CHAPTER – 6
GLOBAL ASPECT OF PROMISSORY ESTOPPEL
AND LEGITIMATE EXPECTATION

Procedure is important. It acknowledges the value of and the need to protect certain interests or fails to do so; it can hinder or assists efficient administration. It must always observe the requirements of statute and the common law. The right to a hearing, or to be consulted or generally to put one’s case may also arise out of the action of the authority itself. This action may take one of two, or both, forms: a promise (or a statement or understanding) or a regular procedure. Both the promise and the procedure are capable of giving rise to what is called a legitimate expectation, i.e., an expectation of the kind which the courts will enforce. To some extent the analogy with estoppel will be apparent.

6.1 Conceptual origin of the Doctrine of Promissory Estoppel under the various legal systems –

Modern contractual jurisprudence n common law countries abounds in a concept generally styled as promissory estoppel. Samuel Williston of the Harvard Law School may be credited with its invention in his work on contract\(^1\). The promissory estoppel as an exception to the requirement of consideration on the enforceable agreement is not in fact based on the principle of estoppel. But it is a doctrine evolved by equity in order to prevent injustice caused because of technical requirements of consideration in every enforceable promise. The principle may be called the child of equity brought into the world with a view to promote honesty and good faith and bringing law closer to injustice. The principle though commonly known as promissory estoppel is neither based on contract nor on the common law doctrine of estoppel. The early cases did not speak of this doctrine as estoppel. They spoke of it “raising equity”.

It is worthwhile to study the development of promissory estoppel in the following legal systems:

\(^1\) B.F. Boyer, Promissory Estoppel; Requirements and Limitations of the Doctrine 98U of Pen. L Rev. 459, note1, 1950
A. The American Legal System
B. The English Legal System
C. The Australian Legal System

6.2 Development in American Legal System –

6.2.1 Position of Promissory Estoppel in U.S.A. –

The doctrine of ‘promissory estoppel’ is by no means new in America, although the name has been adopted only in comparatively recent years. According to this doctrine an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice. Mere omission by the promise to do whatever the promisor promised to do have been held insufficient “forbearance” to give rise to promissory estoppel. Prior to 1500 the equity gave the relief as of it is provided by the doctrine of promissory estoppel of today. The equitable principle revealed that when plaintiff had incurred detriment on the faith of the defendant’s promise, the promise was entitled for the benefit of the principle of promissory estoppel although there are but three reported cases. The modern jurisprudence under common law styles and terms the concept of future promises as promissory estoppel.

In America the legal system has always given chance for adjustment and growth than elsewhere. The doctrine of promissory estoppel has displayed remarkable vigor and vitality in the hands of American Judges and is still rapidly developing and expanding in this country. It is notable that the development of this doctrine does not owe its origin from the judicial pronouncement of Lord Denning in the High Trees case, but dates back to long ago. Though in the English legal system, the principle of promissory estoppel was prevalent and was in discreet

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2 I.C.Saxena, The Twilight of Promissory Estoppel in India: A contrast with English Law, JILI, April – June 1974, Vol. 16(2) at p. 187
3 (1956)1 All ER 256
manner. In U.S.A., too the doctrine was posits in Article 90 of the Restatement of Contracts (1932) which proposed:

“A promise which the promisor should reasonably expect to induce action for forbearance of a definite and substantial character on the part of the promise and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise”.

This article 90 did not mention this principle as promissory estoppel or any other alternate name; however it has provided a remedy to the promisee suffering from the breach of future promise by the promisor. Illustration – A promises B to pay him an annuity during B’s life. B, thereupon resigns a profitable employment, as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A’s promise is binding. The doctrine of promissory estoppel is a substitute for consideration in United States. It works in cases where inequities have resulted to the promisee because of his detrimental reliance on the promise. The promissory representations of the promisor are met by the promisee’s right to enforce the promise. To invoke the doctrine of promissory estoppel the following indispensable requisite conditions must be satisfied. The doctrine initially requires reliance upon a promise. If the promise, acts or forebears action without reliance upon the promise, the doctrine may not be apply. This is because promissory estoppel is conceivable only if the promise has induced action or forbearance by the promisee. If on the other hand, the promisee’s action or forbearance induced the promise, the doctrine of promissory estoppel is not applicable. In that case consideration is, namely a bargained for exchange, with action or forbearance by the promisor, as the price of the promise. The basis of promissory estoppel is reliance upon a promise. Secondly, the reliance

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4 Hughes v. Metropolitan Railway Company, (1877)2 A.C. 439. It is the 1st principle upon which all courts in equity proceed if parties, who have extend into definite and district terms involving certain legal results...” Upheld Birmingham and Distt. Land Co. v. London N.W. Rail Co., (1868)40 Ch.D. 268. But was rejected in Jorden v. Money (1854)5 HLC 185 and again in Sailsbury (Morquess) v. Gilmore (1942) where Lord JT. Mackinnou held that estoppel is still confined to representation of existing fact and not defurto promise.

must be detrimental to the promisee. Promissory estoppel will not apply in the absence of detriment, since it is a basis for allowing recovery or a remedy to the promise.\(^7\) Third, promissory estoppel requires that the promisor reasonably except the action of forbearance by the promisee that has been induced by the promise. This requirement does not mean that promissory estoppel is equivalent to consideration because consideration is something (action or forbearance)\(^8\) that is bargained for; whereas with promissory estoppel it is enough that the promisor had reason to except action or forbearance, although he did not seek it.

Although promissory estoppel differs from ordinary equitable estoppel in that the representation is promissory rather than as to an existing fact\(^9\), yet other elements of estoppel are some, however, some cases even indicating that some sort of fraud must be present for the application of promissory estoppel may be removed by a withdrawal of the promise, where the position of the promisee has not so changed as to prevent him from being placed in \textit{status quo}\(^10\).

\textbf{6.2.2 Applications of Promissory Estoppel in various fields –}

The doctrine of promissory estoppel is most frequently applied to defeat recovery by someone asserting \textit{prima – facie} legal rights. This is borne out by the

\begin{itemize}
\item \textit{Mere promise or representation as to the future will not support on estoppel; but an estoppel may be imposed to prevent injustice where the purpose is reasonably calculated to and does in fact induces substantial detrimental action by the promisee.} \textit{U.S. State Paltm Mot Auto Gorden, Inc. v. Petch, C.A. Wyo 261, F. 2nd 331} – Robert. Gorden Inc. v. Ingressoll Rand Co. \textit{C.C.A. III, 117 F 2nd 654, Jones Stores Co. v. Dean C.C.A.M.O. 56 F. 2nd 110}
\item \textit{Estoppel will not arise simplying from a breach of promise as to future conduct, a mere executor agreement, or from a mere disappointment of expectation,} \textit{Wyo – Vogel v. 21 C.J. p. 1142 note 14}
\item \textit{i) Mo Parnas v. Universal – Engel Paper Box Co. App. 353, S.W. 2d 316}
\item \textit{ii) action or forbearance induced must be of definite and substantial character and enforcement of promisee must be necessary to avoid injustice.} \textit{Pa – New Eroupe Amusement Co. v. Rosinsky 191A, 412, 126 P.A.}
\item \textit{iii) to bring case within the doctrine of promissory estoppel, it is essential that promisee could and would have performed the condition or would not have allowed the defense to arise but for promisor’s waiver.}
\item \textit{iv) an undertaking to do something which is already obligatory will not furnish basis for an estoppel.} \textit{Del Danbyv. Osteopathic Hospital Assn. of Del. 104 A 2d 903 34 Del Cu 427}
\item \textit{Aziz – Waugh v. Leunard, 211, p. 2d 806, 869}
\item \textit{Gilbert & Globe & R.F. Ins. Co. 91 or 59, 174 p. 1161, 178 p. 358, 12 ALR 205}
\end{itemize}
fact that the doctrine is most widely recognized and most frequently applied in cases of promises or representation as to an intended abandonment of existing rights. Some courts have been even stated that these are the only cases in which promises as to future may be the basis of an estoppel.

The better considered statements of the doctrine however, do not contain this limitation, and courts have actually applied the doctrine in numerous instances, which could not fairly be said to involve an abandonment of an existing right. A promise may in the United States derive contractual enforceability from detriment suffered by the promisee in reliance upon it, notwithstanding the absence of any element of bargain in transaction. American Reports furnish numerous recent examples of the application of such a proposition. There is for instance the long line of cases in which a promise to continue a charitable subscription has been consistently held enforceability at the suit of the charity. These decisions are based on the promissory estoppel even they lack consideration.

The doctrine has been widely used in the United States, however not only to support plaintiff’s cause of action, but (differently from common – wealth jurisdiction) in cases in which there is no previous contractual relationship between the parties. Interesting instances are furnished by the “sub-contractor bid cases”, in which a contractor, about to tender for a contract, invites a sub – contractor to submit a bid for sub – contract; after receiving his bid, the contractor submits a tender. In such cases the sub – contractor submits a tender. In such cases the sub-contractor has been held unable to retract his bid and liable in damages if he does so. It cannot be said that any detriment which the contractor can show in these cases amounts to consideration in its strict sense.

In MacIsaac & Menke Co. v. Freeman, the judgment was given for defendant on finding of fact viz. that it was not reasonable in the circumstances of

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13 Irwin v. Lombard University, 56 Ohio St. 9, 46 N.E. 63
that case for the plaintiff to have altered his position in the reliance on the terms of the promise as proved.

In *Hilltop Properties Inc. v. state of California*\(^{16}\), the State of California had given formal notice that it intending to take certain lands of the plaintiff for the purpose of Street road, but it entered into no final contract to do so. Plaintiff, relying on the statement of election, developed its property, leaving underdeveloped the land covered by the notice. The State Government then changed its mind, and decided not to take the land, which was not now capable of full development, relied on promissory estoppel. The Court of Appeal of California accepted plaintiff’s argument and gave judgment in his favor, specially applying the provisions of Article 90 of the Restatement of Contracts as good law. There are many other examples of the application of the same principles in quite different types of transaction\(^{17}\).

Indeed in the more liberal extension of the doctrine to effect broadly the enforcement of a promise or assurance upon which the promisee has relied to his detriment, upon affirmative relief has not infrequently been permitted under its aegis. Although, the widest application of the doctrine in this respect has probably been in charitable subscription cases, in number of cases the doctrine has been extended to a great variety to avoid the harsh application of the statute of limitations or the statute of frauds, where a promise has been made not to rely on one or the other of those statutes. Family or marriage settlement is a particular type of cases which seems to be rest on ground of this doctrine\(^{18}\). Recently the courts have extended the doctrine to commercial transactions. The mere fact that the transaction is commercial in nature should not preclude the use of promissory estoppel\(^{19}\). A number of courts have upheld the validity of charitable subscription of the theory of

\(^{16}\) (1965)43 Cal. Rep. 605
\(^{17}\) *Chrysler Corp. v. Quimby* (1956) 144 A 2d 123, a case where defendant’s failure to grant an agency agreement to plaintiff was held to give a cause of action circumstances which would have left plaintiff without any remedy in English or Commonwealth jurisdiction.
\(^{18}\) Williston, Contract 3rd ed. 140, the policy of the law is to favor such settlement and in accordance with this policy promises which often seem to have been intended as gratuitous have been enforced when the settlement of a family dispute has resulted there from or a marriage has taken place in reliance thereon. *De Gico v. Schweizzer*, 221 NY 331, 117 NE 807
\(^{19}\) *Robert Gorden Inc v. Ingersole Rand Co.* (CA 7111) 117 F 2d 654, Chicago L. Rev. 153, 20 Tex. L. Rev. 478 quoted in CUS vol. 31 at p. 466
promissory estoppel holding that which a mere intention to contribute is unenforceable for want of consideration, if money has been expanded or liabilities have been incurred in reliance on the promise so that non-fulfillment will cause injury to the payee, the donor is estopped to assert the lack of consideration and the promise will be enforced.

In a California case\(^{20}\), Trayor, J. accepts the text of Article 90 of the Restatement of the law of contract as good law on promissory estoppel and added that the absence of consideration is not fatal to the enforcement of such of promise. Thus in U.S.A. like England the doctrine of promissory estoppel is accepted as good law ever so serviceable as a healthy public policy\(^{21}\). This doctrine has been invoked also against the Government in U.S.A. Thus we have the proposition in the 2\(^{nd}\) ed. of American Jurisprudence, “equitable estoppel will not be applied against the State in its governmental, public or sovereign capacity except to prevent fraud or manifest injustice”.

In Federal Crop Insurance Corporation v. Merrill\(^{22}\), Supreme Court of USA decline to apply the doctrine of promissory estoppel against Government. This decision was strongly criticized by Jurists in United States\(^{23}\). But it is noteworthy to see that trend in the Stat Courts has been strongly in favor of the application of doctrine of promissory estoppel against government and public bodies, where interest of justice or morality and common fairness clearly dictate that course.

In U.S. v. Georgia Pacific Co.\(^{24}\), the Federal Court held that “the dictates of both morals and justice indicates that the Government is not entitled to immunity from equitable estoppel”.

The New York Court of Appeals in Planet Const Corp v. Board of Education\(^{25}\), extended the application of doctrine of provisory estoppel even to Municipality.

\(^{20}\) Orsman v. Star Paving Company (1958) 31 Cal. 2d 409
\(^{21}\) Spencer, Bower and Turner’s Estoppel by Representation, 2d. p. 358
\(^{22}\) 332 US 380 92 L. Ed. 10(1947)
\(^{23}\) See Davis on Administrative Law, 3\(^{rd}\) ed. Pp. 344-5
\(^{24}\) 421 F. 2d 92, 103 (9\(^{th}\) ar. 1970)
\(^{25}\) 7 N.Y. 2d 381 (1960)
The California Supreme Court propounded the following principle in *City of Long Beach v. Mansel*\(^26\):

“The Government may be bound by an equitable estoppel in the same manner as a private party is present and in the considered view of a court of Equity the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interests or policy which would result from the raising of the estoppel”.

Summing up the position of promissory estoppel against the government and public bodies, Davis said\(^27\), “During the 1970 onwards the trend is away from Merrill’s\(^28\) decision and now courts are strongly in favor of application of promissory estoppel against Government and public bodies”.

In *Immigration and Naturalization Service v. Hibi*\(^29\), it was held that estoppel is permissible where government agents engaged in “affirmative misconduct”. However in recent years in *Schweikar v. Hansen*\(^30\) the Supreme Court ruled out the possibility of the application of this doctrine against the administration.

In American Jurisprudence\(^31\) and in *Corpus Juris Secundum*\(^32\), it is indicated that when government capacity, in the United States or a Federating states, promissory estoppel is not applied. The doctrine of promissory estoppel will not be applied to deprive the government of the due exercise of its policy-power, or to effect public revenue, or property rights or to frustrate the purpose of the laws or thwart the public policy. On the other hand, when functioning of a proprietary as distinguished from a governmental capacity, the doctrine of equitable estoppel may be applied to the United States or to a Federating State.

It may be noted that doctrine of promissory estoppel does not purport to enforce all promises. Only those promises which are likely to and gratuitous have induced reliance of a substantial character are within the scope of promissory

\(^{26}\) 476 2d 423, 448(1970)

\(^{27}\) Davis, *Administrative Law – cases – text problems*, 543 (1977)

\(^{28}\) Supra note 22

\(^{29}\) 414 U.S. 5, 8-9 (1973)


\(^{31}\) American Jurisprudence, vol. 19 pp. 818-22

\(^{32}\) *Corpus Juris Secundum*, Vol. 31
estoppel and then only when the need to avoid ‘injustice’ demands their inclusion. Purely gratuitous promises are not now enforced in Anglo American Legal System.\(^{33}\)

There are five instances\(^{34}\) in which a promise is enforced, though not supported by conventional consideration, namely, promise to pay debt barred by Statutes, Statute of Limitation Section 86, promise to pay debt discharged in Bankruptcy Section 87, promise to perform voidable duty, stipulations Section 94 and promissory estoppel.

Promissory estoppel in U.S.A. is to leave the gap between the mere promise and the bargain. In this gap the doctrine can operate rationally, logically and usefully as a means of protecting justifiable reliance and avoid injustice.

6.2.3 Pre-existing Contractual Relation and Promissory Estoppel –

The doctrine of promissory estoppel has been widely used in the United States, however, not only to support plaintiff’s cause of action but in cases in which there is no previous contractual relationship between the parties. Interesting instances are furnished by the “sub – contractor bid cases”, in which a contractor, about to tender for a contract, invites a sub – contractor to submit a bid for a sub-contract; after receiving his bid, the contractor has been unable to retract his bid, and liable in damages if he does so. It cannot be said that any detriment which the contractor can show in these cases amount to consideration in its strict sense.

6.2.4 Detriment if as a part of Promissory Estoppel –

The doctrine of promissory estoppel initially requires reliance upon a promise. The basis of promissory estoppel is reliance upon a promise and the reliance must be detrimental to the promisee. Promissory estoppel will not apply in the absence of a detriment since it is a basis for allowing recovery or a remedy to the promisee. At the end of the 19\(^{th}\) century American Courts decided that recovery could be obtained based on the promisee’s detrimental reliance upon the promise, even it is devoid of bargained for exchange. This is because the promisee suffered

\(^{33}\) Corbin’s Anson, 119 as cited in 98 U. of Pen. L. Rev (1950)459

\(^{34}\) Restatements of Contract Sec. 85-94
the detriment as a result of the promise, rather than as an inducement for the making of the promise by the promisor.

However, in recent times the Courts expanded the definition of detrimental reliance that permits enforcement of promises on a promissory estoppel theory even when the plaintiff’s action does not substantially worsen his position. The Court opined that the comparison between the promisee’s position before and after taking action in reliance on the promise is irrelevant to the inquiry. Even the mere taking of action suffices the detrimental reliance. The court has expanded the promissory estoppel beyond its traditional function of protecting a promisee that has changed his or her position for the worse as a result of the promise\(^\text{35}\).

