, "Consideration and Variations: a Different Solution" (2004) 120 LQR 19.
[55] *Nav Canada v Greater Fredericton Airport Authority Inc* (2008) 290 DLR (4th) 405 (CA); discussed in R Bigwood, "Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *Nav Canada v Greater Fredricton Airport Authority Inc*" (2010) 49 Can Bus L J 257 and B Coote, "Variations *sans* Consideration" (2011) 27 JCL 185.
[56] FMB Reynolds and GH Treitel, "Consideration for the Modification of Contracts" (1965) 7 Mal L Rev 1; CH Tan, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 SAcLJ 566, B Coote, notes 54 and 55 above.
[57] *Sea-Land Service Inc v Cheong Fook Chee Vincent*, note 13 above, at [23].
[58] *Restatement of the Law, Second: Contracts* (Philadelphia: American Law Institute, 1964), §90: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

raise a cause of action in the well-known case of *Waltons Stores (Interstate) Ltd v Maher*[59] ("*Waltons Stores*"). However, there has not been widespread acceptance of the doctrine elsewhere in the Commonwealth, and the doctrine appears to be under some strain in Australia itself.

Australia

21. In *Waltons Stores (Interstate) Ltd v Maher*, *B*, a land owner, was in negotiations with *A* to lease the land to *B* for the latter's business. Negotiations were conducted on the basis of some urgency, that *A* required the existing buildings to be demolished and specially rebuilt for its purposes within a short period of time. Lawyers had been appointed to draft the agreement. *A*'s lawyers told *B*'s lawyers they believed approval to be forthcoming from *A*, and that *B* would know the next day if *A* could not agree to any of *B*'s proposed amendments. *B* signed the relevant documents and sent them to *A* for execution and exchange. Not hearing any further from *A*, *B* proceeded to demolish the buildings on his land. In the meantime, *A*, knowing of the demolition in progress, instructed its lawyers to go slow on the negotiations, and eventually informed *B* that that it was withdrawing from the project. On these facts, the High Court of Australia ruled that, in spite of the absence of a pre-existing legal relationship between the parties, *A* was estopped from denying the existence of the contract. There were two lines of reasoning based respectively on *B* believing that there was already a binding agreement[60] and *B* believing that that there was going to be a binding agreement soon. On the former, *A* would not be allowed to deny the existence of the contract on the orthodox basis of estoppel by representation.[61] On the latter ground, the majority held that the absence of a pre-existing legal relationship did not prevent a promise having legal effect under the doctrine of estoppel,[62] thus radically expanding the traditional scope of promissory estoppel.

22. Although it remains the law in Australia for now, this expansion of promissory doctrine in *Waltons Stores* has recently come under strident attack from (now retired) Justice KR Handley,[63] both judicially[64] and extra-judicially.[65] There are three key points in the criticism. First, the development was ahistorical because the chancery court historically intervened in cases of promissory estoppel by issuing a common injunction against the exercise of legal rights, and this could not support the use of promissory estoppel as a cause of action. Secondly, the development took place as a result of a misconceived intermingling of the principles of promissory estoppel and proprietary estoppel leading to the unwarranted transplant of the use of estoppel as a cause of action from proprietary to promissory estoppel.

---

[59] (1988) 164 CLR 387.

[60] The court did not distinguish between the respective assumptions that A had signed the documents and that there was a binding agreement between the parties.

[61] Note 59 above, at 443-445 (Deane J) and 461-464 (Gaudron J). See also 427-428 (Brennan J).

[62] Note 59 above, at 406 (Mason CJ and Wilson J), 428-429 (Brennan J), and 446-455 (Deane J).

[63] Justice Handley retired from the New South Wales Court of Appeal in January 2012. He was Acting Judge from 2007-2012 after formal retirement in 2006.

[64] *DHJPM Pty Limited v Blackthorn Resources Limited (formerly called AIM Resources Limited)* [2011] NSWCA 348; *Selah v Romanous* [2010] NSWCA 274 (Giles JA and Sackville AJA agreeing).

[65] KR Handley, *Estoppel by Conduct and Election* (London: Sweet & Maxwell, 2006), at [13-037]-[13-042]; KR Handley, "The Three High Court Decisions on Estoppel 1988-1990" (2006) 80 ALJ 724; KR Handley, "Further Thoughts on Proprietary Estoppel" (2010) 84 ALJ 239; KR Handley, "Estoppel" (2006) 20(2) CLQ 29 (where it was suggested that the *Waltons Stores* may not be followed in the High Court of Australia).

He further explained *Waltons Stores* itself, as well as the cases where *Waltons Stores* had been followed in Australia, as being founded on proprietary estoppel.[66] Thirdly, the expanded use of promissory estoppel created a kind of equitable contract, thus undermining the common law of contract.

