PROPRIETARY ESTOPPEL

Proprietary estoppel remedies: Expectation and acceleration

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Natasha Dzameh examines the lessons from the Supreme Court's judgment in *Guest*, which looked at the pivotal question of remedies

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The components of proprietary estoppel are set out in *Thorner v Major* [2009], with further useful principles being outlined in *Davies v Davies* [2016]. When considering a proprietary estoppel claim the focus is on whether there has been:

- an assurance of sufficient clarity from A to B;
- reasonable reliance on that assurance by B; and
- detriment to B as a result of the reliance if A resiles from its promise.

Where these criteria are satisfied an equity will be raised. Despite the plethora of proprietary estoppel cases clarifying numerous aspects of the doctrine, a major difficulty has been present in respect of remedies ie when granting a remedy, does the court begin from a position of protecting the injured party's expectation or not? Should the remedy be based on detriment?

Prior to the Supreme Court's decision in *Guest v Guest* [2022], conflicting positions were indicated by several notable cases. The cases of *Suggitt v Suggitt* [2012] and the first instance decision of *Guest v Guest* [2019] pointed towards a starting position of protecting expectation. The cases of *Davies* and *Habberfield v Habberfield* [2019] suggested to the contrary. This put practitioners in a difficult situation when advising their clients on the likely remedies in proprietary estoppel claims.

Guest v Guest

Facts

Andrew Guest issued a proprietary estoppel claim against his parents. In 1981 his parents executed wills pursuant to which Andrew and his brother would inherit the farm property (Tump Farm) and business equally. Over the years comments were made which led Andrew to believe he would inherit a sufficient share of Tump Farm to operate a viable farming business, including 'one day this will all be yours'. Andrew left school in 1982 and worked for a minimum of 60 hours per week at the farm, receiving a low wage. He undertook

various activities which indicated he intended to pursue a career in farming, such as completing an agricultural apprenticeship and courses in farm management and being involved in the establishment of the Northern Milk Partnership. He moved into a cottage on Tump Farm in 1989.

In 2007 the business took over the tenancy of Dayhouse Farm and the farming operations of the two farms were integrated. In 2012 Andrew's brother entered into a partnership with his parents to run Dayhouse Farm. Andrew and his parents entered into a partnership whereby Tump Farm was split between them. The relationship between Andrew and his parents broke down in 2014 and his parents executed new wills under which Andrew had no entitlement beyond his right to occupy the cottage. In 2015 Andrew's parents offered him a farming business tenancy; when he rejected this, his parents dissolved their partnership with him. Andrew left the farm and obtained alternative employment but sought declarations, by way of a proprietary estoppel claim, that he was entitled to occupy the cottage and to the entire beneficial interest in Tump Farm and its business. In the alternative he sought capital to enable a clean break. In 2018 Andrew's father executed a will which disinherited Andrew entirely and he denied promising Andrew any inheritance.

First instance decision – High Court, Chancery Division

HHJ Russen KC determined that the components of proprietary estoppel were satisfied. Although Andrew's expectation as to inheritance shifted when provision was made for his brother in the farming business and two partnerships were created, the uncertainty as to a specific interest was not fatal. A reduction in Andrew's expectation did not mean that there was no representation or assurance.

Until 2014 Andrew's father led him to believe he would succeed to the farming business, albeit Andrew was aware it would be alongside his brother. His father hoped the farm and the business would pass to his sons, which was reflected in the 1981 will, and this had been communicated to Andrew in a sufficiently clear manner to amount to an assurance that he would inherit a sufficient stake in Tump Farm to continue farming after the death of his parents. Andrew relied to his detriment on the assurance by working on the farm for a considerable period for limited financial reward. His disagreements with his father did not reduce the injustice he suffered as a result of his father disinheriting him and the alternative employment procured was not detrimental to his claim.

HHJ Russen KC considered that the remedy was to be addressed by looking at Andrew's expectation based on the nature of the assurance made. The court was required to ensure that satisfaction of the expectation would not produce a remedy which was disproportionate to the value of the detriment he had suffered. The court needed to do justice to the parents which could involve taking into account their continuing interest in the property and the interests of others. The assurance was not quasi-contractual in nature, with the extent of the inheritance being uncertain. A clean break was required due to the breakdown of the relationship and was to be achieved by way of a lump sum payment to Andrew consisting of 50% of the market value of the dairy farming business net of tax and 40% of the value of the buildings at Tump Farm net of tax (subject to a life interest in favour of his parents in the farmhouse). This amounted to approximately £1.3m before taking into account the life interest.

