5. Non-contractual promises: Promissory and proprietary estoppel

Chapter:
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Author(s): TT Arvind

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‘For I have given my word, and I cannot take it back’*

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Consider the legal issues raised by the following fictional newspaper clipping:

Carrson development in jeopardy as partners descend into acrimony

The high-profile redevelopment of the former Carrson shipyard in Middlesbrough is under threat following a legal dispute between the Carrson family and the intended developers, William Tomlinson Associates. The parties had agreed on a complex transaction structure under which Tomlinson would apply for planning approval. The property would be conveyed to Tomlinson for an agreed price once approval was granted. Tomlinson would carry out the redevelopment at its own risk. If Tomlinson’s profits exceeded a certain sum, the excess would be split between the Carrson family and Tomlinson.

Critically, it appears that the agreement was never written down. The parties shook hands over the deal, and each expected the other to stick to their word. Now that planning permission has been granted, the value of the property has risen considerably and the Carrson family are exploiting a legal technicality to say that the agreement is not binding. Both sides are understood to have instructed lawyers, and the dispute appears to be headed for a long and costly lawsuit. ...
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5.1 Introduction

Not all agreements are enforceable in law. This could be because the offer was never accepted (Chapter 2), because there was nothing in the transaction that the law would recognize as consideration (Chapter 3), because the law deems the parties not to have intended to enter into legal relations (Chapter 4), or—as in the example above—because the parties did not comply with some sort of legal formality. In this chapter’s problem, the formality which was not complied with was the requirement of writing. All agreements which create an interest in property must be in writing.\footnote{If they are not, they will not be enforceable. The agreement in the scenario above is precisely such an agreement. It should have been reduced to writing. It was not. As a result, it is not a binding contract even though the parties have reached agreement, and even though one party has acted in reliance on that agreement.}

But that is not the end of the matter. It is often the case in English law that gaps left by one area of law are filled by another. Where an agreement is unenforceable at contract law because some legal prerequisite or formality has not been met, the gap is filled by the law of estoppel. The law of estoppel works by holding a party to be legally prevented (‘estopped’) from going back on something she has in the past asserted, promised, or accepted.\footnote{The effect of estoppel is to hold the person to that past assertion or promise, by preventing her from resiling from it.}

Estoppel applies in a very wide range of circumstances, many of which have little or nothing to do with contracting, but it intersects with the law of contract in four types of situations. Two of these apply to statements of existing fact, and are only relevant to contracts that have been properly formed.\footnote{Estoppel applies in a very wide range of circumstances, many of which have little or nothing to do with contracting, but it intersects with the law of contract in four types of situations. Two of these apply to statements of existing fact, and are only relevant to contracts that have been properly formed.} In this chapter, our focus will be on two forms of estoppel which relate to statements of future intent, rather than existing fact. Both these types of estoppel come into play in situations where a promise or similar statement of future intent has been made and acted upon but where, for some reason, no contract has come into being. These forms are called proprietary estoppel and promissory estoppel. Unlike the rules in relation to the formation of contracts, these types of estoppel do not require an accepted offer, nor do they require the provision of consideration. They are, instead, triggered by reliance—or, more specifically, by representations or assurances made or given by one person to another, on which that other relies.

Although proprietary and promissory estoppel share a common structure, they differ in their scope and effect, and in the details of how their elements are applied. Proprietary estoppel only applies to promises...
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relating to an interest in real property, and creates a binding legal obligation which can be enforced in a court. Promissory estoppel, in contrast, can apply to any promise, but is only ever enforced negatively in English law. It can be used as a defence, but not as the basis of an action. The usual way of putting this is to say that promissory estoppel can be a shield, but not a sword. You can use it to defend yourself against claims made by another party, but you cannot use it to launch an action against another party. The significance of this point cannot be stressed enough. Proprietary estoppel can and does create new legal rights. Promissory estoppel does not. It simply creates a temporary bar to the enforcement of existing rights.

Estoppel tends to be invoked in situations such as the one set out in Problem 5, where parties have reached a deal from which one is subsequently trying to withdraw. Intuitively, it appears both morally and legally appropriate to intervene to prevent this, and uphold the honest expectation of the party who acted in reliance on the other’s promise. Nevertheless, promissory and proprietary estoppel have been the subject of controversy in recent years. At the heart of these debates lies the uneasy question of the relationship between estoppel and consideration, and the extent to which it is appropriate to enforce promises which are not supported by consideration. Whilst judges in England at one stage favoured the expansion of estoppel, in recent years they have been sceptical about its role.

We will begin by setting out the types of situations in which promissory estoppel is typically engaged, and examine what it is about contract doctrine that leads to these promises not having contractual effect. We will then move on to look at the specific ingredients of promissory estoppel and the effect it has on the rights and obligations of the persons involved. We will then consider proprietary estoppel, and conclude by considering the proper place of estoppel in contracting.

5.2 The context of promissory estoppel

A plea of promissory estoppel is typically raised in two types of situations. Problem 5 illustrates the first. Here, the parties face a situation where a binding contract has not come into effect. In the problem, this was because the parties did not comply with a legal formality, but the situation could just as easily have arisen if no consideration was provided. Consider, once again, one of the hamster examples discussed in Chapter 3:

Illustration 5.1

- Thanks for mowing my lawn. Would you like one of my baby hamsters?
- Yes, please!
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As a contract, this promise is unenforceable because the law does not treat past consideration as being good consideration. If, however, the person to whom the promise is made relies upon it (e.g., by buying a hamster cage and hamster food or by paying a vet to have the hamster inoculated), promissory estoppel might come into operation to prevent the promisor from demanding the return of the hamster.