23. While this may well be perceived as a lone voice in the wilderness, there appears to be wider support within Australia opposing the merger of the different types of estoppels.[67] This is a significant point because it was the premise upon which the majority in *Waltons Stores* had proceeded in determining that promissory estoppel could create an independent cause of action.

24. The context of *Waltons Stores* highlights the significance of the distinction between promissory and proprietary estoppel on the facts of individual cases in jurisdictions (including Singapore) where the distinction is still maintained. Because of the disinclination to differentiate between different types of estoppel, the judgments in *Waltons Stores* in the High Court did not clearly distinguish between the two. Insofar as a case can be classified as proprietary estoppel, there are clear established authorities for suing on the promise, and the difficulties of promissory estoppel are not engaged. In the traditional form of proprietary estoppel,[68] *A* promises to *B* that *B* will acquire some interest in land belonging to *A*. *B*'s detrimental reliance may create legal consequences for *A*'s promise, ranging from full enforcement to equitable compensation. In *Waltons Stores* itself, *A*'s alleged promise was not that *B* was going to acquire an interest in *A*'s land, but that *A* was going to acquire an interest in *B*'s land, ie, that *B* would be divested of property. The traditional doctrine seeks to bind the conscience of the owner of the property, and *A* had no relevant property for proprietary estoppel to bite on. Justice Handley argues that this scenario nevertheless still falls within proprietary estoppel, by analogy with the proposition that the owner of land could rely on his own actions taken on his own property to constitute part performance to ask for specific performance of an informal contract of sale.[69] There is some force in this argument, as otherwise the position of the parties would be asymmetrical (ie, *A* can mount arguments of proprietary estoppel but *B* can only rely on promissory estoppel). On the other hand, the asymmetry is arguably the result of a dubious conceptual distinction between proprietary and promissory estoppel, even if the historical differences cannot be denied.

England and Wales

25. Notwithstanding a *dictum* of Lord Diplock that promissory estoppel is an example of injurious reliance giving rise to "legally enforceable obligations",[70] English law is fairly settled on the traditional view. The Court of Appeal in *Baird Textiles Holdings Ltd v Marks*

[66] KR Handley, *Estoppel by Conduct and Election*, ibid, at [11-031]-[11-033], and [13-042].
[67] See PLG Brereton, note 25 above, commenting that the resistance to fusion of the different estoppels was not a New South Wales-centric view.
[68] There are broadly two types of proprietary estoppel: by encouragement to act on an expectation of future rights or interests and by acquiescence to actions done in a mistaken belief as to existing rights or interests. This paper is only concerned with the former, which bears conceptual similarity to promissory estoppel. On the latter, see KFK Low, "Nonfeasance in Equity" (2012) 128 LQR 63.
[69] KR Handley, *Estoppel by Conduct and Election*, note 65 above, at [11-033].
[70] *The Hannah Blumenthal* [1983] 1 AC 854 at 916.

& Spencer plc took as uncontroversial the view that only the House of Lords (now the Supreme Court) was in a position to decide that promissory estoppel could give rise to an independent cause of action.[71] Mance LJ observed that the English court would have been able to reach the same decision as the Australian High Court in *Waltons Stores* but on different reasoning, referring to the alternative basis of the case founded on an assumption of an existing fact or right rather than a promise.[72] On the other hand, Judge LJ observed that the merger of promissory and proprietary estoppel would provide the opening for the argument for using promissory estoppel to create a fresh cause of action.[73]

26. *Cobbe v Yeoman's Row Management Ltd*[74] was a case argued in the House of Lords only on proprietary and not promissory estoppel. Pared to bare essentials, the facts are these. *B*, an experienced property developer, orally agreed with *A* to purchase from *A* some freehold property. The proposed arrangement was that *B* would redevelop the property and *A* and *B* would then share the profits. *A* encouraged *B*'s belief that the property would be sold to *B*, and *B*, acting in that belief, engaged architects and other professionals in applying for planning permission. Immediately after the planning permission was granted, *A* demanded a substantially higher price than previously agreed for the property, and wanted to reduce *B*'s share of the profits. The House of Lords was unanimous in rejecting *B*'s claim based on proprietary estoppel and constructive trust but allowed a restitutionary claim for *quantum meruit* based on the market value of services rendered.

27. In respect of proprietary estoppel, the claim failed for two reasons: it could not be ascertained from the pleadings what was the subject matter of the claimed estoppel;[75] and *B*'s belief that the oral agreement was binding in honour only and had no legal effect was fatal to its claim.[76] What is significant in the context of promissory estoppel is the reasoning of the majority in the opinion of Lord Scott of Foscote.[77] He begins his analysis of the issue by setting out the following:[78]

> An "estoppel" bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a "proprietary" estoppel – a sub-species of a "promissory" estoppel – if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action.