6.2.5 Promissory Estoppel if as a Cause of Action –

It is interesting to note that the doctrine of promissory estoppel has been widely in the United States in diverse situations as founding a cause of action. The most notable instances are to be found in what may to call the “sub – contractor bid cases”. From its beginning, the doctrine is recognized as giving rise to a cause of action, but the damage which are awarded, may be confined to the reimbursement of the “reliance losses” of the promise, rather than to the full damages for the value of its lost expectations (or loss of bargain damages). However, the recent cases are heavily weighted towards the award of full expectation damages. The amounts of the awards for lost profits may be substantial. Courts are also willing to grant equitable remedies such as specific performance or injunctive relief, in cases decided on a promissory estoppel.

6.3 Development in English Legal System –

In England too, promissory estoppel being a principle evolved by equity to avoid injustice and in fact, it is neither in the realm of estoppel nor of the contract. It is interesting to trace the evolution of this doctrine in England and to refer to some English decisions in order to appreciate the true scope, extent and development of this doctrine particularly because, it has been the subject of considerable recent

development and is steadily expanding. The basis of the doctrine is inter – position of equity and law. Equities has always stepped into mitigate the rigors of strict law i.e. to mitigate the rigor caused under certain circumstances by the requirement of consideration in every enforceable promise.

6.3.1 Development of the Doctrine of Promissory Estoppel through case-study –

In the 19th century, the law of England was dominated by the difference between law and equity. Law had its own strict rules. Equity was or should have been more flexible. It was the means by which the needs of the people could be met. Social necessities and social opinions are always more or less in advance of law36. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. The greater or less happiness of a people depends on the degree of promptitude with which the gap is narrowed. The principle of promissory estoppel coined by the court, helped to narrow the gap between the strict rules of law and social necessities of the 20th century.

In 1877, Lord Cairns stated this doctrine in its earliest form in Hughes v. Metropolitan Railway Company37, and explained by Bowen, L.J. in Birmingham and Distt. Land v. L. & N. W. Rly.38 This principle as laid down by Lord Cairns made sporadic appearance in stray cases now and then. But in Jorden v. Money39, the House of Lords held that the Common Law estoppel is applicable to misrepresentation of facts, does not extend to promises defurto. In other words, in England a man may be held to be bound by his past or present conduct on the ground of factual misrepresentation, but he was free to change his promise in futro, though this may perpetrate injustice on promises. The object of the Common Law was to avoid the representor’s fraud and to do justice to the representee. The promisee de-furto was kept outside its purview because it was said that there could be no fraud in respect of future intentions. Further promisee was held enforceable on the theory of contract. In other words, if the contract is inchoate and lacks some essential for its validity, the courts will not sanctify into enforcement, though the

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36 Sir Henry Maine in Ancient Law at p. 24; also see Lord Denning, Discipline of Law at p. 197
37 (1877)2 AC 489
38 (1888)40 Ch. D. 268
39 (1854)5 HLC 185
promisee may have suffered loss or expenses in reliance on it. But in *Hammensley v. De Bielin*\(^{40}\) which the *Jorden’s* case was not referred the House of Lord’s judgment gave the hope that injured party would get assistance of the court if he was induced to an action (or for that matter inaction) by the representations of the other, so much so that in *Loftus v. Man*\(^{41}\), the Vice-Chancellor John Stuart suggested that there was contradiction in the dicta of the above two House of Lords cases. Thus, the *Hammensley’s* case approved where as the Jorden case has disapproved the application of estoppel of future promises.

Then the doctrine of promissory estoppel has under gone considerable development under the tutelage of Lord Denning till the date of his retirement. His efforts to expound the doctrine being in 1947 when the principle of equity as laid down by Lord Cairns in *Hughes* case was disinterested and restated as a recognized doctrine in the *High Trees case*\(^{42}\). The modern history of promissory estoppel (of dispensation of the requirement of consideration in cases of modification or discharge of contract under certain circumstances) starts with the celebrated case.

The plaintiff leased to defendants certain flats for 99 years at rent of $2500 a year. Because of war condition, plaintiffs agreed at the request of the defendant to reduce the rent to $1250 from the beginning of the term. This arrangement worked well for some years. Subsequently, plaintiffs claimed in court the full rent for the two quarters ending September 29 and December 25, 1945. The claim was allowed because the court took the view that the period of which the full rent was claimed fell outside the representation, but Mr. Justice Denning as he was then considered *obiter* whether the plaintiff could have recovered the covenanted rent for the whole period of lease and observed that in equity they could not have been allowed to act inconsistently with their promise. On which the defendants had acted. It was pressed upon the court that it is well settled law as laid down in *Jorden v. Money*\(^{43}\) that no estoppel could be raised against the plaintiffs since the doctrine of estoppel by representation is applicable only to representation as to some state of facts alleged to

\(^{40}\) 12 Cl & Fin 45(1845)
\(^{41}\) (1862)2 Giff 592; 66 ER 549
\(^{42}\) (1947) KB 130
\(^{43}\) Supra note 39
be at the time actually in existence and not to promise *de-furto*, which if binding at all, must be binding only as contracts and here in this case there was a representation of an existing state of facts by the plaintiffs but it was merely a promise or representation of intention to act in a particular manner in the future.

Justice Denning while pronouncing the Judgment pointed out that the law has not been standing still since *Jorden v. Money* case, there has been a series of decisions over the last 50 years which although they\(^\text{44}\) 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 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 honored.

The principle formulated by Mr. Justice Denning was, to quote in his own words, “that a promise intended to be acted upon and in fact acted upon, is binding irrespective of the fact that no consideration is present”. Lord Denning in his work, *The Discipline of Law*,\(^\text{45}\) highlighted the importance of the *High Trees* case as: during the 19\(^{\text{th}}\) century the courts of common law had laid down strict rules of law expressed in archaic terms such as ‘consideration’ and ‘estoppel’. Those strict rules had survived the Judicature Act, 1873 and were capable of causing injustice in many cases. There was gap between those strict rules and the social necessities of the 20\(^{\text{th}}\) century. The *High Trees* case helped to narrow the gap.

Ever since the decision was given, it has been the subject of controversy. The principle formulated in *High Trees* case was accepted and applied by Atkinson, J. in *Ledingham v. Bermejo Estancia Co. Ltd.*\(^\text{46}\). The facts of the case were: the Chairman of a company who had lends it money, agreed in 1930 to waive interest on the loan until such time as the company was in a position to pay the interest. The company was never in that position and 16 years later ceased to carry on business altogether. It then repaid the loan but not the interest. The lender claimed the interest for all the years. The defense was that the claim for interest was waived by the agreement, or

\(^{44}\) *Fenner v. Blake* (1900)2 All ER 361 and *Butlery v. Pickarl* (1946) W.N.25

\(^{45}\) Lord Denning: *The Discipline of Law*, London Butterworths 1979

\(^{46}\) (1947)1 All ER 749
alteration barred by the Limitation Act. Atkinson, J. following reports\(^\text{47}\) and the High Trees case, held that the agreement was binding that on its future interpretation it was not a release of the interest but only a suspension of it and that when the company ceased to carry on business, the payment becomes due. In as much, however, as the agreement was binding during the intervening years, the cause of action for interest did not accrue during that time and was not barred by the Limitation Act.

Lord Denning in *Foot Clinics Ltd. v. Cooper’s Cowens*\(^\text{48}\), pointed that the principle of *High Tree* case did not however apply when the promise was not intended to create legal relations. In *Revening*\(^\text{49}\) case, Somervell L.J. however declined to accept the authority of *High Trees* case by simple words said: “I am not prepared to accept that case as authority for the proposition that the fact that the mortgage says to his mortgagor that, in the events which have happened, he need not pay more than so much at present, precludes him for all time from demanding the sums due under the mortgage”. The words were either not intended to affect legal relations or at the most to suspend it for the time being. However, in *Robertson v. Minister of Pensions*\(^\text{50}\), the court recognized and applied the fundamental principle of quasi – estoppel. The claimant in this case suffered injury while on active service and was anxious to have his subsequent disability attributed to military service. He was assured by the war office that his claim had been accepted and on the faith of this representation he refrained from taking steps to gain independent medical advice or to secure the X-rays plates relating to his accident when later the claimant applied for a pension on the ground of injury, he sought to prevent the Ministry of Pensions from rejecting his claim, by reason of the earlier unequivocal representation by the war office. The court held that all the requirement for quasi estoppel i.e. an independent cause of action, an unequivocal representation, intended to be acted on and in fact acted on by the claimant to the prejudice of his position were present. Consequently Crown could not withdraw its representation until the claimant had

\(^{47}\) (1937)2 All ER 361  
\(^{48}\) (1943) KB 506  
\(^{49}\) (1947)63 TLR 394  
\(^{50}\) (1948)2 All ER 769
been resorted to the position he had before the representation was made. Denning, J., applies his dictum in the High Trees case, but also stresses the fact that claimant has prejudiced his position on the faith of the representation. Thus we have here no promise express or implied by Col. Robertson to forbear from getting a medical opinion. Yet if his disability had not been accepted as attributable to military service he would have got one. He did therefore, on the faith of the war office letter forbear to get such opinion. That is sufficient to make the letter binding. It is submitted that this qualification brings the High Trees definition of quasi estoppel into line with the present argument – that party should act on the representation to his detriment unlike previously; he was merely required to act on it.

In Combe v. Combe\(^{51}\), the court held that quasi – estoppel operates only as a defence. In this case, the husband had promised to pay his wife $100 p.a. permanent maintenance when she gained a decree – nisi. On the faith of this promise, the wife refrained from applying for a Court order for permanent maintenance and then later sued the husband on the promise when his payment fell into arrears. The action could not be supported on a contractual basis after Gainsberg v. Storr\(^{52}\), where it was held that even an express promise to forbear would not amount to consideration in these circumstances. Nevertheless in the court below, Byrne, J., purported to apply the High Trees principle and held that husband was estopped in some way from denying his promise. The court of appeal consisting of Denning Asquith and Birkett L, JJ unanimously reversed this decision of lower court on the ground that quasi – estoppel does not in itself give rise to a cause of action and that consequently wife could not sue on the husbands’ promise unless it was supported by consideration. The case is therefore, valuable as defining one of the limitation to the application of the equitable remedy. In Tungsten Electric Co. Ltd. v. Tool Metal Manufacturing Co. Ltd\(^{53}\), the court held the any detriment will suffice; even it is unconnected with the person making the representation.

After the recognition of the name of promissory estoppel the time came

\(^{51}\) (1951)1 All ER 767  
\(^{52}\) (1949)2 All ER 411  
\(^{53}\) (1950)69 R.P.C. 108 as cited in 64 LQR 1948
for an extension of it. In High Trees case there was an actual promise or assurance.

In the Birmingham case there was only conduct. The law as to sale of goods had got tied into knots, especially when these for delivery had been extended by word of mouth. All these knots were united in Charles Rickards Ltd. v. Oppenhaim\textsuperscript{54} case. In this case Mr. Oppenhaim wanted a body built on a chassis of a Rolls Royce ‘Silver Wraith’. In July 1947, the coachbuilders promised to deliver it ‘within six or at the most seven months’. They did not deliver it in that time. Mr. Oppenhaim still pressed them to deliver. Suppose they tendered delivery in June 1948 in accordance with his request, could Mr. Oppenhaim have refused to accept delivery? According to old cases, he could have done. Denning pointed out the difficulty and gave the solution…” it would have been said that there was no consideration; or if the contract was for the sale of goods, that there was nothing in writing to support the variation. There is the well known case of Plevins v. Dowling, coupled with what was said in Esseler, Walchter, Glover Co. v. South Derwent Coal Co. Ltd. which gave rise to a good deal of difficulties on that score, but all those difficulties are swept away now. If the defendant, as he did, led the plaintiffs’ to believe that he would not insist on the stipulation as to time, and that if they carried out the work, he would accept it and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or on agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he convinced an intention to affect their legal relations. He made in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it…. It is a particular application of the principle of High Trees case. So, “if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that behalf, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do”. In the sale of goods Oppenhaim’s decision was break through. It was decided in 1950. At that time contract for the sale of goods of $10 or more had to be in writing. That requirement was not abolished.

\textsuperscript{54} (1950)1 KB 616
until 1954. In *Panchand S.A. v. Et. General Grain*\(^{55}\) new extension of estoppel by conduct was used to overcome the limitations of the old common law doctrine of ‘waiver’. That doctrine only applied where the party waiving a breach had actual knowledge of it. *Panchand frères* extended it to cases where the other acted. The Court held that if a man who is entitled to reject goods on a certain ground, so conducts himself as to lead the other to believe that he is not relying on that ground, and then he cannot afterwards set it up as a ground of rejection, when it would be unfair or unjust to allow him so to do.

In *Evenden v. Guildfold City Football Club Ltd.*\(^{56}\), the court broadened the application of promissory estoppel is no longer the same passive equity. This means that this doctrine is used as cause of action as well as defence. It over – ruled the limit imposed by *Combe v. Combe* decision, though it is true that it is not itself a cause of action except in cases called proprietary estoppel where it is used as cause of action. In, *W.J. Alan and Co. Ltd. v. El Nair Export & Import Co.*\(^{57}\), Lord Denning expressly rejected detriment as an essential ingredient of promissory estoppel. Lord Denning held that where it was made clear that alteration of position only means that the promisee must have been led to act differently from what he would otherwise have done\(^{58}\). The alteration of position need not involve any detriment to the promisee. “If detriment were necessary element, there would be no need for the doctrine of promissory estoppel because in that event the detriment would form the consideration and the promise would be binding as a contract”.

Lord Donalson in *Dunham Fancy Goods Ltd. v. Michael Jackson Ltd.*\(^{59}\) observed that there is no need to have pre – existing legal relation or pre – existing contractual relationship for invoking the doctrine. It applied whenever a representation is made whether fact or law, present or future, which is intended to be

\(^{55}\) (1970)1 Lloyd’s Rep 53  
\(^{56}\) (1975)3 All ER 269  
\(^{57}\) (1972)2 All ER 127,140  
\(^{58}\) In the same effect there are remarks of Viscount Simonds, J. in *Tool Metal Mfg Co. v. Tungsten Electric Co.* (1955)2 All ER 57 that, “the gist of equity lies in the fact that one party has by his conduct led the other to alter his position”. Also see *Kammins Ballrooms Co. v. Zenith Investments* (1970)2 All ER 871  
\(^{59}\) (1968)2 All ER 989,991
binding, intending to induce a person to act on it and he does act on it.\textsuperscript{60}

Lord Denning was all out for equity and fair deal to the citizen by the State. The Crown cannot take refuge under its so – called privilege and escape liability. He observed in \textit{Lever (Finance) Ltd. v. Westminster Corp.}\textsuperscript{61}

“\textquote{I know that there are authorities which say that a public authority cannot be estopped by any representation made by its officers. But those statements must now be taken with considerable reserve. There are many matters which public authorities can now delegate to their officers. If an officer acting within the scope of his ostensible authority makes a representation on which another acts, then a public officer may be bound by it just as much as a private concern would be”.

In \textit{Howell v. Falmouth Boat Construction Co. Ltd.}\textsuperscript{62}, the court held that promissory estoppel cannot have overriding effect on statute or of legalizing the particular operation in the absence of a license. It is certain that neither a minister nor any subordinate officer of the Crown from enforcing a statutory provision or entitles the subject to maintain that there has been no breach of it\textsuperscript{63} and that “the illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a government officer however high or low in hierarchy”\textsuperscript{64}. Subsequently, the Court in, \textit{Western Fish Product Ltd. v. Penuith Dist. Council}\textsuperscript{65}, held that estoppel cannot be raised to prevent the exercise of a statutory discretion or to prevent or excuse the performance of a statutory duty.

It is noted that while the courts are reluctant to apply the doctrine of promissory estoppel in substantive matters they are willing to do so in procedural matters. If the administration has promised to follow a procedure before taking any decision it may be held bound to follow the promised procedure. In \textit{R. v. Liverpool Corporation ex parte Liverpool Taxi Fleet Operators Association}\textsuperscript{66}, The Court of

\textsuperscript{60} (1968)2 QBD 987
\textsuperscript{61} (1971)1 QB 222
\textsuperscript{62} (1951)A.C. 837
\textsuperscript{63} Ibid at 849
\textsuperscript{64} Garner’s \textit{Administrative Law} (1974) pp. 293
\textsuperscript{65} (1981)2 All ER 204; also see Rootkin \textit{v. Kent Country Council} (1981)1 W.L.R. 1186; \textit{Wells v. Minister of Housing} (1967)2 All ER 1041
\textsuperscript{66} (1972)2 QB 299
Appeal granted prohibition against the Liverpool Corporation to prevent it from increasing the number of Taxi licenses without first honoring its undertaking to hear any representation from interested person. Lord Denning, M.R. expressed the view that the Corporation was bound by its undertaking to hear representation so long as it was not in conflict with corporations’ statutory the duty.

The Privy Council further approved this statement of principle in Attorney General of Hong Kong v. Ng Yuen Shiu\(^67\): “The justification of it is primarily that when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representation from interested parties and as a general rule that is correct”.

The doctrine of promissory estoppel in England suffered from the doctrine of consideration being tacked on to it. Lord Denning added a qualification to the proposition enunciated in the High Trees case, that though in the circumstances set out, the promise would undoubtedly be held by the courts to be binding on the party making it, notwithstanding that 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 consistently with it. Lord Denning recognized in, Crabb v. Arun Distt. Council\(^68\), that there are estoppel and estoppel. Some do give rise to a cause of action. Some do not – in the species called proprietary estoppel it does give rise to a cause of action. Perhaps the main reason why the English Courts have been reluctant to allow promissory estoppel to found a cause of action seems to be the apprehension that the doctrine of consideration would otherwise be completely displaced\(^69\). Lord Denning was cautious and chary in not pushing the doctrine of

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\(^67\) (1983)2 W.L.R. 735
\(^68\) (1975)2 All ER 865 (1975)3 WLR 847
promissory estoppel too far lest the doctrine of consideration be overthrown by a
side word. However, modern attitude towards the doctrine of consideration is that it is something of an anachronism\textsuperscript{70}. The Law Revision Committee (U.K.) in its 6\textsuperscript{th}
Report (1973) also had accepted Prof. Holdsworth view advocating that a contract
should exist if it was intended to create or affect legal relations and either consideration was present or the contract was reduced to writing it\textsuperscript{71}.