The second, and in the modern context far more common, situation relates to renegotiation. Consideration often creates issues when contracts are renegotiated, because renegotiation very often results in one party agreeing to do more, or accept less, for pragmatic reasons rather than for ‘valuable’ consideration in the traditional sense. Whilst Williams v Roffey deals with renegotiation quite effectively in some cases, not every contractual forbearance is associated with a ‘practical’ benefit. Promissory estoppel has since at least the 19th century been used to provide the promisee with a remedy in such circumstances. In Hughes v Metropolitan Railway Co, Lord Cairns set out what is generally taken to be the classic statement of the role of promissory estoppel:

> if parties who have entered into definite and distinct terms involving certain legal results ... 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.

In the modern context, promissory estoppel is also used to get around the rule in Foakes v Beer which, as you will recall, means that an agreement to accept a lesser sum of money than is due under a contract—for example, a reduced rent or a partial payment of a debt—is not enforceable. Here, promissory estoppel can often provide the promisee with a partial defence if the promisor tries to go back on her promise. Consider the scenario set out in the following email:

**Illustration 5.2**

> Dear Santha,

> I understand your social enterprise is in financial difficulty as a result of a loss of grant income. We are keen to support the work you are doing. To help tide you over this difficult period, we are prepared to waive half the amount you have borrowed...
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from us. This will reduce your debt to us from £10,000 to £5,000, and your monthly repayment from £250 to £125. We will treat repayment of the £5,000 as being full and final settlement of the entirety of your debt.

Best wishes,

Jim Flanagan

Account Manager

Allendale & District Bank

Foakes v Beer\textsuperscript{9} means that any agreement the parties reach will be unenforceable for want of consideration. Yet such a result—which would let the bank withdraw from the renegotiated agreement at will—seems unfair to the borrower, who may have reorganized its affairs in reliance on the bank’s promise to waive a portion of its debts. Commerce requires trust and certainty, and permitting a party to resile from a promise in these circumstances arguably cuts against both.

In practice, English courts have therefore been reluctant to allow parties to abandon at will promises or assurances which have been relied upon by the other party, even when those promises are not supported by consideration. The case of Central London Property Trust v High Trees House,\textsuperscript{10} from which the modern approach to promissory estoppel is taken to derive, serves as a good illustration.\textsuperscript{[p. 119]}

Case in depth: Central London Property Trust v High Trees House [1947] KB 130

Central London Property Trust (CLPT) owned a number of properties in London. High Trees House were the lessees of a block of flats on a 99-year lease at a rent of £2,500 per annum. The lease began in 1937. Because of the war, occupancy of the flats was very low, and High Trees were unable to meet their rent. CLPT therefore agreed to halve the rent to £1,250 per annum.

In September 1945, CLPT (who were now in receivership) wrote to High Trees House saying that the full rent was now payable. The receiver also sought the payment of arrears for the entire period, on the basis that the original promise was not supported by consideration. The parties brought proceedings in the High Court on a ‘friendly’ basis to ascertain the legal position.

Denning J in the High Court held that CLPT could recover the full rent from the end of the war onwards, but not for the period before then. He agreed that the promise to accept a lower rent was not
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supported by consideration, and was therefore not enforceable under the rule in *Foakes v Beer*.\(^{11}\) The law had, however, changed, and now recognized a different ground on which the promise might be upheld:

There has been a series of decisions over the last fifty years ... 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 ... 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.\(^ {12}\)

On this basis, CLPT’s promise to accept a lower rent was ‘a promise intended to be binding, intended to be acted on and in fact acted on’ and was therefore ‘binding so far as its terms properly apply’.\(^ {13}\) On the facts, this meant that it would apply while the war went on, but not thereafter.

As the judgment in *High Trees* suggests, it was the limitations of the doctrine of consideration more than anything else that was responsible for the use of promissory estoppel in that case and in subsequent cases. If promissory estoppel were to fully plug the holes left by consideration, however, it would in effect become an alternative to consideration—a mode of creating binding legal obligations grounded in reliance, rather than in consideration.

Some commentators have argued for precisely such an outcome, arguing that promissory estoppel represents a ‘reliance-based model’ for determining when a contract has been concluded, which should be taken at least as seriously as the ‘exchange-based’ model represented by consideration.\(^ {14}\) The courts have, however, been reluctant to let promissory estoppel go too far into the domain of consideration. Their focus has been, rather, on achieving a balance where promissory estoppel supplements the doctrine of consideration in certain cases, without becoming a full-fledged alternative to it. The balance we see in English law today was, in large part, the work of one judge, Lord Denning, who was responsible for a number of influential decisions in the middle of the 20th century which established both the modern form of the doctrine and its relationship to contract and consideration. We will return to the \(^ {(p. 120)}\) question of how well promissory estoppel addresses the
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Limitations of the doctrine of consideration, and whether it is the best way to respond to those limitations, towards the end of this chapter.

5.3 The requirements of promissory estoppel

Let us now move to considering the specific requirements, or ingredients, of promissory estoppel in greater detail. The requirements are easily summarized. For promissory estoppel to arise, there must be a promise, assurance, or representation, which is clear and unequivocal, to the effect that the promisor will not rely upon a particular legal right. The promisee must have relied on this promise by changing his behaviour or conduct. Finally, the making of the promise and the reliance on it must take place in circumstances which make it inequitable to permit the promisor to resile from the promise. We will now look at each of these elements in turn.

5.3.1 A promise or representation

Despite its name, ‘promissory’ estoppel does not require an express promise to have been made. A person who has by her words or conduct given a clear and unequivocal assurance, or made a clear representation, can also be estopped if that assurance or representation is in the nature of a promise.

In Robertson v Minister of Pensions, an army officer was found unfit for general service following an injury. He wrote a letter to the War Office asking whether his disability would be treated as ‘attributable to military service’ for the purposes of his pension. He received a reply saying that it would be. When he applied for a pension, however, the Minister of Pensions decided that his disability was not attributable to military service. The Court of Appeal held that the letter from the War Office had the effect of estopping the Crown from going back on its promise. Whilst there was no ‘promise’ as such by the War Office, the assurance it gave Robertson in relation to how his disability would be treated had a similar effect.

