

## A PROMISE IS A PROMISE

### Central London Property Trust Ltd v High Trees House Ltd

Robert Pearce QC

#### INTRODUCTION

10.1 As every law student and practitioner knows, Denning J's decision in *Central London Property Trust Ltd v High Trees House Ltd*<sup>1</sup> ('High Trees') launched the modern development of the equitable doctrine of promissory estoppel.

<sup>1</sup> [1947] KB 130.

#### THE FACTS

10.2 The facts of the case are simple. By a lease dated 24 September 1937 the claimant let a newly constructed block of flats to the defendant for a term of 99 years from 29 September 1937 at a ground rent of £2,500 a year. It was intended that the defendant would sub-let individual flats to occupational lessees. As a result of the outbreak of war, the flats proved to be hard to let. Consequently, an arrangement was made between the claimant and the defendant, which was recorded in a letter dated 3 January 1940 from the claimant to the defendant and in a board resolution of the claimant. The letter stated: 'we confirm the arrangement made between us by which the ground rent shall be reduced as from the commencement of the lease to £1,250 per annum'. The defendant paid the reduced rent from 1940 onwards. In 1941 the claimant went into receivership. By the beginning of 1945, war conditions having eased, all the flats were fully let.

By a letter dated 21 September 1945 (received on 24 September 1945), the claimant's receiver wrote to the defendant saying that rent must be paid at the full rate, and claiming arrears of £7,916. Subsequently, the claimant commenced proceedings claiming £625, the difference between the original and the reduced rent for the quarters ending 29 September 1945 and 25 December 1945.

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The defendant raised three defences, namely (1) the letter of 3 January 1940 constituted an agreement that the rent should be £1,250 and applied for the whole duration of the lease, (2) alternatively the claimant was estopped from alleging that the rent exceeded £1,250 and (3), in the further alternative, by failing to demand rent in excess of £1,250 before its letter of 21 September 1945, the claimant had waived rent in excess of the reduced rent that had accrued prior to receipt of that letter.

The claimant replied to the defendant's first defence by arguing that, since the lease was under seal, it could only be varied by a deed.

### THE DECISION

10.3 Dealing with the defendant's first defence, Denning J, applying *Berry v Berry*,<sup>1</sup> held that equity would give effect to an agreement evidenced in writing to vary a lease under seal. But he continued:

'That equitable doctrine, however, could hardly apply in the present case because the variation here might be said to have been made without consideration.'

Denning J rejected the defendant's second defence, of estoppel, on the ground that *Jorden v Money*<sup>2</sup> established that an estoppel by representation had to be of an existing fact, whereas a representation that payment of the rent would not be enforced at the full rate was a representation as to the future.

Denning J then proceeded to formulate the statement of principle for which the case is famous. He deduced from cases decided in the previous 50 years 'which, although they are said to be cases of estoppel, are not really such' a principle that:

'where 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 acted on . . . the courts have said that the promise must be honoured.'

Having accepted that 'under the old common law, it may be difficult to find any consideration for' the promises in the cases where courts had held such promises to be binding, Denning J said:

'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.'

He regarded the decisions as 'a natural result of the fusion of law and equity'.

Applying that principle, Denning J then proceeded to determine 'the scope of the promise in the present case'. He held that: 'the promise was understood by all parties only to apply under the conditions prevailing at the time it was made, namely, when the flats were only partially let', and that it 'ceased to apply' when in early 1945 the flats became fully let. He therefore held that the claimant was entitled to recover the sum claimed.

<sup>1</sup> [1929] 2 KB 316.

<sup>2</sup> (1854) 5 HL Cas 185.

## AN UNLIKELY CASE FOR INNOVATION

10.4 Few landmark cases have been decided so economically. The case occupies only six and a half pages of the Law Reports. The entire hearing appears to have been completed within a day, and Denning J's judgment was unreserved. Despite 'a tidying up afterwards for the Law Reports',<sup>1</sup> the judgment retains the feel of the spoken word.

For several reasons, *High Trees* was an unlikely occasion for the development of the law.

First, it is surprising that the case was litigated at all. The commercial justification for the litigation is not obvious. Denning J described the action as 'friendly proceedings'. The lower the rent payable by the defendant to the claimant, the greater the defendant's profitability. But the defendant was a subsidiary of the claimant, and hence the defendant's increased profitability through payment of a lower rent would have been for the ultimate benefit of the claimant in its capacity as a shareholder in the defendant. Further, the claimant might have been able to exercise its rights as a shareholder in the defendant to procure that the defendant entered into a further agreement reinstating the full rent.

