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Consideration and Promissory Estoppel

1. CONSIDERATION

In general, agreements or promises are contractually binding in English law only if supported by consideration. The requirement of consideration means that each party must receive or be promised something in return for giving or promising something. Consideration is, therefore, the legal description of the element of exchange and its practical effect is to ensure that gratuitous promises are not binding whereas bargains are. So if A promises B £1000, B cannot enforce that promise because B has provided no consideration (nothing in exchange) for it.

It is traditional to *define* consideration as a benefit to the promisor or a detriment to the promisee. So in *Currie v Misa* (1875) LR 10 Ex 153, 162 Lush J stated, 'A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.' This definition can be misleading unless one emphasises, in line with the need for an exchange, that the detriment to the promisee must be *requested* by the promisor. So if A promises B £1000 and B, in reliance on receiving that money, buys a car, that may constitute detrimental reliance by B but B has not thereby provided any consideration for A's promise. In contrast, if A promises B £1000 in return for B's car (ie A requests the car), B's transfer of the car, or promise to transfer it, is consideration for A's promise.

In a bilateral contract which has not yet been performed (ie where the consideration is 'executory') each party's promise is consideration for the other. In a unilateral contract the promisee's performance of the requested act is the consideration for the promise; and the promise is the consideration for the performance of the requested act. (For explanation of what is meant by bilateral and unilateral contracts, see above, 3.)

The main exception to the requirement of consideration is a contract made by deed (often referred to in the past as a contract under seal because, until 1989, a deed required a seal). A gratuitous promise contained in a deed is contractually binding (see 3–4 above, although, on another view, contracts made by deed are not contracts at all

but are, instead, binding *outside* the law of contract). Some gratuitous promises may also be binding under the doctrine of promissory estoppel, which is examined in the second part of this chapter. The tension between consideration and promissory estoppel is as important as it is fascinating and reflects different conceptions of the scope of the law of contract.

In examining cases on the doctrine of consideration, there are three main points (leaving aside the rule, bound up with the doctrine of privity of contract, that consideration must move from the promisee: see Chapter 10). First, the consideration need not be adequate. Secondly, past consideration does not count. Thirdly, a traditionally difficult issue, where there remains some uncertainty, is whether performance of, or a promise to perform, a pre-existing duty is good consideration. The case law on each of these three points will be examined in turn.

Before we do so, this is an appropriate place to mention briefly that requirements of form play a minor role in the modern law of contract. Assuming that the contract is not being made by deed, most contracts are valid whether made orally or in writing. There are three main exceptions to this: (i) by the Statute of Frauds 1677, section 4, contracts of guarantee must be *evidenced* in writing (in *Actionstrength Ltd v International Glass Engineering SpA* [2003] UKHL 17, [2003] 2 AC 541 the House of Lords rejected the argument that estoppel could be invoked to avoid section 4); (ii) by the Law of Property (Miscellaneous Provisions) Act 1989, section 2, a contract for the sale or other disposition of an interest in land must be made in writing: (iii) by the Consumer Credit Act 1974, regulated consumer credit agreements (eg a hire-purchase agreement made by a consumer) must be in writing, in a specific form and signed. Also, by definition, contracts on, for example, a bill of exchange or promissory note (as dealt with in the Bills of Exchange Act 1882) will be in writing.

Introductory reading: E McKendrick, *Contract Law* (10th edn, 2013) 5.2–5.21, 5.29.

(1) The Consideration Need Not Be Adequate

Chappell & Co Ltd v Nestlé Co Ltd [1960] AC 87, House of Lords

The claimants owned the copyright in a piece of music called 'Rockin' Shoes'. The defendants arranged for records of this tune to be made and offered these to the public for 1s 6d plus three wrappers from their 6d chocolate bars. Section 8 of the Copyright Act 1956 permitted the making of records for retail sale provided notice was given to the owner of the copyright and a royalty was paid of 6 ¼% of the 'ordinary retail selling price'. A notice was given stating that the ordinary retail selling price was 1s 6d. The claimants refused to accept this and sought an injunction restraining the 'sale' of the records on the ground that the defendants were infringing their copyright. In determining whether section 8 had been infringed, the question at issue was whether the chocolate bar wrappers, although of trivial value, were part of the consideration for the sale of the records. By a 3–2 majority, the House of Lords held that they were and the claimants' appeal, against the overturning of an injunction granted at first instance, was therefore allowed.

Lord Reid: I can now turn to what appears to me to be the crucial question in this case: was the 1*s.* 6*d.* an "ordinary retail selling price" within the meaning of section 8? That involves two questions, what was the nature of the contract between the Nestlé Co. and a person who sent 1*s.* 6*d.* plus 3 wrappers in acceptance of their offer, and what is meant by "ordinary retail selling price" in this context. To determine the nature of the contract one must find the intention of the parties as shown by what they said and did. The Nestlé Co.'s intention can hardly be in doubt. They were not setting out to trade in gramophone records. They were using these records to increase their sales of chocolate. Their offer was addressed to everyone. It might be accepted by a person who was already a regular buyer of their chocolate; but, much more important to them, it might be accepted by people who might become regular buyers of their chocolate if they could be induced to try it and found they liked it. The inducement was something calculated to look like a bargain, a record at a very cheap price. It is in evidence that the ordinary price for a dance record is 6*s.* 6*d.* It is true that the ordinary record gives much longer playing time than the Nestlé records and it may have other advantages. But the reader of the Nestlé offer was not in a position to know that.

It seems to me clear that the main intention of the offer was to induce people interested in this kind of music to buy (or perhaps get others to buy) chocolate which otherwise would not have been bought. It is, of course, true that some wrappers might come from the chocolate which had already been bought or from chocolate which would have been bought without the offer, but that does not seem to me to alter the case. Where there is a large number of transactions – the notice mentions 30,000 records – I do not think we should simply consider an isolated case where it would be impossible to say whether there had been a direct benefit from the acquisition of the wrappers or not. The requirement that wrappers should be sent was of great importance to the Nestlé Co.; there would have been no point in their simply offering records for 1*s.* 6*d.* each. It seems to me quite unrealistic to divorce the buying of the chocolate from the supplying of the records. It is a perfectly good contract if a person accepts an offer to supply goods if he (*a*) does something of value to the supplier and (*b*) pays money: the consideration is both (*a*) and (*b*). There may have been cases where the acquisition of the wrappers conferred no direct benefit on the Nestlé Co., but there must have been many cases where it did. I do not see why the possibility that in some cases the acquisition of the wrappers did not directly benefit the Nestlé Co. should require us to exclude from consideration the cases where it did. And even where there was no direct benefit from the acquisition of the wrappers there may have been an indirect benefit by way of advertisement.

I do not think that it matters greatly whether this kind of contract is called a sale or not. The appellants did not take the point that this transaction was not a sale. But I am bound to say that I have some doubts. If a contract under which a person is bound to do something as well as to pay money is a sale, then either the price includes the obligation as well as the money, or the consideration is the price plus the obligation. And I do not see why it should be different if he has to show that he has done something of value to the seller. It is to my mind illegitimate to argue – this is a sale, the consideration for a sale is the price, price can only include money or something which can be readily converted into an ascertainable sum of money, therefore anything like wrappers which have no money value when delivered cannot be part of the consideration.

The respondents avoid this difficulty by submitting that acquiring and delivering the wrappers was merely a condition which gave a qualification to buy and was not part of the consideration for sale. Of course, a person may limit his offer to persons qualified in a particular way, e.g., members of a club. But where the qualification is the doing of something of value to the seller, and where the qualification only suffices for one sale and must be re-acquired before another sale, I find it hard to regard the repeated acquisitions of the qualification as anything other than parts of the consideration for the sales. The purchaser of records had to send 3 wrappers for each record, so he had first to acquire them. The acquisition of wrappers by him was, at least in many cases, of direct benefit to the Nestlé Co., and required expenditure by the acquirer which he might not otherwise have incurred. To my mind the acquiring and delivering

of the wrappers was certainly part of the consideration in these cases, and I see no good reason for drawing a distinction between these and other cases.

…

I am of opinion that the … notice that the ordinary retail selling price was 1*s.* 6*d.* was invalid, that there was no ordinary retail selling price in this case and that the respondents' operations were not within the ambit of section 8. They were therefore infringements of the appellants' copyright and in my judgment this appeal should be allowed.

Lord Somervell of Harrow: My Lords, section 8 of the Copyright Act, 1956, provides for a royalty of an amount, subject to a minimum, equal to 6¼ per cent. of the ordinary retail selling price of the record. This necessarily implies, in my opinion, that a sale to be within the section must not only be retail, but one in which there is no other consideration for the transfer of property in the record but the money price. Parliament would never have based the royalty on a percentage of a money price if the section was to cover cases in which part, possibly the main part, of the consideration was to be other than money. This is in no sense a remarkable conclusion, as in most sales money is the sole consideration. It was not argued that the transaction was not a sale.

The question, then, is whether the three wrappers were part of the consideration or, as Jenkins L.J. held, a condition of making the purchase, like a ticket entitling a member to buy at a co-operative store.

I think they are part of the consideration. They are so described in the offer. "They," the wrappers, "will help you to get smash hit recordings." They are so described in the record itself – all you have to do to get such new record is to send three wrappers from Nestlé's 6*d.* milk chocolate bars, together with postal order for 1*s.* 6*d.* This is not conclusive but, however described, they are, in my view, in law part of the consideration. It is said that when received the wrappers are of no value to Nestlé's. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn. As the whole object of selling the record, if it was a sale, was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration. For these reasons I would allow the appeal.

Viscount Simonds (dissenting): In my opinion, my Lords, the wrappers are not part of the selling price. They are admittedly themselves valueless and are thrown away and it was for that reason, no doubt, that Upjohn J. was constrained to say that their value lay in the evidence they afforded of success in an advertising campaign. That is what they are. But what, after all, does that mean? Nothing more than that someone, by no means necessarily the purchaser of the record, has in the past bought not from Nestlé's but from a retail shop three bars of chocolate and that the purchaser has thus directly or indirectly acquired the wrappers. How often he acquires them for himself, how often through another, is pure speculation. The only thing that is certain is that, if he buys bars of chocolate from a retail shop or acquires the wrappers from another who has bought them, that purchase is not, or at the lowest is not necessarily, part of the same transaction as his subsequent purchase of a record from the manufacturers.

I conclude, therefore, that the objection fails, whether it is contended that (in the words of Upjohn J.) the sale "bears no resemblance at all to the transaction to which the section … is pointing" or that the three wrappers form part of the selling price and are incapable of valuation. Nor is there any need to take what, with respect, I think is a somewhat artificial view of a simple transaction. What can be easier than for a manufacturer to limit his sales to those members of the public who fulfil the qualification of being this or doing that? It may be assumed that the manufacturer's motive is his own advantage. It is possible that he achieves his object. But that does not mean that the sale is not a retail sale to which the section applies or that the ordinary retail selling price is not the price at which the record is ordinarily sold, in this case 1*s.* 6*d.*

Lord Tucker gave a speech concurring with Lords Reid and Somervell. **Lord Keith of Avonholm** gave a dissenting speech.

NOTES AND QUESTIONS

1. As the chocolate bar wrappers, although of trivial value, were held to be part of the consideration for Nestlé's promise, the case illustrates that the courts will not assess the adequacy of the consideration: ie it does not matter that the value of what one party receives is significantly lower than what it is giving to the other party. An older, and more straightforward, example is *Thomas v Thomas* (1842) 2 QB 851 where the court accepted that a widow's promise to pay £1 a year and to keep a cottage in good repair was good consideration for the promise to allow her to live in that cottage for the rest of her life. A 'peppercorn' rent (ie rent of a trivial amount) given by a tenant to a landlord is a further illustration of this principle.
2. It is sometimes suggested that consideration must be of some economic value even if the amount of that value does not matter. However, this may be thought to be contradicted by *Chappell v Nestlé* and by, eg, *Shadwell v Shadwell* (below, 100) and *Ward v Byham* (below, 98). See also the well-known United States case of *Hamer v Sidway* 124 NY 538 (1891) where an uncle's promise to pay $5,000 to his nephew if he gave up smoking and drinking liquor was held to be supported by consideration and enforceable. (Cf *White v Bluett* (1853) 23 LJ Ex 36 where a promise of money from a father in return for his son's ceasing to complain about his unequal treatment was held not to be supported by valid consideration. Would this decision be better justified on the basis that there was no intention to create legal relations?)
3. At the margins, it is notoriously difficult to distinguish between a conditional gratuitous promise and an agreement supported by consideration. If A promises B £1000 if B goes to collect it that would normally be a conditional gratuitous promise which would not be enforceable. But the position could be different if A wants to see B who, eg, has to travel from the other side of the world. In *Chappell v Nestlé* the House of Lords decided that the sending in of the wrappers was not merely a condition for being able to purchase the records but was part of the consideration.
4. If A promises to sell his Rolls-Royce to B for a bag of sweets, and B agrees, is there a valid contract?
5. What is the policy behind the rule that the courts do not assess the adequacy of consideration?

(2) Past Consideration Does Not Count

Eastwood v Kenyon (1840) 11 Ad & E 438, Queen's Bench

The claimant was the guardian of a girl under the age of 21. He took out a loan from a Mr Blackburn for £140 to cover some of the costs of maintaining and educating the girl and improving some cottages that had been left to her. After she had come of age and on her marriage, her husband, the defendant, promised the claimant to pay off

the claimant's debt to Mr Blackburn. When he failed to do so, the claimant sued him. The action failed because no present (only past) consideration had been given by the claimant for the defendant's promise.

Lord Denman CJ: The eminent counsel who argued for the plaintiff in *Lee* v. *Muggeridge* (5 Taunt. 36), spoke of Lord Mansfield as having…maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall* v. *Adney* (3 B. & P. 249), shews the deduction to be erroneous. If the former, Lord Tenterden and this Court declared that they could not adopt it in *Littlefield* v. *Shee* (2 B. & Ad. 811). Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations *of* executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking then the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.

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In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England.

Lampleigh v. *Brathwait* (Hob. 105) is selected by Mr. Smith (1 Smith's Leading Cases, 67), as the leading case on this subject, which was there fully discussed, though not necessary to the decision. Hobart C.J. lays it down that "a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference"; a difference brought fully out by *Hunt* v. *Bate* (Dyer, 272…) there cited from Dyer, where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which the plaintiff had done without request of the defendant, was held to be made without consideration; but a promise to pay 20*l*, to plaintiff, who had married defendant's cousin, but at defendant's special instance, was held binding.

NOTES AND QUESTIONS

1. A promise to pay for what the promisee has already done is a type of gratuitous promise. The denial that past consideration is good consideration is therefore entirely consistent with consideration marking the divide between bargains and gratuitous promises. This case is historically important in making that divide and in rejecting Lord Mansfield's view that a gratuitous promise is supported by consideration where it is deliberately made so that there is a moral obligation to perform it.

2. For other examples of past consideration being held not to be good consideration, see *Roscorla v Thomas* (1842) 3 QB 234 (oral warranty as to soundness of a horse, given after the sale of the horse, held to be unenforceable) and *Re McArdle* [1951] Ch 669 (promise to reimburse a relative for work she had already done to a house held unenforceable). Jenkins LJ, in the latter case said, at 678, '[T]he true position was that, as the work had all been done and nothing remained to be done by Mrs Marjorie McArdle at all, the consideration was a wholly past consideration, and, therefore, the beneficiaries' agreement for the repayment to her of the £488 out of the estate was nudum pactum, a promise with no consideration to support it.'
3. Should past consideration be good consideration?
4. *Lampleigh v Brathwait* (1615) Hob 105, referred to in *Eastwood v Kenyon,* shows that what looks like past consideration may, on closer examination, turn out not to be. On the facts B had killed a man. He asked L to do all he could to obtain a pardon from the King. L tried to do this and incurred expenses in so doing. B later promised him £100 for what he had done. He then broke that promise and L sued him. It was held that B was liable to pay. There was valid consideration because B had requested L to do what he had later promised to pay L for. Subsequent cases, including that to be examined next, have clarified that, in addition to there being a request, there must also be an understanding throughout that the requested act was to be remunerated.

PaO On v Lau Yiu Long [1980] AC 614, Privy Council

The claimants (the Paos) owned the shares of a company called Shing On. The defendants (the Laus) were the majority shareholders in a company called Fu Chip. In February 1973 the claimants agreed with Fu Chip to sell the shares in Shing On to Fu Chip in return for an allocation of 42 million shares of $1 each in Fu Chip. Under that agreement, the market value of the Fu Chip shares was deemed to be $2.50 and the claimants agreed that they would retain 60 per cent of the Fu Chip shares until after 30 April 1974. This restriction was important to the defendants who were anxious to prevent the value of their own shares being depressed by heavy selling of Fu Chip shares. The claimants, however, were concerned that if the market price of the shares fell over that time, they would lose out by being unable to sell and they therefore sought protection from the defendants against a fall in the value of the shares. The form of the protection that the claimants initially accepted was that the defendants agreed to buy back at the end of April 1974 60 per cent of the shares at $2.50 a share. The claimants became unhappy about this, as being a bad bargain for them because, in the event of share prices rising, they would still be bound to sell back to the defendants 60 per cent of the shares at $2.50 a share. The claimants therefore made clear that they would not complete the main contract with Fu Chip unless the defendants agreed—which they did in a 'guarantee agreement' dated 4 May 1973—to indemnify the claimants for any loss suffered if the shares had fallen below $2.50 at the end of April 1974. Over the year, the shares slumped in value. The claimants sought to enforce that guarantee agreement which the defendants resisted on three grounds. First, that the defendants' promise to indemnify in the guarantee agreement was not supported by consideration because the consideration was past. Secondly, that the promise to indemnify was not

supported by consideration because the claimants were under a pre-existing contractual duty to a third party (Fu Chip) not to sell 60 per cent of the shares. Thirdly, that the guarantee agreement had been induced by economic duress exerted on the defendants by the claimants. The Privy Council rejected each of those arguments and held that the guarantee agreement was enforceable. We are here concerned only with the first issue, in relation to which it was held that the consideration was not past.

Lord Scarman (giving the judgment of himself, **Lord Wilberforce**, **Viscount Dilhorne**, **Lord Simon of Glaisdale** and **Lord Salmon**): The first question is whether upon its true construction the written guarantee of May 4, 1973, states a consideration sufficient in law to support the defendants' promise of indemnity against a fall in value of the Fu Chip shares. …

Mr. Neill, counsel for the plaintiffs … contends that the consideration stated in the agreement is not in reality a past one. It is to be noted that the consideration was not on May 4, 1973, a matter of history only. The instrument by its reference to the main agreement with Fu Chip incorporates as part of the stated consideration the plaintiffs' three promises to Fu Chip: to complete the sale of Shing On, to accept shares as the price for the sale, and not to sell 60 per cent. of the shares so accepted before April 30, 1974. Thus, on May 4, 1973, the performance of the main agreement still lay in the future. Performance of these promises was of great importance to the defendants, and it is undeniable that, as the instrument declares, the promises were made to Fu Chip at the request of the defendants. It is equally clear that the instrument also includes a promise by the plaintiffs to the defendants to fulfil their earlier promises given to Fu Chip.

The Board agrees with Mr. Neill's submission that the consideration expressly stated in the written guarantee is sufficient in law to support the defendants' promise of indemnity. An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisors' request: the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit: and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance. All three features are present in this case. The promise given to Fu Chip under the main agreement not to sell the shares for a year was at [Lau's] request. The parties understood at the time of the main agreement that the restriction on selling must be compensated for by the benefit of a guarantee against a drop in price: and such a guarantee would be legally enforceable. The agreed cancellation of the subsidiary agreement left, as the parties knew, the plaintiffs unprotected in a respect in which at the time of the main agreement all were agreed they should be protected.

Mr. Neill's submission is based on *Lampleigh v. Brathwait* (1615) Hobart 105. …

The modern statement of the law is in the judgment of Bowen L.J. in *In re Casey's Patents* [1892] 1 Ch. 104, 115-116; Bowen L.J. said:

> "Even if it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now, the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered. So that here for past services there is ample justification for the promise to give the third share."

Conferring a benefit is, of course, an equivalent to payment: see *Chitty on Contracts,* 24th ed. (1977), vol. 1, para. 154.

Mr. Leggatt, for the defendants, does not dispute the existence of the rule but challenges its application to the facts of this case. He submits that it is not a necessary inference or

implication from the terms of the written guarantee that any benefit or protection was to be given to the plaintiffs for their acceptance of the restriction on selling their shares. Their Lordships agree that the mere existence or recital of a prior request is not sufficient in itself to convert what is prima facie past consideration into sufficient consideration in law to support a promise: as they have indicated, it is only the first of three necessary preconditions. As for the second of those preconditions, whether the act done at the request of the promisor raises an implication of promised remuneration or other return is simply one of the construction of the words of the contract in the circumstances of its making. Once it is recognised, as the Board considers it inevitably must be, that the expressed consideration includes a reference to the plaintiffs' promise not to sell the shares before April 30, 1974 – a promise to be performed in the future, though given in the past – it is not possible to treat the defendants' promise of indemnity as independent of the plaintiffs' antecedent promise, given at [Lau's] request, not to sell. The promise of indemnity was given because at the time of the main agreement the parties intended that [Lau] should confer upon the plaintiffs the benefit of his protection against a fall in price. When the subsidiary agreement was cancelled, all were well aware that the plaintiffs were still to have the benefit of his protection as consideration for the restriction on selling. It matters not whether the indemnity thus given be regarded as the best evidence of the benefit intended to be conferred in return for the promise not to sell, or as the positive bargain which fixes the benefit on the faith of which the promise was given – though where, as here, the subject is a written contract, the better analysis is probably that of the positive bargain." Their Lordships, therefore, accept the submission that the contract itself states a valid consideration for the promise of indemnity.

