

Equitable defences are usually affirmative defences asking the court to excuse an act because the party bringing the cause of action has acted in some inequitable way. Equitable relief will be refused if the party seeking the relief is guilty of inequitable conduct with respect to the transaction upon which the relief sought is based, even though the transaction is in itself valid at law.

1. Promissory Estoppel

Where in an action between two parties, one of the parties had, either by words or conduct, made some representation (in connection with the transaction that gives rise to the cause of action) to the other party, the maker of such representation would be precluded from denying making the representation. A plaintiff who had made such representation, may fail in an action in which he would have otherwise succeeded; likewise a defendant may not be able to plead a defence that would have otherwise turned the case in his favour.

'Where a party has, by words or by conduct, made a representation to another leading him to believe in the existence of a particular fact or state of facts, and that other person has acted on the faith of such representation, then the party who made the representation shall not afterwards be heard to say that the facts were not as he represented them to be.' Per Lord Cranworth in *West v. Jones* (1851), 1 Sim. (N.S.) 205; 61 E.R. 79 at 207. This is the basis of the doctrine of estoppel by representation. Whenever such representation is pleaded and sustained by the court, it constitutes a bar to the claim of the maker.

In *Central London Property Trust Ltd. v. High Trees House Ltd.* (1947) K.B. 130 at 134, Denning J. (as he then was) in the course of his judgment said:

There are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said that the promise must be honoured.'

The *High Trees case* has, in the name of promissory estoppel, given new life to the doctrine of estoppel by representation.

Nigerian courts have approved of and applied the principle in *High Trees case*. In *Ajayi v. R.T. Briscoe (Nigeria) Ltd.* (1962) 1 All N.L.R. 673 at 679, though the defence, based on promissory estoppel, was rejected, on the ground that the defendant had not altered his position on the promise made to him by the plaintiff, the Federal Supreme Court did not doubt that the principle laid down in the *High Trees case* created a new estoppel. The court held that a promise, made without further consideration, to withhold the enforcement of

rights already accrued under a contract, is not enforceable, unless it was intended to create legal relations between the parties, and, to the knowledge of the person making it, was going to be acted upon by the person to whom it was made, and was, in fact, acted upon by him; thereby altering his position under the contract, so as to make it unjust for the promisor to enforce the rights accrued.'

On the appeal to the Privy Council, Lord Hodson without expressly referring to the *High Trees case*, gave the most recent formulation of the doctrine of promissory estoppel. He said: 'The principle which has been described as quasi-estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party.' See *Ajayi v. R.T. Briscoe (Nigeria) Ltd.* (1964) 3 All E.R 556, 559.

Scope of Promissory Estoppel

(i) Is it Limited to Cases Arising out of Existing Contracts:

It is not certain whether the doctrine of promissory estoppel applies only to obligations arising strictly out of an existing contract.

However, the formulation of the doctrine by Lord Hodson in *Ajayi v. R. T. Briscoe* (1964) 3 All E.R 556 at 559, envisages that the doctrine can only operate in respect of obligation arising out of contract. 'The principle, which has been described as quasi-estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party.' The Supreme Court took a similar view in *Tika-Tore Press Limited v. Abina* (supra) at 253. In that case, Fatayi-Williams J.S.C. said 'It is set up, not as the foundation of an action for breach of contract, but as an answer to the contention of a creditor that the letter of the original contract must be observed.'

But the judgment of Denning L.J. in *Combe v. Combe* (1951) 1 All E.R. 767, which the Supreme Court quoted in support of its proposition, did not limit the application of the doctrine to cases arising ex contractu. Nevertheless, it is reasonably clear that established authorities in support of the doctrine conceive the doctrine as applicable only to obligations arising out of contract. This narrow conception of the application of the doctrine may be due to the fact that the cases in which the doctrine has been invoked and considered, largely involved persons who were contractually bound. Should the mere fact that the doctrine has been applied mostly in cases involving contractual relations be sufficient to exclude its application to obligations arising otherwise than out of contract? What is, however, clear, is that whenever the doctrine applies, it modifies the existing obligations of persons; such obligations need not arise strictly out of contract.

(ii) The Doctrine cannot be used to Create a cause of Action:

The doctrine is limited to matters of defence, it can only be used as a shield and not as a sword. The doctrine may be set up as a defence by the promisee in an action by the promisor to enforce the original right: but it cannot be sued on as a separate cause of action by the promisee. See *Offiong v. African Development Corporation Ltd.* (1964) 2 All N.L.R. 75, 79. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel.' *Central London Property Trust Ltd. v. High Trees House Ltd.* (supra) at 134; *Combe v. Combe* (supra) at 219.