An assurance or representation has the nature of a promise if it represents a choice relating to the future. Assurances and representations—whether express or inferred from conduct—which do not look to the future, or do not represent a choice, will not create an estoppel. In Robertson, for example, the assurance concerned the manner in which the government would choose to treat Colonel Robertson’s injury for pension purposes. In High Trees, similarly, the representation related to the way in which CLPT would choose to exercise its right to demand rent. Where, in contrast, the promise or representation did not relate to future conduct, the courts have generally held that the facts do not give rise to promissory estoppel.

In James v Heim Gallery (London) Ltd, a landlord decided not to invoke a contractual right to review rent, because he thought he had lost the right through not exercising it on time. Subsequent developments in the
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Case law showed that his belief was false—time was not of the essence in a rent review clause, and failure to exercise the power on time did not extinguish the right. He therefore initiated a rent review. The lessee argued that he was estopped from doing so. The Court of Appeal rejected the lessee’s argument. The landlord had not made anything in the nature of a promise pertaining to the future, and his decision did not represent a choice in relation to how he intended to behave. He had simply accepted what he believed to be the position at law. This did not create an estoppel: ‘To bow to the inevitable, or the near inevitable, is quite different from agreeing to forego a right.’

Putting this discussion back in the context of the scenarios outlined in this chapter so far, it would seem to be clear that all three meet the requirements of a promise or representation, because all three statements relate to the future. Problem 5 involves an express promise to convey land. Illustration 5.1 involves a promise to transfer ownership of a hamster and Illustration 5.2 involves an assurance that the bank will not seek to recover the entire amount.

5.3.2 Clear and unequivocal

The second requirement that must be met for a claim of promissory estoppel to succeed is that the promise must be ‘clear and unequivocal’. Promises and assurances do not have to be expressly given, and can be implied from a person’s words or conduct. Hughes v Metropolitan Railway Co was such a case. In Hughes, a landlord sent a lessee a notice requiring them to carry out repairs to the leased premises. The lessee wrote back asking if they could negotiate a return of the lease to the landlord instead. The negotiations fell through after some months. It was held that by entering into the negotiations, the landlord gave an implicit assurance that he would not require the repairs to be carried out while the negotiations were going on.

Although the promise or assurance does not have to be express, it does have to be clear and unequivocal, or unambiguous. A promise or representation that is inherently vague or uncertain will not be sufficient for the purposes of promissory estoppel, even if it has been relied upon. Nor will promissory estoppel apply to things that are ‘mere acts of indulgence’ particularly in a commercial context. Just condoning a delay in performance on one occasion, for example, will not create an estoppel waiving the right to object to future delays. The editors of Chitty on Contracts have suggested that the promise or assurance must have ‘the same degree of certainty as would be needed to give it contractual effect if it were supported by consideration’, and the analogy would seem to be sensible given the role promissory estoppel plays in contractual situations. If this view is accepted, an important consequence is that mere silence will not ordinarily be sufficiently clear or unequivocal to create an estoppel, just as mere silence does not ordinarily suffice to create a contractual obligation.
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5.3.3 A legal right

Thirdly, the promise must relate to an existing legal right. The promisor must promise or represent that he will not rely on or enforce a legal right. The right in question does not have to be contractual. It could be any right—whether contractual, proprietary, statutory, equitable, or otherwise. What matters is that ‘there is a pre-existing legal relationship which could in certain circumstances give rise to liabilities and penalties’. This gives promissory estoppel a broad scope. In Robertson v Minister of Pensions, the doctrine was applied to the legal power of the government to determine whether an injury was suffered in the course of military service. This is clearly not a contractual right, but it is one that can be the subject of promissory estoppel.

Of the three scenarios outlined in this chapter, only one—Illustration 5.2—involves a contractual right. In Problem 5 and Illustration 5.1, the right that is the subject of the promise is a property right. In Problem 5, the property right in question is the one which the Carrson family has in its land, and in the first illustration it is the property right the promisor has in the hamster. All three will, however, satisfy the requirement that the promise concerns an existing legal right.

The emphasis on existing legal rights stands in contrast to Denning J’s language in High Trees, which seems to emphasize the intention to create legal relations, rather than the intention to alter existing legal relations. Despite the importance of High Trees as a precedent, however, as the law stands today promissory estoppel is not seen as a means of creating new rights and can only be invoked to alter existing legal rights.

5.3.4 Reliance

Fourthly, the promisee must have relied on the promise. By ‘reliance’, we mean that the promisee must have been led to alter his behaviour or conduct by the promise or assurance. If the promisee’s behaviour was not influenced by the promise or assurance, the requirement of reliance will not be made out, and estoppel will not apply. Note that the promise or assurance does not have to be the sole cause of the alteration. It is sufficient if it is a cause. Thus if the promisee altered her behaviour partly in reliance on the promise, and partly as a result of entirely independent circumstances, promissory estoppel can still apply. This approach to causation reflects a general feature of the way contract law treats representations, which we will consider in more detail in Part III when we consider misrepresentations.

The nature of reliance becomes clearer if we apply it to the three scenarios discussed in this chapter. In Problem 5, the fact that Tomlinson spent time and money to obtain planning permission is very clear evidence of reliance. By working to obtain planning permission, Tomlinson altered their behaviour, and did so as a result of the promise of a conveyance in their favour. Illustration 5.1—the case of the
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hamster—is somewhat more tricky. Merely taking the hamster is not likely to constitute reliance, in that it does not constitute a change of behaviour. However, if the recipient then proceeds to spend money buying hamster food, or a hamster cage, the purchase is likely to be sufficient to demonstrate reliance. In Illustration 5.2, similarly, if the borrower puts together a budget or spending plans based on the assumption that their debt to the bank has been halved, they will have altered their behaviour as a result of the promise of settlement, and have demonstrated reliance.