NOTES

1. Although Lord Scarman spoke of three conditions for there being good consideration even though a promise is only given later, it is the first two that defeat the 'past consideration' objection in showing that there has been consideration throughout. (The third, that the promise must be legally enforceable, is superfluous in the sense that it is applicable to all promises). The first two conditions were here satisfied because the earlier promise made by the claimants to Fu Chip not to sell the shares was made at the defendants' request; and it was understood throughout that, in return for their promise not to sell, the claimants would be protected in some way by the defendants against a drop in share price.
2. For the parts of the judgment dealing with the other two issues, see below, 103, on pre-existing duty and consideration, and 743 on economic duress.

(3) Consideration and the Promise to Perform, or Performance of, a Pre-existing Duty

(a) Pre-existing Duty Imposed by the General Law (ie a Non-contractual Duty)

Collins v Godefroy (1831) 1 B & Ad 950, King's Bench

In a trial of a civil action brought by Godefroy against Dalton, Godefroy had Collins subpoenaed to attend to give evidence as a witness and promised to pay him a guinea a day as his fee for attending. Collins brought an action against Godefroy claiming

six guineas for his six days' attendance (although he was never actually called to the witness box). The claim failed on the basis that there was no consideration for the promise because Collins was bound by the general law to attend court to give evidence when subpoenaed.

Lord Tenterden CJ: If it be a duty imposed by law upon a party regularly subpoenaed, to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration. We think that such a duty is imposed by law; and on consideration of…the cases which have been decided on this subject, we are all of opinion that a party cannot maintain an action for compensation for loss of time in attending a trial as a witness. We are aware of the practice which has prevailed in certain cases, of allowing, as costs between party and party, so much per day for the attendance of professional men; but that practice cannot alter the law. What the effect of our decision may be, is not for our consideration. We think, on principle, that an action does not lie for a compensation to a witness for loss of time in attendance under a subpoena.

NOTES AND QUESTIONS

1. Leaving the issue of consideration to one side, is there any reason of public policy why one might object to a witness of fact being remunerated by a party for attending court to give evidence?
2. Under the modern law a witness of fact, required to attend court in a civil action, is entitled to be compensated but *not* remunerated by the person calling him for expenses and loss incurred, including loss of earnings; and indeed by Civil Procedure Rule 34.7 a witness must be offered or paid, at the time of service of a witness summons, a sum to cover travelling expenses to and from court and to compensate for loss of time.

Glasbrook Brothers Ltd v Glamorgan County Council [1925] AC 270, House of Lords

During a miners' strike, the defendants' colliery manager (Mr James) requested that police should be billeted at the colliery so as to ensure that the colliery was kept open. The police superintendent thought that adequate protection could be given by having a mobile force ready, which could move quickly to the colliery in the event of trouble. But he agreed to the billeting of 70 policemen at the colliery on the terms that the defendants (the owners of the colliery) would pay for them at certain specified rates. After the strike was over, the defendants refused to pay as agreed arguing that the police had been under a duty to provide adequate policing so that there was no consideration for the promise to pay for the billeting of the police. The majority (3–2) of the House of Lords rejected that argument holding that the police had gone beyond their public duty so that there was good consideration for the promise to pay.

Viscount Cave LC: No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury; and the public, who pay for this protection through the rates and taxes, cannot lawfully be called upon to make a further payment for that which is their right. …But it has always been recognized that, where

individuals desire that services of a special kind which, though not within the obligations of a police authority, can most effectively be rendered by them, should be performed by members of the police force, the police authorities may (to use an expression which is found in the Police Pensions Act, 1890) "lend" the services of constables for that purpose in consideration of payment. Instances are the lending of constables on the occasions of large gatherings in and outside private premises, as on the occasions of weddings, athletic or boxing contests or race meetings, and the provision of constables at large railway stations. …There may be services rendered by the police which, although not within the scope of their absolute obligations to the public, may yet fall within their powers, and in such cases public policy does not forbid their performance

…

I conclude, therefore, that the practice of lending constables for special duty in consideration of payment is not illegal or against public policy; and I pass to the second question – namely, whether in this particular case the lending of the seventy constables to be billeted in the appellants' colliery was a legitimate application of the principle. In this connection I think it important to bear in mind exactly what it was that the learned trial judge had to decide. It was no part of his duty to say – nor did he purport to say – whether in his judgment the billeting of the seventy men at the colliery was necessary for the prevention of violence or the protection of the mines from criminal injury. The duty of determining such questions is cast by law, not upon the Courts after the event, but upon the police authorities at the time when the decision has to be taken; and a Court which attempted to review such a decision from the point of view of its wisdom or prudence would (I think) be exceeding its proper functions. The question for the Court was whether on July 9, 1921, the police authorities, acting reasonably and in good faith, considered a police garrison at the colliery necessary for the protection of life and property from violence, or, in other words, whether the decision of the chief constable in refusing special protection unless paid for was such a decision as a man in his position and with his duties could reasonably take. If in the judgment of the police authorities, formed reasonably and in good faith, the garrison was necessary for the protection of life and property, then they were not entitled to make a charge for it, for that would be to exact a payment for the performance of a duty which they clearly owed to the appellants and their servants; but if they thought the garrison a superfluity and only acceded to Mr. James' request with a view to meeting his wishes, then in my opinion they were entitled to treat the garrison duty as special duty and to charge for it. Now, upon this point the Divisional Superintendent Colonel Smith, who was a highly experienced officer, gave specific and detailed evidence; and the learned judge having seen him in the witness box and heard his examination and cross-examination accepted his evidence upon the point, as the following extract from the judgment shows: "Colonel Smith says that if the matter had been left entirely to him without this requisition, he would have protected this colliery, and he would have protected it amply, but in quite a different way, and I accept his evidence that that is so. He would not have sent this garrison there…"

…

Upon the whole matter, I have come to the conclusion that the decision of the learned trial judge and of the Court of Appeal was right…

Viscount Finlay and **Lord Shaw of Dunfermline** delivered speeches concurring with Viscount Cave LC. **Lord Carson** and **Lord Blanesburgh** dissented holding that the police were doing no more than their duty in being billeted at the colliery so that the promise to pay was not supported by consideration.

NOTES AND QUESTIONS

1. The different approaches between the judges were in relation to whether or not the police were going beyond their public duty. It was implicit in the speeches of the majority, as well as the minority, that there would have been no consideration for

the promise to pay had the police merely been performing their duty to do what was necessary to protect the public.

2. Irrespective of the concept of consideration, what is objectionable in public policy terms in a police force charging for the performance of its duty to protect the public?

Ward v Byham [1956] 1 WLR 496, Court of Appeal

When the unmarried parents of an illegitimate child, Carol, split up, the father wrote to the mother as follows: 'I am prepared to let you have Carol and pay you up to £1 a week allowance for her providing you can prove that she will be well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you.' The child went to live with the mother and the father paid the £1 a week for seven months until the mother married. She brought an action against him for the £1 a week. The action succeeded, the Court of Appeal holding that the mother's looking after the child (albeit, in Denning LJ's view, merely performing her statutory duty) constituted good consideration for the father's promise.

Denning LJ: The mother now brings this action, claiming that the father should pay her £1 per week, even though she herself has married. The only point taken before us in answer to the claim is that it is said that there was no consideration for the promise by the father to pay £1 a week: because the mother, when she looked after the child, was only doing that which she was legally bound to do, and that is no consideration in law. …

It is quite clear that by statute the mother of an illegitimate child is bound to maintain it: whereas the father is under no such obligation. (See section 42 of the National Assistance Act, 1948.)…

I approach the case, therefore, on the footing that the mother, in looking after the child, is only doing what she is legally bound to do. Even so, I think that there was sufficient consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for the father to have the child looked after by the mother as by a neighbour. If he gets the benefit for which he stipulated, he ought to honour his promise; and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child.

I regard the father's promise in this case as what is sometimes called a unilateral contract, a promise in return for an act, a promise by the father to pay £1 a week in return for the mother's looking after the child. Once the mother embarked on the task of looking after the child, there was a binding contract. So long as she looked after the child, she would be entitled to £1 a week.

Morris LJ: Mr. Lane [counsel for the father] submits that there was a duty on the mother to support the child; that no affiliation proceedings were in prospect or were contemplated; and that the effect of the arrangement that followed the letter was that the father was merely agreeing to pay a bounty to the mother.

It seems to me that the terms of the letter negative those submissions…

It seems to me… that the father was saying, in effect: Irrespective of what may be the strict legal position, what I am asking is that you shall prove that Carol will be well looked after and happy, and also that you must agree that Carol is to be allowed to decide for herself whether or not she wishes to come and live with you. If those conditions were fulfilled the father was agreeable to pay. Upon those terms, which in fact became operative, the father agreed to pay

£1 a week. In my judgment, there was ample consideration there to be found for his promise, which I think was binding.

Parker LJ concurred.

NOTES AND QUESTIONS

1. What was the difference in approach between Denning LJ and Morris LJ?
2. Morris LJ's approach indicates again—see above, 91—that consideration need not be of economic value.

Williams v Williams [1957] 1 WLR 148, Court of Appeal

A wife deserted her husband. A few months later the parties agreed that the husband would pay the wife £1 10s a week for their joint lives so long as the wife led a chaste life. The wife promised to use that sum for her maintenance and agreed not to pledge her husband's credit. When the husband later stopped paying, the wife sued for arrears of the promised maintenance. He argued that there was no consideration for his promise because a wife who deserts her husband is not entitled to be maintained by him or to pledge his credit. The Court of Appeal rejected that argument holding that the wife was providing consideration (albeit that, in Denning LJ's view, she was merely promising to perform her legal duty to maintain herself).

Denning LJ: [I]n promising to maintain herself whilst she was in desertion, the wife was only promising to do that which she was already bound to do. Nevertheless, a promise to perform an existing duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest. Suppose that this agreement had never been made, and the wife had made no promise to maintain herself and did not do so. She might then have sought and received public assistance or have pledged her husband's credit with tradesmen: in which case the National Assistance Board might have summoned him before the magistrates, or the tradesmen might have sued him in the county court. It is true that he would have an answer to those claims because she was in desertion, but nevertheless he would be put to all the trouble, worry and expense of defending himself against them. By paying her 30*s.* a week and taking this promise from her that she will maintain herself and will not pledge his credit, he has an added safeguard to protect himself from all this worry, trouble and expense. That is a benefit to him which is good consideration for his promise to pay maintenance. That was the view which appealed to the county court judge: and I must say that it appeals to me also.

There is another ground on which good consideration can be found. Although the wife was in desertion, nevertheless it must be remembered that desertion is never irrevocable. It was open to her to come back at any time. Her right to maintenance was not lost by the desertion. It was only suspended. If she made a genuine offer to return which he rejected, she would have been entitled to maintenance from him. She could apply to the magistrates or the High Court for an order in her favour. If she did so, however, whilst this agreement was in force, the 30*s.* would be regarded as prima facie the correct figure. It is a benefit to the husband for it to be so regarded, and that is sufficient consideration to support his promise.

I construe this agreement as a promise by the husband to pay his wife 30*s.* a week in consideration of her promise to maintain herself during the time she is living separate from him, whether due to her own fault or not. The wife cannot throw over the agreement and seek more maintenance from him unless new circumstances arise making it reasonable to allow her

to depart from it. The husband cannot throw it over unless they resume married life together (in which case it will by inference be rescinded) or they are divorced (in which case it is a post-nuptial settlement and can be varied accordingly), or perhaps other circumstances arise not envisaged at the time of the agreement. Nothing of that kind has, however, occurred here. The husband must honour his promise.

Hodson LJ: It was urged by Mr. Edmund Davies, on behalf of the wife, that …it was a valid consideration even if the wife was in desertion, because it was some benefit to the husband to be protected from the embarrassment of invalid claims against him. For my part, I would prefer not to rest my judgment upon that, because once it is conceded that there is no basis for a claim by a wife, no consideration for giving an indemnity by the wife appears to me to emerge. But it is unnecessary to express any concluded opinion upon that matter, since I am entirely in agreement with my Lord on the other point – that this desertion by the wife did not destroy her right to be maintained but only suspended it.

Morris LJ gave a judgment concurring with Hodson LJ.

NOTE

Denning LJ's approach in this case, while not supported by the other two judges, elaborates on what he said in *Ward v Byham*. He explains why, despite the pre-existing duty, there is a benefit to the promisor (ie an added safeguard of performance of the duty); and he also inserts the qualification that there must be nothing contrary to the public interest in upholding the promise (as there was in, eg, *Collins v Godefroy*).

(b) Pre-existing Duty under a Contract with a Third Party

Shadwell v Shadwell (1860) 9 CB (NS) 159, Common Bench

An uncle wrote to his nephew as follows: 'I am glad to hear of your intended marriage with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay to you one hundred and fifty pounds yearly during my life, and until your annual income derived from your profession of a Chancery barrister shall amount to six hundred guineas, of which your own admission will be the only evidence that I shall receive or require.' On the uncle's death, the nephew alleged that the uncle had not paid him in full during the uncle's lifetime and he claimed the arrears from the uncle's estate. In allowing the claim, it was held that the uncle's promise was supported by good consideration constituted by the nephew marrying Ellen Nicholl.

Erle CJ: Now do these facts shew that the promise was in consideration either of a loss to be sustained by the plaintiff or a benefit to be derived from the plaintiff to the uncle, at his, the uncle's, request? My answer is in the affirmative.

First, do these facts shew a loss sustained by the plaintiff at his uncle's request? When I answer this in the affirmative, I am aware that a man's marriage with the woman of his choice is in one sense a boon, and in that sense the reverse of a loss: yet, as between the plaintiff and the party promising to supply an income to support the marriage, it may well be also a loss. The plaintiff may have made a most material change in his position, and induced the object of his affection to do the same, and may have incurred pecuniary liabilities resulting in embarrassments which would be in every sense a loss if the income which had been promised should be

withheld; and, if the promise was made in order to induce the parties to marry, the promise so made would be in legal effect a request to marry.

Secondly, do these facts shew a benefit derived from the plaintiff to the uncle, at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood and the interest in the settlement of his nephew which the uncle declares. The marriage primarily affects the parties thereto; but in a secondary degree it may be an object of interest to a near relative, and in that sense a benefit to him. This benefit is also derived from the plaintiff at the uncle's request. If the promise of the annuity was intended as an inducement to the marriage, and the averment that the plaintiff, relying on the promise, married, is an averment that the promise was one inducement to the marriage, this is the consideration averred in the declaration; and it appears to me to be expressed in the letter, construed with the surrounding circumstances.

Byles J (dissenting): Marriage of the plaintiff at the testator's express request would be no doubt an ample consideration. But marriage of the plaintiff without the testator's request is no consideration to the testator.

…

Was the marriage at the testator's request? Express request there was none. Can any request be implied? The only words from which it can be contended that it is to be implied, are the words "I am glad to hear of your intended marriage with Ellen Nicholl." But it appears…that the marriage had already been agreed on, and that the testator knew it. These words, therefore, seem to me to import no more than the satisfaction of the testator at the engagement,—an accomplished fact. No request can, as it seems to me, be gathered from them. And, further, how does it appear that the testator's implied request, if it should be implied, or his promise, if that promise alone would suffice, or both together, were intended to cause the marriage or did cause it, so that the marriage can be said to have taken place at the testator's request? or, in other words, in consequence of that request?

It seems to me not only that this does not appear, but that the contrary appears; for, the plaintiff before the letter had already bound himself to marry, by placing himself not only under a moral but under a legal objection to marry; and the testator knew it.

The well-known cases which have been cited at the bar in support of the position that a promise based on the consideration of doing that which a man is already bound to do is invalid, apply in this case. And it is not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to the defendant. It may have been an obligation to a third person…The reason why the doing what a man is already bound to do is no consideration is, not only because such a consideration is in judgment of law of no value, but because a man can hardly he allowed to say that the prior legal obligation was not his determining motive. But, whether he can be allowed to say so or not, the plaintiff does not say so here. He does, indeed, make an attempt to meet this difficulty by alleging…that he married relying on the testator's promise: but he shrinks from alleging, that, though he had promised to marry before the testator's promise to him, nevertheless he would have broken his engagement and would not have married without the testator's promise. A man may rely on encouragements to the performance of his duty, who yet is prepared to do his duty without those encouragements. At the utmost the allegation that he relied on the testator's promise seems to me to import no more than that he believed the testator would be as good as his word.

It appears to me, for these reasons, that this letter is no more than a letter of kindness, creating no legal obligation

Keating J concurred with Erle CJ.

NOTES AND QUESTIONS

1. This case is commonly cited as authority for the proposition that a promise to perform, or performance of, what one is already bound to do under a contract with a third party is good consideration for a promise (of payment). This is because, at the time, a promise to marry was a legally binding contract. Therefore the decision of the majority, in expressly accepting that the nephew's marriage was good consideration for the uncle's promise, implicitly accepted that consideration can comprise promising or doing what one is already contractually bound to a third party to do. Byles J in his dissenting judgment expressly referred to the pre-existing duty as an additional reason for there being no consideration.
2. The main point considered by the judges, and on which they disagreed, was the factual one of whether the uncle had requested the nephew to marry Ellen Nicholl. If no such request had been made, it is clear that all the judges would have decided that the promise to pay was not supported by consideration.
3. Is this case another illustration (see above, 91) of the irrelevance of the consideration being of economic value to the promisor?
4. Although not discussed by the judges, do you consider that the parties had an intention to create legal relations?

Scotson v Pegg (1861) 6 H & N 295, Court of Exchequer

The claimants had promised, under a contract with a third party (X), to deliver a cargo of coal to the defendant. The defendant then agreed with the claimants that, 'in consideration' of the claimants delivering the coal to the defendant, the defendant would unload it at a stated rate. The defendant failed to unload the coal at the stated rate as promised and the claimants sued him. The question at issue was whether the defendant's promise to unload was supported by the consideration of the claimants delivering the coal to the defendant given that the claimants were already contractually bound (under the previous contract with X) to deliver the coal. It was held that that was good consideration so that the claim succeeded.

Martin B: [T]he ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. Here the benefit is the delivery of the coals to the defendant. It is consistent with the declaration that there may have been some dispute as to the defendant's right to have the coals, or it may be that the plaintiffs detained them for demurrage, in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship. Then is it any answer that the plaintiffs had entered into a prior contract with other persons to deliver the coals to their order upon the same terms, and that the defendant was a stranger to that contract? In my opinion it is not. We must deal with this case as if no prior contract had been entered into. Suppose the plaintiffs had no chance of getting their money from the other persons who might perhaps have become bankrupt. The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order.

Wilde B: I am also of the opinion that the plaintiffs are entitled to judgment. The plaintiffs say, that in consideration that they would deliver to the defendant a cargo of coals from their ship, the defendant promised to discharge the cargo in a certain way. The defendant, in answer,

says, "You made a previous contract with other persons that they should discharge the cargo in the same way, and therefore there is no consideration for my promise." But why is there no consideration? It is said, because the plaintiffs, in delivering the coals are only performing that which they were already bound to do. But to say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another. But if a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principle, it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons.

NOTE

Although the consideration here was the delivery of the coal (ie the *performance* of the pre-existing duty) Wilde B makes clear that a promise to perform one's pre-existing duty under a contract with a third party would also constitute good consideration.

PaO On v Lau Yiu Long [1980] AC 614, Privy Council

The facts have been set out above, at 93–94. After dealing with the past consideration issue, Lord Scarman turned to whether there was any difficulty—he held not—if one viewed the consideration for the defendants' (the Laus') promise to indemnify the claimants (the Paos) as being the claimants' promise to the defendants not to sell even though the claimants had already made the same promise to Fu Chip (a third party).

Lord Scarman (giving the judgment of himself, **Lord Wilberforce**, **Viscount Dilhorne**, **Lord Simon of Glaisdale** and **Lord Salmon**): The extrinsic evidence in this case shows that the consideration for the promise of indemnity, while it included the cancellation of the subsidiary agreement, was primarily the promise given by the plaintiffs to the defendants, to perform their contract with Fu Chip, which included the undertaking not to sell 60 per cent. of the shares allotted to them before April 30, 1974. Thus the real consideration for the indemnity was the promise to perform, or the performance of, the plaintiffs' pre-existing contractual obligations to Fu Chip. This promise was perfectly consistent with the consideration stated in the guarantee. Indeed, it reinforces it by imposing upon the plaintiffs an obligation now owed to the defendants to do what, at [Lau's] request, they had agreed with Fu Chip to do.

Their Lordships do not doubt that a promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration. In *New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd. (The Eurymedon)* [1975] A.C. 154, 168 the rule and the reason for the rule were stated:

> "An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration … the promisee obtains the benefit of a direct obligation... This proposition is illustrated and supported by *Scotson v. Pegg* (1861) 6 H. & N. 295 which their Lordships consider to be good law."

Unless, therefore, the guarantee was void as having been made for an illegal consideration or voidable on the ground of economic duress, the extrinsic evidence establishes that it was supported by valid consideration.

NOTES AND QUESTIONS

1. *New Zealand Shipping v Satterthwaite, The Eurymedon* [1975] AC 154, here relied on by Lord Scarman, primarily dealt with an issue on privity and is set out below, at 512. For present purposes the relevant facts were that there was a contract between a firm of stevedores and a carrier by which the stevedores were to unload a cargo from a ship. The shipper then promised whoever was unloading that it would exclude its entitlement to sue for any damage negligently caused to the cargo in the unloading. The stevedores negligently damaged the cargo while unloading it. One question was whether the shipper was bound by its promise to exclude liability. The Privy Council held that it was so bound because the consideration for that promise by the shipper was the unloading of the cargo by the stevedores. The fact that the stevedores were already bound to unload the cargo by their contract with the carrier did not invalidate the consideration.
2. The reason given for there being good consideration, even though a claimant is only doing what it was already bound to do under a contract with a third party, was that 'the promisee obtains the benefit of a direct obligation'. For similar reasoning in the context of a pre-existing non-contractual duty, see Denning LJ's judgment in *Williams v Williams* (above, 99). Can that same reasoning be applied where the pre-existing duty is owed under a contract with the promisor?