(iii) Consequent to the Promise, the Promisee must have Altered his position:

In order to establish the defence of promissory estoppel the promisee must have altered his position. This requirement was clearly stated in the leading case of *Ajayi v. R.T. Briscoe (Nigeria) Ltd.* at 559. In that case, the defence of promissory estoppel was dismissed by the Federal Supreme Court and on appeal, by the Privy Council; on the ground that the defendant had not altered his position. Lord Hodson, delivering the judgement of the Board said –

'The principle which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other part. This equity is, however, subject to the qualification that the other party has altered his position.'

However, the representation must be such that it will be inequitable to enforce the right under the original arrangement or transaction. And it will so be inequitable if the representation was made with the intention of being acted upon and was in fact acted upon; for in such a case, the courts have insisted that the representation must be honoured; to decide otherwise will be to encourage breach of faith, which itself constitutes unconscionable and inequitable conduct. Thus, once the representation is acted upon, on the good faith of the representor, then the representee would have altered his position and the circumstances would be that it would be inequitable if the representor is allowed to retract his promise. See *Foster v. Robinson* (1951) 1 K.B. 149; *Wallis v. Se-mark* (1951) 2 T.L.R. 222.

* The extra-judicial opinion of Lord Denning on this aspect is instructive. He wrote - 'There still remains the question, when is it 'inequitable' to allow a person to go back on his promise? The test of what is 'inequitable' may be different when there is a promise from that when there is some other conduct which leads the other to believe that the strict rights will not be enforced. A promise has always been considered to be different in nature and quality from conduct of negligence or omission. A man should keep his word. All the more so when the promise is not a bare promise, but is made with the intention that the other party should act

upon it. Just as contract is different from tort and from estoppel, so also in the sphere now under discussion promises may give rise to a different equity from other conduct.

The difference may lie in the necessity of showing "detriment". Where one party deliberately promises to waive, modify or discharge his strict legal rights, intending the other party to act on the faith of the promise, and the other party actually does act on it, then it is contrary, not only to equity but also to good faith, to allow the promisor to go back on his promise. It should not be necessary for the other party to show that he acted to his detriment in reliance on the promise. It should be sufficient that he acted on it. That is sufficient in the case of promises given on the formation of a contract. It should also be sufficient in the case of a promise given on the modification or discharge of a contract.'

'But where the party has made no promise, express or implied, and all that can be said against him is that he by his conduct has induced the other to believe that the strict rights under the contract will not be enforced or kept in suspense, then the position is different because there is no question of good faith - no question of a man keeping his word. In those circumstances, it may be necessary for the other party to show not only that he acted but also that he acted to his detriment, in the belief that the strict rights would not be enforced.'

The suggestion that a distinction should be drawn between a deliberate promise to waive or modify strict legal rights and a mere conduct that has induced the other to believe that strict legal rights will not be enforced may provide for a more flexible application of the doctrine. In the former case, if the deliberate promise is intended to create legal relation, it is sufficient if the promise is acted upon even though the requirement as to detriment is not satisfied. But in the latter case, where there is no question of good faith, the promisee must show not only that he has acted on the promise but also that he suffers loss.

Effect of Promissory Estoppel

As a rule, the element of temporariness cannot be divorced from promissory estoppel. Unlike proprietary estoppels, promissory estoppel does not give rise to permanent estoppel. The promisor can resile from his promise on giving reasonable notice which need not be a formal notice; giving the promisee a reasonable opportunity of resuming his position. See *Ajayi v. R.T Briscoe (Nigeria) Ltd.* (supra). In fact, it is not the promisor alone who can resile from his promise, either party can also do so.

2. Proprietary Estoppel

Basis of the Doctrine

Conduct giving rise to estoppel may be passive or active. First inaction may amount to passive acquiescence upon which proprietary estoppel may be founded.

Secondly, conduct encouraging such expenditure as referred to in Lord Cranworth's proposition otherwise known as the rule in *Ramsden v. Dyson* may amount to active acquiescence capable of supporting a claim of proprietary estoppel. 'If A puts B into possession of a piece of land, and tells him, 'I give it to you that you may build a house on it', and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation that was made.' Per Lord Westbury L.C. in *Dillwyn v. Llewellyn* (1862) 4 De G.F. & J. 517 at 521; 45 E.R. 1285.