Second, the claimant's claim was only for the recovery of the rent for the quarters ending on 29 September 1945 and 25 December 1945. Denning J held as a question of fact that the promise on which the defendant relied did not extend to the period after early 1945. He could, therefore, easily have disposed of the claim by a short decision on the facts. As it is, his reasons why the claimant could not have recovered the full rent for the period covered by the promise, including his formulation of the doctrine of promissory estoppel, are not part of the ratio decidendi of the case and are obiter dicta.<sup>2</sup>

Third, even had it been necessary for Denning J to consider the recoverability of the full rent for the period before war conditions eased, there were other, more conventional methods, by which a less innovative judge could have arrived at the same result. One such method might have been to discover some consideration for the claimant's agreement to accept a lower rent. The defendant argued that 'The reduction in rent was made so that the defendant might be enabled to continue to run their business and that was sufficient to enable a court to hold the agreement binding on' the claimant. It may be that in other circumstances Denning J would have acceded to such an argument, since his treatment of it ('the variation here might be said to have been made without consideration') is not a clear rejection of it.

Similarly, although Denning J rejected the defendant's case on estoppel on the ground that estoppel required a representation of existing fact, it may be that in other circumstances he would have explored further the possibility of finding in the claimant's statements to the defendant an implied representation of an existing fact concerning the claimant's intention as to the duration of the rent concession, which might have allowed a more conventional estoppel argument to succeed.

<sup>1</sup> Denning, *The Discipline of Law* (1979) OUP, p 203.

<sup>2</sup> See the discussion between R E Megarry and JHC Morris at (1948) 64 LQR 28, 193, 454 and 463.

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### TWO LOOSE ENDS

10.5 Denning J's judgment could perhaps have been a little more explicit on two points. As already noted, he held that 'the scope of the promise' which the claimant made to accept a lower rent was limited to the period before early 1945. But it is not entirely clear whether this conclusion was reached as a matter of construction of the agreement between the parties or by taking a broader view of the extent to which it was unconscionable for the claimant to go back on its promise. The claimant's letter of 3 January 1940 did not by its express terms limit the reduced rent to the duration of wartime conditions. It seems doubtful whether, if that letter had contractual force, it could properly have been construed as being so limited. Denning J stated: 'the promise was understood by all parties only to apply under the conditions prevailing at the time it was made, namely, when the flats were only partially let'. This is arguably a finding that, notwithstanding the unqualified terms of the promise, it was not unconscionable for the landlord to revoke it after the conditions in which it was made had ceased to apply.

Second, Denning J did not deal expressly with the defendant's third defence, namely, that the claimant had waived rent that had accrued prior to the defendant's receipt of the claimant's letter dated 21 September 1945. Here, one may feel that the defendant was unlucky. Denning J found as a fact that the claimant's promise to accept a lesser rent had ceased to apply by early 1945. But he could have held, consistently with that finding, that the claimant had to give reasonable notice of its wish to restore payment of the full rent. The claimant wrote seeking payment of the higher rent on 21 September 1945. That does not seem to be reasonable notice in respect of the rent payable (apparently) on 29 September 1945. Furthermore, the rent seems to have been payable quarterly in arrears, so the claimant's letter was not written until almost the end of the period to be covered by the September instalment. But the claimant recovered the full quarter's rent for the quarter ending on 29 September 1945 as well as (unexceptionably) for the quarter ending on 25 December 1945.

### THE SOURCE OF PROMISSORY ESTOPPEL

10.6 Although Denning J professed to derive the principle he formulated in *High Trees* primarily from 'a series of decisions over the last fifty years', these decisions can be explained on other grounds.<sup>1</sup> The true source of the principle was the decision of the House of Lords in *Hughes v Metropolitan Railway Co*<sup>2</sup> as interpreted by Bowen LJ in *Birmingham & District Land Co v London & North Western Railway Co*.<sup>3</sup> Denning J referred to these cases in *High Trees*, although they had not been cited to him. His use of them reflects a submission he himself had made four years earlier, with partial success, as counsel in the Court of Appeal in *Salisbury v Gilmore*.<sup>4</sup>

In *Hughes v Metropolitan Railway* a landlord forfeited a lease for breach of a covenant to repair on notice. The House of Lords upheld an order granting relief from forfeiture on the ground that correspondence between the parties during the currency of a notice to repair had the effect in equity of extending the period available to the tenant to comply with the notice.

