

A COMPARATIVE STUDY OF THE DOCTRINE OF ESTOPPEL: A CIVILIAN CONTRACTARIAN APPROACH IN CHINA

LIU GUOQING*

I INTRODUCTION

Etymologically, the word ‘estoppel’ owes its origin to the old French term ‘estoppe’ meaning ‘stop up’, or another French word ‘estoupail’ meaning ‘stopper plug’ which refers to placing a halt on the imbalance of the situation. The term is now used in law to indicate a situation where the promisor is barred from relying on his legal rights once he promised not to do so, and from exercising his or her legal rights, on the basis that the promise has been relied upon to the promisee’s detriment, and it would be unconscionable for the promisor to withdraw the promise.

Changing one’s mind is a common phenomenon, occurring everywhere at any time. It happens in many situations for a variety of reasons. The doctrine of estoppel, however, requires a detrimental or, in American terms, justifiable reliance. This article aims to examine from a comparative perspective different doctrinal approaches to promise breaking.

Estoppel is legally recognised in common law jurisdictions and a specific doctrine has in consequence been developed notwithstanding some jurisdictional differences among common law countries. But under civil law jurisdictions estoppel is not recognised as a legal institution. One reason for this may lie in the fact that equity is part of common law legal tradition and it plays a role in doing individual justice. In civil law countries, equity is absent and equitable interests are not recognised or enforced. Another reason for the absence of doctrine of estoppel is that in civil law legal traditions ownership or ‘dominion’ is overwhelmingly regarded as a unitary concept with supremacy. As long as the ownership has not been transferred, the title and ownership remain vested in the legal owner and personal obligations yields to the dominion of ownership. All promises or contracts are personal and, in conflict with the owner’s proprietary legal right, they are not strong enough to prevent the owner from exercising her legal rights.

In contrast, in certain circumstances an equitable owner or equitable interest holder

* Assistant Professor, Faculty of Law, University of Canberra.

can defeat or challenge the dominance of the legal owner in common law jurisdictions. This paper examines this doctrinal problem and analyses the different approaches adopted in different jurisdictions. Particular attention will be paid to the attitudes of Chinese jurists to the doctrine of estoppel and to the deliberate breach of contract. In practice, it is often difficult to apply the doctrine of estoppel properly because Chinese law is unclear or inconsistent on such a doctrine and judges in action often readily misapply the externality of ownership to the internal relationship between the parties to an estoppel. This paper intends to distinguish estoppel from related similar institutions.

II ESTOPPEL IN DIFFERENT JURISDICTIONS

The doctrine of estoppel has a history of over four hundred years. Its principles are applied differently in the various common law legal jurisdictions, though the elements or constituents of it are similar in all jurisdictions. It is said that the first appearance of the word 'estoppel' was in Sir Edward Coke's book *The Institutes of Laws of England* published in 1628.¹ There are three approaches taken by common law jurisdictions. They are respectively: a contractarian approach adopted in US;² a restrictive equitable approach taken by English common law and an inclusive unconscionability-based approach practised in Australia. In civil law systems, particularly in China, the law is tolerant to promisors who have broken their promises in the absence of written evidence or even proved by hard evidence. In property cases estoppel claims rarely succeed because courts in China follow a strict approach to protect the registered proprietor regardless of unconscionability. Equity and conscience are treated as non-binding principles. This paper aims to re-introduce the doctrine of estoppel as an enforceable legal institution based on 'intuitive equity' into China in order to strengthen the institution of promise giving and to rebuild trust among people, which

¹ 朱广新[Zhu Guangxin], 《英国法上的允诺禁反悔》 'Promissory Estoppel in English Law' (2007) 2 《比较法研究》 *Journal of Comparative Law* 92, 93; Kevin M. Teeven, 'Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston's Restatement' (2004) 34 *The University of Memphis Law Review* 499, 502; Edward Coke, *Institutes of the Law of England* (1809, Fleming and Phelan, Upper Ormond Quay, Dublin).

² Teeven, above n 1; Edward Yorio and Steve Thel, 'The Promissory Basis for Section 90' (1991) 101 *Yale Law Journal* 111; 朱广新[Zhu Guangxin], above n 1 ; 朱广新[Zhu Guangxin], 《美国法上的允诺禁反悔制度研究》 'A Study of Institution of Promissory Estoppel in American Law' (2006) 2 环球法律评论 *Global Law Review* 174.

as a result of its 'economic reform' has been diminished to a historically low level.

A *The American Contractarian Approach*

For more than half a century before the 1926 proposal for a promissory estoppel section in the *Restatement of the Law of Contracts (Restatement)*, American courts, with some regularity, granted relief where a promisee had acted with justifiable reliance on commercial promises.³ These reliance-based decisions provided a means to overcome doctrinal obstacles to enforcement of the promises in contract law. However, in theorising contract law, Langdell and Holmes, the latter in particular, had championed the bargain, based on the doctrine of consideration, as the sole ground for enforcing promises, to the exclusion of justifiable reliance.⁴ Both wrote books arguing that reliance upon a promise could not establish consideration,⁵ although the proposition rested on virtually no precedent. The situation was therefore that, on the one hand, courts granted relief based on the promisee's justifiable reliance,⁶ but conservative jurists, on the other hand, rejected equitable reliance as a ground for enforcement of a promise because the conventional doctrine of consideration required something 'definiteness, reciprocal and bargained for'.⁷

The progenitor of enforcement of justifiable reliance in the US is the old action of assumpsit, adopted by equity from the Roman principle of *causa* and transferred thence into the common law,⁸ offering a remedy for loss suffered in reliance on a

³ Kevin M. Teeven, 'Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston's Restatement' (2004) 34 *The University of Memphis Law Review* 499.

⁴ *Ibid.*, 505.

⁵ O.W. Holmes, *The Common Law* (Little, Brown & Co, 1881) 290-2; C.C. Langdell, *A Summary of the Law of Contracts* (Little, Brown & Co, 2nd ed., 1880) 87-9.

⁶ Courts in the US were influenced by 18th century English decisions in *Coggs v Bernard* 92 ER (K.B. 1703) *Phllans v Van Mierop*, 97 ER 1035 (K.B. 1765) and never stopped granting justifiable reliance relief in the 18th and 19th centuries. For example, in the case, *Le Fevre v. Le Fevre*, 4 Serg & Rawle 241 (pa.1818), a Pennsylvania court drew an analogy to part performance of an oral contract falling under the Statute of Frauds. The court concluded it would be a fraud for a defendant landowner to revoke the plaintiff's license after the defendant's request for a modification had induced the plaintiff's change of position. Another Pennsylvania land license decision rendered in 1826, *Rerick v. Kern*, 14 Serg & Rawle 267 (pa. 1826), acted as a catalyst for sympathetic treatment of reliance upon at-will business license agreements in Pennsylvania. A landowner revoked a land license after the plaintiff had relied by building a mill, and the court declared that if the enjoyment of a revocable license 'must necessarily be preceded by the expenditure of money', an attempt to revoke thereafter was precluded. Parsons cited *Rerick* for the proposition that reliance in equity sometimes performed the role of consideration (see Theophilus Parsons, *The Law of Contract* 359 n. (c) (Boston Little, Brown & Co. 7th ed.1883).