It is evidently fraudulent for a true owner of land, in the circumstances explained in *Ramsden v. Dyson* and in *Dillwyn v. Llewellyn*, to set up his title with a view to claiming the land with the improvements made on it by the mistaken party to the knowledge and with the passive or active acquiescence of the true owner.

However, for the court to restrain the owner of a legal right from exercising it on the plea of proprietary estoppel by the person who has expended money, certain requisites must be established:

- (i) First, P who has expended money on the land must have been mistaken as to his legal right in the land; he must have genuinely believed though, erroneously, that he was the owner of the land;
- (ii) P, acting on the faith of his mistaken belief, must have expended some money or must have done some act which will be prejudicial to him if D the true owner of the land were subsequently allowed to set up his right against P;
- (iii) D, the true owner, must have known of the existence of his own right which is inconsistent with the right claimed by P. If D was unaware that he was the owner of the land the plea of proprietary estoppel will not be sustained.
Note that there cannot be conduct amounting to acquiescence, an essential element of the doctrine, where the true owner was not aware of his right and, therefore, could not be said to have knowledge of or to have acquiesced to any infringement of such right;
- (iv) D must have known of P's mistaken belief of his rights in the land, such knowledge will raise an equity in favour of P and make it inequitable for D to subsequently set up his title against P;
- (v) D must have encouraged P in his expenditure of money or in other acts which P has done either directly or by abstaining from asserting his legal rights.

The foregoing elements must co-exist in order to establish a plea of proprietary estoppel. See *Willmott v. Barber* (per Fry J) :

In *Ozokpo v. Paul* (1990) 2 NWLR (Pt. 133) p.494, the case for the respondent is that, her father made a grant of a piece of land to her. It is part of a portion of land given to her father by her grand-father. The land was given to her in 1956. She and her mother farmed on it planting cassava, vegetables, okro, etc. sometime in the 1950s, she saw one Ogbuka developing the said land. In spite of warnings from her and her father, Ogbuka erected a building on the land. Ogbuka sold the house in 1958 to Ozokpo and Ozokpo moved into the house. He took on tenants and then the civil war broke out.

Ozokpo fled to Port Harcourt with his family and abandoned the property leaving behind his personal belongings and documents of title relating to the property. In the absence of Ozokpo, the respondent (Justina Paul) moved into the building and took possession, saying the building was erected on her land without her consent. Ozokpo died before the end of the war. His widow got back from Port Harcourt and tried to get the house back. The respondent refused to give up possession. Mrs. Ozokpo applied for and obtained letters of administration to manage the estate of Ozokpo. As the respondent would not give up possession, Mrs. Ozokpo (appellant) took out an action against the respondent for arrears of rent in the Magistrate Court in Port Harcourt and she got judgment in her favour. The respondent (Paul) paid up arrears of rent owed.

The Court held that a tenant who pays rent to another as landlord with full knowledge of the fact that he was not the sole owner of the property, is stopped from subsequently denying the landlord's title. It was dishonest of the respondent to move into the house when Ozokpo died reaping where she did not sow. There is even no evidence that the respondent ever protested to Ozokpo in respect of the property when he was alive.

The Effect of the Operation of the Doctrine

Proprietary estoppel or equitable estoppel gives rise to a permanent modification of the rights of the parties and those of their successors in title; unlike promissory estoppel whose effect is as a rule, temporary or suspensory. Moreover, proprietary estoppel can be used either as a shield or as a sword. In other words, it is capable of creating substantive rights upon which a cause of action may be founded. See the following: *Dillwyn v. Llewelyn* (1862) 4 De G.F. & J. 517; 45 E.R. 1285. *Thomas v. Thomas* (1956) N.Z.L.R. 785; *Ibadan City Council v. Ajanaku* (1969) N.M.L.R. 32.

Whenever the plea is sustained, it creates an equity in favour of the person who has expended money on the land and, the real owner of the land will henceforth be prevented from exercising or asserting his legal rights in respect of the land. However, the question remains as to whether the person who has expended money will be given compensation for the money so expended or he is entitled to conveyance. There is much uncertainty as to the kind of order the court will make whenever the relief is granted. There does not appear to be any

general rule as to the proper order. Thus, the court must look at the circumstances in each case to decide in what way the equity can be satisfied.

