Proprietary estoppel and proportionality following the case of *Habberfield* : back to the heart of the doctrine

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"The woods are lovely dark and deep

But I have promises to keep..."

The case of *Habberfield v Habberfield* is an interesting one. It serves to remind us what proprietary estoppel is, at its essence, all about.

Lewison LJ includes the above lines from Robert Frost's poem "Stopping by Woods on a Snowy Evening" in his Judgment. Their inclusion provides a somewhat delightful encapsulation of what is going on when the Court is faced with the bitter accusations, cross-accusations, fall-outs, heartache and broken promises which are often at the centre of proprietary estoppel claims.

Lewison LJ states, after he quotes the aforementioned lines:

"Underpinning the whole doctrine of proprietary estoppel is the idea that promises should be kept."

This, perhaps to the untrained eye, could seem like stating the obvious. However it is in actuality a timeous reminder from on high which speaks to

the core nature of the doctrine. It also marks a perceptible change in tone and emphasis from the Court of Appeal, and indeed Lewison himself, from the arguably more mechanistic and somewhat reductive approach to the doctrine which appeared evident in the second *Davies v Davies* decision.

Given that Lewison LJ considered that it would be helpful to remind us of what underpins the doctrine i.e. what it is fundamentally about (no doubt on the basis that when we understand the fundamentals of difficult concepts, we also better understand how their various iterations operate in practice), it is hoped that the following etymological information will also be of some general assistance.

In my experience, many people rightly connect the word 'stop' present in the word "estoppel" with the fact that estoppels serve to *stop* someone from doing something. That connection is of some use, but I think a deeper understanding is even more helpful. If we trace back the origins of the word 'estoppel' we find that it comes from the Old French '*estoupaille*', meaning "to bung up" or "to plug up". Further, we can see the very real connection between the modern functioning of the legal doctrine with its etymological Old French origins if we imagine the following…

A party (the promisor) has for years been promising a house to another party (the promisee), on the proviso that the promisee does certain things (ABC etc.) for them. The promisee, for the sake of argument, has relied on the promises in all of the necessary ways for an estoppel to arise, and has performed ABC dutifully. Those things being so, the promisor, after much time has transpired, suddenly decides to change their mind and unconscionably (and perhaps even cruelly) say something like "Actually no! You're not getting my house anymore…" However, just as the promisor seeks to do so, some magical manifestation of the law swoops in and

physically bungs up their mouth so that they cannot speak and the law metaphorically retorts something like "You! Put a cork in it!" If we then imagine the promisor being all stopped up, perhaps with some ethereal hand of justice covering their mouth, and we see them going all red as they are simply unable to utter the unfair words of recantation - then we can picture what, in a roundabout way, is happening when the law estops promises from being unfairly reneged upon.

Of course, in real life the law cannot stop unfair words from being uttered, but it can stop them from being of meaningful effect.

However there is more to the doctrine than the simple exposition above might suggest, and there is more in the *Habberfield* case than a literary reference giving pause for thought.

The importance of remembering the essence of the doctrine, and how doing so helps us to arrive at what is just in difficult cases, is also evident in Lewison LJ's thoughtful Judgment.

One of the more difficult themes in proprietary estoppel cases is how the Court should weigh up the different methods of "doing equity" in a case. To that end, there has been something of a battle between the promisee's *expectations*, on the one hand, as set against something tantamount to the sum of the promisee's *detrimental reliance* on the other. In some recent cases detrimental reliance has been approximated to meaning reliance which can be assessed in some "calculable" objective/ arithmetical fashion. In addition, much, and indeed perhaps too much, has turned on whether it can be said of the relevant promisee that they have positioned their "working life" around the promise.

Quasi-Contractual Deals

Where the promisee has positioned their whole (working) life around a promise, and where the, albeit implicit, "agreement" between the parties was sufficiently clear, the Courts have tended to adopt a quasi-contractual analysis which speaks to the deal-making quality which proprietary estoppel often has: if you do X, then you will get Y.

