

Fundamentals of Anglo- American and Polish Legal Systems – Safety valves

Dr Jan Halberda
(jan.halberda@uj.edu.pl)

Principle of Good Faith and Fair Dealing in the civil law tradition



Statutory doctrines (examples):

- abuse of right,
- culpa in contrahendo,
- manner of performance,
- extraordinary change of circumstances (clausula rebus sic stantibus),
- etc.

Art. 5. Abuse of right.

One cannot exercise one's right in a manner contradictory to its social and economic purpose or the principles of community life. Acting or refraining from acting by an entitled person is not deemed an exercise of that right and is not protected.

Principle of Good Faith and Fair Dealing in the civil law tradition



Art. 354. Manner of performance.

§ 1. A debtor should perform his obligation in accordance with its substance and in a manner complying with its social and economic purpose and the principles of community life, and if there is established custom in this respect - also in a manner complying with this custom.

§ 2. The creditor should cooperate in the same manner in the performance of an obligation.

Art. 72. Culpa in contrahendo.

§ 2. A party which enters into or conducts negotiations in breach of good custom, in particular without intending to execute a contract, is obliged to remedy any damage which the other party suffers by the fact that it was counting on the contract being executed

Principle of Good Faith and Fair Dealing in the civil law tradition



Art. 357(1). Extraordinary change in circumstances.

If, due to an extraordinary change in circumstances, a performance entails excessive difficulties or exposes one of the parties to a serious loss which the parties did not foresee when executing the contract, the court may, having considered the parties' interests, in accordance with the principles of community life, designate the manner of performing the obligation, the value of the performance or even decide that the contract be dissolved. When dissolving the contract, the court may, as needed, decide how accounts will be settled between the parties, being guided by the principles set forth in the preceding sentence.

Principle of Good Faith and Fair Dealing in the American law



Uniform Commercial Code (1952)

§ 1-201.(20) "Good faith," except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

§ 1-304. Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.

Restatement (Second) of the Contracts (1981)

§ 205. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

Bhasin v. Hrynew (2014): duty of honest performance in CAN



Starting point: No such Principle in English law



„Palm tree justice” argument
No discussion about the abuse of rights

Cases from the end of 20th century:

- Interfoto (1987),
- Walford v. Miles (1992)

Lord Bingham’s approach -> Piecemeal solutions:

- interpretation of contract,
- frustration of contract,
- economic duress, undue influence, unconscionable bargains, misrepresentation,
- fiduciary duties
- different kinds of estoppels.

Starting point: No such Principle in English law



Winds of change in England and Wales?

(after the Principle was recognized in American law, Australian law, Canadian law)

Leggatt J. in *Yam Seng* (2013)

Lord Leggatt in the UK Supreme Court (2020)

Fundamentals of Anglo- American and Polish Legal Systems – Safety valves: Estoppel

Dr Jan Halberda
(jan.halberda@uj.edu.pl)

Sir Edward Coke's estoppels



E. Coke, The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton: Not the Name of the Author only, but of the Law itself, London 1628:

„‘Estoppe’ commeth of the French word estoupe, from whence the English word stopped: and it is called an estoppel or conclusion, because a man’s owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth”.

Lord Denning w McIlkenny v. Chief Constable of the West Midlands (1980):
„That meant a bung or cork by which you stopped something from coming out”.



Sir Edward Coke's estoppels



E. Coke, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton: Not the Name of the Author only, but of the Law itself*, London 1628:

„Touching estoppels, which is an excellent and curious kinde of learning, it is to be observed, that there be three kinde of estoppels, viz. **by matter of record**, **by matter of writing**, and **by matter in pais**”.

Estoppel by matter in pais



Source of the name: what is the pais? (trial by jury; estoppel by verdict)

Present equivalent: **estoppel by representation**

Scope: **the facts** notorious to the neighbourhood (seisin of the real property, legal capacity of the parties)

The most important slide comes now...:



Most important estoppels of the 21st century

Promissory estoppel:

Ineffective Promise + Pre-Existing Legal Obligation + Reliance + Detriment(?) => Effective Promise

Proprietary estoppel:

Ineffective Promise + concerning Real Property + Reliance + Detriment => Effective Promise



Promissory estoppel's fields of application



- If the promise is invalid due to lack of consideration:
High Trees (1947), Collier (2008),
- If the party promised not to use defence of statute of frauds:
Actionstrength (2003)
- If the party promised not to use defence of limitations:
Commonwealth v. Verwayen (1990),
- If the party promised not to use its strict rights:
Hughes (1877),
- Failed attempts to use promissory estoppel in negotiations:
Baird Textiles (2001)

Old estoppels' legacy



Common feature is to „stop” an **inconsistent behaviour** of another person

Rule:

Estoppel (should) operate as a defence and not as cause of action:

Denning LJ. w Combe v. Combe (1951):

„estoppel is a shield and not a sword”

Exception:

Only proprietary estoppel might be used as a sword.



Shield vs Sword

Shield

Defence of estoppel, only suspensory effect



Sword

Free-standing cause of action,
can have a permanent effect

- only in case of proprietary estoppel



Promissory estoppel vs art.5 of CC

- Judgment of the Polish Constitutional Tribunal of October 17, 2000 (file ref. SK 5/99) on the application of art. 5 CC
- Subsidiarity
- Unique character, careful use
- The need to take into account all the circumstances of the case
- It does not extinguish the rights, but only limits the possibility of pursuing them
- Temporary protection, not permanent
- The defence, not the free-standing cause of action

Jan Halberda

ESTOPPEL
W ANGLOAMERYKAŃSKIM
PRAWIE PRYWATNYM



Thank you !

https://www.researchgate.net/profile/Jan_Halberda

jan.halberda@uj.edu.pl