

COMMENT

PROMISSORY ESTOPPEL IN NEW SOUTH WALES

BY PETER PUNCH*

Since the case of *Central London Property Trust Ltd v. High Trees House Ltd*,¹ there has been a good deal of academic and judicial discussion of the operation, scope and even the legitimate existence of the doctrine that has come to be known as "promissory estoppel".² However, it can now be said with reasonable certainty that the doctrine has managed to establish itself in English law.³ This achievement is in no small measure due to the tenacity (some may prefer to say perversity) of Lord Denning.⁴

But the principle associated with the *High Trees* case still has its critics and opponents, amongst whom, it is suggested, should be included the editors of the third Australian edition of Cheshire and Fifoot's *The Law of Contract*, Messrs J. G. Starke and P. F. P. Higgins. They conclude that, whatever the operation of the doctrine of promissory estoppel in England, it cannot operate in New South Wales.⁵

This conclusion is very much open to question. Serious doubts as to the correctness of the editors' views have been expressed in an article by Nicholas Seddon, entitled "Is Equitable Estoppel Dead or Alive in Australia?"⁶ For an informative and detailed analysis of the scope of the doctrine of promissory estoppel and its operation in Australia, Mr Seddon's article must be recommended.

This paper is in substantial agreement with Mr Seddon's conclusion that since the fusion of the New South Wales Supreme Court's common law and equity jurisdictions in the Supreme Court Act 1970, it is quite open to the Supreme Court to adopt the doctrine of promissory estoppel as it operates in England at present. The essence of Seddon's argument is that the High Court's decision in *Albert House Ltd (In Liq.) v. Brisbane City Council*⁷ is not authority for the proposition the editors suggest. This paper, whilst agreeing with Seddon's analysis of the *Albert House* case, will attempt to show that the other cases on which the editors rely, such as *Barns v. Queensland National Bank Ltd*⁸ and *Chadwick v. Manning*⁹ are

* Third year student, 1975.

¹ [1947] K.B. 130.

² See e.g., Wilson, "Recent Developments in Estoppel" (1951) 67 L.Q.R. 330; Jackson, "Estoppel as a Sword" (1965) 81 L.Q.R. 84 and 223; Turner, "*High Trees House* Re-inspected—Promissory Estoppel in 1963" (1963) 1 New Zealand U.L.R. 185; Gordon, "Creditor's Promises to Forgo Rights—a Study of the *High Trees* and *Tool Metal* cases" [1963] Camb. L.J. 222; Guest, "The New Estoppel: An English Development" (1956) 30 A.L.J. 187; Denning, "Recent Developments in the Doctrine of Consideration" (1952) 15 M.L.R. 1; Harland, "Promissory Estoppel and the Doctrine of Consideration" (text of a lecture delivered at Sydney University Law School, 1/7/71); Marston and Smith, "Consideration and the Discharge or Modification of Contracts" (1970) 1 A.C.L.R. 131.

³ See *Ajayi v. R.T. Briscoe (Nigeria) Ltd* [1964] 1 W.L.R. 1326.

⁴ Note 2 *supra*.

⁵ J. G. Starke and P. F. P. Higgins (eds): Cheshire and Fifoot, *The Law of Contract* (3rd Aust. ed., 1974) 675-678.

⁶ [1975] I.C.L.Q. 438.

⁷ (1968) 118 C.L.R. 144.

⁸ (1906) 3 C.L.R. 925.

similarly not authority for the view that promissory estoppel is dead in New South Wales.

What is Promissory Estoppel?

The basic precept of the English law of contract is that something called "consideration" is required for the formation of a legally binding contract, and thus a "bare promise" in a contractual context has not, of itself, any legal significance. Promissory estoppel contradicts that concept to a certain extent—that is, in some circumstances, a man is bound by his promise, even when it is quite gratuitous.

In England, the doctrine was given its modern and widest enunciation by Denning J. (as he then was) in *Central London Properties Trust Ltd v. High Trees House Ltd*.¹⁰ The plaintiffs claimed rent from the defendants for two quarters of 1945 at a rate agreed between them in 1937 by a lease under seal. The defendants alleged that the plaintiffs either had waived their right to the full amount of rent or were estopped from claiming it by a representation in 1940 that the rent would be reduced. Denning J. found for the plaintiffs on the question of the amount of rent payable for the two quarters of 1945,¹¹ but in the course of his Honour's judgment he considered whether the landlord could, notwithstanding his promise in 1940, recover the full amount for the entire period 1940-1945.¹² In terms of traditional legal principles, there were two reasons why the tenant should not have been able to prevent the landlord enforcing his "strict legal rights" under the 1937 lease:

1. The landlord's promise was simply a bare promise, not supported by consideration. Such a promise, it was held in *Foakes v. Beer*,¹³ could not be enforced because the promise was not a contract.
2. The landlord could not be estopped from suing for the full amount because his promise was a representation of future intention, as distinct from a representation of present or past fact. It was held in *Jordan v. Money*¹⁴ that a representation of the former kind could not give rise at law or in equity to an estoppel.

