
Guarantees, Estoppel and the Statute of Frauds
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ACTIONSTRENGTH Ltd. v. *International Glass Engineering In.Gl.En. SpA and others* [2003] UKHL 17, [2003] 2 W.L.R. 1060 raised two issues of law: the nature of a guarantee caught by section 4 of the Statute of Frauds 1677, and the question whether one may be estopped from claiming that such a guarantee is unenforceable for want of formalities.

The first defendant ("Inglen") and the claimant ("Actionstrength") were contractor and sub-contractor, respectively, in the construction of a factory for the second defendant, Saint-Gobain Glass UK Ltd. ("St-Gobain"). In February 2000 Inglen owed Actionstrength £197,000, so that Actionstrength was contractually entitled to withdraw its labour. St-Gobain's representative promised (or so Actionstrength alleged) that if Actionstrength would continue to supply labour to Inglen, St-Gobain would do its best to ensure that Inglen paid Actionstrength and, if Inglen did not do so, that St-Gobain would itself pay Actionstrength, if necessary using monies due from St-Gobain to Inglen. Actionstrength carried on working; by May 2000 it was owed some £1.3 m. It withdrew its workforce, and sued both companies, obtaining a worthless default judgment against Inglen. St-Gobain's defence was that it had not made the alleged promise; but that in any event such a promise was a guarantee, and unenforceable for want of writing pursuant to the Statute of Frauds. It applied for summary judgment on the basis that Actionstrength had no real prospect of success, under CPR r.24.2; in that application Actionstrength's version of events had to be

assumed true. St-Gobain failed at first instance but succeeded in the Court of Appeal and in the House of Lords.

Argument in the Court of Appeal ([2001] EWCA Civ 1477) focused on the first issue: was this a guarantee caught by the Statute of Frauds, whereby a "special promise to answer for the debt default or miscarriages of another person" is unenforceable by action unless evidenced in writing. It applies to guarantees and not to indemnities, *i.e.* only to secondary liability dependent upon there being a liable debtor who has not paid, and not to a primary liability. The Court of Appeal, looking to substance rather than to form, found that the promise was a guarantee. It considered a statement in O'Donovan and Phillips, *The Modern Contract of Guarantee*, 3rd edn. (Sydney, Law Book Company Ltd., 1996) at p. 68 to the effect that there is no guarantee within the Statute of Frauds where the promisor does not undertake to be liable generally but only in respect of specific funds; this it disapproved on the basis that there was no authority, nor any policy reason, for reading this qualification into the statute.

The claim that the promise was not a guarantee was not pursued in the House of Lords, and so their Lordships had to deal with the claimant's answer, that St-Gobain was estopped from relying on the Statute of Frauds (dismissed as "quite hopeless" by Simon Brown L.J. in the Court of Appeal).

There is a resistance to circumventing a statute by using estoppel, in case this subverts Parliament's intention. It has been done, for example in relation to the Wills Act 1837 (*Wayling* v. *Jones* (1993) 69 P. & C.R. 170), or to the Limitation Acts and other statutory provisions as to time (*Kammins Ballrooms Co. Ltd.* v. *Zenith Investments (Torquay) Ltd.* [1971] A.C. 580). In some contexts it is well-established that it cannot be done; for example, a tenant cannot be estopped from claiming the protection of the Rent Acts. The Privy Council in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] A.C. 993 explained that a statute should not be circumvented by estoppel where the statute's purpose is to protect a vulnerable class of individuals, such as tenants, or borrowers of money. In *Actionstrength*, the House of Lords saw no reason in principle why estoppel should not operate in the context of the Statute of Frauds. Lord Walker of Gestingthorpe referred to *Kok Hoong* and took the view (at para. [49]) that this was not a case where the policy behind the statute made estoppel unavailable.

Nevertheless, the estoppel point failed. The principles of estoppel are well-known; there must be a representation, relied on by the claimant to his detriment, so that it is unconscionable for the other party to go back on the representation (in this case by relying on

section 4). And here there was neither representation nor detrimental reliance. St-Gobain had not stated that it would not rely on the lack of formality, nor had it encouraged any such assumption by Actionstrength (whose mind the Statute of Frauds doubtless did not cross). Nor was there any detrimental reliance on such a representation; Actionstrength simply lent the money, in reliance upon the contract of guarantee. Thus, with regret, their Lordships found in favour of St-Gobain. Lord Hoffmann doubted whether detriment to support an estoppel could ever be found in a case involving this pattern of facts (para. [26]).

It was not open to Actionstrength to claim that St-Gobain was simply estopped from going back on its promise to pay the debt. In English law, unlike American and Australian, estoppel is not a cause of action unless the representation relates to an interest in land. (For the Australian view of this case, see the forthcoming note by Andrew Robertson in *Journal of Contract Law*; the point that estoppel subverts the Statute of Frauds is met by the fact that the courts in Australia are more ready to give relief measured by reliance rather than expectation; thus Actionstrength would receive only the debt incurred after St-Gobain's promise, rather than the whole debt.)

Had this been a promise to bequeath land, for example, there would have been no necessity for any separate assurance that the promisor (or his estate) would not rely upon the requirements of the Wills Act 1837; it would have been acceptable to sue upon the promise, or (put another way) upon the equity raised by the estoppel. What the courts are uncertain about is the legitimacy of applying this argument to a "contract" which has failed to come into being because of the formality requirements of the Law of Property (Miscellaneous Provisions) Act 1989, despite the Law Commission's intention that this should be possible. (The latest in that saga seems to be *Moloo* v. *Standish Hotels Ltd.*, 6 March 2002, Ch. Div., unreported.) *Actionstrength* is a useful reminder of the principle in *Kok Hoong* that there is no absolute rule about the use of estoppel in the face of a statute; it is also, unfortunately, an example of a case where the court finds itself powerless to prevent the mischief that a formalities statute may cause.

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