(c) Pre-existing Duty under a Contract with the Promisor

(i) Promising to pay more for a pre-existing duty

Stilk v Myrick (1809) 2 Camp 317, King's Bench

The claimant, a seaman, had contracted with the defendant, the master of a ship, to sail to the Baltic and back at a wage of £5 per month. When the ship arrived at Cronstadt, two of the crew deserted. As the captain could not find any substitutes he promised the rest of the crew to divide the wages of the two deserters between them if they would work the ship home short-handed. After the ship had been safely brought back to England, the claimant asked for his extra wages but this was refused by the master. The claimant's action failed because the members of the crew provided no good consideration by performing what they were already contractually bound to do.

Lord Ellenborough: I think *Harris v. Watson* was rightly decided, but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all that they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were

wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month.

NOTES AND QUESTIONS

1. In *Harris v Watson* (1791) Peake 102, where the master had agreed to pay extra wages to a seaman to navigate the ship out of danger, the basis for the decision that the promise to pay extra was not binding was that this would open the door to duress by seamen against masters. It would appear, therefore, that in *Stilk v Myrick* Lord Ellenborough was distancing himself from that policy explanation by instead resting his decision on the lack of consideration. Unfortunately there is some doubt about this because in a different report of *Stilk v Myrick* (1809) 6 Esp 129 it is said that Lord Ellenborough 'recognised the principle of the case of *Harris v Watson* as founded on just and proper policy'. Campbell's report (which is the one we have used above) is generally regarded as more likely to be accurate than that of Espinasse. However, in a detailed examination of the two reports and of the historical background, **P Luther 'Campbell, Espinasse and the Sailors' (1999) 19 *Legal Studies* 526** argues that to ignore Espinasse's report would be over-simplistic.
2. If in this sort of case the real justification for refusing to enforce the promise is the fear of opening the door to duress, would it be clearer to distinguish consideration and duress by saying that there is a contract supported by consideration but that it may be voidable in a particular case because of duress? On the facts of *Stilk v Myrick* there was no evidence that the seamen had made any demand, express or implied, for extra wages so that it is unlikely that duress could have been established.
3. In *Stilk v Myrick* and *Harris v Watson* the members of the crew were not promising to do more than they were already bound contractually to do: ie the contract required the crew to deal with emergencies. For a case where consideration was found because the sailors were being required to go outside their existing contract, see *Hartley v Ponsonby* (1857) 7 El & Bl 572. See also *North Ocean Shipping v Hyundai, The Atlantic Baron,* below, 741, where the promisee, a ship-builder, was agreeing to do something more than it was already bound to do in return for the promise of an extra 10 per cent payment.

Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1, Court of Appeal

The defendants had contracted to refurbish a block of 27 flats. They sub-contracted the carpentry work to the claimant for a price of £20,000 payable in instalments. After he and his men had completed some of the work and been paid £16,200, the claimant ran into financial difficulties, not least because the price was too low. The defendants were

liable to a penalty clause in the head-contract with the employer if the work was not completed on time. The defendants therefore called a meeting with the claimant and (on 9 April 1986) promised to pay him an extra £10,300 at £575 per flat to complete the work on time. The claimant and his men continued with the work and substantially completed eight flats, but then the claimant refused to continue because he had received only one further payment of £1,500. The defendants brought in other carpenters to complete the work. In the claimant's action for the money he alleged was owing, the defendants denied that they had any liability to pay any part of the extra money because their promise to pay extra was not supported by any consideration. The trial judge held that the claimant was entitled to £4,600 (consisting of 8 x £575) less certain deductions for defective and incomplete items plus a reasonable proportion of the £2,200 that was outstanding from the original contract sum. In dismissing the defendants' appeal, the Court of Appeal held that the claimant had provided good consideration for the promise of extra money even though he was merely performing his pre-existing contractual duty to the defendants.

Glidewell LJ: *Was there consideration for the defendants' promise made on 9 April 1986 to pay an additional price at the rate of £575 per completed flat?*

The judge made the following findings of fact which are relevant on this issue. (i) The subcontract price agreed was too low to enable the plaintiff to operate satisfactorily and at a profit. Mr. Cottrell, the defendants' surveyor, agreed that this was so. (ii) Mr. Roffey (managing director of the defendants) was persuaded by Mr. Cottrell that the defendants should pay a bonus to the plaintiff. The figure agreed at the meeting on 9 April 1986 was £10,300.

The judge quoted and accepted the evidence of Mr. Cottrell to the effect that a main contractor who agrees too low a price with a subcontractor is acting contrary to his own interests. He will never get the job finished without paying more money. The judge therefore concluded:

> "In my view where the original subcontract price is too low, and the parties subsequently agree that additional moneys shall be paid to the subcontractor, this agreement is in the interests of both parties. This is what happened in the present case, and in my opinion the agreement of 9 April 1986 does not fail for lack of consideration."

In his address to us, Mr. Evans outlined the benefits to his clients, the defendants, which arose from their agreement to pay the additional £10,300 as: (i) seeking to ensure that the plaintiff continued work and did not stop in breach of the subcontract; (ii) avoiding the penalty for delay; and (iii) avoiding the trouble and expense of engaging other people to complete the carpentry work.

However, Mr. Evans submits that, though his clients may have derived, or hoped to derive, practical benefits from their agreement to pay the "bonus," they derived no benefit in law, since the plaintiff was promising to do no more than he was already bound to do by his subcontract, i.e., continue with the carpentry work and complete it on time. Thus there was no consideration for the agreement. Mr. Evans relies on the principle of law which, traditionally, is based on the decision in *Stilk v. Myrick* (1809) 2 Camp. 317. …In *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd* [1979] Q.B. 705, Mocatta J. regarded the general principle of the decision in *Stilk v. Myrick*, 2 Camp. 317 as still being good law. He referred to two earlier decisions of this court, dealing with wholly different subjects, in which Denning L.J. sought to escape from the confines of the rule, but was not accompanied in his attempt by the other members of the court.

[*He then considered* Ward v Byham *and concluded:*] As I read the judgment of Morris L.J., he

and Parker L.J. held that, though in maintaining the child the plaintiff was doing no more than she was obliged to do by law, nevertheless her promise that the child would be well looked after and happy was a practical benefit to the father which amounted to consideration for his promise. [*After also considering* Williams v Williams *he continued:*]

It was suggested to us in argument that, since the development of the doctrine of promissory estoppel, it may well be possible for a person to whom a promise has been made, on which he has relied, to make an additional payment for services which he is in any event bound to render under an existing contract or by operation of law, to show that the promisor is estopped from claiming that there was no consideration for his promise. However, the application of the doctrine of promissory estoppel to facts such as those of the present case has not yet been fully developed: see e.g. the judgment of Lloyd J. in *Syros Shipping Co. S.A v. Elaghill Trading Co.*[1980] 2 Lloyd's Rep. 390, 392. Moreover, this point was not argued in the court below, nor was it more than adumbrated before us. Interesting though it is, no reliance can in my view be placed on this concept in the present case.

There is, however, another legal concept of relatively recent development which is relevant, namely, that of economic duress. Clearly if a subcontractor has agreed to undertake work at a fixed price, and before he has completed the work declines to continue with it unless the contractor agrees to pay an increased price, the subcontractor may be held guilty of securing the contractor's promise by taking unfair advantage of the difficulties he will cause if he does not complete the work. In such a case an agreement to pay an increased price may well be voidable because it was entered into under duress. Thus this concept may provide another answer in law to the question of policy which has troubled the courts since before *Stilk v. Myrick*, 2 Camp. 317, and no doubt led at the date of that decision to a rigid adherence to the doctrine of consideration.

This possible application of the concept of economic duress was referred to by Lord Scarman, delivering the judgment of the Judicial Committee of the Privy Council in *Pao On v. Lau Yiu Long* [1980] A.C. 614. [*He considered that case and continued:*]

Accordingly, following the view of the majority in *Ward v. Byham* [1956] 1 W.L.R. 496 and of the whole court in *Williams v. Williams* [1957] 1 W.L.R. 148 and that of the Privy Council in *Pao On* [1980] A.C. 614 the present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

As I have said, Mr. Evans accepts that in the present case by promising to pay the extra £10,300 his client secured benefits. There is no finding, and no suggestion, that in this case the promise was given as a result of fraud or duress. If it be objected that the propositions above contravene the principle in *Stilk v. Myrick*, 2 Camp. 317, I answer that in my view they do not; they refine, and limit the application of that principle, but they leave the principle unscathed e.g. where B secures no benefit by his promise. It is not in my view surprising that a principle enunciated in relation to the rigours of seafaring life during the Napoleonic wars should be subjected during the succeeding 180 years to a process of refinement and limitation in its application in the present day. It is therefore my opinion that on his findings of fact in the present case, the judge was entitled to hold, as he did, that the defendants' promise to pay the extra £10,300 was supported by valuable consideration, and thus constituted an enforceable agreement.

Russell LJ: There is no hint in [the relevant passage in the defendants'] pleading that the

defendants were subjected to any duress to make the agreement or that their promise to pay the extra £10,300 lacked consideration. As the judge found, the plaintiff must have continued work in the belief that he would be paid £575 as he finished each of the 18 uncompleted flats (although the arithmetic is not precisely accurate). For their part the defendants recorded the new terms in their ledger. Can the defendants now escape liability on the ground that the plaintiff undertook to do no more than he had originally contracted to do although, quite clearly, the defendants, on 9 April 1986, were prepared to make the payment and only declined to do so at a later stage. It would certainly be unconscionable if this were to be their legal entitlement.

The submissions advanced on both sides before this court ranged over a wide field. They went far beyond the pleadings, and indeed it is worth noticing that the absence of consideration was never pleaded, although argued before the assistant recorder, Mr. Rupert Jackson Q.C. Speaking for myself – and I notice it is touched upon in the judgment of Glidewell L.J. – I would have welcomed the development of argument, if it could have been properly raised in this court, on the basis that there was here an estoppel and that the defendants, in the circumstances prevailing, were precluded from raising the defence that their undertaking to pay the extra £10,300 was not binding. For example, in *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] Q.B. 84 Robert Goff J. said, at p. 105: "it is in my judgment not of itself a bar to an estoppel that its effect may be to enable a party to enforce a cause of action which, without the estoppel, would not exist. It is sometimes said that an estoppel cannot create a cause of action, or that an estoppel can only act as a shield, not as a sword. In a sense this is true – in the sense that estoppel is not, as a contract is, a source of legal obligation. But as Lord Denning M.R. pointed out in *Crabb v. Arun District Council* [1976] Ch. 179, 187, an estoppel may have the effect that a party can enforce a cause of action which, without the estoppel, he would not be able to do."

[*He then cited from the judgments of Lord Denning MR and Brandon LJ in the Court of Appeal in the* Amalgamated Investment *case, see below, 129, and continued:*]

These citations demonstrate that whilst consideration remains a fundamental requirement before a contract not under seal can be enforced, the policy of the law in its search to do justice between the parties has developed considerably since the early 19th century when *Stilk v. Myrick*, 2 Camp. 317 was decided by Lord Ellenborough C.J. In the late 20th century I do not believe that the rigid approach to the concept of consideration to be found in *Stilk v. Myrick* is either necessary or desirable. Consideration there must still be but, in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect the true intention of the parties.

What was the true intention of the parties when they arrived at the agreement pleaded by the defendants …? The plaintiff had got into financial difficulties. The defendants, through their employee Mr. Cottrell, recognised the price that had been agreed originally with the plaintiff was less than what Mr. Cottrell himself regarded as a reasonable price. There was a desire on Mr. Cottrell's part to retain the services of the plaintiff so that the work could be completed without the need to employ another subcontractor. There was further a need to replace what had hitherto been a haphazard method of payment by a more formalised scheme involving the payment of a specified sum on the completion of each flat. These were all advantages accruing to the defendants which can fairly be said to have been in consideration of their undertaking to pay the additional £10,300. True it was that the plaintiff did not undertake to do any work additional to that which he had originally undertaken to do but the terms upon which he was to carry out the work were varied and, in my judgment, that variation was supported by consideration which a pragmatic approach to the true relationship between the parties readily demonstrates.

For my part I wish to make it plain that I do not base my judgment upon any reservation as to the correctness of the law long ago enunciated in *Stilk v. Myrick.* A gratuitous promise, pure and simple, remains unenforceable unless given under seal. But where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage arising

out of the continuing relationship with the promisee the new bargain will not fail for want of consideration.

Purchas LJ: The point of some difficulty which arises on this appeal is whether the judge was correct in his conclusion that the agreement reached on 9 April did not fail for lack of consideration because the principle established by the old cases of *Stilk v. Myrick,* 2 Camp. 317 approving *Harris v. Watson*, Peake 102 did not apply. Mr. Makey, who appeared for the plaintiff, was bold enough to submit that *Harris v. Watson*, albeit a decision of Lord Kenyon, was a case tried at the Guildhall at nisi prius in the Court of King's Bench and that *Stilk v. Myrick* was a decision also at nisi prius albeit a judgment of no less a judge than Lord Ellenborough C.J. and that, therefore, this court was bound by neither authority. I feel I must say at once that, for my part, I would not be prepared to overrule two cases of such veneration involving judgments of judges of such distinction except on the strongest possible grounds since they form a pillar stone of the law of contract which has been observed over the years and is still recognised in principle in recent authority: see the decision of *Stilk v. Myrick* to be found in *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd* [1979] Q.B. 705, 712 *per* Mocatta J. With respect, I agree with his view of the two judgments by Denning L.J. in *Ward v. Byham* [1956] 1 W.L.R. 496 and *Williams v. Williams* [1957] 1 W.L.R. 148 in concluding that these judgments do not provide a sound basis for avoiding the rule in *Stilk v. Myrick*, 2 Camp. 317. Although this rule has been the subject of some criticism it is still clearly recognised in current textbooks of authority: see *Chitty on Contracts,* 28th ed. (1989) and *Cheshire, Fifoot and Furmston's Law of Contract,* 11th ed. (1986). …

In my judgment, therefore, the rule in *Stilk v. Myrick*, 2 Camp. 317 remains valid as a matter of principle, namely that a contract not under seal must be supported by consideration. Thus, where the agreement upon which reliance is placed provides that an extra payment is to be made for work to be done by the payee which he is already obliged to perform then unless some other consideration is detected to support the agreement to pay the extra sum that agreement will not be enforceable. The two cases, *Harris v. Watson*, Peake 102 and *Stilk v. Myrick*, 2 Camp. 317 involved circumstances of a very special nature, namely the extraordinary conditions existing at the turn of the 18th century under which seamen had to serve their contracts of employment on the high seas. There were strong public policy grounds at that time to protect the master and owners of a ship from being held to ransom by disaffected crews. Thus, the decision that the promise to pay extra wages even in the circumstances established in those cases, was not supported by consideration is readily understandable. Of course, conditions today on the high seas have changed dramatically and it is at least questionable, as Mr. Makey submitted, whether these cases might not well have been decided differently if they were tried today. The modern cases tend to depend more upon the defence of duress in a commercial context rather than lack of consideration for the second agreement. In the present case the question of duress does not arise. The initiative in coming to the agreement of 9 April came from Mr. Cottrell and not from the plaintiff. It would not, therefore, lie in the defendants' mouth to assert a defence of duress. Nevertheless, the court is more ready in the presence of this defence being available in the commercial context to look for mutual advantages which would amount to sufficient consideration to support the second agreement under which the extra money is paid. Although the passage cited below from the speech of Lord Hailsham of St. Marylebone L.C. in *Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd*. [1972] A.C. 741 was strictly obiter dicta I respectfully adopt it as an indication of the approach to be made in modern times. The case involved an agreement to vary the currency in which the buyer's obligation should be met which was subsequently affected by a depreciation in the currency involved. The case was decided on an issue of estoppel but Lord Hailsham of St. Marylebone L.C. commented on the other issue, namely the variation of the original contract in the following terms, at pp. 757-758:

"If the exchange of letters was not variation, I believe it was nothing. The buyers asked for

a variation in the mode of discharge of a contract of sale. If the proposal meant what they claimed, and was accepted and acted upon, I venture to think that the vendors would have been bound by their acceptance at least until they gave reasonable notice to terminate, and I imagine that a modern court would have found no difficulty in discovering consideration for such a promise. Business men know their own business best even when they appear to grant an indulgence, and in the present case I do not think that there would have been insuperable difficulty in spelling out consideration from the earlier correspondence."

…

The question must be posed: what consideration has moved from the plaintiff to support the promise to pay the extra £10,300 added to the lump sum provision? In the particular circumstances which I have outlined above, there was clearly a commercial advantage to both sides from a pragmatic point of view in reaching the agreement of 9 April. The defendants were on risk that as a result of the bargain they had struck the plaintiff would not or indeed possibly could not comply with his existing obligations without further finance. As a result of the agreement the defendants secured their position commercially. There was, however, no obligation added to the contractual duties imposed upon the plaintiff under the original contract. Prima facie this would appear to be a classic *Stilk v. Myrick* case. It was, however, open to the plaintiff to be in deliberate breach of the contract in order to "cut his losses" commercially. In normal circumstances the suggestion that a contracting party can rely upon his own breach to establish consideration is distinctly unattractive. In many cases it obviously would be and if there was any element of duress brought upon the other contracting party under the modern development of this branch of the law the proposed breaker of the contract would not benefit. With some hesitation and comforted by the passage from the speech of Lord Hailsham of St. Marylebone L.C. in *Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd.* [1972] A.C. 741, 757-758, to which I have referred, I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment. In my judgment, on the facts as found by the judge, he was entitled to reach the conclusion that consideration existed and in those circumstances I would not disturb that finding. … For these reasons and for the reasons which have already been given by Glidewell L.J. I would dismiss this appeal.

NOTES AND QUESTIONS

1. This is the most discussed modern case on the doctrine of consideration. It appears to lay down that a promise (by A) to perform one's existing contractual duty to the promisor (B) is good consideration for B's promise of extra money where B thereby obtains a 'practical benefit'. On these facts the practical benefit appeared to be the greater assurance of the work being completed on time and, thereby, B's avoidance of the penalty clause (although Russell LJ did also mention as beneficial to B a more formalised payment system). But why is there not always a practical benefit to the promisor (who promises more for the promisee's performance of his existing duty) because of the greater assurance that the promisee will complete full performance of the contract? If B, a commercial party, did not think it was benefiting, why would it promise to pay more? Although the judges disputed this, it is strongly arguable that their reasoning *is* tantamount to saying that a promise to perform a pre-existing duty is good consideration for B's promise to pay more, thereby obviating the principle in *Stilk v Myrick.* In *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3481 (QB) (below, 752) David Donaldson

QC, while considering himself bound to apply *Williams v Roffey*, said, at [41], 'Though all three judges claimed to accept the rule in *Stilk v Myrick* it is wholly unclear how the decision in *Williams v Roffey* can be reconciled with it'.

2. In a wide-ranging analysis, **M Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes' in *Good Faith and Fault in Contract Law* (eds J Beatson and D Friedmann, 1995) 123** criticises the 'illusory notion' (at 150), relied on in *Williams v Roffey*, that a 'practical benefit' is consideration. But in a subsequent essay, **M Chen-Wishart, 'A Bird in the Hand: Consideration and Contract Modifications' in *Contract Formation and Parties* (eds A Burrows and E Peel, 2010) 89**, she has modified her position by arguing that the solution to the problem of consideration posed by the promise to pay more (or accept less) is to recognise that what the promisor is paying more for (or accepting less for) is *the performance* of the pre-existing duty, not the promise to perform. In other words, the new contract in question is a unilateral not a bilateral contract. There was, therefore, consideration for a unilateral contract in, eg, *Williams v Roffey*. '[A] complete answer is provided by supplementing the original bilateral contract with a collateral unilateral contract to pay more (or accept less) *if* actual performance is rendered' (at 96).
3. An alternative approach to the problem in *Williams v Roffey*, which would have led to the same result, is to say that consideration is not needed for the variation, as opposed to the formation, of a contract. That was the approach adopted in section 2-209(1) of the United States Uniform Commercial Code. It has recently been put forward as an alternative to the *Roffey* approach, but without ultimately making a choice between them, by the New Zealand Court of Appeal in *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23. Which is the better approach?
4. Although not disentangled in the judgments in *Williams v Roffey*, it is clearer to separate the issues of consideration and duress. That is, if the real concern is the fear of duress where B promises more for A to do what A is already bound to do, that should be tackled directly through applying the defence of duress rather than indirectly through denying that there is consideration. On the facts, there was no duress because the initiative for the extra payment came from B not A. A had made no threat and was genuinely in financial difficulties. For the law on duress, see below, Chapter 14, and for this case in that context, 751.
5. Does *Williams v Roffey* support Denning LJ's approach in *Williams v Williams* (see above, 99)?
6. *Williams v Roffey* concerned a promise to pay more for full performance of a pre-existing duty. In *Foakes v Beer*, which we shall consider next, it was laid down that a promise to accept less than full performance (ie to accept part payment of a debt in satisfaction of the whole) is not supported by consideration. *Foakes v Beer* was not mentioned in *Williams v Roffey* but there is real doubt whether the two cases can be reconciled as a matter of principle.

(ii) Promising to accept less than a pre-existing duty

Foakes v Beer (1884) 9 App Cas 605, House of Lords

In August 1875, the defendant Mrs Beer, had obtained a court judgment against Dr Foakes for £2090 19s. Mrs Beer was entitled to interest on that sum until paid off. Dr Foakes asked for time to pay off the money and Mrs Beer agreed that, if he paid £500 immediately and £150 on two occasions each year until the whole sum had been paid, then she 'would not take any proceedings whatever on the said judgment'. Dr Foakes paid off the debt in accordance with the terms of that agreement. Mrs Beer then brought an action claiming the interest on the debt. Assuming that the true construction of the agreement was that Mrs Beer (the respondent) had promised to forgo her interest on the debt, the House of Lords nevertheless held that that promise was not binding on her because it was not supported by consideration. She was therefore entitled to the interest on the debt.