Notwithstanding those traditional authorities, Denning J. was firmly of the opinion that the tenant could prevent the landlord suing for the full amount for the period prior to the two quarters in issue. Drawing support mainly from the House of Lords' decision in *Hughes v. Metropolitan Railway Co.*¹⁵ and the Court of Appeal judgment in *Birmingham and District Land Co. v. London and Northwestern Railway Co.*,¹⁶ his Honour said:

[T]here has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted upon by the person to whom it was made, and which was in fact so acted on. In such cases the Courts have said that the promise must be honoured . . . The

⁹ [1896] A.C. 231.

¹⁰ [1947] K.B. 130.

¹¹ *Id.*, 135.

¹² *Id.*, 133-135.

¹³ (1884) 9 App. Cas. 605.

¹⁴ (1854) 5 H.L.C. 185.

¹⁵ (1877) 2 App. Cas. 439.

¹⁶ (1888) 40 Ch.D. 268.

Courts have not gone so far as to give a cause of action in damages for breach of such a promise, but they have refused to allow the party making it to act inconsistently with it . . . The decisions are a natural result of the fusion of law and equity . . .¹⁷

In the following years his Honour's obiter remarks steadily gained judicial support. The doctrine he formulated was given the imprimatur of the Court of Appeal in *Combe v. Combe*,¹⁸ tentatively adopted by the House of Lords in *Tool Metal Manufacturing Co. Ltd v. Tungsten Electric Co. Ltd*,¹⁹ and then more enthusiastically embraced by the Privy Council in *Ajayi v. R.T. Briscoe (Nigeria) Ltd*.²⁰

Although all the elements of the doctrine are not completely settled, the basic elements can, it is submitted, be formulated in this way:

If two parties, who are in some contractual relationship, enter into a course of negotiations that result in one party promising or representing to the other, in the absence of consideration, that either he will not enforce his full legal rights or he will hold them in abeyance, the other party will have an equitable defence to an attempt by the promisor to enforce his full legal rights *if*:

- (a) the promisor intended to create legal relations by his promise, that is he intended to be bound by it;
- (b) the promisor knew that his promise would be acted on;
- (c) the promisee acts on the promise or representation in such a way as to "alter his position";²¹
- (d) either the promisor has not given reasonable notice that he has revoked his promise or the promisee has so altered his position as not to be able to return to the position he was in previous to the promise being made;²² and
- (e) the promisee has not himself acted inequitably.²³

Of course, the principles outlined above are not all beyond dispute—for example, *Combe v. Combe* and *Robertson v. Minister of Pensions*²⁴ suggest that the doctrine may be more than purely a defensive equity, whilst *P. v. P.*²⁵ provides some ground for believing that the doctrine may operate outside of a purely contractual context. Apart from those qualifications, the basic elements of promissory estoppel seem to be reasonably well established, though some problems, as Seddon points out, still exist.²⁶

Is Promissory Estoppel Good Law in New South Wales?

To decide whether the N.S.W. Supreme Court has taken any attitude on this question, one needs to briefly survey those N.S.W. cases in which the doctrine of promissory estoppel was considered and which were decided before the Supreme Court Act 1970 came into operation. Messrs Starke and Higgins in Cheshire and Fifoot's *The Law of Contract* consider that

¹⁷ [1947] K.B. 130, 134.

¹⁸ [1951] 1 All E.R. 767.

¹⁹ [1955] 2 All E.R. 657.

²⁰ [1964] 1 W.L.R. 1326.

²¹ *Id.*, 1330.

²² *Ibid.*

²³ *D. & C. Builders v. Rees* [1966] 2 Q.B. 617.

²⁴ [1949] 1 K.B. 227.

²⁵ [1957] N.Z.L.R. 854.