Mr Blohm QC, also of St John's Chambers, put the crux of that analysis this way:

> "If you get what you asked for, you should give what you offered".

This simple formulation, quoted with approval by Lewison LJ, has the kind of ringing clarity which makes its truth seem obvious and which makes one wonder why no one had put it quite that way before. It speaks to the rightness of the quasi-contractual analysis where the simple "deal" could be expressed (in pure logical terms) this way:

If X then Y; X, so Y.

The simplicity of that formulation also helps us to understand why the law (at least sometimes) wishes for the promisee to get exactly what they were promised; we perceive that there is something fundamentally unfair about not getting what you deserve, especially when your "reward" has been agreed, and you have put yourself out on the basis that the promise/deal will come true.

The fact that we perceive it as fundamentally unfair for parties to renege on their bargains/quasi-bargains no doubt contributed to Lewison choosing to remind us that, as already set out above, 'Underpinning the

whole doctrine of proprietary estoppel is the idea that promises should be kept'.

To repeat: it is unfair when we don't get what we were promised, especially when we have done (some or all) of what we were told we needed to do to get our reward. But the doctrine of estoppel goes further than that, it is not contract law (which of course is the law of deals proper) but is an equitable doctrine which aims at fairness even when the words exchanged between the parties were loose, or where there were no words and there is no clear deal to be found.

The Role of Proportionality

Related to the idea of getting what you were promised is the tussle between the promisee's expectation interest and their quantifiable detrimental reliance.

The subtle relationship between the two is arguably something which the Courts have struggled to take firm control of. On one analysis the concept "proportionality" is something of a mediator between the two *prima facie* opposing rubrics, - expectation and detrimental reliance.

We see the issue raised in *Habberfield*, in which Lewison addresses the matter head on, from para 53 of the Judgment. For the avoidance of doubt the discussions on this issue tie into and intertwine with the wider topic of how to "do equity" in a case.

Lewison LJ begins the section of his Judgment which tackles this matter by noting that Hobhouse LJ first stated in *Sledmore* (approving words from an Australian case) that there ought to be proportionality:

'between the *remedy* and the *detriment*'.

Lewison goes on to say that this was altered by Aldous LJ, in *Jennings v Rice,* who approved the aforementioned comment, and then subsequently stated that, 'the most essential requirement is that there must be proportionality between the *expectation* and the *detriment*'.

Lewison then set out the now well known passage from Walker LJ's Judgement in *Jennings* in which he stated at [50]:

> "... if the claimant's expectations are ... out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way."

Walker LJ having stated immediately before the above-quoted section that in a paradigm quasi-contractual case, 'the court's natural response is to fulfil the claimant's expectations'.

Lewison LJ then followed up the above quotation by noting that Walker LJ also commented at [56] that the principle of proportionality between detriment and remedy is relevant in English law.

Lewison LJ then attempts to address the issue (which arises from the perhaps confusing reiterations of similar ideas by the COA) of whether "proportionality" is to be between the *remedy* and the detriment or between the *expectation* and detriment; in a sense Lewison is addressing the more fundamental question: what is the role of proportionality in proprietary estoppel?

He does this in part by deconstructing a passage of Arden LJ's Judgment in *Suggitt v Suggitt* in which she added the following to the conversation, referring to what Walker LJ had said in *Jennings* at [50]:

> "In my judgment, this principle does not mean that there has to be a relationship of proportionality between the level of detriment and the relief awarded. What Walker LJ holds in this paragraph is that if the expectations are extravagant or "out of all proportion to the detriment which the claimant has suffered", the court can and should recognise that the claimant's equity should be satisfied in another and generally more limited way. So the question is: was the relief that the judge granted "out of all proportion to the detriment" suffered?"

