

**PROMISEE'S RIGHT TO BOUND PUBLIC AUTHORITIES TO THEIR
PROMISE: THE DEBATE BETWEEN THE DOCTRINE OF ESTOPPEL AND
LEGITIMATE EXPECTATION**

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ABSTRACT: *It is common place that public authorities sometimes give assurance to individual or group of citizen such as postponing development project, relocation, provision of benefits etc. As public administrative does not exist only to serves the interest of the representee, the rights and interest of others must be considered as well. Hence the ability of representee to enforce promises made by the authorities denotes administrative consistency and trust for the government. Traditionally, the representor is prevented by the private law doctrine of estoppel from resiling. However, the principle has gradually shifted towards collectivism. This essay revisit the principle behind the traditional doctrine and the current principle of legitimate expectation. In view of gradual acceptance of the latter, this essay discusses the viability of abolishing the traditional doctrine and the possible effect to future claims.*

KEYWORDS: estoppel, law, legitimate expectation, public administration

INTRODUCTION

A physically disabled person is admitted to a public funded care home. He is promised of proper care and comfort for as long as he stays there. Few years later, the local authority decided to develop the area into commercial center and the residents of the home will be relocated to a remote area. This, perhaps, causes serious inconvenience to the resident. Can the residents object to the relocation decision? Can the residents bound the local authority to its promise? One may argued that it is the public body or local government's authority to develop areas that are within its vicinity. Others may opined that it is of public interest to develop and the home should give way for sake of public good. Yet some kind-heart-soul may argue that it is inequitable for public bodies to breach its own promises and jeopardizes the already disadvantaged. It is a threat to public trust. The answer to this question depends on whether the legal system adopts the doctrine of estoppel or legitimate expectation. The following sections explain the definition and application of both doctrine in ultra and intra vires public decision; and disparity between the doctrines. In view of rapid development in public administration, this essay will discuss the appropriateness of abolishing the doctrine of estoppel in public law, its consequence in term of the future of public law and remedies available to the promisee.

DOCTRINE OF ESTOPPEL AND THE PUBLIC ADMINISTRATION

Edward Coke defined the term estoppel simply as “stopped”. This definition is dated back to 1832 in the infamous common law bible of Commentaries on Littleton. Estoppel is a private law tool used when a representee wish to enforce a representation against the representor, where the former does not generally provide any consideration for the promise. In the presence of consideration, a civil claim could be raised in term of breach of contract. Estoppel principle enables claim base on the reliance placed upon the representor. The degree of detriment suffered drives the strength of claim against the representor. Hence, it is deem unfair or unconscionable for the latter to rescind from his representation. Over the centuries, common law estoppel has flourished into many types, namely estoppel by record (per rem judicatam), by issue, by deed, by representation, by conduct, by acquiescence, by waiver, by negligence, promissory and proprietary. This is yet to be exhaustive and is prone to further exploration along with the evolution of common law.

The application of the principle of estoppel in public law defers between ultra and intra vires representation. Ultra vires representation is either made outside the statutory power of the public body; or one that is within its power to make but not to be delegated to another official of which the statute does not authorise. The latter is ultra vires delegation, rendering any reliance on the representation unreasonable because of the mean of which the representation is made rather than the content of the representation. This is true even if the officer has bona fide belief that the representation is within his authority to make. In the case of *Western Fish Products Ltd v Penwith District Council* (1981), the claimant attempted to stop the council from refusing its planning permission by reason of statement made by the council’s planning officer. The Court rejected this claim because the Town and Country Planning Act 1971 require that the decision concerning planning permission should be made by the council instead of an officer. The delegation is ultra vires, hence does not bind the council. Vice versa, if the duty and discretion of the public body can be delegated, then "an officer, acting within the scope of his ostensible authority, makes a representation on which another acts on it to their detriment, then a public authority is estopped from denying." (*Lever (Finance) Ltd v City of Westminster* (1971) 1. Q.B.222 at 230).