Andrew's parents were granted permission to appeal in respect of the remedy and so asserted as follows:

- The judge should have asked what an objective bystander must have thought was intended by the owner and/or what Andrew's parents must be taken to have intended so as to avoid an unconscionable result, rather than basing the relief on Andrew's subjective expectation.
- The remedy went beyond what was necessary to avoid an unconscionable result or the minimum equity to do justice should this be different. The award should have been a charge on the farming business or Tump Farm for:
    - a sum representing the enhancement to the business resulting from Andrew's contribution over and above that required by his employment;
    - a sum to compensate him for the loss of opportunity to save money to purchase a house; or
    - such other sum as the court considered necessary to avoid an unconscionable outcome.
- The equity could be satisfied by the making of a declaration or grant of injunctive relief. Whether further relief should be granted and the extent of any such relief was to be considered at the date of death in light of all the circumstances.

Court of Appeal judgment

The Court of Appeal dismissed the appeal, with Floyd LJ delivering the judgment on behalf of himself, Newey LJ and Arnold LJ. The judges confirmed that the objective of the remedy was to avoid an unconscionable result. The addition of the objective bystander test in the suggested manner would add an unnecessary complication and risked skewing the assessment in a way not supported by authority. In any event an objective bystander would consider all the circumstances of the case including Andrew's expectations and his detriment rather solely the parents' perspective. Further even if this test had been adopted the judge would not have been bound to grant an award based on the increased value of the farm rather than Andrew's expectation interest given the uncertainty as to precisely what Andrew was to receive. Andrew had given up the possibility of being able to pursue a successful career elsewhere and had relied on the assurances for over 30 years. It was unconscionable to repudiate the promise or place oneself in such a position that the promise could not be performed.

The alternative remedies proposed by Andrew's parents were inadequate. Compensation representing the increase in value resulting from Andrew's contribution did not take into account the nature of the assurance and focused entirely on his parents' gain in promising something they failed to deliver. It also required a factual enquiry not undertaken at trial. Compensation based on Andrew's lost opportunity to work elsewhere was also rejected. There was a large, unquantifiable element attributable to the loss of opportunity which would often make it just to award more than a figure based on a wage differential.

Andrew had performed his part of the bargain and in such a situation it was fair to take what he had been promised as a rough representation of what he had lost. The judge was entitled to take Andrew's expectation as a strong factor in deciding how to satisfy the equity. While the expectation was that he would inherit on the deaths of his parents, there was no prospect of them continuing to work together and live in close proximity. A deferral would prolong the situation. The judge had been aware that a sale would be a consequence of the breakdown in relations and was necessary to avoid an unconscionable outcome. A farming business tenancy would nowhere near satisfy the equity. Further, the farming business tenancy offered in 2015 was for a fixed term with no guarantee of renewal.

Andrew's parents appealed, focusing their arguments on the failure of the court to adopt a detriment-based remedy and the accelerated nature of the remedy.

Supreme Court judgment

The judicial panel was comprised of Lord Briggs, Lady Arden, Lord Leggatt, Lord Stephens and Lady Rose JJSC. The split was 3:2.

Lord Briggs' judgment

Lord Briggs JSC delivered the judgment on behalf of himself, Lady Arden and Lady Rose JJSC. He asserted that the courts of equity developed an equitable estoppel-based remedy in the 1860s which aimed to prevent unconscionable repudiation of promises or assurances about property. The easiest way of preventing such unconscionability was to hold the promisor to their promise and this was the remedy, albeit it was discretionary and the circumstances could be such that enforcing the promise was unjust. Unconscionability was to be addressed either by way of preventing or remedying conduct (whether actual or threatened) which usually meant the expectations of the promisee were met. Neither protecting the promisee from detriment nor providing compensation were the aim, only the prevention of unconscionability. In more recent years, however, a view had been advanced by some that the aim of proprietary estoppel was protection from detriment or provision of compensation.

Lord Briggs JSC considered that a detriment-based approach failed to recognise that 'it is the repudiation of the promised expectation which constitutes the unconscionable wrong' and ignored the fact that in equity land is unique. Further, if the relevant harm were detriment there would no longer be a 'flexible conscience-based discretion aimed at producing justice' and the court would simply quantify the detriment and award the lesser of this or the expectation as the 'minimum equity to do justice'.

Proportionality must be considered when determining whether an expectation-based remedy would result in substantial justice between the parties but the question to be asked is simply whether the remedy is out of all proportion to the detriment – 'the remedy should not, without some good reason, be out of all proportion to the detriment, if that can readily be identified'. Where it could not be so identified Lord Briggs JSC stated the proportionality test would likely be of little, if any, use.