28. At first blush, this appears to provide the opening needed to argue that promissory estoppel may create a fresh cause of action just like proprietary estoppel. However, three comments may be made of this passage. First, anyone schooled in equity would have been startled by

---

[71] [2002] 1 All ER 737, [2001] EWCA Civ 274 at [39], [55], and [99].
[72] Ibid, at [98]. The existence of written documents embodying the estopped contract would presumably satisfy section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Under English law, proprietary estoppel cannot be used to bypass this provision to enforce an oral agreement for the disposition of an interest in land: *Cobbe v Yeoman's Row Management Ltd*, note 2 above, at [29] (Lord Scott. Lord Hoffmann, Lord Brown, and Lord Mance agreed).
[73] Note 71 above, at [52].
[74] Note 2 above.
[75] Note 2 above at [14]-[15] (Lord Scott, with agreement from Lord Hoffmann, Lord Brown and Lord Mance).
[76] Note 2 above, at [81], [85] and [91]-[92] (Lord Walker, with agreement from Lord Brown).
[77] Lord Scott retired from the House of Lords in 2009.
[78] Note 2 above, at [14].

the proposition that proprietary estoppel is a sub-species of promissory estoppel; this is historically unsupported.[79] His colleague Lord Neuberger of Abbotsbury MR reported (extra-judicially) "sharp intakes of breath" at this suggestion. However, Lord Scott may not have been thinking of history as such, and he would not be wrong in saying that there are many conceptual similarities between these two types of estoppels. Nevertheless, the proposition remains highly controversial even at the conceptual level. Shortly thereafter, Lord Walker in *Thorner v Major* expressed that he had difficulty with the idea of merging the two concepts.[80] On the other hand, Lord Neuberger expressed sympathy for the idea of unification extra-judicially.[81]

29. Secondly, the use of "sub-species" appears to suggest that Lord Scott was assimilating proprietary estoppel to promissory estoppel, such that the former will take on the characteristics of the latter, the only distinguishing factor being that the former arises in connection with interests in property. This is reinforced by the language in the first sentence in the quote that the estoppel merely stands in the way of some right claimed by the person entitled to the estoppel. If this reading is right, then it is proprietary estoppel that has been turned into a shield. Far from empowering promissory estoppel, Lord Scott would have emasculated proprietary estoppel.[82] On the other hand, Lord Scott did not disapprove of precedents which had allowed the enforcement of promises in proprietary estoppel cases. Fortunately, shortly thereafter, the House of Lords in *Thorner v Major* confirmed that proprietary estoppel as a cause of action was alive and well.[83] However, it does not follow that Lord Scott had meant that it is promissory estoppel that takes after the cause of action characteristic of proprietary estoppel. It only means that the meaning of the quoted passage is obscure.

30. Thirdly, Lord Scott suggests an expansion of proprietary estoppel beyond land, to chattels and choses in action.[84] This could expand considerably the scope of proprietary estoppel as a cause of action. It is still limited to cases where the assumption is the acquisition of rights over this expanded class of property.[85] Nevertheless, this increases the prospects of proprietary estoppel arguments being raised in many more commercial contexts, and it may

[79] See Lord Neuberger, note 33 above, at 547.
[80] [2009] 1 WLR 776, [2009] UKHL 19 at [67].
[81] Lord Neuberger, note 33 above, at 547.
[82] B McFarlane and A Robertson, "The Death of Proprietary Estoppel" [2008] LMCLQ 449. See also J Getzler, "*Quantum meruit*, estoppel, and the primacy of contract", (2009) 125 LQR 196 at 198.
[83] Note 80 above. See B McFarlane and A Robertson, "Apocalypse averted: proprietary estoppel in the House of Lords" (2009) 125 LQR 535; Lord Neuberberger, note 33 above; B Sloan, "Proprietary Estoppel: Recent Developments in England and Wales" (2010) 22 SAcLJ 110.
[84] See also the more tentative suggestions at *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 (CA) at 242 and *Western Fish Products Ltd v Penwith DC* [1981] 2 All ER 204 (CA) at 218. See also *Re Basham* [1986] 1 WLR 1498 at 1503-1504. J Cartwright, "Formality and Informality in Property and Contract" in J Getzler (ed), *Rationalizing Property, Equity and Trusts* (London: LexisNexis, 2003).
[85] The distinctiveness of immovable property in the context of the availability of specific performance to enforce a contract of sale was recently challenged by the Singapore High Court in *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232; [2010] SGHC 270; the decision was affirmed by the Court of Appeal without deciding the issue: [2012] 1 SLR 32; [2011] SGCA 50.

cause further tension in the supposed distinction between proprietary and promissory estoppel.[86]

31. Thus, in England and Wales, while it is settled at the Court of Appeal level that promissory estoppel cannot on its own create a cause of action, no clear direction has been set out by its highest appellate court.