⁷ Teeven, above n 3, 501.

⁸ Teeven, above n 3, 503; F.B. Ames, 'The History of Assumpsit' (1888) 1 *Harvard Law Review* 1.

promise.⁹ This doctrine was, in turn, borrowed from church courts by both chancery and common law courts.¹⁰ The ecclesiastical action *fidei laesio* was available when a promisee reposed trust in a promisor by reliance and then was later deceived by promisor's breach of faith.¹¹ Later, *assumpsit* developed the principal model of consideration for modern contract law. Langdell and Holmes represented the formalist school of contract scholarship, and their influence on the doctrine of consideration was dominant in the nineteenth century in the US.¹² Nonetheless, in legal practice, however, courts tended to afford relief in cases where the promisee had acted in justifiable reliance on a promise.¹³

The American Law Institute (ALI) was formed in February 1923. There began a process modeled on the civil law practice of academics drafting legislative solutions. Samuel Williston, a member of the ALI's Inaugural Council, was selected as Reporter for the contracts project, being the unquestioned authority on the subject.¹⁴ He had published a four volume contracts treatise two years earlier. Williston, influenced by Holmes' theory of consideration,¹⁵ isolated bargain, in Section 75, as the unitary Restatement standard for sufficient consideration. Corbin, his assistant in drafting, challenged his approach with cases in which a promisee's justifiable reliance was recognised by the court.¹⁶ Reluctantly Williston added the text of Section 90 of the *Restatement of Contracts (1932)* which reads as follows:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.¹⁷

Reading between the lines, one can draw the implication that the standard set for an

⁹ Yorio and Thel, above n 2, 112.

¹⁰ Teeven, above n 3, 503.

¹¹ Ibid.

¹² Ibid.

¹³ Yorio and Thel, above n 2, 111.

¹⁴ Teeven, above n3, 511.

¹⁵ 朱广新[Zhu Guangxin], 《美国法上的允诺禁反悔制度研究》 'A Study of Institution of Promissory Estoppel in American Law' (2006) 2 环球法律评论 *Global Law Review*.176.

¹⁶ Ibid ; Mark L. Movsesian, 'Williston as Conservative-Pragmatist' (2007) 32 *Southern Illinois University Law Journal* 135.

¹⁷ Mark L. Movsesian, 'Williston as Conservative-Pragmatist' (2007) 32 *Southern Illinois University Law Journal* 135.

enforceable reliance-based promise is high. First, the promisor must reasonably foresee the consequence of his or her promise. In other words the promise must be seriously intended. Secondly, the promise has to cause definite and substantial reliance by the promisee. Thirdly, the promise must have induced a definite and substantial reliance or detriment on the part of the promisee. Lastly, the controversial notion of injustice, which is inevitably subjective, is used to trigger enforcement. The rigid requirements for estoppel that were reluctantly added to the *Restatement* were not followed until a half century later when the section was modified.

During the next fifty years, under the influence of Professor Fuller's version of natural law,¹⁸ Section 90 was applied to protect the promisee's reliance interest. In the *Restatement (Second) of Contracts* (1981) the principle was expanded into:

- (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
- (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

The statutory modifications are significant. The elimination of 'definite and substantial character' signals the shift from promise-based approach to reliance-based approach. The inclusion of 'a third person' enlarges the application of the provision. More importantly, a guiding principle for awarding relief is provided, though the vagueness of 'justice' is inevitable. The addition of subsection (2) signifies the decline of doctrine of consideration in estoppel cases in charity and marriage. It actually allows certain gratuitous gifts to be enforced under this provision.

The American contractarian approach has regarded a promise as a "half-completed exchange".¹⁹ In US law, equity-based institutions such as trust and estoppel have been assimilated into common law legal doctrines by some writers. For example, Langdell and Holmes formerly treated a promise as an offer, and they railed against justifiable

¹⁸ Yorio and Thel, above n 2, 111; 朱广新[Zhu Guangxin] above n15, 174; Teeven, above n 3.

¹⁹ See the comments to Section 90 of the *Restatement (Second) of Contracts* (1981).

reliance being regarded as consideration.²⁰ Today Langbein considers trusts as consensual deals – contracts.²¹

The advantage of the American contractarian approach in treating estoppel is, in my view, that it pigeonholes sophisticated doctrine of estoppel into the box of contract. This is more acceptable and easier to understand by ordinary people and civil law jurists. The disadvantage, however, lies in the fact that it contractualises reliance based relations, and unconscionability in equitable estoppel is misconceptualised or denied by the doctrine of consideration. In fact the doctrine of estoppel based on detrimental reliance and the doctrine of consideration for enforcement of contract are distinct from each other and not necessarily contradictory. As we will see below, estoppel can happen anywhere at any time, with or without a contract in question.²²

Nevertheless, a promise is treated as an offer which can form an option contract, and the enforceability of such a contract depends on multiple factors.²³ Since estoppel has been brought into contract law in the US, the remedy takes account of such issues as foreseeability, unjust enrichment and even the formality in which the offer is made.²⁴ Thanks to Fuller and his classification of interests,²⁵ i.e. restitution interest, reliance interest and expectation interest,²⁶ the results obtained by American courts in applying its contractarian approach to estoppel are not radically different from the results obtained in other common law jurisdictions. The detrimental or justifiable reliance is protected with various remedies. The US contractarian approach is an assimilation of equitable relief into contract theory.

B *The English Equity-based Approach*

In English law, however, estoppel is treated as an equity-based matter rather than as a contractual dispute though the outcome may not be substantially different. Parsons

²⁰ Teeven, above n 3, 505.

²¹ John H. Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *The Yale Law Journal* 625.

²² *Ewing v. Dominion Bank* 35 Can. Supreme Ct. 133.

²³ See the comments to Section 87 of the *Restatement (Second) of Contracts* (1981).

²⁴ See the comments to Section 90 of the *Restatement (Second) of Contracts* (1981).

²⁵ See L.L. Fuller and William R. Perdue, Jr, 'The Reliance interest in Contract Damages' (1936-7) 46 *The Yale Law Journal* 52.

²⁶ The famous dialogue between Mr Williston and Mr Coudert on a hypothetical case of estoppel during the 1926 proceedings of the American Law Institute presented the two schools of legal thought among common law lawyers and equity lawyers. I will come back to this debate when I analyse Chinese approach to estoppels.

noted in the middle of 19th century that 'reliance was binding in equity in much the same way that consideration operated at law'.²⁷ In many historic and modern estoppel cases, the promises were not express, if they had indeed been made at all, and given for no consideration.²⁸ A fraudulent misrepresentation or an agreement assumed by the parties to be the true state of affairs can give rise to an estoppel.²⁹ For instance, in *Montefiori v Montefiori*,³⁰ between the brothers of Joseph and Moses there was no promise at all but they misrepresented Joseph well being by Moses lending a money note to Joseph. In many cases there was often no bargaining involved in gratuitous promise giving. The enforceability of the promise lies in equity, in unconscionability and in the concept of detrimental reliance on the promise.

