RECEIPTS CLAUSES AND "CONTRACTUAL ESTOPPEL" REVISITED

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One person places property in the name of another. The pair then fall out, and the first sues the second to recover the property. The Privy Council's decision in *Chen v Ng* [2017] UKPC 27 is a recent instance of that recurring phenomenon, and with some exotic trappings: the property was 80% of the shares of a company incorporated in the British Virgin Islands which owned a hotel in Macau, where its directors, Mr Ng and Madam Chen, had lived until shortly after the transfer.

There was no dispute that Mr Ng transferred legal title to the shares to Madam Chen. In October 2011 the couple executed a note recording their sale for US$40,000, a transfer which recorded that US$40,000 was "paid to [Mr Ng] by [Madam Chen]", a directors' resolution approving the transfer and a share certificate in Madam Chen's name. Despite the documentation, no money was in fact transferred. The following month, Mr Ng signed a declaration and board minutes recording that he retained no rights in the shares, and in January 2012, Madam Chen made a will in favour of Mr Ng whose sole subject matter was the shares. However, the trial judge recorded that "[s]hortly thereafter, Mr Ng and Madam Chen split up for good", and Mr Ng sued to recover the shares.

Mr Ng maintained that the shares were transferred to Madam Chen in order to create the impression that she had substantial assets, so as to facilitate an application to build a new hotel and casino in Macau. Mr Ng had been the subject of allegations of fraud in a Macau newspaper, while Madam Chen was said to have good contacts in Macau and Beijing. He alleged that they had agreed that she would retransfer the shares to him after six months. Madam Chen for her part maintained that she was a woman of immense wealth in her own right, who owned five hotels in mainland China and who had personally lent HK$100 million to acquire the company's hotel in the first place. She alleged that the shares were at all times beneficially hers.

The trial judge (Bannister J. (Ag), Eastern Caribbean Supreme Court, 14 November 2013) accepted neither party's account. Bannister J. did not accept Mr Ng's account, because it was

clear from the documents supplied in support of the proposed development that he was to be deeply involved in it, so that the transfer of shares to Madam Chen was "self-evidently futile" if intended to conceal his true involvement, and because he would have protected his position by obtaining an executed transfer from Madam Chen. Neither of these matters had been put squarely to Mr Ng in a lengthy cross-examination.

Bannister J. considered aspects of Madam Chen's evidence to be "risible". He found that Mr Ng's signature on a receipt tendered by her for the HK$ 100 million was a forgery, and that she neither owned any hotels in mainland China, nor had any other independent source of significant wealth. Yet her rejection as a witness of truth did not prevent Madam Chen's success at trial. The trial judge concluded:

> "I have no idea why Mr Ng sold the shares to Madam Chen, but he has failed to establish a case why she should be ordered to retransfer them".

The Eastern Caribbean Court of Appeal allowed Mr Ng's appeal. Kentish-Egan J.A. (Ag), with whom Baptiste J.A. and Michel J.A. agreed, considered that because the shares had in fact been transferred for no consideration, Madam Chen held them on resulting trust for Mr Ng. The court also considered that there were two errors arising from the way the case had been run at trial: it had not been open to the trial judge either to reject Mr Ng's evidence on bases which had not been put to him in cross-examination, or to find in favour of Madam Chen based on the documents executed in October 2011. The court also refused to admit fresh evidence filed by Mr Ng in litigation in Macau to the effect that the transfer of shares was designed to avoid the risk of seizure of Mr Ng's assets by creditors.

Lord Neuberger and Lord Mance together wrote forthe Privy Council, allowing Madam Chen's further appeal, but ordering a retrial rather than reinstating her success at first instance. Their Lordships readily rejected the reasoning that Madam Chen could not succeed based on the October 2011 documents. Even though her account was disbelieved, she was unquestionably the legal owner of the shares. Neither party had alleged that the transaction was a sham, and Mr Ng would thus fail unless he made out some basis for ordering a retransfer. Lord Neuberger and Lord Mance also rejected the finding of resulting trust, in part on the basis that fresh evidence should have been admitted, which could arguably have supported an intention to make a gift of the shares. And their Lordships upheld the conclusion that it was not open to the trial judge to reject Mr Ng's evidence, on matters central to the litigation, as to which he had not been confronted in one-and-a-half days of cross-examination.

So much represents merely the application of established principle, and would not warrant a note in this journal. The most significant aspect of the Board's decision is something *not*

decided by the Board: the comments made in relation to *Prime Sight Ltd v Lavarello* [2013] UKPC 22; [2014] A.C. 436. Madam Chen had pointed to the receipt clause recording payment of US$40,000 and had submitted that it was not open to Mr Ng to contend to the contrary, invoking *Prime Sight,* which appears to hold that a receipt clause can give rise to a "contractual estoppel".