Some of the authorities on reliance go further, and suggest that reliance must incorporate an element of detriment. That is to say, it is not sufficient for the promisee to have altered her behaviour. She must have done so in a way that is to her detriment. An alteration that is beneficial, or neutral, is not in this view sufficient reliance for the purposes of promissory estoppel. This position appears to be based on an analogy with estoppel by representation which does require reliance to be detrimental. It may also owe something to the contractual context in which promissory estoppel is increasingly invoked. To speak of ‘detriment’ creates a parallel with the standard definition of consideration, which can be both useful and attractive when the doctrine is used in a contractual context.

Nevertheless, detriment is not a requirement on which the courts have insisted. In several leading cases where the parties successfully pleaded promissory estoppel—including both High Trees and Hughes v Metropolitan Railway—reliance arguably operated to the benefit rather than detriment of the promisee. In High Trees, the primary effect of the promisees’ reliance was to enable them to enjoy a lower rate of rent for an extended period of time. In Hughes, it was to let them postpone their contractual obligation to repair the property for several months. It is hard to see how either of these can be termed a detriment. Whilst the suggestion that reliance must be detrimental is still occasionally made in argument and even referred to in decisions, there is good reason to believe that legal doctrine does not require reliance to be detrimental.

5.3.5 Inequitable

The final ingredient of promissory estoppel is that it must be inequitable to allow the promisor to go back on her promise or assurance. If it is not inequitable, the courts will not apply promissory estoppel even if the other elements are made out.

It is not possible to come up with a checklist of what makes a particular set of facts ‘inequitable’. As with most doctrines with equitable roots, promissory estoppel gives courts discretion to allow or deny relief in response to the specific facts of individual cases. A few general points can, however, be made.
First, the courts will not ordinarily apply promissory estoppel if there has been impropriety on the part of the promisee. The case of *D & C Builders v Rees* provides a good illustration. D&C Builders had carried out building works for Mr and Mrs Rees, who owed them just over £480. Mrs Rees knew that the company was on the verge of insolvency, and told them that she would offer £300 in final settlement of the debt. Because of their financial situation, D&C Builders accepted a cheque for £300, and on Mrs Rees’s insistence gave her a receipt saying that the money had been received ‘in completion of the account’. They subsequently sued to recover the remaining £180. The Court of Appeal held that they were entitled to recover. Promissory estoppel only applied where it was inequitable to permit the promisor to resile from the terms of the promise. Because Mrs Rees’s conduct amounted to intimidation, it was not inequitable to permit D&C Builders to resile from their assurance that their acceptance of a lower sum was in final settlement.

Secondly, the courts will not apply promissory estoppel if it appears that the promisor had good reasons for changing his mind. In *Williams v Stern*, Williams had borrowed money from Stern, and had set up some furniture as security. On the day one of the instalments fell due, Williams asked Stern for extra time. Stern said he would give Williams a week. On the third day, however, Stern discovered that Williams’s landlord was about to distrain the furniture for rent in arrears. He immediately seized the furniture. The Court of Appeal held that he was entitled to do so. Given that the goods had been threatened by the promisee’s landlord, the promisor was entitled to change his mind.

Finally, although detriment is not a necessary ingredient of promissory estoppel, the fact that no detriment has been or will be caused to the promisee can, in combination with other circumstances, be relevant to the question of whether or not going back would be inequitable. In *The Post Chaser*, the buyers of a consignment of palm oil had by their conduct waived certain defects in the documents of sale. Two days later, they sought to revoke their waiver. Goff J in the High Court permitted them to do so, holding that it was not inequitable for them to insist on their rights. This was because of a combination of the very short time between the waiver and its revocation, and the fact that no detriment had been suffered by the promisee in reliance on the representation. Note, though, that it is unlikely that the mere absence of detriment unaccompanied by other factors will by itself be enough.

### 5.4 The effect of promissory estoppel

Two points must be made about the effect of promissory estoppel. The first, which was briefly discussed in the introduction, is that promissory estoppel can only be pleaded as a defence. You cannot sue to enforce a promise or representation that is the subject of promissory estoppel, or to recover damages for its breach. The second point is that the effect of promissory estoppel is to suspend the right which the promisor promises not to enforce. It does not usually extinguish the right.
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The right is put into abeyance, and will revive once the circumstances creating the estoppel have passed. We will look at each of these in turn.

5.4.1 Not a cause of action

The idea that promissory estoppel can only be used as a defence arises from the principle that it only deals with promises or representations concerning existing legal rights, rather than the creation of new rights. You cannot use promissory estoppel to enforce the promise or assurance, but you can use it if the promisor seeks to enforce or rely upon the original right in contravention of the promise. Thus, for example, in Illustration 5.1, the promisee of the hamster will not be able to sue for delivery of the hamster if the promisor fails to hand it over. However, if the promisor tries to take the hamster back, the promisee will be able to use the promise as a defence.

The fact that promissory estoppel cannot be the basis of a claim does not, however, mean that it cannot be used by a claimant. A claimant might, for example, be able to use promissory estoppel to resist a defence raised by the defendant. *Robertson v Minister of Pensions*,\textsuperscript{36} which you encountered in section 5.3, was precisely such a case. Robertson’s cause of action against the minister was based on his statutory claim for a pension, not on the assurance given by the War Office. Promissory estoppel was used to respond to the minister’s defence, which was that Robertson’s injury was not attributable to military service.

*Robertson* is not the only case in which promissory estoppel was successfully used by a claimant. In *Combe v Combe*,\textsuperscript{37} Denning LJ cited *Robertson* and a number of similar cases, and then summarized the position thus:

> 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.\textsuperscript{38}

Underlying Denning LJ’s reluctance to permit promissory estoppel to act as a cause of action was the view that this was necessary to protect the position of the doctrine of consideration:

> 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 ...\textsuperscript{39}
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The practical implications of this rule can be seen if we return to Problem 5. To succeed against the Carrsons, Tomlinson would have to bring an action on the promise of a conveyance. Because there is no other cause of action available to Tomlinson, the promise cannot play a merely ‘supplementary’ role. The result will be that Tomlinson will be left without a remedy in promissory estoppel, despite having relied on the promise, because promissory estoppel cannot be a cause of action. This represents a deliberate choice by the English judiciary to the effect that promissory estoppel should supplement the doctrine of consideration, but should not be allowed to subvert it. (p. 126)

Debates in context: a sword or a shield?