Estoppel was dealt with by common law courts earlier than the court of equity.³¹ There were some inconsistencies between the two jurisdictions in this respect. The common law courts enforce estoppel of existing facts only while equity enforces promissory estoppel. The major shortcoming of the English doctrine of estoppel is the complexity of the doctrine. It subdivides estoppel into estoppel by record, estoppel by deed, estoppel by convention, promissory estoppel and proprietary estoppel, the last two types being merged into equitable estoppel. Of course the historical reason for this is, at least in part, the dual court system in English legal history.

Both courts of law and the court of equity could hear estoppel cases and adjudicate on them on different legal bases.³² The common law requires a formal statement of existing fact which forms a legal basis for relief against the promisor whereas equity takes informal parole evidence of statements of future intention as an adequate factor which prevents the promisor from going back to his or her original position. Equity provides a wider coverage of estoppels than the common law.

²⁷ Theophilus Parsons, *The Law of Contracts* (Little, Brown & Co, 5th ed. 1866) 359.

²⁸ *Thorner v Major & Ors* [2009] UKHL 18.

²⁹ *Montefiori v Montefiori*, 1 Black. W. 363.8; *Neville v Wilinon*, 1 Bro.Ch.Ca.543; *Eastbrook v Scott*, 3 Ves. Jun. 456; *Thorner v Major & Ors* [2009] UKHL 18.

³⁰ (1 W. Bl. 363)

³¹ This proposition is contentious because some commentators believe equity exercised equitable relief for the promisee earlier than common law courts (See 朱广新 [Zhu Guangxin], 《英国法上的允诺禁反悔》 'Promissory Estoppel in English Law' (2007) 2 《比较法研究》 *Journal of Comparative Law* 92, 94). Common law estoppel was strictly applied to misrepresentation of existing facts before equity enforced equitable estoppel/promissory estoppel. This will be shown at the discussion below.

³² The major difference in judging an estoppel case between the court of common law and the court of equity is that the former recognises estoppels based on a statement of existing fact while the latter, in a broader sense, recognises estoppels based on a representation of existing fact (see Samantha Hepburn, *Principles of Equity and Trusts* (Routledge-Cavendish, Second Edition, 2001) 127).

The most significant difference between the English doctrines of estoppel and that of other common law jurisdictions such as Australia and Canada is that estoppel can only be used defensively in England. In other words they cannot be used, though resented by many as ‘rigorous and inequitable’³³, as a ‘sword’ but only as a ‘shield’. Or more precisely, estoppel is not to be employed as a cause of action that creates new rights in the promisee but as an evidentiary defence that prevents the promisor from enforcing his or her legal rights.

The English doctrine of estoppel is unnecessarily complex. The case of *Jorden v. Money*,³⁴ is the best known nineteenth century case, but also the most controversial one. It distinguished representation of facts from representation of intentions. The former can base a claim of estoppel but the latter cannot at common law. In that case Mrs Jorden repeatedly declared that she would never enforce a bond against Mr Money to which Mr Money was responsible for paying off the debt of £1200. The statement was construed as a representation of intention, not of fact.³⁵ Furthermore there was no hard evidence to show Mrs Jorden’s abandonment or waiver of her rights as required by the Statute of Frauds 1677. The Lord Chancellor (Lord Cranworth) did not think that one witness could defeat the defendant’s answer to the bill without evidence in writing and signature.³⁶

In fact, the differences between *Jorden v Money* and previous cases such as *Neville v. Wilkinson*³⁷ and *Montefiori v. Montefiori* were minor and immaterial from a modern perspective. In *Jorden v. Money* nothing was written and nothing was physically done except that parol promises were made, while in *Neville v. Wilkinson* and *Montefiori v. Montefiori*, courts based their injunctions on the fact that Mr Wilkinson did not include his personal debt of £ 8000 in the debts list he had made for Mr Neville presented to Mr. Robinson before marrying his daughter, and the fact that Moses Montefiori at the request of his brother fraudulently gave Joseph Montefiori a note for a large sum of money to make his brother appear to be a wealthy person for the purposes of marriage.³⁸ When we blow away the historical dust from the cases, we can see that “what was once a leading case is now little more than a historical

³³ Silas Alward, 'A New Phase of Equitable Estoppel' (1905) 19 *Harvard Law Review* 133.

³⁴ [1854] 10 E.R.868.

³⁵ See the opinion of Lord Cranworth in *Jorden v. Money* 879-898.

³⁶ *Ibid.*

³⁷ (1 Bro. C. C. 543)

³⁸ See the opinion of the Lord Cranworth in *Jorden v Money* [1854] 10 E.R.868, 880.

curiosity.³⁹ An interesting point about the judgment of *Jorden v. Money* is that the case was sent back to the Court of Chancery ‘to do what is right’, which indicates that the Court of Equity accepted oral evidence in reasoning and judging cases while the courts of law did not, no matter how convincing the oral testimony and parol statement were. It was not until the *High Trees* case,⁴⁰ the twentieth century leading case on estoppel, that the principle of statement of existing facts was shaken and the doctrine of promissory estoppel was fully recognised.⁴¹

Central London Property Trust Limited v. High Trees House Limited is a leading English decision of the mid- twentieth century. The case is not complicated but it is significant in several respects. It concerned a lease under seal made in 1937 between the plaintiff, Central London Property Trust Limited, and the defendant, High Trees House Limited. The lease was of ninety-nine years duration at a rent of £2,500 per annum. In 1940, owing to war conditions, the plaintiff wrote a letter to the defendant, confirming that the rent would be reduced by half. In 1945, however, the war was over and the property was fully let. The plaintiff proposed to restore the rent to £2,500 from the third quarter of the year. In principle estoppel prevents the promisor from going back to the original position once the promise is made and relied upon, or a modification is agreed upon. Denning J permitted the lessor to claim the original rent. Denning J invoked equity as the basis of relief, stating that ‘[A]t this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect.’ Thus the common law principle of estoppel – based on a representation of existing facts established since *Jorden v. Money* – was fashioned into a more equitable principle which emphasises equitable reliance and future intention rather than contractual consideration and existing facts.

Another significant aspect of the *High Trees* case is that it established an equity-based approach to promissory estoppel, allowing flexible consideration to be given to such matters as a change of condition. If the rent were still payable at the lower rate, it would have been inequitable to the landlord since the war conditions had ceased to

³⁹ M. P. Thompson, ‘From Representation to Expectation: Estoppel as a Cause of Action’ (1983) 42 *The Cambridge Law Journal* 257, 259.

⁴⁰ *Central London Property Trust Limited v. High Trees House Limited* [1947] KB130.

⁴¹ Though the *High Trees* case is not the first case of equitable estoppel, it is certainly a most influential one in the history of the doctrine.

exist and the tenant would have been unjustly enriched at the expense of the landlord. In the meantime, the claim by the landlord for arrears amounting to £7,916 was denied by Denning J because of the existence of an accord between the two parties. In other words, the landlord had an intention to be legally bound when he agreed to accept reduced rent.

The *High Trees* case turned a new page in the history of estoppel in England. As a result, the rigid requirement of representation of existing facts is no longer required and detrimental reliance, and even perhaps non-detrimental reliance, has become the basis for estoppel.