Earl of Selborne LC: But the question remains, whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent, unless she received consideration for it from the appellant, or unless, though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed, except a present payment of £500, on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of £150 each, at the times therein mentioned; much less did he give any new security, in the shape of negotiable paper, or in any other form. The promise de futuro was only that of the respondent, that if the half-yearly payments of £150 each were regularly paid, she would "take no proceedings whatever on the judgment." No doubt if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not (in my opinion) be a consideration for the relinquishment of interest and discharge of the judgment, unless the payment of the £500, at the time of signing the agreement, was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction, so long as any future instalment remained payable; and I do not see how any mere payments on account could operate in law as a satisfaction ad interim, conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything, in fact, done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her.

The question, therefore, is nakedly raised by this appeal, whether your Lordships are now prepared, not only to overrule, as contrary to law, the doctrine stated by Sir Edward Coke to have been laid down by all the judges of the Common Pleas in *Pinnel's Case* 5 Rep. 117 a in 1602, and repeated in his note to Littleton, sect. 344 Co. Litt. 212 b, but to treat a prospective agreement, not under seal, for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made; the case not being one of a composition with a common debtor, agreed to, inter se, by several creditors. …The doctrine itself, as laid down by Sir Edward Coke, may have been criticised, as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do right, if you were now to reverse, as erroneous, a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.

The doctrine, as stated in *Pinnel's Case*, is "that payment of a lesser sum on the day" (it would of course be the same after the day), "in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." As stated in Coke Littleton, 212 (b), it is, "where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater;" adding (what is beyond controversy), that an acquittance under seal, in full satisfaction of the whole, would (under like circumstances) be valid and binding.

The distinction between the effect of a deed under seal, and that of an agreement by parol, or by writing not under seal, may seem arbitrary, but it is established in our law; nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be (as, in the actual state of the law, I think it is), whether consideration is, or is not, given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be, generally, binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. …What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to *Cumber v. Wane* 1 Sm. L. C. 8th ed. 366, is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration far any other sort of agreement not under seal.

Lord Blackburn: [I]t is necessary to consider the ground on which the Court of Appeal did base their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking £500 in satisfaction of the whole £2090 19*s*, subject to the condition that unless the balance of the principal debt was paid by the instalments, the whole might be enforced with interest. If, instead of £500 in money, it had been a horse valued at £500, or a promissory note for £500, the authorities are that it would have been a good satisfaction, but it is said to be otherwise as it was money.

This is a question, I think, of difficulty.

In Coke, Littleton 212 b, Lord Coke says: "where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because *it is apparent* that a lesser sum of money *cannot* be a satisfaction of a greater. … If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." For this he cites *Pinnel's Case* 5 Rep. 117 a .That was an action on a bond for £16, conditioned for the payment of £8 10*s.* on the 11th of November 1600. Plea that defendant, at plaintiff's request, before the said day, to wit, on the 1st of October, paid to the plaintiff £5 2*s.* 2*d*, which the plaintiff accepted in full satisfaction of the £8 10*s.* The plaintiff had judgment for the insufficient pleading. But though this was so, Lord Coke reports that it was resolved by the whole Court of Common Pleas "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, &c., in satisfaction is good, for it shall be intended that a horse, hawk, or robe,

&c., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material; so if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction for the whole £10, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the Court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction it was his own fault. And that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.

There is a second point stated to have been resolved, viz.: "That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." This was certainly not necessary for the decision of the case; but though the resolution of the Court of Common Pleas was only a dictum, it seems to me clear that Lord Coke deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake, and there certainly are cases in which great judges have treated the dictum in *Pinnel's Case* as good law.

For instance, in *Sibree v. Tripp* 15 M. & W. 33, 37, Parke, B. says, "It is clear if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder." And Alderson, B. in the same case says, "It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand which ought to be paid, is payment only in part, because it is not one bargain, but two; viz. payment of part, and an agreement without consideration to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled." After such strong expressions of opinion, I doubt much whether any judge sitting in a Court of the first instance would be justified in treating the question as open. But as this has very seldom, if at all, been the ground of the decision even in a Court of the first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this House, I did think it open in your Lordships' House to reconsider this question. And, notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges.

…

What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper.

Lord Watson and **Lord Fitzgerald** disagreed that, on the true construction of the agreement, Mrs Beer had promised to forgo interest on the debt. But if that were the true construction, they agreed that there was no consideration for the promise to forgo interest.

NOTES AND QUESTIONS

1. Do you agree with Lord Blackburn's doubts about the proposition that a lesser payment than what is owed cannot be a benefit to the promisor?
2. Is it not rather artificial to say that fresh consideration would exist if a lesser payment were to be made at an earlier time or at a different place?
3. If the 'no consideration' rule here acts to protect creditors against unscrupulous debtors, is there a better way of pursuing that policy than denying that there is consideration?
4. Does *Foakes v Beer* remain good law in the light of (i) *Williams v Roffey* (on which see the next case); and (ii) the development of promissory estoppel (see below, 117–51, esp 121 note 3, and 151 note 2)?
5. **J O'Sullivan, 'In Defence of *Foakes v Beer*' [1996] *CLJ* 219** controversially argues that there are good reasons to distinguish the treatment of promises to pay more from promises to accept less; they are not straightforward mirror images of each other. But if that distinction is regarded as untenable, so that either *Foakes v Beer* or *Williams v Roffey* must 'go', she tentatively argues that it should be *Roffey* that is reconsidered.

Re Selectmove Ltd [1995] 1 WLR 474, Court of Appeal

In July 1991, Selectmove Ltd owed the Inland Revenue substantial sums of income tax and national insurance contributions. At a meeting between Mr ffooks, managing director of Selectmove, and Mr Polland, a collector of taxes, Mr ffooks proposed that the company would pay future tax as it fell due and that the arrears would be paid off at a rate of £1000 per month. Mr Polland said that he would have to seek approval from his superiors for that proposal and that he would let the company know if it was unacceptable. The company heard nothing, but in October 1991 the Revenue wrote demanding payment in full of the arrears of £25,650 and threatening a winding-up petition if payment was not made. That winding-up petition was eventually made in September 1992. The company argued that the petition should be dismissed on the basis of the agreement reached in July 1991. That argument failed and the company's appeal was dismissed, the Court of Appeal taking the view that no agreement had been reached (because Mr Polland had not bound the Inland Revenue) and, in any event, there was no consideration to support that agreement.

Peter Gibson LJ: There are two elements to the consideration which the company claims was provided by it to the revenue. One is the promise to pay off its existing liability by instalments from 1 February 1992. The other is the promise to pay future P.A.Y.E. and N.I.C. as they fell due. Mr. Nugee [counsel for the company] suggested that implicit in the latter was the promise to continue trading. But that cannot be spelt out of Mr. ffooks's evidence as to what he agreed with Mr. Polland. Accordingly the second element is no more than a promise to pay that which it was bound to pay under the fiscal legislation at the date at which it was bound to make such

payment. If the first element is not good consideration, I do not see why the second element should be either.

The judge held that the case fell within the principle of *Foakes v. Beer* (1884) 9 App.Cas. 605. In that case a judgment debtor and creditor agreed that in consideration of the debtor paying part of the judgment debt and costs immediately and the remainder by instalments the creditor would not take any proceedings on the judgment. The House of Lords held that the agreement was nudum pactum, being without consideration, and did not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest on the judgment. Although their Lordships were unanimous in the result, that case is notable for the powerful speech of Lord Blackburn, who made plain his disagreement with the course the law had taken in and since *Pinnel's Case* (1602) 5 Co.Rep. 117a and which the House of Lords in *Foakes v. Beer*, 9 App.Cas. 605, decided should not be reversed. Lord Blackburn expressed his conviction, at p. 622, that

> "all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole."

Yet it is clear that the House of Lords decided that a practical benefit of that nature is not good consideration in law.

Foakes v. Beer has been followed and applied in numerous cases subsequently, of which I shall mention two. In *Vanbergen v. St. Edmunds Properties Ltd.* [1933] 2 K.B. 223, 231, Lord Hanworth M.R. said:

> "It is a well established principle that a promise to pay a sum which the debtor is already bound by law to pay to the promisee does not afford any consideration to support the contract."

More recently in *D. & C. Builders Ltd. v. Rees* [1966] 2 Q.B. 617 this court also applied *Foakes v. Beer,* Danckwerts L.J. saying, at p. 626, that the case

> "settled definitely the rule of law that payment of a lesser sum than the amount of a debt due cannot be a satisfaction of the debt, unless there is some benefit to the creditor added so that there is an accord and satisfaction."

Mr. Nugee however submitted that an additional benefit to the revenue was conferred by the agreement in that the revenue stood to derive practical benefits therefrom: it was likely to recover more from not enforcing its debt against the company, which was known to be in financial difficulties, than from putting the company into liquidation. He pointed to the fact that the company did in fact pay its further P.A.Y.E. and N.I.C. liabilities and £7,000 of its arrears. He relied on the decision of this court in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1 for the proposition that a promise to perform an existing obligation can amount to good consideration provided that there are practical benefits to the promisee.

…

Mr. Nugee submitted that, although Glidewell L.J. in terms confined his remarks to a case where B is to do the work for or supply goods or services to A, the same principle must apply where B's obligation is to pay A, and he referred to an article by Adams and Brownsword, "Contract, Consideration and the Critical Path" (1990) 53 M.L.R. 536, 539-540 which suggests that *Foakes v. Beer*, 9 App.Cas. 605 might need reconsideration. I see the force of the argument, but the difficulty that I feel with it is that, if the principle of *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1 is to be extended to an obligation to make payment, it would in effect leave the principle in *Foakes v. Beer*, 9 App.Cas. 605 without any application. When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see

a practical benefit to himself in so doing. In the absence of authority there would be much to be said for the enforceability of such a contract. But that was a matter expressly considered in *Foakes v. Beer* yet held not to constitute good consideration in law. *Foakes v. Beer* was not even referred to in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1, and it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of *Williams's* case to any circumstances governed by the principle of *Foakes v. Beer* 9 App.Cas. 605. If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by Parliament after consideration by the Law Commission.

In my judgment, the judge was right to hold that if there was an agreement between the company and the revenue it was unenforceable for want of consideration.

Stuart-Smith LJ and **Balcombe LJ** concurred.

NOTES AND QUESTIONS

1. This case clarifies that *Foakes v Beer* remains good law despite *Williams v Roffey*. But it does nothing to resolve the tension between those two cases. Are there good reasons to distinguish the treatment of promises to pay more from promises to accept less?
2. In examining *Re Selectmove,* **E Peel, 'Part Payment of a Debt is No Consideration' (1994) 100 *LQR* 353** looks at what options are open for reforming the present incoherent law on acceptance of part payment of a debt: eg, applying *Williams v Roffey*, promissory estoppel, or economic duress.
3. For a judicial view that promises to accept less (in this case, a landlord's promise to accept a reduced rent) cannot in principle be distinguished from promises to pay more, and that *Williams v Roffey* not *Foakes v Beer* is the way forward, see the decision of the Supreme Court of New South Wales (Santow J) in *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723. In England, see *Anangel Atlas Compania Naviera SA v Ishikawajima – Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526: here *Williams v Roffey* was applied by Hirst J in holding that a shipbuilder's promise to reduce the price payable by the buyers was supported by the good consideration of the buyers accepting the ship's delivery on the day fixed even though the buyers were already bound to do that. However, the force of Hirst J's decision is diminished by there being no mention of *Foakes v Beer*.

2. PROMISSORY ESTOPPEL

Even though a promise is not supported by consideration, it may be binding (at least to some extent) under the doctrine of promissory estoppel. After looking at the emergence of this doctrine, we shall consider its ingredients. These may be said to be that: it is not a cause of action; the promise must be clear and unequivocal; the promisee must have relied (*quaere* detrimentally) on the promise; the promisee must not have induced the making of the promise by inequitable conduct; and that it is open to debate whether the doctrine's effect is extinctive rather than suspensory only.

Introductory reading: E McKendrick, *Contract Law* (10th edn, 2013) 5.22–5.28.

(1) The Emergence of Promissory Estoppel

Hughes v Metropolitan Rly Co (1877) 2 App Cas 439, House of Lords

In October 1874, the claimant landlord had given the defendant tenant six months' notice to repair the premises. The landlord was entitled to the forfeit of the lease if the notice was not complied with. The tenant replied agreeing to do the repairs but also suggesting that the landlord might like to buy the defendant's interest in the property and that it would defer any repairs until it heard from the landlord. On 1 December the landlord wrote back to say that it might be interested depending on the price but, on 31 December, negotiations about the price broke down. There were no further relevant communications between the parties until 19 April 1875 when the tenant wrote to say that, as negotiations had broken down, it would now be carrying out the repairs. The six months' notice expired on 22 April 1875 and, on 28 April, the landlord served a writ of ejectment on the tenant. The tenant completed the repairs in June 1875. The House of Lords, dismissing the landlord's appeal, held that the tenant was entitled to relief against forfeiture. The notice to repair was in suspension for the duration of the negotiations. It did not revive until 31 December and the tenant had carried out the repairs within six months of that date.

Lord Cairns LC: [It] is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. My Lords, I repeat that I attribute to the Appellant no intention here to take advantage of, to lay a trap for, or to lull into false security those with whom he was dealing; but it appears to me that both parties by entering upon the negotiation which they entered upon, made it an inequitable thing that the exact period of six months dating from the month of October should afterwards be measured out as against the Respondents as the period during which the repairs must be executed.

Lords O'Hagan, Selborne, Blackburn and **Gordon** delivered concurring speeches.

NOTES AND QUESTIONS

1. This was the most important of the earlier cases relied on by Denning J in *High Trees* (see below, 119). The landlord's right to evict the tenant for non-repair was held to have been suspended because the landlord had led the tenant to believe that it would not be exercising that right while negotiations for the possible purchase of the lease by the landlord from the tenant were pending.
2. Why was the principle in this case not applied, so as to reach a different result, in *Foakes v Beer* (above, 112)?

Central London Property Trust Ltd v High Trees House Ltd [1947] 1 KB 130, King's Bench Division

In 1937 the claimant company (the landlord) let a block of flats to the defendant company (the tenant) on a 99-year lease at an annual ground rent of £2,500. With the Second World War approaching, many people left London and the defendant was unable to sub-let all the flats. Discussions took place between the directors of the claimant and defendant companies, and in January 1940 it was agreed that the ground rent should be reduced as from the commencement of the lease to £1,250 per annum. The defendant paid the reduced ground rent until the beginning of 1945. In September 1945 the receiver of the claimant company realised that the rent stated in the lease was £2,500 and on 21 September 1945, he wrote to the defendant demanding the full amount for the future and some arrears. A friendly action was brought to test the position in law, whereby arrears of £1,250 were claimed comprising the two quarterly sums of £625 that had been due at the end of September 1945 and December 1945. While allowing that claim, Denning J held that the promise to accept less rent while war-time conditions prevailed was binding despite the absence of consideration.

Denning J: If I were to consider this matter without regard to recent developments in the law, there is no doubt that had the plaintiffs claimed it, they would have been entitled to recover ground rent at the rate of 2,500*l.* a year from the beginning of the term, since the lease under which it was payable was a lease under seal which, according to the old common law, could not be varied by an agreement by parol (whether in writing or not), but only by deed. Equity, however stepped in, and said that if there has been a variation of a deed by a simple contract (which in the case of a lease required to be in writing would have to be evidenced by writing), the courts may give effect to it as is shown in *Berry v. Berry* [1929] 2 K. B. 316. That equitable doctrine, however, could hardly apply in the present case because the variation here might be said to have been made without consideration. With regard to estoppel, the representation made in relation to reducing the rent, was not a representation of an existing fact. It was a representation, in effect, as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. Such a representation would not give rise to an estoppel, because, as was said in *Jorden v. Money* (1854) 5 H. L. C. 185, a representation as to the future must be embodied as a contract or be nothing.

But what is the position in view of developments in the law in recent years? The law has not been standing still since *Jorden v. Money*. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They 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 cases to which I particularly desire to refer are: *Fenner v. Blake* [1900] 1 Q. B. 426, *In re Wickham* (1917) 34 T. L. R. 158, *Re William Porter & Co., Ld* [1937] 2 All E. R. 361 and *Buttery v. Pickard* [1946] W. N. 25. As I have said they are not cases of estoppel in the strict sense. They are really promises – promises intended to be binding, intended to be acted on, and in fact acted on. *Jorden v. Money* can be distinguished, because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. 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. The decisions are a natural result of the fusion of law and equity: for the cases of *Hughes v. Metropolitan Ry. Co* (1877) 2 App.

Cas. 439, 448, *Birmingham and District Land Co. v. London & North Western Ry. Co.* (1888) 40 Ch. D. 268, 286 and *Salisbury (Marquess) v. Gilmore* [1942] 2 K. B. 38, 51, afford a sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in *Foakes v. Beer* (1884) 9 App. Cas. 605. At this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect. It is to be noticed that in the Sixth Interim Report of the Law Revision Committee, pars. 35, 40, it is recommended that such a promise as that to which I have referred, should be enforceable in law even though no consideration for it has been given by the promisee. It seems to me that, to the extent I have mentioned that result has now been achieved by the decisions of the courts.

I am satisfied that a promise such as that to which I have referred is binding and the only question remaining for my consideration is the scope of the promise in the present case. I am satisfied on all the evidence that the promise here was that the ground rent should be reduced to 1,250*l.* a year as a temporary expedient while the block of flats was not fully, or substantially fully let, owing to the conditions prevailing. That means that the reduction in the rent applied throughout the years down to the end of 1944, but early in 1945 it is plain that the flats were fully let, and, indeed the rents received from them (many of them not being affected by the Rent Restrictions Acts), were increased beyond the figure at which it was originally contemplated that they would be let. At all events the rent from them must have been very considerable. I find that the conditions prevailing at the time when the reduction in rent was made, had completely passed away by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made, namely, when the flats were only partially let, and that it did not extend any further than that. When the flats became fully let, early in 1945, the reduction ceased to apply.

In those circumstances, under the law as I hold it, it seems to me that rent is payable at the full rate for the quarters ending September 29 and December 25, 1945.

If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope of the representation. I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply. Here it was binding as covering the period down to the early part of 1945, and as from that time full rent is payable.

I therefore give judgment for the plaintiff company for the amount claimed.

NOTES AND QUESTIONS

1. This is Lord Denning's most celebrated case. In it he lays down and applies what has subsequently been labelled the doctrine of promissory (or equitable) estoppel. As had been established in *Jorden v Money* (1854) 5 HL 185, the traditional form of estoppel—estoppel by representation—does not apply to a representation as to the future, ie a promise. But Denning J steered round that restriction by relying on an analogous promissory principle having been applied in equity in cases such as *Hughes v Metropolitan Rly Co* (above, 118).
2. Did Denning J regard the principle he was applying as suspensory or extinctive? What would the position have been if the claimant landlord in this action had been claiming arrears of rent for the period 1940–44? What would the position have

been if the landlord in 1942 had given notice that it would require full rent for the future?

3. By focussing on promises (to forgo one's rights) rather than representations of fact, Denning J recognised that his principle clashed with the need for consideration laid down by the House of Lords in *Foakes v Beer* (above, 112). How did he explain away that decision? Is there any other way in which the two decisions can be reconciled?
4. It is perhaps surprising that there was no attempt to resolve the apparent conflict between *Foakes v Beer* and promissory estoppel in *Re Selectmove Ltd* (above, 115). As we have seen, *Foakes v Beer* was applied; yet the Court of Appeal also implied, in a part of the judgment not set out above, that promissory estoppel was applicable because it was only on the facts that it ruled out a separate argument based on that doctrine. (The relevant facts ruling out the doctrine were that, first, Mr Polland could not bind the Inland Revenue and, secondly, the company had not stuck by what it had itself promised it would do in paying off future tax as it fell due so it would not have been inequitable or unfair for the Revenue to withdraw from a promise to forgo some of the tax owed.)

Collier v P & MJ Wright (Holdings) Ltd
[2007] EWCA Civ 1329, [2008] 1 WLR 643, Court of Appeal

Collier (C) and his two business partners, Broadfoot (B) and Flute (F), had been loaned money by Wright (Holdings) Ltd (W). W had obtained a judgment against them jointly for £46,800 in relation to the loan. That debt was to be paid off in monthly instalments of £600. After 18 months or so, W allegedly told C that, if he carried on paying off his £200 share each month, W would 'chase' B and F, ie that C would be treated as a separate, rather than a joint, debtor. C continued to pay monthly instalments of £200 for the next 4 or so years and thereby paid off a one-third share totalling £15,600. As B and F had become bankrupt, W then demanded payment of the full balance of the £46,800 (plus interest) from C. Under the statutory rules governing his potential bankruptcy, C sought to set aside the demand of W. The Court of Appeal held that, although applying *Foakes v Beer* (above, 112) and *Re Selectmove* (above, 115) there was no consideration provided by C for W's promise, C had a real prospect of successfully establishing at trial that promissory estoppel operated to extinguish W's right to the balance. W's demand was therefore set aside. The extracts below deal purely with promissory estoppel.

Arden LJ:

40 …In all the circumstances Mr Collier has, in my judgment, raised a triable issue as to promissory estoppel.

42 The facts of this case demonstrate that, if (1) a debtor offers to pay part only of the amount he owes; (2) the creditor voluntarily accepts that offer, and (3) in reliance on the creditor's acceptance the debtor pays that part of the amount he owes in full, the creditor will, by virtue of the doctrine of promissory estoppel, be bound to accept that sum in full and final satisfaction of the whole debt. For him to resile will of itself be inequitable. In addition, in these

circumstances, the promissory estoppel has the effect of extinguishing the creditor's right to the balance of the debt. This part of our law originated in the brilliant obiter dictum of Denning J in the *High Trees* case [1947] KB 130. To a significant degree it achieves in practical terms the recommendation of the Law Revision Committee chaired by Lord Wright MR in 1937.

