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JUDICIAL ONSLAUGHT ON SOME COMMON LAW TRADITIONALIST GHOSTS MILITATING AGAINST THE PRINCIPLE OF ESTOPPEL

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Abstract

More than two hundred years ago, the principle of estoppel was introduced into the English Courts at a time when all proceedings were carried out in Norman-French. Since then, it became a legal doctrine that was gradually developed in the English courts. The doctrine precludes a party from asserting a fact or claim inconsistent with a position previously taken either through his words, conduct or representation, most especially while another party had placed reliance on such words, conduct, or representation. From this simple origin, it is of great interest that various typologies of the principles of estoppel have manifested themselves in virtually all the branches of the law. As periods went by, it became apparent that estoppel emerged as a revolutionary principle of immense importance in the fields of law. The effect was that the frontiers of the principle of estoppel were still evolving. At a stage in England and some Commonwealth Countries, the requirement of consideration which the courts held to be a fundamental requirement in contractual relations became a clog in the development of this important principle. Furthermore, there also abound some common law traditionalist relics posing a serious threat to the full operation of estoppel. Interestingly, the courts went against this tide. The judicial uprising against this tide in some jurisdictions was wholly and substantial. Meanwhile, in some other jurisdictions, the uprising had remained partial. Against the background of these interesting developments, the motivating factor for this paper relates to how theoretical and practical efforts were made and how the courts had succeeded in breaking the walls of traditionalist ghosts confronting the principle of estoppel.

KEYWORDS: Judicial, Onslaught, Common Law, Traditionalist, Ghosts, Militating, Principle, Estoppel

1.0 Introduction

Estoppel is a rule of evidence that precludes a party from denying the truth of the representation which he has made to another party and based on which the other party had altered his position. In the application of the principle of estoppel, the following ingredients must be satisfied; first, there must be a representation by the promisor; second, the representation must be made by the promisor to affect the legal relationship between the promisor and the promisee, third, the promisee must

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have acted on the representation and forth, the promisor must intend to renege from his earlier promise. The principle of estoppel has the notion of justice as its basic pillar. Rawls in his work puts forward a theory of justice[1] that affords equal basic rights, equality of opportunity, and one that ensures the promotion of the interests of the plebs. By the plebs we mean, the least advantaged members of society. Thus, according to Rawls, people should use what he termed the thought experiment to determine the kind of society they intended to inhabit. Essentially, right from the very beginning of the usage of the principle of estoppel, central to its applicability by the courts, is the need to have a society where people reasonably uphold their promises and the need for persons to be upright in their contractual dealings with others, etc. According to Ucaryilmaz[2] , the notion of justice is common to all cultures where mankind could be found. In pursuit of the notion of justice, the Courts have made bold attempts to stem the tide against all the common law hindrances to the overreach strength of the principle of estoppel. Hence, this paper examined the Court's uprising against some of these common law traditionalists' impediments.

2.0 Some Common Law Traditionalist Ghosts

The Common Law relics, that constitute the monsters that prevent the realization of the full potentials of the principle of estoppel are as follows:

i. The principle of consideration.

ii. The rule that no one could by agreement impeach or modify a deed in writing

iii. The rule that estoppel is not available to cover future promises and that estoppel could not be used to enforce gratuitous promises.

iv. The existence of a pre-contractual relationship for the operation of the principle of promissory estoppel.

v. The view that estoppel could not be deployed to create a new cause of action where none exists.

vi. The view that estoppel could only be used as a shield and not a sword.

vii. The rule that promissory estoppel could not be invoked against the government.

viii. The rule that estoppel could not be used to abrogate or annul the clear provisions of the statute.

[1] Rawls, J (1971) A Theory of Justice, Belknap Press.

[2] Ucaryilmaz, T. (2021) The Principle of Proportionality in Modern Ius Gentium, *Utrecht Journal of International and European Law,* 36(1), Pp. 14-32.

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ix. The understanding that estoppel could not be allowed to prevent double prosecution in the realm of international law.

This paper revealed that while the courts have succeeded through an activist approach to uproot the first eight of the common law relics, they have not done so wholly to uproot the last three relics.

2.0 Estoppel and the Principle of Consideration

To start with, the English case of Currie v Misa[3] established the rule that no agreement could be enforced by a party that has not furnished consideration. This is in line with the principle that equity would not aid a volunteer. The principle was demonstrably explained in the dictum of Lush, J. thus:

> A valuable consideration in the eye of the law may consist either in some right, interest, profit, or benefit accruing to the one party or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other. Thus, consideration does not only consist of profit by one party but also exists where the other party abandons some legal rights in the present or limits his legal freedom of action in the future as an inducement for the promise of the first. So, it is irrelevant whether one party benefits but enough that he accepts the consideration and that the party giving it does not undertake some burden, or lose something which in contemplation of law may be of value.

On proper analysis, there are about six ambits to the definition of consideration proposed by Lush, J., in the above case as follows:

i. What the parties use in exchange for their bargain may be both properties and money.

ii. From the above, there must be a flow of detriments and benefits on both sides.

iii. On one side, consideration could be the abandonment of legal freedom or legal right by a person in the present for the future, for the sake of another party.

iv. Consideration could come in form of abandonment of the legal right to a property in the future.

[3] (1875) L.R. O Exch. P. 153 at p. 162.

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v. Thus, Lush J. excluded giving nothing for something in his definition. That is, the principle of giving zero for something is not inclusive in Lush J's, definitional approach.

vi. The principle of value measurement of the loss to one party to the benefit of another party does not arise. Such comparison will only take the principle of the contract to the uncertain quantitative analysis of the mathematical calculation of the quantum of detriments and benefits.

From the above, the perspective of Barry, on the doctrine of consideration is very relevant. According to Barry[4], the emphasis of the doctrine of consideration is pointedly based upon the theory of exchange and its rejection of more for the same, which constitute the most adequate thesis for the modern environment[5]. This theory translates to the principle of consideration that there must be an exchange of detriments and benefits on both sides of the contracting parties. Apart from this, a party cannot get anything in addition to what he bargained for, and conversely, a party cannot get less than what he bargained for without taking anything from the other.

Despite the above position, Barry recognized in his paper that, rewards may alter partly because the commercial context in which an obligation is to be performed fluctuates. Consequently, the obvious effect according to Barry, is that there is a noticeable disinclination to use the principle. This shows the reluctance or lack of enthusiasm by the Courts to insist on consideration as the basic yardstick of measuring parties' consensus and hence, the adoption of the principle of estoppel as a fit-for-all purpose in problem-solving, most especially in contractual relations[6]. Put differently, this propensity to reluctance is more prominent concerning the variation of contractual rights. The result is a remarkable decline in total reliance on the principle of consideration. This paper showed that the classical doctrine is falling into either desuetude or a state of disuse and has been substantially waived by the Courts in most commonwealth nations, most especially in the United Kingdom in promissory estoppel cases, and drastically reduced in significance.

Meanwhile, it should be noted that the fundamental standpoint of English jurisprudence is premised on the fact that not every promise or contract is legally enforceable. In this regard, the Court faces the problem-solving task of establishing the yardstick or parameter to distinguish between a contract that is enforceable from those that are not enforceable.

Consequently, the common law settled with the theory of bargain as the problem-solving mechanism. The predominant principle, therefore, rest on the requirement of consideration to be supplemented by the requirement of intention to enter into legal relations by parties. On the two mechanisms, once parties were ad-idem, it is done. In essence, the requirement of consideration becomes an indispensable pillar in contractual relations as the exchange became the terra cognita

[4] Barry H. (2001) "The Doctrine of Consideration: Dead or Alive in English Employment Contracts" (retrieved from; eprints.bournemouth.ac.uk) p.1).
[5] *Ibid*.
[6] *Ibid*.

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(the unhalt obligations)[7] of contractual relations. In essence, for enforceability of contractual obligations, the Courts took no cognizance of zero-sum contribution rights of enforceability of contractual obligations.

However, the Courts in most countries of commonwealth nations no longer consider the principle of consideration as the primary dominant evidence of contractual intent. Hence, the Courts in most of these commonwealth nations are consistently developing alternative explanations for contractual liability. This position is a confrontation with the traditionalist standpoints. The presence of consideration is either ignored or not taken into consideration. This paper revealed that though the Courts, most especially in the commonwealth countries have not virtually demolished the principle of consideration; the requirement for the enforceability of contractual obligation was based on alternative requirements of waiver, promise-based consideration, ineptitude, and non-vigilance of parties to the terms of their contracts. In doing this, the approaches of the courts to the traditionalist common law positions on the principle of estoppel, and the statutory provisions on the principle of estoppel represent important weapons and factors that brought about the turns of events.[8] Thus, via the activist and sometimes strict constructivist approaches of the courts, the fundamental principle of consideration, kowtow to the principle of estoppel. This long-time monster confronting the operation of the principle of estoppel is gradually falling in significance. Through lack of enthusiasm by the Courts to place total reliance on consideration as the sole factor in estoppel cases, the doctrine no longer explains the distinction between enforceable and non-enforceable contracts.

3.0 The Indian Courts, Principle of Consideration, Waiver, Existence of Pre-Contractual Relationship, And Estoppel Against Government

he Courts in the commonwealth nations have gone viral by engaging the pluralist jurisprudential model of analytical reasoning in the determination of estoppel cases. The traditionalist ghost is on the road to Golgotha. The onslaught is gradual in some countries, in India, the onslaught is total and monumental. In the Indian case of M/S Motilal Padampat Sugar Mills. v. State of Uttar Pradesh & Ors[9] which on appeal raises a question of considerable importance in the field of Public Law the question is; how far and to what extent is the state bound by the doctrine of promissory estoppel? According to the court,

> It is a doctrine of comparative resent origin, but it is potentially so fruitful and pregnant with such vast possibilities for growth that traditional lawyers are alarmed, lest it might upset existing doctrines which are looked upon almost reverentially and which have held the field for a long number of years. The law in regard to promissory estoppel, is not yet well settled, though it has been the subject of considerable debate in England as well as in the United States of America, and it has also received consideration in some recent decisions in India and we, therefore, propose to discuss it in some detail with a view to defining its parameters.