C. *The Australian Unconscionability-based Approach*

In Australia the doctrine of estoppel has developed into a more expansive concept than that of England and the United States. In a leading case, *Waltons Stores (Interstate) Ltd v Maher* (1988),⁴² the High Court expanded the doctrine of estoppel to include an implied promise or inaction which encourages the plaintiff to act to his detriment. As Justice Killam observed in *Ewing v Dominion Bank*, ‘silence under certain circumstances gives rise to an estoppel.’⁴³

In September 1983 Waltons Stores and the Mahers entered into negotiations with a view to Waltons leasing the Mahers’ property at Nowra. The Mahers proposed to demolish existing buildings on the site and erect a new one suitable for Waltons’ purpose. In October a draft lease was sent to the Mahers by Waltons. On the assumption that a lease would be concluded, the Mahers started demolishing the old buildings when their solicitor informed Waltons’ solicitor of the knocking down of the buildings.

In November Mr Maher insisted that Waltons should sign the lease before he knocked down a new brick part of the building. The response from Waltons’ solicitor was that the terms negotiated for the lease were acceptable and that Waltons would finalise the lease next day. In late November Waltons had second thoughts about proceeding with the lease. They became aware of the demolition in early December. Nevertheless Waltons failed to communicate to the Mahers until the latter had begun constructing a

⁴² *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

⁴³ 35 Can. Supreme Ct. 133. Cited by Alward, above n 33.

new building to Waltons' specification that they did not intend to proceed with the lease. The Mahers commenced proceedings in the Supreme Court of New South Wales for specific performance of the lease or damages in lieu. Kearney J gave judgement for the Mahers for damages in lieu of specific performance. The subsequent High Court decision established the principles of the Australian law of estoppel which are broader and more flexible than the English doctrine in that it does not confine the doctrine to be employed only as a shield, but as a sword as well.

The important points in the case are: first, the court expanded the notion of estoppel to include an implied promise, being either knowing inaction or encouraging acquiescence. Second, Brennan J analysed equitable estoppel to include six elements, being the plaintiff's assumption that a legal relationship will be created; the defendant's inducement of the assumption; the reliance on the assumption by the plaintiff; the defendant's knowledge of the reliance; the detrimental action or inaction of the plaintiff; and the defendant's failure to prevent that detriment. Third, Deane J developed the Australian doctrine of estoppels by recognising a representation or assumption of a future state of affairs instead of conventional existing state of affairs. Fourth, Gaudron J stated that the plaintiff has a positive right to claim the benefit of the estoppel which is metaphorically referred to as the 'sword', so that estoppel can be considered to be a cause of action.⁴⁴

Another influential and much-cited Australian case is *Commonwealth v. Verwayen*.⁴⁵ The facts of the case were simple. Mr Verwayen was injured on 10 February 1964 when the *Voyager* and HMAS *Melbourne* collided while engaged in combat exercises. In 1984 he commenced an action in the Supreme Court of Victoria against the Commonwealth for damages for negligence. By its defence the Commonwealth admitted negligence but not that the plaintiff had been injured or had suffered loss and damage. The Commonwealth did not plead that the action was barred by the *Limitation of Actions Act 1958*, or that the Commonwealth did not owe him a duty of care because the *Voyager* was engaged in combat operations at the time of the collision. Both before and after the defence was filed, the Commonwealth stated that it had adopted a policy of not contesting liability and not pleading the statute of limitations.

⁴⁴ Above n 41 388-9.

⁴⁵ (1990) 170 CLR 394.

Following a change in policy in late 1985 the Commonwealth applied for leave to amend its defence so as to raise both defences, which I believe was wrongly admitted. The legal questions which arose were whether the Commonwealth's statement that it would not plead the statute of limitations was a waiver of statutory rights which can be revoked or a promise not to assert a legal right which cannot be resiled. Toohy and Gaudron JJ classified the statement as a waiver of rights.⁴⁶ Brennan J, however, disagreed and analysed the case in terms of estoppel.⁴⁷ Dawson J regarded it as a non-insistence upon a legal right.⁴⁸ I consider that the Commonwealth's statement was promissory. The distinction between the two is blurry or, as Ewart himself admitted, 'waiver evidently was an empty category'.⁴⁹ Nonetheless it is generally regarded that a promise is a specific guarantee while a waiver is an abandonment of a legal right. A promise requires two parties to be effective whereas a waiver is a unilateral action. For example, in *Jorden v Money*, Jorden's promise not to use the bond against Money is a promise, not a waiver. But in a sense the two concepts share the same effect: they can both be the basis for estoppel.

A majority of the High Court rejected the application of the doctrine of waiver, preferring to apply that of promissory estoppel.⁵⁰ The appeal by the Commonwealth was dismissed as a promissory estoppel even though the trial judge's finding of the non-existence of a pre-existing legal relationship did not alter the nature of the case.

Australian judges are more concerned about the actual detriment incurred to the promisee in a particular case,⁵¹ rather than the approach applied in *Waltons Stores (Interstate) Ltd v Maher* which emphasises the expectations created by the promise.⁵² Or perhaps, there was no substantial expectation in *Verwayen* except that a trial would take place without the statute of limitations being pleaded.

*Giumelli v. Giumelli*⁵³ is a family estoppel case. Unlike the other two cases which involve commercial and governmental promise, *Giumelli* is a typical family dispute

⁴⁶ Ibid 394.

⁴⁷ Ibid 395.

⁴⁸ This is another way of supporting the doctrine of estoppel.

⁴⁹ J.S. Ewart, *Waiver Distributed* (Harvard University Press, 1917) 4.

⁵⁰ The merge of waiver and estoppels was actually done by Lord Denning in the *High Trees* case. See

朱广新[Zhu Guangxin], above n 3, 93.

⁵¹ Andrew Robertson, 'Satisfying The Minimum Equity: Equitable Estoppel Remedies After *Verwayen*' (1996) 20 *Melbourne University Law Review* 805, 806.

⁵² Ibid 807.

⁵³ (1999) 196 CLR 101.

over a series of promises made by Mr. and Mrs. Giumelli on different occasions and in different terms to their son, Robert Giumelli, to convey to Robert a piece of land.

Robert worked with other family members for the family partnership since 1971 without wages. But other family members were paid for their work. In 1974, as compensation for his working without wages and for his contribution to the family property, the parents made a promise that they would give him a part of the property. In 1980, when Robert intended to get married and build a house for his marriage, the parents agreed that he could select a site and build a house on it and that the house and the land would be his.

Relying on the promise, Robert built a house worth \$ 47,000. The partnership advanced Robert \$ 25,000 against his account with the partnership. In 1981, a promise was made to him that a subdivision of land to create a lot on the northern side of the property including the house and an orchard would be transferred to him if he agreed to stay on the property and reject the offer made to him by his father-in-law to work elsewhere. The son relied on the promise, which resulted in his divorce in 1983. The family relationship broke down in 1985 when Robert wanted to marry a woman of whom his parents disapproved. Robert was told to make a choice between his new wife and the promised property. He went ahead with his second marriage and left the property which was subsequently occupied by his younger brother Steven. Robert initiated proceedings against his parents in 1986, alleging that his parents held the property on trust, and to convey the property to him as promised, and to pay him a sum of money representing rents for the house.

The legal issues arising from the case are: whether it was necessary to impose a constructive trust over the property; whether it went beyond what equity requires ordering the defendants to convey the land to the plaintiff; and whether a reliance-based approach or an expectation-based approach should be adopted in proprietary estoppel.

