

## Estoppel Claims: Unconscionable Behaviour

*Mark Pawlowski considers whether bad behaviour on the part of an estoppel claimant will deny or modify equitable relief*

Although a proprietary estoppel claim will fail unless the claimant is able to establish the three essential elements of assurance, reliance and detriment, it is evident from the Court of Appeal ruling in *Gillett v Holt* [2001] Ch 210 that these prerequisites are not “watertight compartments” and that “the quality of the relevant assurances may influence the issue of reliance, [and] that reliance and detriment are often intertwined”: see, at 225. In this connection, Robert Walker LJ also recognised (at 232) that “in the end the court must look at the matter in the round” and that, ultimately, the process involves:

“ . . . a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.”

It is apparent, therefore, that unconscionability is an overarching element operating in proprietary estoppel claims. The term has been defined judicially as meaning an objective value judgment on behaviour (*Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, at [28], per Lord Walker) and refers to the court’s broad equitable jurisdiction to either deny a remedy or modify it given all the circumstances of the case. This, in turn, suggests that the claimant’s rights in equity do not necessarily crystallise forever at the time when the equitable right comes into existence. Indeed, subsequent events occurring after the relevant assurance is made may have an important influence on how the claimant’s equity may be satisfied (if at all) at the hearing of the claim.

In *Sledmore v Dalby* (1996) 72 P & CR 196, for example, the legal owner’s present use and need for the property weighed against the claimant’s personal circumstances so as to deny the claimant relief altogether. The breakdown in the parties’ relationship may also influence the form of relief. Thus, whilst it will often be appropriate to satisfy the equity by granting the claimant the interest he (or she) was intended to have, if that is not practicable or unworkable, the court has to do the best it can even though this may mean granting a form of relief wholly different from what was envisaged when the parties were on good terms: see, for example, *Burrows & Burrows v Sharp* (1991) 23 HLR 82 and *Dodsworth v Dodsworth* (1973) 228 EG 1115. In circumstances where the parties’ relationship has broken down, a clean break may be the only solution: see, for example, *Baker v Baker and Baker* (1993) 25 HLR 408.

It is also well established that, in deciding how to satisfy any equity, the court must weigh the detriment suffered by the claimant in reliance on the legal owner’s assurances against any counter-balancing benefits enjoyed in consequence of that reliance. The net result of such a balancing process may be that the claimant is held not to have suffered any detriment at all in financial or material terms. In these circumstances, the claimant will be denied any remedy and his claim will fail notwithstanding his reliance on the assurances made. But to what extent will the claimant’s behaviour towards the legal owner influence the court in deciding whether to grant or modify equitable relief?

## **The claimant's misconduct prior to the hearing**

In a normal case, whether there is an equity and its extent will depend upon the initial conduct alleged to give rise to the equity. However, as we have seen, the court is not confined to such conduct and may take into account supervening circumstances in determining how the equity can best be satisfied. In the words of Nicholls LJ in *Voyce v Voyce* (1991) 62 P & CR 290, at 296:

“The extent to which [the legal owner] is precluded or estopped depends on all the circumstances. Regard must be had to the subject-matter of the dispute, what was said and done by the parties at the time and what has happened since.”

The point was also addressed by Cumming-Bruce LJ in the earlier case of *Williams v Staite* [1979] Ch 291, at 300-301:

“I take the view . . . that the true analysis is that, when the plaintiff comes to court to enforce his legal rights, the defendant is then entitled to submit that in equity the plaintiff should not be allowed to enforce those rights and that the defendant, raising that equity, must then bring into play all the relevant maxims of equity so that the court is entitled then on the facts to look at all the circumstances and decide what order should be made, if any, to satisfy the equity.”