The factual situations of this case are as follows; the appellant is a limited liability company

[7] *Ibid*.
[8] Per Lord Chelrisford L.C. in Earl of Darnley v. London, Chaltam and Dover Rly. Co
[9].AIR 1979 SUPREME COURT p. 621.

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that is primarily concerned with the business of manufacturing and sale of sugar and it has also a cold storage plant and a steel factory. On the 10th day of October 1968, a news item appeared in the National Herald in which it was stated that the State of Uttar Pradesh had decided to give exemption from sales tax for three years under S. 4A of the Uttar Pradesh Tax Act to all new Industrial Units in the state to enable them "to come on firm footing in developing stage. This news item was based upon a statement made by Shri. M.P. Chatterjee, the then Secretary in the Industries Department of the government. The appellant, based on this announcement, addressed a letter dated the 11th day of October 1968, to the Directors of Industries stating that given the sales tax holiday announced by the government, the appellant intended to set up a hydrogeneration plant for the manufacture of Vanaspati. He, therefore, sought confirmation whether this industrial unit which he sought to set up would be entitled to sales tax holidays for a three years periodicity from the date of commencement of production.

The Director of Industries replied by his letter dated the 14th day of October 1968 confirming that "there will be no sales tax for three years on the finished product of your proposed Vanaspati factory from the date it gets power connection for the commencement of production". The appellant thereupon started taking steps to contact various financiers for financing the project and also initiated negotiations with manufacturers for the purchase of machinery for setting up the Vanaspati factory. On the 12th day of December 1968, the appellant's representative met the 4th respondent who was at that time the Chief Secretary to the Government and also Advisor to the Governor intimating to him that the appellant was setting up a Vanaspati factory solely based on the assurance given on behalf of the government that the appellant would be entitled to exemption from sales tax for three years from the date of commencement of commercial production and the 4th respondent reiterated the assurance. Then, by its letter dated the 14th day of December, the appellant placed on record what had transpired at the meeting on the previous day and requested the 4th respondent for reconfirmation. On that same day, the appellant entered into an agreement with Ms. De Smith (India) Puto Ltd, Bombay for the supply of plant and machinery for the Vanaspati factory, providing clearly that the appellant would have the option to terminate the agreement; if within 10 weeks exemption from sales tax was not granted by the State Government.

The 4th respondent replied on the 22nd December 1968, confirming that the state government will be willing to consider your request for grant of exemption from U.P., sales Tax for three years from the date of production "and asked the appellant to obtain the requisite application form and submit a formal application to the Secretary to the government in the industries department and the meanwhile to go ahead with the arrangement for setting up the factory. The appellant in response had submitted an application dated 21st December 1968 for a formal order granting the exemption under S. 4A of the Act. However, it appears that the letter of the 4th respondent dated 22nd December 1968 was not regarded as sufficiently okay by the financial institutions which were approached by the appellant for financing the project since it merely state that the state government would be willing to consider the request for grant of exemption and did not convey the decision by the state government that the exemption would be granted. Consequently, the appellant addressed a letter dated 22nd January 1969 to the 4th respondent pointing out that the financial institution was of the view that the letter of the 4th respondent dated the 22nd December 1968 "did not purport to commit the government for the concession mentioned" and it was, therefore, necessary to obtain a formal order of exemption in terms of the application submitted by it. The 4th respondent in his letter dated the 23rd day of January 1969, stated categorically that the proposed Vanaspati factory of the appellant" will be entitled to exemption from U.P Sales Tax for three years from the date of going into production and that this will apply to all Vanaspati sold during that period in Uttar Pradesh itself". He expressed further his surprise

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that "a letter from the Chief Secretary to the State Government stating this fact in unambiguous words should not carry conviction with the Financial Institution. Given this unequivocal assurance, the appellant went ahead with the setting up of the Vanaspati factory.

The state government, however, went back upon the assurance and that by a letter dated the 20th day of January 1970 addressed to the 5th respondent intimating that the Government had taken a policy decision that new Vanaspati units in the state which goes into commercial production by 30th September 1970 would be given partial concession in Sales Tax at the following rates for three years;

i. First-year of production 31:2%

ii. Second-year of production 30%

iii. Third-year of production 21.2%

The appellant wrote to the secretary to the Government that they proposed to start commercial production and would be availing of the exemptions granted by the State Government. The appellant thereafter went into the commencement of production. The State Government again changed its decision and on 12th August 1970, a news item appeared in the Northern India Patricia stating that the Government had decided to rescind its earlier decision to allow concession in the rates of sales tax to new Vanaspati units. The rescission of the earlier concession, moved the appellant to file a writ of the petition in the High Court of Allahabad asking for a writ directing the State Government to exempt the sale of Vanaspati manufactured by the appellant from sales tax for three years commencing from the 2nd day of July 1970 by issuing a notification under section 4A and not to collect or charge sales tax from the appellant for the said period of three years.

The scenario of this case was such that, it appears that in the writ petitions as originally filed, there was no plea of promissory estoppel taken against the State Government, and the writ was therefore amended by obtaining the leave of the High Court to introduce the plea of promissory estoppel. The appellant urged in the amended writ petition, that the 4th respondent acting on behalf of the State Government had given an unequivocal assurance to the appellant, that the appellant would be entitled to exemption from payment of sales tax for three years from the date of commencement of production and this assurance was given by the 4th respondent, intending or knowing that it would be acted on by the appellant. The appellant stated that acting in reliance on it, they established the Vanaspati factory by investing a large amount, and the state government was, therefore, bound to honour the assurance and exempt the Vanaspati manufactured and sold by the appellant from payment of sales tax for three years from 2nd July 1970.

The above plea, based on the doctrine of promissory estoppel was rejected by the Division Bench of the High Court principally on the ground that the appellant had waived the exemption, if any by accepting the concessional rates set out in the letter of the Deputy Secretary dated the 20th January 1970. The appellant thereupon preferred the present appeal after obtaining a certificate from the High Court. In dealing with the case, the Supreme Court first considered the question of waiver, the Court upheld the golden rule of pleading that since the question of waiver is a question of fact, it must be pleaded. This is because the rule is that you cannot spring a surprise against your adversary. But since the respondent failed to plead waiver, then the conclusion that the appellant waived its right is unsustainable and it is consequently wrong for the judge to raise it suo motu. According to the court;

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> The High Court held that even, if there was an assurance given by the 4th respondent on behalf of the State Government and such assurance was binding on the State Government on the principle of promissory estoppel, the appellant had waived its right under it by accepting the concessional rates of sale tax set out in the letter of the 5th respondent dated the 20th January 1970. We do not think this view taken by the High Court could be sustained.

The court now stated the reason why the position taken by the High Court could not be sustained thus;

i. In the first place, it is elementary that a waiver is a question of fact and it must be properly pleaded and proved.

ii. No plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for it is laid, in the pleadings.

iii. That it was common ground that the plea of waiver was not taken by the State Government in the affidavit filed on its behalf in reply to the writ petition, nor was it indicated even vaguely in such affidavit.

iv. That the plea of waiver was raised for the first time at the hearing of the writ petition. That was impermissible without an amendment of the affidavit in reply or a supplementary affidavit raising such a plea.

v. If waiver were properly pleaded in the affidavit in reply, the appellant would have had an opportunity of placing on record facts showing why and in what circumstances the appellant came to address the letter dated 25th June 1970 and establishing that on these facts, there was no waiver by the appellant of its right to an exemption under the assurance given by the 4th respondent.

vi. But in the absence of such pleading in the affidavit in reply, this opportunity was denied by the appellant.

vii. That it was therefore not right for the High Court to have allowed the plea of waiver to be raised against the appellant and that plea should have been rejected in limine.

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The second point that the court considered on the question of waiver was that from its simplistic meaning, waiver means abandonment. The court observed that there was no feature in the case itself suggesting that the plaintiff abandoned its right to the three years tax exemption. According to the court;

> ……it is difficult to see how, on the facts, the plea for a waiver could be said to have been made out by the State Government. Waiver means the abandonment of a right and it may be either expressed or implied from conduct, but its basic requirement is that it must be "an intentional act with knowledge?[10]..... There can be no waiver unless the person who is said to have waived (his right) is fully informed as to his right and with full knowledge of such right, he intentionally abandoned it.[11]

On this note, one might be quick to add that per adventure in the letter written by the State Government addressing the matter of change of policy as regards the sale tax, it was stated categorically that "with this, the early three years sale tax exemption previously granted your company is hereby canceled or abridged and the present new sales tax exemption regime substituted" and under this clear expression, the appellant wrote a letter of acceptance, then in such circumstance, the appellant would have been said to have waived his rights. Anything beyond this clear and unambiguous statement, therefore, fall short of a clear explanation as thus, according to the Halsbury's Laws of England[12], for a waiver to be effectual, the person giving up his right must be fully informed as to his rights. Also, Isaac J, delivering the judgment of the High Court of Australia in Craine v. Colonial Mutual Fire Insurance Co. Ltd[13] emphasized that: "Waiver must be with knowledge, an essential supported by many authorities". Ostensibly, on the above catena of authorities, the court stated thus;

> Now in the present case, nothing is suggesting that at the date when the appellant addressed the letter dated the 25th June 1970, it had full knowledge of its right to an exemption under the assurance given by the 4th respondent and that it intentionally abandoned such right.