3. Equitable defence of Laches

This doctrine emanated from the maxim 'delay defeats equities' or 'equity aids the vigilant'. Simply put, the substance of the doctrine seems to be that a litigant who has unreasonably slept over his right may not be granted equitable relief in respect of this right particularly where the granting of such relief will result in hardship to the other party who has acquired the right. The exercise of this equitable jurisdiction, like all others, is discretionary and, in the usual manner, the discretion may not be exercised arbitrarily.

The doctrine may be invoked where the conduct or neglect of the plaintiff indicates to the defendant a waiver of the plaintiff's rights, which rights have been acquired by the defendant. See *Ibeziako v. Abutu* (1958) 11 E.N.L.R. 24, 27; *Blake v. Gale* (1886) 32 Ch.D. 571. As Lord Camden put it, a court of equity: 'has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive and does nothing.' See *Smith v. Clay* (1767) 3 Bro. C.C. 639n at 640n.

In *Erikitola v. Alli & Others* (1941) 16 N.L.R. 56, Butler Lloyd Ag. C.J., delivering the judgment of the Supreme Court, contended that laches consists of standing by while an infringement of one's rights is in progress. In this case, the Supreme Court refused to invoke the doctrine because the owners of the rights in dispute did not stand by but posted caution notices on both occasions when an infringement of their rights by the sale of the property was attempted. See further, *Odunsi v. Ku-foriji* (1948) 19 N.L.R. 7.

'The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. If an argument against relief, which otherwise would be just, is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy'.

The circumstances warranting the invocation of the doctrine were aptly stated by the Supreme Court in the case of *Fagbemi v. Aluko* (1968) 1 All N.L.R. 233 at 237. In considering the equitable doctrine of laches, the court does not act only on the delay by the plaintiff, but must also consider (i) acquiescence on the plaintiff's part, and (ii) any change of position that has occurred on the defendant's part.'

Distinction Between Proprietary Estoppel and Laches

Acquiescence, as an integral part of proprietary estoppel, implies fraud which is the basis of the equity in favour of the person who has expended money on the land: the owner of the land should not stand by and allow another person who thinks the land is his to make improvements; he wants to take the improvements and thereby cheat the other person of the expense he is making. See *Ukwa v. Awka Local Council* (supra) at 46. But in laches, acquiescence implies negligence or indolence on the part of a person to assert his right with promptitude after such right has been violated. See Lord Camden in *Smith v. Clay* (1767) 3 Bro. C.C. 639n at 40n.

Operation of the Doctrine

Delay in asserting ones right is an important factor though not necessarily the controlling factor; where the defence against the relief sought by the plaintiff is founded upon mere delay and the delay does not amount to a bar of the relief by any statute of limitations, the court will proceed to consider the length of the delay, the inadequacy or unsatisfactory nature of the explanation of the delay, the nature of the acts done during the interval, that is, the degree of change which has occurred and whether in the circumstances the balance of justice or injustice is in favour of granting the remedy or withholding it.

In *Agbeyebe v. Ikomi* (1953) 12 W.A.C.A. 383 at 386, the plaintiff's action to set aside the sale of his property was in 1938 struck out by the Court. He did not take any further proceedings until 1947 when he moved the Supreme Court to re-list the suit which had been struck out in 1938. He gave, as reasons for the undue delay, the death of his legal advisers, his own illness and the difficulties of ascertaining his true position in the matter. But during the interval the defendant had rebuilt and occupied the property. The decision of the Supreme Court in favour of the plaintiff was reversed by the West African Court of Appeal on the ground that the plaintiff was guilty of laches.

On appeal to the Privy Council, the Judicial Committee of the Privy Council agreed with the decision of the West African Court of Appeal. The length of the delay, the inadequacy of the explanation of the delay, and the consequences of setting aside the sale as against the defendant who was a bona fide purchaser for value and who had been in occupation of the land during the whole period of nine years and had apparently altered the buildings thereon caused a balance of justice in favour of the defendant within the meaning of laches as expanded by Lord Selbourne in *Lindsay Petroleum Company v. Hurd* (1874) L.R. 5 P.C. 221. The doctrine operates to bar a variety of claims for equitable reliefs, for example, specific performance, injunction, rescission etc. These are special reliefs in equity and will only be given on condition of the plaintiff coming with great promptitude or as soon as the nature of the case will admit. Any substantial delay after negotiations have terminated and the cause of action has arisen - such as a year or probably less may be a bar. Thus, in *Ibeziako v. Abutu*

(1959) III E.N.L.R. 24 at 27, a party to an agreement and who was clearly entitled to an order for specific performance of the agreement was denied the remedy because of his failure to claim the remedy with promptitude.

