Private Client eBriefing

Guest v Guest: clarity at last for proprietary estoppel?

Article by Elizabeth Houghton, 31st March 2023

Guest v Guest[1] is one in a long line of decisions involving proprietary estoppel and the family farm. The principles applicable to establishing proprietary estoppel claims are now well defined, but the remedy in such cases has defied easy explanation, and been the source of considerable academic commentary.

The facts of the case follow a well-trodden path. Tump Farm was owned by David and Josephine Guest. David and Josephine have three children: Andrew, Ross and Jan. Andrew, the eldest son, had lived and worked on the farm for 33 years since leaving school. He had lived in a cottage on Tump Farm and worked for low wages in the expectation that he would inherit an unspecified part of the farm after his parents' death, sufficient to permit him to continue a viable farming business. The trial judge found that Andrew was consistently led to believe by his father, with the tacit support of his mother, that he would succeed to the farming business and inherit a substantial share of Tump Farm.

In 1981 the parents made wills providing for Andrew and his younger brother Ross to inherit Tump Farm and its business in equal shares upon the death of the second parent, subject to a pecuniary legacy to Jan (Andrew's sister) equal to one fifth of the value of the estate. The evidence was that Andrew did not know about the terms of these wills.

Andrew and his parents fell out in 2015. As a result, Andrew and his family moved out of their cottage on Tump Farm and he was forced to look for work elsewhere. The parents eventually made wills which excluded Andrew entirely. Andrew brought a claim (while his parents were still alive) in proprietary estoppel seeking enforcement of the promise made.

[1] [2022] UKSC 27

The trial judge concluded, and the Supreme Court agreed, that Andrew had relied on the representations made by his parents and made life-changing decisions with irreversible consequences. His claim for proprietary estoppel was therefore made out.

By the time the case came to the Supreme Court, the appeal was on the question of remedy only. Specifically, should the remedy be fashioned to fulfil Andrew's expectation (with adjustments if necessary), or should it aim only to compensate him for the detriment suffered in reliance on the promise. In short: expectation or detriment? Andrew sought specific performance of the promise; his parents argued he should only be compensated for the detriment he had suffered as that was the "minimum equity to do justice".

The Supreme Court was split (3:2). Lord Briggs delivered the majority judgment (Lady Arden and Lady Rose agreeing). Lord Leggatt (with Lord Stephens agreeing) delivered the minority judgment.

The majority concluded that the promise (and Andrew's expectation) should be specifically enforced, but that there should be some adjustment for the fact that Andrew was receiving fulfilment of the promise while his parents were still alive rather than upon their death (which had been the promise made). Lord Briggs rejected the notion that the choice was a binary one between expectation and detriment.

Curiously, the majority gave the parents the choice between a non-financial and financial remedy. The non-financial remedy was the promised share in the farm and business held on trust for Andrew until his parents' death and in which his parents were to have a lifetime interest. The financial remedy was a sale of the farm now, with a discount for early receipt.

The minority would have calculated Andrew's detriment and awarded financial compensation. An appendix was provided which provided detailed analysis of how to quantify Andrew's reliance loss.

The judgments delivered by both the majority and the minority are extremely dense and will be analysed for many years to come. Academics and practitioners alike will be rolling

up their sleeves to understand the impact of the decision, not only for proprietary estoppel but also other equitable remedies. For now it is useful to highlight some of the key consequences of the decision and the lingering uncertainties.

1. **Start with expectation, and move along the "spectrum"**

It is relatively clear that the starting point for Lord Briggs is to prevent or remedy the "unconscionability" caused by a broken promise.

Lord Briggs outlined a two-stage approach to remedying the unconscionability [74]-[75]. The first stage (establishing the "equity") is to determine whether the promisor's repudiation of his promise is unconscionable in light of the promisee's detrimental reliance. The second stage (remedy) is to start with the assumption that the promisor should be held to his promise, although he noted there may be many reasons why something less than full performance will negate the unconscionability caused.