Based on the above premises, the court accordingly rejected the plea of waiver raised on behalf of the government. Finally, the court now turns to the question of whether the assurance given by the 4th respondent on behalf of the State Government that the appellant would be exempt from sales tax for three years from the date of commencement of production could be enforced against the government. After tracing the origin of the principle of promissory estoppel, the basis of the doctrine, and the consideration of catena of cases from the United Kingdom, the United States of America, the court distilled the following crucial points of law.

i. That the doctrine or principle of promissory estoppel is a principle evolved by equity to avoid injustice and though commonly named promissory estoppel, it is neither confined to the realm of contract nor the realm of estoppel.

[10] Addition mine
[11] Harlsbury's Laws of England (4d) Volume 16, paragraph 1472 at page 994.
[12] Crime v. Colonia (Mutual Fire Insurance Company Ltd (1920) HCA p.64 ; 28 CLR p. 305.
[13] *Supra*.

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ii. The basis of this doctrine is the interposition of equity, since equity has always, true to form, stepped in to mitigate the rigours of strict law; and it has undergone considerable development.

iii. That Lord Cairns stated the doctrine in the case of Hughes v. Metropolitan Railway company[14] thus;

> It is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms, involving certain legal results…… afterward by their act or with their actions or with their consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance. The person who otherwise might have enforced those rights would not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties".

iv. The court observed that Lord Cairns in his enumeration of the principle assumed that, there must be a pre-existing contractual relationship between the parties, but reiterated that this does not seem to be essential provided that there is a pre-existing legal relationship that could in certain circumstances give rise to liabilities and penalties.

v. The court observed that even the limitation suggested that, there should be a pre-existing legal relationship that could in certain circumstances give rise to liabilities and penalties is not warranted and affirmed that it is even significant that the statement of the doctrine by Lord Denning does not contain such limitation.

vi. That Lord Denning consistently refused to introduce any such limitation in the doctrine even while sitting in the Court of Appeal, he refused to be persuaded to introduce such

[14] . (1877) 2 AC p. 439

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qualification as could be seen in the case of Evenden v. Guildford City Association Football Club Ltd[15]". According to the Court;

> Counsel for the appellant referred us, however, to the second edition of spencer and Bower's book on Estoppel by Representation (1966) pp. 340 – 342 by sir Alexander Turner, a judge of the New Zealand Court of Appeal. He suggested that Promissory Estoppel is limited to cases where parties are already bound contractually, one to the other. I do not think it is so limited…….it applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act on it and he does act on it

The court, therefore, concluded that this observation by Lord Denning suggests that the parties need not be in any kind of legal relationship before the transaction from which the promissory estoppel takes its origin. Thus, the doctrine would apply even where there is no pre-existing legal relationship between the parties, but the promise is intended to create a legal relationship or affects a legal relationship that will arise in the future.

Consequently, the Court of Appeal restates the true principle of consideration and its relationship with the principle of Promissory estoppel as follows;

i. It must be pointed out in fairness to Lord Denning that he made it clear in the High Tree's case[16] that the doctrine of promissory estoppel cannot find a cause of action in itself.

ii. It can never do away with the necessity of consideration in the formation of a contract.

iii. But that Lord Denning repudiated in Evenden's case[17], the necessity of a pre-existing relationship between the parties.

iv. That Lord Denning pointed out in Crabb v. Arun Distinct Council[18] that equity will in a given case where justice and fairness are demanded, prevent a person from insisting on his strict legal rights even where they arise not under any contract, but on his title deeds or under the statute.

The India Court of Appeal, therefore, drew the following innuendo; restating the true principle in this dictum:

> The true principle of promissory estoppel, therefore, seems to be that where one party has by his own words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the other party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not

[15] (1974) 1WLR P. 1097.
[16] *Central London Property Trust Ltd v. High Trees House Ltd.* (1947) K.B. 130
[17] *Supra.*
[18] (1975) 3 All E.R. p. 865

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In a very sharp twist of judicial activism, the Indian Court of Appeal moves to demolish the ghost of traditional estoppel that promissory estoppel itself cannot itself be the basis of action. In commencing this work of demolition, the Indian Court of Appeal combined the wisdom of some prominent law Lords like the indomitable Lord Denning, Buckley J, Scarman L.J, Lord kingdom, etc. In doing away with the misleading narrow traditionalist approach, the court stated thus;[19]

i. That in England, the law has been well-settled for a long time, though there is some indication of a contrary trend to be found in resent juristic thinking in that country, that promissory estoppel cannot itself be the basis of action. It cannot find a cause of action.
ii. That promissory estoppel can only be a shield and not a sword.
iii. That this narrow approach to a doctrine that is otherwise full of great potential is largely the result of an assumption, encouraged by its rather misleading nomenclature that, the doctrine is a branch of the law of estoppel. Since estoppel has always been traditionally a principle invoked by way of defense.
iv. That the doctrine of promissory estoppel has also come to be identified as a measure of defense.
v. The ghost of traditional estoppel continues to haunt this new doctrine.

The Court of Appeal of India, however, decided to look into the mind of the progenitor of the doctrine, the legendary Lord Denning and they made an important discovery going through, Lord Dennings' mind thus;

i. We find that while boldly formulating and applying this new equity in the High Tree's case[20], Lord Denning added a qualification that though in the circumstances, set out, the promises would undoubtedly be held by the court to be binding on the party making it, notwithstanding that under the old common law it might be difficult to find any consideration for it.
ii. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise.
iii. But the courts have refused consistently to allow the party making it to act inconsistently with it.[21]

In line with the above argument, they also pin-point the dictum of Lord Denning in Combe v. Combe[22] to the effect that;

> Much as I am inclined to favour the principles stated in the High Trees case, it is important that it should not be stretched too far, lest, it should be endangered. That principle does not create new causes of action where non–existed before. It only prevents a party from insisting upon its strict legal rights, when it would be unjust to allow him to enforce them having regard to the dealings which have taken place between the parties.

After reviewing the above cases and many more, the Lordships in the Indian Court of Appeal made a classical Up-turn remark.

> "The doctrine of promissory estoppel need not, therefore, be inhibited by the same limitation as estoppel in the strict sense of the term. It is an equitable

[19] *Supra.*
[20] *Supra.*
[21] Combe v. Combe (1951) 2 K.B p. 215
[22] *Supra.*

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> principle evolved by the courts for doing justice and there is no reason why it should be given only a limited application by way of defense".

The Lordships premised their conclusion on the authorities starting from Lord Denning himself.

> It may be noted that even Lord Denning himself, recognized in Crabb v. Arun District Council[23], (Supra) that there are estoppels and estoppels. Some do give the right to a cause of action, some don't, and added that in the specie of estoppel called proprietary estoppel it does give rise to a cause of action.

The court of Appeal also quoted Lord Denning's dictum in Mortgage Mercantile Co. Ltd v. Twitchings[24], where Lord Denning stated the effect of estoppel on the true owner that:

> "….his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates because of his conduct – what he has led the others to believe – even though he never intended it……..the new rights and interests so created by estoppel in and over land, will be protected by the courts, and in this way give rise to a cause of action".

The India Court of Appeal also referred to the case of Crabb v. Arun District Council[25] to conclude that promissory estoppel could find a cause of action. In this case, the representative of the Arun Distinct Council gave assurance to Crabb that they would give him access to the new road at point B to serve the southern portion of his land, and the Arun District council constructed a gate at point B, and in the belief induced by this representation that he would have right of access to the new road at point B, Crabb agreed to sell the Northern portion of his land without reserving for himself as the owner of the southern portion any right of way over the northern portion for access to the new road.

The Court raised equity in favour of Crabb and held that;[26]

i. The equity would be satisfied by giving Crabb "the right of access at point B free of charge without paying anything for it.

ii. Arun District Council was held bound by its promise to provide Crabb access to the new road at point B

iii. This promise is enforceable against Arun District Council, at the instance of Crabb.

> In commenting on the above case, the India appellate court observed that "This case was one which fell within the category of promissory estoppel and it may be regarded as supporting the view that promissory estoppel can be the basis of a cause of action".

[23] Crabb v. Arun District Council (1975) 3 All ER. p. 865
[24] *Mortgage Mercantile Co. Ltd v. Twitchings (1977) AC p.890.*
[25] *Supra.*
[26] *Supra.*

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The Indian appellate court also referred to the book by Spencer, Bower, and Turner[27] where they explained the above decision on the basis that it is an instance of the application of the doctrine of estoppel by encouragement or acquiescence or what has now to come to be equated with the doctrine of proprietary estoppel, which according to them, forms an exemption to the rule that estoppel cannot found a cause of action. The Indian court on a thorough analysis of the above case came out with the conclusion that;

> But if we look at the judgments of Lord Denning and Scarman L.J. It is apparent that they did not base their decision on any distinctive feature of proprietary estoppel, but proceeded on the assumption that there was no distinction between promissory and proprietary estoppel, so far as the problem before them was concerned. Both the learned Law Lord and the learned Lord Justice applied the principle of promissory estoppel in giving relief to Crabb.[28]

The Indian Court in doing justice to the Motilat's case observed that the basic reason why the English courts have been reluctant to allow the principle of promissory estoppel as the basis of a cause of action seems to be the apprehension that the doctrine of consideration might be completely displaced. They also discovered that the decision of Lord Denning in the High Tree's case[29] represents a significant landmark to escape the limitations imposed by the House of Lords in Jorden v. Money[30]. Lord Denning rediscovered equity which was long hidden in Hughes v. Metropolitan Railway Co[31] from where he derived his inspiration to bring about a remarkable development in the law to ensure its approximation with justice, but interestingly, Lord Denning was not prepared to go further in order not to uproot the doctrine of consideration which was deeply rooted and entrenched in English jurisprudence. For this reason, Lord Denning raised a caveat in Combe v. Combe[32], that the principle of promissory estoppel should not be used as a Sword to establish a cause of action, but as a shield for the defense at the instance of a suit commenced by the promisor.