The principle that promissory estoppel cannot be a cause of action has come in for criticism from academics for several decades. The argument has been that there is nothing intrinsic to the doctrine that requires it to only be a defence, and that it is illogical to so confine it. Other academics have gone further. Professor Atiyah wrote a number of influential books and articles in the 1970s and 1980s calling for consideration to be abolished altogether, and replaced by a reliance-based test inspired by promissory estoppel. More recently, Professor Hugh Collins has argued that reliance represents an alternative approach to determining when a contract is formed, which deserves to be taken as seriously as the more orthodox approach embodied in the doctrine of consideration.

Courts in several other common law jurisdictions have moved in this direction. The courts in Australia, as well as several US states, have abandoned this distinction, and are now willing to permit claimants to use promissory estoppel as a cause of action. In Australia, the shift came about in the case of *Waltons Stores (Interstate) Ltd v Maher*. Maher owned property, and was in negotiations with Waltons Stores who were interested in taking some of his property on a long-term lease. They said that they would require an existing building to be demolished and replaced by a new one. Maher began carrying out these works, believing—on the strength of Waltons’ words—that a contract had been concluded, and that the actual exchange of signed documents was a formality. In reality, a contract had not come into being, and Waltons was under no binding obligation to take the property on lease. Following a retailing review, they decided that they would not proceed with the contract. Maher sued. The High Court of Australia found for Maher, holding that promissory estoppel could, in Australian law, be the basis of a cause of action in the same way as proprietary estoppel, both of which should be seen as aspects of a single unified action of equitable estoppel:
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Many commentators have argued that English courts should follow the Australian courts, and there have been some signs from the judiciary of willingness to look beyond the traditional division of estoppel into promissory and proprietary estoppel, although no court has as yet sought to restate the law along these lines. The traditional understanding of promissory estoppel also has prominent defenders. The editors of *Chitty on Contracts*, for example, have argued that promissory estoppel is far better understood as a type of forbearance rather than estoppel. As such, it would be a mistake to attempt to turn it into an enforceable cause of action.

The debate continues.

5.4.2 Suspending or extinguishing rights?

Suspending rights through estoppel

In the majority of cases, the effect of promissory estoppel is to temporarily suspend the right that is the subject of the promise or assurance. The right is not extinguished, and will become enforceable again when the circumstances that gave right to the estoppel have passed. In *High Trees*, for example, the landlord was able to demand payment of the full rent once the war had ended. The promise only suspended full payment while the war was ongoing. Similarly, in *Hughes v Metropolitan Railway*, the tenants’ obligation to repair the property did not disappear. It was simply held in abeyance while the parties were negotiating.

In *High Trees*, Denning J linked the suspensory effect of promissory estoppel to the parties’ intention. Promises not to enforce a right, including the promise that was the subject of *High Trees*, are typically intended to be temporary. As a result, they should only be treated as suspending the rights of the parties for the intended period, rather than extinguishing them completely. There is also a strong equitable element to the rule that promissory estoppel is ordinarily only suspensory. In the absence of consideration, it is only fair and equitable to permit the promisor to change his mind by giving reasonable notice to the other party.
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What, then, is required in order to effectively put an end to a period of suspension? Case law suggests that the promisor is not required to issue a notice expressly terminating the period of suspension, or even making reference to it. All that is needed is 'a clear intimation of a reversal' by the promisor of their previous attitude in relation to the right that was placed in abeyance, and of 'their intention to enforce compliance' with that right. Thus it has been held that filing a claim (ie starting a lawsuit) or a counterclaim which seeks to assert or enforce the right in question can serve as sufficient notice for the purposes of ending an estoppel.

Extinguishing debts through estoppel

When it comes to debts and the payment of money, a purely suspensory doctrine is of limited utility. Think back to the nature of the problem posed by Foakes v Beer and Selectmove, where a contract is renegotiated so that one party agrees to accept a lesser sum in place of a greater one. If promissory estoppel were to be purely suspensory, it would mean that the promisor could revive his claim to the greater sum simply by giving notice to the other party. In Illustration 5.2, for example, if the bank could insist on repayment of the full £10,000 at any time simply by giving notice that it had changed its mind, there would be little point to the estoppel. To be of any use in cases involving the part-payment of debts or the payment of lesser sums of money in place of greater ones, therefore, promissory estoppel will need to do more than merely suspend rights. It will need to extinguish them at least in part.

And, in point of fact, the courts have repeatedly treated promissory estoppel as extinguishing a right in cases relating to debts and other payments of money, even while claiming to treat it as having no more than a suspensory effect. High Trees itself serves as an example. Although Denning J described the effect of the doctrine in that case as suspensory, it was suspensory only in the sense that the right to claim the higher rent for future years could be reinstated. The right to claim the higher rent for past years was not suspended. It was extinguished. CLPT could not, by giving notice, reinstate the right to demand payment for the years of the war.

On its face, reconciling this with the decision in Foakes v Beer appears less than straightforward. Foakes was quite unambiguous in holding that an agreement to accept a lesser sum in place of a greater one has no legal effect, and it made no reference to promissory estoppel, or to Hughes v Metropolitan Railway, even though it postdates Hughes. In historical terms, however, this is readily explicable. Hughes was decided in terms of the courts’ discretionary power to grant a tenant relief against the forfeiture of a lease. At the time Foakes was decided, therefore, Hughes would have been seen as a case specifically concerned with the powers of a court in relation to leases, rather than reflecting a more general principle affecting all contracts. It did not come to be seen as
representing the same underlying principle as promissory estoppel until the 20th century.