²⁶ Note 6 *supra*.

the Court's opinion is that promissory estoppel can never apply in New South Wales:

It has even been suggested that because, on occasions, when it had been confronted with the doctrine, the Supreme Court had neither accepted nor rejected it, but based its decision upon the fact that the Common Law Procedure Act 1899 (N.S.W.), s. 95, in any event precluded the doctrine being raised as a defence in a common law action, since, admittedly, it did not constitute the basis of a cause of action in equity, it would be open to that court to uphold the doctrine in the event of the provisions of the Judicature Act being adopted in New South Wales.²⁷

This statement, from its general tone, seems to imply that the editors feel the Supreme Court may have already decided not to apply promissory estoppel in New South Wales after the fusion of law and equity. If that be the editors' proposition, their opinion is questionable.

First and foremost, the question of the status of promissory estoppel in New South Wales after the fusion of law and equity must, of necessity, be an open one as far as the Supreme Court is concerned (subject, of course, to any binding decisions of higher courts). How can it be otherwise when, as the editors concede, the Supreme Court has on those occasions that it was confronted with the doctrine refused to apply it because of jurisdictional problems, as distinct from reservations as to the correctness of the doctrine? Examples of this exclusion of the doctrine on technical grounds are *Perpetual Trustee Co. Ltd v. Pacific Coal Co. Ltd*,²⁸ *Gray v. Lang*²⁹ and *Kater v. Kater (No. 3)*.³⁰ For an analysis of these and similar New South Wales cases, see Mr Seddon's article.³¹

Secondly, there is very little judicial dicta to support the editors' skeptical view. In *Gray v. Lang* the Supreme Court examined the concepts of promissory estoppel, waiver and forbearance, but prefaced its remarks by saying: "we express no concluded opinion on [these concepts] here".³² In *Perpetual Trustee Co. Ltd v. Pacific Coal Co.*, Owen J. seemed to give a slight hint that promissory estoppel could well apply in New South Wales after the fusion of law and equity, when his Honour remarked that the underlying reasons for the rule in the *High Trees* case are to be found in the existence of the Judicature Act 1873—that is, in the fusion of law and equity.³³ Herron J., in the same case,³⁴ considered that promissory estoppel could not, in New South Wales, go beyond the conclusions of Long Innes J. in *Greater Sydney Development Association Ltd v. Rivett and Anor*.³⁵ Long Innes J. had said in that case that promissory representations of future intention could not prevent a person enforcing his legal rights, but they could form a good defence to an action seeking equitable relief in respect of those legal rights.³⁶ But it seems difficult to say that Herron J. was forever confining promissory estoppel in New South Wales to being

²⁷ Note 5 *supra*, 677.

²⁸ (1955) 55 S.R. (N.S.W.) 495.

²⁹ (1956) 56 S.R. (N.S.W.) 7.

³⁰ [1964] N.S.W.R. 987.

³¹ Note 6 *supra*.

³² (1956) 56 S.R. (N.S.W.) 7, 11.

³³ (1955) 55 S.R. (N.S.W.) 495, 508.

³⁴ *Id.*, 519.

³⁵ (1929) 46 W.N. (N.S.W.) 99.

³⁶ *Id.*, 100.

merely a defensive equity to an action seeking equitable relief. It is much more reasonable to interpret his Honour's remarks as suggesting that, in New South Wales, promissory estoppel could not be a defence to a common law action because that was the practical effect of the law in this State at that time. So, Herron J. was probably not saying anything on the status of the doctrine in New South Wales after the fusion of law and equity.

It being clear that the Supreme Court has not decided, or even expressed a strong opinion on the question of the status of promissory estoppel in New South Wales after the fusion of law and equity, it must now be considered whether any other authorities preclude the doctrine operating in this State now that the provisions of the Supreme Court Act 1970 are in operation.

Messrs Starke and Higgins believe the doctrine is so precluded by three authorities:

1. The first of these authorities is the High Court decision in *Barns v. Queensland National Bank Ltd.*³⁷ This is the only case in which the High Court considered the case of *Hughes v. Metropolitan Railway Co.*³⁸ (the case that Denning J. relied on as authority for the proposition he was advancing in *High Trees*, and the case that the House of Lords in *Tool Metal Manufacturing Co. Ltd v. Tungsten Electric Co. Ltd*³⁹ considered was the *locus classicus* for the modern doctrine of promissory estoppel). According to the editors, *Barns* established that the doctrine in *Hughes* depended for its application upon "something in the nature of consideration" flowing between the parties. Thus, say the editors, the High Court negated the notion that a "naked promise" as to future intention could have any legal or equitable significance.
2. Next is the High Court decision in *Albert House Ltd (In Liq.) v. Brisbane City Council.*⁴⁰ The editors say the High Court perceived the doctrine of promissory estoppel purely in terms of contract law.
3. Even if the two High Court cases do not negative the *High Trees* principle, the Privy Council in *Chadwick v. Manning*⁴¹ on appeal from the New South Wales Court of Equity, established in the view of the editors that in New South Wales the law on estoppel is unequivocally governed by *Jordan v. Money*⁴² in that promises relating to future intention cannot form the basis of an estoppel.