Upon the above position the Indian court realized this important fact that though it can hardly be disputed that over the last three or four centuries, the doctrine of consideration has come to occupy such a predominant position in the law of contract under the English law.

The Court also accepted the fact that it is impossible to think of a contract without consideration, the consequence of which one could explain the hesitation or refusal to push the doctrine of promissory estoppel to its logical conclusion. But the Indian Court rediscovered that the modern attitude towards the doctrine of consideration is, however, changing fast. The court, thus, bowed out from the phlegmatic disposition or otherwise calm attitude of the English court by eliciting a considerable body of juristic thought that emphasized that the doctrine of consideration is something of an anachronism. First among the modern juristic thinking distilled by the Indian Court could be found in the work of Holdsworth[33] who pointed out that:

> The requirement of consideration in its present shape prevents the enforcement of many contracts which ought to be enforced. If the law really wishes to give

[27] Spencer, Bower and Turner, Treatise on The Law relating to Estoppel by Representation
[28] *Supra*
[29] *Supra.*
[30] (1854) UKHL p. 50
[31] (1877) 2 AC p.439.
[32] (1951) 2KB p.215.
[33] Holdsworth (1909 – 52) A History of English law, Methuen, London

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> effect to the lawful intentions of the parties to them; and it would prevent the enforcement of many others, if the judges had not used their ingenuity to invent considerations. But the invention of consideration, by reasoning which is both devious and technical, adds to the difficulty of the doctrine.

The second juristic thought was that of Lord Wright[34] who states that; "the doctrine of consideration in its present form serves no practical purpose and ought to be abolished".

Another issue the court in India considered was whether the doctrine of promissory estoppel is applicable against the government. In this regard the court made the insightful statement below:

i. It is heartening to find that in India the doctrine of promissory estoppel has been adopted in its fullness.

ii. It has been recognized as affording a cause of action to the person to whom the promise is made.

iii. The requirement of consideration has not been allowed to stand in the way of enforcement of such a promise.

iv. The doctrine of promissory estoppel has also been applied against the government and the defense based on executive necessity has been categorically negatived.

Meanwhile, it is remarkable to note that, as far back as 1880, the doctrine of promissory estoppel was applied against the government in the case of Municipal Corporation of Bombay v. The Secretary of State[35] subsequently decided by the Bombay High Court. In this case, the Government of Bombay, intending to construct an arterial road, requested the Municipal Commissioner to remove certain fish and vegetable markets that obstructed the construction of the proposed road. The Municipal Commissioner replied that the markets were vested in the corporation, but that he was willing to vacate certain municipal stables which occupied a portion of the proposed site provided the government would rent other land mentioned in his letter to the Municipality at a nominal rent. The municipality in response made an undertaking to bear the expenses of leveling the same and permit the Municipality to erect on such land stables of wood and Iron, with the noble foundation to be removed at six months' notice on other suitable ground being provided by the government.

The Government accepted the suggestion of the Municipal Commissioner and sanctioned the application of the Municipal Commission for a site for stabling on the terms set out above. The Municipal Commissioner thereafter entered into possession of the land and constructed the stables,

[34] Wright, Lord, 49 Harvard Law Review, 1225

[35] . Municipal Corporation of India v.Secretary of State (1934) 36 BOMBAY.LR. p. 568, 152 Ind. Cas. p. 947

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workshops, and chaws at considerable expense. Twenty-four years later, the government served a notice on the Municipal Commissioner, determining the tenancy and requesting the Municipal Commissioner to deliver possession of the land within six months and in the meantime to pay rents at the rate of RS 12,000 per month.

The Municipal Corporation declined to hand over possession of the land or to pay the higher rent and the Secretary of State for India thereupon filed a suit against the Municipal Corporation for a declaration that the tenancy of the Municipal Corporation stood determined and for an order directing the Municipality to pay rent at the rate of Rs 12,000 per month. The suit was resisted by the Municipal Corporation on the ground that the event which had transpired had created equity in favour of the Municipal Corporation.

This defense was upheld by a Division Bench of the High Court. Jenkins C.J. speaking on behalf of the Divisional Bench pointed out that[36]:

> ….. the municipality gave up the old stables, leveled the ground, and erected the moveable stables in 1866 in the belief that they had against the government an absolute right not to be turned out until not only the expiration of the six-month notice but also other suitable ground was furnished that this belief is preferable to an expectation created by the government that their enjoyment of the land would be following this belief and that the government knew the municipality was acting on the belief so created.

The court, therefore, held that;

i. an equity was created in favour of the Municipality which entitled it to appeal to the court for its aid in assisting them to resist the Secretary of States' claim that they shall be ejected from the land.

The above decision of the Bombay High Court is a clear authority for the proposition that, it is open to a party who has acted on a representation made by the government to claim that the government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution.

This was how the decision was interpreted in the Indian Court in the case of Collector of Bombay v. The Municipal Corporation of the city of Bombay and Others[37]. The fact given rise to this case was that in 1865, the government of Bombay called upon the predecessor in title of the Municipal Corporation of Bombay to remove old markets from a certain site and vacate it, and on the application of the Municipal Commissioner, the government passes a resolution approving and authorizing the grant of another site to the Municipality. The resolution states further that the government does not consider that any rent would be charged to the Municipality as the market would be like other public buildings for the benefit of the whole community. The Municipal Corporation gave up the site on which the old markets were situated and spent a sum of Rs 17 lakhs on erecting the maintaining markets on the new site. In 1940, the collector of Bombay assessed the new site to land revenue, and the Municipal Corporation thereupon filed a suit for a declaration that the order of assessment was ultra vires and that it was entitled to hold the land forever without payment of any assessment.

[36] That the crown also came within this range of equity.

[37] Collector of Bimbay v. The Municipal corporation of the state of Bombay (1951) AIR S.crt p.469.

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The High Court of Bombay held that the government had lost its right to assess the land in question because of the equity arising out of the facts of the case in favour of the Municipal Corporation. On appeal by the Collector, the majority of the judges held that the Government reason was not under the circumstances of the case entitled it to assess and collect revenue on the land in question because the municipal corporation had taken possession of the land in terms of the government resolution and has continued in such possession openly, uninterrupted and even for over seventy years. The court concluded that the Municipality acquired unlimited title and the right to hold the land in perpetuity free of rent. Of particular interest was the decision per Chandrasekhar Ayer J[38]. Agreeing with the concurrent majority. He rested his decision on the principle of promissory estoppel in the below dictums positing that the government could not be allowed to go back on the representation made by it;

> If we do so, would it not amount to our countenancing the perpetration of what can be compendiously described as legal fraud which a court of equity must prevent being committed.

His Lordship further observed that even if the resolution of the government amounted merely to the holding out of a promise that no rent would be charged in the future, the government must be deemed in the circumstances of this case to have bound themselves to fulfill it. The court, therefore, concluded that;[39]

> The defense of executive necessity was thus clearly defeated by this court and it was pointed out that it did not release the government from its obligation to honour the promise made by it, if the citizen, acting in reliance on the promise, had altered his position. The doctrine of promissory estoppel was in such a case applicable against the government and it could not be defeated by invoking the defense of executive necessity.

In the case under consideration, i.e Motilat Padampat, it was also contended on behalf of the government that if the government was held bound by every representation made by it regarding its intention, the result would be that the government would be held bound by a contractual obligation even though no formal contract in the manner required by Article 299 was executed.

Pointedly, the above contention was negative by the court in the statement that;[40]

(i) The respondent is not seeking to enforce any contractual right.

(ii) The respondent is seeking to enforce compliance with the obligation which is laid upon the Textile commissioner by the terms of the scheme.

(iii) We are of the view that even if the scheme is executive in character, the respondent who was aggrieved because of the failure to carry out the terms of the scheme was

[38] *Supra.*
[39] *Supra.*
[40] *Supra.*

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entitled to seek resort to the Court and claim that the obligation imposed upon the Textile commissioner by the scheme be ordered to be carried out.

(iv) It was laid down that a party who has acted in reliance on a promise made by the government, altered his position, is entitled to enforce the promise against the government.

(v) the promise is enforceable even though the promise is not in the form of a formal contract as required by Article 299.

(vi) That Article 299 of the constitution does not militate against the applicability of the doctrine of promissory estoppel against the government.

(vii) Under Indian jurisprudence, the Government is not exempt from liability to carry out the representation made by it as to its future conduct.

(viii) The government cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it.

(ix) Also, the government cannot claim to be the judge of its obligation to the citizen on an ex-parte appraisement of the circumstances in which the obligation has arisen.

The Court in India, therefore, carries the activist approach to its unfathomable highest peak when it stated the law as far as India is concerned thus;[41]

> The law may, therefore, now be taken to be settled as a result of this decision that where the Government makes a promise knowing or intending that it would be acted on by the promisee, and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the constitution.

The court added the other constitutional aspects anchored on the fact that the Government must be bound to its promise in a State where the principle of constitutionalism and the rule of

[41] *Supra.*

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law is fully operative in the following dictum:[42]

> It is elementary that in a Republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned; the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government commit to the rule of law can claim immunity from the doctrine of promissory estoppel. Can the government say that it is under no obligation to act in a manner that is fair and just, or that it is not bound by consideration of honesty and good faith? Why should the Government not be held to a high standard of rectangular rectitude while dealing with its citizens?