Longmore LJ:

45 The first question is: what was the oral promise or representation made by Mr Wright to Mr Collier? Mr Collier says that Mr Wright's promise was that if Mr Collier continued to pay £200 per month the company would look to Mr Broadfoot and Mr Flute for their share and not to Mr Collier. I agree that it is arguable (just) that that constitutes agreement or representation by Mr Wright never to sue Mr Collier for the full judgment sum. It is also arguable that it is no more than a promise that the company will not look to Mr Collier while he continues to pay his share. One would expect an agreement permanently to forgo one's rights (especially rights founded on a judgment) to be much clearer than the agreement evidenced in this case. …

46 The second question is whether, even if the promise or representation is to be regarded [as] a permanent surrender of the company's rights, Mr Collier has relied on it in any meaningful way. The judge could find no evidence that he had. …

47 Nevertheless…it seems that on the authority of *D & C Builders Ltd v Rees* [1966] 2 QB 617 it can be a sufficient reliance for the purpose of promissory estoppel if a lesser payment is made as agreed. That does, however, require there to be an accord. No sufficient accord was proved in the *D & C Builders* case itself since the owner had taken advantage of the builder's desperate need for money. For the reasons I have given, I doubt if there was any true accord in this case because the true construction of the promise or representation may well be that there was only an agreement to suspend the exercise of the creditor's rights, not to forgo them permanently.

48 There is then a third question, namely whether it would be inequitable for the company to resile from its promise. That cannot be inquired into on this appeal, but I agree that it is arguable that it would be inequitable. There might, however, be much to be said on the other side. If, as Arden LJ puts it, the "brilliant obiter dictum" of Denning J in the *High Trees* case [1947] KB 130 did indeed substantially achieve in practical terms the recommendation of the Law Revision Committee chaired by Lord Wright MR in 1937, it is perhaps all the more important that agreements which are said to forgo a creditor's rights on a permanent basis should not be too benevolently construed.

49 I do, however, agree with Arden LJ that it is arguable that Mr Collier's promissory estoppel defence might succeed if there were to be a trial. …

Mummery LJ concurred.

NOTES

Arden LJ's approach in [42] is a bold and enlightened one and could prove very significant. But in assessing its impact, one should note that Longmore LJ was far more cautious; and that this was not a trial so that the court merely had to decide whether there was a triable issue on promissory estoppel. For the Law Revision Committee's 1937 Report, see below, 152.

(2) Promissory Estoppel Not a Cause of Action

Combe v Combe [1951] 2 KB 215, Court of Appeal

On a divorce, a husband (the defendant) agreed, in a solicitor's letter, to pay his wife £100 per annum free of tax. He made no payments to her at all. Several years later she sued him for the arrears of £675. Byrne J held that, while she could not recover for arrears beyond six years (because time-barred) she was entitled to six years' arrears (£600). Although she had provided no consideration for her husband's promise, the *High Trees* principle applied. This decision was overturned by the Court of Appeal which held that there was no consideration for the husband's promise and that the *High Trees* principle does not create a cause of action.

Denning LJ: Much as I am inclined to favour the principle stated in the *High Trees* case [1947] K. B. 130, it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties. That is the way it was put in *Hughes v. Metropolitan Railway* (1877) 2 App. Cas. 439, 448, the case in the House of Lords in which the principle was first stated, and in *Birmingham, etc., Land Company v. London and North-Western Railway Co* (1888) 40 Ch. D. 268, 286 the case in the Court of Appeal where the principle was enlarged. It is also implicit in all the modern cases in which the principle has been developed. Sometimes it is a plaintiff who is not allowed to insist on his strict legal rights. Thus, a creditor is not allowed to enforce a debt which he has deliberately agreed to waive, if the debtor has carried on business or in some other way changed his position in reliance on the waiver…On other occasions it is a defendant who is not allowed to insist on his strict legal rights. His conduct may be such as to debar him from relying on some condition, denying some allegation, or taking some other point in answer to the claim. Thus a government department, which had accepted a disease as due to war service, were not allowed afterwards to say it was not, seeing that the soldier, in reliance on the assurance, had abstained from getting further evidence about it: *Robertson v. Minister of Pensions* [1949] 1 K. B. 227. A buyer who had waived the contract date for delivery was not allowed afterwards to set up the stipulated time as an answer to the seller: *Charles Rickards Ld. v. Oppenhaim* [1951] 1 K. B. 149, 156. A tenant who had encroached on an adjoining building, asserting that it was comprised in the lease, was not allowed afterwards to say that it was not included in the lease: *J. F. Perrott & Co. Ld. v. Cohen* [1950] 1 K. B. 616, 621-3. A tenant who had lived in a house rent-free by permission of his landlord, thereby asserting that his original tenancy had ended, was not afterwards allowed to say that his original tenancy continued: *Foster v. Robinson* [1951] 1 K. B. 705 . In none of these cases was the defendant sued on the promise, assurance, or assertion as a cause of action in itself: he was sued for some other cause, for example, a pension or a breach of contract, and the promise, assurance or assertion only played a supplementary role – an important role, no doubt, but still a supplementary role. That is, I think, its true function. It may be part of a cause of action, but not a cause of action in itself.

The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.

Seeing that the principle never stands alone as giving a cause of action in itself, it can never

do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge. I fear that it was my failure to make this clear which misled Byrne, J., in the present case. He held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although, as he held, there was no consideration for it. That is not correct. The wife can only enforce it if there was consideration for it. That is, therefore, the real question in the case: was there sufficient consideration to support the promise?

If it were suggested that, in return for the husband's promise, the wife expressly or impliedly promised to forbear from applying to the court for maintenance – that is, a promise in return for a promise – there would clearly be no consideration, because the wife's promise was not binding on her and was therefore worth nothing. Notwithstanding her promise, she could always apply to the Divorce Court for maintenance – maybe only with leave – and no agreement by her could take away that right: *Hyman v. Hyman* [1929] A. C. 601, as interpreted by this court in *Gaisberg v. Storr* [1950] 1 K. B. 107.

There was, however, clearly no promise by the wife, express or implied, to forbear from applying to the court. All that happened was that she did in fact forbear – that is, she did an act in return for a promise. Is that sufficient consideration? Unilateral promises of this kind have long been enforced, so long as the act or forbearance is done on the faith of the promise and at the request of the promisor, express or implied. The act done is then in itself sufficient consideration for the promise, even though it arises ex post facto, as Parker, J., pointed out in *Wigan v. English and Scottish Law Life Assurance Association* [1909] 1 Ch. 291, 298. If the findings of Byrne, J., were accepted, they would be sufficient to bring this principle into play. His finding that the husband's promise was intended to be binding, intended to be acted upon, and was, in fact, acted on – although expressed to be a finding on the *High Trees* principle – is equivalent to a finding that there was consideration within this long settled rule, because it comes to the same thing expressed in different words: see *Oliver v. Davis* [1949] 2 K. B. 727. But my difficulty is to accept the finding of Byrne, J., that the promise was "intended to be acted upon". I cannot find any evidence of any intention by the husband that the wife should forbear from applying to the court for maintenance, or, in other words, any request by the husband, express or implied, that the wife should so forbear. He left her to apply if she wished to do so. She did not do so, and I am not surprised, because it is very unlikely that the Divorce Court would have then made any order in her favour, seeing that she had a bigger income than her husband. Her forbearance was not intended by him, nor was it done at his request. It was therefore no consideration.

It may be that the wife has suffered some detriment because, after forbearing to apply to the court for seven years, she might not now be given leave to apply…The court is, however, nowadays much more ready to give leave than it used to be…and I should have thought that, if she fell on hard times, she would still obtain leave. Assuming, however, that she has suffered some detriment by her forbearance, nevertheless, as the forbearance was not at the husband's request, it is no consideration. …

The doctrine of consideration is sometimes said to work injustice, but I see none in this case…I do not think it would be right for this wife, who is better off than her husband, to take no action for six or seven years and then come down on him for the whole 600*l.*

Asquith LJ: The judge has decided that, while the husband's promise was unsupported by any valid consideration, yet the principle in *Central London Property Trust Ld. v. High Trees House Ld.* [1947] 1 K. B. 130 entitles the wife to succeed. It is unnecessary to express any view as to the correctness of that decision, though I certainly must not be taken to be questioning it; and I would remark, in passing, that it seems to me a complete misconception to suppose that it struck at the roots of the doctrine of consideration. But assuming, without deciding, that it is good law, I do not think, however, that it helps the plaintiff at all. What that case decides is

that when a promise is given which (1.) is intended to create legal relations, (2.) is intended to be acted upon by the promisee, and (3.) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it. It does not, as I read it, decide that a promisee can sue on the promise. On the contrary, Denning, J., expressly stated the contrary. Neither in the *High Trees* case nor in *Minister of Pensions v. Robertson* [1949] 1 K. B. 227 (another decision of my Lord which is relied upon by the plaintiff) was an action brought by the promisee on the promise. In the first of those two cases the plaintiff was in effect the promisor or a person standing in the shoes of the promisor, while in the second the claim, though brought by the promisee, was brought upon a cause of action which was not the promise, but was an alleged statutory right.

[*Asquith LJ's judgment went on to deal with the question of consideration on which he concurred with Denning LJ.*]

Birkett LJ delivered a concurring judgment.

NOTES AND QUESTIONS

1. This was the first case to make clear that, in English law, promissory estoppel does not create a cause of action. This is sometimes expressed by saying that it operates only as a defence or, in a description approved by Birkett LJ in this case, as a 'shield and not a sword'. To found a cause of action a promise must therefore be supported by consideration (or made by deed). But, as Denning LJ's judgment clarified, this is not the same as saying that promissory estoppel can be used only by defendants and not claimants. What is essentially meant is that it applies only to promises to forgo one's existing rights.
2. Assuming that Mrs Combe had detrimentally relied on Mr Combe's promise of maintenance by not seeking maintenance from the courts, why was that not good consideration?

Crabb v Arun District Council [1976] Ch 179, Court of Appeal

The claimant owned land along the side of which was a road owned by the defendant council. The claimant had a right of access to the road at point A and a right of way over the road. He wished to divide his land into two to be sold off but to do that he would need another right of access at point B. At a meeting between the claimant, his architect (Mr Alford) and the defendant's representative, an agreement in principle was reached that the claimant would be given the second access at point B. The defendant erected a boundary fence and put gates at points A and B. The claimant then sold off that part of his land which had access point A so that for the rest of his land he was dependent on access point B. However, the defendant then fenced off access point B and refused to allow the claimant access unless he paid for it. The claimant brought an action seeking, first, a declaration that he had a right of access at point B and a right of way along the road and, secondly, an injunction restraining the defendant from interfering with those rights. The Court of Appeal, applying as a cause of action a form of estoppel (which Lord Denning MR categorised as proprietary estoppel), held that the action should succeed.

Lord Denning MR: When Mr. Millett, for the plaintiff, said that he put his case on an estoppel,

it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action. … The new rights and interests, so created by estoppel, in or over land, will be protected by the courts and in this way give rise to a cause of action. …

The basis of this proprietary estoppel—as indeed of promissory estoppel—is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as "estoppel." They spoke of it as "raising an equity." If I may expand what Lord Cairns L.C. said in *Hughes v. Metropolitan Railway Co.* (1877) 2 App.Cas. 439, 448: "it is the first principle upon which all courts of equity proceed," that it will prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.

…

The question then is: were the circumstances here such as to raise an equity in favour of the plaintiff? True the defendants on the deeds had the title to their land, free of any access at point B. But they led the plaintiff to believe that he had or would be granted a right of access at point B. At the meeting of July 26, 1967, Mr. Alford and the plaintiff told the defendants' representative that the plaintiff intended to split the two acres into two portions and wanted to have an access at point B for the back portion; and the defendants' representative agreed that he should have this access. …

The judge found that there was "no definite assurance" by the defendants' representative, and "no firm commitment," but only an "agreement in principle," meaning I suppose that, as Mr. Alford said, there were "some further processes" to be gone through before it would become binding. But if there were any such processes in the mind of the parties, the subsequent conduct of the defendants was such as to dispense with them. The defendants actually put up the gates at point B at considerable expense. That certainly led the plaintiff to believe that they agreed that he should have the right of access through point B without more ado.

The judge also said that, to establish this equity or estoppel, the defendants must have known that the plaintiff was selling the front portion without reserving a right of access for the back portion. I do not think this was necessary. The defendants knew that the plaintiff *intended* to sell the two portions separately and that he would need an access at point B as well as point A. Seeing that they knew of his intention – and they did nothing to disabuse him but rather confirmed it by erecting gates at point B – it was their conduct which led him to act as he did: and this raises an equity in his favour against them.

In the circumstances it seems to me inequitable that the council should insist on their strict title as they did; and to take the high-handed action of pulling down the gates without a word of warning: and to demand of the plaintiff £3,000 as the price for the easement. If he had moved at once for an injunction in aid of his equity – to prevent them removing the gates – I think he should have been granted it. But he did not do so. He tried to negotiate terms, but these failing, the action has come for trial. And we have the question: in what way now should the equity be satisfied?

Here equity is displayed at its most flexible, see *Snell's Principles of Equity*, 27th ed. (1973), p. 568, and the illustrations there given. If the matter had been finally settled in 1967, I should have thought that, although nothing was said at the meeting in July 1967, nevertheless it would be quite reasonable for the defendants to ask the plaintiff to pay something for the access at point B, perhaps – and I am guessing – some hundreds of pounds. But, as Mr. Millett pointed out in the course of the argument, because of the defendants' conduct, the back land has been landlocked. It has been sterile and rendered useless for five or six years: and the plaintiff has been unable to deal with it during that time. This loss to him can be taken into account. And at the present time, it seems to me that, in order to satisfy the equity, the plaintiff should have the right of access at point B without paying anything for it.

I would, therefore, hold that the plaintiff, as the owner of the back portion, has a right of access at point B over the verge on to Mill Park Road and a right of way along that road to

Hook Lane without paying compensation. I would allow the appeal and declare that he has an easement, accordingly.

Lawton LJ: I ask myself whether any principle of equity applies. I am grateful to Mr. Lightman [counsel for the defendant] for having drawn our attention this morning to *Ramsden v. Dyson,* L.R. 1 H.L. 129. If there had been any doubt in my mind about the application of principles of equity to the facts as I have recounted them, that case has dissipated it. As was pointed out to Mr. Lightman in the course of the argument, if one changes the parties in a passage in the speech of Lord Cranworth L.C. into the names of the parties in this case, one has a case for the intervention of equity which Lord Cranworth regarded with favour. That passage, at p. 142, is in these terms:

> "… if I had come to the conclusion that Thornton, when he erected his building in 1837, did so in the belief that he had against Sir John an absolute right to the lease he claims, and that Sir John knew that he was proceeding on that mistaken notion, and did not interfere to set him right, I should have been much disposed to say that he was entitled to the relief he sought."

Mr. Lightman's answer was that the plaintiff had not got an absolute right to have the gates put up. For the reasons I have stated, I am of the opinion that he had, in the sense that he had been given a firm undertaking. The defendants, knowing that the plaintiff intended to sell part of this land, stood by when he did so and without a word of warning allowed him to surround himself with a useless piece of land from which there was no exit. I would allow this appeal and grant relief in the terms indicated by Lord Denning M.R.

Scarman LJ: I agree that the appeal should be allowed. The plaintiff and the defendants are adjoining landowners. The plaintiff asserts that he has a right of way over the defendants' land giving access from his land to the public highway. Without this access his land is in fact landlocked, but, for reasons which clearly appear from the narration of the facts already given by my Lords, the plaintiff cannot claim a right of way by necessity. The plaintiff has no grant. He has the benefit of no enforceable contract. He has no prescriptive right. His case has to be that the defendants are estopped by their conduct from denying him a right of access over their land to the public highway. If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties. In such a case I think it is now well settled law that the court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?…Such therefore I believe to be the nature of the inquiry that the courts have to conduct in a case of this sort. In pursuit of that inquiry I do not find helpful the distinction between promissory and proprietary estoppel. This distinction may indeed be valuable to those who have to teach or expound the law; but I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance.

…

I come now to consider the first of the three questions which I think in a case such as this the court have to consider. What is needed to establish an equity?...While *Ramsden v. Dyson* may properly be considered as the modern starting-point of the law of equitable estoppel, it was analysed and spelt out in a judgment of Fry J. in 1880 in *Willmott v. Barber* (1880) 15 Ch.D. 96, a decision to which Pennycuick V.-C. referred in his judgment. I agree with Pennycuick V.-C. in thinking that the passage from Fry J.'s judgment, from p. 105, is a valuable guide as to the matters of fact which have to be established in order that a plaintiff may establish this particular equity. Moreover, Mr. Lightman for the defendants sought to make a submission in reliance upon the judgment. Fry J. said, at pp. 105-106:

"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly," – if I may digress, this is the important element as far as this appeal is concerned – "the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right."

…

I have no doubt upon the facts of this case that the first four elements referred to by Fry J. exist. The question before the judge and now in this court is whether the fifth element is present: have the defendants, as possessor of the legal right, encouraged the plaintiff in the expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting their legal rights? [*Having decided that they had, Scarman LJ continued:*]

I turn now to the other two questions – the extent of the equity and the relief needed to satisfy it. There being no grant, no enforceable contract, no licence, I would analyse the minimum equity to do justice to the plaintiff as a right either to an easement or to a licence upon terms to be agreed. I do not think it is necessary to go further than that. Of course, going that far would support the equitable remedy of injunction which is sought in this action. If there is no agreement as to terms, if agreement fails to be obtained, the court can, in my judgment, and must, determine in these proceedings upon what terms the plaintiff should be put to enable him to have the benefit of the equitable right which he is held to have.

…

Had matters taken a different turn, I would without hesitation have said that the plaintiff should be put upon terms to be agreed if possible with the defendants, and, if not agreed, settled by the court. But as already mentioned by Lord Denning M.R. and Lawton L.J., there has been a history of delay, and indeed high-handedness, which it is impossible to disregard. In January 1969 the defendants, for reasons which no doubt they thought good at the time, without consulting the plaintiff, locked up his land. They removed not only the padlocks which he had put on the gates at point B, but the gates themselves. In their place they put a fence – rendering access impossible save by breaking down the fence. I am not disposed to consider whether or not the defendants are to be blamed in moral terms for what they did. I just do not know. But the effect of their action has been to sterilise the plaintiff's land; and for the reasons which I have endeavoured to give, such action was an infringement of an equitable right possessed by the plaintiff. It has involved him in loss, which has not been measured; but, since it amounted to sterilisation of an industrial estate for a very considerable period of time, it must surpass any sort of sum of money which the plaintiff ought reasonably, before it was done, to have paid the defendants in order to obtain an enforceable legal right. I think therefore that nothing should now be paid by the plaintiff and that he should receive at the hands of the court the belated protection of the equity that he has established. Reasonable terms, other than money payment, should be agreed: or, if not agreed, determined by the court.

For those reasons I also would allow the appeal.

NOTES AND QUESTIONS

1. Scarman LJ thought that it was unhelpful in deciding this case to categorise it as involving a proprietary, rather than a promissory, estoppel. But that is how this case has conventionally been analysed. As Lord Denning's judgment indicates, the difficulty otherwise is that this decision would clash with promissory estoppel not being a cause of action. It is well-established that proprietary estoppel—which concerns conferring rights over one's land (or, probably, one's goods)—does create a cause of action; and the cases primarily relied on by all the judges were proprietary estoppel cases.
2. Assuming that the law of estoppel does treat promises (and representations) as to rights over one's land (or goods) differently from other promises, can that different treatment be justified?
3. In an infamous pair of case-notes, Professor Atiyah clashed with Peter Millett QC (counsel for Mr Crabb and later a Law Lord) on the correct interpretation of *Crabb v Arun DC*. **P Atiyah, 'When is an Enforceable Agreement not a Contract? Answer: When it is an Equity' (1976) 92 *LQR* 174** argued that the invocation in *Crabb v Arun* of estoppel to enforce a promise was unnecessary because all the elements of a binding contract were present. In particular, consideration, in Atiyah's view, embraces any good reason to enforce a promise, including unrequested detriment. The case should therefore be seen as a contract case. It is needlessly complex to have two doctrines when one alone should suffice. Pleading equitable estoppel, rather than contract, achieved no different result. Applying a conventional view in response to Atiyah's 'interesting, if intemperate, note', **P Millett, 'Crabb v Arun DC – A Riposte' (1976) 92 *LQR* 342** argued that contract and equitable estoppel are significantly different. 'The apparent similarity of the results achieved…is…deceptive. The claims [in contract and estoppel] are different, require different facts to be proved and have different consequences' (at 346).
4. For recent examinations of proprietary estoppel by the House of Lords, see *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752; *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776.

Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84, Court of Appeal

The claimant (AIP) requested the defendant bank to make a loan to AIP's subsidiary (ANPP) in the Bahamas. AIP agreed with the bank, under a guarantee, that it would pay on demand all moneys owed to the bank by ANPP. No loan was directly made by the bank to ANPP under that arrangement but $3,250,000 was loaned (the 'Nassau loan') to ANPP by the bank's subsidiary in the Bahamas (Portsoken). AIP and the bank assumed that the guarantee applied in respect of the loan by Portsoken. But when the bank sought to enforce the guarantee (by withholding other moneys owed amounting to $750,000) in respect of non-payment of money owing on the loan from Portsoken, AIP argued that it was not liable on the guarantee and sought a declaration to that effect. Robert Goff J held that, while as a matter of interpretation of the contract the guarantee did not apply to the loan by Portsoken, AIP was estopped from denying that it did so

apply. The Court of Appeal disagreed on the construction of the agreement which, it held, did apply to the loan by Portsoken. However it agreed that, in any event, AIP was estopped from denying that the guarantee applied. We are here concerned solely with the estoppel point.

