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One may wonder, what happens when a party A in a contract, through their words or conduct, causes party B to act, only for party A to renege on their promise, to the detriment or loss of party B. Such disputes are prevalent in different contractual relationships, which state of affairs may leave the innocent party unsure about their rights and duties. In the face of such situations, the principle of *Estoppel in pais* comes into to the aid of play, the innocent party that acted to their detriment based on prior words or conduct of the other party. In such instances, courts view the legal relations of the party based on the words and conduct of the parties. The implication of the principle is that the innocent party has a cause of action based on their reliance on the words and conduct of the other party which led them to acting to their detriment. The equitable aim of the doctrine is to protect a party who is harmed by the deceptive words or conduct of the other party to the contract.

Estoppel in pais as an equitable estoppel signifies “estoppel at large” or “estoppel by conduct”, and thus capable of referring to all estoppels other than those limited by reference to record or form.

As succinctly mentioned, the equitable principle above as widely used in the Australian system protects the innocent party as explained by Dixon J in the case of **Thompson v Palmer (1933)** 49 CLR 507:

“[t]he object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party he may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations such as bailment, or because he has exercised against the other party rights which would exist only if the assumption were correct... or because knowing the mistake the other laboured under he refrained from correcting him when it was his duty to do so, or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption or because he directly made representations upon which the other party founded he assumption. But, in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if the departure from the assumption be permitted [emphasis added].”

The foregoing disposition was further buttressed by the same Judge in the case of **Grundt v The Great Boulder Proprietary Gold Mines Ltd ((1937) 59 CLR 641**.

From the foregoing, we deduce the following principles around *estoppel in pais*:

- a. The court shall look at the part played by the person creating the assumption leading to its reliance and adoption by the other party;
- b. The assumption formed a basis on which the other party relied on to enter into a contractual relationship or other mutual relations;
- c. The party creating the assumption fails to correct the other party on the assumption created leading to a proximate cause of the other party adopting and acting on the assumption to his detriment; and
- d. The person creating the assumption is not bound to adhere to the assumption but the other party placing a reliance on it would be materially disadvantaged for the court to allow departure from the assumption.

It is to be noted that the starting point for enforcement of *estoppel in pais* is the reliance placed by the innocent party on the words or conduct of the other party, rather than the conduct of the other party.

Notably, the representations and assumptions that the innocent party relied upon refers to both existing and future conducts.

The origin of *Estoppel in pais* can be traceable to the case of **Central London Property Trust Ltd v High Trees House Ltd** [1947] KB 130 where the equitable doctrine of promissory estoppel was enunciated. Here, the promise relied upon was the landlord's representation that he not would demand for the full contractual rent, but only half of it. It was noted that the promise created legal relations intended to be relied upon and as such, the tenant paid half of the rent for the agreed period. It was further stated that this was not “*estoppel in the strict sense but was an estoppel in the limited sense that the courts, although not giving a cause of action in damages for breach of such a promise, refused to allow the promiser to act inconsistently with it.*”

Locally, the doctrine has been upheld in several cases to protect parties who incur loss as a result of mischievous acts of other parties. For instance in the cases of **Kiplagat Kotut v Rose Jebor Kipngok [2019] eKLR and Kivindu & another v Musau & 4 others (Civil Appeal 233 of 2020) [2023] KECA 1015 (KLR) (28 July 2023) (Judgment)**, the Court of Appeal held that the doctrines of proprietary estoppel and constructive trust are applicable where there is “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the innocent party or claimant.

The Court held, if one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable.

In conclusion, in order to found estoppel, a representation (likewise a promise) must be clear, and that the party setting up an estoppel must have placed himself in a position of material harm or loss if there should be a departure from the reliance of the innocent party and their legitimate expectation that the promise would be fulfilled. In cases where the court finds that one party has been unjustly enriched, a constructive trust may be imposed to remedy the situation.

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