Lewison LJ seems to struggle with this paragraph and describes it as difficult to understand. However in my view Lewison LJ might have been a little dismissive of Arden's analysis, and perhaps did not properly draw out the wisdom from her comments.

Arden LJ's approach in *Suggitt* - A Good Rule of Thumb?

It appears that Lewison LJ considered that Arden LJ's analysis included mutually exclusive propositions - he comments, 'in the first sentence Arden LJ denied the relationship of proportionality between remedy and detriment; in the final sentence the question she posed herself raised exactly that relationship…' He then proceeds to favour the question posed in the last sentence (which he takes to endorse linear proportionality as assessed between detriment and remedy) and to state that 'it seems to me that the first sentence of that paragraph cannot be taken literally'.

However, I think there is scope to be a bit more generous to Arden LJ. She does not, for example, both say that there has to be and that there does not have to be a direct relationship of proportionality between remedy and detriment, which might be more straightforwardly illogical. In my view she is stating something more nuanced than that, particularly bearing in mind that she was careful to say that there does not *have* to be a relationship of proportionality between the level of detriment and the remedy.

We might reformulate what she said thus:

a. The relief awarded does not have to be *directly* proportional to the level of detriment. (Where 'proportional' is taken to mean, 'corresponding in size or amount to something else' - i.e. they don't have to be of corresponding sizes).

b. However, as Walker LJ also stated, the principal of proportionality *is relevant* in English law.

c. It is relevant because even though there does not have to be a linear relationship of proportionality between detriment and remedy (see a. above), the Court should ask itself this question: is the proposed remedy *out of all proportion* to the detriment suffered?

d. *If* (and perhaps *if and only if*) the proposed remedy (based on the expectation interest) is 'out of all proportion' to the detriment suffered, then the Court should grant the equity in a different way.

e. However, if the expectation interest is *not* out of all proportion to the detriment suffered, then the Court should grant the expectation interest as the remedy.

Arden LJ may well have been simply trying to unite Walker LJ's arguably differently angled comments at 50 and 56. In my view she successfully did so. She suggested a rubric for doing equity in estoppel cases which arguably wasn't given enough credence by Lewison LJ.

In effect, Arden LJ was suggesting that the Court should ordinarily, all things being equal, grant the expectation of the promisee, except for cases in which the expectation is wildly different (i.e. out of all proportion) to the level of detriment. And, that being so, there does not *have* to be a direct/linear relationship of proportionality between detriment and remedy at all - contrary to what Lewison appears to have concluded (though his final thoughts on the matter are a little hard to discern).

One issue which arguably arises from this approach is whether the above rule-of-thumb should be limited in its application to quasi-contractual cases. This is a difficult question owing to the fact that Walker LJ's pronouncement which in effect gave rise to it was made in relation to a quasi-contractual paradigm case. However, in my view there is no need for the above approach to be so constrained. The route to the answer comes, I think, from an old foundational case *Ramsden v Dyson* in which Lord Kingsdown spoke (at 170) of an equity being raised by a verbal agreement - "or *what amounts to the same thing*, a*n expectation, created or encouraged*". Further Denning MR stated in *Crabb v Arun District Council* (at 187) that in the proprietary estoppel context 'equity does not depend on agreement, but on words or conduct'.

It seems to me that the unfairness in proprietary estoppel cases does not flow solely from broken promises (because in some cases no words have been spoken), but from endeavour encouraged or acquiesced to which was

undertaken on the basis of expectations which were (in turn) created or encouraged (by the "promisor").

Further, and importantly, after 10, 20 or 30 years of detrimental reliance by a Claimant, whether for a few moments at the beginning of the timeline there were clear-ish words tantamount to an agreement, or simply suggestive words hinting at a payoff, or indeed no words at all, the sufferance and/or dutiful performance in either case is just as real.