32. While there is clearly conceptual similarity between promissory and proprietary estoppel, there is one important contextual difference in their application. Promissory estoppel is often used to address gaps in consideration, while proprietary estoppel is more often used to address gaps in formalities.[87] These are not legal boundaries, but it is important to bear in mind that the case law from the two areas tended to focus attention on different problems. There are two possible spillover effects from proprietary to promissory estoppel arising out of the twin cases of *Cobbe v Yeoman's Row Management Ltd* and *Thorner v Major*. One is that commercial parties often conduct negotiations expressly or impliedly subject to written contractual documents, and the courts will be slow to allow estoppel to operate in such situations. The second is a more specific point that commercial parties should not act on promises which are clearly intended to be binding in honour only.[88] The first point appeals to common sense. The second point is more controversial, and there is some tension between this observation and the approach of the Australian High Court in *Waltons Stores*,[89] as well as the approach of the Singapore Court of Appeal in *Lam Chi Kin*.[90]

Hong Kong SAR

33. In the Hong Kong Court of Final Appeal case of *Luo Xing Juan v Estate of Hui Shui See*[91] ("*Luo Xing Juan*"). The court, while purporting to apply the doctrine of promissory estoppel as a "shield" in the traditional sense, effectively used it as a "hidden blade". The facts are simplified for the purpose of discussing the promissory estoppel issue. *A* owned 100% of a company which owned a flat. *A* co-habited with *B* in the flat. *A* promised *B* a 35% share of flat, and transferred 35% of the shareholding in the company to *B*. In reliance, *B* moved in with her daughter, redecorated the flat, paid one mortgage instalment, lent *A* HK$1m without

[86] *Cf Western Fish Products Ltd v Penwith DC*, note 84 above, at 218: "there is no good reason for extending the principle [of proprietary estoppel] further".

[87] Promissory estoppel was argued to bridge the formalities gap in an attempt to enforce an oral guarantee in *Actionstrength Ltd v International Glass Engineering IN GL EN SpA* [2003] 2 AC 541, [2003] UKHL 17. The argument was rejected on the basis that a mere oral promise to act as guarantor without more could not operate to estop the guarantor from relying on the statutory formalities. If operative, the estoppel would have operated as a shield because the contract is unenforceable and not void.

[88] See also Sir Terence Etherton, "Constructive trusts and proprietary estoppel: the search for clarity and principle" [2009] Conv 104 at 119; Lord Neuberberger, note 33 above at 543.

[89] Note 59 above.

[90] Note 18 above. But see text in footnote 2. It may be that the context makes all the difference (*cf Thorner v Major*, note 80 above, and *DHJPM Pty Limited v Blackthorn Resources Limited*, note 64 above at [56]), and that it is a question of whether it was reasonable for the promisee to rely on the promise in all the circumstances. Obvious contextual differences will arise between commercial and family cases. There could be a difference between encouraging a person to believe that a promise will be performed and encouraging a person to take the risk that a non-binding promise may be performed. Although in *Cobbe v Yeoman's Row Management Ltd*, note 2 above, *A* had encouraged *B* to believe that *A* would carry out its promise, it was only a promise to *negotiate* (at [28]). There may also be differences in reasonable expectations between a situation of the modification of an existing agreement and one of negotiation to reach agreement.

[91] (2009) 12 HKCFAR 1.

security. *A* died suddenly, and *A*'s sister acting on behalf of *A*'s estate and as director of the company, sought to evict *B* from the flat.

34. The trial judge and the Court of Appeal had decided that the company held the flat on a common intention constructive trust for its shareholders in proportion of their shareholding: this gave *B* a 35% in the beneficial interest in the flat. The Court of Final Appeal invited the parties to submit on promissory estoppel. It dismissed the appeal on the basis of promissory estoppel. The court was of the view that neither common intention constructive trust nor proprietary estoppel could work on the facts because *A* did not own the property. It is hard to see how the case can be classified as proprietary estoppel even on the expanded view of its scope in the majority opinion in *Cobbe v Yeoman's Row Management Ltd*, given that there was no suggestion in that case to depart from the principle of equity's jurisdiction acting on the conscience on the *property owner* in proprietary estoppel.[92]

35. Ribeiro PJ delivered the only reasoned judgment of the Court.[93] While recognising that promissory estoppel and proprietary estoppel are distinct, he also acknowledged that they share many constituent elements, and in such cases, "authorities on proprietary estoppel provide guidance in cases involving promissory estoppel."[94] Indeed, quite apart from the issue of using estoppel as a cause of action, the authorities in both were treated as very much interchangeable. Noting the divergence between English and Australian law, he observed that the Hong Kong courts were "presently inclining towards the English approach".[95] He set out the elements of the traditional view of promissory estoppel and applies them.