The trial judge declined to award a constructive trust on the ground of estoppel but on appeal the Full Court imposed a constructive trust over the disputed land for the benefit of Robert. The High Court judgment dealt first with the definition of a constructive trust, declaring that the remedy is not always proprietary; it can impose

personal liability.⁵⁴ In this case ‘there is an appropriate equitable remedy which falls short of the imposition of a trust’⁵⁵. The conclusion of the High Court on this point is that the imposition of a trust went beyond what equity required, considering all the circumstances, especially the contributions of other family members. Nevertheless the remedy of damages in lieu of constructive trust was granted to the promisee.

The approach adopted by Australian judges in respect of estoppel seems a comprehensive one which is based on equity with the alternatives of reliance-based and expectation-based remedies available, whichever is equitably appropriate. This is, in my view, correct. The remedy can be expectation based if an estoppel is more of contractual nature, and it can be reliance-based if it is fair to allow the promisor to keep title to promised property. The selection of the correct remedy involves a balancing exercise. The relevant factors should, however, be prioritised. Some obvious factors enjoy priority, such as the right to life and the right to education. This could be illustrated by an English case where the court rejected an unconscionable request for specific performance of a contract of sale of property where the defendant had contracted cancer after the contract had been signed.⁵⁶ Though the Australian approach does little to establish where equitable estoppel is to be situated in prioritising property interests it is certainly more inclusive than the English approach and more equitable than the American approach.

III THE DOCTRINE OF ESTOPPEL IN CHINA: A CONTRACTARIAN APPROACH

Breaking a promise was forbidden or looked down upon in ancient China. There is a Chinese proverb that ‘君子一言驷马难追’ [Once a promise is made by a gentleman, it can never be taken back]. In 《四书》 [The Great Four Books] ,⁵⁷ this principle of personal credit was regarded by Confucius as one of the three fundamental principles

⁵⁴ Ibid 112 [3]-[4].

⁵⁵ Ibid [10].

⁵⁶ See the case of *Patel v Ali* [1984] 1 Ch 283, [1984] 1 All ER 978.

⁵⁷ Referred to 《大学》 Daxue , 《中庸》 Zhongyong, 《论语》 Lunyu, and 《孟子》 Mengzi, which are the four books promoting Confucius philosophy in China.

in running a state.⁵⁸ Once 孔子[Confucius] was asked by his student, 子贡[Zigong], ‘what are the most important things in running a state?’ He answered ‘sufficient grain, sufficient army and people’s trust in the government’. ‘Which is dispensable if one has to be deleted from the three?’ asked the student. ‘The army,’ answered Confucius. ‘What is the next if another has to be eliminated?’ ‘The grain; because no one can escape from death but, if people do not trust the state, that state will never establish itself as a state,’ Confucius concluded.⁵⁹

In modern China, however, estoppel is not an established doctrine; breaking one’s promise is permitted in many circumstances. For instance, in 《中华人民共和国合同法》 [Contract Law of People’s Republic of China] (Chinese Contract Law), a person is allowed to alter or cancel what was previously promised regardless of whether it was relied upon or not.⁶⁰

Like the US approach Chinese lawyers apply the contract theory to estoppel. But unlike the common law of contracts, civilian lawyers employ a sophisticated system in contract law and all contracts are nominal under the Chinese Contract Law.⁶¹ The action of gift giving is named ‘donation contract’. Moreover the civilian contract law categorise contracts into promissory and practice contracts. The former takes effect when a promise is made and accepted while the latter when the performance is conducted by one party. There are two questions to answer in recognising promise giving as a contract. First, what type of contract does gift giving belong to under the Chinese contract law theory? Promissory or practice? Second, is a donation contract unilateral or bilateral?

In answering the first question, there was a shift from regarding gift giving as a practice contract to regarding it as a promissory contract. In 《中华人民共和国民法

⁵⁸ Liu Juntian and Lin Song and Yu Kechen, *The Full Explanation of "the Four Books"* (1990) 231.

⁵⁹ Ibid.

⁶⁰ See for example 《中华人民共和国合同法》 [Contract Law of People’s Republic of China] (People’s Republic of China) National People’s Congress, 15 March 1999, art. 185-195; 《中华人民共和国继承法》 [Succession Law of People’s Republic of China] (People’s Republic of China), 10 April 1985 art. 20; 《中华人民共和国民事诉讼法》 [Civil Procedural Law of People’s Republic of China] (People’s Republic of China) National People’s Congress, 8 March 1928 art. 16 and 91.

⁶¹ There are 15 categories of nominal contracts in the Chinese Contract Law.

通则》 [General Principles of Civil Law of People's Republic of China], gift giving was regarded as a practice contract, i.e., it takes effect at the moment of physical delivery of a gift.⁶² But in the Chinese Contract Law, it was treated as a promissory contract because Article 186 provides:

The donor may rescind the donation before the rights in the donated property have been transferred.

Where the donation contract was made for public welfare or imposed a moral obligation in providing for disaster or poverty relief, or the donation is notarised, the provisions of the preceding paragraph shall not apply.

In answering the second question there was a discussion among the Chinese contract lawyers. Some insist that it was a unilateral disposition of property with no consideration; others held an opinion that it was a bilateral contract or an agreement with mutual consent.⁶³ In fact both sides are correct to the inclusion of the other. It can be unilateral if the donor attaches no obligations to his giving. It can also be bilateral if the gift is a conditional one.

The institution most relevant to the doctrine of estoppel in China is the donation contract derived from the German Civil Code and the French Civil Code with some Chinese modifications.⁶⁴

The *Bürgerliches Gesetzbuch* (Germany Civil Code) recognises the characters of both unilateral and bilateral sides of donation. Section 516 of German Civil Code provides:

(1) A disposition by means of which someone enriches another person from his own assets is a donation if both parties are in agreement that the disposition occurs gratuitously.

(2) If the disposition occurs without the intention of the other party, the donor may, specifying a reasonable period of time, request him to make a declaration as to acceptance. Upon expiry of the period of time, the donation is deemed to be accepted if

⁶² 《中华人民共和国民法通则》 [General Principles of Civil Law of People's Republic of China] (People's Republic of China) National People's Congress, 12 April 1986, art. 128.

⁶³ <http://cnd2105.chinaw3.com/news/k/194204325.htm>

⁶⁴ See, for example Chinese Contract Law art 185-195; *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 516-534; *Code Civil* [Civil Code] (France) art 953-966. The modifications will be discussed in due course.

the other party has not previously rejected it. In the case of rejection, return of what has been bestowed may be demanded under the provisions on the return of unjust enrichment.

By incorporating it into the Contract Law, the Chinese legislators have taken a contractarian view regarding gift giving as a bilateral revocable contract. Article 185 of Chinese Contract Law provides:

A donation contract refers to a contract whereby the donor presents gratuitously his property to the donee, and the donee expresses the acceptance of the donation.

The use of word of acceptance indicates the notion of the bilateral nature of the institution. But the donation contract has its particularity of unilateral revocability by the donor.

There is no disagreement in relation to revocability of a gratuitous disposition of property among civilian jurisdictions. The question is under what conditions the promisor can withdraw a promise made to the promisee. Should it be free to exercise or be restricted with certain conditions?