While negating the principle of executive necessity which had all the while served the as the refuge for the government, the court stated further:[43]

> There was a time when the doctrine of executive necessity was regarded as sufficient justification for the government to repudiate even its contractual obligations; but let it be said to the eternal glory of this Court, this doctrine was emphatically negative ……. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action.

The Court stated further that if the government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position by relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such a promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the courts and the legislatures must therefore, be to close the gap between the law and morality and bring about a new approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. Nevertheless, the Court considered some exceptions.[44]

i. That where the Government owes a duty to the public to act differently, promissory estoppel cannot be invoked to prevent the government from doing so. This provision according to the court is unexceptionable because where the government owes a duty to the public to act in a particular manner, and obviously since duty means a course of

[42] *Supra.*
[43] *Supra*.
[44] *Supra.*

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conduct enjoined by law, the doctrine of promissory estoppel cannot be invoked to prevent the government from acting in the discharge of its duty under the law. Thus, the court observed that the doctrine of promissory estoppel cannot be applied in the teeth of an obligation or liability imposed by law.

From the above, it is clear that the doctrine of promissory estoppel cannot be invoked to abridge the law or cannot be availed to permit or condone a breach of the law. Put differently, the doctrine of promissory estoppel cannot be invoked to compel the government or even a private party to do an act prohibited by law.

ii. There can be no promissory estoppel against the exercise of legislative power. The legislature can never be precluded from exercising its legislative function by resorting to the doctrine of promissory estoppel.

Finally, the court in Motilat's case found that this case did not fall within any of the exceptions to the applicability of the principle of promissory estoppel.[45] The court, therefore, held that;

i. That against the line of established authorities, the court could not possibly have intended to lay down an absolute proposition that there can be no promissory estoppel against the government in the exercise of its governmental, public, or executive powers.

ii. That public bodies or the state are as much bound as private individuals to carry out obligations incurred by them because parties seeking to bind the authorities have altered their position to their disadvantage or have acted to their detriment on the strength of the representation made by these authorities. It would, therefore, be seen there are no authoritative decisions on the Indo-Afghan Agencies case and the century spanning's Manufacturing company's case. The

[45] (1970) 3 SCR p. 854

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law laid down in these decisions as elaborate and expounded by us continues to hold the field.

iii. Applying the facts to Motilat Padampat's case[46] in the light of the law, the court held that it is clear from the letter of the 4th respondent that a categorical representation was made as to sales tax exemption for three years on behalf of the government, which further clarification was made by the 4th respondent as the Secretary to the Government and it was therefore made on behalf of the government which averment to that effect was not denied by the state in their affidavit in reply.

iv. The Indian Court further held that there can be no doubt that this representation was made by the Government, knowing and intending that it would be acted upon by the appellant. Consequent to this the appellant decided to set up the factory for the manufacture of Vanaspati at Kanpur by borrowing money from various financial institutions.

v. That the facts necessary for invoking the doctrine of promissory estoppel were therefore clearly present and the Government was bound to carry out the representation and exempt the appellant from sales tax in respect of sales of Vanaspati effected by it in Uttar Pradesh for three years from the date of commencement of production.

Finally, the State contended that the doctrine of promissory estoppel had no application in the present case because the appellant did not suffer any detriment by acting on the representation made by the government. In reply, the Indian Supreme Court concluded in this dictum[47];

> This contention of the state is clearly unsustainable and must be rejected. We do not think it is necessary, in order to attract the applicability of

[46] *Supra.*
[47] *Supra.*

> the principle of promissory estoppel, that the promisee acting in reliance on the promise, should suffer detriment. What is necessary is only that the promisee should have altered his position in reliance on the promise. This position was impliedly accepted by Lord Denning in W.J Alan & Co. Ltd v. EL. Nasr Export and Import Co[48], where the learned Law Lord made it clear that alteration of position only means that he (the promisee) must have been led to act differently from what he would otherwise have done.

Finally, examining the lines of authority while holding the government bound to its promise, the Supreme Court of Indian Stated further;

> And if you study the cases in which the doctrine has been applied, you will see that all that is required is that the one (promisee) should have acted on the belief induced by the other party. Barry puts the scenario thus:[49]The law could find the required reciprocity in an exchange of promises; a promise received in return for a promise given, is understood as necessarily beneficial to the parties. The classical definition of consideration, which is furnished by (Lush J. in) Currie v Misa[50], requires something else. Barry observed that though the bargain theory that there is no contract without reciprocity is sacrosanct,[51] he noted further that this sees the promise as being bought by the promisee. No wonder Collins put forth the argument that the classical doctrine of bargain theory subsumed two distinct versions. First, the dominant model of exchange, emphasized that anything requested by the promisor would be counted as benefits[52]. Here the emphasis is the request.[53] The second is the alternative version, which emphasized the reciprocity of detriment and benefit between the promisor and the promise.[54]

In line with Barry[55], Collins[56] , and Pollock's[57] perspectives, though the Courts refused to abolish in its entirety, the principle of consideration that forms a fundamental pillar of establishing a contractual relationship between parties, nevertheless, it has fallen into desuetude in estoppel cases with emphasis on the exchange of promises.

The second ghost hunting the principle of estoppel and barring it from achieving its full operation is the principle that no one could by oral agreement alter or modify a deed in writing. Meanwhile, at common law, the general rule of the law of contract is that contracts could be made informally, by oral agreements. In essence, there is no compulsion that a contract is made in

[48] W.J. Alan & Co. Ltd v. El-Nasir Export and Import case (1972) 2 All E.R p. 127 C.A.
[49] *Ante*.
[50] (1875) L.R. 10 Ex. P. 153.
[51] Barry, *op. cit*.
[52] Collins, H. (1997), *The Law of Contract*, 3rd edition, Butterworths. Ch. 4.
[53] Smith, J.S. (1979), "The Law of Contracts, Alive or Dead", 13. *The Law Teacher* p.73.
[54] Wright, Lord (1935) "Ought the Doctrine of Consideration to be Abolished from the Common Law", 49 *Harvard Law Review* p. 12, 25
[55] *The Law Teacher* p. 73. Barry *op. cit.*
[56] Collins, H. (1997), *The Law of Contract*, 3rd edition, Butterworths Ch. Pollock, F. (1950) *The Principles of Contract*, 13th Edition, Stephen & Sons, London, p. 175
[57]. Pollock, F. (1950) *The Principles of Contract*, 13th Edition, Stephen & Sons, London, p. 175.Allen & Overy (2018) "Basic Principle of English Law of Contract" (retrieved from www.id.org on the 2nd day of November 2019), 24

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writing, except in some exceptional cases. In essence, an informal exchange of promises is legally valid like a written contract. As a matter of law, there are statutory exceptions to the rule that a contract could be made orally. For example, the Law of Property Act, 1925, of the United Kingdom provides that a lease agreement for more than three years must be made by deed in writing. Also, under Section 2 of the Law of Property (Miscellaneous Provisions) Act of 1989, any contracts for the sale or disposition of land must be made by a deed in writing. In addition under Section 4 of the Statutes of Fraud, contracts of guarantees are also to be made in writing[58]. Despite the above positions, there are instances where the Courts would set aside the writing requirements provision of statutes, as equity will not allow a statute to be used as an instrument of fraud. The principle of proprietary estoppel is one of the exceptions, as revealed in this paper. Equity is therefore the potent instrument against the above rigid positions of law.

Besides, there is another traditionalist position at common law known as the Parole Evidence Rule. The rule provides that evidence cannot be admitted to add, vary or contradict a written agreement. In essence, where a contract has been put in writing, the presumption is that the writing was intended to encapsulate virtually all the terms of the contract and that no party can vary such contract by parole or any extrinsic evidence, otherwise than by another written agreement. Nevertheless, this presumption is rebuttable. If the written agreement failed to set out all the terms of the contract and where the situational and commercial context under which the agreement was made fluctuates, this neoclassical position would subside. This traditionalist position was demolished by Lord Denning in the case of Central London Properties Trust Ltd. v. High Trees Property Ltd[59]. This decision has been adopted by the courts in Nigeria, Ghana, and virtually all the considered commonwealth countries of India, South Africa, Australia, and, in the United States of America, where parties inserted as part of their terms of the contract, a clause that variation of their terms of the contract could only be effected by a written agreement, what is the effect of such term? There are contradictory judicial authorities in the English Courts.

4.0 The Courts and no Oral Modification Clause in Agreement.

Generally, the effect is that anything short of that might be declared invalid by the court given recent decisions from the English Courts. The question therefore is; when a term such as this agreement might not be amended, except by mutual written agreement of the parties, can such agreement be varied by oral agreement? There are conflicting judicial decisions in this regard from the United Kingdom. However, Lord Denning allowed the variation of written agreement by Oral evidence to impeach the traditionalist position in the case of Central London Property Trust Ltd v. High Trees Property Ltd[60].

In Union Bank Ltd v. Massod ASIF & Anor[61], the court held that a contract containing anti oral variation clause (that 'No variation shall be valid or effective unless made by one or more instruments in writing and accompanied by the signature of both parties) could only be amended by a written agreement of both parties complying with the clause. The innuendo from the decision of the Court of Appeal which disallowed permission to appeal was that oral variation of written agreement by oral agreement is ineffective and could not have any legal effect. However, in World online Telecom Ltd. v. 1 – Way Ltd[62], the court held that parties have made their law by

[58] . Though the Court would not allow a Statute to be used as an instrument of fraud.
[59] *Supra*
[60] *Supra.*
[61] (2000) EWCA, civ, p. 465.
[62] (2002) EWCA, civ p. 413.

