

---

---

## INTRODUCTION

---

---

The papers compiled in this volume are selected papers from the proceedings of an International Workshop on Estoppel jointly organised by the Faculties of Law, University of Hong Kong, International Islamic University, University Kebangsaan Malaysia and University of Malaya and hosted by the Faculty of Law, University of Malaya on 23-25 August 1999. The workshop was a follow-up of an International Workshop on the New Equity held in Hong Kong in September 1998, organised by the University of Hong Kong. The discussions focused on the case of *Union Eagle Ltd v Golden Achievement Ltd*.<sup>1</sup>

In Malaysia, as elsewhere, there has been a marked development of equity principles in recent years. In particular, the doctrine of estoppel and the related concept of unconscionability have pervaded many areas of the law. It was felt that the new form of estoppel is widely used without much analysis of its elements and how it should work in practice. The use of estoppel as a remedy, triggered by unconscionability often seemed to depend on the subjective, judicial interpretation of what constituted improper behaviour. Used as a general "catch all" for the new equity, it also underlined new forms of estoppel which have now become a sword as well as a shield as applied in the Australian case of *Walton Stores Intestate Ltd v Maher*.<sup>2</sup>

The Federal Court in the case of *Boustead Trading (1985) Sdn Bhd v Arab Merchant Bank Bhd*<sup>3</sup> observed:

"The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has

---

<sup>1</sup>[1997] 3 HKC 173.

<sup>2</sup>(1988) 76 ALR 513.

<sup>3</sup>[1995] 3 MLJ 331.

been resorted to in varying fact patterns to achieve justice. Indeed the circumstances in which the doctrine may operate are endless."

Thus using the decision in *Boustead Trading* as a focus the workshop discussed the development and impact of estoppel in different areas of law including contract, property, trust, administrative, procedural as well as Islamic law.

The workshop which was attended by international speakers from Australia, England, Hong Kong, Ireland, and Malaysia provided a forum for some very interesting discussions on the developments of the New Equity. The papers were discussed under three main headings, namely, (i) Estoppel as a remedy; (ii) Estoppel and commercial law; and (iii) Estoppel and public law, procedure and criminal law. Related issues of restitution, equitable compensation, unconscionability, illegality, imputed notice and *res judicata* in the Syariah Court were also discussed. A number of comparative papers presented in the last session which considered the role of equity in copyright, intellectual property, communications and multimedia, and even a paper on the claimability of illegal earnings in tort added an interesting dimension to the proceedings.

We would like to record our thanks to Professor Judith Sihombing who was the primary initiator and the main co-ordinator of these workshops. Having organised the first workshop in Hong Kong, she was mainly responsible for putting together this second workshop. We would also like to thank all the Deans of the various faculties of law for their support of this event and in particular, our host Professor Dato' Dr. Mimi Kamariah Majid. We would also like to express our sincere gratitude to our sponsors. This gathering was the first of its kind organised jointly by the law faculties of the local public universities. We trust that it will be the first of many.

**Ramy Bulan\***

\* Lecturer in Law  
Co-organiser of International Workshop on Estoppel  
Faculty of Law  
University of Malaya

---

---

## CLAIMABILITY OF ILLEGAL EARNINGS IN TORT: A PERPETUAL CASE FOR EQUITY TO INTERVENE

---

---

Loss of earnings is one of the heads of damages allowed by tort law in relation to personal injury and fatal accident claims. However, neither the common law based tort law nor the related provisions in the Civil Law Act 1956<sup>1</sup> provide us any guidance regarding the recoverability of earnings from illegal sources. This issue surfaced before the local courts in several cases. Recently in *Chua Kim Suan*,<sup>2</sup> it was observed by our Supreme Court that “the claim for that part of damages as related to earnings from illegal sources should be disallowed because of *ex turpi causa non oritur actio*, or in other words, such claim would be against public policy”.<sup>3</sup> The court was, further, of the view that “we should not make a distinction between income earned from a very minor transgression of law and income resulting from commission of serious crime” as such a distinction in reality turns on the question of degree of criminality which will not alter the basic nature of criminality of such conduct.<sup>4</sup> *Chua Kim Suan* was followed by *Tay Lye Seng*<sup>5</sup> and *Rosli Md. Nor*<sup>6</sup> wherein the courts allowed claims based on illegal earnings, in utter disregard of *Chua Kim Suan*, by differentiating their cases from it. We are of the opinion that the decision in *Chua Kim Suan* leaves hardly any scope for differentiation and it is the injustice and hardship resulting to the claimants from *Chua Kim Suan* with

---

<sup>1</sup>Civil Law Act 1956, sections 7(3)(IV) and 28A(2)(c).

<sup>2</sup>*Chua Kim Suan v Government of Malaysia* [1994] 1 CLJ 32.

<sup>3</sup>*Ibid*, at page 325.

<sup>4</sup>*Ibid*.

<sup>5</sup>*Tay Lye Seng v Nazori Teh* [1998] 3 CLJ 466.

<sup>6</sup>*Wakil Diri Bagi Harta Pusaka Atas Rosli Md. Nor (Simati) v TP Safeer* [1998] 4 CLJ 241.