In, \textit{Ajayi v. R.T. Briscoe (Nigeria) Ltd.}\textsuperscript{72}, the Judicial Committee said that the principle is:

“When one party to a contract in the absence of fresh consideration agrees not to enforce his rights, equity will be raised in favor of the other party”. Their Lordship continued: “this equity is, however, subject to the qualification: (i) that the other party has altered his position, (ii) that the promisor can resile from his promise on giving reasonable notice which need not be a formal notice giving the promisee a reasonable opportunity of resuming his position, (iii) the promise only becomes final and irrevocable if the promisee cannot resume his position”.

Thus when a promise given is:

i) Intended to create legal relation;

ii) Intended to be ‘acted’ upon by the promisee;

iii) In fact so ‘acted’ upon by the promisee, and

iv) The promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it.

The promise under such circumstances being not backed with a consideration, though not enforceable at the instance of the promisee, but is not devoid of all legal significances, because it operates as equitable estoppel as against the promisor and stops him from enforcing his standing legal rights. The promisor can withdraw his promise by giving due notice to the promisee, the validity of the due notice of the purpose will; again depend on the circumstances of the case concerned. It should be

\textsuperscript{70} Per Lord Holdsworth in History of English Law, and Lord Wright in his article in 49 Har L. Rev. 1225, Sir Fredrick Pollock in Genius: Common Law, p.91
\textsuperscript{71} Lord Denning, \textit{The Discipline of Law} (1982), Butterworths.
\textsuperscript{72} (1964)1 W.L.R. 1326 at 1330
a reasonable notice which may be express or implied so as to permit the promisee to resume the rights that were kept in suspense or held in a abeyance provided under the circumstances of the particular case it is not inequitable to do so without being detrimental to the promisee. But if the detriment under the circumstances cannot be avoided to the promisee, the notice of withdrawing the promise remains in fructuous and invalid.

6.3.2 Pre – existing Legal Relations/ Contractual Relation –

The two early cases\textsuperscript{73} make it clear that, so far as the doctrine was enunciated in the last century, the principle was limited in its operation where the parties were already bound by contractual relation and subsequently one of the parties induces the other to believe that rights under such contract shall not enforce and as a result of such inducement of representation such other party has altered his position to his own detriment. Thus in, Hughes v. Metropolitan Rail Co., where plaintiff and defendants were already bound in contract as lessor and lessee, Lord Cairns observed, “if parties who have entered into definite and distinct terms involving certain legal results afterwards – enter upon a course of negotiations”. Ten years later the similar observation was appeared in the Birmingham Land case where Bown, L.J. held:

“If persons who have contractual right against other induced by their conduct those against whom they have such rights to believe…”

This principle again found favor with the House of Lords in Tool Metal Co. v. Tungsten Electric Co.\textsuperscript{74} In this case too, there was a pre – existing relationship between the parties. But in a subsequent case Durham Fancy Goods Ltd. v. Jackson (Michael) Fancy Goods Ltd.\textsuperscript{75}, Donaldson, J. observed that “although pre – existing contractual relationship was not necessary for the application of the doctrine but there must be pre – existing legal relationship which could in certain circumstances given rise to liabilities and penalties”.

\textsuperscript{73} Hughes v. Metropolitan Rail Co. (1877)2 App. Case 439; and Birmingham & Distt. Land Co. v. London & North – Western Rail Co. (1888)40 Ch. D. 268

\textsuperscript{74} (1968)2 Q.B.D. 839

\textsuperscript{75} (1968)2 All ER 987
However, Lord Denning in the *High Trees* case pronounced that there is no need of any such limitation for the application of the doctrine of promissory estoppel. In *Evenden v. Guilford City Assn. Football Club Ltd.*\(^{76}\), he totally repudiated the necessity of a pre-existing legal relationship between the parties and refused to introduce such limitation for the operation of the doctrine of promissory estoppel, provided other compelling circumstances for its applicability are present in a particular case.

In *Crabb v. Arun Distt. Council*\(^{77}\), the court in a crystalline manner held that the true principle of promissory estoppel, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would be inequitable to allow him to do so having regard to the dealings which taken place between there is any pre-existing relationship between the parties or not.

### 6.3.3 Detriment if as a Necessary ingredient of Promissory Estoppel –

Is detriment a necessary ingredient for the invoking of the doctrine of promissory estoppel? In 1937, Report of the Law Revision Committee held it, as an essential ingredient. Early cases\(^{78}\) on promissory estoppel do not express, a change of relations between the two parties, but both use the word “inequitable” as the word of definition. The test therefore, as at the end of the *Birmingham Land* case seems to be, not whether the promisor has moved to this detriment, but whether or not it would be inequitable to enforce the original arrangement having regard to what has occurred. In *High Trees* case Lord Denning held that for the applicability of doctrine of promissory estoppel it is not necessary for the promisee to show that on the reliance of the promisor’s promise, the promisee has suffered some detriment. What is necessary is only that the promisee should have altered his position in reliance on

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\(^{76}\) (1975)3 All ER 269

\(^{77}\) (1975)3 All CR 865


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the promise Lord Denning again confirmed this position in *W.J. Alan & Co. Ltd. v. El Nair Export & Import Co.*

79 where it was made clear that alteration of position only means that the promisee must have been led to act differently from what he would have done otherwise. The alteration of position need not involve any detriment to the promisee. “If detriment were a necessary element there would be no need for the doctrine of promissory estoppel because in that event it would form the consideration and the promise would be binding as contract”. The Court expressly rejected detriment as an essential ingredient of promissory estopped and held:

A seller may accept a less sum for his goods than the contracted price, thus inducing his buyer to believe that he will not enforce payment of the balance

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Lord Cohen in *Tool Metal* case reiterated the earlier ruling of Lord Denning and held that there is no need of detriment as an essential requisite of promissory estoppel but what is required is that “the one should have acted on the belief induced by the other party”. The present trends in English Courts reveal the fact that in large number of cases decided on promissory estoppel that courts reaches on conclusion that it is not the detriment but alteration of position to one’s detriment on reasonable reliance is an essential ingredient of promissory estoppel

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**6.3.4 Promissory Estoppel shield sabre under the English Legal System –**

In England the law has been well – settled for a long time, though there is some indication of a contrary trend to be found in recent juristic thinking in that country, that promissory estoppel cannot itself be the basis of an action. It cannot found a cause of action. It can only be a shield and not sword. This narrow approach to a doctrine which is otherwise full of great potentialities is largely result of an assumption of misleading nomenclature, i.e. the doctrine is branch of the law of estoppel. Since estoppel has always been traditionally a Principle invoked by way of defence the doctrine of promissory estoppel has also identified as a measure of

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79 (1979)2 All ER 127, 140; this case overruled the ruling that detriment is an essential part of promissory estoppel. *Ayadeji Ajagi v. R.T. Briswe (Nigeria) Ltd. and Carr v. Brikon Investment Ltd.* (1979)2 All ER at 758, 759, (1974) QB 467 at 487

80 (1972) All ER 127, 140

defence. The ghost of conventional estoppel continues to haunt this new estoppel formulated and applying this new equity in the *High Trees* case. Lord Denning added a qualification that though the circumstances set out, the promise would undoubtedly be held by the Courts to be binding on the party making it, not understanding that under 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 in consistently with it”.

Lord Denning in *Combe v. Combe* pointed out that this principle should not be stretched too far, lest it should be endangered. The principle does not create new cause of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties.

Similarly, Backley, J. in *Beesly v. Hallwood Estate Ltd.*\(^{82}\) reiterated that “the doctrine may afford a defence against the enforcement or otherwise of enforceable rights, it cannot create a cause of action”. Here it is, however, necessary to make it clear that though this doctrine has been called in various judgments and text books as promissory estoppel, rather, is a doctrine involved by equity in order to prevent injustice where a promise is made by a person knowing that it would be acted on by the person to whom it is made and in fact it is so acted on and it is inequitable to allow the party making the promise to go back upon it. Lord Denning in *High Trees* case held that they are really promises, promises intended to be binding intended to be acted upon and in fact acted upon. These facts substantiate the fact that doctrine of promissory estoppel need not be inhibited by the same limitation as estoppel in the strict sense of the term. It is an equitable principle evolved by the Courts for doing justice and there is no reason why it should be given only a limited application by way of defence. It may be noted that even Lord Denning in *Crabb v. Arun Distt. Council* held that “there are estoppel and estoppel”. Some do give rise to a cause of action. Some do not and added that “in the species of estoppel, it does give rise to a cause of action”. And since the proprietary estoppel and promissory estoppel like

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\(^{82}\) (1960)All ER 314; *Argy Trading Co. v. Lapid Developments* (1977) W.L.R. at 444, 457
proprietary estoppel should give rise to cause of action. It is quite justifiable because both are the offspring of equity and if equity is flexible enough to permit proprietary estoppel to be used as a cause of action, there is no reason in logic or principle why promissory estoppel should also not be available as a cause of action if necessary to satisfy the equity.

But perhaps the main reason why the English Courts have been reluctant to allow promissory estoppel to found a cause of action seems to be the apprehension that the doctrine of consideration would otherwise be completely displaced. The modern attitude towards the doctrine of consideration is however changing fast and there is considerable body of juristic thought which believes that this doctrine is something of an Article in Harvard Law Review\textsuperscript{83}, that this doctrine of consideration ought to be abolished since in its present form it serves no practical purpose. The Law Revision Committee in its 6\textsuperscript{th} Report advocated the same view and recommended that a contract should exist if it was intended to create or affect legal relations and either consideration was present or the contract was reached to writing. This recommendation however did not fructify into law with the result that present position remain what it was. But it is submitted that by having regard to the general opprobrium to which the doctrine of consideration has been subjected by eminent jurists, we need not be unduly anxious to protect this doctrine against assault or erosion nor allow it to dwarf or stultify the full development of the equity of promissory estoppel or inhibit or curtail its operational efficacy as a justice device for preventing injustice. In the same spirit in recent case Lucknoo, J. in \textit{Jamaica Telephone Co. Ltd. v. Robinson}\textsuperscript{84} held that the present trend in U.K. seems to be in favor of promissory estoppel as both as shield and as sword.

6.4 Development in Australian Legal System –

6.4.1 Versatility of promissory estoppel under the Australian Legal System –

There has been a sense of inevitability about the acceptance of the ‘doctrine’ or ‘principle’ of promissory estoppel as forming part of Australian Law. In his work,

\textsuperscript{83} 49 Harvard Law Review 1225
\textsuperscript{84} (1970) W.L.R. at 170
“Is equitable estoppel dead or alive in Australia?” Nicholas Seddon argued persuasively. This view was contrary to the view expressed by the authors of the then current Australian edition of Cheshire and Fifoot’s law of Contract in which the author stated that there was no Australian authority inconsistent with the acceptance of the doctrine of promissory estoppel.

Nicholas Seddon held that in *Albert House Ltd. (in vol lig) v. Brisbane City Council*, the High Court observed that there is no obstacle to accept the doctrine or promissory estoppel in Australia. The same view was affirmed in *Barnes v. Queensland National Bank Ltd.* and *Chadwick v. Manning*. In the mid – 1970’s there has been a rash of State and Territory Supreme Court cases which have touched on the doctrine. Finally, in *Legione v. Hateley* the High Court considered the doctrine extensively.

In a number of cases the mid – 1970’s Australian Courts have referred to the doctrine of principle of promissory estoppel without any apparent censure (criticism, animadversion) but without discussing it in detail or expressly accepting it as part of the law of the particular jurisdiction concerned. In some of these cases of courts were prepared to assume the applicability of the doctrine but found against the proponent on the facts and so did not have to discuss the question whether or not the doctrine formed part of the law of the relevant jurisdiction. However, with respect to all the cases it would be argued that the court did, at least tacitly, concede that the doctrine in some form or other form was part of the law available to be applied. There have also been a number of more positive assertions that the doctrine forms part of Australian Law and in at least three superior courts decisions, the doctrine

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85 (1975)1 C.L.Q. 438
86 3rd ed. (1974) at pp. 675-78
87 (1968)118 C.L.R. 144, (1968)42 A.L.J.R. 158
88 (1906)3 C.L.R. 925
89 (1896)A.C. 23
90 (1983)57 A.L.J.R. 292
91 Ibid
has been accepted and extensively examined.94

In *Jet Maintiendrai Pty Ltd. v. Quaglia*95 the facts, in so far as they are relevant, were not alike those in *Central London Property Trust Ltd. v. High Trees House Ltd.*96 The lessor of shop premises, at the lessee’s request and without consideration, agreed to accept a reduced rent for an indefinite period. Approximately eighteen months later the lessor claimed and sued for the arrears of the full rent. In the Full Court of the Supreme Court of South Australia, the leading judgment was given by King, C.J. with respect to the High Court’s decision in *Albert House Ltd. v. Brisbane City Council*97, the court took the view that the question of promissory estoppel did not arise in that case and that the case could not be regarded as a rejection of the doctrine. Whilst agreeing with the authors of the third Australian edition of Cheshire and Fifoot’s law of Contract that the Privy Council on appeal from the Supreme Court of New South Wales in *Chedwick v. Manning*98 endorsed the second ground for the decision in *Jorden v. Money*99 (that a representation as to intention as distinct from existing fact could not be found an estoppel) the court went on the say that this holding was inconsistent with the subsequent Privy Council decision in *Ajayi v. R.T. Briscoe (Nigeria) Ltd.*100 which “clearly and unequivocally recognized estoppel arising from promise or statement of intention as part of the law”, although the necessary conditions of the doctrine’s operation were not found to be present on the facts of that case, King, C.J. concluded: “I think that until the question is dealt with by the High Court, this Court should treat the formulation of the principle in *Ajayi’s* case as authoritative”101.

In his Honor’s view it was clear that there could be no estoppel unless the promisee had altered his position on the faith of the promise. In this respect he could

94 *Jet Mainteendrai Pty Ltd. v. Quaglia* (1980)26 S.A.S.R.101 (Supreme Court of South Australia, in Banc, King C.J.); *Gollin & Co. Ltd. v. Consolidated Fertilizer D.M. Campbell, W.B. Campbell & Andrew, JJ; Reed v. Sheeshan* (1982)56 F.L.R. 206 (Federal Court)of Australia, Fox Blackburn & Deane, JJ
95 (1980)26 S.A.S.R. 101
96 (1947) KB 130
97 (1968)118 C.L.R. 144; (1968)42 A.I.J.R. 158
98 (1896)A.C. 231
99 (1854)5 H.L.C. 185; (1854)23 L.J. CH. 865; 10 ER 368
100 (1964)1 W.L.R. 1326
101 Ibid
see no valid distinction between promissory estoppel and estoppel by representation of fact. He did not favor the view, which Lord Denning, M.R. had expressed in *W.J. Alan Ltd. v. El Nasr Export & Import Co.*\(^{102}\), “that it is sufficient that the promisee had acted upon the promise and that in the case of promissory estoppel, unlike estoppel by representation, detriment to the promisee is unnecessary”\(^{103}\).

In the opinion of King, C.J. “a person who promises or states his intention to another not to enforce or insist upon his legal rights is not estopped from resiling from that position and reverting to the strict legal position, unless his doing so would result in some detriment and therefore some injustice to that other”\(^{104}\). In the same case Cox, White, JJ of the view that the doctrine of promissory estoppel did form part of South Australian Law and that detriment was an essential element.

Later in *Gollin & Co. Ltd. v. Consolidated Fertilizer Sales Pty Ltd.*\(^{105}\) The court did not discuss whether or not the doctrine of promissory estoppel formed part of the law of Australian Legal System, but the judgment centered on certain features of the doctrine. W.B. Campbell, J. examined the Privy Council’s decision in *Ajayi v. R.T. Briscoe (Nigeria) Ltd.*\(^{106}\) and said that it was “implicit in that decision that their Lordship were of the opinion that an alteration of position (promisee’s position) meant something more than merely acting on the promise. After referring to Lord Denning’s judgment in *D&C Builders Ltd. v. Rees*\(^{107}\), *W.J. Alan & Co. Ltd. v. El Nasr Export and Import Co.*\(^{108}\) and *Brikom Investment Ltd. v. Carr*\(^{109}\), he said: “I am unable to find in the authorities any Judicial support for Lord Denning’s view as to what is meant by ‘alteration of position’. For W.B. Campbell, J. there must have been an alteration of position in such a way “that such new position was different from that prior to the promisee’s acting upon the promise”\(^{110}\).

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\(^{102}\) (1972)2 QB 189 at 213

\(^{103}\) (1980)26 S.A.S.R. 101 at 105

\(^{104}\) 1970 W.L.R. at 170

\(^{105}\) (1982) Qd. R. 435

\(^{106}\) (1964)1 WLR 1326

\(^{107}\) (1966)2 QB 617

\(^{108}\) (1972)2 Q.B. 189

\(^{109}\) (1979)1 Q.B. 467

\(^{110}\) (1982)Q.B. 435 at 456
In Reed v. Sheehan\textsuperscript{111}, Dean, J. along with Blackburn, J. while answering the question whether promissory estoppel is to be considered as included in the category of estoppel ‘in pais’ or consigned to a separate class, at first examined the general notion of ‘estoppel in pais’ as considered by Dixon, J. in Thompson v. Palmer\textsuperscript{112}. Dean, J. took the view that his Honor’s remarks in the case still constitute a correct statement of an underlying general principle which can be discerned in the established emanations of the doctrine of estoppel in pais. His Honor stated that there are statements of high authority to support the existence of a distinct principle of equity, which precludes in certain circumstances the enforcement of strict rights arising under a contract where there has been a promissory representation that they would not be enforced. It is this principle of equity which has been seen as providing the foundation of the doctrine of promissory estoppel: where law and equity are fused, with equity prevailing, such an equitable doctrine of promissory estoppel can, if accepted, conveniently be treated as an emanation of estoppel ‘in pais’ in an area where the doctrine of consideration would otherwise have prevailed. If it is so treated, however, care needs to be taken to ensure that question of principle (e.g. whether estoppel in pais generally or promissory estoppel in particular, is properly to be regarded as being no more than a rule of evidence or as being incapable of founding a cause of action) are not concluded or foreclosed by….. “Assimilation of doctrines, which are not strictly cognate”, it is noted that Dean, J. noted the limitation that the doctrine of promissory estoppel was confined by reference to parties in a pre-existing contractual relationship. He found three features common to both types of estoppel:

i) the representation or promise must be clear and unambiguous;

ii) both estoppel looks chiefly at the situation of the person lying on the representation or promise;

iii) no estoppel can arise, “unless as a result of adopting the (assumption or misrepresentation) as a basis of action or in action, the other party will have

\textsuperscript{111} (1982) 56 F.I.R. 206

\textsuperscript{112} (1933) 49 C.L.R. 507 at 547
placed himself in a position of material disadvantage,113 if departure from the assumption or representation is permitted.