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contracting, and can in principle unmake or remake it. Since the World online case is inconsistent with the ASIF case, it became incumbent on the Court of Appeal to state which of the decisions it is to be given priority and preferred. In this respect, the English Court of Appeal stated that such clauses pursue a legitimate aim by setting an evidentiary threshold. The Court explained, further, that whilst a false claim of an oral agreement might be disproved after a full trial, such false claims might prevent a party from obtaining summary judgment in the contract. The Court stated further that though anti oral variation clauses might prevent a party from a large organization from invoking oral evidence to vary the content of the written agreement and more so since parliament has required variation of written agreements in the transfer of an interest in land and guarantee to be in writing but none the less, the above would not sit easily with the idea that parties were free to agree whatever they choose and would do so by word of mouth or conduct.

Conclusively, the court stated that just as parties were free to include terms regulating how a contract could be varied, they should also be just as free to agree to no longer be bound by the same. Meanwhile, the law in respect of No Oral Variation clause of a written agreement was summarized by Smith and Sally Ann thus[63]:

i. The starting point for the party relying on no oral variation clause was that it meant that any amendment had to be in writing and be accompanied by the signatories of both parties.
ii. That it was not open to the parties to amend the terms of the agreement orally.
iii. It was said that the purpose of the no oral variation to a written agreement clause was to promote certainty and avoid false or frivolous claims of an oral agreement.
iv. Such clauses can also prevent a person from a large organization from producing a document that is inconsistent with a prior agreement entered into by the organization.
v. However, the position that a party cannot by oral evidence varies a written agreement.
vi. Should not be seen as establishing an absolution categorical rule. Such a situation only set an evidentiary threshold. In addition to the above, it could be added that to prove the existence of oral agreements by both parties, the party who claims such existence has the herculean burden to prove that both parties were ad idem to the variation.

Besides, the test is an objective one rather than the subjective desire of one of the contractive parties. The court could easily determine through the factual situation of the case and the changing unfolding scenario that could warrant the existence o such oral agreement. In this regard, the general principle of English Law is that the parties have the freedom to agree on whatever terms that appeal to them either in a document, by words of mouth, or by conduct. This principle was followed in the more recent case of Globe Motors Inc. v TRW Luca Varity Electric

[63] Smith R, Sally Ann, S(2016) "Contractual Amendments –Only in Writing and Signal by Parties" (Retrieved from *https:/www.texology.com* on the 1st day of November 2091).

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Steering Ltd[64]. In this case, the Court of Appeal determined the legal effect of the no oral amendment to a written agreement clause to the effect that: 'this agreement which includes the appendices hereto is the only agreement between the parties relating to the subject matter hereof. It can only be amended by a written document which

i. Specifically refers to the provision of this agreement to be amended and

ii. Is signed by both parties.

In that case, the Court of Appeal decided that the inclusion of a No Oral Amendment Clause to a written agreement would not prevent future variation of such a contract orally or by conduct. However, the recent decision of the Supreme Court in Rock Advertising Limited (Respondent) v. MWB Business Exchange Centers (Appellant)[65] had changed the position of the law. In this case, the United Kingdom Supreme Court by unanimous decision upheld the effectiveness of the "No Oral Modification" clause otherwise known as NOM clause. The court held that the purported oral agreement or variation of the contract was invalid for want of writing and non-fulfillments of the signatures required by the NOM clause.

The case involved a written agreement between MWB Business Exchange Centers Ltd., a property management company (Licensor), and Rock Advertising Limited (The Licensee). MWB had licensed an apartment to Rock Advertising. Rock Advertising had accrued arrears of more than £12,000 in license fees. The case of Rock was that its sole director had called a credit controller of MWB and offered a deferred repayment schedule for these arrears which was accepted as a variation. MWB did not accept the revised payment schedule; and consequently, MWB locked Rock out of the premises, thenceforth terminated Rock's license, and sued for the full arrears. Rock counterclaimed by seeking damages for mouthful eviction claiming that the contract had been varied orally through the telephone conversations and that the parties have agreed on the revised payment schedule.

However, the parties have entered into a license agreement for office space which contained a NOM clause that provided that all variations to the license agreement must be agreed upon, set out in writing, and signed on behalf of both parties before they took effect. The respondent canvassed the argument that the parties had agreed orally to vary the license agreement with a revised schedule of payments, albeit orally. A dispute thus arose on whether the oral variation was effective in law. The country court decided that the oral variation did not satisfy the formal requirements of NOM clause. The Court of Appeal, however, reversed this decision and held that the oral variation amounted to an agreement to dispense with the NOM clause. Consequently, the appellant brought the matter before the Supreme Court.

The main issue before the U.K's Supreme Court was whether the contractual term precluding the amendment other than in writing was legally effective. Unanimously allowing the appeal, the court held that:

i. NOM clauses are common in business agreements and are recognized and effective in many legal codes around the world.

[64] (2016) EWCA Civ. P. 396
[65] (2018) UKSC P. 24.

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ii. That the law of contract does not normally obstruct legitimate intentions of businessmen except for overriding reasons of public policy

iii. That there are no overriding reasons of public policy against the legitimate intention of businessmen to obstruct the terms of their contract

iv. That there is no mischief as well in No Oral Modification Clauses nor do they frustrate or contravene any policy of the law.

v. That the approach adopted by the Court of Appeal was to override the parties' interaction to bind themselves as to how future changes in their legal relations are to be determined, and the consequence of doing so was that the Court of Appeal differed from the consideration requirement in favour of parties autonomy based on the fallacy that party autonomy only operate up to the point when the contract is made but thereafter, only to the extent to which the contract allows.

On this aspect of the law, the court reasoned that the natural conclusion to be drawn from a failure to observe a NOM clause was that the parties were "courting invalidities with their eyes open".

The effect of this decision of the Supreme Court of the United Kingdom is not at all devastating on estoppel cases as one could be inclined to think. Only what a party in contractual relation would do in their contractual agreement is to agree on an alternative to NOM clauses or avoid its insertion in their contract. This would bring the parties in compliance with the principle that a contract could be amended by a written or oral agreement.

Lord Sumption in his judgment realized the possible tension between the principle of estoppel and the No Oral Modification Clause. In this regard, his lordship agreed with the lower court's finding on fact that Rock advertising had not taken sufficient steps to invoke the defense of estoppel. His lordship observed, albeit obiter, that the scope of estoppel cannot be so broad to have the over sweeping effect of destroying in wholeness the benefit of certainty inherent in the No Oral Modification Clause. Even from the judgment, his lordship stressed the fact that the mere fact that a contract contained a NOM clause does not foreclose completely the possibility of estoppel defense to a promise. What the party pleading estoppel defense needed to show is to go a step further by pleading good evidence of unequivocal words or conduct on the part of a party sought to be estopped. As Lord Sumption puts it: "In England, the safeguard against injustice lies in the various doctrines of estoppel". This is not the place or circumstances in which a person could be estopped from relying on contractual provisions laying down conditions for the formal validity of a variation. The Court below rightly holds that minimal steps taken by Rock Advertising were not enough to support any estoppel defenses. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when

they agreed upon terms including the No Oral Modification Clause. At the very least (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its formality and (ii) a meeting would be required for this purpose than the informal promise itself. See Actionstrength Ltd. v International Glass Engineering in GL En SpA[66].

Commenting on whether the court could find consideration to sustain the estoppel argument, the court felt that the factual situation of this case could not find consideration in support. The fact that evidence available shows that Rock Advertising paid 3500 pounds on the same day via a telephone conversation, being part of the payment of the whole debt of 12,000 could not be of help. Another stumbling block against the full-fledge opposition of the principle of estoppel could not be invoked against a statement of intention, but only applicable to a statement of fact.

5.0 Estoppel, Statement of Fact Vis-À-Vis That Of Intention, a Sword or a Shield, Usage as a Course of Action.

This assertion was made in the case of Jorden v Money[67]. In that case, Mr. Money owed a certain sum to a certain person to whom he executed a bond with a promise to pay the debt. However, when the creditor died, his sister became entitled to the money. However, Mrs. Jordan stated on several occasions that she did not intend to enforce the payment since the same was incurred under unpleasant or unfair circumstances. Mrs. Jordan however made her final decision dependent on consideration of marriage to Mr. Money. Having the assurance that the debt would no longer hang over his head, Mr. Money consummates the marriage. After the marriage, Mr. Money brought an action for a declaration that the debt had been abandoned and therefore relief for the bond. In that case, the court held that estoppel could only be applicable for a statement of fact and not to a statement of intention[68].

Cartwright[69] premised the reason for limiting the application of the Principle of Estoppel only to the representation of facts, rather than to a statement of intent on the fact of its being formerly treated as a rule of evidence. By its being treated as such, any party who made a representation of fact would not be permitted to lead evidence in rebuttal of same in an action by or against the party who relied on that representation to his detriment. Meanwhile, this paper revealed that this common law bottleneck had been rendered impotent by the courts through the application of the principles of proprietary estoppel and promissory estoppel respectively[70].