The French approach is reasonable and detailed. Under French law an *inter vivos* gift can only be revoked on account of non-fulfilment of conditions under which the gift is made, on account of ingratitude and on account of unforeseen birth of child.⁶⁵

The German approach is also balanced. It allows the donor to revoke a promise on account of non-fulfilment by the donee or on account of gross and intentional ingratitude. But it enlarges the scope of revocability to include the promisor's decline in living quality.⁶⁶ Interestingly, some sort of estoppel is regulated in the German Civil Code.⁶⁷ Section 532 provides that once the donor has forgiven the donee for his wrongs the donor is excluded from exercising her right to claim for return of the gift given.

The Chinese approach is not recommendable because of the freedom given to the promisor to rescind the donation contract without any reason. Article 186 does not define under what conditions or circumstances a promisor could revoke her promise.

⁶⁵ *Code Civil* [Civil Code] (France) art 953.

⁶⁶ *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 527, 528 and 530.

⁶⁷ *Ibid* § 532-533.

It is implied that the promisor does not need to meet any requirement before she can withdraw her promise so long as the title has not been transferred to the promisee.

The original legislative purpose is reported to provide a type of self-help device for the grantor to revoke the transaction of a donation in case of changed circumstances or non-fulfilment of conditions by the donee, or even a mistake.⁶⁸ But the free revocability in Article 186 has greatly changed the original legislative intention and created social problems.

It is mystifying that Chinese lawmakers, perhaps being influenced by the doctrine of consideration, only recognise the enforceability of contracts to donate to charity or notarised contracts. On this point they are conflating private gift giving and charitable donations and treating both as donations. They do not distinguish gifts from donation contracts. The implication is that non-charitable gift-giving is not protected at all. Promisors of private gratuitous gifts are free to rescind their promises and justifiable reliance is not a legally binding factor on the promisor. There is no interpretation, either legislative or judicial, of the provision. An assumed understanding of the legislative purpose of Article 186 is that the promisor is the legal owner with a proprietary legal right and the donee or promisee is a voluntary receiver who has given no consideration. In the event of a conflict between the parties, the property right will prevail over the contractual expectation.

Because of Article 186 and an extremely unusual soar of property prices through recent urbanisation in China, there have been many estoppel cases between family members and many breaches of contract of sale of property. If there is an estoppel or dispute over promise breaking, judges apply Article 186, which gives no remedy for the promisee even there has been detrimental reliance. Some have even ended in tragedy.⁶⁹

⁶⁸朱广新[Zhu Guangxin], 《意思表示错误之撤销与相对人的信赖保护》 ‘Withdrawal Based on Misrepresentation of Intention and Protection of Reliance of the Promisee’ (2006) 4 法律科学 (西北政法学院学报) *The Legal Science* (Journal of the North-west Institute of Political Science and Law) 114.

⁶⁹ It was reported by CCTV on 3 March 2008 that an adult son who had paid for a 房改房 [a dwelling sold to employees by the State at a discount price as a welfare housing] from his mother’s 单位 [employer] jumped down from the third floor because his mother broke her promise and wanted to sell

Article 186 is so badly written that it virtually invites dishonesty and disadvantages an honest promisee who has detrimentally acted on the reliance of promise.

As analysed above there are economic and legal reasons behind this phenomenon of excessive “estoppels” in China. The economic reason for the increase in breaches of contract is that soaring property prices all over China have made it more profitable to breach contracts of sale even at the cost of paying the contractual penalty – the double repayment of the deposit. On the other hand, the Chinese law on breach of contract and breach of promise is far too weak in protecting the reliance and the expectation interests of the non-breaching party.

1 Necessity to Establish the Doctrine of Estoppel

Whether there is a need to establish the doctrine of estoppel in China is debatable because the distinction between breach of contract and estoppel is not clear. Many civilian lawyers think they are the same. In my view, the doctrine of estoppel is broader than breach of contract. It applies to many situations where no contractual consideration is required or given but detrimental reliance is involved. The following true story in China will demonstrate the characters of breach of contract, cheating and estoppel.

After many years of hard working, a couple had accumulated some wealth and in their forties they had a baby boy. Unfortunately their baby boy was stolen. They called police and tried every means they could to look for the lost boy, including a reward advertisement of ¥200,000 in different media. Sometime later, someone called them telling them that he had seen a boy who looked very much like their lost boy. They got excited and hurried to the place. But the boy was not their boy. Another month later, a man called them and sent them a mobile picture of a boy. The couple immediately recognised the boy and promised to pay the reward. With the help of the police, they got back their boy and a DNA test also confirmed the genealogy.

But when they were asked to pay the reward, they breached their promise and paid only ¥20,000 to the information supplier. The man finally accepted the reward and went home. On second thoughts, the man was not satisfied with the reward and came

the property and split the proceeds among the family members.
<http://bugu.cntv.cn/news/legal/jinrishuofa/videopage/index.shtml>

back to demand the rest of the reward. The parties could not reach an agreement. The information provider stayed in the couple's home alleging that he would not leave until paid. The couple, knowing that the reward promise was binding on them, took a chance by thinking that the reward claimant would leave after some time.

The tragedy happened when the claimant saw no hope of getting the promised reward for which he could have resorted to law but he did not. He grabbed the boy one day and rushed to the balcony threatening to drop the boy from the balcony if he was not paid. The parents promised to pay him and told him to wait for them to get the money from the bank. The kidnapper waited and waited when he heard the siren. He realised that they had broken their promise again and he would be charged with kidnapping. So he jumped down with the child. Both were dead.⁷⁰

Breach of contract, estoppel and deceit feature in this story. The couple's promise of a reward constitutes an offer and there is an enforceable contract between the couple and the reporter. The reporter's implied acceptance of ¥ 20,000 by going back home without demanding the rest is an implied promise not to exercise his legal right which is a pre-requisite for an estoppel. The couple's lying to draw cash but reporting to the police is a deceit.

To distinguish an estoppel from breach of contract and deceit, we need to examine the basic elements of them and the remedies available. In my view, estoppel usually starts with a promise, express or implied, *not* to exercise certain *legal* rights.⁷¹ The promise is relied upon to the promisee's detriment and the exercise of that legal right would result in an unconscionable outcome. Three elements must be present; legal rights, detrimental reliance and unconscionable outcomes. Short of any of them there would be no estoppel but something else. In breach of contract, however, an offer is not based on restriction of a legal right but a voluntary exchange for a consideration. Reliance is not a requirement but damages resulted from the breach. The contractual reliance is based on good faith principle in contract law. Deceit or fraud is an intentional misrepresentation with no intention to perform the promised obligation. Remedies for estoppel and breach of contract are compensatory, whether personal or

⁷⁰ 《湖北日报》2005年5月6日[Hubei Daily, May 6 2005]

⁷¹ *Jorden v. Money* [1854] 10 E.R.868; *Commonwealth v. Verwayen* 170 CLR 394 (1990); *Waltons Stores v Maher* (1988) 164 CLR 387.

proprietary, and remedies for the tort of a deceit might be exemplary.

The lack of a doctrine of estoppel makes a legal system incomplete and because of this a floodgate has been opened by Article 186. There is a flood of cases in China which are judged in favour of breaching promisors.