In *Legione v. Hately*114, their Honors held that doctrine of promissory estoppel is part of Australian Law and there are strong English authorities for a limited application of the promissory estoppel in Australia, *albeit* a doctrine restricted to precluding departure from a representation by a person in a pre-existing contractual relationship that he will not enforce his strict contractual rights. Of course, their Honor’s noted that crucial passages referred to earlier in *Hughes v. Metropolitan Rly Co.*115 and *Birmingham & Distt Land Co. v. London & North Western Rly Co.*116 cases. Importantly, they had no hesitation in describing the generality of the comments of Lord Cairns & Bowen, L.J. respectively, in these cases as by no means consistent with statements in the House of Lords, the Privy Council and the High Court which assert that in order to found an estoppel against a person who seeks to enforce a legal right, there must have been a misrepresentation by the persons as to existing facts, not of mere intention, and in saying that a choice had to be made between such statement on the one hand and the clear acceptance, in subsequent cases in the Privy Council and the House of Lords, of doctrine of promissory estoppel may operate to preclude the enforcement of rights at least between parties in a pre-existing contractual relationship117. Their Honor’s continued118 “the clear trend of recent authorities the rational of the general principle underlying estoppel in *patis*”, established equitable principle and the legitimate search for justice and consistency under the law combine to persuade us to conclude that promissory estoppel should be accepted in Australia as applicable between parties in such a relationship. Their Honors did not find it necessary to consider: (a) whether the doctrine would apply regardless of whether the parties were in a pre-existing contractual relationship, or (b) whether the doctrine should be treated as an extension of estoppel in *patis* into a field where the doctrine of consideration

113 Per Dixon, J. in *Thompson v. Palmer* (1933)49 CLR 507 at 547
114 (1983)A.L.J.R. 292
115 (1877)AC App. Case 439
116 (1888)40 Ch.D. 268
117 (1983)57 L.J.R. 292
118 Ibid at 304
otherwise predominated or as an independent equitable doctrine. In either case there
was a general correspondence between the ‘grounds of preclusion’ of an ordinary
estoppel by representation and of a promissory estoppel particular. It was necessary
to both classes of estoppel: (i) that the representation or promise must be clear, (ii)
as a result of adopting it the other party must have placed himself in a position of
material disadvantage. Mason and Deane, JJ concluded that for the invoking of
promissory estoppel the parties must have at least pre – existing contractual
relationship. Recently in Walton Stores (Inter State) Ltd. v. Mahr,\textsuperscript{119} the
Australian High Court has significantly broadened the doctrine of promissory estoppel
by sanctioning its use as a sword and in circumstances where neither a pre – existing
contractual relationship exists between the parties. As such the High Court’s
decision in Walton Stores weaken the requirement that promises, in order to be
legally binding must be founded on consideration. This case portends the significant
expansion of contract law into new areas of promising. Tracing the development of
the doctrine of promissory estoppel in England and Australia Mason, C.J. and
Wilson, J. concluded:

‘One may discern in the cases a common thread which links them together,
namely the principle that equity will come to the relief of a plaintiff who has acted to
his detriment on the basis of a basic assumption in relation to which the other party
to the transaction has played such a part in the adoption that it would be unfair or
unjust if he were left free to ignore it.\textsuperscript{120} Equity comes to the relief of such a plaintiff
on the footing that it would be unconscionable conduct on the part of the other party
to ignore the assumption\textsuperscript{121}. In concluding that promissory estoppel is merely one
type of equitable estoppel, Brennan, J. posited that for the application of equitable
estoppel a plaintiff must prove the following:

1.) the plaintiff assumed or expected that a particular legal relationship exists
between the plaintiff and the defendant or that a particular legal relationship
will exists between them, and, in the latter case, that the defendant is not free
to withdraw from the expected legal relationship;

\textsuperscript{119} (1986)76 ALR 513
\textsuperscript{120} Ibid
\textsuperscript{121} Ibid at 524
2.) the defendant has induced the plaintiff to adopt the assumption or expectation;
3.) the plaintiff acts or abstains from acting in reliance on the assumption or expectations;
4.) the defendant knew or intended him to do so;
5.) the plaintiff’s action or in action will occasion detriment if the assumption or expectation is not fulfilled; and
6.) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.\textsuperscript{122}

\textbf{6.4.2 Detriment if as part of Promissory Estoppel –}

It is difficult to be certain as to the precise concept to which reference was intended to be made when such expression as ‘acting on the promise’, ‘reliance on the promise’, ‘change of position’, ‘detriment to the promisee’, and ‘in equity to the promisee’ have been used.

Literally, the term, ‘reliance’ might reasonably suggest in the present context the promisee’s belief and confidence that the promised indulgence will be forthcoming, and perhaps in addition, a corresponding ordering by the promisee of his affairs in a way in which they would not have been ordered but for the promise. Literally, the term ‘detriment’ in the present context might reasonably be used to refer to the promisee’s worsening (in some sense) of his position on account of his belief that the promise will be honored, or alternatively to a position of disadvantage which the promisee would occupy if the promisor were allowed to repudiate his promise. It is observed that irrespective of the terminology used, three things have been intended to be referred to by whatever language: 1\textsuperscript{st} and at the lowest level, the promisee may have merely accepted or acquiesced in the offer of the promise, believing that it would be kept; 2\textsuperscript{nd}, he may have accepted or acquiesced in the promise and in addition and in consequences, changed his position that is to say acted in a way in which he would not have acted but for the promise (change of position); 3\textsuperscript{rd}, he may have so changed his position that he be in a position of

\textsuperscript{122} Ibid at 542
substantial disadvantage if the promisor was allowed to resile from his promise.

Lord Denning M.R. espoused a view favorable to an expansive operation of the doctrine in that his lordship would not have required as an essential element i.e., a change of position. On the other hand, it is not entirely clear that he would have been satisfied with mere acceptance of or acquiescence in the promise. His Lordship would have required ‘reliance’ by or ‘influence’ of, the promisee, but precisely what this was intended to denote over and above acceptance or acquiesce is no clear.123

In Australian Legal System, in Gollin & Co. Ltd. v. Consolidated Fertilizer Sales Pty. Ltd.124, the Court held that it was an essential element of promissory estoppel that the promisee should have changed his position. In Jet Maintendrai Pty Ltd. v. Quaglia125, the Supreme Court of South Australia expressed the view that ‘detriment to the promisee’ was an essential element of the doctrine and the nature of such detriment should be material disadvantage caused to the promisee by the promisor’s resiling from the position which he had taken up.

In Legion v. Hateley126, the court held that it to be an essential element that the promisee must have adopted the promise ‘as the basis of action or inaction’ and thereby placed himself ‘in a position of material disadvantage’ if the promisor were allowed to withdraw, without notice, the promised indulgence.

6.4.3 Pre – existing Contractual Relationship and Promissory Estoppel –

Is the application of the doctrine of promissory estoppel confined to parties who are in a pre – existing contractual relationship?

Dean, J. (with whom Blackburn, J. agreed) in Reed v. Sheehan127 said: “Overall, however, my tentative inclination is to accept at least the limited doctrine of promissory estoppel recognized by the Privy Council in128 (that is between parties in a pre – existing contractual relationship) as constituting part of law of Australia.

125 (1980) 265 A.S.R. 101
126 Per Dixon, J. in Thompson v. Palmer (1933)49 CLR 507 at 547
127 (1982)56 F.L.R. 206 at 231
128 Ajayi v. R.T. Briscoe Nigeria Ltd. (1964)1 W.L.R. 1326 at 1330
In *Legion v. Hately*\(^{129}\), Gibbs, C.J. and Murphey, J. did not consider this aspect of promissory estoppel. However, Mason and Deane, JJ concluded that the doctrine should be accepted as forming part of Australian Law at least as between parties in a pre – existing contractual relationship. But in very recent case\(^{130}\), the court removes any doubts as to whether a pre – existing contractual relationship or a pre – existing legal relationship of some kind is necessary for promissory estoppel to apply.

The court in this case applied the promissory estoppel even when there was no prior contractual or legal relationship the parties were merely in the negotiation stage. This view is in stark contrast to the view recently upheld in *Kurt Keller Pty Ltd. v. B.M.W. Australia Ltd.*\(^{131}\), in which Powell, J. held that the better view of Australian authorities…. To be that the doctrine may operate to preclude the enforcement of rights only in a situation where there has been a pre – existing contractual relationship between the parties concerned\(^{132}\). The High Court’s view also extends upon the position of recent English Court which have held that promissory estoppel is not limited to cases in which there is a pre – existing contract, but can arise out of any pre – existing legal relationship\(^{133}\).

6.4.4 The Promissory Estoppel whether a Shield/ Sword in the Australian Judicial System-

Is the position that the doctrine of promissory estoppel can be used as a ‘shield’ only and not as ‘sword’?

In *Reed v. Sheehan*\(^{134}\), Dean, J. (Blackburn, J. concurring) raised without answering the question whether or not promissory estoppel should be ‘regarded as being no more than a rule of evidence r as being incapable of founding a cause of action’? it appears that in his Honor’s opinions the question is an open one and its

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\(^{129}\) (1983)57 A.L.J.R. 292

\(^{130}\) Walton Stores (Interstate) Ltd. v. Mahr (1988)76 C.L.R. 513

\(^{131}\) (1984)1 NSWVR 353 at 369; see also *State Rail Authority of New South Wales v. Health Outdoor Pty Ltd.*(1986)7 NSWLR 170, where a majority of the New South Wales Court of Appeal held that doctrine of promissory estoppel is confined to existing contractual relationship only.

\(^{132}\) Ibid at 371

\(^{133}\) See, e.g. *Robertson v. Minister of Pension* (1949)1 KB 277 DW Greig and JLR Davis, The Law of Contract 1987 at 143-149

\(^{134}\) (1982)56 F.L.R. 206
answer should not necessarily be determined by answers obtained in the context of traditional estoppel in *patis*. For Powell, J. in *Dewhirst v. Edwards*135 held that it was clear that the doctrine cannot be relied upon to create a new cause of action where none existed before. In all these cases136 the application of promissory estoppel limited to situations in which it was used as a shield to prevent the inequitable assertion of legal rights. In other words, it must not be used as a sword to create rights by allowing the plaintiff to base its whole cause of action on promissory estoppel137. In *Walton Stores*138 case the sword/ shield distinction is analyzed by Brennan, J. “But there is a logical difficulty in limiting the principle so that it applies only to promises to suspend or extinguish existing rights. If a promise by A not to enforce an existing right against B is to confer an equitable right on B to compel fulfillment of the promise, why should B be denied the same protection in similar circumstances if the promise is intended to create in B a new legal right against A? There is no logical distinction to be drawn between a change in legal relationships affected by a promise which extinguishes a right and a change in legal relationships affected by a promise which creates one why should equity of the kind to which *Combe v. Combe* refers be regarded as ‘a shield but not sword’. The use of promissory estoppel as a sword, as opposed to its limited use to prevent the unconscionable insistence upon strict legal rights marks a significant expansion in the kinds of promises and expectations traditionally considered as enforceable in contract law. *Walton Store’s* decision marks a shift away from 19th century consideration principles focusing on the benefit of the promisor, and a move towards an expanded use of estoppel which emphasizes the reliance by plaintiffs on the implied promises of defendants to provide reasonably reliable advice.

135 (1983)1 N.S.W.L.R. 34
137 *Combe v. Combe* (1951)2 KB 215; *NSW Rutile Mining Co. Pty Ltd. v. Eagle Metal & Industrial Products Pty Ltd.* (1960) S.R. (NSW) 495 at 503 per Sugerman, J. if there is no pre – existing legal relationship then it is likely that the plaintiff will have to base its case solely on promissory estoppel as a cause of action, thereby using it as a sword to create, rights rather than a shield to prevent the unconscionably strict insistence f rights.
138 (1988)76 CLR 513 at 539-40

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6.5 Conceptual origin of the Doctrine of Legitimate Expectation in various Legal systems –

The scope of the duty to observe the requirements of procedural fairness is now extremely wide. It is well-settled that the duty extends to virtually every exercise of a statutory power which might have an adverse effect on an individual unless there is a very clear legislative indication to the contrary. The doctrine of legitimate expectation contributed to the expansion of the duty to observe the requirements of natural justice by extending the duty beyond the relatively narrow range of rights and interests to which natural justice had traditionally applied. The legitimate expectation doctrine was invoked in a range of cases, the common theme of which was the principle that when administrative officials had created or induced a belief in a person about the possible exercise of their powers, any change affecting this belief should be conditioned by the rules of natural justice.

6.6 Development in Singapore Legal system –

The doctrine of legitimate expectation in Singapore protects both procedural and substantive rights. In administrative law, a legitimate expectation generally arises when there has been a representation of a certain outcome by public authorities to an individual. To derogate from the representation may amount to an abuse of power or unfairness. The doctrine of legitimate expectation as a ground to quash decisions of public authorities has been firmly established by the English Courts. Thus, where a public authority has made a representation to an individual who would be affected by a decision by the authority, the individual has a legitimate expectation to have his or her views heard before the decision is taken. In addition, an individual may also have a legitimate expectation to a substantive right. The recognition of substantive legitimate expectation is somewhat controversial as it requires a balancing of the requirements of fairness against the reasons for any change in the authority’s policy. This suggests the adoption of a free-standing proportionality approach, which has been said not to apply in administrative law.

The doctrine of legitimate expectation – in both its procedural and substantive dimensions – has been recognized by Singapore Courts. Nonetheless, the scope of the doctrine in Singapore is not clear due to the dearth of cases and lack of definite
pronouncements by the Courts in judgments that have been rendered. Whether the courts will adopt the UK approach with regard to measuring legitimate expectation with the ruler of proportionality remains an open question.

6.6.1 Legitimate expectation of a procedural right –

Singaporean courts have accepted the existence of both procedural and substantive legitimate expectation. In Re Siah Moori Guat139, the applicant was a Malaysian national who declared a prohibited immigrant under section 8(3) (k) of the Immigration Act140 and had her re-entry permit to Singapore and employment pass cancelled. As the applicant’s appeal to the Minister for Home Affairs was rejected, the applicant took out an application to the High Court to quash the decision of the Minister. One ground of the application was that the applicant had a legitimate expectation to two procedural rights: the opportunity to make representations to the Minister before he considered her case under the Immigration Act, and the duty of the Minister to give reasons for his decision141.

In his judgment, Jt. T.S. Sinnathuray considered Schmidt v. Secretary of State for Home Affairs142, decided by the Chancery Division of the High Court of England and Wales. He found that the procedural principles that govern the administration of Singapore’s immigration laws were similar to those in the UK. In Schmidt it was decided that an alien has no right to enter the country except by leave and the Home Secretary can refuse leave without giving leave to enter the country for a limited period he has no right to stay, and no legitimate expectation of being allowed to stay, for a day longer than permitted period; and that an alien’s application for an extension of his stay can be refused without reasons and without a hearing as the rules of natural justice do not apply143. Furthermore, in Schmidt Lord Denning had espoused the obiter view that where an alien’s permit to stay “is revoked before the time limit expires, he ought…. to be given the opportunity of making representations: for he would have a legitimate expectation of being allowed to stay

139 (1988) 2S.L.R. (R) 165, H.C.
140 Immigration Act (Cap 133, 1985 Rev. Ed.)
141 Supra note 139 at p. 172
142 [1968]EWCA Civ1, (1969)2 Ch. 149
143 Cited in Siah Moori Guat, p. 178
for a permitted time"\(^{144}\). This argument was advanced by \textit{Siah's} counsel to persuade the court that “an alien who is in possession of an entry permit which has not yet expired is in the country lawfully until the date of expiry and, therefore, he has an interest during the unexpired portion that carries with it a public law right to a fair procedure if and when the minister desires to terminate that leave to stay prematurely”. The High Court judge considered this proposition and conceded that it was an “attractive” one. However, he ultimately dismissed the argument by saying that it had “not been supported by any English authority\(^{145}\), and that the position in Singapore is “quite different”. He stated that Parliament had already provided in the Immigration Act for appeals and the right to be heard has been given statutory recognition and protection in the Act\(^{146}\), and the applicant had already availed herself of the right to appeal. The Minister was not required to give reasons for his rejection of the appeal under the Common Law or the Immigration Act\(^{147}\).

\textbf{6.6.2 Legitimate Expectation of a substantive benefit –}

The existence of the doctrine of substantive legitimate expectation in Singapore public law was accepted by the Court of Appeal in the case of \textit{Abdul Nasir Bin Amer Hamash v. Public Prosecutor}\(^{148}\). In his judgment written on behalf of the court, Chief Justice Yong Pung How stated that the idea behind the doctrine is that certain “expectations could, in suitable circumstances, be deserving of protection, even though they did not acquire the force of a legal right”. However, the decided cases do not indicate whether the doctrine of substantive legitimate expectation will be developed in the way it has been developed in the U.K.

In \textit{Siah Mooi Guat}, another argument the applicant raised was that she had a legitimate expectation to continue to reside in Singapore until the expiry of her re-entry permit\(^{149}\). Sinnathuray, J. distinguished \textit{Attorney – General of Hong Kong v. Ng Yuen Shiu}\(^{150}\), a Privy Council case on appeal from Hong Kong, from the case at

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\(^{144}\) Supra note 142 at p. 171

\(^{142}\) \textit{Siah Mooi Guat, Ip. 178}

\(^{146}\) Immigration Act, S. 8(6)

\(^{147}\) Supra note 145

\(^{148}\) (1997)2 S.L.R. (R) [Singapore Law Reports (Reissue) 842 at 858, Court of Appeal]

\(^{149}\) \textit{Siah Mooi Guat} p.172

\(^{150}\) (1983) UKPC 2, (1983)2 A.C. 629, P.C. (on appeal from Hong Kong)
hand. In the Privy Council case there had been an express promise made to Ng by the Government of Hong Kong which had created a substantive legitimate expectation. In the present case, no promise had been made to be applicant that her stay in Singapore was to be conditioned by any considerations other than those provided in the Immigration Act and related regulation. No substantive legitimate expectation arose in the applicant’s favor; following the dictum of Lord Fraser of Tullybelton in the GCHQ case that that legitimate expectation arises “either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue”\textsuperscript{151}. Thus, the judge did not discuss the detailed legal rules to be applied to determine when an aggrieved person may be said to have a legitimate expectation to a substantive right.