The Board stated that no argument had been heard on the point, that it:

> "would not wish to be thought to be commenting on the existence, scope or application of any such equitable rule or therefore to be questioning *Prime Sight",*

and that the point was mentioned merely for completeness (both at [29]).

Nonetheless, it referred at some length (at [29]-[35]) to the extra-judicial criticisms of *Prime Sight* and authority, including Australian authority, to the contrary. What is to be made of this *occultatio?* It is clear that *Chen v Ng* in no way endorses *Prime Sight.* More importantly, one way of reading the passage is that it flags the possibility of future change in the law: the criticisms *of Prime Sight* have not passed unnoticed, and at the least have sufficient weight to attract the attention of the Board. Such indications serve a useful purpose, to warn litigants and their advisers, not to mention judges who are bound by a problematic appellate decision, of the potential danger in relying on it; changes in judge-made law are thereby made less jarring. Such indications are also apt to attract a grant of leave where leave to appeal is necessary in some later case where reliance has been placed upon the problematic decision.

An opportunity to revisit this aspect of *Prime Sight* is most welcome. True it is that there was a rule at law, qualified by considerations of public policy, which precluded the tender of evidence contradicting a recital in a deed. But equity treated the matter differently. Essentially, the same facts arose in *Wilson v Keating* (1859) 27 Beav. 121; 54 E.R. 47: a share sale where the vendor signed an acknowledgement of receipt of the purchase price, which had not in fact been paid. Sir John Romilly M.R. said at 126:

> "It is true the deed does estop the parties at law, because at law you cannot contradict the deed, but it is settled by an abundance of authority that in this Court you can contradict the statement of the payment of the purchase-money; nay more, though there is a receipt for the purchase-money endorsed and duly signed by the vendor."

The Court of Appeal in Chancery dismissed the appeal, again distinguishing the position at law and in equity: (1859) 4 De G. & J. 588; 45 E.R. 228. Lord Walker, writing for the Privy Council in *Creque v Penn* [2007] UKPC 44 at [10], endorsed the Master of the Rolls'

statement as the "leading statement of the equitable rule". Yet *Creque* was not mentioned in *Prime Sight.*

There may be some nice questions of precedential authority in jurisdictions bound by decisions of the Privy Council in determining the combined effect of *Creque, Prime Sight* and *Chen v Ng.* But the position as a matter of English law appears to be clear at levels below the Supreme Court. There seems no reason to doubt the authority of *Greer v Kettle* [1938] A.C. 156; [1937] 4 All E.R. 396, especially since *Prime Sight* appears not to have grappled with that decision, as a previous note in this journal has pointed out: Handley (2014) 130 L.Q.R. 370. Lord Maugham's speech (with which Lord Atkin, Lord Macmillan and Lord Roche agreed) warrants reproducing extensively:

> "Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between parties and privies, and therefore as not admitting any contradictory proof. It is important to observe that this is a rule of common law, though it may be noted that an exception arises when the deed is fraudulent or illegal. The position in equity is and was always different in this respect, that where there are proper grounds for rectifying a deed, eg, because it is based upon a common mistake of fact, then to the extent of the rectification there can plainly be no estoppel based upon the original form of the instrument. It is at least equally clear that in equity a party to a deed could not set up an estoppel in reliance on a deed in relation to which there is an equitable right to rescission or in reliance on an untrue statement or an untrue recital induced by his own misrepresentation, whether innocent or otherwise to the other party."

Lord Russell, the other member of the House of Lords, wrote to the same effect (at 166).

Obviously, nothing in the Judicature Acts 1873 and 1875 detracted from the position in equity, as Lord Maugham observed (at 172). As was noted (in a different context) in *Byrnes v Kendle* [2011] HCA 26; 243 C.L.R. 253 at [71], it would be "to reverse the relationship between law and equity, and is without logic" to determine the position which now obtains without regard to what had been established before the Judicature reforms. Indeed, the second half of the passage of Lord Maugham's speech was relied on by the *respondent* in *Prime Sight* (see [2014] A.C. 436 at 440). Difficulties will arise when the first half of that passage is quoted in isolation. Those difficulties will be heightened if the second sentence is read only as indicating that the common law rule is subject to exceptions, and not in its main sense, that it is a *common law* rule, distinct from the position in equity. That may be seen in some texts. For example, Cartwright, *Formation and Variation of Contracts* (2014), at p.231, cites the first sentence in isolation as a "clear indication of the approach of the courts". The same incomplete reading, with respect, appears to attend the reasoning in *Prime Sight,* as indeed was noted by the Board (at [29]).