However, if one closely analyses these cases, it seems rather difficult to see how they can be regarded as authorities for the proposition the editors advance.

First, their reliance on *Barns* seems quite misplaced. The facts were that the defendant Nott, trustee under a will, had mortgaged property belonging to the trust to the defendant bank. Default having been made in payment after demand, the bank sold the property. The plaintiff, a beneficiary under the will, sought to set the sale aside or claim damages from the bank,

³⁷ (1906) 3 C.L.R. 925.

³⁸ (1877) 2 App. Cas. 439.

³⁹ [1955] 2 All E.R. 657.

⁴⁰ (1968) 118 C.L.R. 144.

⁴¹ [1896] A.C. 231.

⁴² (1854) 5 H.L.C. 185.

arguing that the sale was conducted in a negligent manner. When the defendant bank alleged that default had occurred, the plaintiff replied that default had not in fact occurred because the bank, through its manager, had agreed after making the formal demand to grant a time extension for payment.⁴³ The High Court found for the plaintiff and awarded compensation on the basis of the value of the property because the bank had not exercised its power of sale in a *bona fide* manner.⁴⁴ That being the strict *ratio decidendi* of the case, any references to the *Hughes v. Metropolitan Railway Co.* decision are strictly dicta.

Unfortunately, the dicta in *Barns* are not instructive *vis-à-vis* promissory estoppel because the Court's treatment of *Hughes* is very unsatisfactory. Griffith C.J., delivering the judgment of the Court, made the quite simple point that the doctrine stated by Lord Cairns in *Hughes* covered the situation where the "so-called waiver" of legal rights by one party (meaning promise not to enforce those legal rights by that person) occurred after the breach of the contract as well as before. But then Griffith C.J. said that whether the promise was given before the breach of contract or after, the doctrine whereby the promise became binding depended for its operation on "something in the nature of what is called a consideration".⁴⁵ That, it is respectfully submitted, is a most vague and perplexing statement by the Court. Does it mean that there must be consideration flowing between the parties, or does it mean that the party relying on the promise must make some response to the promise—that is, alter his position? Surely the Court could not have meant that the principle stated in *Hughes* depended for its operation on consideration—that would be a gross misreading of the judgments delivered in the House of Lords. By way of illustration, one need only cite the oft-quoted passage from Lord Cairns's judgment:⁴⁶

. . . it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.⁴⁷

Clearly, Lord Cairns was not saying that the legal concept of consideration was a precondition to the exercise of this "first principle of equity". That being so, what meaning can be given to the phrase used by the High Court—that is, "something in the nature of . . . consideration"? Quite probably, the Court was inserting into the principle of *Hughes* if it was not already there, the qualification inserted into the *High Trees* principle by the Privy Council in *Ajayi v. Briscoe*—namely, the necessity for the promisee to alter his position before he can rely on the promise. Is this not implicit in the finding of the High Court that the failure of the trustee to do all that was necessary to save the property because of the bank's

⁴³ (1906) 3 C.L.R. 925, 931-932.

⁴⁴ *Id.*, 941-945.

⁴⁵ *Id.*, 938.

⁴⁶ *Ibid.*

⁴⁷ (1877) 2 App. Cas. 439, 448.

promise not to enforce its power of sale for a time was probably sufficient "consideration" to satisfy the requirements of the *Hughes* principle?⁴⁸ Admittedly, not much weight can be placed on this finding of the Court, as the whole discussion of *Hughes* is littered with ambiguity and confusion. Why is this so? Marston and Smith in their article, "Consideration and the Discharge or Modification of Contracts" suggest that—

The Court confused the issue by thinking that *Hughes* was relevant to a situation where a plaintiff at law was trying to enforce a representation, and consequently they thought consideration was needed for its application.⁴⁹