36. Ribeiro PJ found that the co-habitation relationship was a sufficient pre-existing legal relationship to invoke promissory estoppel.[96] All that was needed was "a relationship involving enforceable or exercisable rights, duties or powers".[97] This accordingly sets the stage for equity to restrain the *power* of *A* to deal with the property (through *A*'s control over the company) in any manner inconsistent with any promise to *B*. Ribeiro PJ found that the parties had sufficiently understood *A* to have made in substance a clear and unequivocal promise that he would not exercise his power as the controlling shareholder of the company

---

[92] *Cf* KFK Low, "*Luo Xing Juan Angela v Estate of Hui Shui See Willy, Deceased*: family property and interposed companies" [2009] Conv 524 at 529. R Lee and L Ho, "Disputes over family homes owned through companies; constructive trust or promissory estoppel?" (2009) 125 LQR 25 at 27 rightly pointed out that Lord Scott's expanded view could apply to an alleged promise to transfer 35% of the beneficial interest in *A*'s loan made to the company (a chose in action owned by *A*). The Court of Final Appeal found that no such promise had been made (note 91 above, at [49]).

[93] Li CJ, Chan PJ, Nazareth PJ, and Sir Gerard Brennan NPJ agreeing. Brennan NPJ was part of the *coram*, and had had expressed strong views in favour of merging proprietary and promissory estoppel, in *Waltons Stores*.

[94] Note 91 above, at [55].

[95] Note 91 above, at [72].

[96] Note 91 above, at [58], relying on *Maharaj v Chand* [1986] 1 AC 898 (PC, Fiji). This case also lies on the fringes of proprietary estoppel; the expectation engendered was a personal right to remain on the property and any equitable interest would have violated statutory law. The application of promissory estoppel in that case has been criticised: P Coughlan, "Equity – Swords, Shields and Estoppel Licences" (1993) 13 DULJ 188 at 201, which is referred to in the commentaries cited in note 92 above. Another author has argued that the "promissory estoppel" had been used in an "entirely manipulative manner" in the case to circumvent the statute: M Halliwell, "Estoppel: unconscionability as a cause of action" (1994) 14 LS 18 at 27.

[97] Note 91 above, at [50].

to (a) cause the property to be disposed of without *B* getting a 35% share of the property or (b) cause the company to evict her from the premises pending the disposal.[98]

37. The analysis in terms of the restraint of a *power* goes beyond the traditional bounds of promissory estoppel in restraining *A*'s *legal right* against *B*. This is the "hidden blade" that turns promissory estoppel into an independent cause of action. As mentioned in the beginning of this paper, the reason for the pre-existing legal relationship is that it sets the stage for equity to prevent *A* from enforcing a pre-existing *legal right* against *B*. By going beyond right to power, the relationship becomes meaningless, since *A*'s powers to deal with his own rights and property generally exist independently of any relationship. Practically any relationship can pass muster, and any promise to do a positive act can be recast as a promise to restrain from exercising a power. For example, if *A* promises to give his son *B* $500 and *B* relies on it, the Hong Kong version of promissory estoppel can allow *B* to sue *A* on the promise, once recast as a promise not to dispose of money without giving *B* $500. *A* has the power to dispose of his money any way he likes, and equity is merely restraining his power to do so in accordance to the promise made to his son.

38. On the facts, the court found that there was clearly detrimental reliance on the promise.[99] It would thus be unconscionable for *A* (or his estate) to go back on his promise. The remedial analysis followed the pattern in proprietary estoppel rather than promissory estoppel. Ribeiro J did not ask whether the operation of estoppel in this case was suspensory or extinctive, ie, whether *A* (or his estate) could resume his legal position upon giving reasonable notice. Instead, after surveying the range of remedies available in proprietary estoppel cases, Ribeiro PJ held that while the court does not grant relief beyond the minimum necessary to do justice,[100] his inclination was to fulfil the claimant's expectations unless they were out of proportion to the detriment suffered, following Walker LJ in *Jennings v Rice*.[101] Thus the appropriate relief in the case was to satisfy in substance *B*'s expectations engendered by *A*'s promise.[102] Accordingly, *B* was awarded 35% share of the net proceeds of sale of the property[103] and she was entitled to stay rent-free in the flat until its disposal.