In *Birmingham & District Land Co* building agreements made between a

landowner and a builder allowed the builder to occupy land for the purpose of erecting buildings, and required him to vacate if the buildings were not completed by a specified date. The landowner subsequently requested the builder to suspend building, and the builder did so. A successor in title of the landowner took possession of the land shortly after the original specified date. The Court of Appeal held that the effect of the landowner's request that work be suspended was to extend the time available to the builder to complete the work, and that his interests under the agreements subsisted at the time the successor in title took possession.

Both of these cases concerned situations in which a landowner sought to enforce a provision in a contract entitling him to take possession of land following the default by a person in occupation in the performance of an obligation owed to the landowner. They can, on their facts, be understood as applications, or modest extensions, of equity's jurisdiction to relieve against forfeiture.

However, in *Birmingham & District Land Co*, Bowen LJ stated the principle to be derived from *Hughes v Metropolitan Railway Co* in wide terms. He stated that it:

'has nothing to do with forfeiture . . . It was applied in *Hughes v Metropolitan Railway Company* in a case in which equity could not relieve against forfeiture upon the mere ground that it was a forfeiture, but could interfere only because there had been something in the nature of acquiescence, or negotiations between the parties, which made it inequitable to allow the forfeiture to be enforced. The truth is that the proposition is wider than cases of forfeiture. It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.'

Denning J's achievement in *High Trees*, and in the subsequent cases in which he applied and extended its principle, was to show how Bowen LJ's re-statement of the equitable principle applied in *Hughes v Metropolitan Railway Co* offered an elegant, simple and flexible alternative to the difficult<sup>5</sup> common law rules concerning the variation of contractual obligations and alteration of the mode of their performance.

<sup>1</sup> See DM Gordon QC, 'Creditors' promises to forego rights' [1963] CLJ 222.

<sup>2</sup> (1877) 2 App Cas 439.

<sup>3</sup> (1888) 40 Ch D 268.

<sup>4</sup> [1942] 2 KB 38.

<sup>5</sup> For a modern review of the common law rules, see Phipps, AJ, 'Resurrecting the doctrine of common law forbearance' (2007) 123 LQR 286.

## CURRENT STATUS OF PROMISSORY ESTOPPEL

10.7 Denning J's statements of legal principle in *High Trees* itself are in somewhat discursive terms. Four years later, in *Combe v Combe*,<sup>1</sup> he sought to re-state definitively the principle he had identified in *High Trees*. In that case, a wife sued a husband on a written promise to pay maintenance on which she

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claimed to have relied by refraining from applying for maintenance to the court. The Court of Appeal allowed an appeal from a judgment in her favour. Denning J stated:

'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.'

Subsequent decisions have further refined elements of the doctrine. For the doctrine to apply, a promise must be clear and unequivocal.<sup>2</sup> It must be inequitable for the promisor to go back on his promise and insist on his strict rights. The doctrine is not applied where it would be not be inequitable for the promisor to go back on his promise.<sup>3</sup> The promisee must have altered his position in reliance on the promise, but it is not necessary that he should have acted to his detriment.<sup>4</sup> The doctrine is capable of extinguishing, as well as suspending, rights.<sup>5</sup>

At the present stage in its development, promissory estoppel is generally seen as an equitable alternative to the rules of the common law relating to the variation of contractual obligations and alteration of the mode of their performance. It is not understood to be capable of giving a remedy to a promisee where the promisor is in breach of a promise, unsupported by consideration, to confer a right on the promisee in the future. The doctrine is recognised to have elements in common with other forms of estoppel, but it is also generally recognised to differ from the other forms of estoppel to such an extent that it is not possible to assimilate them all into a single formulation of a broad principle restraining unconscionable conduct. Nevertheless, unconscionability provides the link between them.<sup>6</sup>

The doctrine of promissory estoppel raises questions which have yet to be satisfactorily resolved. Two of these are the relationship between the doctrine and the rule in *Foakes v Beer*,<sup>7</sup> and the question whether the doctrine should be developed so as to be capable of being used to found a cause of action.

<sup>1</sup> [1951] 2 KB 215.

<sup>2</sup> *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741.

<sup>3</sup> *D & C Builders v Rees* [1966] 2 QB 617.

<sup>4</sup> *Société Italo-Belge pour le Commerce et L'Industrie SA v Palm & Vegetable Oils (Malaysia) Sdn Bhd* [1982] 1 All ER 19.