Proprietary estoppel and promissory estoppel are of the same genus. However, promissory estoppel could only be used as a shield but proprietary estoppel could be used both as a shield and a sword. This is because proprietary estoppel is capable of conferring a right of action as well as a substantive equitable right of property in favour of its pleader. There are two essential stages in the process of claiming a remedy by way of proprietary estoppel, to wit: first, the establishment of estoppel equity, and second, satisfying that equity by appropriate remedy. For the establishment of estoppel equity, the claimant must prove the followings: first, circumstances that entitle him to demand a remedy, second, he must show that the cause of action mainly proprietary estoppel has been raised, third, he must show that the three factors to establish proprietary estoppel abound namely: an assurance, a reliance and a change of position or detriment. If the above conditions are

[66] (2003) 2 A.C. p. 9 per (Lord Bingham (51) Lord Walker).
[67] *Supra*.
[68] *Low v. Bouverie* (1891)3 Ch. P. 82 ar p. 105,112.
[69] Cartwright J. (2006), "Protecting Legitimate Expectations and Estoppel in English law". Report to the 17th International Congress of Comparative Law. EJ CL.
[70] Cartwright J. *Ibid.*

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satisfied, then, estoppel equity would arise. Once estoppel equity is established, the claimant is entitled to remedial relief.

Meanwhile, the mere existence of equity does not predetermine the appropriate remedial response. Rather, the court must decide what specific remedy would be appropriate in the circumstances to satisfy the equity raised by way of estoppel. Where proprietary estoppel has been used as a sword, at the instance of the plaintiff based on the defendant's promise, the plaintiff must prove detrimental reliance on evidence. There can be no shift of this evidentiary onus since it is trite law that he who alleged must prove, it is out of place to contemplate a shift of the evidentiary onus to the defendant. Consequently, the Australian Court rejected Lord Denning's principle of presumption of reliance in the case of Greasley v. Cooke[71] . Thus, in the case of Sidhu v. Van Dyke,[72] the court expressed the feelings that adopting Lord Denning's view implies that the evidentiary onus would be shifted to Sidhu to prove that Van Dyke did not rely on his promise to her detriment. In this case, Van Dyke while still, a married woman rented a cottage from Sidhu and his wife. Sidhu and his wife lived one hundred meters away on the main homestead property. Sidhu and his wife were joint owners of the property. Sidhu and Van Dyke commenced a love relationship involving sexual intercourse. Consequently, Van Dyke's marriage broke down. Sidhu gave Van Dyke assurance that she should not worry about getting a property settlement in divorce as he promised to sub-divide the property belonging to him and his wife and gave the cottage to Van Dyke. Meanwhile, the relationship between Sidhu and Van Dyke ended eight years later. Sidhu repudiates the earlier promise he made to Van Dyke. Sidhu's wife also refused to give her consent to a sub-division of the property. The court unanimously held that: first, Van Dyke had successfully proved detrimental reliance, and second, Sidhu was estopped from reneging on his promise to Van Dyke. But the circumstances of the case were such that the cottage had burnt down and the sub-division was unattainable. The court, therefore, further held that equitable compensation equivalent to the value of what she had lost, being the hub of the case, should be found in her favour.

To buttress the fact that estoppel is a rule of evidence, Bernet[73] elicits four evidentiary reasons for how the court found detrimental reliance in favour of Van Dyke: first, the trial court found in Van Dyke a reliable witness of truth in her evidence-in-chief. She stated that in reliance on Sidhu's promise she did not engage in full-time work, she failed to seek a divorce settlement and she chooses to develop the property. The court argued that evidence of this nature reflects the possibility of human behavior in hopeful situations. The court, therefore, concluded that "Sidhu's promise have a great impact on Van Dyke's decision-making process. Second, Van Dyke had discharged the onus she bore in that she believed Sidhu's representation, and that believe she would suffer detriment if Sidhu was permitted to renege on the representation made to her. Third, the fact that Van Dyke was worried as to whether Sidhu would honour his promise as a result of which she sought that Sidhu should put his promise in writing was confirmation that Sidhu's promise was material inducement on Van Dyke remaining on the property. Fourth, the court found itself unimpressed that Van Dyke's evidence showed that she wass not induced by Sidhu's promise to stay on the property.

The Court's approach in deploying the principle of proprietary estoppel as a sword is first,

[71] *Greasley v Cooke* [1980] 3 All ER 710.
[72] *Sidhu .v. Van Duke* (2014) HCA 19 p.55
[73] Barnett, P. (2001), *Res Judicata, Estoppel and Foreign Judgments*, Oxford University Press, U.K.

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either to enforce the promise or to order the expectations generated by the promise, or second to take an approach of awarding the minimum equity to do justice which sometimes results in relief less than the enforcement of the promise. Based on these, the Court reasoned that first, Van Dyke could not get the promise enforced via specific relief, second, the promise had burnt down and the division never took place. The Court further, felt that it would be inappropriate to award specific relief because of the impact it would have on Sidhu's wife as joint owner of their property. The Court eventually awarded a remedy of equitable compensation measured by reference to the value of the properties earlier promised as at the date of the judgment.

Another common law stumbling block for invoking estoppel is the existence of a pre-contractual relationship. The basis for the existence of a pre-contractual relationship is to avoid unjust rebut between parties to the contract. The essential is the standard bargain theory that at least, certain benefits must accrue to the promisor if the promissee is to take the benefit of the promise. In this regard, Feinman[74], after reviewing many authorities, found kostritsky's[75] perspective very interesting while she attempted a clear departure from the neoclassical law and theory that make the existence of a pre-contractual relationship and that of detriments and benefits on both sides of the contracting parties the condition precedent for the enforcement of the principle of estoppel under the law of contract. Thus, Feinman found in Kostritsky's work, an attempt to deviate from the standard within the old tradition of contract law. According to Kostritsky[76], if a reasonable explanation could be found that would mount barriers at the doorpost of contracting parties from reneging out of their mutually agreed contract in favour of the promise. In Kostritsky's analysis through the cases, such barriers include the relative status and knowledge of the contracting parties; the entangling and broader relationship between the parties, and the existence of the trust and confidential relationship between the parties.

In Feinman's dismay, the first two factors that Kostritsky ought to explore to quieten the neo-classical focus were channeled to service a new theory of assent-based liability, when assent is the heart of neo-classical or traditionalist emphasis. Meanwhile, Feinman proposed a revolutionary science that would take one step beyond the traditionalist neo-classical position by embracing a relational analysis that would ignore the distinction between promise and reliance. This relational analysis is in tandem with the uprising of the courts against the traditionalist conception of the existence of a pre-contractual relationship. Thus, the necessity for an ongoing contractual relationship is eschewed in favour of a distinct relationship to establish estoppel. Thus, promise and a distinct relationship suffice.[77]

There are other three neo-classical traditionalist bottlenecks of common law forbidding the full operation of the principle of estoppel. The first is the rule that estoppel has not found a new cause of action, where non exist; the phrase 'where non exist', is not taken note of in most judicial decisions as coined by Lord Denning in the case of Combe v Combe[78]. Second, is the rule that the principle of estoppel could only be used as a shield, as a protection against the suit brought at the instance of the promisor and the third is that the principle could not be used at the instance of a gratuitous promisee. On this third rule, it is apt to quickly state that the fundamental basis for this rule is that at common law, a party that furnished no consideration cannot enforce a contract, albeit, a gratuitous promisee. Meanwhile, such a promise could be enforced when made by a deed.

[74] Feinman, J.M.; (1992), "The Last Promissory Estoppel Article", Fordham Law Review, Vol. 61, issue 2.
[75] Kostritsky, Juliet. P. (1987) A New Theory of Assent-Based Liability Emerging under the Guise of Promissory Estoppel: An Explanation and Defense [article]. Wayne Law Review, Vol
[76] *Ibid.*
[77] *Ibid*.
[78] *Supra*.

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Though equity will not assist a volunteer, nor perfect an imperfect gift, but, once made by deed, under seal, it has taken the promise a step further to a formal contract, which takes its validity from form, and consequently, such contract could be enforceable by invoking the principle of estoppel.

The first two traditionalist impediments are that the principle of estoppel could not find a new cause of action where none exist and that it could only be used as a shield at the instance of the promisee. Interestingly, these two traditionalists' stumbling blocks formed the subject of a decision of the English Courts in the case of Mears Ltd v Shoreline Housing Partnership Ltd.[79] That case discussed the thorny rules that estoppel could not find an independent cause of action, or put differently, that it could only be used as a shield and not as a sword. The case concerned the repair and maintenance contract involving a thousand properties. Shoreline invited Mears, a contractor, to tender for the ongoing maintenance and repair works to Shoreline's substantial housing portfolio.

Mears has been the successful tenderer. The two parties entered into a contract that was priced on the basis that for each task Mears would charge on a cost-plus fee basis and also on the following terms:

Every six months, this cost-plus fee would be reconciled against the contractual schedule of rates which specified the value of each type of task;

i. Mears would be entitled to the value of the tasks and would benefit from a further payment

which reflected the extent to which the cost plus fee pricing was lower than the value price;

and

ii. If the cost plus fee was greater than the value then Mears would own the difference to

Shoreline.

Meanwhile, the facts revealed that it was after nine to ten months when Mears was successful before the contract was finalized. Within that interregnum, there were further negotiations around the various rates used to price the work. Incidentally, Shoreline's call center staff had experienced difficulties allocating the correct code to the necessary work.

Consequently, the parties agreed to a supplementary document, that a simplified system of composite rates would be used by Shoreline's staff when allocating work to Mears. These rates as agreed would represent both the sum charged by Mears and the sum which would be paid by the Shoreline. The innuendo was that there would be no six-monthly reconciliation.

The contract was operated for a six months periodicity based on these composite rates and thereafter, the full contract was eventually agreed upon. However, there was never an amendment to reflect the shift to the composite rates instead of the schedule of rates. Meanwhile, towards the end of the six months, Shoreline claimed it realized that it had been overpaying Mears and in consequence withheld 300,000 pounds which were due to Mears claiming that the correct basis for pricing the work done was the schedule of rates. In contradiction, Mears maintained the opposite position that the composite rates are to be applied.