Lord Briggs appears to have been very attracted to the idea that there is a "spectrum" between detriment and expectation when it comes to remedy. His Lordship said at [29]:

> *It goes far beyond the idiosyncrasies of particular judges to regard reliance during the best part of the promisee's working life as creating a much stronger case for the fulfilment of expectation than a few months spent as a lodger on return from abroad [as in Dodsworth v Dodsworth discussed at [27]]. If there is some kind of spectrum between expectation and detriment as the basis for relief based upon the length of the period of detrimental reliance, then the length of that period in the present case must surely lie at the expectation end of the spectrum.*

And at [77]-[79]:

> *There is in my view real merit in Lord Walker's spectrum (as he would now prefer to call it) between on the one hand a case where both the promise and the detriment are reasonably precisely defined by the time when the promise is repudiated, where the one is in a sense the quid pro quo of the other although falling short of contract, and on the other hand where either or both are left much less certain. The "almost contractual" end of the spectrum is likely to generate the strongest equitable reason*

for the full specific enforcement of the promise if the reliant detriment has been undertaken in full, regardless of a disparity in value between the two. At the other end there may be much greater scope for a departure from full enforcement, even if there are no other problems making it just to do so.

Cases where at the time of a repudiation during the lifetime of the promisor the date of performance lies in the future, e.g. upon the death of the promisor, are likely to be the most difficult in terms of finding an appropriate remedy. […]

I can see no principled justification for treating a perceived need to abandon full enforcement as a reason for moving straight (or at all) to compensation on the basis of an attempt to value the detriment. That would suggest something approaching a binary choice which would be alien to the flexible and pragmatic nature of the discretion. I recognise that, in a case where there is perceived to be a large gap between the respective values of the promise and of the detriment this may leave the judge with a wide range of options with little in the way of rules as a guide.

Although this might appear to be a neat framework, it remains to be seen whether the wide flexibility inherent in the approach provides sufficient certainty for judges (seeking to decide cases on a principled basis) and parties (seeking to understand their prospects and perhaps to settle cases without going to court).[2] Lord Briggs made it clear that while proportionality and "minimum equity" arguments were not the correct starting points, there was room for these concepts in the "spectrum" approach. In particular, as a cross-check on whether a reduced or difference award is called for because of reasons of practicality, justice between the parties or fairness to third parties [94].

In response, Lord Leggatt said that an approach focused on remedying unconscionability;

provides no yardstick for deciding when it is appropriate to award something other than what was promised (or its value) or for deciding what that something else should be." He continued: "*The decision whether to enforce the promise and, if not,*

[2] See the criticism of Lord Leggatt at [172] and in particular the article referred to by M Dixon, "Painting proprietary estoppel: Howard Hodgkin, Titian or Jackson Pollock?" [2022] Conv 30.

> *what alternative remedy to grant is arbitrary. Legal principle has been replaced by the portable palm tree.* [181]

It is fair to say that whether or not reneging on a promise is unconscionable (and to what extent) is not a question of objective fact. Reasonable minds may differ as to when and how much a claimant's reasonable expectation should be fulfilled or adjusted. Whether the majority approach amounts to desirable flexibility or arbitrary justice remains to be seen.

2. Conceptual justifications for the remedy

The majority and minority judgments both spend considerable effort analysing past proprietary estoppel cases in an attempting to distil the essence of the cause of action. Lord Briggs concludes that the conceptual basis for proprietary estoppel is the unconscionability caused when a claimant relies to his detriment on a defendant's promise. And so, he says, the remedy must also be focused on remedying the unconscionability. Lord Leggatt considers that detriment is the key concept for a claim to arise since without it the promise is unenforceable. Accordingly, he says, the remedy must focus on detriment.

This conceptual wrangling is of limited assistance, and not very convincing either way. The cause of action requires both an expectation arising from a promise, and detrimental reliance on that promise. Attempting to isolate the 'key' to the cause of action and therefore the 'key' to the appropriate remedy is unrewarding.

The handful of cases which appear to have taken a detriment approach were plainly at the forefront of both judgments. Lord Briggs explained those as being situations which justified a departure from the expectation measure because that measure would result in the claimants receiving in excess of their real expectation (eg [27]). Lord Leggatt held up those cases as examples of the correct detriment-focused approach.

The majority and minority judgment also struggled to explain when and why a promisor would be permitted to change their mind and depart from the promise they had made to the promisee. Both were agreed that a promisor should be free to change their mind provided that the circumstances were right. Lord Leggatt would permit the promisor to

change his mind if no detriment had been suffered or upon payment of compensation [252]. Lord Briggs – it appears – would permit change of mind, without the promisor being required to specifically perform the promise, only where it was not unconscionable [62].