In \textit{Borissik Svetlana v. Urban Redevelopment Authority}\textsuperscript{152}, the applicant her husband owned a semi – detached house which they wished to redevelop. In 2002, the Urban Redevelopment Authority (URA) had issued a circular imposing certain restrictions on the redevelopment of semi – detached houses. The URA rejected the applicant’s redevelopment application on the basis of the circular. Counsel for the applicant argued before the High Court that the applicant had a legitimate expectation that the proposal to redevelop the house would be approved. The court held that the URA had not acted in a way that could have led the applicant to have such legitimate expectation\textsuperscript{153}. The only legitimate expectation that could have arisen after the 2002 circular had been issued was that the URA would act in accordance with those guidelines unless the circumstances were such that an expectation has to be made\textsuperscript{154}. The applicant in \textit{Borissik} argued that she had a legitimate expectation to a substantive right, but since the court decided that the URA had made no clear representation to her, it did not make any pronouncements on the approach that should be taken towards substantive legitimate expectations in Singapore. On the other hand some people are skeptical as to whether the doctrine of legitimate expectation should apply to substantive rights. Thio li – ann argues that

\textsuperscript{151} GCHQ case, p. 401
\textsuperscript{152} (2009)4 S.L.R. (R) 92, H.C.
\textsuperscript{153} Supra note 152, p. 105
\textsuperscript{154} Supra note 152, p. 106
legitimate expectations should relate only to procedural rather than substantive rights. Procedural protection only has a minimal impact on the administrative autonomy of the relevant public authority, since the court is only concerned with the manner in which the decision was fair. Thus, the ultimate autonomy of public authorities is never placed in jeopardy. Conversely, as Mark Elliot posits, giving effect to a substantive legitimate expectation impinges on the separation of power. The authority has been entrusted by Parliament to make decisions about the allocation of resources in public interest. Applying legitimate expectation substantively allows the courts to inquire into the merits of the decision. Such interference with the public authority’s discretion would be overstepping their role and exceeding proper constitutional function.

On the other hand, in Coughlan the Court of Appeal cited the following passage from R. v. Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd.:

“If a public authority so conducts itself as to create legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it… the doctrine of legitimate expectation is rooted in fairness.”

The Court of Appeal emphasized that the approach taken in that case made no formal distinction between procedural and substantive unfairness. Substantive Legitimate Expectation does not intrude upon the executive’s policy-making powers, as it is for public authorities, acting within their statutory powers, to adopt or change policies. The reasons for doing so are not usually open to judicial review.

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159 MFK Underwriting Agents at p. 1569-70, cited in Coughlan, p.247
160 Coughlan, p. 247
On the other hand, it is the job of the courts to determine whether an authority’s application of a policy to an individual who has been led to expect something different is a just exercise of power.\footnote{161}

6.7 Development in English Legal system through case – study -

The doctrine of legitimate expectation has developed in Britain over the last forty years. We will discuss the doctrine of legitimate expectation in England with the help of cases. The description of the leading cases will show that the following situations generate legitimate expectations and lead to the implication of a duty of procedural fairness when a decision is at the discretion of an administrative body. First, where the nature of the interest is such that the person has a right to expect that the privilege will continue (as in, e.g., the case of a license) a hearing of some sort is required before the benefit can be withdrawn. Second, if the decision maker has made a representation that a procedure in accordance with natural justice will be followed, this will be respected. In addition, if there is a regular practice of according a hearing or other procedure, this procedure will be accorded in the future. Finally, if a representation is made that a certain decision will be made or certain criteria will be applied, the agency will be bound to accord natural justice to a person before applying different criteria or making a different decision. Nevertheless, the British cases have been careful to avoid specific definitions of what constitutes a legitimate expectation, so there has never been a clear, coherent judicial definition of the legal doctrine.

6.7.1 Schmidt case –

The first appearance of legitimate expectation was in the judgment of Lord Denning M.R. in Schmidt v. Secretary of State for Home Affairs\footnote{162}. The Home Officer, which administered the Aliens Order, 1953\footnote{163}, had a policy of according aliens studying at a ‘recognized educational establishment’\footnote{164} a permit to live in Britain. The plaintiff had been admitted to study at the Hubbard College of Scientology and was given permits to stay in the country for a certain period of time.

\footnote{161} Coughlan, p. 251
\footnote{162} (1969)2 Ch. 149 (C.A.)
\footnote{163} S.I. 1953/1671, arts 1(1), 5(1),(3)
\footnote{164} Supra note 162 at p. 153
The home secretary, because of concerns about Scientology announced that the college would no longer be considered a “recognized educational establishment” when the plaintiffs applied for renewal of their permits, they were refused. They alleged that this constituted a denial of natural justice, since they were not given a hearing before this decision was made.

Lord Denning emphasized that, since the plaintiffs were alien, they were only entitled to remain in the country “by license of the Crown”\textsuperscript{165}. He held that the duty to allow representations to be made “depends on whether (the plaintiff) has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say”\textsuperscript{166}. In this case there was no legitimate expectation of being allowed to remain in the country for the time specified which would have entitled them to a hearing. With these obiter comments, the doctrine was introduced into British Administrative Law. Although the concept was not clearly defined, it was held that a legitimate expectation triggered the right to a hearing and to the protections of natural justice where a discretionary decision was being made Lord Denning outlined at least one situation where an expectation was legitimate – where a permit or license was given for a certain period and was withdrawn before its expiry.

6.7.2 \textit{Liverpool Taxi case—}

The doctrine was further developed in \textit{R. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators’ Association}\textsuperscript{167}. Although this decision was also written by Lord Denning, the words “Legitimate Expectation themselves never appear in the judgment. It has nevertheless become accepted as a leading case on the doctrine. The number of taxi licenses in \textit{Liverpool} had been limited by the county council to 300 for some time. When the taxicab owners’ association heard that the Council was considering increasing the number of taxi licenses, it expressed concern and received letters from the town clerk assuring it that there would be opportunities for the taxicab owners to make representations and that “interested parties would be

\textsuperscript{165} Ibid at 170
\textsuperscript{166} Ibid
\textsuperscript{167} (1972)2 Q.B. 299 (C.A.)
fully consulted”. The taxicab owners were represented by counsel before a meeting of a city council subcommittee, which did recommend an increase in the number of licenses. After the city council meeting which approved these minutes, the subcommittee Chair announced that the number of licenses would not be increased until national legislation, then pending, to restrict ‘private hire cabs’ was in force. This undertaking was confirmed in a letter to the association. Nevertheless, several months later, without informing the association, the committee and the city council decided to begin increasing the number of licenses almost immediately. Although the owners asked for a hearing when they indirectly heard about the pending resolution, this was denied to them.

The associations’ demand that the council not act on the resolution without first giving it a hearing was granted. Lord Denning held that because of their ‘interest’ in the number of taxi licenses in existence it was the duty of the council to give them a hearing before any change in the number of licenses was authorized. In addition, an undertaking was given following that hearing that the number of cabs would not be increased until Parliament’s legislation was in effect. Lord Denning held that this promise gave the plaintiff a right to another hearing if a decision was to be made contrary to it. He wrote:

“So long as the performance of the undertaking is compatible with their public duty, they must honor it. And I should have thought that this undertaking was so compatible. At any rate they ought not to depart from it except after the most serious consideration and hearing what the other party has to say: and then only if they are satisfied that the overriding public interest requires it”.

This passage establishes that if an undertaking has been given by a public body, it cannot be changed without at least giving the affected person a chance to be heard. It is important to note that the undertaking to which Lord Denning was referring was that the number of licenses would not be increased until Parliament had passed its legislation. This was not a representation that a procedure would be followed, but a promise that a policy being put into place would be respected. Lord Denning held that this substantive promise could not be broken without giving the owners special procedural rights.
Liverpool Taxi appeared to establish a broad basis for the concept of legitimate expectation. The power to increase the number of taxi licenses was a decision based on public policy considerations, made by elected officials. Although those who had taxicab licenses before the decision were particularly affected by it (it would affect the amount of their business, the value of their licenses, etc.), it could be said that the decision also had the potential to have large effects on all the citizens of Liverpool. It would affect the availability of taxis in Liverpool, perhaps the prices of the cabs, traffic congestion and so on. The fact that this led to judicial review on fairness grounds of this sort of polycentric decision, one that would likely be classified as legislative in modern Canadian Law, was not a concern for Lord Denning. Further, he was not concerned about the fact that at least three hundred people would potentially be able to take advantage of the right to a hearing.

In addition, there is even a suggestion that the undertaking gave the taxicab owners more than just procedural rights. The statement that the ‘overriding public interest’ must require the change suggests that the discretion of the council to decide how many taxi licenses there should be in Liverpool had been limited by the undertaking, and that because of it, the council was required to justify any change in policy with a different standard (the policy had to be in the ‘overriding’ public interest). The impact of the application of the concepts set out in Liverpool Taxi had the potential to be very expansive indeed.

It is worthwhile noting that this decision came in the context of a challenge to a local council decision, since the 1970’s saw British Courts taking an activist role towards reviewing the substance of local council’s discretionary decisions. It is interesting to contrast the decision in Liverpool Taxi with the decision several months later in Bates v. Lord Hailsham of St. Marylebone where the plaintiff sought to challenge a decision made by a committee (made up mostly to judges) delegated by legislation with the power to set solicitor’s fees. Megarry, J. held that the decision was not subject to the duty of fairness, because it was ‘legislative’ and was completely different from a city council’s licensing power. The British Courts

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169 (1972)3 All E.R. 1019 (Ch. D.)
appear to have been much more willing to apply a duty of fairness and force consultation when there were decisions with which they disagreed, and upon bodies for whom they had less respect. However, Liverpool Taxi, the activist decision has become one of the leading British Legitimate expectation cases, while Bates has been relatively ignored there (although it still stands for the fact that legislative decisions are not generally reviewable).

6.7.3 McInnes case –

In McInnes v. Onslow Fane170 another British Lower Court decision, a somewhat different spin was put on the concept than in Lord Denning’s decision. The plaintiff had applied to the British Boxing Board of control for a boxing manager’s license but had been refused without reasons or an oral hearing. Megarry V.C. distinguished three types of cases involving licenses or other cases where ‘rights’ were not involved. If there were forfeiture or revocation of a license or membership, the plaintiff was generally entitled, it was held, to the full range of procedures of natural justice. At the other extreme, if what was at issue were merely an application for a benefit, there was no right to be heard (although the decision – maker could not act capriciously or with bias). Megarry V.C. suggested that legitimate expectations constituted an ‘intermediate category’171. These arose, he suggested, where someone’s license or membership was up for renewal, or where it had been granted informally but was waiting for confirmation. Thus, following this decision, either the nature of the interest presently held (McInnes), or a representation or statement (Schmidt, Liverpool Taxi) could give rise to an expectation. It is important to note that these “nature of the interest” situations would certainly be classified in India as interests or privileges, though the British concept is more limited.

6.7.4 Ng case-

The Privy Council addressed the issue of legitimate expectations in Attorney – General of Hong Kong v. Ng Yuen Shiu172. This was the first of what was to

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170 (1978)3 All E.R. 211 (Ch.D.)
171 Ibid at 218
172 (1983)2 A.C. 629
become a common type of legitimate expectation case, where the expectation was of a hearing itself. The Government of Hong – Kong had instituted what was known as a ‘reached base’ policy for illegal immigrants. If an immigrant from China reached the urban areas of Hong – Kong without being arrested the person was not deported. However, because of an influx of illegal immigrants, the policy was changed and it was announced that illegal immigrants from China would begin to be deported. In response to a petition from a group of illegal immigrants from Macau, an immigration official read a statement outside government house which stated that illegal immigrants from that country would “be treated in accordance with procedures for illegal immigrants from anywhere other than China. They will be interviewed in due course. No guarantee can be given that you may not subsequently be removed. Each case will be treated on its merits”. The plaintiff, an illegal immigrant who had entered from Macau, heard a report about this statement on television, after he had reported to an immigration office to register. However, at his interview the next day, he was only allowed to answer questions that were put to him, and was not allowed to express what he felt were the humanitarian reasons he should stay.

Lord Fraser of Tullybelton held that the statement that each case would be treated on its merits gave rise to a legitimate expectation on the part of the plaintiff, who therefore had a right to bring forward the reasons he should be allowed to stay. The Government’s promise of treatment on the ‘merits’ constituted a promise of a fair procedure, one that would give Ng the opportunity to ask the immigration official to use his or her discretion and allow him to remain in Hong – Kong.

A ‘Legitimate Expectation’, Lord Fraser held was of a benefit that went ‘beyond legally enforceable rights’. This emphasizes the place of the doctrine in determining whether a duty of fairness is owed. Though he did not give a complete definition of the concept, he held that a representation by the responsible authority was one way of generating such an expectation. Finally, he held that if the representation ‘conflicted with its duty’ the body would not be held to it. If the representation made was ultra vires the body would not be required to grant a hearing when departing from it.
Ng was also the first leading case in which the terminology used was of fairness, rather than natural justice. Ng was not granted a formal hearing in a case where he would have had no rights otherwise, but was held to be entitled to put certain, but was held to be entitled to put certain information before the person interviewing him about his status. The Court’s interpretation of the meaning of the meaning of the representation that Ng was given both established and defined the content of the duty of fairness owed to hi. This is particularly important, since it shows that the concept can have an application other than as a threshold device. It is also worth noting that there was no requirement that Ng had relied or taken any action on the basis of the representation that was made to him. He went to register at the immigration office before he heard the statement on the news. Representations give rise to legitimate expectation, this implies, not solely because people rely on them, but because it is an important principle that public officials should not break their promises. Anyone who has heard or knows of a representation is entitled, this suggests, to raise it as a legitimate expectation.

6.7.5 Khan case –

Ng was applied and developed in the Court of Appeal in R. v. Secretary of State for the Home Department ex parte Khan. In this case, the Home Office had circulated a pamphlet outlining the criteria which it would use when exercising its discretion to allow a child to come into Britain for adoption. The circular also set out a procedure for gaining approval. The plaintiff wished to adopt his relatives’ child, who lived in Pakistan. He followed the steps set out in the circular were not applied, since those which the Home Office normally used were quite different. Parker, L.J. held that the circular created a legitimate expectation on the part of Khan that the criteria contained in it would be the ones applied. He was entitled to a hearing at which he could argue why the stated criteria should be applied to him. There is also a suggestion that the ministry could apply different criteria unless there was an overriding public interest that justified changing them. Like Liverpool Taxi, Khan shows that a representation by the decision – making body that decisions will be made based on a certain policy can give rise to special procedural protections. The

173 (1985)1 All ER 40
expectation here was not of a procedure, but of the application of a certain set of criteria, a “substantive” expectation.

6.7.6 **GCHQ case** –

Perhaps the most extensive application of the doctrine came in what is now generally considered the leading case on legitimate expectations, in the House of Lords in *Council of Civil Service Union v. Minister for Civil Services*[^174]. The case, involved employees of Government Communications Headquarters’ (GCHQ) who were responsible for communications and intelligence functions for the government. These functions were believed by the Government to be vital to national security. The several thousand people employed in this branch of the Government were represented by various national trade unions. As part of the national unions’ action against the Thatcher govt., several one – day strikes, work – to – rule campaigns, and overtime bans were carried out by the unions working at GCHQ. As a result of concerns about these job actions and their effect on national security, Thatcher, who was also the minister for the civil services, announced that the workers at GCHQ would no longer be entitled to the national unions, and could only belong to an approved staff association. This was done without any consultation with the unions, despite the fact that in the past, changes in the civil servants conditions of employment had been the subject of consultation. The union argued that they were entitled to a hearing before the decision was made.

The Union’s demand that the decision be quashed was rejected, but on the ground that the govt. had demonstrated that national security was at issue. Consultation on withdrawing the union’ right to strike would, it was held, risk provoking more strikes that would affect the sensitive operations that took place at GCHQ. Nevertheless, the law Lords stated that was not for this, the union would have been entitled to a hearing under the legitimate expectations doctrine. The legitimate expectation arose from the practice of consultation that had existed since the establishment of GCHQ whenever changes to ‘conditions of service’ were made.

Lord Diplock, in a well – known passage, held that legitimate expectations

[^174]: (1985)A.C. 374 (H.L.)
arise when a government body deprives a person of some benefit or advantage which either (i) he had in the past been permitted by the decision – maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision – maker will not be withdrawn without giving him the opportunity of advancing reasons for contending that they should not be withdrawn.

Although again a clear definition was not given. Lord Diplock emphasized that a legitimate expectation was not simply one which a reasonable person would entertain, but required something more to be ‘legitimate’. This analysis, though suggested that the only types of promises that could trigger the doctrine were those of hearing (as in Ng and GCHQ), and minimized the possibility of promises of substantive benefits giving rise to procedural rights (as e.g. in Khan). Lord Fraser’s view in the same case, however, was broader and did seem to encompass the Khan situation. GCHQ is probably most significant for its recognition that a regular practice of consultation could give rise to a legitimate expectation. Further, GCHQ shows how procedural fairness can be used to enforce a duty on the part of government bodies to consult with certain groups before policy decisions are made. Although at issue was a broad decision made for reasons of public interest and policy, the unions and their members were particularly affected by the decision. For that reason, the govt. had consulted with them on previous occasions. However, it seems improper that their right to consultation should depend on the existence of the government’s past practice. The effect on the unions was similar to that of narrower, more individual decisions on the person concerned, since they and their members had a particular interest in the decision: it affected their very existence as representatives of these workers. Unlike broad policy decisions that affect the population at large in similar ways, where the public has the numerical power to express its displeasure through the ballot box or other political means, this decision affected a tiny group when compared to the general population. It seems that this consideration is much more important than the existence of the past practice.
6.7.7 Substantive Legitimate Expectations –

Since GCHQ, there have been tentative moves in British towards the possibility of giving substantive protection to legitimate expectations. Under this concept, not only will a representation such as that in Khan or Liverpool Taxi give rise to a duty of fairness or natural justice, it will also prevent the public body from going back on its representation. Authority for this possibility comes indirectly from the statements in those two cases that the representation could not be reneged upon unless there was a hearing and it was also in the overriding public interest. While an extensive discussion of the merits of substantive legitimate expectations is beyond the scope of this note, it is important to note that according substantive protection to expectation is a much discussed issue in Britain, often through the concept of public law estoppel. Although giving substantive effect to legitimate expectations seems a natural evolution from giving procedural effect to this kind of promise, this raises very different issues about the use and fettering of discretion, and the extent to which public authorities should be bound by their declaration of policy.