<sup>5</sup> *Ajayi (t/a Colony Carrier Co) v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326, PC.

<sup>6</sup> See *Johnson v Gore-Wood & Co (a firm)* [2002] 2 AC 1 at 41 (Lord Goff).

<sup>7</sup> (1884) LR 9 App Cas 605.

**FOAKES V BEER**

10.8 In *Foakes v Beer*<sup>1</sup> the House of Lords affirmed the existence of a general rule that an agreement to pay a lesser sum is not of itself consideration for the release of an obligation to pay a greater sum. In that case, a written agreement between a judgment creditor and debtor provided that if the debtor paid the judgment debt and costs by instalments the creditor would not take proceedings on the judgment. The debtor paid all the instalments. The creditor then sued for the interest due on the judgment debt. The House of Lords upheld the creditor's claim, holding that the written agreement was unsupported by consideration and was unenforceable by the debtor.

In *High Trees*, Denning J envisaged that the principle in *Hughes v Metropolitan Railway Co*<sup>2</sup> would be applied to reverse the effect of *Foakes v Beer*. He stated:

'The logical consequence, no doubt, is that a promise to accept a smaller 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. This aspect was not considered in *Foakes v Beer*.'

Whilst *Hughes v Metropolitan Railway Co* was not cited or referred to in *Foakes v Beer* it is unlikely, as Denning J might appear to imply, that this was due to oversight. As Professor Robert Bradgate has pointed out,<sup>3</sup> Lords Selborne and Blackburn were parties to both decisions. Both of their speeches in *Foakes v Beer* are sympathetic to criticisms of the rule that that case affirmed, and they would surely have drawn attention to any equitable ameliorations of it of which they were aware. It seems likely that when *Foakes v Beer* was decided the principle of *Hughes v Metropolitan Railway Co* was not understood to have the far-reaching scope that Bowen LJ's dictum subsequently gave it.

The criticism of *Foakes v Beer* which Denning J implicitly supported by his dictum in *High Trees* is that where the debtor's agreement to pay a lesser sum is in fact a benefit to the creditor, there would be no injustice in upholding such an agreement.

The converse position, where injustice would result from upholding such an agreement, was considered in *D & C Builders v Rees*.<sup>4</sup> There a debtor who had the means to pay the full amount of a debt put pressure on an impecunious creditor to agree to accept part payment in full satisfaction. The Court of Appeal dismissed an appeal from a finding as a preliminary issue that there was no consideration to support the agreement and that it was unenforceable. Winn LJ, applying *Foakes v Beer*, held that there was no consideration for the agreement, and did not consider promissory estoppel. Lord Denning MR (with whom Danckwerts LJ agreed) also held that the agreement was unsupported by consideration, but did not decide the appeal on that ground. He held that the principle of *Hughes v Metropolitan Railway Co* was applicable, but that it only barred the creditor from his legal rights where it would be inequitable for him to insist on them. He continued:

'Where there has been a true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction 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.'

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He then held that the pressure applied by the debtor to the creditor to enter into the agreement prevented there being a true accord, and that creditor was not prevented by the agreement from recovering the full sum.

Although all three members of the Court of Appeal agreed in the result in that case, their decision did not leave the law in a stable condition, as it would seem that they would have arrived at differing conclusions had the debtor not applied pressure on the creditor to accept a lesser sum.

<sup>1</sup> (1884) LR 9 App Cas 605.

<sup>2</sup> (1877) 2 App Cas 439.

<sup>3</sup> *The Law of Contract*, 3rd edn, LexisNexis Butterworths, para 2.122.

<sup>4</sup> [1966] 2 QB 617.

10.9 The interaction between *Foakes v Beer*<sup>1</sup> and promissory estoppel was further considered by the Court of Appeal in *Collier v P & M J Wright Holdings Ltd.*<sup>2</sup> A debtor and two others were jointly liable to a creditor to pay a debt by instalments. The debtor alleged that he and the creditor agreed that, in return for the debtor accepting sole responsibility for a one-third share of the instalments, the creditor would not seek payment from him of the other two thirds. The debtor paid a one-third share of the instalments and the creditor then sought to pursue him for the balance. Arden and Longmore LJ both held that by virtue of the rule in *Foakes v Beer* the alleged agreement was unenforceable as a contract for want of consideration. The debtor sought to rely alternatively on promissory estoppel. Arden LJ concluded from the judgment of Lord Denning MR in *D & C Builders v Rees*<sup>3</sup> that, if the creditor and the debtor voluntarily made the agreement alleged by the debtor, the agreement and the subsequent payment by the debtor of one-third of the instalments would make it inequitable for the creditor to pursue the debtor for the balance. She stated:

‘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.’