Lord Denning MR: When the parties to a contract are both under a common mistake as to the meaning or effect of it – and thereafter embark on a course of dealing on the footing of that mistake – thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them. …

The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

That general principle applies to this case. Both the plaintiffs and the bank proceeded for years on the basis of the underlying assumption that the guarantee of the plaintiffs applied to the $3,250,000 advanced … Their dealings in rearranging the portfolio, in releasing properties and moneys, were all conducted on that basis. On that basis the bank applied the surplus of $750,000 … in discharge of the obligations of the plaintiffs under the guarantee. It would be most unfair and unjust to allow the liquidator to depart from that basis and to claim back now the $750,000.

Brandon LJ: Two main arguments against the existence of an estoppel were advanced on behalf of the plaintiffs both before Robert Goff J. and before us. The first argument was that, since the bank came to hold its mistaken belief in the first place as a result of its own error alone, and the plaintiffs had at most innocently acquiesced in that belief which it also held, there was no representation by the plaintiffs to the bank on which an estoppel could be founded. The second argument was that, in the present case, the bank was seeking to use estoppel not as a shield, but as a sword, and that that was something which the law of estoppel did not permit.

I consider first the argument based on the origin of the bank's mistaken belief. In my opinion this argument is founded on an erroneous view of the kind of estoppel which is relevant in this case.

The kind of estoppel which is relevant in this case is not the usual kind of estoppel in pais based on a representation made by A to B and acted on by B to his detriment. It is rather the kind of estoppel which is described in *Spencer Bower and Turner, Estoppel by Representation,* 3rd ed. (1977), at pp. 157-160, as estoppel by convention. The authors of that work say of this kind of estoppel, at p. 157:

> "This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as

regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed."

Applying that description of estoppel by convention to the present case, the situation as I see it is this. First, the relevant transactions entered into by the plaintiffs and the bank were the making of new arrangements with regard to the overall security held by the bank in relation to … loans [including the Nassau loan]. Secondly, for the purposes of those transactions, both the bank and the plaintiffs assumed the truth of a certain state of affairs, namely that the guarantee given in relation to the Nassau loan effectively bound the plaintiffs to discharge any indebtedness of A.N.P.P. to Portsoken. The transactions took place on the basis of that assumption, and their course was influenced by it in the sense that, if the assumption had not been made, the course of the transactions would without doubt have been different.

Those facts produce, in my opinion, a classic example of the kind of estoppel called estoppel by convention as described in the passage from *Spencer Bower and Turner, Estoppel by Representation,* which I have quoted above, and so deprive the first argument advanced on behalf of the plaintiffs of any validity which, if the case were an ordinary one of estoppel by representation, it might otherwise have.

I turn to the second argument advanced on behalf of the plaintiffs, that the bank is here seeking to use estoppel as a sword rather than a shield, and that that is something which the law of estoppel does not permit. Another way in which the argument is put is that a party cannot found a cause of action on an estoppel.

In my view much of the language used in connection with these concepts is no more than a matter of semantics. Let me consider the present case and suppose that the bank had brought an action against the plaintiffs before they went into liquidation to recover moneys owed by A.N.P.P. to Portsoken. In the statement of claim in such an action the bank would have pleaded the contract of loan incorporating the guarantee, and averred that, on the true construction of the guarantee, the plaintiffs were bound to discharge the debt owed by A.N.P.P. to Portsoken. By their defence the plaintiffs would have pleaded that, on the true construction of the guarantee, the plaintiffs were only bound to discharge debts owed by A.N.P.P. to the bank, and not debts owed by A.N.P.P. to Portsoken. Then in their reply the bank would have pleaded that, by reason of an estoppel arising from the matters discussed above, the plaintiffs were precluded from questioning the interpretation of the guarantee which both parties had, for the purpose of the transactions between them, assumed to be true.

In this way the bank, while still in form using the estoppel as a shield, would in substance be founding a cause of action on it. This illustrates what I would regard as the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed. That, in my view, is, in substance, the situation of the bank in the present case.

It follows from what I have said above that I would reject the second argument against the existence of an estoppel put forward on behalf of the plaintiffs as well as the first. It further follows, from my rejection of both arguments against the existence of an estoppel, that I would …[hold] that, if the plaintiffs did not, by the contract relating to the Nassau loan, undertake to the bank to discharge any indebtedness of A.N.P.P. to Portsoken, they are, nevertheless, estopped from denying that they did so by reason of the basis, accepted by both the bank and the plaintiffs, on which the transactions between them were later conducted during the period from 1974 to 1976.

Eveleigh LJ delivered a concurring judgment. But, while agreeing that estoppel here applied, he suggested, contrary to the reasoning of the other two judges, that, had the bank been bringing an action to enforce the guarantee, it could not have done so because that would be using estoppel as a cause of action.

NOTES AND QUESTIONS

1. This case concerned estoppel by convention. It is generally assumed that, like promissory estoppel, estoppel by convention does not create a cause of action. Brandon LJ's judgment is particularly helpful in showing that, while accepting that proposition, estoppel by convention (and, by analogy, promissory estoppel) can be crucial to the success of a cause of action. Had the bank been suing on the contractual guarantee (in fact the bank had withheld other moneys owing so that the claim was being brought by AIP) the relevant cause of action would have been a standard contractual cause of action. Estoppel (by convention) would have come in not to found the cause of action but to prevent AIP applying an interpretation of that guarantee that was contrary to both parties' understanding and conduct.
2. Do you agree with Lord Denning that the various types of estoppel 'merge into one general principle shorn of limitations'? Is that consistent with his approach in *Crabb v Arun DC* (above, 125)?

Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, High Court of Australia

The defendants (Waltons) negotiated with the claimants (Mr and Mrs Maher) for the Mahers to demolish a building on their land and to construct a new one, to Waltons' specifications, which the Mahers would then lease to Waltons as retail premises. The Mahers said that they did not wish to complete all the demolition work until it was clear that there were no problems with the lease. The Mahers' solicitors sent to Waltons' solicitors 'by way of exchange' the lease which had been signed by the Mahers. Further demolition work was then carried out by the Mahers but Waltons began to have second thoughts about the deal and instructed their solicitors to go slow. Waltons knew that 40 per cent of the work had been completed when it informed the Mahers that it would not be proceeding with the lease. The trial judge found in the Mahers' favour and ordered Waltons to pay damages in lieu of specific performance. Waltons unsuccessfully appealed to the New South Wales Court of Appeal and the High Court of Australia. On appeal, the Mahers accepted that there was no formally binding contract because, as with all contracts for interests in land, the agreement was 'subject to contract' which required an exchange of contracts. The case therefore turned on estoppel, and it was held that the Mahers should succeed applying promissory estoppel as a cause of action.

Mason CJ and **Wilson J**: There has been for many years a reluctance to allow promissory estoppel to become the vehicle for the positive enforcement of a representation by a party that he would do something in the future. Promissory estoppel, it has been said, is a defensive equity: *Hughes v. Metropolitan Railway Co*. (1877) 2 App. Cas. 439, at p. 448; *Combe v. Combe* (1951) 2 K.B. 215, at pp. 219-220, and the traditional notion has been that estoppel could only be relied upon defensively as a shield and not as a sword…*High Trees* [1947] K.B. 130 itself was an instance of the defensive use of promissory estoppel. But this does not mean that a plaintiff cannot rely on an estoppel. Even according to traditional orthodoxy, a plaintiff may rely on an estoppel if he has an independent cause of action, where in the words of Denning L.J. in *Combe v. Combe*, the estoppel "may be part of a cause of action, but not a cause of action in itself".

But the respondents ask us to drive promissory estoppel one step further by enforcing

directly in the absence of a pre-existing relationship of any kind a non-contractual promise on which the representee has relied to his detriment. For the purposes of discussion, we shall assume that there was such a promise in the present case. The principal objection to the enforcement of such a promise is that it would outflank the principles of the law of contract. Holmes J. expressed his objection to the operation of promissory estoppel in this situation when he said "It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it": *Commonwealth v. Scituate Savings Bank* (1884) 137 Mass. 301, at p. 302. Likewise, Sir Owen Dixon considered that estoppel cut across the principles of the law of contract, notably offer and acceptance and consideration: "Concerning Judicial Method" *Australian Law Journal*, vol. 29 (1956) 468, at p. 475. And Denning L.J. in *Combe v. Combe*, after noting that "The doctrine of consideration is too firmly fixed to be overthrown by a side-wind", said (at p 220) that such a promise could only be enforced if it was supported by sufficient consideration. …

There is force in these objections and it may not be a sufficient answer to repeat the words of Lord Denning M.R. in *Crabb v. Arun District Council* [1976] Ch. 179, at p. 187, "Equity comes in, true to form, to mitigate the rigours of strict law". True it is that in the orthodox case of promissory estoppel, where the promisor promises that he will not exercise or enforce an existing right, the elements of reliance and detriment attract equitable intervention on the basis that it is unconscionable for the promisor to depart from his promise, if to do so will result in detriment to the promisee. And it can be argued…that there is no justification for applying the doctrine of promissory estoppel in this situation, yet denying it in the case of a non-contractual promise in the absence of a pre-existing relationship. The promise, if enforced, works a change in the relationship of the parties, by altering an existing legal relationship in the first situation and by creating a new legal relationship in the second. The point has been made that it would be more logical to say that when the parties have agreed to pursue a course of action, an alteration of the relationship by non-contractual promise will not be countenanced, whereas the creation of a new relationship by a simple promise will be recognized: see D. Jackson, "Estoppel as a Sword" *Law Quarterly Review*, vol. 81 (1965) 223, at p. 242.

The direct enforcement of promises made without consideration by means of promissory estoppel has proceeded apace in the United States. *The Restatement on Contracts* 2d §90 states:

> "(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

…

However, we need to view the development of the doctrine in the United States with some caution. There promissory estoppel developed partly in response to the limiting effects of the adoption of the bargain theory of consideration which has not been expressly adopted in Australia or England. It may be doubted whether our conception of consideration is substantially broader than the bargain theory…though we may be willing to imply consideration in situations where the bargain theory as implemented in the United States would deny the existence of consideration: see Atiyah, *Consideration in Contracts: A Fundamental Restatement* (1971), pp 6-7, 27, f.n. 35; Treitel, "Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement" *Australian Law Journal*, vol. 50 (1976) 439, at pp. 440 et seq. It is perhaps sufficient to say that in the United States, as in Australia, there is an obvious interrelationship between the doctrines of consideration and promissory estoppel, promissory estoppel tending to occupy ground left vacant due to the constraints affecting consideration.

The proposition stated in §90(1) of the Restatement seems on its face to reflect a closer connection with the general law of contract than our doctrine of promissory estoppel, with its origins in the equitable concept of unconscionable conduct, might be thought to allow. This is because in the United States promissory estoppel has become an equivalent or substitute for

consideration in contract formation, detriment being an element common to both doctrines. Nonetheless the proposition, by making the enforcement of the promise conditional on (a) a reasonable expectation on the part of the promisor that his promise will induce action or forbearance by the promisee and (b) the impossibility of avoiding injustice by other means, makes it clear that the promise is enforced in circumstances where departure from it is unconscionable. Note that the emphasis is on the promisor's reasonable expectation that his promise will induce action or forbearance, not on the fact that he created or encouraged an expectation in the promisee of performance of the promise.

…

The foregoing review of the doctrine of promissory estoppel indicates that the doctrine extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required. [*Att-Gen of Hong Kong v*] *Humphreys Estate* [[1987] AC 114] suggests that this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party. …

The application of these principles to the facts of the present case is not without difficulty. The parties were negotiating through their solicitors for an agreement for lease to be concluded by way of customary exchange. *Humphreys Estate* illustrates the difficulty of establishing an estoppel preventing parties from refusing to proceed with a transaction expressed to be "subject to contract". And there is the problem… that a voluntary promise will not generally give rise to an estoppel because the promisee may reasonably be expected to appreciate that he cannot safely rely upon it. This problem is magnified in the present case where the parties were represented by their solicitors.

All this may be conceded. But the crucial question remains: was the appellant entitled to stand by in silence when it must have known that the respondents were proceeding on the assumption that they had an agreement and that completion of the exchange was a formality? The mere exercise of its legal right not to exchange contracts could not be said to amount to unconscionable conduct on the part of the appellant. But there were two other factors present in the situation which require to be taken into consideration. The first was the element of urgency that pervaded the negotiation of the terms of the proposed lease. …The respondents' solicitor had said to the appellant's solicitor on 7 November that it would be impossible for Maher to complete the building within the agreed time unless the agreement were concluded "within the next day or two". The outstanding details were agreed within a day or two thereafter, and the work of preparing the site commenced almost immediately.

The second factor of importance is that the respondents executed the counterpart deed and it was forwarded to the appellant's solicitor on 11 November. The assumption on which the respondents acted thereafter was that completion of the necessary exchange was a formality. The next their solicitor heard from the appellant was a letter from its solicitors dated 19 January, informing him that the appellant did not intend to proceed with the matter. It had known, at least since 10 December, that costly work was proceeding on the site.

It seems to us, in the light of these considerations, that the appellant was under an obligation to communicate with the respondents within a reasonable time after receiving the executed counterpart deed and certainly when it learnt on 10 December that demolition was proceeding. …The appellant's inaction, in all the circumstances, constituted clear encouragement or inducement to the respondents to continue to act on the basis of the assumption which they had made. It was unconscionable for it, knowing that the respondents were exposing themselves to detriment by acting on the basis of a false assumption, to adopt a course of inaction which encouraged them in the course they had adopted. To express the point

in the language of promissory estoppel the appellant is estopped in all the circumstances from retreating from its implied promise to complete the contract.

Brennan J: Parties who are negotiating a contract may proceed in the expectation that the terms will be agreed and a contract made but, so long as both parties recognize that either party is at liberty to withdraw from the negotiations at any time before the contract is made, it cannot be unconscionable for one party to do so. Of course, the freedom to withdraw may be fettered or extinguished by agreement but, in the absence of agreement, either party ordinarily retains his freedom to withdraw. It is only if a party induces the other party to believe that he, the former party, is already bound and his freedom to withdraw has gone that it could be unconscionable for him subsequently to assert that he is legally free to withdraw.

…

The unconscionable conduct which it is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion. The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon.

If this object is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed.

…

A contractual obligation is created by the agreement of the parties; an equity created by estoppel may be imposed irrespective of any agreement by the party bound. A contractual obligation must be supported by consideration; an equity created by estoppel need not be supported by what is, strictly speaking, consideration. The measure of a contractual obligation depends on the terms of the contract and the circumstances to which it applies; the measure of an equity created by estoppel varies according to what is necessary to prevent detriment resulting from unconscionable conduct.

In *Combe v. Combe* [1951] 2 K.B. 215 Denning L.J. limited the application of promissory estoppel, as he expounded the doctrine, to ensure that it did not displace the doctrine of consideration. His Lordship's solution of the problem was to hold that the promise should not itself be a cause of action, but merely the foundation of a defensive equity.

…

If the object of the principle were to make a promise binding in equity, the need to preserve the doctrine of consideration would require a limitation to be placed on the remedy. But there is a logical difficulty in limiting the principle so that it applies only to promises to suspend or extinguish existing rights. If a promise by A not to enforce an existing right against B is to confer an equitable right on B to compel fulfilment of the promise, why should B be denied the same protection in similar circumstances if the promise is intended to create in B a new legal right against A? There is no logical distinction to be drawn between a change in legal relationships effected by a promise which extinguishes a right and a change in legal relationships effected by a promise which creates one. Why should an equity of the kind to which *Combe v. Combe* refers be regarded as a shield but not a sword? The want of logic in the limitation on the remedy is well exposed in Mr David Jackson's essay "Estoppel as a Sword" in *Law Quarterly Review,* vol 81 (1965) 223 at pp. 241-243.

Moreover, unless the cases of proprietary estoppel are attributed to a different equity from that which explains the cases of promissory estoppel, the enforcement of promises to create new proprietary rights cannot be reconciled with a limitation on the enforcement of other promises. If it be unconscionable for an owner of property in certain circumstances to fail to fulfil a non-contractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person

to fail to fulfil a non-contractual promise that he will confer a non-proprietary legal right on another? It does not accord with principle to hold that equity, in seeking to avoid detriment occasioned by unconscionable conduct, can give relief in some cases but not in others.

If the object of the principle of equitable estoppel in its application to promises were regarded as their enforcement rather than the prevention of detriment flowing from reliance on promises, the courts would be constrained to limit the application of the principles of equitable estoppel in order to avoid the investing of a non-contractual promise with the legal effect of a contractual promise.

…

But the better solution of the problem is reached by identifying the unconscionable conduct which gives rise to the equity as the leaving of another to suffer detriment occasioned by the conduct of the party against whom the equity is raised. Then the object of the principle can be seen to be the avoidance of that detriment and the satisfaction of the equity calls for the enforcement of a promise only as a means of avoiding the detriment and only to the extent necessary to achieve that object. So regarded, equitable estoppel does not elevate non-contractual promises to the level of contractual promises and the doctrine of consideration is not blown away by a side-wind. Equitable estoppel complements the tortious remedies of damages for negligent mis-statement or fraud and enhances the remedies available to a party who acts or abstains from acting in reliance on what another induces him to believe.

…

In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.

This is such a case.

Deane J and **Gaudron J** delivered concurring judgments.

NOTES AND QUESTIONS

1. The primary importance of this case is that it shows promissory estoppel being successfully used as a cause of action. The case was not one of *proprietary* estoppel because the promisor (Waltons) was not promising to confer rights over its land: rather it was promising to enter into a contract to take a lease.
2. Brennan J's judgment sought to resolve the clash between promissory estoppel as a cause of action and the doctrine of consideration by treating the former as concerned to protect the promisee's detrimental reliance rather than to enforce the promise. Do you regard that as a tenable reconciliation?
3. Despite Brennan J's words, it is unclear whether the damages actually awarded in this case protected the Mahers' expectation or reliance interest. (For explanation of

the terms 'expectation' and 'reliance' interest, see below, 354, note 2.) For further consideration of whether 'Australian estoppel' protects the claimants' reliance, rather than expectation, interest, see *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394; *Giumelli v Guimelli* (1999) 196 CLR 101; Edelman (1999) 15 *JCL* 179 (below, 153). There is an analogous long-standing debate in the United States as to whether section 90 of the *Restatement of Contracts* (cited above, 133) is concerned to protect the reliance or expectation interest: see Slawson (1990) 76 *Cornell LR* 197 (below, 152).

4. *If* promissory estoppel were concerned to protect the promisee's reliance, rather than expectation interest, would it be more natural to view it as analogous to tortious misrepresentation rather than as analogous to, or part of, the law of contract?
5. Would it be acceptable to leave open the question of the appropriate remedy for promissory estoppel so as to give the courts a flexible remedial discretion? Consider the analogous question raised as to the remedies for *proprietary* estoppel: see, eg, Gardner (1999) 115 *LQR* 438 (below, 153); *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 100.

Baird Textiles Holdings Ltd v Marks & Spencer plc [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737, Court of Appeal

The claimant had been one of the main suppliers of garments to the defendant retailer for 30 years. In October 1999 the defendant gave notice that, from the end of the current production season, they would not require any more garments from the claimant. One issue was whether the parties had entered into a long-term contract which could not be terminated by so short a period of notice. That issue was resolved in the defendant's favour as we have seen above, at 64. The claimant's alternative argument was that, even if there was no concluded long-term contract, the defendant was estopped from terminating the relationship by so short a notice period. In allowing the defendant's cross-appeal, that argument was rejected by the Court of Appeal which held that, applying the restrictions established by the English authorities, no form of estoppel (whether promissory, proprietary or estoppel by convention) could here succeed.

Sir Andrew Morritt V-C:

34 Counsel for M&S submits that the judge was wrong. He contends…that this court is, as the judge was, bound by three decisions of the Court of Appeal to conclude that the estoppel claim has no real prospect of success either. The three decisions and the propositions they respectively established are (1) a common law or promissory estoppel cannot create a cause of action (*Combe v Combe* [1951] 1 All ER 767, [1951] 2 KB 215); (2) an estoppel by convention cannot create a cause of action either (*Amalgamated Investment & Property Co. Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, [1982] QB 84) and (3) accepting that a proprietary or equitable estoppel may create a cause of action it is limited to cases involving property rights, whether or not confined to land, (*Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204 at 217).

35 Counsel for Baird did not dispute that those cases established the propositions for which M&S contended. Rather, he submitted, it is wrong to categorise particular types of estoppel and then impose limitations in each category not applicable to one or more of the other categories.

He suggested that English law permits some cross-fertilisation between one category and another. He contended that English law should follow where the High Court of Australia has led in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 *and Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 and permit estoppel to create causes of action in non-proprietary cases. In reply counsel for M&S conceded that if the Australian cases, to the effect that promissory estoppel extends to the enforcement of voluntary promises, represent the law of England then the judge was right and the cross-appeal must fail.

36 Warnings against categorisation have been given by Robert Goff J and Lord Denning MR in *Amalgamated Investment & Property Co. Ltd v Texas Commerce International Bank Ltd* [1981] All ER 923 at 935, 936 and 584, [1982] QB 84 at 103, 104, and 122, by Scarman LJ in *Crabb v Arun DC* [1975] 3 All ER 865 at 875, [1976] QB 179 at 192, 193 and by Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* [2001] 1 All ER 481, [2001] 2 WLR 72. But dicta to the contrary effect are to be found in *First National Bank plc v Thompson* [1996] 1 All ER 140 at 144, [1996] Ch 231 at 236 per Millett LJ, *McIlkenny v Chief Constable of the West Midlands Police Force* [1980] 2 All ER 227 at 235, [1980] 1 QB 283 at 317 per Lord Denning MR and in *Johnson v Gore Wood & Co* [2001] 1 All ER p. 481 at 507, 508, [2001] 2 WLR 72 at 99 per Lord Goff of Chieveley.