That may well be true, for it would be rather off-putting for a plaintiff to endeavour to base a cause of action upon that which was usually regarded as merely an equitable defence. But clearly, the plaintiff in *Barns* did not base her cause of action on the bank manager's promise—in fact, the plaintiff sued on the basis that the bank had not exercised its power of sale in a *bona fide* manner, and relied on the bank manager's promise to disregard the formal demand only as a reply to the bank's defence that a formal demand had been issued and left unsatisfied by the trustee. The Court in actual fact confused itself by dealing with the plaintiff's reply to the bank's defence before dealing with the essential issue of whether the bank had exercised its power of sale in a *bona fide* manner. In determining whether there was a lack of *bona fides*, the Court should have treated the promise as one of the factors to be taken into consideration, along with such factors as insufficient advertising of the sale of the subject property.

Instead, the Court considered the promise in isolation, as if it were a separate cause of action, and consequently tried to fit the promise into the recognized categories of contract and estoppel. It is submitted that only on this basis can some of the remarks of the Court be understood. For instance, the Court said that if a mortgagee makes a formal demand and then gratuitously agrees to continue on in the relationship with his mortgagor regardless of the demand, the mortgagee has raised in favour of the mortgagor a common law estoppel, as the mortgagee has made a representation of existing fact (that the demand is to be regarded as not having been made), not a representation of future intention (that is, the mortgagee would not in future rely upon the existence of the demand).⁵⁰

After that monumental piece of hair-splitting the Court, in postulating a hypothetical situation in which the bank manager tears up the formal demand in front of the defendant Nott, commented that that situation was not unlike the actual facts, and concluded that the hypothetical situation gave rise to a contract for valuable consideration and a common law estoppel.⁵¹ At this point, the Court, one suspects with relief, abandoned *Hughes* and dealt with the real issue in the case—that is, whether the bank exercised its power of sale in a *bona fide* manner. In this context, the bank manager's promise not to rely on the formal demand took on its true role—as a factor in determining whether there was a *bona fide* sale of the property by the bank.⁵²

⁴⁸ (1906) 3 C.L.R. 925, 939.

⁴⁹ (1970) 1 A.C.L.R. 131, 140.

⁵⁰ (1906) 3 C.L.R. 925, 939.

⁵¹ *Id.*, 939-940.

⁵² *Id.*, 941-945.

Clearly, *Barns* is very weak authority for anything beside the point that a promise not to enforce strict rights made after the breach of a contract may still attract the doctrine of *Hughes*. Other than that, the comments on *Hughes*, on consideration and on estoppel generally, are vague and confusing. To rely on the case as some sort of disapproval of promissory estoppel is stretching the judgment of the Court to extraordinary lengths.

The editors also place much reliance on the case of *Albert House Ltd (In Liq.) v. Brisbane City Council*⁵³ as authority for the proposition that all promises, to be in any way enforceable, must be supported by consideration. But that is a strange assertion when one examines the case itself. It is true that Campbell J. in the Supreme Court of Queensland did rest his judgment in part on the doctrine of promissory estoppel,⁵⁴ but in the High Court the case was argued on the basis that the promise in question was enforceable because it was supported by valuable consideration—in short, that there was a contract. Taylor and Menzies JJ. said:

Before this Court it was common ground that whatever mode of expression might be adopted, the critical question was whether the appellant, in consideration of the making of the agreement of sale, had impliedly promised or undertook that it would not claim compensation . . .⁵⁵

The facts were that Brisbane Council wanted to buy Albert House's land, but the latter demanded a higher price than the Council was willing to pay. Consequently, the Council decided to use its statutory powers to resume the land. At this stage, Albert House accepted a sum in exchange for the land. Subsequently, Albert House brought an action claiming compensation for injurious affection of property under The City of Brisbane Town Planning Act 1964. The Council said the plaintiff had promised not to bring such an action when it accepted the agreement of sale. The Court found that no such promise could be implied from the facts.⁵⁶ But even if such a promise could have been implied, the case would then have involved the issues associated with the case of *Hoyts Pty Ltd v. Spencer*⁵⁷—collateral contracts. The dissentient, Kitto J., certainly thought so. To his Honour the respondent's case was based on the existence of an "implied collateral contract".⁵⁸ There is nothing in the judgment of the majority to contradict that view, as Taylor and Menzies JJ. direct their entire attention to the question of whether it was justifiable to conclude from all the evidence that the appellant had impliedly promised not to make a compensation claim in exchange for the agreement of sale.⁵⁹ So, it must be concluded that the High Court never directed its attention to the question of what effect a gratuitous promise (if made) would have had. Needless to say, the Court makes no mention of estoppel or the *High Trees* case. It is submitted that the case is not an authority on promissory estoppel.