Longmore LJ was not prepared to go so far. He accepted that on the facts alleged by the debtor it would be arguable that it would be inequitable for the creditor to resile from its promise but said: ‘There might however be much to be said on the other side’.

The decision of the Court of Appeal in *D & C Builders v Rees* is authority for the proposition that, if there is no ‘true accord’ between the creditor and the debtor that the creditor will accept a lesser sum in satisfaction of a liability to pay a larger sum, the doctrine of promissory estoppel will not prevent the creditor seeking payment of the balance. But it is unclear whether the courts will follow the suggestions made in *High Trees* and *D & C Builders v Rees* and adopted by Arden LJ in *Collier v P & M J Wright Holdings Ltd* that, as a corollary, if there is a ‘true accord’, it will necessarily follow that it will be

inequitable for the creditor to seek payment of the balance. That approach has the practical effect of reversing *Foakes v Beer*, and it is difficult to feel enthusiasm for so prescriptive a view of what is 'inequitable'. The next step in the development of this area of the law should surely be a re-consideration by the Supreme Court of *Foakes v Beer*.

<sup>1</sup> (1884) 9 App Cas 605.

<sup>2</sup> [2007] EWCA Civ 1329, [2008] 1 WLR 643.

<sup>3</sup> [1966] 2 QB 617.

### PROMISSORY ESTOPPEL AS A CAUSE OF ACTION?

10.10 In *High Trees* itself and in *Combe v Combe*,<sup>1</sup> Denning J stated that promissory estoppel did not give rise to a cause of action, and in *Baird Textile Holdings Ltd Marks and Spencer plc*<sup>2</sup> the Court of Appeal held that it was precluded by authority from holding that promissory estoppel may in general found a cause of action.

Nevertheless, there are attractive arguments for saying that this limitation on the scope of the principle should be removed. Proprietary estoppel (which Lord Scott has recently described as a 'sub-species' of promissory estoppel),<sup>3</sup> can found a cause of action, and it is arguably illogical that promissory estoppel should not be able to do so. It is arguable that there is no necessary inconsistency between consideration being an essential element of a contract and giving a cause of action to a promisee who has acted on a promise which, though unsupported by consideration, was intended to affect legal relations. It is further arguable that the importance of consideration can be respected by drawing a distinction between the remedies for breach of a contract (such remedies being intended to give the claimant the benefit of his bargain) and remedies for breach of a non-contractual promise (such remedies to be limited to compensating the claimant for the detriment he sustains as a result of unconscionable action by the defendant).

Arguments on these lines have been accepted in Australia. In *Waltons Stores (Interstate) v Maher*<sup>4</sup> a builder agreed, subject to contract with a chain of retailers, to construct a store on land owned by him and to let it to the retailers. His solicitors sent signed contractual documents to the retailers for signature and exchange. Acting in the belief that contracts would be exchanged, the builder carried out work to construct the store. Meanwhile, the retailers, without informing the builder, decided to 'go slow', failed to exchange contracts and eventually withdrew from the transaction. The High Court of Australia dismissed an appeal from an order that the retailer pay the builder damages in lieu of an order for specific performance of an agreement for lease. A majority of the High Court held that the basic purpose of promissory estoppel was not to enforce a promise but to make good detriment suffered by the promisee in consequence of an unconscionable departure by the promisee from the terms of the promise. The majority further concluded that there was no justification for confining the scope of promissory estoppel to cases where the promise related to the enforcement of existing rights, and further that it should be regarded as an instance of a more general principle that precludes the unconscionable departure by one party from an assumption on which another had acted to his detriment.

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<sup>1</sup> [1951] 2 KB 215.

<sup>2</sup> [2001] EWCA Civ 274.

<sup>3</sup> *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 at [14]. In *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [67] Lord Walker said he had 'some difficulty' with this observation.

<sup>4</sup> (1988) 164 CLR 387.

## THE FUTURE

10.11 Sixty years after Denning J's extempore judgment in *High Trees* launched the modern doctrine of promissory estoppel, the doctrine has yet to be reviewed by the House of Lords or the Supreme Court. The need for such a review has long been recognised.<sup>1</sup> When the opportunity arises, it is to be hoped that the Supreme Court will take full advantage of it.

<sup>1</sup> See eg *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 758 (Lord Hailsham).