Some Chinese scholars apply property law theories to estoppels, arguing that the promisor's legal property right prevails over the promisee's personal claim.⁷² In fact the doctrine of estoppel is to prevent unconscionable results from civil wrongs; it is not a determination of the nature of rights enjoyed by the parties. Property rights and legal title are irrelevant to estoppel. What is protected is the credibility system of a society and what it protects against is the detrimental harm that the breach causes. The breaching promisor's property right in the property should not necessarily favour him as a wrongdoer.

As we know, China has a long history of criminal law for its feudal ruling and a short history of private law. Laws need to be interpreted for judges to apply them.⁷³ Lower court judges depend judicial interpretations from the Supreme Court. A judicial interpretation given by the Supreme Court of China on February 17, 1990 regarding a question of breach of contract in a property sale holds:

...after signing a contract of property sale, before completing the formalities of transfer of title to the property, one party wants to rescind the contract, it should assumed that the civil legal action has not been legally formed. It is permitted for a party to withdraw from the contract.⁷⁴

Though this judicial interpretation was later overridden by a judicial circular from the same authority, it had a negative impact on legal practice in China because a judicial interpretation of the Supreme Court is taken as a source of law in courts in China. Such impact can be seen in the following case of deliberate breach of contract.

Due to the soaring prices in property market over the past few years, deliberate

⁷² This misapprehension is the main theoretical barrier to establishing the doctrine of estoppel in China. Before, China was a communist system in which private real property rights were not recognised and with the enactment of its Property Rights Act 2007 many people believe the owner's proprietary right is superior to personal claims under any circumstances. This imbalance of rights needs to be addressed.

⁷³ This is because there is no class of professional judges in China and there is a strong dissenting voice against professionalisation of judges for political reasons.

⁷⁴ See 《最高人民法院司法解释 1990》 *Judicial Interpretations of Supreme Court of China* (1990).

breaches of contract of property in China have become common. Private sellers and real property developers repudiate their contracts in order to obtain higher prices even at the cost of paying contractual penalties. Why does this unusual thing become usual and popular? Because it is profitable to do so under the Chinese Contract Law as Article 113 provides:

Where one party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the contract and causes losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of contract, including the interests receivable after performance of the contract, provided not exceeding the probable losses caused by the breach of contract which has been foreseen or ought to be foreseen when the party in breach concludes the contract.

Such a provision is made for normal business practice under normal business settings. But the commercial environment in China is distorted by its current speculative nature. Under such a provision, who cares the consequence of breach of contract? The breaching party can easily deny the foreseeability of the plaintiff's loss. We will see in the case below how important it is to enforce a binding contract and how wrongly it is to misapply legal principles.

It was reported that a real property developer in Guangzhou, the capital city of Guangdong province, deliberately breached contracts with more than 20 purchasers who had already paid deposits. In court the defendant company declared that it had a right to breach the contracts and offered to pay the penalty - double the amount of deposit. The plaintiff purchasers applied for specific performance of the contracts to the Intermediate Court of Guangzhou. But the court said it could not force the breaching developer to perform the contracts because to do so would be against the doctrine of freedom of contract and the autonomy of parties.⁷⁵

What a theory! In contract law, freedom of contract and autonomy of parties are principles applicable in contract formation. The court in this case is not forcing parties to enter into a contract; it is enforcing the performance of the contract. If such an obvious misapplication of legal doctrines is not a real reflection of the poor level of judges, it must be judicial corruption. The court's non-interference decision had the

⁷⁵ (2008)穗中法民二终字第 2187 号[(2008) Civil Court of Guangzhou Intermediate Court final No 2187].

effect, not of protecting the freedom of contract, but of protecting the freedom to breach contract.

As analysed above, the doctrine of estoppel straddles between contract and equity or belongs to the equity part of contract law. But there is no equity or equity part of contract law in China. To prevent unconscionable conduct and unconscionable legal results it is necessary to introduce or re-activate the doctrine of estoppel in China.

2 Family Equitable Estoppels in Current China

It is well known to the Chinese that China experienced a housing reform in the mid-1990s. The reform affected almost all families living in cities. The policy was that the State, through different 单位[*danwei*], ‘sold’ dwellings occupied by the working staff of the 单位[*danwei*], to those who were dwelling in them.⁷⁶ This type of properties were called 房改房[housing reform property]. The price consisted of two parts: a cash payment and a credit part determined by reference to the buyer’s working period. The properties bought were old buildings. Under the policy at that time, the properties could not be traded on the market before five years had passed but they were inheritable by family members.

To ‘enjoy’ the policy, many families and parents decided to buy the property jointly with their children. In most cases the property was purchased with their parents’ combined working period, but the cash was paid by one of the children who lived with the parents because the parents wanted to save money for their old age. Normally there was a word-of-mouth promise made by the parents to transfer the title to the paying child when it was possible to do so. At that time it was only possible to register the property under the parent’s name. This constitutes a typical resulting trust in which the legal owner, the parent(s), is the trustee and the paying child is a beneficiary. Due to the absence of the institution of trust, the equitable interest of the child is vulnerable with no protection.

The overheating of the property market in China in recent years has made the second hand property market irrationally exuberant. Many family property disputes are

⁷⁶ The word ‘*danwei*’ is hard to translate because it covers a vast range of institutions; government departments, schools, factories, anything except individuals.

brought to court. A majority of them are,⁷⁷ in substance, cases of equitable estoppel: parents or siblings deny the existence of a promise or agreement they made and declare that purchase money was a family loan. They insist the person under whose name the ownership certificate was issued is the legal owner enjoying an indefeasible registered title. This view has been accepted by judges who understand neither trust nor de facto co-ownership. The judges regard this relationship as a donation contract subject to free withdrawal by the donor.

3 Evidential Rules in Estoppels Claims in China

Not only are the theoretical and doctrinal misperceptions of contract and estoppel disseminated in China, forensic procedures are also misapplied in hearing cases. It is a fundamental rule in civil cases that a person who pleads will bear the burden of proof. Nevertheless, family estoppel cases are in most cases oral and very often the suffering promisee has no hard evidence to prove the existence of the promise. The burden of proof has become the key in fact finding.

By misperception, judges, in hearing cases of this kind, do not check the source of purchase money and the purposes of payment, which are key issues, but look at the title document to determine the registered legal owner, which is not the legal issue of the claim. The doctrine of estoppel applies to cases where the enforcement of a relied-upon promise is awarded or where an injunction against an exercise of a legal right of the breaching promisor is ordered. It is not a determination of legal ownership but the true facts that happened between the promisor and the promisee. In the absence of evidence, the court tends to assume that the money paid by the child is a personal loan between family members, which usually leads to a personal claim. I believe that under the circumstances of a family property dispute, the burden of proof should be fairly allocated and the promisor should be obliged to prove where the purchase money comes from and whether it is a loan or a contribution. As Cooter and Freedman propose in their joint article “The Fiduciary Relationship: Its Economic Character and Legal Consequences”:

Because a fiduciary’s misappropriation is profitable and difficult to prove, it is

⁷⁷ It was reported by the Supreme People’s Court of China that 30% of civil disputes brought to court were so called ‘*fanggai*’ disputes’. (www.court.gov.cn)

appropriate for fiduciary law to infer disloyalty from its appearance. Once the appearance of disloyalty is established, the burden shifts to the fiduciary who must prove her innocence. Alternatively if disloyalty is actually proved rather than inferred, it may be appropriate for fiduciary law to increase the sanction to include punishment, not just disgorgement of the appropriated asset.⁷⁸

Even in the absence of fiduciary law in China, the court should apply Article 71 of 《中华人民共和国民事诉讼法》 [The Civil Procedural Law of People's Republic of China], which provides:

The people's court shall examine the statements of the parties concerned in the light of other evidence in the case to determine whether the statements can be taken as a basis for ascertaining the facts.