Estoppel cannot, however, legitimise an act which is ultra vires in itself (*Commonwealth of Australia v Burns*). One cannot bind the promisor to perform an illegal promise. The rational is in the source of its power. The power of the public body is given by the Parliament which is the supreme law making body. The jurisdictional boundary of the public body is defined by the Parliament. The role of the public body is to exercise those powers to meet purpose intended by the Parliament, which reflect the overall objective of the nation through the peoples’ representative. Representation that is ultra vires deviate from the national objective. Hence allowing individual to enforce his so called entitlement contrary to public interest is inequitable. In addition, permitting alteration to that boundary

would denote elevating the Court's power to be above those of the Parliament. The rule of evidence should not be above the rule of law.

The applicability of the estoppel principle on *intra vires* representation or decision is more problematic. Generally, the doctrine of estoppel operates in *intra vires* cases but this is not without restriction. Estoppel cannot deter the exercise of statutory duty or discretion (*Maritime Electric Comp Ltd v General Diaries Ltd*). This is because the statute confers upon the public body the power to exercise a free and unhindered discretion to decide as they deem fit in the interest of the public, save for situation where there is statutory provision that warrant fettering of that power. Therefore, the promisee cannot insist to enforce the previous policy when the authority has subsequently decided to replace it with a new policy. This is true even if the representee has acted on the earlier assurance to his detriment. This has been confirmed in the case of *Southend-on-Sea Corp v Hodgson (Wickford) Ltd* (1961). In that case, a builder found a suitable premise to establish a builders' yard. They wrote to the borough engineer employed by the planning authority asking whether the premise could be used as builders' yard. The borough engineer replied that there is existing user as a builders' yard, therefore no planning permission was necessary. The builder, relying on the engineer's letter, bought the land and used it as a builders' yard. Later, the planning authority considered that the land had no such existing user and could not be so used without planning permission. The authority served an enforcement notice on the builder requiring them to cease usage. The builder appealed to the justice. It was held at first instance that the authority was estopped by the letter issued by its engineer. The authority appealed. It was held that estoppel could not operate to hinder or prevent the exercise by the local planning authority of their statutory discretion under the Act that was intended to be exercised for the benefit of the public.

LEGITIMATE EXPECTATION AND THE PUBLIC ADMINISTRATION

Unlike the ancient doctrine of common law estoppel, the principle of legitimate expectation is relatively new in the English public law. It was first coined by Lord Denning in the case of *Schmidt v. Secretary of State for Home Affairs* [1969]. Prior to this, the concept of legitimate expectation does not exist. As asserted by Lord Denning that "the idea came out of my own head and not from any continental or other source" (Forsyth, 1988). This concept arises from the sense of need to reinforce trust in the public administrative system. Public trust is the thrust of good governance. It is also important that legal certainty be maintained, so that individuals are able to plan their life accordingly.

The doctrine distinguishes between procedural and substantive legitimate expectation, if a public body has led an individual to believe that he will have a particular procedural right, then he is said to have procedural legitimate expectations. General principle of fairness and natural justice require that it is only equitable if this expectation is to be protected (CCSU) for sake of certainty. Procedural legitimate expectation denotes the existence of some

process right which the applicant claims to possess as a result of behavior by the public body which generate that expectation.

The following types of intra vires acts is capable of raising legitimate expectation:

- 1) Replacing a generally accepted norm or policy with a new one
- 2) Act or decision that depart from the general norm or policy
- 3) Following a change in general policy, the public body resile from a representation made to a representee earlier
- 4) Individualised representation that has been relied on by the representee and the public body, thereafter, changes its mind

A problem synonym to that of estoppel occurs. Enforcement of legitimate expectation against intra vires decision of a public body is fettering the discretion conferred on the body by statute which has authority as well as duty to change policy in accordance to changing circumstances of the society. Complication heightens when the promisee has relied on the earlier representation and expects substantial benefit to flow from the policy.