6.8 Development in Canadian Legal system –

Although legitimate expectation is generally considered to have begun its development in Canada in the late 1980’s and early 1990’s the phrase itself appeared in some earlier decisions. Several cases considered the application of the doctrine in the sense in which it was originally developed in the British cases, as a device for determining whether a duty of fairness was owed. In Re Webb and Ontario Housing Corporation175, Mackinnon A.C.J.O. addressed the issue of whether a tenant facing eviction from public housing was entitled to be treated by the housing corporation in accordance with the duty of fairness. In framing the issues, he stated that the plaintiff had argued that: “even if the Board of Directors was performing an administrative function, on the facts of this case there was a ‘duty to act fairly’, and the appellant had a ‘legitimate expectation’ she should be treated fairly and this expectation was not met”.

In dealing with this argument, however, the decision did not refer to the

175 (1978)22 O.R. (2d) 257 (C.A.)
English Legitimate Expectation cases, nor was the phrase itself used again. Although Mackinnon A.C.J.O. held that there was a duty of fairness, he did so by looking at the nature of the plaintiff’s interest under the then newly developing general duty of fairness. By implication, Webb rejected the notion that a legitimate expectation was necessary to establish a duty of fairness.

The same issue, and the same result, arose in Hutfield v. Board of Fort Saskatchewan Hospital Distt. No. 98176. Hutfield had requested, but was denied hospital privileges by the defendant hospital board without being given an oral hearing or reasons for the decision. The board argued that Hutfield was not owed a duty of fairness; since he had no ‘right’ to the benefit he was seeking. He had to demonstrate a legitimate expectation, which he could not do. McDonald J. rejected these submissions, holding that the duty of fairness is a general one that applies to privileges and interests whatever or not there is a legitimate expectation to receiving them. He pointed out that the board’s submissions showed:

“The artificiality of the distinction drawn in the recent English cases cited, that have pushed the frontiers of judicial review and procedural fairness outward but have limited them on grounds (legitimate expectation and slur) that do not reflect a principle that can withstand scrutiny in the light of the object of judicial review by certiorari”.

McDonald J.’s judgment emphasized that the doctrine of legitimate expectation is unnecessary at the stage of establishing whether a duty of fairness is owed, and showed that it would restrict the concept of judicial review if it were used in the way the British cases had applied it177. This decision was affirmed on different grounds in the Court of Appeal178, although McDonald J.’s comments on the doctrine were not discussed. However, they explain why the doctrine is, in most situations, unnecessary in Canada and may limit the extent of the duty of fairness. It is unfortunate that McDonald J.’s warnings were not heeded in subsequent cases. As the above quotation suggests, the ways in which the doctrine of legitimate

176 (1986) 74 A.R. 180 (QB)
177 D.P. Jones, “A comment on ‘Legitimate Expectations’ and the duty to give reasons in Administrative Law” (1987)255 Alta. L. Rev. 512
178 (1988) 89 A.R. 274
expectations limits judicial review, even though it expands it in other ways, are not consistent with the principles behind the duty of fairness, particularly in Canadian laws.

In another early case, Quebec (Sous – Ministre du Revenue) v. Transport Lessard (1976) Limitid\(^{179}\), the Quebec Court of Appeal used the concept to imply substantive rights into the duty of fairness, in order to hold the minister to a ‘promise’. The plaintiff company had received an assurance, based on an internal directive issued by the ministry that sales tax would not be charged on the trucks owned by another company whose assets it was about to purchase. The ministry later changed its interpretation of the legislation, and sales tax was charged. Relying on Khan, the court held that the duty to act fairly could lead to substantive results as well as procedural protections. This use of the concept to hold the ministry to its promise about how its discretion would be exercised was a very different use of the doctrine than in the two previous cases. Giving substantive effects to the legitimate expectations of the plaintiff constituted a major expansion of the duty of fairness outside the procedural realm. Fairness, the Court of Appeal held, could require the ministry of revenue to exercise its discretion in a certain way. A Canadian concept of legitimate expectations built on this principle would have dramatically expanded the duty of fairness. It seems unclear, though, why the concept of fairness, which is focused on giving procedural right and the right to be heard, should be used to do something very different, preventing the government from changing its mind about the interpretation of a tax statute. The danger of using the same doctrine to do too many different things is that it may not be properly adapted or specific enough to accomplish any of them successfully.

In Gaw v. Canada (Commr. of Corrections)\(^{180}\) the Canadian Courts have cited the British cases, when the commissioner was held to a representation that set out the procedure that would be followed during an investigation of the conduct of Gaw, the district lawyer, Gaw was assured that although he would not be heard at the preliminary inquiry, if the process proceeded he would be given a formal hearing.

\(^{179}\) (1985) R.D.J. 502  
during the second stage of the investigation. This second stage, however, was abandoned by the Deputy Commissioner without the formal hearing having occurred, although he agreed to meet with Gaw before a final decision was made. Gaw argued that he was entitled to a formal hearing. Dubi, J. concluded that “a public authority is bound by its undertakings as to the procedure it will follow, provided this procedure does not conflict with its duty”. Although he took the general principle from the leading British cases, it is important to note that he did not find it necessary to determine whether the representations came under the formal rubric of a ‘legitimate expectation’. The content of the duty of fairness that was otherwise owed to Gaw was determined by holding the Commissioner to his representations. Dubi, J.’s judgment shows that the principle of holding a body to its statements about procedure can be easily accommodated within Canadian Administrative Law, without the need to determine if the complicated conditions for legitimate expectations are fulfilled. If we compare, while Hutfied shows that legitimate expectations is largely unnecessary, and could possibly have regressive effects, Gaw shows that a wholesale importation of the doctrine is not necessary to ensure that a body is held to its representations about the procedure it will follow. Subsequent cases have, unfortunately, failed to recognize this.

In Penikett v. R.\(^{181}\), an unsuccessful attempt was made to use legitimate expectations to enforce past practices of consultation by the federal government. The Yukon Government Leader, Tony Penikett, sought to challenge the Meech Lake Accord\(^{182}\) agreed to by the Prime Minister and the provincial premiers on the basis that the Yukon govt. had not been consulted during the negotiations. Relying on GCHQ, Penikett argued that the past practice of including the territorial governments in constitutional negotiations led to a legitimate expectation, and therefore, fairness required that the Yukon be included in the negotiations. The Court of Appeal held that the issues were not justiciable, since the making of constitutional accords was part of the process of legislation leading to the amendment


of the Constitution, and was therefore not subject to the duty of fairness. It did not address whether, in this case, a legitimate expectation had arisen, although in obiter, it suggested that executive powers were ordinarily reviewable by the Courts on the basis of fairness. The Court in Penikett did not exclude the application of legitimate expectations in all cases where decisions of a legislative nature were being made, only where they arose in the process of making legislation.

The most important and most often cited early Canadian case is Bendahmane v. Canada (Minister of Employment and Immigration). Bendahmane had come to Canada on a visitor’s visa, but was denied entry to Canada by an immigration officer who believed he was not a “genuine visitor”. An inquiry confirmed this finding, which Bendahmane appealed. As he was waiting for the appeal to be heard, a program was announced to clear the backlog of refugee claimants, under which special criteria would be used to consider their applications. Bendahmane obtained a form letter stating that those waiting for an inquiry could apply for refugee status before a certain date and be considered under this program. Although these criteria did not apply to the plaintiff (since an inquiry had already been held in his case), he applied for refugee status. He was then sent a letter stating that he did not qualify for the backlog reduction program, but that his ‘claim for refugee status will continue to be considered in the usual way”. The minister later refused to consider his application however, since under the statute refugee claims was held. The last sentence of the letter did not in fact apply to his case, and the information in it was wrong. However, Bendahmane argued that this representation created a legitimate expectation that his application would be handled as other applications were, and that he was therefore, entitled to the full hearing that other claimants (who had made the request at the proper time) received.

The Federal Court of Appeal, in large part, accepted this argument. Hugessen, J. A., writing for the majority, held that the minister had not fulfilled the duty to act fairly. He pointed out that although the statute set out the procedure for the hearing of refugee claims (including the fact that they had to be filed before inquiry was held), the minister retained discretion to hear them at other times. However, he held

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183 (1989) F.C. 16 (C.A.)
that the more general question of whether the duty of fairness applied to someone who claimed refugee status outside the normal time limit did not arise in this case. He held, after citing Ng that the minister was obliged to consider Bendahmane’s application, since the representations in the letter gave rise to an expectation that his application would be considered. Since the representation did not conflict with the minister’s statutory duty, it had to be honored, and an order was made that the minister considers the case “in accordance with the rules of fairness and the principles of fundamental justice”.

Marceau J.A. dissented. He held that this was not a proper case for legitimate expectation, since the applicant, in trying to force the minister to uphold his promise, was asking the court for substantive, rather than procedural relief. He disagreed with the majority’s interpretation of the statute, and held that the minister was not ‘entirely free’ to disregard the procedure set out in it. He also held that Bendahmane should have realized that the latter did not apply to someone in his position, so no legitimate expectation arose.

This case shows several important issues that recur in the Canadian application of legitimate expectations. The majority, in my view, used the concept to avoid deciding whether a duty of fairness was owed in ordinary circumstances to someone who made an application for refugee status outside the statutory procedure. Were legitimate expectations not applied, the court would have had to decide whether, given that the statute permitted the minister to make a decision on a refugee application outside the regular time frame, this exercise of discretion attracted the principles of fairness. It would have been difficult for the court to hold that such a decision was not a determination of a right, interest, or privilege, so fairness should have applied in any case. The doctrine enabled the court to avoid making a decision that would have required the minister to consider all applications made outside the statutory procedure. Although the concept is supposed to lead to an expansion of the duty of fairness, this decision was used to avoid a broad interpretation of the duty. A subsequent plaintiff in Bendahmane’s position who makes an application outside the time frame may well be required to show a legitimate expectation. Legitimate expectation was used to find that a duty existed, but this was unnecessary. As would
occur in many later cases, the dispute between the majority and dissent over issues such as whether the expectation was substantive or procedural, and whether the expectation was ‘legitimate’ obscured the real issues about when fairness applies to exercise of discretion, and how the existence of another procedure affects this. What the letter should have been used for, I believe, is to determine what the content of the duty should be – perhaps fairness would normally only require minimal procedures if an application was made outside the normal time frame, but the letter meant that Bendahmane was entitled to the same procedure as someone who applied within this period.

Legitimate expectation arose in yet another context in *Sunshine Coast Parents for French v. School District No. 46*184. In this case, a group of parents challenged the school board’s decision to eliminate its French immersion program, which began at grade one, and replace it with one beginning in grade four. The parents were not consulted prior to the decision, and argued that the duty of fairness had not been complied with, since the board had a policy requiring that they be consulted. Spencer, J. acknowledged that legitimate expectations formed part of Canadian Law, but implied that a legitimate expectation could only arise from a promise or practice of consultation. However, he went on to hold that the school board is making a legislative decision, and that under the principles in *Insuit Tapirisat*, fairness did not apply to legislative functions. He rejected the plaintiff’s argument that legitimate expectation constituted a general exception to the rule preventing judicial review of legislative functions. The plaintiff’s proper course of action, he held, “was to vote (the board) members out of office at the first opportunity”.

Nevertheless, he went on to consider the fact that the board had previously passed a policy which included among its provisions a responsibility to invite comment from those particularly affected by a proposal. He held that legitimate expectations would force a body exercising a legislative function to follow its own procedures while they were in effect. Although the board could have avoided this requirement by suspending the policy and then passing the motion, it was bound by

184 (1990)49 B.C.L.R. (2d) 252 (S.C.)
the policy while it was in effect. However, the plaintiffs did not know of the policy, so they could not have relied on it and therefore, in the judge’s view, had no legitimate expectation. The plaintiff’s motion was therefore dismissed.

Again, the focus on legitimate expectation and on the board’s policy obscured what should have been the important issues. The parents of children attending the French immersion classes had a special interest in the question of the grade levels at which they would be offered as legislative (which is debatable), it is the nature of the parents interest that should have given them rights to participate in the decision. While a broader conception of legitimate expectation that focused on “nature of the interest” claims might have taken this into account. Spencer, J.’s narrow conception of legitimate expectation and the exclusion of judicial review of legislative functions prevented this. The doctrine of legitimate expectation simply does not seem an appropriate way to determine whether these parents who had children in French immersion classes would probably not have the political power to “vote the board members out of office” as suggested by Spencer, J. the majority of voters in the school district, if their children were not in French immersion, would likely not be much concerned about this decision. It is this fact, rather than the existence of some form of promise, that should be at the centre of the debate. Consultation with the parents was necessary to ensure that their views were at least taken into account. Focusing on the current definition of legitimate expectation obscured the real reasons consultation was needed.

6.8.1 Decisions of the Canadian Supreme Court –

In 1990, the Supreme Court first ruled on the issue of legitimate expectation in *Old St. Boniface*, but only in a brief paragraph at the end of the judgment. The plaintiffs were opposed to the rezoning of an area of Winnipeg. Among several other arguments, the association submitted that city councilors had promised that it would be consulted as part of the process of developing a plan for the area, and that this would occur before the redevelopment to which the group was opposed. This, it argued, created a legitimate expectation, preventing the city from approving the rezoning without the consultation taking place.

Although this was the first time the Court had addressed this emerging issue,
Sopinka, J. judgment did not refer too many of the leading British Cases (he referred only to *GCHQ* and *Ng*), nor did it review any of the above Canadian cases other than Gaw. Nevertheless, Sopinka, J., in Obiter, confirmed the doctrine’s place in Canadian law and proceeded to give a basic definition of it. He held:

“The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances where there otherwise would be no such opportunity. The Court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation”.

Sopinka, J., went on to hold, however, that since the City of Winnipeg Act set out a procedure for consultation in the planning and zoning process, it was not appropriate for the Court to apply the doctrine even if the councilors’ statements had given rise to legitimate expectations on the part of the resident’s association. The residents had their chance under the procedure set out in the statute, he argued, to make representations to a committee before the reasoning decision was made (although this admittedly fell short of what they were promised). The legitimate expectations doctrine, he held, “would not justify this Court in mounting onto the elaborate statutory scheme yet another process of consultation”.

Although this judgment purported to apply the British and Canadian cases, it is in fact severely restricted doctrine. This decision imported the doctrine but without even considering its place in the different Canadian context. Especially perplexing was Sopinka, J.’s statement that legitimate expectation is an extension of the duty of fairness and that it gives the right to “make representations” where there would otherwise be no right. This implies that legitimate expectation is a threshold device that it leads to the implication of a duty of fairness. However, the judgment does not say how the duty of fairness is extended, or in what situations legitimate expectation leads to a duty of fairness where there would otherwise be none. Though the doctrine triggers the duty of fairness in Britain, and Sopinka, J.’s statement would be correct there, the broad conception of fairness in Canada makes it unnecessary to extend the duty of situations not covering rights or interests. The
only significant possibility for extension of the duty is into review of decisions that would otherwise be considered legislative. Because Sopinka, J., talked about an opportunity to make representations in circumstances “where otherwise there would be no such opportunity”, he also seemed to rule out the possibility that legitimate expectation could be used to define the content of the duty of fairness in cases where the duty would exist under the general test.

The statement that the effect of the doctrine is an opportunity to “make representations” seemed to confirm that in Canada there are no substantive effects to the doctrine. Presumably, then, the use of the doctrine to give a “substantive content” to the duty of fairness in *Transport Lessard* was not appropriate. Canada was not to follow Britain down the road to using the doctrine as a devise to hold governments to the substantive elements to their promises.

Sopinka, J.’s wording suggests that legitimate expectations only arise from conduct giving rise to an expectation of consultation. These rules out two of the categories which in Britain can give rise to a legitimate expectation – those arising from the nature of the interest itself, as in *McInnes*, and the promise of a substantive benefit, as in Khan. Although the expectation was of consultation in the two cases referred to by Sopinka, J., the doctrine itself protects other, broader conceptions of expectations. Lord Diplock’s erroneous restriction of the concept to promises of procedure in Q, which has not been followed in Britain, was nevertheless picked up by Sopinka, J. because of the limited sources upon which he relied.

Although the residents were heard in accordance with the procedure in the statute, Sopinka, J. failed to address directly the issues that had arisen in a slightly different context in Bendahmane. In that judgment, it was held that so long as the undertaking is not contrary to what is provided for in the statute, the body will be held to it, even if the statute itself sets out a different procedure. The judgment in *Old St. Boniface* suggested, instead, that if there is any consultation provided for in the statute, a judge has the option to decline to protect the legitimate expectation. This seems to contradict one of the principles behind the legitimate expectation doctrine – that public officials should be held to their promises, even if what is promised is not required by legislation. Unless the statute specifically prohibits the
body from carrying out consultations in addition to what the statute requires, there appears no reason to go against this principle. Again, the doctrine was restricted, but without real reasons being given for that decision.

*Old St. Boniface* left a seriously limited doctrine of legitimate expectation in place in Canada, and Sopanika, J.’s, description of the doctrine did not take into account the difference in Canadian and British Administrative Law. It was difficult to see from this case – how the doctrine would apply in Canadian Law, unless it constituted an exception to the rule that legislative decisions do not attract a duty of fairness.