37 As in the case of the contractual claim, it is important to appreciate exactly what is being alleged and why. The material allegation…is that M&S is estopped from denying that 'the relationship with BTH could only be determined by the giving of reasonable notice'. But by itself this claim, which has undoubted echoes of *Hughes v Metropolitan Rly Co*. (1877) 2 App Cas 439 [1874-80] All ER Rep 187 and *Central London Property Trust Ltd v High Trees House Ltd (1946)* [1956] 1 All ER 256, [1947] 1 KB 130, does not lead to the relief sought. For that purpose it is essential to establish an obligation by estoppel that, in the words of [Baird's claim], 'during the subsistence of the relationship Marks & Spencer would acquire garments from BTH in quantities and at prices which in all the circumstances were reasonable'. As counsel for Baird put it in their written argument 'BTH contends that an equity generated by estoppel can be a cause of action'. …

38 In my view English law, as presently understood, does not enable the creation or recognition by estoppel of an enforceable right of the type and in the circumstances relied on in this case. First it would be necessary for such an obligation to be sufficiently certain to enable the court to give effect to it. That such certainty is required in the field of estoppels such as is claimed in this case as well as in contract was indicated by the House of Lords in *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* [1972] 2 All ER 271, [1972] AC 741 and by Ralph Gibson LJ in *Troop v Gibson* [1986] 1 EGLR 1 at 6. For the reasons I have already given I do not think that the alleged obligation is sufficiently certain. Second, in my view, the decisions in the three Court of Appeal decisions on which M&S rely do establish that such an enforceable obligation cannot be established by estoppel in the circumstances relied on in this case. This conclusion does not involve the categorisation of estoppels but is a simple application of the principles established by those cases to the obligation relied on in this. …

Mance LJ:
80 Baird acknowledges that an estoppel precluding M & S from denying that the relationship with BTH could only be determined by the giving of reasonable notice would not assist, unless it also meant that M & S (and presumably Baird) were precluded from ceasing to place and honour orders for a 'reasonable' or 'appropriate' share of whatever were M & S's requirements from time to time, so as to ensure, to that extent, that the production facilities that Baird had devoted to M & S's business to date were maintained, or at least run down gradually, during such period of notice. The question presents itself how such an estoppel would differ in substance or effect (a) from the enforcement of obligations of insufficient certainty to be

contractual (b) in circumstances where an intention to affect legal relations cannot objectively be imputed to either party. Baird's answer is that it does not seek to protect its expectation interest. That, it accepts, could only be done in contract. Rather it is seeking to protect its reliance interest.

83 In support of its claim based on an estoppel protecting its reliance interest, Baird argues that estoppel is or should be viewed as a flexible doctrine, that any rigid classification into different types of estoppel with differing requirements should be rejected, and that it is open to English law to afford the protection proportionate to Baird's reliance for which Baird contends. … Speaking generally, I accept that estoppel is a flexible doctrine, that broad equitable principles underlie its application in different fields (the concept of unconscionability being one such general principle) and that one should avoid 'rigid classification of equitable estoppel into exclusive and defined categories' (Robert Goff J's phrase in the *Amalgamated Investment* case [1981] 1 All ER 923 at 935, 936, [1982] QB 84 at 103, 104…).

84 However, not only are we bound in this court by previous authority on the scope of particular types of estoppel, but it seems to me inherent in the doctrine's very flexibility that it may take different shapes to fit the context of different fields. Throughout the passage in Robert Goff J's judgment in the *Amalgamated Investment* case [1981] 1 All ER 923 at 935-938, [1982] QB 84 at 103-107, to which Mr Field [counsel for Baird] drew our attention, careful attention was paid to context. That there are, on authority, certain distinctions between the characteristics of estoppel in different contexts is also clear. For example, it is established that to found a promissory estoppel, a representation must be clear and unequivocal: *Woodhouse AC Israel Cocoa Ltd. SA v. Nigerian Produce Marketing Co. Ltd.* [1972] 2 All ER, [1972] AC 741. …

85 In contrast, a proprietary estoppel may arise from promises of an 'equivocal nature': cf observations of Slade LJ in *Jones v. Watkins* [1987] CA Transcript 1200 (cited by Robert Walker LJ in *Gillett v Holt* [2000] 2 All ER 289 at 302, [2001] Ch 210 at 226). …

86 In the present case, Baird's complaint is that M & S did not honour mutual understandings with M & S and/or assurances given by M & S. It is a 'general principle that a purely gratuitous promise is unenforceable at law or in equity' and—

> 'Furthermore, even if a purely gratuitous promise is acted upon by the promisee, generally speaking such conduct will not of itself give rise to an estoppel against the promissor; such an estoppel would be inconsistent with the general principle that purely gratuitous promises will not be enforced.'

87 See per Robert Goff J in the *Amalgamated Investment* case [1981] 1 All ER 923 at 937, [1982] QB 84 at 106, citing *Combe v Combe* [1951] 1 All ER 767, [1951] 2 KB 215. …

88 How far an estoppel may assist in bringing about a cause of action, without standing alone as 'a cause of action in itself', has remained a matter of dispute over subsequent years. …In the *Amalgamated Investment* case itself, Lord Denning MR and, on the view I would prefer, Brandon LJ held that both the company and the bank were bound by their conventional treatment of the company's guarantee of its subsidiary's indebtedness to the bank as extending to such subsidiary's indebtedness to the bank's subsidiary (Portsoken), thus entitling the bank to set up sums due under the guarantee, read in this extended sense, against the obligation that it otherwise had to account to the company for realisations which it had made.

91 In the present case, what is submitted is that the law ought to attach legal consequences to a bare assurance or conventional understanding (falling short of contract) between two parties, without any actual contract or third party being involved or affected. The suggested

justification is the limitation of the relief claimed to reliance loss. On this submission, the requirements of contract (consideration, certainty and an intention to create legal relations) are irrelevant because no contract is asserted. The requirements of estoppel (eg that is an unequivocal promise to found a promissory estoppel or conventional conduct of sufficient clarity to found an estoppel by convention and, secondly, the objective intention to affect some actual or apparent pre-existing legal relationship) are bypassed by the limitation of relief. But no authority in this jurisdiction supports the submission that estoppel can here achieve so expanded an application, simply by limiting recovery to reliance loss…Any development of English law in such a direction could and should, in my view, now take place in the highest court.

92 It is also, on authority, an established feature of both promissory and conventional estoppel that the parties should have had the objective intention to make, affect or confirm a legal relationship. In *Combe v Combe*, all three judges, echoing what Denning J had said in the *High Trees* case, referred to the need for a promise or assurance 'intended to affect the legal relations between them' or 'intended to be binding' ([1951] 1 All ER 767 at 770, 772-774, [1951] 2 KB 215 at 220, 224, 225 per Denning, Birkett and Asquith LJJ respectively)…

94 As I have already said, the fact that there was never any agreement to reach or even to set out the essential principles which might govern any legally binding long-term relationship indicates that neither party can here objectively be taken to have intended to make any legally binding commitment of a long-term nature, and the law should not be ready to seek to fetter business relationships with its own view of what might represent appropriate business conduct, when parties have not chosen, or have not been willing or able, to do so in any identifiable legal terms themselves. These considerations, in my judgment, also make it wrong to afford relief based on estoppel, including relief limited to reliance loss, in the present context.

95 In support of his case, Mr Field seeks to liberate recognised principles of proprietary estoppel from the confines of that field, and use them to fertilise a more general development of equitable estoppel. …He…relied on the reasoning of the Australian cases of *Waltons Stores (Interstate) Ltd. v Maher* (1988) 164 CLR 387 and *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 as pointing the road to development of English law.

97 There is…in this court binding authority that the scope of proprietary estoppel (leaving aside cases of mistaken belief as to the existence of current rights) does not extend beyond cases where A to the knowledge of B acts to his detriment in the expectation, encouraged by B, of acquiring a right over B's land or (probably) other property, such expectation arising from what B has said or done: *Western Fish Products v. Penwith DC* [1981] 2 All ER 204 at 217-219. In that case, it was insufficient that the plaintiffs acted to their detriment in developing their own land as a manufactury, in the belief that the District Council accepted that there was an established use for that purpose and would be prepared to give planning permission on that basis. The present case is not a case of encouragement of Baird to act to its detriment in respect of its own land or other property. It is also not a case of mistaken belief as to existing rights.

98 It does not, I think, follow axiomatically from the *Western Fish* case that this court could not and would not reach a result similar to that reached in the *Waltons Stores* case, even though not by the same reasoning. There was in the *Waltons Stores* case complete agreement on the terms of the lease. The agreement was merely unenforceable for want of compliance with the statute. It may be arguable that recognition of an estoppel here would not be to use estoppel 'as giving a cause of action in itself', and it would certainly not be to undermine the necessity of consideration. Rather, it would preclude the potential lessee from raising a collateral objection to the binding nature of the agreed lease (which was also effectively the reasoning of some of the members of the High Court of Australia: cf headnote para. (2) on (1988) 164 CLR 387

at 389). The High Court of Australia's decision in *The Commonwealth of Australia v. Verwayen* (where, after assurances by the Commonwealth that it would not plead either a limitation defence or absence of any duty of care, the Commonwealth was held estopped from later relying on either defence) could well also be reached under English law, without adopting the High Court of Australia's reasoning. I note the view of Professor Treitel to like effect in *Chitty on Contracts* (28th edn, 1999) vol. 1 paras 3-095, n 32 and 3-099, n 63.

Judge LJ delivered a concurring judgment.

NOTES AND QUESTIONS

1. This case firmly rejects the view that under the present English law promissory estoppel can be used as a cause of action (even if the claim is limited to the protection of the claimant's reliance interest). Yet Mance LJ suggested that *Walton Stores* might have been decided the same way in England. Do you agree with his reasoning on this point?
2. The Court of Appeal here accepted that different principles apply to different types of estoppel. Do you agree with that approach?

(3) Promissory Estoppel Requires a Clear and Unequivocal Promise

Woodhouse AC Israel Cocoa SA v Nigerian Produce Marketing Co Ltd [1972] AC 941, House of Lords

The defendant sellers (Nigerian Produce) and the claimant buyers (Woodhouse) had entered into a contract for the sale of cocoa. This provided for payment in Nigerian pounds in Lagos. The buyers asked if the sellers would be prepared to accept payment of sterling in Lagos and the sellers, by a letter dated 30 September 1967, had replied that 'payment can be made in sterling and in Lagos'. Sterling was then devalued so that it was worth 14–15 per cent less than the Nigerian pound. The buyers argued that they were entitled to pay at the rate of one pound sterling for one Nigerian pound, which would have meant that the sellers bore the loss in the value of sterling. The buyers based their argument on the letter of 30 September being either a variation of the contract supported by consideration or as founding a promissory estoppel. In dismissing the buyers' appeal, the House of Lords held that both arguments failed because it was not clear that the promise to accept sterling meant to refer to measurement of the amount owing as opposed to the currency in which payment should be made.

Lord Hailsham of St Marylebone LC: Counsel for the appellants was asked whether he knew of any case in which an ambiguous statement had ever formed the basis of a purely promissory estoppel, as contended for here, as distinct from estoppel of a more familiar type based on factual misrepresentation. He candidly replied that he did not. I do not find this surprising, since it would really be an astonishing thing if, in the case of a genuine misunderstanding as to the meaning of an offer, the offeree could obtain by means of the doctrine of promissory estoppel something that he must fail to obtain under the conventional law of contract. I share the feeling of incredulity expressed by Lord Denning M.R. in the course of his judgment in the instant case when he said [1971] 2 Q.B. 23, 59-60:

> "If the judge be right, it leads to this extraordinary consequence: A letter which is not sufficient to *vary* a contract is, nevertheless, sufficient to work an *estoppel* – which will have the same effect as a *variation*."

There seem to me to be so many and such conclusive reasons for dismissing this appeal that it may be thought a work of supererogation to add yet another. But basically I feel convinced that there was never here any real room for the doctrine o[f] estoppel at all. If the exchange of letters was not variation, I believe it was nothing. The buyers asked for a variation in the mode of discharge of a contract of sale. If the proposal meant what they claimed, and was accepted and acted upon, I venture to think that the vendors would have been bound by their acceptance at least until they gave reasonable notice to terminate, and I imagine that a modern court would have found no difficulty in discovering consideration for such a promise. Business men know their own business best even when they appear to grant an indulgence, and in the present case I do not think that there would have been insuperable difficulty in spelling out consideration from the earlier correspondence. If, however, the two letters were insufficiently unambiguous and precise to form the basis, if accepted, for a variation in the contract I do not think their combined effect is sufficiently unambiguous or precise to form the basis of an estoppel which would produce the result of reducing the purchase price by no less than 14 per cent. against a vendor who had never consciously agreed to the proposition.

I desire to add that the time may soon come when the whole sequence of cases based on promissory estoppel since the war, beginning with *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K.B. 130, may need to be reviewed and reduced to a coherent body of doctrine by the courts. I do not mean to say that any are to be regarded with suspicion. But as is common with an expanding doctrine they do raise problems of coherent exposition which have never been systematically explored.

Viscount Dilhorne: While I recognise that a party to a contract, while not agreeing to a variation of it, may nevertheless say that he will waive the performance by the other party of certain of its terms, and that if the other party relies on the waiver performance of the terms waived cannot be insisted on, in this case there was not a representation of the character alleged contained in or to be implied from the letter of September 30. To found an estoppel, the representation must be clear and unequivocal. In my opinion, the letter of September 30 could not reasonably be understood to contain or to imply a clear and unequivocal representation of the nature alleged.

Lord Pearson, Lord Cross of Chelsea and **Lord Salmon** delivered concurring speeches.

NOTES AND QUESTIONS

1. Does the normal law of certainty in contract (see Chapter 2 above) require promises to be 'clear and unequivocal'? Would it be better to apply the normal standard of certainty required in contract to promissory estoppel? Was there a clear and unequivocal promise in *Hughes v Metropolitan Rly Co* (above, 118)?
2. Viscount Dilhorne, as is commonplace, uses the language of 'waiver' alongside that of (promissory) estoppel. One must be careful with the language of waiver because it is broad enough to refer to, for example, a variation of a contract supported by consideration as well as to promissory estoppel. See generally E Peel, *Treitel on the Law of Contract* (13th edn, 2011) 3-066–3-099.
3. More than 35 years on, Lord Hailsham's call for a judicial review and restatement of the doctrine of promissory estoppel has still not been met.

4. Just as certainty and intention to create legal relations are linked but separate doctrines in contract law so, in relation to promissory estoppel, a separate requirement from certainty is that the promisor intended to create legal relations. See Denning J's statement of the doctrine in the *High Trees* case and in *Combe v Combe* at 119 and 123 above. See also *Baird Textiles Holdings Ltd v Marks & Spencer plc*, above, 137.

(4) Does Promissory Estoppel Require Reliance or Detrimental Reliance?

WJ Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 QB 189, Court of Appeal

The sellers (WJ Alan & Co Ltd) were Kenyan producers of coffee. They contracted to sell coffee to the buyers (El Nasr Export) at 262 Kenyan shillings per hundredweight. There were to be two shipments and payment was to be made by letter of credit in Kenyan shillings. In fact the letter of credit opened by the buyers was for payment in sterling rather than Kenyan shillings. The sellers made no objection to this and presented invoices in sterling. At the time of the first shipment, this made no difference because there was parity between sterling and Kenyan currency. However, after the sellers had presented an invoice in sterling for the second shipment, sterling was devalued. Payment under the credit was made in sterling but the sellers claimed an additional sum to bring the price up to 262 Kenyan shillings per hundredweight. The Court of Appeal held that this claim should fail for two reasons: (i) the sellers had 'waived' their strict rights to insist on payment in Kenyan shillings or (ii) (per Megaw and Stephenson LJJ) there had been a variation, supported by consideration, of the contract so as to allow payment in sterling.

Lord Denning MR: [A] "conforming" letter of credit… is… one which is in accordance with the stipulations in the contract of sale. But in many cases – and our present case is one – the letter of credit does not conform. Then negotiations may take place as a result of which the letter of credit is modified so as to be satisfactory to the seller. Alternatively, the seller may be content to accept the letter of credit as satisfactory as it is, without modification. Once this happens, then the letter of credit is to be regarded as if it were a conforming letter of credit…

There are two cases on this subject. One is *Panoutsos v. Raymond Hadley Corporation of New York* [1917] 2 K.B. 473; but the facts are only to be found fully set out in 22 Com.Cas. 207. The other is *Enrico Furst & Co. v. W. E. Fischer Ltd.* [1960] 2 Lloyd's Rep. 340. In each of those cases the letter of credit did not conform to the contract of sale. In each case the non-conformity was in that it was not a confirmed credit. But the sellers took no objection to the letter of credit on that score. On the contrary, they asked for the letter of credit to be extended: and it was extended. In each case the sellers sought afterwards to cancel the contract on the ground that the letter of credit was not in conformity with the contract. In each case the court held that they could not do so.

What is the true basis of those decisions? … It is an instance of the general principle which was first enunciated by Lord Cairns L.C. in *Hughes v. Metropolitan Railway Co.* (1877) 2 App.Cas 439, and rescued from oblivion by *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K.B. 130. The principle is much wider than waiver itself: but waiver is a good instance of its application.

The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: see *Plasticmoda Societa per Azioni v. Davidsons (Manchester) Ltd.* [1952] 1 Lloyd's Rep. 527, 539. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist upon them: *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761. But there are cases where no withdrawal is possible. It may be too late to withdraw: or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made.

Instances of these principles are ready to hand in contracts for the sale of goods. A seller may, by his conduct, lead the buyer to believe that he is not insisting on the stipulated time for exercising an option: *Bruner v. Moore* [1904] 1 Ch. 305. A buyer may, by requesting delivery, lead the seller to believe that he is not insisting on the contractual time for delivery: *Charles Rickards Ltd. v. Oppenheim* [1950] 1 K.B. 616, 621. A seller may, by his conduct, lead the buyer to believe that he will not insist on a confirmed letter of credit: *Plasticmoda* [1952] 1 Lloyd's Rep. 527, but will accept an unconfirmed one instead: *Panoustsos v. Raymond Hadley Corporation of New York* [1917] 2 K.B. 473; *Enrico Furst & Co. v. W. E. Fischer* [1960] 2 Lloyd's Rep. 340. A seller may accept a less sum for his goods than the contracted price, thus inducing him to believe that he will not enforce payment of the balance: *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K.B. 130 and *D. & C. Builders Ltd. v. Rees* [1966] 2 Q.B. 617, 624. In none of these cases does the party who acts on the belief suffer any detriment. It is not a detriment, but a benefit to him, to have an extension of time or to pay less, or as the case may be. Nevertheless, he has conducted his affairs on the basis that he has that benefit and it would not be equitable now to deprive him of it.

The judge rejected this doctrine because, he said, "there is no evidence of the buyers having acted to their detriment." I know that it has been suggested in some quarters that there must be detriment. But I can find no support for it in the authorities cited by the judge. The nearest approach to it is the statement of Viscount Simonds in the *Tool Metal* case [1955] 1 W.L.R. 761, 764, that the other must have been led "to alter his position," which was adopted by Lord Hodson in *Ajayi v. R. T. Briscoe (Nigeria) Ltd.* [1964] 1 W.L.R. 1326, 1330. But that only means that he must have been led to act differently from what he otherwise would have done. And if you study the cases in which the doctrine has been applied, you will see that all that is required is that the one should have *"acted* on the belief induced by the other party." That is how Lord Cohen put it in the *Tool Metal* case [1955] 1 W.L.R. 761, 799, and that is how I would put it myself.

Megaw LJ: In my view, if there were no variation, the buyers would still be entitled to succeed on the ground of waiver. The relevant principle is, in my opinion, that which was stated by Lord Cairns L.C., in *Hughes v. Metropolitan Railway Co.* (1877) 2 App.Cas. 439, 448. The acceptance by the sellers of the sterling credit was, as I have said, a once-for-all acceptance. It was not a concession for a specified period of time or one which the sellers could operate as long as they chose and thereafter unilaterally abrogate; any more than the buyers would have been entitled to alter the terms of the credit or to have demanded a refund from the sellers if, after this credit had been partly used, the relative values of the currencies had changed in the opposite way.

Stephenson LJ: I would leave open the question whether the action of the other party induced by the party who "waives" his contractual rights can be any alteration of his position, as Lord

Denning M.R. has said, or must, as the judge thought, be an alteration to his detriment, or for the worse, in some sense. In this case the buyers did, I think, contrary to the judge's view, act to their detriment on the sellers' waiver, if that is what it was, and the contract was varied for good consideration, which may be another way of saying the same thing; so that I need not, and do not, express a concluded opinion on that controversial question.

NOTES AND QUESTIONS

1. The importance of this case lies in Lord Denning MR's view that for promissory estoppel (or 'waiver' as he here termed it, see above, 142, note 2) there is no need for *detrimental* reliance. Mere reliance (ie acting on) the promise is sufficient.
2. Although Stephenson LJ thought that the buyers had acted to their detriment, the facts on this are not clear. Ie there appeared to be no evidence that the buyers would be in a worse position to pay the full amount measured in Kenyan currency than they would have been had no promise to accept sterling been made by the sellers.
3. Was there any *detrimental* reliance by the tenant in the *High Trees* case?

Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser [1981] 2 Lloyd's Rep 695, Queen's Bench Division

The claimant sellers contracted to sell palm oil to the defendant buyers. It was a term of the contract that, as soon as possible after sailing, the sellers should notify the buyers of the name of the ship being used. In breach of contract the sellers did not notify the buyers until more than a month after the ship had sailed. The buyers made no protest about this and requested the sellers to transfer the documents covering the goods to sub-buyers. Two days later the sub-buyers rejected the documents because of the late notification of the ship's name as, on the same day, did the buyers. The sellers were therefore forced to sell the oil elsewhere at a lower price than the contract price. In an action for damages by the sellers, they argued that the buyers had 'waived' their right to reject the documents. Although Robert Goff J decided that the buyers had made an unequivocal representation that they were waiving their rights to insist on a prompt notification of the ship, he held that the sellers had not suffered any prejudice by reliance on that representation, so that the buyers could go back on it.