39. The award of the expectation measure appears to be fairly prevalent in English law in proprietary estoppel cases, and Australian law appears to be moving in the same direction.[104] In *Jennings v Rice*, Walker LJ had also suggested it was relevant to consider whether the case involved a bargain or non-bargain type of situation depending on how far they fall short of an enforceable contract.[105] Lord Walker has clarified extra-judicially that the cases fell on a spectrum rather than on two sides of a dividing line.[106] *Luo Xing Juan* has been criticised as

---

[98] Note 91 above, at [64].
[99] Note 91 above, at 25 (unnumbered paragraph between [64] and [65].
[100] Note 91 above, at [70].
[101] [2003] 1 P & CR 8 (CA), [2002] EWCA Civ 159. *Jennings v Rice* has also been followed in Singapore: *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292, [2006] SGHC 205.
[102] Note 91 above, at [75].
[103] The Court of Final Appeal did not disturb the order of the trial court to wind the company up and to sell the flat: note 91 above, at [74]. On the facts there were no relevant creditor claims to the flat.
[104] R Walker, "Which Side 'Ought to Win'? – Discretion and Certainty in Property Law" [2008] SJLS 229 at 237- 239.
[105] Note 91 above, at [45].
[106] Note 104 above, at 239.

falling on the wrong side of the spectrum, and for awarding a very generous remedy compared to the quantum of detriment suffered.[107]

40. The impact of this case on the commercial law and practice in Hong Kong remains to be seen. It has been cited in a number of commercial cases since, but so far none has applied it to create a cause of action.

Canada

41. In Canada, the home of the remedial constructive trust,[108] judicial reception to this new estoppel has so far been lukewarm, and the traditional version of promissory estoppel continues to apply.[109]

New Zealand

42. In contrast, in New Zealand, the courts had moved rapidly from the expression of caution[110] to unqualified statements of acceptance that *Waltons Stores* is part of the law of New Zealand.[111] However, to the author's knowledge, it has not actually been applied in any reported case.[112]

The United States of America

43. There is abundant case law on promissory estoppel in the United States, as a result of section 90 of the *Restatement (Second) on the Law of Contracts*[113] and its predecessor the *Restatement on the Law of Contracts*.[114] Authors have attempted to analyse the case law into a contract theory (reliance as a substitute for consideration for the enforcement of promises by giving effect to expectations) or a tort theory (making good the harm caused by detrimental reliance on a promise).[115] The reality is that it is difficult to pin down a single theory operating in the courts, and they lean towards reliance or expectations depending on where they see the justice in the case.[116]

---

[107] Lee and Ho, note 92 above, at [29]-[30].

[108] It is perhaps because of the zealous attention paid to this that the concept of estoppel has been relatively neglected in Canadian law: JM Glenn, "Promissory Estoppel, Proprietary Estoppel and Constructive Trust in Canada: What's in Name?" (2007) 30 Dalhousie LJ 141.

[109] *Maracle v Travellers Indemnity Co of Canada* [1991] 2 SCR 50 (SCC) at [13] (Sopinka J); *Fraser Valley Credit Union v Siba* 2001 BCSC 744, 42 RPR (3d) 135 (BC SC) at [25] (CL Smith J); *M (N) v A (AT)* (2003) 13 BCLR (4th) 73.

[110] *Mawson v Auckland Area Health Board* [1991] 3 NZLR 599 (question left open).

[111] *Goldstar Insurance Co Ltd v Gaunt* (1992) 7 ANZ Insurance Cases 77,393, 77,396-77,397; *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192; *Krukziener v Hanover Finance Ltd* [2008] NZCA 187; *Hickman v Turn and Wave Ltd* [2011] 3 NZLR 318.

[112] *Gillies v Keogh* [1989] 2 NZLR 327 (CA) is notable for Cooke P's *dictum* (at 331) doubting the distinction between proprietary and promissory estoppel. The facts involved claims to proprietary interests in land in the quasi-matrimonial context.

[113] Note 58 above. The principal change from the first restatement was an added clarification that the remedy does not need to meet the expectations engendered by the promise.

[114] *Restatement of the Law of Contracts* (St Paul: American Law Institute, 1933). There was also authority pre-dating the Restatements: see, eg, *Ricketts v Scothorn* (1898) 57 Neb 51 (SC Nebraska).

[115] For a survey, see EM Holmes, "The Four Phases of Promissory Estoppel" (1996) 20 Seattle UL Rev 45, and RA Hillman, "Questioning the 'New Consensus' on Promissory Estoppel: An Empirical and Theoretical Study" (1998) Columbia L Rev 579.

[116] See Hillman, ibid, at 592.