However, this possibility was eliminated, and the doctrine was even further limited eight months later with the Court’s decision in the CAP case. This case reached the Supreme Court after the British Columbia Court of Appeal had delivered a judgment which expanded the reach of the doctrine considerably. Under the Canada Assistance Plan\(^\text{185}\), the minister of national health and welfare was authorized to enter into agreements with the provinces under which the federal government would pay fifty percent of the costs of social assistance in the province. Another section of the legislation provided that the agreement was in effect until it was terminated by mutual agreement or with one year’s notice by either party. The notice provisions were also included in the agreement. British Columbia entered into an agreement under the plan, as did all other provinces. In its budget speech, the federal government announced that contributions to British Columbia, Alberta and Ontario would be reduced and determined under a different formula. This change was to take place right away, and was implemented through a change in the legislation.

The government of British Columbia argued, and it was accepted by the Court of Appeal, that the agreement gave the provincial government a legitimate expectation that it would be obtained before changes were made to the agreement, unless the one year’s notice was given. Although the Court of Appeal recognized that parliamentary sovereignty prevented the court from sanctioning Parliament’s

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\(^{185}\) R.S.C. 1985, C.C-1
action, it held that the doctrine of legitimate expectations prevented the executive from introducing the legislation into Parliament without the required consent from the British Columbia government. Thus, while interference in the legislative process was not permissible the executive was constrained by its undertaking from introducing legislation that went against the expectation.

The Court of Appeal decision was overturned by a unanimous Supreme Court, in a decision also written by Sopinka, J., fist, he held that the Court of Appeal’s holding introducing the legislation required the consent of British Columbia was an improper use of the legitimate expectation doctrine to create substantive rights. The judgment confirmed that the duty of fairness cannot impose constraints on decision – making bodies except in the procedures they follow. He wrote:

“It was held by the majority of the Court below…. That the federal government acted illegally in invoking the power of Parliament to amend the plan without obtaining the consent of British Columbia…. This must be contrasted with a claim that there was a legitimate expectation that the federal government would not act without consulting British Columbia. If the doctrine of legitimate expectation required consent, and not merely consultation, then it would be the source of substantive rights; in this case, a substantive right to veto proposed federal legislation”.

Again, Sopinka, J., did not seem to recognize the possibility that a legitimate expectation of a substantive result might lead to procedural protection. He did not address the possibility that, as in Khan, British Columbia’s legitimate expectation of its consent being required (a substantive expectation) could give rise to the right to be consulted before the commitment to obtain that consent was reneged upon (a procedural protection). His judgment here, as in Old St. Boniface, does seem to imply that only a legitimate expectation that a certain procedure will be followed gives rise to procedural protection. This seems counter intuitive. A promise that a certain result will follow is stronger and more reassuring than a promise that a certain procedure will be accorded. However, under Sopinka’s, J., and approach the former would lead to no protection under the Doctrine of legitimate expectation,
while the latter would.

Sopinka, J. went on to hold that the doctrine was also not applicable because of the nature of the Minister’s decision that was being challenged – the introduction of a bill into Parliament. The introduction of legislation, he held, was a fundamental part of the legislative process, and using the doctrine of legitimate expectation to restrict it would interfere with Parliamentary sovereignty. Sopinka, J. went further, however, and also held that “the rules governing procedural fairness do not apply to a body exercising purely legislative functions”.

Citing Inuit Tapirisat, Martineau v. Matsqui Disciplinary Board186 and Penikett, the judgment seemed to reject the argument (as put forward, for example, by the plaintiffs in Sunshine Coast) that legitimate expectation constituted an exception to the rule that legislative functions were not reviewable. However, this is not entirely clear, since Sopinka, J. was dealing with a case in which part of the Parliamentary legislative process was being challenged. He directed most of his discussion to this question, although the citations suggest that this analysis also applied to legislative functions as defined in Inuit Tapirisat and Knight, and this is how subsequent cases have interpreted this decision. Although in the particular context of this decision the formal legislative process was at issue, Sopinka, J.’s judgment appeared to close the door on the possibility of legitimate expectation being the exception to the rule that legislative decision lead to no duty of fairness. His holding that the doctrine applies only to administrative, not legislative functions and his reference to cases like Inuit Tapirisat that define when a general duty of fairness exists, seems to directly contradict his holding in Old St. Boniface that the purpose of legitimate expectation is to expand the duty of fairness to situations where it would otherwise not be applicable. Sopinka, J. did not even consider whether applying the duty of fairness to legislative functions might be a possible “extension” of the duty of fairness. Legitimate expectation is best seen as a doctrine whose function is to increase the content of the duty of fairness where a certain procedure has been regularly followed, or a representation has been made to the plaintiff.

186 (1980)1 S.C.R. 602
6.9 Development in Australian Legal system –

The scope of the duty to observe the requirements of procedural fairness is now extremely wide. It is well – settled that the duty extends to virtually every exercise of a statutory power which might have an adverse effect on an individual unless there is a very clear legislative cases the important question now is not whether the requirements of procedural fairness apply but what they require in a particular instance. But that was not always the case. During the evolution of procedural fairness, or natural justice as the doctrine was commonly called in this earlier period, many cases focused on the ‘threshold question’ of whether the doctrine applied. The answer to this preliminary question often depended on whether the courts could identify a particular reason or circumstances why natural justice ought to apply. The doctrine of legitimate expectation contributed to the expansion of the duty to observe the requirements of natural justice by extending the duty beyond the relatively narrow range of rights and interests to whom natural justice had traditionally apply.187 ‘Abuse of power’ is formally recognized as a ground of judicial review in some statutory schemes of judicial review in Australia, but there are clear reasons why this statutory ground does not represent an adoption of either the substantive legitimate expectation doctrine or the wider notion of abuse of power articulated in English Law. The ground was first enacted in Australia well before Coughlan, at that time; the substantive legitimate expectation doctrine was not accepted as part of Australian Law. The small number of cases in which this ground has been pleaded does not encourage the view that this statutory ground is now taken to encompass English developments, or that the ground provides a vehicle for

significant innovations in the law of judicial review\textsuperscript{188}. The same reasoning applies to the related statutory ground of review which proscribes an exercise of power that is ‘otherwise contrary to law’. This ground was included in the Administrative Decision (Judicial Review) Act 1977 (Cth) (ADJR Act) at the suggestion of Sir William Wade and has been reproduced in the subsequent state and territory schemes modeled on that Act. Wade thought that this ground could assist ‘future developments’ in the law of judicial review\textsuperscript{189}, but his prediction has not been vindicated. The statutory mechanisms of judicial review that were enacted in several Australian jurisdictions have successfully overcome many of the technical problems of judicial review at common law, such as the absence of any right to reasons for decisions, but they have proved less successful in stimulating any evolution of the grounds of review.

The statutory recognition of apparently expansive grounds of judicial review such as ‘abuse of power’ or ‘otherwise contrary to law’ could in theory provide convenient vehicles for invoking the substantive legitimate expectation doctrine. However, it is likely that any acceptance that the doctrine falls within the scope of these grounds would only occur if it gained acceptance at common law. The cases to date suggest that any such acceptance in unlikely. While \textit{Coughlan} has been cited in several Australian decisions, the substantive legitimate expectation doctrine has not been accepted as part of Australian Law\textsuperscript{190}. That position is due largely by several members of the High Court in \textit{Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam}\textsuperscript{191}. However, closer analysis reveals that doubts about the doctrine have a longer heritage.

\textsuperscript{188} \textit{Sunshine Coast Broadcaster Ltd. v. Duncan} (1988)\textsuperscript{83} ALR 121, 130-132 (Pincus, J.); \textit{Daishatsu Australia Pty Ltd. v. Deputy Commr of Taxation} (2000)\textsuperscript{182} ALR 239, 253-61, (Lehane, J.)

\textsuperscript{189} Sir William Wade, \textit{Constitutional Fundamentals} (Revised ed. 1989)\textsuperscript{90}

\textsuperscript{190} \textit{Daishatsu Australia Pty Ltd. v. Deputy Commissioner of Taxation} (2000) 182 ALR 239, 255-9, where Lehane J. discussed the English cases and noted that they had been received cautiously in Australia; \textit{Rush v. Commissioner of Police} (2006)\textsuperscript{150} FCR 165, 185-7, where Finn, J. flatly rejected the doctrine; \textit{Sidhu v. Min. for Immigration and Multicultural and Indigenous Affairs} (2007)\textsuperscript{FCA 69} (Unreported, Lander, J., 9Feb,2007) [126], where Lander, J. cited the rejection of the doctrine as being part of current Australian Law in \textit{Rush v. Commissioner of Police} (2006)\textsuperscript{150} FCR 165

\textsuperscript{191} (2003)\textsuperscript{214} CLR 1
6.9.1 Constitutional objections to the Substantive legitimate expectation Doctrine–

The possible effect of the Australian Constitution upon judicial review was relatively neglected until the late 1990’s with the advent of challenges to provisions that sought to limit or exclude judicial review of migration decisions\(^\text{192}\). But the potential constitutional obstacles to the substantive legitimate expectation doctrine were signaled earlier by Brennan, J. in \textit{Quin}\(^\text{193}\). Although \textit{Quin} was not commenced under provisions of the Australian Constitution, the principles expounded by Brennan, J. were fashioned by close reference to the separation of powers doctrine embodied in the Constitution and the attendant limits that the doctrine places on judicial review. Brennan, J. proceeded from the principle of \textit{Marbury v. Madison}\(^\text{194}\), where the Supreme Court of the United States claimed that it was ‘the province and duty’ of the judicial branch to declare the law. His Honor reasoned that this principle both defined and confined judicial power in equal measures. More particularly, it provided a barrier to the courts from assuming power over the merits of administrative action. Brennan, J. explained:

“The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in doing so, the court avoids administrative injustices or error, so be it; but the court has no jurisdiction simply to cure administrative justice or error. The merits of administrative action, to the extent that they can be distinguished from legality, and for the repository of the relevant power and, subject to political control, for the repository alone”\(^\text{195}\).

This conception of judicial power and the consequential limits it places upon the proper scope of judicial review led Brennan, J. to identify several issues relevant


\(^{193}\) (1990)170 CLR 1

\(^{194}\) 5 US (1 Cranch), 177 (Marshall CJ) (1803)

\(^{195}\) Quin (1990)170 CLR 1, 36

327
to the substantive legitimate expectation doctrine. An important one was that the scope of judicial review should be directed to the ‘protection of individual interests but in terms of the extent of power and the legality of its exercise’. That approach does not lend itself easily to the rights-based focus of the substantive legitimate expectation doctrine. Brennan, J. also acknowledged that the judicial role envisaged by *Marbury v. Madison* left the court to determine the law, but did not itself provide guidance on what the law might be in any particular case. However, Brennan, J. reasoned that the Courts should be mindful that ‘the judicature is but one of the three coordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual’. This reasoning suggests that the judicial balancing role devised in *Coughlan*, by which various factors relevant to the circumstances of a particular person are measured against a more general public interest, is not one that Australian Courts should embrace.

The central propositions offered by Brennan, J. were adopted by a majority of the High Court in *City of Enfield v. Development Assessment Commission*¹⁹⁶. In that case, the court held that the American principle that grants considerable deference to administrators in the adjudication of jurisdictional facts was incompatible with the limited role that Australia’s constitutional arrangements impose upon the function of the executive. The court reasoned that administrator could not determine authoritatively (or non – authoritatively, subject to great deference from the courts) legal questions such as jurisdictional facts; such issues were clearly the constitutional province of the Courts. However, the High Court stressed that corresponding restrictions applied to the power of the courts to undertake judicial review of administrative action, and that the judicial function could not extend to issues that formed part of the merits of a decision. This conception of the constitutional limits on the role of the courts did not bode well for the substantive legitimate expectation doctrine because that doctrine could easily be characterized as one that drew the courts closer to the merits of a decision than the Australian Constitution, or the High Court, might allow.

¹⁹⁶ (2000) 199 CLR 135
That point came to the fore in Lam\textsuperscript{197}, when several members of the High Court doubted whether Australia’s Constitutional arrangements could allow the adoption of the substantive legitimate expectation doctrine. The basis of the claimed legitimate expectation in Lam was relatively simple. Lam was a non-citizen who had been convicted of criminal offences. While Lam was in prison, he was notified by migration authorities that they were considering whether to revoke his visa on character grounds. Lam was invited to respond and did so with a lengthy letter explaining his circumstances, particularly the position of his two children from a previous relationship. The authorities again wrote to Lam asking for the contact details of the person caring for his children. Lam provided the requested information, but the authorities did not contact the carer. The Minister reviewed a lengthy brief on Lam’s case and decided to cancel his visa.

Lam claimed a denial of procedural fairness, essentially arguing that the second letter from the authorities created a legitimate expectation that they would follow a certain procedure (that no decision would be made before the carer of his children was contacted). Any possible legitimate expectation would clearly have been procedural in nature, so counsel for Lam did not directly rely upon Coughlan, but four members of the High Court took the opportunity to express strong doubts about the constitutional viability of the substantive legitimate expectation doctrine. The strength of those doubts suggests that there are significant obstacles to the substantive legitimate expectation doctrine in Australia.

Gleeson CJ addressed the substantive legitimate expectation doctrine at a general level, suggesting that the reasoning in Coughlan involved ‘large question as to the relations between the executive and judicial branches of Government’\textsuperscript{198}. The Chief Justice concluded that the jurisdiction vested in the High Court by C.75 (v) of the Australian Constitution ‘does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch of government to impose upon the executive branch its idea of good administration’. McHugh and Gummow, JJ, with whom Callinan, J. agreed on this issue, reached a similar

\textsuperscript{197} (2003) 214 CLR 1
\textsuperscript{198} Lam (2003) 214 CLR 1
conclusion but their Honors conceded that the normative values offered in recent English cases on abuse of power bore some similarity to the ‘values concerned in general terms with abuse of power by the executive and legislative branches of government’, in Australian Constitutional Law. However, their Honors cautioned that ‘it would be going much further to give those values an immediate normative operation in applying the Constitution’. This reasoning suggests that the current Australian conception of the separation of powers preclude judges from giving effect to the normative values that have been favored in recent English cases, such as the notion of good administration or the concept of abuse of power. There is one obvious consequence of this formalist approach to constitutional interpretation, which is that the suggestion by judges that the reach of judicial power under the Constitution does not extend to enable judges to devise or impose norms on administrative action does not prevent the creation or enforcement of those values; it only precludes judicial involvement in the exercise of them. The reasoning of the majority in Lam implies that this outcome is one that is necessarily dictated by the separation of powers doctrine.

McHugh and Gummow, JJ., also emphasized the differences between the constitutional structures of Australia and England, which dictated that Australian developments in judicial review required particular attention to S. 75(v) of the Constitution. Their Honors explained that:

Considerations of the nature and scope of judicial review, whether by this court under Sec. 75 of the Constitution or otherwise, inevitably involves attention to the text and structure of the document in which Sec. 75 appears. An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.

This reasoning foreshadows an important obstacle to the substantive legitimate expectation doctrine and suggests that their Honors see the balancing act required by Coughlan to be within the province of the executive and therefore beyond that of the courts. The approach of McHugh and Gummow, JJ, illustrates the suggestion of Sir Anthony Mason that the Australian Constitution was fashioned to
operate ‘as a delineation of government powers rather than as a charter of citizen’s rights’. It also precludes the related English proposition that governments should normally be able to be held to their word in administration and the like can be removed from judicial consideration, an important potential justification for the substantive legitimate expectation doctrine is removed.

McHugh and Gummow, JJ also drew attention to the central role that the distinction between jurisdictional and non – jurisdictional error plays in Australian Law, their Honors reasoned that the distinction informed the principles governing Sec. 75 (v) of the Constitution which, despite the many problems arising from the jurisdictional error doctrine, provided a touchtone to distinguish those administrative action which were authorized by law from those which were not. But the reliance of McHugh and Gummow, JJ on jurisdictional error must be understood in light of the crucial role that the doctrine has played in other aspects of the operation of the High Court’s jurisdiction under Sec. 75 (v) of the Constitution, particularly the operation of and limits upon privative clauses. The High Court has essentially held that decisions infected with jurisdictional error cannot be regarded as ‘authorized’ by the statute under which they were supposedly made and, therefore, cannot logically be protected by any privative clause contained in the same statute. This approach presumes limitations upon the different arms of government that are relevant to the substantive legitimate expectation doctrine. The courts have claimed exclusive jurisdiction to determine question of law, such as the application of jurisdictional error. The reservation of that jurisdiction to the High Court has provided a crucial means by which the Court has struck down privative clauses that seek to place administrative decisions beyond effective judicial scrutiny. However, just as this constitutional doctrine reserves certain issues to the sole province of the judicial arm of government, it must concede other issues to the executive arm. The invocation of jurisdictional error by McHugh and Gummow, JJ as the principle that guides the reach of Sec. 75 (v) of the Constitution reinforce the point that the considerable body of doctrine that the court had developed to define and defend its role ha necessary

limits. It is most unlikely that those limits could extend to encompass the substantive legitimate expectation doctrine without a major reformation of wider doctrines.

Any such change would almost certainly need to extend beyond the particular constitutional doctrines that lie in the path of the substantive legitimate expectation doctrine to the wider foundations of the Australian conception of the nature and scope of the judicial role. Mason alluded to this when he suggested that doctrines by which the High Court has expounded its jurisdiction under Sec. 75 (v) of the Constitution are underpinned by another more potent element of the separation of powers doctrines, namely, ‘the limited Australian conception of the content of judicial power’. He explained that this conception owes much to the influence of Sir Owen Dixon and his determination that the courts should be insulated from controversial issues which involve policy and which would bring the courts into controversy. That argument also suggests that the constitutional principles invoked in recent cases, such as jurisdictional error, which tend against the expansion of the judicial function to encompass the balancing exercise of Coughlan, express a long-standing judicial reluctance to engage in issues apt to be identified as ones of policy rather than law.

There is a clear difference between a judicial decision that influences administrative decision – making and one which directs it. Coughlan was a novel case in part of Appeal of England and Wales did not go to the length of reviewing the decision of the health authority on its merits, as if it had been empowered by statute to hear and determine an appeal against that decision on the merits. Rather, the Court of Appeal found that the health authority had not presented good reasons why it had acted as it did and disappoint what was considered to be Ms. Coughlan’s legitimate expectation. Although the Court did not assume the power to make or remake the decision on Ms. Coughlan’s living arrangements, the Court’s balancing of the factors for and against the decision of the health authority edged towards a review of the decision on the merits.