Further, proportionality did not involve exclusively considering finances. Where the detriment has resulted in lifelong consequences, an analysis of the valuation of detriment would 'fall upon stony ground' and so only in cases involving detriment which is 'specific and short-lived, and in particular shorter than the parties are likely to have contemplated' is such a detriment valuation analysis likely to be useful. The judge outlined the court's normal approach as follows:

- **First stage**: determine whether repudiation of a promise by a promisor is unconscionable, taking into account the detrimental reliance by the promisee.
- **Second stage (remedy stage):** there is an assumption but not a presumption that holding the promisor to the promise is the simplest method of remedying unconscionability. A promisee cannot assert that the detriment suffered is greater than the value of a fully performed promise, but they may have other reasons why something less than full performance would remedy the unconscionability.

> Where the promisor proves that specific enforcement of the promise, or an equivalent monetary award, is out of all proportion to the cost of the detriment, the court may limit the remedy. Nonetheless, in doing so it is rectifying the disproportionality, not seeking to compensate primarily for detriment.
>
> Detriment will rarely be equivalent in value to expectation and it is not, as a matter of principle, unjust for a promise to be fully enforced where its value outweighs the cost of the detriment. If the promise is not to be fully enforced, the court does not then automatically award compensation based on the value of the detriment if indeed it does so at all.

Lord Briggs JSC noted that cases involving early receipt presented additional difficulties such that there may be a discount due to the expectation being accelerated. Further, there may be a risk that a promisor of an inheritance may need to realise part of the property promised to pay for nursing care which would not normally be unconscionable and would be taken into account when determining the remedy. The need for a clean break, for example, to avoid forcing the parties to reside together may also be a reason why the court departs from specific enforcement, however:

> *… where the only objection to full enforcement is that it will be out of all proportion to the detriment then the court will… just have to do the best it can.*

Ultimately the court has to consider the provisional remedy and all the relevant circumstances, asking whether it would do justice between the parties and whether injustice would be caused to third parties. The judge described the yardstick for the justice assessment as being:

> *… whether, if the promisor was to confer that proposed remedy upon the promisee, he would be acting unconscionably. 'Minimum equity to do justice' means, in that context, a remedy which will be sufficient to enable that unconscionability question to be answered in the negative.*

As to the specific circumstances in *Guest*, Lord Briggs JSC noted there were difficulties in the case which had in prior cases prevented the promise being fully enforced ie the uncertainty as to the precise interest in Tump Farm, repudiation occurring at an indefinite time before the inheritance as promised fell due and the cohabitation issue. Nonetheless the nature and extent of the detrimental reliance suffered by Andrew was clear. His reliance had consequences for his entire life. HHJ Russen KC was said to have correctly identified that any remedy would involve a clean break. However he had not expressly considered why this required an immediate, rather than a reversionary, interest in Tump Farm to be conferred upon Andrew or why the sale should take place while Andrew's parents were alive.

In accordance with the analysis outlined, it was clearly incorrect for Andrew's parents to seek a detriment-based remedy. However, Lord Briggs JSC held that the concerns raised as to the accelerated nature of the remedy were legitimate. The award was such that Andrew

would receive more than he had been promised due to him receiving it early rather than as an inheritance. The court cannot give a claimant more than the promised expectation whether by way of the amount or accelerated receipt. Where acceleration occurs, a discount must be built in to reflect the early receipt. It was unknown why no such discount had been given by the judge at first instance and there could only be speculation as to his reasoning. In this respect the judge had exceeded his discretion and the Supreme Court was required to reconsider the position.

Andrew was entitled to 50% of the business under his partnership with his parents. 40% of the farm was an appropriate division for the parents to make good on their promise. Nonetheless this was the appropriate level once his parents had died and Andrew could have been granted a reversionary interest under a trust of the farm, with his parents having a life interest in the interim. He was not to be given further compensation for his being off the farm. Although it was an implied part of his parents' promise that he could continue to live and work there, the impossibility of performance resulted from the relationship breakdown and Andrew had secured alternative employment with accommodation provided at as good a financial rate as he was likely to achieve if he had continued to work on the farm. It was not unconscionable for him to receive no further compensation for his disappointed expectation.

Lord Briggs JSC recognised that Andrew's parents may prefer to sell the farm to secure a complete break now and the order made at first instance provided an appropriate framework for this if a discount was built in for early receipt. Ultimately it was for Andrew's parents to decide between those two forms of relief. As to the size of the discount, this would normally be dealt with by way of expert evidence about the value of a notional life interest of the parents in the whole farm, but the court did not have this. The parties had requested the court determine this, due to concern over the further costs and delay, and the judge at first instance had the notional life interest in the farmhouse executed as part of the valuation of the whole farm. That approach sufficed in the circumstances for the general acceleration discount and was to be conducted before the parents decided on the choice of remedy. If the figures could be agreed there would be no further proceedings. Should they be unable to agree, that question would be dealt with by the Chancery Division.