Prior to 2001, there was uncertainty as to whether substantive legitimate expectation is recognised in UK. Earlier cases were argued under the heading of abuse of power and fairness rather than the explicit terms of substantive legitimate expectation. For example, in the case of *R v Secretary of State for the Home Department ex parte Khan* [1984], it was held that a public authority cannot resile from the assurance given earlier because it would be unfair to do so. In that case, Khan has applied to the British Embassy in Islamabad for entry certificates to join the father in the UK. It was 1972 and Khan was 14 years old and unmarried. Entry certificate was granted almost 7 years later. By then, he was 21 years old. But his status in the entry permission remained as “an unmarried and fully dependent son under 21”. Two weeks before he left for the UK, Khan was married. He subsequently entered the UK without his wife. In 1978, the wife was granted an entry certificate indorsed 'Settlement to join husband'. Several months later, Khan was arrested and detained as a person who had obtained entry by deception. He applied for a writ of habeas corpus. The Court held for Khan. When entering the UK, it should have been clear to the immigration officer from Khan's passport that he was over 21 and it was unlikely that at that age he would still be fully dependent on his father. In failing to make any inquiries, the immigration officer had waived any objection. In addition, having considered the time lapse between the application and granting of the certificate, it is not reasonable to aspect Khan's representation to remain unchanged. He was under no duty to disclose his changed circumstance unless he was asked. As long as the entry certificate is not revoked, it is unfair for the immigration office to resile from its assurance.

In another case of *ex parte Ruddock* [1987], the claimant could legitimately expect that the police would comply with published criteria for when telephone interception would take place unless departure from those criteria was required for reasons of national security. In *MFK Underwriting Agencies* (1990), the Revenue could not withdraw from a representation if this would cause substantive unfairness to the applicant. In *Unilever*

(1996), the Court of Appeal held that Inland Revenue could not without prior warning discontinue a practice applied constantly for about 25 years. Its sudden change of conduct was unfair breach of the applicant's legitimate expectation and therefore abuse of power.

In recent years it has become accepted that if a public body has led an individual to believe that he will receive a substantive benefit, then he may have "substantive" legitimate expectation that can be protected. A promise is more probable to incur substantive benefit if it is made to a small group of people. It give rise to a contractual relationship. It is deem unlikely that the authority will make a representation so significant that will present substantial benefit to a large number of people. So what is the magnitude of substantiveness? In *Ex. p Coughlan* [2001], Ms.Coughlan was suffering from tetraplegic. She moved into a home on the basis of a promise that it is a "home for life". Later, the home needs to be closed due to resources deficiency. Ms.Coughlan opposed to the decision of the Health Authority. The Court held that she has a legitimate expectation that she will be able to live there for the rest of her life. It is unlawful to frustrate a substantive legitimate expectation if doing so is so unfair that it will amount to an abuse of power.

The decision in *Coughlan* demonstrated the Court's tendency to weight between the welfare of the individual against the burden upon the authority to fulfill its promise. The mere fact that there has been some change in policy does not necessarily give rise to a legitimate expectation. Even if the applicant is able to prove existence of substantive legitimate expectation on the fact of the case, consideration must also be given to the rational put forth by the public body justifying its departure from the policy. In *Coughlan*, the rational to abolish the home was economic and the consequence to the Health Authority of having to honour its promise was only financial.

The decision in *Coughlan* was not without criticism. It was argued that the cost spent to satisfy Ms.Coughlan's legitimate expectation deprived others who need treatment as well. *Coughlan's* decision is also said to have overlooked the non-fetter principle that forms the precedent for future cases. It is also argued that the task of finding the balance between the competing health needs of the residents was given by Parliament to the Health Authority. The Court has neither the authority nor expertise to make such decision. However, the Court assured that it does not intend to impede administrative independence. It merely seeks to secure legitimate expectation of citizen who has relied on consistency of government's policy and trust that it will not deprive their rights.

The Court in these cases does not order the expectation to be fulfilled but merely require the authority to take those expectation into consideration in the course of decision making. Example can be seen in the case of *R(Bibi) v Newham LBC* [2002]. In this case, the council had promised to provide the claimant with permanent accommodation within 18 months. But later, the House of Lords declared that the claimant has no right for such accommodation. This makes the council's promise ultra vires. Nevertheless, the council continued to provide the applicants with temporary accommodation. The applicants sought judicial review of the council's failure to comply with its promise. The Court of Appeal

held that the claimant had a legitimate expectation of permanent accommodation. The council appealed. The Court held that the council should honour its promise unless there is valid reason for not doing so. The Court will not assume the power of the executive by ordering honouring of the promise. Instead, the council is under the duty to consider the applicant's legitimate expectation for a permanent housing. Failure to exercise that duty is unlawful.