Now, given that the promisee's expectations are usually based on the promises made to them, and given that what underpins the whole doctrine of proprietary estoppel is the idea that promises should be kept - we might consider that Arden LJ's rubric for analysis represents an obviously sensible way to approach the doctrine, and a great rule of thumb for attempting to "do equity" in promise based, or quasi-contractual estoppel cases.

Further, for the reasons expressed immediately above, we may similarly consider that it also provides a sound rule of thumb for all other proprietary estoppel cases, in which context we might wish to rework the foundational comments of Lewison LJ to read: underpinning the whole doctrine of proprietary estoppel is the idea that an expectation created or encouraged should be fulfilled.

However, if the aforementioned approach is the right one, it does cast some doubt over the correctness of some other recent awards made by the Courts, such as the award in the *Davies* case - where the Court engaged in an activity close to simply quantifying the promisee's detriment, and adding a little bit on.

It is true that the award can, in part, be explained by the fact that in *Davies* the promisee was not judged to have "positioned her whole life" on the operative promises. However, that dispute arose following the promisee having worked on a farm (albeit with breaks) for the best part of thirty years. That being so, the rather high-stakes question, 'did the promisee position their *whole* (working) life around the promise' could well strike us as misguided and unhelpful.

This is especially so if falling short on that surely fragile test (what is the difference between positioning your "*whole*" life around a promise and *nearly your whole life* around it...) means that the claimant falls off a cliff - going from receiving their expectation, to little more than the quantifiable detriment.

It seems to me that using Arden's formulation of how to do equity, this kind of issue is far less likely to arise.

The Academic Input in *Habberfield*

The interesting discussion starting at paragraph 64 of *Habberfield* could further help provide answers to the question of how to "do equity" in proprietary estoppel cases where, for whatever reason, there is no linear relationship between expectation and detriment. There Lewison LJ refers to two articles: The reliance basis of proprietary estoppel remedies [2008] Conv 295; and McFarlane and Sales: Promises, detriment, and liability: lessons from proprietary estoppel (2015) LQR 610.

The core of Robertson's thesis is that the goal of the remedy in proprietary estoppel is to prevent the promisee from suffering harm as a result of their reliance on promises. Robertson favours awards *in specie*, as they cannot

under-compensate the promisee. Robertson also states, as quoted in the Judgment at 65:

> "Where it is not practical to fulfil the claimant's expectations *in specie*, expectation relief in monetary form provides a reliable proxy for the claimant's reliance interest, and is the best available means of ensuring that the claimant suffers no harm as a result of his or her reliance."

McFarlane & Sales contribute the following (particularly difficult) passage quoted at 66 and 67 of *Habberfield*:

> "The relief afforded to B under the promise-detriment principle is protection in respect of B's detrimental reliance, unless and until any performance he or she rendered under a reciprocal arrangement with A of which A's promise forms part amounts to substantial performance by B of the return A wished to secure by making the promise…
>
> At that point the law will generally move to protect B's expectation interest: even if the parties' bargain is not contractually enforceable, it does provide evidence that A and B, at one point at least, regarded B's promised right as a proportionate reward for B's reliance."

To analyse the segments above, Robertson is arguing that if relief cannot be given *in specie*, expectation relief should be granted in monetary form. This, he says, ensures that the promisee suffers no harm, where (in his view) the promisee suffering harm owing to their detrimental reliance is the mischief which it is the purpose of the doctrine to avoid. This approach

seems to me to be to be exactly in line with Arden's rubric for doing justice as set out above.

McFarlane & Sales put a different spin on it. As I read it, they are suggesting that at first the promisee is protected by the promise-detriment principal and then once the performance they have rendered amounts to "substantial performance" of what the promisor asked for, the law will protect their expectation interest. This analysis, while perhaps useful for highlighting that "substantial performance", rather than total performance, should be sufficient to justify granting the expectation interest, seems to suggest that if substantial performance has not been rendered, then only the detrimental reliance is to be quantified.