But should a new ground of review be rejected simply because it might draw a court closer to the merits of a case? It has long been recognized that some grounds of judicial review which relate to the legality of administrative actions grant the
Courts considerable latitude in determining what are to be regarded as legal limitations on powers conferred on administrative agencies of government. Unreasonableness in the *Wednesbury* sense, e.g., often involves judicial consideration of the substance of administrative decisions, and, to some extent, appraisal of them according to standards which courts regard as ones of which administrative agencies should conform in the exercise of their functions. Chief Justice Murray Gleeson has explained that this aspect of the ground of unreasonableness does not necessarily mean that a clear distinction between principles of legality and merits cannot be drawn. The difference between the two, his Honour explained extra – judicially, ‘is not always clear – cut; but neither is the difference night and day. Twilight does not invalidate the distinction between night and day’

A similar point must surely apply to all grounds of judicial review to the extent that a consideration of the legality of decision – making requires a court to consider the context within which decisions are made. The differing extent to which different grounds of review might require the context of a decision to be remarks of Chief Justice Gleeson, obscure the basic distinction between review and appeal.

The separation of powers doctrine enshrined in the Australian Constitution does not, it may be argued, prohibit courts exercising a federal supervisory jurisdiction from adjudging federal administrative action invalid on the ground that relevant legitimate expectation had not been taken into account by the authors of that action. According to this view, a substantive legitimate expectation to which a decision – maker must have regard, as might any unfairness that resulted from the denial of the expectation. However, it is doubtful that constitutional doctrines would permit an Australian court to go further because the separation of powers doctrine may be interpreted as having placed constraints on what courts exercising federal jurisdiction may properly do when the validity of administrative decision is challenged on the ground that, in the circumstances of the individual case, the decision – maker was bound to exercise a discretionary power in a way which fulfilled the complainant’s legitimate expectation. In cases of this description, it may be argued that the court would be exceeding its judicial powers were it to adjudge

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the validity of the administrative action by assessing countervailing public and private interests. For this reason, the central judicial task devised in Coughlan is beyond the reach of Australian Courts. The issue is ultimately one of boundaries, or rather whether a ground blurs the merits/legalities distinction sufficiently that it may be argued to breach that distinction.

Abuse of power is a recognized ground for judicial review of administrative action under the ADJR Act. The High Court of Australia has not yet had occasion to consider the extent to which application of that ground of review may be constrained by the separation of powers doctrine. While the Court may accept that abuse of power is a ground on which federal administrative action is judicially reviewable, it would, no doubt, insist that the ground not be employed as a subterfuge for merits review. It would likely take the view that the separation of powers doctrine precludes judicial review of federal administrative action to the extent manifested in the case of Coughlan. On this view, the doctrine established in Coughlan could not be fostered in Australia by indirect means.

6.10 Development in South African Legal system -

The doctrine of legitimate expectation was authoritatively accepted as part of South African administrative law in the landmark case of Administrator, Transvaal v. Traub\(^{201}\) in 1989. In that case Chief Justice Corbett extended the scope of application of the rules of natural justice, specifically the *audi alteram partem* principle beyond the traditional “liberty, property and existing rights” formula to cases where something less than an existing right, a legitimate expectation, required a fair procedure to be followed. This acceptance followed the trend in other Commonwealth jurisdictions to extend the application of the rules of natural justice and hence afford greater procedural protection to individuals affected by administrative decisions. Although Chief Justice Corbett expressly stated that the content of the expectation may be substantive or procedural in nature, the protection of that expectation, if found to be legitimate, was exclusively procedural. Since the Traub decision, the doctrine of legitimate expectation has been deeply entrenched in

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\(^{201}\) Administrator, Transvaal v. Traub, 1989(4) SA 731 (A)
South African administrative law to extend the scope of procedural rights afforded individuals affected by administrative action. It is now an established principle of South African administrative law that a person, who has a legitimate expectation, flowing from an express promise by an administrator or a regular administrative practice, has a right to be heard before administrative action affecting that expectation is taken. The doctrine, has however, by and large, remained one that provides procedural protection in South Africa. In a number of recent decisions by South African Courts, ranging from the High Court to the Supreme Court of Appeal and the Constitutional Court, there have been increasing calls for the application of legitimate expectations beyond procedural claims.

In other Commonwealth jurisdictions the doctrine of legitimate expectation has been developing beyond the procedural context for a number of years. The question that has been asked in these jurisdictions is whether the existence of a legitimate expectation can give rise to a substantive remedy. In other words, can a court compel an administrator to grant a substantive benefit to an individual based on that individual’s legitimate expectation of receiving such benefit? This application of the legitimate expectation doctrine is referred to as substantive legitimate expectation, as opposed to the traditional procedural legitimate expectation. The doctrine of substantive legitimate expectation has, however, not been universally accepted in Commonwealth jurisdiction. In England, where it has received the most attention and acceptance, the position seems to be unclear in the absence of an authoritative opinion from the House of Lords. In as well the administrative law of the European Union (EU) and many of its members Sates, the protection of legitimate expectation is widely accepted. The scope of such protection extends significantly beyond that afforded in Commonwealth jurisdictions and includes substantive protection. The analysis of South African law shows that substantive legitimate expectation is still in an early stage of development.

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202 In Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services) (2001)2 SCR 281, the minority judgment rejected substantive protection of legitimate in Canadian Law. The majority decided the case on different grounds. See also Reference re Canada Assistance Plan (BC) (1991)83 DLR(4th) 297 (SCC). In Attorney General, New South Wales v. Quin (1990)93 ALR 1 (HC) the doctrine was rejected in Australian Law, see also Cameron Stewart, Substantive Unfairness: A New Species of Abuse of Power? 28 Fed. L. Rev. 617(2000) at 634
6.10.1 Decisions of the South African Supreme Court -

The doctrine of legitimate expectation was imported from English Law of South African Law in the 1989 case of Administrator Transvaal v. Traub. In line with English Law, at least at that time, the ambit of the doctrine was restricted to procedural protection. It was incorporated into South African Law as an extension of the rules of natural justice that is the procedural requirements for fair administrative action. Only most recently, has there been mention of substantive protection of legitimate expectation in South African Law.

The requirements for the existence of such an expectation in South African Law were recently restated in National Director of Public Prosecutors v. Philips. These includes: (i) that there must be a representation which is ‘clear, unambiguous and devoid of relevant qualification’, (ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it, (iii) that the expectation must have been lawful for the decision maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator’s actions on the ground of procedural unfairness. If the Court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back of the decision – maker to deal with it in a procedurally fair manner.

A number of recent South African Court decisions, however, have referred to the possibility of extending the protection of legitimate expectation to substantive relief that is the doctrine of substantive legitimate expectation. Against the backdrop of conflicting opinions in the lower courts, this question has recently surfaced in two judgments by the Supreme Court of Appeal and two Constitutional Court

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203 1989 (4) SA 731 (A)
204 2002(4) SA 60(W), quoted with approval by the Supreme Court of Appeal in South African Veterinary Council and Another v. Szynanski 2003(4) BCLR 378(SCA) at paragraph 19 and in Minister of Environmental Affairs and Tourism and Others v. Phambili Fisheries (Pty) Ltd. and another 20032 All SA 616 (SCA)
205 President of the Republic of South Africa and others v. south Africa Rugby Football Union and others 2000 (1) SA (1) (cc)
opinions207.

In both of the cases the Court rejected the claim based on substantive legitimate expectation. It is important to note, however, that although the court expressed considerable reluctance in embracing the doctrine, it did not reject it and expressly left the door open to an acceptance of the doctrine in South African Law in future. In both cases the court rejected the claim on the grounds that no legitimate expectation in fact existed. In Meyer v. Iscor Pension Fund208 the appellant appealed against an order of the High Court setting aside a determination of an adjudicator appointed in terms of the Pension Funds Act. Meyer retired before reaching the normal retirement age and as a result received reduced pension benefits in terms of the rules of his employer’s Iscor, Pension fund. These rules stated that pension benefits will be reduced in case of early retirement, calculated with reference to the number of months by which actual retirement precedes the normal retirement age. Less than two months after Meyer’s retirement the rules of the fund was amended as a special measure to encourage early retirement, which formed part of rationalization scheme agreed to between Iscor and the trade unions. The amended rules removed the penalty imposed on pension benefits in case of early retirement for a certain group of employees. Had Meyer retired two months later, he would have received more than twice the benefits he did. Meyer subsequently laid a complaint against the fund in terms of the Pension Funds Act and the adjudicator appointed under the Act determined the dispute in Meyer’s favor. The adjudicator ordered the fund to pay Meyer increased pension benefits under the amended rules. The fund succeeded in the High Court to set the adjudicator’s order aside upon appeal, but the court allowed Meyer to appeal the judgment.

One of Meyer’s arguments in the Supreme Court of Appeal was that he had a legitimate expectation that any amendment to the rules, which resulted in increased pension benefits as part of the realization scheme, would be implemented with

207 Premier, Province of Mpumalanga and another v. Executive Committee of the Association of Governing Bodies of State – Aided Schools: Eastern Transvaal 1999(2) BCLR 151(cc), Bel Patro School Governing body and others v. Premiure of the Province, Western Cape and Another 2002(9) BCLR (cc)
208 Meyer v. Iscor Pension Fund 2003(2) SA 715 (SCA), South African Veterinary Council and another v. Szymanski 2003(4) SA 42(SCA)
retrospective effect. Had this been done, he would be entitled to increased pension
benefts. Meyer based his legitimate expectation on promises made by Iscor in the
course of the rationalization program that improved retrenchment benefts would be
implemented with retrospective effect. He did not, however, claim that his legitimate
expectation entitled him to procedural relief, but that the substantive beneft should
be afforded to him.

The court assumed for purposes of the judgment that trustee’s decisions in
terms of the rules of pension funds can be reviewed on a basis analogues to the
review of administrative decisions. It noted the recent developments in English Law
accepting substantive legitimate expectation, but also noted the rejection of this
doctrine in other Commonwealth jurisdictions such as Australia and Canada. The
Court expressly refused to either accept or reject the doctrine of substantive
legitimate expectation in South African Law. It held that whether to adopt this
doctrine or not is a “difcult and complex” question and cautioned against simply
grafting foreign doctrines on to local law. The court emphasized the importance of
understanding the underlying needs that prompted the development of the doctrine
in its country of origin. In this respect the court suggested that the doctrine of
substantive legitimate expectation may have developed in English Law in response
to the requirement that valuable consideration be given before an undertaking can be
legally binding, which requirement is foreign to South African law. Despite these
remarks the court continued to analyze Meyer’s alleged legitimate expectation and
found that even if the doctrine of substantive legitimate expectation were accepted
as part of South African Law, he would still not be entitled to the relief claimed.
This conclusion seemed inevitable on the basis that the facts did not support a
legitimate expectation.

The second Supreme Court of Appeal case, South African Veterinary Council
v. Szymanski209, involved a substantive claim to be registered as a veterinary
surgeon. As part of a special arrangement in terms of which South African citizens
holding foreign veterinary degrees could be registered to practice in South Africa,
the Council conducted a special admissions examination. Szymanski wrote this

209 2003 (4) SA 42(SCA)
examination and was awarded a combined mark of 45.25%. The council regarded this as a failure, taking 50% to be the pass marks and refused to register him. Szymanski subsequently applied to the High Court for an order setting aside the Council’s decision that the pass marks was 50% and an order requiring the Council to register him as a veterinary surgeon in South Africa. He based his claim on a legitimate expectation that the pass marks was 40% and not 50%, which expectation followed from numerous statements by the Council and its officials. The High Court ruled in favor of Szymanski setting aside the Council’s decision and ordering the Council to register him as a veterinary surgeon, that is, the High Court granted Szymanski substantive relief based on his legitimate expectation. Upon appeal Cameron JA, for a unanimous Supreme Court of Appeal, dealt with the doctrine of substantive legitimate expectation in a single paragraph. He noted that the Court recently cautioned against ‘an overhasty’ adoption of the doctrine in South African Law. According to the Judge, it was, however, not necessary in the present case to decide the matter, because “Dr. Szymanski’s case was deficient in its most basic essentials”. The court continued to show that the applicant did not have a legitimate expectation on the facts of the case. Resultantly the appeal was upheld.

The doctrine of substantive legitimate expectation has also been mooted in the Constitutional Court. Two judgments are noteworthy in this respect. In the first of these, the Premier, Province of Mpumalanga case, the member of the provincial executive council responsible for education terminated bursaries paid to certain state schools for needy students. These bursaries were paid to schools educating mainly white students as part of the apartheid education system. The MEC’s decision to terminate these bursaries formed part of the general transformation of the education system. About 100 of the schools that previously received such bursaries subsequently challenged the MEC’s decision on the grounds that it was procedurally unfair and unjustifiable. The schools applied for an order setting aside the decision and an order compelling the MEC to continue to pay the bursaries until the end of that school year that is 1995. They based their case on the legitimate expectation that bursaries would be paid for 1995 and that they would be afforded a fair procedure
before the administration terminated the payments. These expectations entitled them to a fair procedure in terms of Sec. 24(b) of the Interim Constitution\textsuperscript{210}, a failure of which would result in the administrative action being invalid, so the argument went. In the judgment O’Regan, J. stated that it was not necessary in the present instance to decide whether a legitimate expectation may entitle an applicant to substantive relief. The reason for this conclusion is that section 24(b) of the Interim Constitution expressly stated that an individual shall have the right to procedurally fair administrative action where his or her legitimate expectation is affected. A claim based on legitimate expectation in terms of section 24(b) of the Interim Constitution is therefore clearly restricted to a procedural remedy. In the present case, the court found that the legitimate expectation of the schools entitled them to a fair procedure before the bursaries were terminated and that no such procedure was followed. Consequently, the decision was set aside. The court, however, refused to sanction the substantive relief ordered by the High Court that is that the bursaries must be paid until the end of the school year in line with the applicant’s legitimate expectation. O’Regan, J. concluded that this was not a case in which a court could substitute its own decision for that of the administrator\textsuperscript{211}. However, it was not possible to refer the decision back to the MEC to be taken in a procedurally fair manner, seeing that the judgment date was 1998 while the bursaries terminated naturally at the end of 1995. The end result of the Constitutional Court’s judgment was therefore that the bursaries had to be paid until the end of 1995 that is a result similar to the substantive relief granted by the High Court.

The second case in which the Constitutional Court referred to the doctrine of substantive legitimate expectation is that of Bel Porto Governing Body v. Premier of the Province, Western Cape\textsuperscript{212}. In that case the governing bodies of a number of schools challenged certain decisions taken by the provincial education department as

\textsuperscript{210} Constitution of the Republic of South Africa, Act 200 of 1993
\textsuperscript{211} In Common law a court only substitute its own decision on the merits for that of the administrator in very narrow circumstances. These included cases where the end result is a foregone conclusion and referring the matter back to the administrator would only be a waste of resources and cases where the administrator exhibited such degree of bias that referring the matter back to him would result in an injustice.
\textsuperscript{212} 2000(9) BCLR (cc)
part of a rationalization scheme. In order to eradicate inequalities between former “white – only” and “non – white” schools, the provincial department embarked on an extensive rationalization program. At the same time, the applicants, which were all former white – only schools catering for disabled children, started making requests to the department to employ special assistants who were currently employed by the schools themselves213. Upon the department’s refusal to take over these employees prior to implementing the rationalization program, the schools instituted review proceedings. The Schools averred that a number of their Constitutional rights have been infringed by the department’s actions and applied for substantive relief in the form of an order enforcing the department to employ the special assistants currently on the school’s own pay – roll.

The High Court rejected the application and the schools appealed to the Constitutional Court. The Constitutional Court dismissed the appeal, but only narrowly on a 6-4 split. Chief Justice Chaskalson wrote the opinion for the majority, with three dissenting opinions being filed. The majority rejected the claim based on administrative justice on the ground that a fair procedure was followed vis – a – vis the schools and specifically declined to express an opinion on substantive legitimate expectation. It is, however, Madala J.’s dissenting opinion in the Bel Porto School case, which is the most relevant for present purposes. He bases his opinion on a general duty of fairness, which rests on the administration. From there he continues to discuss the doctrine of legitimate expectation and its development in English law and reception in South African Law. He notes that the doctrine has developed in English law to include substantive protection. There is, however, a flaw in his argument where he jumps from the statement that the doctrine of legitimate expectation, as it exists in South African Law, protects both procedural and substantive expectations to the statement that legitimate expectation will be protected substantively in certain instances. While the former statement is undoubtedly correct, his second statement does not follow from the first. As

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213 These schools argued that while they employed their special assistants themselves, the former non – whites state school did not have to do so. The assistants at the latter schools were employed by the respective education departments. The former white – only schools were finding it increasingly difficult to afford their special assistants and therefore appealed to the education department to employ the special assistants working at these schools.
indicated above, the legitimate expectation doctrine was originally restricted to procedural protection. That is, although the content of the expectation could be procedural or substantive in nature, the relief afforded was restricted to procedure and specifically the extension of the *audi* principle. Although the extracts from the *Traub* case quoted by Madala, J. support the contention that substantive expectations are protected by the doctrine of legitimate expectation, they are no authority for the proposition that substantive legitimate expectation will be protected substantively. The only further authority that Madala, J. offers for his conclusion that substantive expectations will be “given substance to” by Prof. Robert E Riggs\(^{214}\) in which he examines the development of the doctrine of legitimate expectation in English Law. It would therefore, seem that Madala, J.’s casual acceptance of the doctrine of substantive legitimate expectation is rather lacking in authority as far as South African Law is concerned. This is not to suggest that the doctrine cannot be imported into South African Law as was originally done with legitimate expectation in the *Traub* case and as recently suggested by Brand JA in the case of *Meyer v. Iscor Pension Fund*. However, any such reception must be done on a careful analysis of the relevant foreign developments and an evaluation of the need that prompted that development in the foreign jurisdiction(s) and the corresponding need in South African Law.

The doctrine of substantive legitimate expectation is only starting to find its way into South African Law. The Courts have suggested that a careful analysis of the development of the doctrine in English Law is required before it can be accepted in South African Law. The substantive protection of legitimate expectation is well established in EU law and the EU law holds some very important lessons for the development of substantive legitimate expectation in South African Law.