IS THE DOCTRINE OF ESTOPPEL REDUNDANT IN PUBLIC LAW?

There are close similarities between the public law doctrine of legitimate expectations and the private law doctrine of estoppels. It has been established in *Western Fish* that the principle of estoppel does not take effect in ultra vires cases. Likewise, there is no legitimate expectation in ultra vires representation. The decision in *Western Fish* would remain unchanged post *Coughlan*. Difference in treatment for intra vires cases are as discussed as above.

During the days when the concept of abuse of power and legitimate expectation is yet to be fully developed, estoppel is a useful tool to hold Authorities accountable (*R(Reprotech)*, 2003). Now, the framework has grown to the extent where the doctrine of estoppel has been absorbed into the principle of legitimate expectation. From the standpoint of public law, the principle of legitimate expectation offers more proportional justification to allow public body to adapt to changing society. Public body serves not only private interest, but statutorily tasked to serve interest of the public. As such, maintaining the doctrine of estoppel in public administration bear the risk of pleasing few selected individual and post injustice to others, especially the right of third party who does not have the chance to be heard. No right mind will believe that this is what the Parliament has intended. Allowing a claim under estoppel will inevitably lead the Court of being accused as overreaching the Parliament's intend with its own. In fact, Lord Hoffmann has promoted in *Reprotech* that "public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet" (at para 35). Sedley J. too strongly supported the legitimate expectation principle in *Hamble Fisheries*.

The issue of human right – The UK legal system is deeply affected by the European Union (EU) conventions on human right. Any discussion of the UK legal system can not be satisfactorily completed without discussion of EU human right convention. Also having considered the hiking importance of human right debate in international arena, this facet can not be taken lightly. Commonwealth countries that have modelled their legal system from, or referred to the UK legal system are remote spectator of the human right convention. The following paragraphs explain whether abolishment of the doctrine of estoppel will give rise to claim of violation of human right.

Since the UK entrance into the EU in 1973 and the enactment of the Human Right Act 1998, domestic Courts are required to observe convention rights and to consider decision

reached at the European Court of Human Right. At times, principles adopted by European courts defers from that of the UK. One obvious example is the different between the European's proportionality test and the UK standard of reasonableness. Though the UK Parliament has absolute sovereignty to determine the principles of which it choose to adopt, the European influence is not to be neglected.

Article 14 of the Convention provided that the enjoyment of the rights and freedom set out in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The Article, however, does not preclude any exceptional treatment if the situation so warrant. European courts have always upheld the principle of proportionality. It will uphold a claim if the applicant could prove existence of legitimate expectation and that it will not jeopardize the interest of the public, though the terms procedural and substantive legitimate expectation are literally absent from the Community law.

Reprotech has finally provide a concrete direction carved in stone (literally) that reliance upon estoppel by representation is unlikely to be successful in a public law case except in very limited circumstances. Remedies against public authorities must take into account the interests of the general public which the authority exists to promote and the Human Rights Act 1998. Hence, estoppel cannot be used to protect individual right when interest of the public is at stake.

THE CONSEQUENCE OF ABOLISHING THE DOCTRINE OF ESTOPPEL

Lord Hoffman has indirectly suggested the abolishment of estoppel principle from public law. If that is the call, it is time to assess its consequence.