The proceedings that ensued took an interesting twist, in that, in the original proceeding

[79] (2013) EWHC 27 (TCC), (2013) ECWA, Civ. p. 639, (2015) EWHC 1396 (TCC).

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that ensued, Mears predicated its claim upon the contract as incorporated in the composite rates alleging that Shoreline was estopped from withholding the sum it deducted, with the estoppel being based on representations. Shoreline puts up a detailed defense which complained about the lack of particulars in the particulars of the claim by Mears and also relied on the primacy of contract as contained in the schedule of rates which according to Shoreline, contained an exhaustive regime governing payment for the works. Consequently, replying to the defense by Shoreline, Mears filed an amended particularly of claim dated the 8th day of November 2012 relying on the meetings on the 21st day of May 2009, the production of the composite rates agreed upon, agreement at the Core Group Meeting on the 27th day of May 2009, and another meeting of the second day of June 2009. In addendum, in the amended particulars of claim, estoppel by convention basis and a misrepresentation claim were added.

In the 4th paragraph of his judgment, Justice Akenhead made revealed facts from the code that:

> Mears submitted its tender on the 13th of February 2009, offering to provide the service in accordance with Contract Data Part 1 and Contract Data Part 2 for a sum to be determined in accordance with the conditions of the contract and said that 'this tender together with your written acceptance shall constitute a binding contract between us'. On the 18th day of March 2009, Mr. Tomkinson informed Mears by letter that Mears had been successful in being selected as our preferred partner for the delivery of this contract.[80]

In the same paragraph, the letter of acceptance by Shoreline stated the reasons for Mears's success as follows:[81]

i. Mears total tendered price at £24,263 million was almost £2 million less than the nearest tenderer;

ii. Internally, in a report to Shoreline's board on the 17th day of March 2009, a 22% savings was identified which, if realized would generate about £1 million worth of savings per year.

Justice Akenhead recorded in his judgment that Mr. Tomkinson on behalf of Shoreline wrote in his letter to Mears that;

> We intend to award the contract to yourself having achieved a score of 99.33, judged strictly following the scoring criteria circulated with the tender documentation. This is viewed as the most economically advantageous tender.[82]

[80] *Supra*.
[81] *Supra*.
[82] *Supra*.

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In his judgment, Akenhead J listed the applicable principle for the operation or assertion of estoppel by convention as follows:

i. Estoppel by convention can arise when parties to a contract act on an assumed state of facts or law. His Lordship added that a concluded agreement can be a convention.

ii. The assumption must be shared by the parties, or at least it must be an assumption made by one party and acquiesced in by the other.

iii. The assumption must be communicated between the parties.

iv. At least the party claiming the benefit of the convention must rely upon the assumption, all be it will almost invariably the case that both parties relied upon it.

v. The key element of effective estoppel by convention will be based on the ability or unjustness on the part of the person said to be estopped to assess the true legal or factual position. it is enough that the party claiming the benefit of the convention has been materially influenced by the convention.

vi. Detrimental reliance is not a limiting factor, though it reinforces the view that the party claiming the benefit acted unconscionably and was unjust.

Akenhead J commenting on whether estoppel could be used as a cause of action stated that:

> While estoppel cannot be used as a sword as opposed to a shield, analysis is required to ascertain whether it is being used as a sword. In this context, the position of the party claiming the benefit of the estoppel as claimant or indeed as the defendant is not determinative or does not even raise some sort of presumption one way or the other. While a party cannot in terms find a cause of action on estoppel, it may as a result of being able to rely on estoppel succeed on a cause of action without being able to rely on the estoppel, it would necessarily have failed.[83]

With the above, Akenhead J puts the law thus; "that the position of a party claiming the benefit of estoppel is indeterminate and that a party may base his action on estoppel in a situation were to deny it of that benefit might fail altogether". Thus, an attempt to persuade his Lordship that Mears was deploring this principle of estoppel to impeach or subvert the important doctrine of consideration was rejected. On this, Akenhead J stated thus;

> The reality is that estoppel is properly on the facts being relied

[83] *Supra*.

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> upon to show that the deduction of some £300,000 by Shoreline was not conscionable or just because of the convention between the parties. If that is right, Shoreline is estopped from asserting that it was entitled to make the deduction and once it is so estopped, the amount deducted should be repaid because there is no remaining ground to justify its retention.[84]

On whether a party invoking the principle of estoppel must prove detrimental reliance, Akenhead J, gave a guide by stating that detrimental reliance is not a necessary or compelling requirement though, it may reinforce the position of the relying party. On this point, his lordship stated the law thus;[85]

> A key element of effective estoppel by convention will be unconscionably or unjustness on the part of the person said to be estopped to assert the true legal position.

In uprooting the traditionalist ghost that estoppel could not be used to initiate a new cause of action, the ratio of this case is that it could ignite a new cause of action if the party invoking estoppel would suffer a failure without a remedy. To this, the court of equity could not fold its hands unconcerned. At the same time, the principle of estoppel could be deployed as a sword rather than a shield when it comes to estoppel by convention. A convention thus agreed upon by both parties with effective communication of the terms therein, in face of the unjust and unconscionability of the other party could find an offensive deployment of estoppel.

On proper analysis, however, a fact revealed that on the first particulars of claim, Mears pleaded estoppel by representation. To this plea, Shoreline claimed that there were zero particulars of claim and raised further defense relying on the primacy of the contract with the schedule of rates that contained an exhaustive regime as governing payment for the works. To this defense, Mears took up the sword by an amendment to the particulars of claim raising estoppel by convention and misrepresentation, thereby putting Shoreline on a reversionary onus to join issues in defense.

Another major stumbling block to the full operation of the principle of estoppel is the writing requirement under the statutes of fraud. In 1679, the English Parliament passed an Act for the prevention of fraud and perjuries. There are twenty-five sections in the statutory provisions but only sections 4 and 7 are important for the Principle of Contract.

Section 4 provides that:

> And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June, no action shall be brought whereby to charge an executor or administrator upon any special promise, to answer damages out of his estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to change any person upon any agreement made upon

[84] *Supra*.
[85] *Supra*.

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> consideration of marriage; or upon any contract for sales of lands, tenements or hereditaments or any interest in or concerning them; (4) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other persons thereto by him lawfully authorized.

The effect of the above provision on the principle of estoppel, most especially proprietary and promissory estoppel is very devastating. As the law of contract and law of evidence developed over the years, the increasing judicial onslaught on the statute is on the high. The court continues to question the justification for the continued existence of the Statute of Frauds which is non-compliance with its writing requirements.

Steinberg[86] stated that the courts have developed several exceptions to the strict operation of the requirements of the statute. The exceptions include the doctrine of part performance, the imposition of the rule of constructive trusts, quasi-contracts, the presence of fraud or mistake, the main purpose rule, the joint obligor rule, equitable estoppel, and recent, promissory estoppel. Formerly, the courts in enforcing the promise made without a written agreement would be ready to enforce the promise made, in so far as the promise was accompanied by an auxiliary promise to prepare the agreement in the future time. Put differently, there must be a subsidiary promise to reduce the main promise into writing for the court to enforce the promise. The English case of Leak v Morrice[87] is apposite of this position, where an oral contract to assign a lease with an additional promise to put the main contract in writing was held to be valid, and the Statute of Fraud was held to be no defense due to presence of the subsidiary agreement. However, equity has always detested the hard operation of statutory provisions. It is one of the important maxims of equity that equity will not permit a statute to be used as an instrument of fraud. In essence, the doctrines of promissory estoppel and proprietary estoppel have been used to delimit the writing requirement of the Statute of Fraud.

Finally, the doctrine of executive necessity and that of sovereign immunity is another double head ghost preventing the citizens from maximizing the great potential of the principle of estoppel to compel executive responsibilities to bring it in line with its campaign promises. Though the Courts starting from the United Kingdom and most profoundly in India had succeeded in caging these ghosts, the ghost is yet to be finally laid to rest though it represents the path to compelling executive responsibilities via promissory estoppel to enhance democratic values of accountability, rule of law, and good governance. As Lord Denning puts it in the case of Robertson v. Minister of Pensions:[88]

> The crown cannot escape its obligation under the principle of promissory estoppel by praying in aid to the doctrine of executive necessity.

[86] Steinberg, J.G. (1975) "Promissory Estoppel as a Means of Defeating the Statute of Frauds," 44, *Fordham Law Review*, p. 114

[87] *Ch. Cas. 135, 22 Eng*. Rep. 883 (1682).s

[88] (1949) 1 K.B. 227

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Despite the above, the principle of estoppel is limited in operation by the doctrine of dual sovereignty. Thus, if "A" commits an offense by carrying cocaine from Nigeria to the United Kingdom and he escaped arrest in Nigeria but was apprehended in the United Kingdom if he was eventually jailed in the UK and after the jail service, he came back to Nigeria and was arrested "A" cannot call in aid the principle of estoppel to escape being tried in Nigeria.

6.0 Conclusion:

It is apparent that the preponderance of judicial opinion was that estoppel could not be used to create a new cause of action. This was because the Courts felt that the requirement of consideration was too essential in contractual relations so that a party who failed to furnish consideration should not be allowed to sue a promisor or representor. In essence, the promissee could only use the principle of estoppel or promissory estoppel as a shield, or a defensive weapon to the suit initiated at the instance of the promisor. This rule that estoppel could only be used as a shield has resulted in the emergence of hard cases. Most times, litigants could not get justice as a result of this rule. This paper recommended a double soul of estoppel where estoppel could be used both as a sword and a shield, and also the judicial demolition of other relics forbidding the attainment of justice through the instrumentality of the principle of estoppel.