It being fairly probable that the High Court cases cited by the editors do not really encroach at all on the doctrine of promissory estoppel, what weight and authority can be given to the decision of the Privy Council in *Chadwick*

⁵³ (1968) 118 C.L.R. 144.

⁵⁴ *Id.*, 157.

⁵⁵ *Ibid.*

⁵⁶ *Id.*, 159.

⁵⁷ (1919) 27 C.L.R. 133.

⁵⁸ (1968) 118 C.L.R. 144, 148.

⁵⁹ *Id.*, 154-159.

v. *Manning*?⁶⁰ It is submitted that the judgment of the Board in no way relates to the doctrine of promissory estoppel. It is true that Owen J., the then Chief Judge in Equity in New South Wales, decided the case on the basis of "equitable estoppel by representation"⁶¹ but before the Board that issue was not raised, and counsel argued the case on the principles of contract law. Lord MacNaghten, delivering the judgment of the Board, cited the decision in *Jordan v. Money* and said:

The learned counsel for the respondents did not, of course, question the law established by *Jordan v. Money* . . . They endeavoured to argue that there was a contract on the part of Mr Chadwick binding him not to enforce the indemnity.⁶²

Their Lordships did say that estoppel only related to existing facts,⁶³ but they were not directing their minds to the quite separate issue of whether promissory representations of future intention constituted an equitable defence (or a "defensive equity"); as has been observed above, their Lordships were preoccupied with the question of whether there was a binding contract. To add force to that proposition it need only be pointed out that the report of the case carries no reference to the *Hughes* case. In any event, in view of the finding of fact made by the Board, promissory estoppel could not have been raised even if counsel had been so disposed, as the Board decided that there was no contract because there was no mutual intention to enter into legal relations.⁶⁴ As one of the basic ingredients of the concept of promissory estoppel is that there must be an intention to create legal relations by a bare promise, the absence of such an intention immediately rules out the applicability of the doctrine in *Chadwick v. Manning*.

It seems perplexing to this writer that the editors should place such reliance on *Chadwick v. Manning*—it is an old case, and one would suppose that if it decided that promissory representations of future intention were to have no legal or equitable force, the Board would at least have paid some cursory attention to *Hughes* and the equitable principles so closely associated with it. One can only further question the case's authority with regard to promissory estoppel when it is pointed out that the case was not mentioned in *Ajayi v. Briscoe*, the most authoritative judgment in the Commonwealth on the *High Trees* principle. Surely, if *Chadwick v. Manning* possessed the meaning that Messrs Starke and Higgins attach to it, the Privy Council would have at least paid some fleeting regard to it? The failure of the Board in *Ajayi v. Briscoe* to mention *Chadwick v. Manning* can only be explained in one of two ways: either the case was overlooked or, much more likely, no-one considered it of any relevance to promissory estoppel. It must be concluded that *Chadwick v. Manning* does not carry the weight the editors ascribe to it. The case does not bind New South Wales courts to the proposition that only representations of present or past fact are to have any legal significance and does not stop the New South Wales Supreme Court applying promissory estoppel in the same manner as the doctrine now applies in England and the rest of the Commonwealth after *Ajayi v. Briscoe*.

It is therefore respectfully submitted that Messrs Starke and Higgins are

⁶⁰ [1896] A.C. 231.

⁶¹ *Id.*, 232.

⁶² *Id.*, 238.

⁶³ *Ibid.*

⁶⁴ *Id.*, 239.

in error in maintaining that it is "beyond doubt" that the law of New South Wales cannot recognize and apply the principle of promissory estoppel as it operates in England. This submission is made on the following grounds:

1. Before 1970, the New South Wales courts acknowledged and analysed the principle associated with and derived from the *High Trees* case.
2. Because of the division of law and equity that prevailed before 1970 promissory estoppel could only operate as a defence to an action seeking equitable relief begun in the Supreme Court's equitable jurisdiction.
3. There is no binding decision or persuasive dicta of the Supreme Court at law or in equity that suggests that, after the fusion of law and equity, promissory estoppel would not apply in New South Wales.
4. There are no decisions of the High Court or the Privy Council that constitute a bar to the operation of promissory estoppel in this State.