Robert Goff J: [T]here next arises the question whether there was any sufficient reliance by the sellers on this representation to give rise to an equitable estoppel. Here there arose a difference between [counsel for the sellers] and [counsel for the buyers] as to the degree of reliance which is required. It is plain, however, from the speech of Lord Cairns in *Hughes v Metropolitan Railway Co.*, (1877) 2 App. Cas. 439 at p 448 that the representor will not be allowed to enforce his rights "where it would be inequitable having regard to the dealings which have taken place between the parties"; accordingly there must be such action, or inaction, by the representee on the faith of the representation as will render it inequitable to permit the representor to enforce his strict legal rights

…

The case therefore raises in an acute form the question…whether it is sufficient for this purpose that the representee should simply have conducted his affairs on the basis of the representation, or whether by so doing he must have suffered some form of prejudice which

renders it inequitable for the representor to go back on his representation. A simple example of the latter did occur where a seller, relying upon a representation by his buyers, arranged his affairs and tendered documents to the buyer and by so doing missed an opportunity to dispose of the documents elsewhere for a price greater than that available when the buyer later rejected the documents. Such a conclusion could only be based on findings of fact as to the movements of the market over the relevant period. In [*Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109] Lord Salmon felt it unnecessary to resolve this problem because, as he held, "the sellers clearly acted on the basis of waiver, and also to their detriment in spending time and money on the appropriations" which they made…

On the other hand in *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 1 Lloyd's Rep. 313; [1972] 2 QB 189, Lord Denning M.R. (at pp 323-324 and 213), while stating the principle of equitable estoppel in terms that it must be inequitable for the representor to be allowed to go back on his representation, nevertheless considered that it might be sufficient for that purpose that the representee had conducted his affairs on the basis of the representation, and that it was immaterial that he has suffered any detriment by doing so.

…

I approach the matter as follows. The fundamental principle is that stated by Lord Cairns, viz. that the representor will not be allowed to enforce his rights "where it would be inequitable having regard to the dealings which have thus taken place between the parties". To establish such inequity it is not necessary to show detriment; indeed, the representee may have benefited from the representation and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights. Take the facts of *Central London Property Trust Ltd v High Trees House* [1947] K.B. 130, the case in which Lord … Denning, M.R., breathed new life into the doctrine of equitable estoppel. The representation was by a letter to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist upon his legal right to the unpaid rent because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a court might well think it right to conclude that only after reasonable notice could a lessor return to charging rent at the higher rate specified in the lease. Furthermore it would be open to the court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice. But it does not follow that in every case in which the representee has acted, or failed to act, in reliance on the representation it will be inequitable for the representor to enforce his rights; for the nature of the action, or inaction, may be sufficient to give rise to the equity, in which event a necessary requirement stated by Lord Cairns for the application of the doctrine would not have been fulfilled.

This, in my judgment, is the principle which I have to apply in the present case. Here, all that happened was that the sellers…presented the document on the same day as the buyers made their representation; and within two days the documents were rejected. Now on these simple facts, although it is plain that the sellers did actively rely on the buyers' representation, and did conduct their affairs in reliance on it, by presenting the documents, I cannot see anything which would render it inequitable for the buyers thereafter to enforce their legal right to reject the documents. In particular, having regard to the very short time which elapsed between the date of the representation, and the date of the presentation of the documents on the one hand, and the date of the rejection on the other hand, I cannot see that, in the absence of any evidence that the sellers' position had been prejudiced by reason of their action in reliance on the representation, it is possible to infer that they suffered any such prejudice. In these circumstances, a necessary element for the application of the doctrine of equitable estoppel is lacking; and I decide this point in favour of the buyers.

NOTES AND QUESTIONS

1. Robert Goff J here took the view that, while detrimental reliance was needed in some cases (including this one) for equitable (ie promissory) estoppel to operate, in others (eg *High Trees*) mere reliance was sufficient. This would turn on what was equitable or inequitable on the particular facts.
2. Is the answer to the question whether detriment is needed fact-specific or is it a policy question that the law ought to resolve once and for all?

(5) Promissory Estoppel Cannot be Founded on a Promise Induced by the Promisee's Inequitable Conduct

D & C Builders Ltd v Rees [1966] 2 QB 617, Court of Appeal

The claimants were a small firm of builders. They were engaged to do some work for Mr and Mrs Rees (the defendants). The defendants paid £250, which left a balance owing of some £483. The claimants made several requests for payment but received no reply. The claimants were by now in dire financial straits as the defendants knew. Mrs Rees, in a telephone call, offered to pay the claimants £300 in full settlement. Saying that they had no choice, the claimants accepted this and took a cheque for £300. The claimants brought this action for the balance and succeeded. The majority (Winn and Danckwerts LJJ) based their decision on *Foakes v Beer*, ie there was no consideration given by Mr and Mrs Rees for the claimants' promise to accept less. Lord Denning MR saw the case as turning on promissory estoppel and Danckwerts LJ, in obiter dicta, also touched on that approach, albeit in looking at whether there was a 'true accord'. Both decided that the equitable doctrine was inapplicable because of the intimidation by the defendants.

Lord Denning MR: This case is of some consequence: for it is a daily occurrence that a merchant or tradesman, who is owed a sum of money, is asked to take less. The debtor says he is in difficulties. He offers a lesser sum in settlement, cash down. He says he cannot pay more. The creditor is considerate. He accepts the proffered sum and forgives him the rest of the debt. The question arises: Is the settlement binding on the creditor? The answer is that, in point of law, the creditor is not bound by the settlement. He can the next day sue the debtor for the balance: and get judgment. The law was so stated in 1602 by Lord Coke in *Pinnel's Case* (1602) 5 Co.Rep. 117a – and accepted in 1889 by the House of Lords in *Foakes v. Beer* (1884) 9 App. Cas. 605.

…

This doctrine of the common law has come under heavy fire. It was ridiculed by Sir George Jessel in *Couldery v. Bartram* (1881) 19 Ch.D. 394, 399. It was said to be mistaken by Lord Blackburn in *Foakes v. Beer* 9 App.Cas. 605, 622. It was condemned by the Law Revision Committee ([1937] Cmd. 5449), paras. 20 and 21. But a remedy has been found. The harshness of the common law has been relieved. Equity has stretched out a merciful hand to help the debtor. The courts have invoked the broad principle stated by Lord Cairns in *Hughes v. Metropolitan Railway Co.*(1877) 2 App.Cas. 439, 448

> "It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect

of leading one of the parties to suppose that *the strict rights arising under the contract will not be enforced,* or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights *will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties*."

It is worth noticing that the principle may be applied, not only so as to suspend strict legal rights, but also so as to preclude the enforcement of them.

This principle has been applied to cases where a creditor agrees to accept a lesser sum in discharge of a greater. So much so that we can now say that, when a creditor and a debtor enter upon a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so. This was well illustrated during the last war. Tenants went away to escape the bombs and left their houses unoccupied. The landlords accepted a reduced rent for the time they were empty. It was held that the landlords could not afterwards turn round and sue for the balance, see *Central London Property Trust Ltd. v. High Trees House Ltd* [1947] 1 K.B. 130 This caused at the time some eyebrows to be raised in high places. But they have been lowered since. The solution was so obviously just that no one could well gainsay it.

In applying this principle, however, we must note the qualification: The creditor is only barred from his legal rights when it would be *inequitable* for him to insist upon them. Where there has been a true *accord,* under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor *acts upon* that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. But he is not bound unless there has been truly an accord between them.

In the present case, on the facts as found by the judge, it seems to me that there was no true accord. The debtor's wife held the creditor to ransom. The creditor was in need of money to meet his own commitments, and she knew it. When the creditor asked for payment of the £480 due to him, she said to him in effect: "We cannot pay you the £480. But we will pay you £300 if you will accept it in settlement. If you do not accept it on those terms, you will get nothing. £300 is better than nothing." She had no right to say any such thing. She could properly have said: "We cannot pay you more than £300. Please accept it on account." But she had no right to insist on his taking it in settlement. When she said: "We will pay you nothing unless you accept £300 in settlement," she was putting undue pressure on the creditor. She was making a threat to break the contract (by paying nothing) and she was doing it so as to compel the creditor to do what he was unwilling to do (to accept £300 in settlement): and she succeeded. He complied with her demand. That was on recent authority a case of intimidation: see *Rookes v. Barnard* [1964] A.C. 1129, H.L.(E.) and *Stratford (J. T.) & Son Ltd. v. Lindley* [1964] 2 W.L.R. 1002, 1015, 1016, C.A. In these circumstances there was no true accord so as to found a defence of accord and satisfaction: see *Day v. McLea* (1889) 22 Q.B.D. 610, C.A. There is also no equity in the defendant to warrant any departure from the due course of law. No person can insist on a settlement procured by intimidation.

Danckwerts LJ: I agree … that, in the circumstances of the present case, there was no true accord. The Rees really behaved very badly. They knew of the plaintiffs' financial difficulties and used their awkward situation to intimidate them. The plaintiffs did not wish to accept the sum of £300 in discharge of the debt of £482, but were desperate to get some money. It would appear also that the defendant and his wife misled the plaintiffs as to their own financial position. Rees, in his evidence, said: "In June (1964) I could have paid £700 odd. I could have settled the whole bill." There is no evidence that by August, or even by November, their financial situation had deteriorated so that they could not pay the £482.

Nor does it appear that their position was altered to their detriment by reason of the receipt given by the plaintiffs. The receipt was given on November 14, 1964. On November 23, 1964,

the plaintiffs' solicitors wrote a letter making it clear that the payment of £300 was being treated as a payment on account. I cannot see any ground in this case for treating the payment as a satisfaction on equitable principles.

Winn LJ gave a concurring judgment without touching on promissory estoppel.

NOTES AND QUESTIONS

1. In deciding that there was no consideration provided by Mr and Mrs Rees, the majority (Winn and Danckwerts LJJ) overruled an earlier decision, *Goddard v O'Brien* (1882) 9 QBD 37, which held that payment by cheque, rather than cash, was good consideration for a promise to accept a lesser sum.
2. The inequitable conduct of Mr and Mrs Rees in inducing the promise was what would now be referred to as economic duress (see Chapter 14 below). What other types of conduct would equally bar promissory estoppel (see, on this, Danckwerts LJ's judgment)?
3. Danckwerts LJ indicated that, in his view, *detrimental* reliance was required for the equitable doctrine. Contrast the view of Lord Denning in this case and in other cases (see above, 143–45).

(6) Does Promissory Estoppel Extinguish or Suspend Rights?

Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd [1955] 1 WLR 761, House of Lords

Tool Metal (TMMC) owned the patents over certain hard metal alloys. By a contract made in 1938 they granted Tungsten Electric (TECO) a licence until 1947 to deal in those alloys. If TECO's use of the alloys in any given month exceeded a set quota, TECO was to pay TMMC compensation. In 1942, triggered by war-time circumstances, TMMC agreed to suspend the payment of compensation until a new agreement was reached. In September 1944 TMMC submitted to TECO the draft of a proposed new agreement which contained a provision for the revival of compensation. This was rejected by TECO. In 1945 TECO brought an action against TMMC for breach of contract and fraudulent misrepresentation in relation to the 1938 agreement. TMMC counterclaimed in March 1946 for the compensation payable in respect of use of the alloys after 1 June 1945. That counterclaim failed in the Court of Appeal (reported at (1952) 69 RPC 108) on the basis that, while TMMC had promised only to suspend the payment of compensation, which could therefore be revived, the suspension was binding in equity (applying *Hughes v Metropolitan Rly*, see above, 118) until terminated by reasonable notice and reasonable notice had not been given. TMMC thereupon commenced a new action in 1950 claiming compensation as from January 1947 and arguing that the making of the counterclaim in March 1946 in the first action constituted the reasonable notice necessary to terminate the suspension of payments of compensation (ie nine months' notice had been given). The House of Lords held that that argument should succeed: the promised suspension, binding in equity, had been terminated by reasonable notice.

Lord Tucker: The sole question, therefore, before the courts on this issue in the present action has been throughout: Was the counterclaim in the first action a sufficient intimation to terminate the period of suspension which has been found to exist?

…

It has been said more than once that every case involving the application of this equitable doctrine [ie the doctrine in *Hughes v Metropolitan Rly*] must depend upon its own particular circumstances. It is, of course, clear … that there are some cases where the period of suspension clearly terminates on the happening of a certain event or the cessation of a previously existing state of affairs or on the lapse of a reasonable period thereafter. In such cases no intimation or notice of any kind may be necessary. But in other cases where there is nothing to fix the end of the period which may be dependent upon the will of the person who has given or made the concession, equity will no doubt require some notice or intimation together with a reasonable period for readjustment before the grantor is allowed to enforce his strict rights. No authority has been cited which binds your Lordships to hold that in all such cases the notice must take any particular form or specify a date for the termination of the suspensory period. This is not surprising having regard to the infinite variety of circumstances which may give rise to this principle which was stated in broad terms and must now be regarded as of general application. It should, I think, be applied with great caution to purely creditor and debtor relationships which involve no question of forfeiture or cancellation, and it would be unfortunate if the law were to introduce into this field technical requirements with regard to notice and the like which might tend to penalise or discourage the making of reasonable concessions.

…

In my view, the counterclaim of March 26, 1946, followed by a period of nine months to January 1, 1947, from which date compensation in the present action is claimed, is sufficient to satisfy the requirements of equity and entitle T.M.M.C. to recover compensation under … the deed as from the latter date. In the somewhat peculiar circumstances of the present case any other result would, I think, be highly inequitable.

Lord Cohen: [T]o make the principle [in *Hughes v Metropolitan Rly*] applicable the party setting up the doctrine must show that he has acted on the belief induced by the other party, but this factor is of no importance in the instant case as it has been decided in the first action that the principle is applicable. Does this principle afford a defence to the claim in the present action?

[I]n the present case equity required T.M.M.C. to give some form of notice to TECO before compensation would become payable. But it has never been decided that in every case notice should be given before a temporary concession ceases to operate. It might, for instance, cease automatically on the occurrence of a particular event. Still less has any case decided that where notice is necessary it must take a particular form.

Romer L.J. seems to have taken the view that the counterclaim could not be a notice because you cannot terminate an agreement by repudiating it. With all respect, the fallacy of this argument consists in treating the arrangement found to exist by the Court of Appeal in the first action as an agreement binding in law. It was not an agreement, it was a voluntary concession by T.M.M.C. which, for reasons of equity, the court held T.M.M.C. could not cease to allow without plain intimation to TECO of their intention so to do. The counterclaim seems to me a plain intimation of such change of intention …

Viscount Simonds delivered a concurring speech on this matter. **Lord Oaksey** delivered a concurring speech without dealing with this matter.

NOTES AND QUESTIONS

1. This is a very difficult case to analyse. It is possible to interpret it as showing that promissory estoppel is a suspensory doctrine; or that, in relation to periodic

payments, it is suspensory as regards future, but not past, payments. However, such interpretations seem misleading because, as in *Hughes v Metropolitan Rly*, the promise in this case was intended to last for only a limited period. Ie TMMC was promising to suspend its right to compensation only pending a new agreement. When TECO rejected a new agreement, TMMC's promise ran out and, by giving reasonable notice, it could revert to its original rights from then on without breaking its promise. But during the period when the promise was operative, and until reasonable notice expired, the right to compensation was extinguished so that TMMC could not later claim compensation for that period. The implication, therefore, is that for the period during which a promise is intended to be operative, the doctrine is extinctive. What was the tenor of Denning J's judgment on this issue in the *High Trees* case (see above, 120, question 2)? In *D & C Builders v Rees* Lord Denning MR said, above, 148, 'It is worth noticing that the principle may be applied, not only so as to suspend strict legal rights, but also so as to preclude the enforcement of them.'

2. Taking the extinctive interpretation of promissory estoppel removes a possible way of partly reconciling promissory estoppel and *Foakes v Beer* (above, 112). The suspensory view would say that, even where a creditor's promise to accept less was meant to last forever (as in *Foakes v Beer*), the creditor could always revert to his right to claim the full amount by giving reasonable notice to the debtor. The extinctive view would, in contrast, say that, as the promise was intended to be permanent, the creditor's right to claim the balance forgone had been extinguished.

3. In *EA Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 the claimant owner of lorries had let them out on hire-purchase to the defendant. Some of the lorries needed repair and the owner had agreed to the hire-purchaser not paying the instalments due on those lorries while they were being repaired. However, despite the doctrine of promissory estoppel, the owner was held able to recover the full instalments due (including arrears) once the lorries had been repaired and made available to the hire-purchaser. Lord Hodson, giving the judgment of the Privy Council, rather confusingly linked the question whether promissory estoppel is suspensory or extinctive with the issue of whether the promisee had detrimentally relied (by irretrievably altering its position). In a well-known statement, he said, at 1330:

> '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. This equity is, however, subject to the qualification (a) that the other party has altered his position, (b) that 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, (c) the promise only becomes final and irrevocable if the promisee cannot resume his position.'

Although Lord Hodson's judgment is far from easy, he appears to have held that promissory estoppel did not here apply, so that the hire-purchaser was bound to pay all the instalments, because there had been no detrimental (ie irretrievable) alteration of position by the hire-purchaser. For the view that detrimental reliance is not needed, see Lord Denning's view in *Alan v El Nasr* above, 143, in which he contrasted Lord Hodson's words in *Ajayi v Briscoe* with those of Lord Cohen in the *Tool Metal* case.

Additional Reading for Chapter 3

J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (29th edn, 2010) Ch 4
S Smith, *Atiyah's Introduction to the Law of Contract* (6th edn, 2005) 106–30

Law Revision Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (1937, Cmd 5449)
While stopping short of recommending the abolition of consideration, the LRC proposed a number of reforms to the doctrine. These included that, even though not supported by consideration, the following promises should be binding: promises in writing, promises for a past consideration, promises to accept part payment as discharging a debt, promising to do what one is already bound to do, firm offers (ie offers promised to be open for a period), and promises detrimentally relied on by the promisee (where the promisor knew, or should have known, that the promisee would rely on the promise).

P Atiyah, *Consideration in Contracts: A Fundamental Restatement* (1971) reprinted (with revisions to meet the criticism of Treitel) in *Essays on Contract* (1986) 179
In this famous essay, Atiyah attacks the conventional view of the doctrine of consideration on the basis that it does not correspond with what the courts are doing. So the various propositions within the standard approach to consideration are 'deconstructed' by reference to decided cases that do not fit the propositions. On Atiyah's view, consideration means nothing more than a good reason for the enforcement of a promise and the reasons, relied on by the courts in the past, cannot be strait-jacketed into the conventional description. It is especially noteworthy that, on his view, it is a nonsense to treat 'promissory estoppel' as an exception to consideration: a promise that has been relied upon is supported by consideration because the reliance constitutes the good reason (and hence the consideration) for enforcing the promise.

G Treitel, 'Consideration: a Critical Analysis of Professor Atiyah's Fundamental Restatement' (1976) 50 *ALJ* 439
Treitel argues that Atiyah is wrong to regard consideration as meaning nothing more than a good reason for enforcing a promise. The conventional doctrine does explain what the courts are doing and there is flexibility because courts can 'invent' consideration. In England, in contrast to the USA, only a narrow doctrine of promissory estoppel is required because of the broad definition of consideration.

W Slawson, 'The Role of Reliance in Contract Damages' (1990) 76 *Cornell LR* 197
The author examines the long-running debate in the United States as to whether promissory estoppel triggers reliance, rather than expectation, damages. He argues that, as a matter of precedent and for many reasons of principle and policy, the expectation interest is, and should be, protected for promissory estoppel.

E Cooke, 'Estoppel and the Protection of Expectations' (1997) 17 *Legal Studies* 258
Cooke argues that, in England, the primary function of estoppel (and she focuses essentially on proprietary and promissory estoppel) is, and should be, to protect and fulfil expectations and not to compensate reliance loss. Departures from that are exceptional.

S Gardner, 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 *LQR* 353
This article examines what is meant when it is said that, for proprietary estoppel, relief is discretionary. Rejecting the view that this means that courts adopt whatever measure of relief they think fit, Gardner argues that the best fit with the case law is that, while protection of the expectation interest is the normal aim, this can be departed from where it is impracticable to protect that interest or for a limited range of other reasons.

J Edelman, 'Remedial Certainty or Remedial Discretion in Estoppel after Giumelli?' (1999) 15 *JCL* 179
Edelman argues that, in the light of the Australian High Court decision in *Giumelli v Giumelli* (1999) 196 CLR 101, 'Australian estoppel' rests on a 'rule-based discretion' whereby the promisee's expectation interest is protected. While such an estoppel is not enforcing a promise as a contract (in his words 'estoppel is not a contract') it does enforce a promise in the same manner as a contract.

R Halson, 'The Offensive Limits of Promissory Estoppel' [1999] *LMCLQ* 256
The author argues that, as well as being used defensively, promissory estoppel can, in various ways, assist a claimant who is asserting a recognised cause of action. However, contrary to the law in, eg, Australia, it does not create a new cause of action and there are good reasons why it should not do so.

Sir Guenter Treitel, *Some Landmarks of Twentieth Century Contract Law* (2002) Ch 1 ('Agreements to Vary Contracts')
Treitel examines the pre-existing duty rule and promissory estoppel by looking back at leading cases such as *Stilk v Myrick, Foakes v Beer, High Trees* and *Williams v Roffey Bros*. He distinguishes between 'increasing pacts' (promises to pay more), 'decreasing pacts' (promises to accept less) and 'cross-overs' (whether one can use, eg, *Williams v Roffey Bros* in a *Foakes v Beer* situation).

***Principles of European Contract Law* (eds O Lando and H Beale, 2000) 137–43, 157–58**

Article 2:101: Conditions for the Conclusion of a Contract

(1) A contract is concluded if:

(a) the parties intend to be legally bound, and
(b) they reach a sufficient agreement without any further requirement.

Article 2:107: Promises Binding without Acceptance

A promise which is intended to be legally binding without acceptance is binding.

[These two provisions show that, in contrast to English law, consideration is not required under PECL.]