Promissory estoppel, then, should be seen as a later development, which offers one route to mitigating some of the problems created by the doctrine of consideration, and which for that reason does not offend the rule in *Foakes*. The decision in *Collier v P & MJ Wright (Holdings) Ltd* provides a useful illustration of how the courts currently use promissory estoppel in situations that are also covered by the rule in *Foakes v Beer*.

**Case in depth: Collier v P & MJ Wright (Holdings) Ltd [2007] EWCA Civ 1329**

This case related to a commercial loan which Collier, together with two partners, had taken out with P & MJ Wright. Collier and his partners defaulted on the loan. Following a settlement, they began repaying the debt in monthly instalments of £600. Under the terms of the settlement, all of them were liable for the entire loan, so that if any partner failed to pay his share the other partners would have to pay back his share as well.

The other partners got into financial difficulties. Collier began paying monthly instalments of £200 on his own. He claimed that he had a meeting with P & MJ Wright, at which they agreed to release him from liability for the other partners’ shares of the loan, leaving him only liable for one-third of the loan. He then continued making monthly payments of £200, until he had repaid this amount. In the meantime, the other partners became insolvent and stopped paying altogether. P & MJ Wright then sued him, demanding repayment of the entire loan.

The facts of the case were disputed—P & MJ Wright denied that they had ever agreed to release Collier from liability for the other partners’ shares. However, the case came before the Court of Appeal on a preliminary procedure, which meant that it only had to determine whether there was a ‘genuine triable issue’. This turned on two questions. The first was consideration. On the assumption that P & MJ Wright had in fact promised to release Collier from liability for the other partners’ shares, would there have been a valid contract? On this issue, the court held that there was no triable issue—the law was clear that the contract would be invalid under the rule in *Foakes v Beer* because Collier had provided no consideration for that promise.

The second point was the defence of promissory estoppel. Here, the Court of Appeal held both that there was a triable issue and that P & MJ Wright would not be able to claim the residual sum from Collier if
promissory estoppel were established. Because the court was not considering the merits, it did not consider the question of whether there was sufficient reliance. Arden LJ suggested that the payment of a lesser sum would in and of itself constitute sufficient reliance, if the debtor was acting on the promisor’s assurance in making that payment. Longmore LJ was more sceptical, however, and pointed out that there was no evidence of any alteration of conduct on Collier’s part, which would suggest that there was no meaningful reliance. They were not, however, required to decide this point, and they did not do so.

The ruling in Collier has been criticized on the grounds that it stretches promissory estoppel further than it ought to be stretched—promissory estoppel, it has been argued, cannot be used to plug every gap in the doctrine of consideration without destroying its coherence. The practical sense behind the ruling can, however, be seen if we relate it back to the scenario set out in Illustration 5.2. If the ruling in Collier holds, the effect would be that the bank, once it has given an assurance that it is waiving part of the debt, will not then be able to go back on the assurance.

The exception will be where for some reason it is equitable to allow the bank to resile from its initial assurance. Collier does not hold that promissory estoppel is automatically available in all cases where there has been an agreement to accept a lesser sum. The party relying on estoppel will still need to demonstrate that the ingredients of promissory estoppel are made out, including the requirement that resiling from the promise must be inequitable. This gives a degree of protection to the bank, in that it will enable it to change its mind if there is good reason for it to do so, or if there has been some impropriety on the part of the borrower.

The importance of this requirement was highlighted by the Court of Appeal in MWB Business Exchange Centres v Rock Advertising Ltd. In that case, a licensor had initially agreed to reschedule payments due from a licensee to enable the licensee to clear arrears under the licence. Two days after the agreement, the licensor changed its mind and sought to cancel the agreement. The Court of Appeal accepted the ruling in Collier, but nevertheless unanimously held that the licensor would not be estopped from changing its mind, because going back on its word would not be inequitable. Rock had not suffered any prejudice or detriment as a result of its reliance on the promise, and could easily be restored to the position it had originally occupied. On subsequent appeal, the case was decided on other grounds, but the Court of Appeal’s decision nevertheless demonstrates that Collier is capable of being applied in a way that achieves a just balance, and thus represents a position that is both necessary and sensible.
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5.5 Proprietary estoppel

Before we leave the topic of estoppel, we need to briefly consider the other form of estoppel that has relevance to situations where the formation process has failed; namely, proprietary estoppel. Proprietary estoppel differs fundamentally from promissory estoppel in that it creates a cause of action on which proceedings can be brought. To put it in the terms used earlier, it can be a sword. However, as its name suggests, it only applies to a limited set of promises—those pertaining to an interest in real property.

On the face of it, the ability of proprietary estoppel to serve as a cause of action makes it of potential relevance to Problem 5. As we have seen, promissory estoppel is of little assistance to Tomlinson because it can only serve as a defence, and not a cause of action. Can proprietary estoppel, then, help?

The answer is that although proprietary estoppel is, in principle, capable of furnishing a cause of action in such circumstances, it is unlikely to do so in this particular case. The requirements of proprietary estoppel closely parallel those of promissory estoppel, but they are stricter. It is, for example, a clear requirement in proprietary estoppel—unlike promissory estoppel—that reliance must be detrimental and reasonable. The courts have also stressed that the elements of proprietary estoppel ‘cannot be treated as subdivided into three or four watertight compartments’.59

Instead:

the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined, and that whether there is a distinct need for a ‘mutual understanding’ may depend on how the other elements are formulated and understood. Moreover the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.60

In considering the requirements that follow, therefore, it must be kept in mind that the court will treat its enquiry as an integrated one and determine whether proprietary estoppel is made out based on a consideration of all the circumstances of the case, rather than in terms of individual requirements.

5.5.1 A promise or encouragement

As in promissory estoppel, the first requirement of proprietary estoppel is that there must be something akin to a promise or a representation. This must be of a nature that encourages the defendant to believe that they
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will be given (or already have been given) an interest in real property, and it must be made by the true owner of the property in question. The property must also be identified: a promise which is vague in terms of the property to which it relates will not give rise to a proprietary estoppel.  