However, if indeed this was the author's intention it could create a quantum leap in the award received by claimants: those who have not mustered "substantial" performance get simply their detrimental reliance; whereas those who have substantially performed go into hyper-drive and receive their full expectation. This disjunction does not seem obviously fair. What about the claimants who have nearly substantially performed, why should they fall off a cliff? What about the fact that what underpins the doctrine is the idea that promises should be kept? What about Robertson's view that the purpose of the doctrine is to protect the promisee from the harm suffered by relying on an empty promise - is this not what the doctrine, and the Court's conscience, is there for?

Added into the debate is the fact that in many cases twenty or thirty years have gone by where the promisee's life and decisions have been significantly affected by the promises; that is a very high price to pay. Further, during that time, the promisee will surely have engaged in, and continued with, their detrimental course of action with the expectation of a

reward in mind. In that way the expectation interest of the promisee can be thought of as the driving force behind the entire arrangement between the parties, it is what motivated the promisee to suffer detriment. That being so, placing particular emphasis on granting the promisee their expectation interest would seem to me to be entirely justifiable.

A related facet of the analysis of justice in this area is whether what the promisee's life would have been like had the operative promises not been made to them can be at all analysed by the Court. Or in other words, how does the Court approach the "non-financial" detriment suffered by the promisee?

The non-financial detriment was described as 'imponderable and speculative' by the Court in *Davies*. The Court was no doubt right that the counterfactual decisions, choices and actions of the promisee (the road not taken…)[1] are well-described as unknowable. The Court, the same as the promisee, will never grasp hold of what the promisee's life could have been like, had it not been shaped around the (unkept) promises.

However, we might feel inclined to describe, in nearly all cases involving continual detriment over the long passage of years, the somewhat unknowable non-financial detriment as "extremely significant" and/or "very difficult to understate".

Shortly put, in my view where someone's life has, wholly or otherwise, revolved around promises (or as we could say in some cases, has been moulded and manipulated by promises) for a long number of years, our sympathies and the sympathies of the Court should, very clearly, lie with them…

[1] Click for hyperlink

Conclusions

Drawing together the threads, Lewison LJ reminded us, pointedly, that proprietary estoppel is underpinned by the idea that promises should be kept; who could disagree with that.

This central tenet can and should inform the practical application of justice, and thus also the question of "how to do equity" in a proprietary estoppel case. Lewison LJ was drawn to, but then dismissed LJ Arden's comments in *Suggitt*. I think that by dismissing her (re)formulation something important was missed. Academic opinion focuses on either granting the promisee's expectation (Robertson), or granting it with the caveat that the promisee should have substantially performed (McFarlane & Sales). However I think that Arden's formulation - that so long as the promisee's expectation is not *out of all proportion* to their detriment, the expectation interest should be granted, provides the best way forward as a rule of thumb for doing equity. Notably, it protects the promisee, underlines that promises are to be kept, places appropriate emphasis on the promisee's expectation, and still prevents uncomfortable awards where the promisee gets far more than they deserve. In that way it also contains an element of the good sense offered by McFarlane & Sales: that there are some levels of detriment which it simply cannot be right to reward with the promisee's full expectation.

Lastly, I think that Arden's formulation sends out an interesting public policy message to society, and perhaps particularly to farming families: be careful about promising the world to people; the law may ask you to keep your promises.

This is a societal message which has a clear moral element, and, importantly, is in line with the heart of the proprietary estoppel doctrine - the idea that promises should be kept.

The Robert Frost poem quoted by Lewison LJ ends with the refrain:

"And miles to go before I sleep
And miles to go before I sleep"

Given that the Courts have been wrangling over the words, concepts and tests involved in the context of proprietary estoppel for a long period of years now, the one thing that we might all agree upon is that the doctrine still has a way to go before the various issues in it are finally put to bed.

Lewison's thoughtful and interesting Judgment can be found here: https://www.bailii.org/ew/cases/EWCA/Civ/2019/890.html.

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