Key Issues for the Future

44. *Gay Choon Ing*[117] has signalled the willingness of the Singapore Court of Appeal to dilute the operation of the doctrine of consideration. *Rainforest Trading*[118] exemplifies this in its approach to the doctrine of past consideration. *Lam Chi Kin*[119] sends a strong signal that at least in the commercial context of contract modification, the court will be ready to use promissory estoppel to keep parties to their promises. Significantly it also states that even if the promisee cannot show detrimental reliance, the fact that the promisor has received an advantage from the reliance may be sufficient to invoke promissory estoppel. This may be compared to the English Court of Appeal's somewhat tentative new model of promissory estoppel in *Collier v Wright*[120] which is based on nothing more than an agreement to modify rights. So with practical benefits on one hand and promissory estoppel on the other, contract modifications are unlikely to fail on the ground of lack of consideration. This raises the conceptual question whether the issue should be addressed head-on as a problem in the law of consideration, and there is a respectable argument that consideration should not be required to modify a contract. There are practical implications in the route chosen. The courts are faced with a choice of developing the solution within the law of contract (greater certainty but less flexibility) or outside the law of contract in the doctrine of promissory estoppel (more flexibility but greater uncertainty).

45. While the use of promissory estoppel to create an independent cause of action has been recognised in Australia in *Waltons Stores*,[121] this extension has been challenged within Australia and has not had much impact outside the country until recently in Hong Kong in *Luo Xing Juan*,[122] where it was surreptitiously used under the guise of the traditional doctrine. The long-standing jurisprudence in the United States allowing promissory estoppel as a cause of action has not had any significant influence in the Commonwealth. As a matter of principle, it is difficult to justify why promissory estoppel is only defensive while proprietary estoppel can be used as a cause of action.[123] The primary concern is that it will undermine the law of contract if promises unsupported by consideration can be enforced. In principle, there is no inconsistency between the doctrine of consideration and the promissory estoppel as a cause of action if promissory estoppel is seen as primarily tortious in nature and remedy.[124] However,

---

[117] Note 8 above.
[118] Note 14 above.
[119] Note 18 above.
[120] Note 37 above.
[121] Note 59 above.
[122] Note 91 above.
[123] One does not have to go so far as to *unify* all estoppels to reach this conclusion. It is enough to accept that proprietary and promissory estoppel share the same conceptual basis.
[124] Professor Davies had argued for the expansion of promissory estoppel on this basis: note 24 above. See also S Bright and B McFarlane, "Personal liability in proprietary estoppel" [2005] Conv 14. One possible path of development for promissory estoppel is to create a general compensatory remedy for reliance losses in pre-contractual contexts. It would go some way towards meeting the function of civil law delictual liability in *culpa in contrahendo* for pre-contractual liability; for a comparison, see G Kühne, "Reliance, Promissory Estoppel and *Culpa in Contrahendo*: A Comparative Analysis" (1990) 10 Tel Aviv Universities Studies in Law 279. See also: J Spencer, "A Call for a Common Law *Culpa in Contrahendo* Counterpart" (1981) 15 U of San Francisco L Rev 587. It would complement the common law liability to reverse unjust enrichment which is clearly available on appropriate facts in such contexts: see, eg, *Cobbe v Yeoman's Row Management Ltd*, note 2 above.

the experience in the United States has shown otherwise. Commonwealth case law in proprietary estoppel manifests many instances of fulfilled expectations (though it should be noted that the problem in this context is generally not consideration but formalities). To the extent that expectations engendered by promises can be fulfilled outside the law of contract using promissory estoppel, the doctrine of consideration is indeed challenged. In principle, there is no contradiction either if one accepts that consideration is only one reason for the enforcement of a promise. Professor Atiyah has suggested reliance as another reason,[125] and Professor Cartwright has suggested a private law analogy of the public law doctrine of legitimate expectations.[126] How persuasive this line of argument will turn out to be depends on the strength of the faith one has that consideration is the touchstone of liability for engendered expectations,[127] and this was the very proposition doubted in *Gay Choon Ing*.[128] There may be wide potential implications for the use of promissory estoppel as a cause of action. For example, one fertile area where promissory estoppel is frequently invoked in the United States is in the context of tenders: a promise (unsupported by consideration) to keep an offer open could become binding if relied upon.[129]

46. One important issue is whether the de-emphasis on detrimental reliance in contract modification cases should be confined to that context. In that context, the role of promissory estoppel in the modern case law is largely to substitute for consideration, in a situation where the parties are already in an existing contractual relationship. The relationship has already passed muster as far as legal enforcement goes; the modification only goes to the working out of the relationship. If promissory estoppel is indeed developed to create a fresh cause of action and to operate beyond pre-existing legal relationships, the question is whether the strict requirement for detrimental reliance as in the cases of proprietary estoppel is the more appropriate model to follow. In proprietary estoppel cases, the historical role of detrimental reliance was to generate the equity to be enforced to get around the obstacle of statutory formalities applying to contracts for the disposition of interests in land: through proprietary estoppel, the court enforces an equity and not a contractual promise.[130] Doctrinally, the same might be said of the obstacle of consideration. From a substantive perspective, if promissory