Lord Leggatt's judgment

Lord Leggatt JSC delivered the judgment on behalf of himself and Lord Stephens JSC. He considered that while there were many statements in the case law to the effect that the court's aim was to avoid an unconscionable result, such statements failed to provide a principled basis for identifying what an unconscionable result is or the equity that arises. Proprietary estoppel is to be governed by principle, not simply a particular judge's sense of fairness or conscience, and:

> *… [t]o give judges no clearer mandate than to do what they think just or necessary to avoid unconscionability is a recipe for inconsistent and arbitrary decision-making. That is itself a source of injustice.*

Lord Leggatt JSC considered prevention of detriment to be the aim, with this being capable of being achieved by compelling performance or awarding a sum of money putting the promisee in as good a position as they would have been, insofar as money was capable of

doing so, if the promise had been performed, ie compensating the reliance loss as he preferred to call it. Further, the court should adopt whichever method resulted in the minimum award required to achieve that aim.

He determined that a distinction was to be drawn between cases where the promise had fallen due and cases where it was conditional on an event which had not yet occurred, for example, the death of the promisor. In the latter cases the court should consider whether an offer of compensation had been made by the promisor and if it had, provided it represented a genuine and reasonable attempt to prevent the promisee suffering detriment, the court should be slow to order relief exceeding said offer. Otherwise in such cases the choice was between compensation for the reliance loss and an expectation-based remedy which would need to take into account the fact that an immediate remedy provided the property or money sooner than was promised. He asserted that the court had flexible discretion but:

> *… the aim is to award a remedy which does all that is necessary, but no more than is necessary, to prevent B from suffering detriment as a result of having relied on a promise of a gift of property which A no longer intends to make.*

Lord Leggatt JSC was inclined to allow the appeal but substitute the remedial order with an order that the parents pay Andrew £610,000 as equitable compensation. He considered the start date for detriment to be the start of 1990, after Andrew moved into Granary Cottage, and his lost earnings from then onwards to be £267,748. Compensation was added for Andrew being kept out of this sum which amounted to £342,162 and this total was rounded up to £610,000.

Conclusion for practitioners

Although not a unanimous decision as regards the reasoning for allowing the appeal and the extent of its success, the Supreme Court's judgment puts to rest for the foreseeable future the idea that proprietary estoppel remedies are aimed at providing compensation for detriment suffered or fulfilling expectations. The aim is to prevent or undo unconscionability but it will often be the case that fulfilment of the promise is the starting position for the remedy. Nonetheless the circumstances of the case may be such that a different award is made. As to proportionality the concern is simply whether the remedy is out of all proportion to the detriment and the burden in establishing this rests with the promisor. Further, it is clear that detrimental reliance includes more than simply finances and a pure financial comparison may well be inappropriate.

Practitioners should ensure that, if the triggering event has not yet occurred such that performance of the promise is not currently due, they consider what discount to apply to the remedy to take into account accelerated receipt.

This judgment alleviates some of the difficulties associated with advising on remedies in proprietary estoppel claims but, unsurprisingly, means the judiciary still retains considerable discretion. This is inevitable due to the very nature of such claims, as the factual circumstances often mean there is a multitude of relevant factors which prevents more prescriptive guidelines from being formulated.

There are two other points of note in this case. First, there were two options available to the court insofar as remedies were concerned, with the court permitting Andrew's parents to decide which remedy he would obtain. Although that may have been appropriate given the circumstances in *Guest*, albeit this is debateable, it is not difficult to envisage situations where this could result in injustice. Secondly, it is entirely possible that there will be cases involving trigger events which are such that determining the appropriate discount is a far from simple task. How these aspects are addressed by the lower courts and whether they prove problematic insofar as dispute resolution is concerned remains to be seen. Nonetheless it is apparent that while this recent judgment is helpful, it is perhaps less helpful than it may appear at first blush.

Cases Referenced

- Davies & anr v Davies [2016] EWCA Civ 463
- Guest & anr v Guest [2020] EWCA Civ 387; WTLR(w) 2021-05
- Guest & anr v Guest [2022] UKSC 27 (to be reported in a future edition of the Wills and Trusts Law Reports)
- Guest v Guest & anor [2019] EWHC 869 (Ch)
- Habberfield v Habberfield [2019] EWCA Civ 890
- Suggitt v Suggitt & anr [2012] EWCA Civ 1140; [2012] WTLR 1607 CA
- Thorner v Major & ors [2009] UKHL 18; [2009] WTLR 713 HL

Citation reference:
Natasha Dzameh, 'Proprietary estoppel remedies: Expectation and acceleration', (January/February 2023 #240) *Trusts and Estates Law & Tax Journal*, https://www.lawjournals.co.uk/2023/01/10/trusts-estates-law-and-tax-journal/proprietary-estoppel-expectation/, see footer for date accessed