3. Contractual analogies helpful or unhelpful?

The majority and minority judgment both recognised that a promise is not usually enforceable unless made part of a contract (eg Lord Briggs at [4]). Lord Leggatt spent a considerable portion of his judgment querying why promises or assurances which do not form part of a binding contract should be elevated, resulting in a claimant receiving essentially the same remedy [173ff].

Lord Briggs' spectrum analysis appears based on the notion (although not expressly) that there may be cases where the detriment caused to a claimant will be akin to him providing consideration for the promise. The question is framed as one of unconscionability but the language of "quid pro quo" belies the contractual concepts at work. Lord Leggatt is right to state that:

> *A theory of proprietary estoppel which views detrimental reliance as capable of making an informal promise legally enforceable is also inconsistent with how the doctrine has been applied in what is now a large body of case law. A property expectation claim does not operate in a binary way. The approach of the courts is not that, provided there has been substantial reliance, the promise will be enforced.*

One of the looming problems with viewing "substantial reliance" through the lens of consideration is of course that contract law requires consideration to be sufficient but not adequate. However, the same cannot be said of reliance in Lord Briggs' analysis; reliance is quantified against the value of the promise in order to determine where the case lays on the spectrum. It is measured in a way consideration would not be in contract claims.

It is difficult to keep contract analogies away from the discussion about proprietary estoppel, particularly where the question is framed as one of "specific enforcement". Whether or not those analogies are helpful or appropriate remains to be seen. Even if contractual analogies are misplaced it does not necessarily follow that a detriment-based analysis is the better way forward.

4. Practical considerations – valuing expectations vs. valuing detriment

From a practical standpoint, it seems fair to say that in cases like this where a promise has been relied upon with whole-life consequences, it is easier (and therefore arguably fairer) for the court to assess expectation, rather than attempting to assess detriment. Assessing detriment requires the court to compare the life the claimant has in fact had with a hypothetical counterfactual had he not relied on the promise. Attempting to understand what shape Andrew's life could have taken had he not spent 33 years working his family farm in expectation of his inheritance is an extremely difficult task, and one that is inevitably going to be riddled with error (see [95]).

There are of course situations where such hypothetical counterfactuals must be undertaken because there is no alternative, such as personal injury cases. But where there is an alternative in the form of quantifying expectation that must be preferable for practical reasons alone.

The Court is ill-equipped to perform detriment calculations and it is costly for the parties for it to try to do so. The results will be imperfect. Avoiding the costs and injustice of the exercise might be seen as the fairest for all involved. Approaching the remedy from an expectation standpoint has the advantage of requiring the court to identify what the claimant was actually promised, and what they did in reliance.

5. Election by the parents?

One of the most surprising aspects of the majority decision is the finding that the parents should be able to choose between a financial and non-financial remedy:

> *I consider that the parents should be entitled to choose between those two alternative forms of relief. They would thereby be spared, if they so choose, the injustice of having to sell up and leave early, but alternatively given the opportunity of a completely clean break at a considerably lower price than that ordered by the judge. Either remedy if afforded to Andrew would draw the sting of unconscionability from the outright repudiation of their promises to him. Since the aim of the remedy is to prevent or remove unconscionability, then where there are two different ways*

of doing so the persons against whom the equity is asserted should in principle be the ones to make that choice. [104]

It is unclear what the justification might be for the parents (the 'wrongdoers'[3]) to choose the remedy. Election between remedies is a right usually reserved for a claimant. No authority is given to justify giving the choice to the parents. It is unclear whether Lord Briggs viewed this as an example of the flexibility which should be given to judges in order to remedy unconscionability on the facts of an individual case, part of a "minimum equity" crosscheck or a principle with wider application.

Conclusion

Guest v Guest provides a neat framework for those approaching remedies for proprietary estoppel. However, there are certainly lingering uncertainties and the conceptual justification for the expectation-based approach has not been fully explained. It remains to be seen how future cases will apply Lord Briggs framework, and whether or not it will simplify the approach, reduce argument, and encourage settlements in this area.

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[3] The parents conduct in reneging on their promise to Andrew was sufficiently unconscionable to establish proprietary estoppel. However, some may bristle at the description of the parents as 'wrongdoers'; it is noteworthy that Lord Briggs also had difficulty in describing the conduct as an equitable "wrong" [9].