5.5.2 Reliance and reasonableness

The second requirement is that the promise or encouragement must induce reliance, which must be reasonable. The courts have in recent years placed quite a bit of emphasis on the requirement of reasonableness. The decision of the House of Lords in *Yeoman's Row Management Ltd v Cobbe* provides an excellent illustration.

**Case in depth: Yeoman's Row Management Ltd v Cobbe**

[C]obbe was a developer who entered into an oral agreement with Yeoman's Row to develop land owned by Yeoman's Row. Cobbe went to great expense to obtain planning permission for the development. After permission came through, Yeoman's Row sought to increase the price it intended to charge.

Cobbe could not bring an action for breach of contract, because the contract had not been reduced to writing. Instead, he advanced a claim in proprietary estoppel. His claim succeeded in the High Court and the Court of Appeal, but was rejected by the House of Lords.

Lord Scott agreed that the behaviour of Yeoman's Row was unconscionable, but held that that was not sufficient to give rise to a proprietary estoppel. Unlike a domestic claimant, a commercial party such as Cobbe was fully aware of the risks inherent in proceeding without an enforceable agreement:

*It would be an unusually unsophisticated negotiator who was not well aware that oral agreements relating to such an acquisition are by statute unenforceable and that no express reservation to make them so is needed. Mr Cobbe was an experienced property developer and Mrs Lisle-Mainwaring gives every impression of knowing her way around the negotiating table. Mr Cobbe did not spend his money and time on the planning application in the mistaken belief that the agreement was legally enforceable. He spent his money and time well aware that it was not. Mrs Lisle-Mainwaring did not encourage in him a belief that the second agreement was enforceable. She encouraged in him a belief that she would abide by it although it was not. Mr Cobbe’s belief, or expectation, was always speculative. He knew she was not*
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legally bound. He (p. 132) regarded her as bound ‘in honour’ but that is an acknowledgement that she was not legally bound.65

Under the circumstances, Cobbe could not use proprietary estoppel to overturn the result of a risk he had consciously taken: ‘conscious reliance on honour alone will not give rise to an estoppel’.66 Cobbe’s action, therefore, failed.

Where the parties are not commercial, however, the courts have tended to be less strict. In Thorner v Major,67 a man had worked without pay on his cousin’s farm for several decades, in the expectation—which had been encouraged by his cousin’s words and actions—that he would inherit the farm. The House of Lords held that such an expectation was not unreasonable given the facts of the case.

5.5.3 Reliance and detriment

In proprietary estoppel, reliance must be detrimental. That is to say, the promisee must suffer detriment as a result of relying on the promise. Detriment is often clear. In Thorner v Major, the detriment was held to lie in the fact that the claimant had worked for no pay on his cousin’s farm for over 30 years. Similarly, in Crabb v Arun District Council,68 Crabb had at a meeting with Arun District Council been given an assurance that they would provide him with a right of access to his land through council property. Relying on this assurance, Crabb sold a portion of his land, leaving it with no independent means of access. The council then sought to charge Crabb for the right of access. On Crabb’s suit, the Court of Appeal held that the council’s assurance and Crabb’s detrimental reliance gave rise to a proprietary estoppel in Crabb’s favour.

5.5.4 Unconscionability

The final requirement is that it must be unconscionable not to give effect to the expectation of acquiring an interest in real property created by the promisor’s actions. Unconscionability by itself is not sufficient to ground an action in proprietary estoppel. If the other elements of promissory estoppel are not made out on the facts of a case, ‘however reprehensible the behaviour of the defendant and whatever the court’s reaction to it may be, the doctrine of proprietary estoppel will not avail the claimant’.69

What, then, is the role of unconscionability in proprietary estoppel? In Yeoman’s Row v Cobbe,70 Lord Walker distinguished behaviour that was merely unattractive from (p. 133) behaviour that was truly unconscionable, and explained the nature of unconscionability in these terms:
[Unconsciousness] is being used (as in my opinion it should always be used) as an objective value judgment on behaviour (regardless of the state of mind of the individual in question). As such it does in my opinion play a very important part in the doctrine of equitable estoppel, in unifying and confirming, as it were, the other elements. If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again.71

Returning, then, to Problem 5, it is likely that proprietary estoppel will not come to the rescue of Tomlinson. The transaction between Tomlinson and the Carrson family was a commercial one, and Yeoman's Row v Cobbe makes it clear that the requirement that reliance be reasonable will set a high bar in commercial transactions involving property. In such cases, the fact that one party ‘chose to stand on her rights rather than respecting her non-binding assurances’ is likely to only render that party’s conduct unattractive, and not unconscionable,72 because the promisee entered into the arrangement knowing full well that the obligations only bound the other party in honour.

5.6 In conclusion: estoppel and consideration

Promissory and proprietary estoppel are grounded in the simple principle that a person who gives an assurance on which another person relies should, in some cases, be restrained from going back on that assurance. Because this principle is materially different from the idea that underlies the doctrine of consideration, there is a great deal of scope for the two to productively supplement each other, but also for them to come into conflict.

The use of promissory estoppel in dealing with the problems posed by renegotiations, particularly in relation to debt, is a particularly clear example of the productive role that can be played by promissory estoppel in supplementing the doctrine of consideration. Indeed, as we have discussed in the course of this chapter, it was deliberately nudged in this direction by Lord Denning; and the decision of Arden LJ in Collier v P & MJ Wright shows clear signs of being similarly motivated.