Firstly, the doctrine of detrimental reliance will become redundant in public law – Public law upholds two fundamental principles: firstly, jurisdiction cannot be exceeded; and secondly, duties cannot be fettered. The justification for enforcing legitimate expectation is fairness and to guard against abuse of power by a public body, which was entrusted with the duty to protect the citizen. Under the doctrine of estoppel, the promisor is estopped from denying its responsibility to honour the promise because the said promise has come to the knowledge of the promisee and the he has relied on it to his detriment in managing his affair. In the public law context, however, the claimant belief that a policy exist and has legitimate expectation that it to be followed in the future. In this sense, the former is retrospective, whereas the latter is prospective. The gap in question is “detrimental”. Does a claimant under the legitimate expectation principle need to demonstrate detrimental reliance just like its estoppel cousin? This is answered in the case of Bibi – Negative. Later, the Court of Appeal in R(Rashid) v. Home Secretary [2005] reconfirm that the court's ability to intervene does not depend upon the claimant's knowledge of the policy. Nor does it depend upon any publication of the policy. To this juncture, if estoppel is to be removed

from public law, future applicants no longer need to prove detrimental reliance, although both reliance and detriment were relevant considerations in determining whether it would be unfair to allow the authority to resile from its policy.

Secondly, availability of damages – A successful claim under the traditional doctrine of estoppel enables the representee to obtain damages from the representor for breaking the promise. The Court will award damages for expenditure incurred by the claimant for acting on the promise. Such expenditure must be capable of being calculated in economic value and one that is within the representor reasonable contemplation at the time of the contract. Non-economic losses are not normally included, unless the contract was one which provides non-economic benefit. However, not all disappointment can be calculated. For example in *Ruxley Electronics and Construction Ltd v Forsyth* [1995], the court find difficulty in forming the most accurate formula to compensate the claimant whom swimming pool was not build to the correct depth. In such circumstance, the Court may award damages for reliance loss, but this is only rare and is not one of the claimant's entitlements. The claimant is also expected to mitigate his loss. Equitable remedies such as injunction and prohibition order is also available in private law. It is not the claimant's right but discretion of the Court.

Damages is also available under the public law, but damages is only an appropriate for cases such as *Lever (Finance)* where all that is involved is financial in business context. Damages may not be equitable for cases that involve personal welfare. Ms.Coughlan would rather have a home than monetary compensation. What is more important is to induce reflection on the part of the decision-maker to reflect the appropriateness of its action. In fact, the Court has discretion to refuse remedy to an applicant, even if he is able to prove fault on the part of the authority. The public law is equipped with various prerogative remedies, namely the *ceteorari*, prohibition and the *mandamus* order. Applicant may claim one or more of these remedy though the award rest on the Court's discretion.

The *ceteorari* or quashing order serves to nullify a decision which has been made, making the decision completely invalid. This is normally applied in *ultra vires* cases. The case will be sent back to the decision maker with the instruction to reconsider the decision, or on rare occasion, the Court may make the decision itself. But this is uncommon as the Court is cautioned against assuming the role of the executive. The Prohibiting order is an order to prevent the Authority from committing an *ultra vires* act. It is similar to *ceteorari* order except that it stops future action such as preventing implementation of a decision that breach natural justice. The *mandamus* or mandatory order compels public authorities to fulfil their duties. While *ceteorari* and prohibition orders deal with wrongful acts, *mandamus* order addresses wrongful failure to act. It is similar to mandatory injunction that requires an act to be performed.

These remedies are deem more appropriate for cases where the applicant's objective is not to seek monetary compensation, but rather a performance or non-performance of an act. In awarding these remedies, individual's right protected by the HRA must be considered.

Likewise, welfare of the general public is equally considered. It eases the financial pressure of public administration, but applicant who aimed for damages would be disappointed.

CONCLUSION

Concluding the above discussion, the Author firmly settled here that the principle of estoppel should cease to apply on public law issues. Citizen who felt that they have been unfairly prejudiced by flip-flop administration can rely on the legitimate expectation principle. Apart from the question of monetary remedies, a prejudiced citizen gain recourse in the form discussed above. The Author finds this sufficiently equitable as genuine applicant should be more interest in seeking enforcement of a promise rather than pacified by monetary reward. Interest of others in the community should be weighted as well. Furthermore, public funding is partly sourced from tax payer. An award of damages would inevitably mean using public money to compensate a project that counter public interest. If the argument of public law estoppel is to do justice for the applicant, what justice does it serve when a non-socially-approved project is to be paid by the society?

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