Onus of Proof

When the defence pleads acquiescence, it is not for the plaintiff to prove there had been none, but for the defendant to prove the acquiescence. See *Alade v. Aborishade* (1960) 5 F.S.C. 167, 171; *Odunsi v. Kuforiji* (1948) 19 N.L.R. 17.

Limit of the Doctrine

Acquiescence is an important factor upon which the doctrine of laches is founded. Therefore, the doctrine will not be applied where there is no acquiescence, express or implied on the part of the true owner in the defendant's assumption of the right in dispute. See *Tobias Epelle v. Ojo* (1926) 7 N.L.R. 96, 97. In *Akeju v. Suenu* (1925) 6 N.L.R. 87, the plaintiff sought to set aside a conveyance of family property which was made without his knowledge or consent. The defence of lying by was rejected because the plaintiff took all reasonable and proper steps to protect his interests as soon as he learnt that the property was being dealt with without his authority.

Laches and Matrimonial Causes

In a matrimonial cause for divorce, the court is not bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition. As Bairamian J.S.C. explained in *Enekebe v. Enekebe* (1964) 1 All NLR 102 at 105, this is intended to make a spouse diligent in presenting his or her petition, for it is in the public interest that he or she should be diligent; and that a husband who is late in petitioning may well give ground for the view that he has acquiesced in the misconduct of his wife or is indifferent to the loss of her company. See sections 26, 28(c) & 37(b) Matrimonial Causes Act, Vol. 8, Cap. M7 Laws of the Federation of Nigeria, 2004.

Statutes of Limitation

The Limitation Decree does not derogate from the importance of the doctrine of laches. Indeed, the Decree gives statutory recognition to the jurisdiction of the court to refuse relief on the ground of laches. Section 2 of Decree No. 88 of 1966 provides 'Nothing in this Decree shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.'

In *Muomah v. Spring Bank Plc* (2009) 3 NWLR (Pt. 1129) p. 553, on nature of statute of limitation and rationale therefore, the Court of Appeal held that:

"The law on limitation of actions is the pivot upon which the wheel of litigation rotates and the ruthless watchman that guards the gates to the sanctuary of justice. The Statute of

Limitation is therefore an act of peace based on the principle that long dormant claims have more of cruelty than justice in them, as the defendant might have lost the evidence to disprove a statement of claim and that persons with good causes of action should pursue them with reasonable diligence. The reasoning of the statute of Limitation is that greater injustice is likely to be done by allowing stale claims than by refusing them a hearing on the merit."

On determination of period of limitation, see the case of *Odum v. Uganden & Ors.* (2009) 9 NWLR (Pt. 1146) 281 where it was held as follows:

"The period of limitation in any statute of limitation is determined by looking at the writ of summons and the statement of claim alleging when the wrong was committed which gave rise to the cause of action, and by comparing that date with the date on which the writ of summons was filed. In the instant case, to determine if the action is statute barred, it is the date the respondents, now possessed of the land, got the land that has to be compared with the date of filing of the case, for the purpose of determining whether or not the said action is statute barred."

In *Kumaila v. Sheriff & Ors.* (2009) 9 NWLR (Pt. 1146) p. 420, it was held that "time begins to run when there is an existence a person who can sue and another who can be sued, and all facts have happened which are materials to be proved to entitle the plaintiff to succeed. In determining whether an action is statute barred, it is important to first determine when time began to run."

On what laches denotes and the distinction between laches and statute of limitation, see *Chukwu v. Amadi* (2009) 3 NWLR (Pt. 1127) p. 56, where the Court held as follows:

1. Where a statute prescribes a specific period for the filing of an action in a Court of law, any action filed after the expiration of the period is null and void. Such period of limitation starts to run from the very date the cause of action arose.
2. What determines whether or not a cause of action is statute barred is the writ of summons or statement of claim alluding to the date the cause of action accrued and the date of filing the suit.
3. Laches denotes an equitable principle by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim where the granting of such relief would be unfair or unjust.
4. The difference between laches and statute of limitation is very thin. The doctrine of laches like the statutes of limitation in their conclusive effects are employed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.

See also *Unity bank Plc v. Nwadike* (2009) 4 NWLR (Pt. 1131) p. 352.