The refusal of a party to make statements shall not prevent the people's court from ascertaining the facts of a case on the basis of other evidence.

Presumptions used in court should be abreast of social changes. Though it is a part of traditional Chinese culture that the younger generation supports the older generation when there was no social welfare system to support the old, it should not be presumed that the money advanced by a child in need is a gift. Instead, if the paying junior is staying in the property with the parents, the money contribution should be assumed to be for the purpose of obtaining a future interest in the property, and not a loan, in the absence of evidence to the contrary.

Family borrowing is, in the absence of evidence or other supporting circumstances, presumed by law to be a loan under both common law and civil law. The point is that in China, even with hard evidence of the parent's commitment that the paying child has a future interest, the court still holds that that commitment is a gift and the registered proprietor is entitled to rescind the so called 'donation contract'.⁷⁹

China is undergoing an unprecedented period of breakdown of trust. Frauds, breaches of contract and breaches of promise take place everywhere and everyday. A typical type of inequity in the present-day China is breach of promise which is relied upon to the detriment of the promisee because estoppel is not an established enforceable

⁷⁸ Robert Cooter and Bradley J. Freedman, 'The Fiduciary Relationship: Its Economic Character and Legal Consequences' (1991) 66 *New York University Law Review* 1045, 1048.

⁷⁹ This has happened to the author and for the sake of privacy the case reference is omitted.

doctrine under its current law. The party in breach is money-driven and takes advantage of the absence of a doctrine of estoppel. Of course the inadequacy in remedy to compensate the non-breaching party is another factor. However, wrongs cannot be allowed to endure. Courts in China are becoming aware of the injustice so produced and some are trying to avoid it by adopting equitable remedies. Unfortunately most judges continue to apply the old approach to cases of equitable estoppel and breach of contract.

4 Equity: the Key to Application of Estoppel

Although some remedial progress is being made in cases of breach of contract, courts in China are still comparatively ignorant in applying the doctrine of estoppel. The following case is an illustration.⁸⁰

The plaintiff, Mrs Li, and the defendant, Mr Zhang, were husband and wife. On their divorce they reached a settlement. The arrangement was that the two sons, aged 12 and 8, were to be taken care of by their mother, and their father was to pay ¥100,000 per month for the children's expenses.⁸¹ The defendant did not perform his obligation to pay after divorce. In defence to the plaintiff's claim, the defendant argued that he was unable to afford such a big payment because his monthly earning was about ¥20,000 and that his agreement to the settlement was a mistake. The court, however, rejected his defence and made an order of specific performance on the basis of the doctrine of 'estoppel'.

The soul of the doctrine of estoppel is equity. The primary purpose of enforcing a promise in estoppel is to prevent detrimental harm and to protect the promisee's reasonable reliance. Even the American expectancy approach is applied to realise the circumstances foreseen by the promisor. Anything beyond that would be unconscionable.⁸² To order the defendant to pay a hundred times more than needed is not a reasonable expectation and it should not be enforceable. Equitable enforcement of a promise never goes beyond what equity requires. The misapplication of the doctrine by the court in the case above shows that equitable rules must be applied equitably. Strict enforcement of a mistaken promise produces no equity but injustice.

⁸⁰ The source of the case is on <http://www.cpd.com.cn/gb/node/2008-02/02/default.htm>.

⁸¹ The amount equals USD\$ 13,000 – 14,000.

⁸² Section 90 of the *Restatement of Contract (1981)*.

It is important to distinguish the doctrine of estoppel from other legal institutions such as a rectification for mistake or rescission for mistake or misrepresentation.

Generally speaking, the promisor is held by equity to his or her promise. But in certain circumstances equity does not insist on performance. Suppose that A promises to assign his property to B at a later time, but soon after, A is diagnosed with a fatal disease which necessitates the sale of the property for the medical expenses. Equity would not enforce such a promise because it would be unconscionable to do so.⁸³

IV CONCLUSION

The doctrine of estoppel differs in its technical requirements from jurisdiction to jurisdiction. If a spectrum is to be established, the American expectation approach gives a full range of protection to estoppel cases because it is treated as a breach of contract. The English application of the doctrine of estoppel is split into common law estoppel and equitable estoppel. The former applies only to representation of existing facts and the latter has a broader coverage to include representations of future interests. But estoppel is still not recognised as a cause of action. It is placed halfway along the spectrum. The Australian approach, however, protects both expectation and reliance interests, depending on the circumstances of the case. It is more inclusive than the English approach in the sense that it recognises estoppel as a cause of action. But the Chinese approach towards estoppel is substantially different from that of common law jurisdictions and other civilian jurisdictions. It permits a breach of promise though it does not encourage it.⁸⁴ That is the source of trouble in the present day China.

A vivid illustration of the fundamental difference in estoppel approaches is the classical debate about hypothetical enforcement of a promise between Mr. Williston

⁸³ See the case of *Patel v Ali* [1984] 1 All ER 978 1 ch 283.

⁸⁴ 《最高人民法院关于实施中华人民共和国民法通则的意见》[The Supreme Court of People's Republic of China's Opinion on the Implementation of the General Principles of Civil Law (1988)]. Article 85 provides that '[A]fter the legal transfer of ownership of property, one party changes mind, it should not be supported. If the legal title has not been transferred as stipulated by original agreement and the breaching party does not have a justifiable reason and the agreement is still performable, it should be performed; if it not performable and has caused loss on the other party, the breaching party should be reliable for compensation'.

and Mr. Coudert in the 1926 ALI proceedings.⁸⁵ Uncle being aware of the fact that Nephew is thinking about buying a car, promised to give Nephew \$1000. Nephew spent \$600 on a second hand car. If Uncle reneges on his promise and Nephew sues, what should Nephew recover, \$1000 or \$600? The arguments from common law lawyers are either \$1000 or \$600. But an answer from a Chinese judge is likely to be 'zero'. This perhaps reveals the fundamental divergence between common law and civil law jurisprudence, the former being reliance-based and the latter being dominion-based.

The necessity to establish an equity-based doctrine of estoppel in contemporary China is self-evident. The mistakes made by courts, identified in this paper, should be corrected as a matter of urgency. To promote a healthy economy and a just and equitable society, it is essential to have a social trust system in which people can fully rely on promises made to them without fear of inequitable breach of promise. By contrast, if market participants and ordinary people worry about being deceptively misled or disadvantaged by free revocation of promisors, as is the situation in China now, how can justice and efficiency be achieved in such a society? The establishment of an equity-based doctrine of estoppel is too fundamental to be ignored as it affects the lives of millions of people in China.

⁸⁵ Yorio and Thel, above n 2, 116.