Yet, while developing the law of estoppel, the courts have also been keenly aware that estoppel sits somewhat uneasily alongside the doctrine of consideration, and have been reluctant to take steps that will tilt the balance too far in favour of estoppel and against consideration. Throughout his development of promissory estoppel, Lord Denning stressed that promissory estoppel should not be allowed to become a sword, because to do so would be to undermine the role of consideration in contract. Other judges have expressed their concern in more colourful terms. In Taylor v Dickens,73 Judge Weeks QC sitting as a Deputy Judge of the High Court expressed concerns about placing too much store in proprietary estoppel on the fact that one party’s actions were...
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unconscionable. To do so, he said, would threaten the traditional role of contract, and run the risk of making justice arbitrary:

In my judgment there is no equitable jurisdiction to hold a person to a promise simply because the court thinks it unfair, unconscionable or morally objectionable for him to go back on it. If there were such a jurisdiction, one might as well forget the law of contract and issue every civil judge with a portable palm tree. The days of justice varying with the size of the Lord Chancellor’s foot would have returned.74

As things stand, therefore, it appears clear that the English judiciary does not share the enthusiasm some academics have shown for expanding promissory estoppel into a cause of action, to say nothing of replacing consideration with a broader test of reliance. For the present, it would seem that promissory estoppel will remain a tool which supplements consideration and mitigates its shortcomings, particularly in situations involving renegotiated contracts and partly paid debts, without challenging its place in the doctrinal structure of contract law.

Key points

- Certain promises which are not enforceable as contracts may have a limited effect through the doctrine of estoppel. Estoppel operates by preventing a party from going back on something they have asserted, promised, or accepted.
- Two types of estoppel supplement the law of contract: promissory estoppel and proprietary estoppel. The central element in both types of estoppel is reliance.
- Promissory estoppel is a defence, and does not give rise to a cause of action. It suspends rights, but does not extinguish them.
- Proprietary estoppel can be both a defence and a cause of action.
- For promissory estoppel to be triggered, there must have been a promise, assurance, or representation, which was clear and unequivocal and related to a legal right. That promise must have been relied on by the other party, in circumstances making it inequitable for the promisor to go back on the promise.
- To be a promise, a statement must relate to the future. It does not have to be express. It can be implied from a party’s conduct.
- A party has relied on a promise if it leads them to alter their behaviour or conduct. Reliance does not have to be detrimental (although some authorities hold otherwise).
- Proprietary estoppel is only available in cases relating to interests in real property.
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- It is available if there was a promise or encouragement relating to interests in land. The promise must have been relied on to the promisee’s detriment, in circumstances which make that reliance reasonable. The behaviour of the promisor must be unconscionable (and not merely unattractive).

**Assess your learning**

You should be able to respond to each of the following points with a confident ‘yes’. If you can’t, then you should revisit the sections listed against that point.

Can you:

(a) *Distinguish* between contracts, promissory estoppel, and proprietary estoppel, *identify* the constitutive elements of each, and *describe* the circumstances to which they apply? (Sections 5.2 to 5.5)

(b) *Identify* the role of reliance in establishing promissory estoppel, how it differs from the role of reliance in proprietary estoppel, and the tests for each? (Sections 5.3.4, 5.5.2 and 5.5.3)

(c) *Explain* how promissory estoppel can be used as a shield, *identify* the limitations this places on its use, and *apply* your knowledge to specific fact scenarios? (Section 5.4.1)

(d) *Explain* what it means to say promissory estoppel has suspensory effect, *analyse* how this differs from the effect of a contract, and *apply* your knowledge to design special formation processes? (Section 5.4.2)

(e) *Outline* the way in which promissory estoppel can be used to ameliorate the limitations imposed by the doctrine of consideration? (Sections 5.2 and 5.4.2)

In relation to each of the above, you should be able to:

(i) identify and clearly explain the key rules and principles;
(ii) identify the key cases and statutes, and why they matter;
(iii) apply the principles and cases to specific real or hypothetical fact situations;
(iv) evaluate the limitations, if any, of the law as it currently stands.

**Further reading**


5. Non-contractual promises: Promissory and proprietary estoppel


Notes:

* Cf Judges 11:36.


2. ‘Estopp’ is simply an old-fashioned Anglo-Norman way of saying ‘stop’, equivalent to modern French etop.

3. These are estoppel by convention and estoppel by representation.

4. See the discussion in Chapter 3, section 3.2.2.


6. (1877) 2 App Cas 439 (HL).

7. Ibid, 448.

8. (1884) 9 App Cas 605 (HL).

9. Ibid.

10. [1947] KB 130.

11. (1884) 9 App Cas 605 (HL).

12. Ibid, 134 (Denning J).


15. [1949] 1 KB 227 (CA).
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17. Ibid.

18. Ibid, 277 (Buckley LJ).


20. (1877) 2 App Cas 439 (HL).


25. [1949] 1 KB 227 (CA).


30. [1947] KB 130.

31. (1877) 2 App Cas 439 (HL).

32. For one recent example, see Collier v P & MJ Wright (Holdings) Ltd [2007] EWCA Civ 1329, [36] (Arden LJ).

33. [1966] 2 QB 617 (CA).

34. (1879) 5 QBD 409.


36. [1949] 1 KB 227 (CA).

37. [1951] 2 KB 215 (CA).

38. Ibid, 220.
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39. Ibid.

40. For an early statement of this view, see D Jackson, ‘Estoppel as a Sword’ (Parts 1 and 2) (1965) 81 LQR 84 and 223.


42. Ibid.

43. [1947] KB 130.

44. (1877) 2 App Cas 439.


46. Ibid.

47. (1884) 9 App Cas 605 (HL).

48. [1947] KB 130.

49. (1884) 9 App Cas 605 (HL).

50. (1877) 2 App Cas 439.


53. Ibid, [39].

54. Ibid, [46].


56. [2016] EWCA Civ 553. It is worth noting that the bench hearing this case included Arden LJ, who delivered the lead judgment in Collier.

57. Ibid, [63] (Kitchin LJ).


60. Ibid.


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64. [2008] UKHL 55, [28].

65. Ibid, [27] (Lord Scott).

66. Ibid, [81] (Lord Walker).


68. [1976] Ch 179.


71. Ibid, [92].

72. Ibid.

73. [1998] 1 FLR 806.

74. Ibid, 820.