---

[125] PS Atiyah, "Consideration: A Restatement" in PS Atiyah, *Essays on Contract* (Oxford: Clarendon Press 1986) 179, a reprint of *Consideration in Contracts: A Fundamental Restatement* (Canberra: ANU Press, 1971) incorporating a response to GH Treitel, "Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement" (1976) 50 ALJ 439. B Coote, "The Essence of Contract: Part I" (1988–89) 1 JCL 91 and "The Essence of Contract: Part II" (1988–89) 1 JCL 183 at 202-203, argues for the eventual recognition of a "contract" based the reliance on a promise, but on the theory of assumption of obligation as the basis of contracting.

[126] J Cartwright, "Protecting Legitimate Expectations and Estoppel in English Law", vol 10.3 Electronic Journal of Comparative Law, (December 2006), <http://www.ejcl.org/103/art103-6.pdf>. *Cf* Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433 at 440: "Promissory estoppel is often used to soften the rigidity of classical contract law solutions in order to give effect to the reasonable expectations of the parties."

[127] In *Waltons Stores*, note 59 above, at 449, Deane J said: "As a matter of underlying rationale, the prima facie exclusion of representations or assumptions about future conduct from the reach of estoppel by conduct could be justified, both at law and in equity, only by deference to the primacy of the doctrine of consideration."

[128] Note 8 above.

[129] M Furmston and GJ Tolhurst, *Contract Formation: Law and Practice* (Oxford: OUP, 2010) at [3.68]-[3.73]. In Anglo-Singapore law, sometimes a collateral contract analysis may be used to achieve substantially the same result.

[130] This pattern of analysis in equity is demonstrated most clearly in *Maddison v Alderson* (1883) 8 App CA 467 in respect of the doctrine of part performance.

estoppel is seen essentially as a tortious cause of action, then detrimental reliance must be a necessary element of the cause of action. If it is seen as essentially contractual, then the conceptual inquiry is to identify the juristic reason for the enforcement for the promise. The historical and substantive reason in proprietary estoppel and the Australian and US versions of promissory estoppel is the detrimental reliance. Anything less would move the basis of liability outside the realm of an estoppel cause of action.

47. Finally, as the court has demonstrated a readiness to invoke promissory estoppel, one may also expect (some) commercial parties to take defensive action. It can be anticipated that parties may attempt to exclude the operation of promissory estoppel in their contracts. An exclusion clause would have to be very clearly worded.[131] Promissory estoppel generates an equity,[132] not a liability in negligence or contract. On the face of it, such an exclusion clause would not fall within section 2 (negligence liability) or section 3 (contractual liability) respectively of the Unfair Contract Terms Act[133] ("UCTA"). However, section 13(1)(b) extends the statutory protection against clauses "making the liability or its enforcement subject to restrictive or onerous conditions". Insofar as promissory estoppel works as a "shield", the effect of a clause excluding the operation of promissory estoppel would appear to impair the promisee's ability to sue on the underlying cause of action. This could amount to an imposition of restrictive or onerous conditions on the liability or its enforcement. As such, an exclusion clause is arguably be caught by the UCTA. However, the UCTA would appear not to apply to an exclusion of liability in respect of an obligation that is exclusively generated by promissory estoppel as a cause of action.[134]

Yeo Tiong Min
Yong Pung How Professor of Law
School of Law, Singapore Management University

[131] An "entire contract" clause does not affect the operation of promissory estoppel. Neither does a clause excluding (oral) variation of contract, as promissory estoppel is conceptually not a variation of contract.
[132] Provided that there is no exclusion of liability arising from dishonesty, equities and equitable obligations may be excluded by contract: *Armitage v Nurse* [1998] Ch 241 (CA); *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13 (PC, Guernsey). Public policy may, however, extend further to prevent exclusion of liability by banks where such exclusion would undermine public confidence in the integrity of the banking system: *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246, [2011] SGHC 149 at [122] (exclusion of liability arising as a result of the fraud of bank's employees found to be against public policy). It may go too far, however, to suggest that the "equitable fraud" in failing to keep one's promise is against public policy.
[133] Cap 396, 1991 Rev Ed. Where the Consumer Protection (Fair Trading) Act (Cap 52A, 2004 Rev Ed) applies, the parties cannot contract out of the statutory protection against unfair practices.
[134] In any event, there may not be an opportunity to bargain for an exclusion clause outside the context of a pre-existing contractual relationship.