There is an abundance of Australian authority inconsistent with *Prime Sight.* In *Petersen v Moloney* (1951) 84 C.L.R. 91 at 100, the joint reasons of Dixon J., Fullagar J. and Kitto J., constituting the High Court of Australia, confirmed that "[t]he acknowledgement of payment in the transfer does not create an estoppel against the plaintiff', referring to *Burchell v Thompson* [1920] 2 K.B. 80 at 86, where Lush J. recalled the time before the Judicature Act when:

> "it was always open to the party who had been misled to show in a Court of equity as against the grantor that the money had not been paid".

Further High Court authority may be found in *Barba v Gas & Fuel Corporation of Victoria* (1976) 136 C.L.R. 120 at 131 and *Fischer* v *Nemeske Pty Ltd* [2016] HCA 11; (2016) 257 C.L.R. 615 at [87] and [193]. Thus *Prime Sight* could not be accepted on this point as part of Australian law by any court below the ultimate appellate court.

The position when a plaintiff who wishes to contend, contrary to a receipt clause, that no consideration had in fact been paid so as to allege a presumed resulting trust, is slightly different from, say, rectification. The critical issue will be the intention to be imputed to the plaintiff, and it may fairly be said that an acknowledgement is powerful evidence of that. But consistently with the decisions referred to above, it is hard to see how a receipt clause which is no answer of itself to a claim for rectification or misrepresentation, could *preclude* an examination of the facts where it is claimed that the purchaser holds on a resulting trust having taken for no consideration. Rather, it is *evidence* in the light of which the court will determine whether the presumed resulting trust (or other basis for relief in equity) is established.

A larger question touched upon by the cautionary treatment of *Prime Sight* is the nature of so-called "contractual estoppel" itself. The Board there stated (see [2014] A.C. 436 at [47] that:

> "contractual estoppels are subject to the same limits as other contractual provisions, but there is nothing inherently contrary to public policy in parties agreeing to contract on the basis that certain facts are to be treated as established for the purposes of their transaction, although they know the facts to be otherwise".

Contractual estoppel is controversial. The current edition of *Spencer-Bower: Reliance-Based Estoppel,* 5th edn (2017) embraces it, although Professor McMeel has described this so-called estoppel as "illegitimate" (see [2011] L.M.C.L.Q. 185 at 206-207). Indeed, an entire book has recently been published: Trukhtanov, *Contractual Estoppel* (2018), which makes the claim that:

> "Unlike reliance-based estoppels, to raise contractual estoppel it is not necessary to show inducement, reliance or detriment. A statement that it is contractually binding raises an estoppel by contract alone" (para.2.19).

The Board appears, when criticising commentary published earlier in this journal by the same author ((2014) 130 L.Q.R. 3), to flag the possibility that a different position may obtain where there is merely a contract supported by consideration, as opposed to a deed. This note is not the occasion to address the merits and demerits of the doctrine and its limits. However, there is, with respect, a deal of force in the observation of Lord Neuberger and Lord Mance (at [30]) that "contractual or conventional estoppel may in reality be a confusing misnomer". That echoes a point made in *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) at [309], by reference to Wilken and Ghaly, The Law of Waiver, *Variation and Estoppel,* 3rd edn (2012), at para. 13.22. If there is to be a doctrine which gives rise to enforceable rights by reason of a clause in a written contract, for which detrimental reliance is not required, why call it "contractual estoppel"? Why not refer to it simply as part of the law of contract? While the idea of a police officer's "discretionary duty" mentioned in *Haynes v Harwood* [1935] 1 K.B. 146 at 162 has proven influential, there is no need to multiply oxymorons, and all the ink spilt on preventing estoppels swallowing up the law of contract makes "contractual estoppel" seem a poor label.

Labels matter, not least because they shape the connotation of a legal principle and thus the way people think about it. The point was made elegantly in Lord Hoffmann's swansong in the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 at [17]:

> "The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition."

Lord Hoffmann was there referring to definitions in contracts, but the sentiment surely applies a fortiori to the labels used by lawyers to refer to a legal doctrine. Such a distortion of language underlay Lord Goff's disdain for "proximity" (prophetically, as it turned out: *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] AC 1732 at [106]), as recorded in his 1983 Maccabean lecture, "The Search for Principle". As his Lordship there said, and rightly, "Law is not only difficult, but extremely complex; and our vision of law is constantly changing". Perhaps the principal controversial issue with so-called contractual estoppel is the extent to which a clause in a contract can prevent rescission for misrepresentation in equity or pursuant to statute; cf. *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep. 511 at [571- In *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ

1221; [2010] 2 C.L.C. 705 at [143]—[144], Aikens L.J. acknowledged that parties were entitled to agree what they liked, subject to some principle of law or statute to the contrary. The general position is undoubted; the question is as to the scope of the qualification, namely, what principles or statutes conflict with the parties' agreement, and how are those conflicts to be resolved. It makes little sense to complicate those issues by a label that distracts from legal analysis.

Mark Leeming

Judge of Appeal, Supreme Court of New South Wales