It is apparent, therefore, that where impropriety is alleged against the party setting up the equity, the court must consider whether he (or she) comes with clean hands so as to be entitled to relief. In some cases, this may leave the estoppel claimant with no right at all. Thus, in *Brynowen Estates Ltd v Bourne* (1981) 131 New LJ 1212, Mrs Bourne claimed that she had been granted a licence to occupy (together with her husband) a house owned by a company for their joint lives. The company sought to terminate the licence on the grounds of her behaviour which was adversely affecting the company's caravan park nearby. Evidence was given that Mrs Bourne had sworn at and made obscene gestures at visitors to the park and had on many occasions deliberately driven her car at high speed along the roads of the park, sometimes sounding her horn continually so as to disturb the sleep of the occupiers of the caravans. The trial judge held that, on the basis that there was an implied term in the licence, Mrs Bourne had conducted herself in such a way that the company's business premises were gravely prejudiced, and they had a right to determine the licence. The Court of Appeal, agreeing with the trial judge, held that, insofar as Mrs Bourne was claiming equitable relief on the strict enforcement of the company's legal rights, she had so behaved herself as to make it right for the court to deny the equitable right (an equitable licence) which she was seeking.

Similarly, in *J Willis & Son v Willis* (1986) 1 EGLR 62, the occupiers of a flat claimed that they had a right to remain in occupation by virtue of an equitable estoppel. They claimed that on the faith of repeated statements (made on behalf of the owners) that they could live rent-free in the flat as long as they wanted to, they had spent money on the improvement and repair of the premises. The assistant recorder, at first instance, rejected this plea on the ground of misconduct by the occupiers. There was evidence that they had put forward, in support of particulars of alleged expenditure for the benefit of the premises, a letter from a third party about supposed work done which was wholly fictitious and fraudulent. The Court of Appeal held that the assistant recorder was fully justified in deciding that, in the

circumstances, no court could grant equitable relief: see also, *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873, where a prospective tenant who sought to assert an estoppel claim against a landlord was denied equitable relief as it had not come to equity with the requisite clean hands, given that it had fabricated documentary evidence so as to exaggerate its claim for expenditure incurred in improving the premises. In *Murphy v Burrows* [2004] EWHC 1900 (Ch), on the other hand, the number of hours the claimant had claimed to have worked were grossly exaggerated, although he had not been deliberately dishonest and no finding was made as to an allegation of theft, so it was held not to be appropriate to decline equitable relief on those grounds.

In *Bye v Colvin-Scott*, (unreported, 28 July 2009, Kingston-upon-Thames County Court, available on Westlaw), it was held that any claim that might have been proved by a daughter in relation to establishing proprietary estoppel in respect of her mother's home was offset by the daughter's abusive conduct towards her mother. In particular, even if sufficient detriment was established, it was negated by the daughter's conduct which had been psychologically and emotionally, and possibly financially, abusive.

### **Qualified assurances**

In *Uglove v Uglove* [2004] EWCA Civ 987, the Court of Appeal recognised that an assurance could be implicitly qualified in a way that took account of events unforeseen and not expressly catered for by the parties at the time the assurance was made. In that case, it was not unconscionable for the assurance to be withdrawn in the unforeseen events that occurred (i.e., the failure of the business partnership and the grant of a tenancy to the claimant in recompense). What *Uglove* suggests, therefore, is that it may not always be unconscionable for the legal owner to withdraw an assurance even after the detriment has occurred. It could be argued, for example, that a father's assurance to his son that he would inherit his farm business on the former's death was not unqualified - it was not "you can have the farm and business whatever happens", but "you can have the farm and business if we remain on good terms". The point here is that there would be no unconscionability in withdrawing the assurance when the basis on which it was made had altered over time. Thus, if the son's bad behaviour towards his father was the reason for the breakdown of their relationship, this would provide some justification for denying the son equitable relief.

In *Moor v Moore*, (unreported, 19 August 2016, Bristol District Registry, available on Westlaw), for example, it was suggested in argument that the son's bad behaviour justified his father's conduct in resiling from his promise to leave the farm and business to him. The court, however, concluded that the alleged bad behaviour was so trivial as to have no effect and so, therefore, the son was held entitled to receive his inheritance.

### **Assurance obtained by misrepresentation or oppression**

It has been held that no estoppel will arise if the legal owner's assurance relied on by the estoppel claimant has been procured by the latter's false representations or oppressive manipulation. In *Ildebrando de Franco v Stengold Ltd*, (unreported, 14 May, 1985, CA), the claimant argued that he was the tenant of a flat owned by the defendants. The defendants

wanted to find a company tenant for the flat, which would then license the claimant to occupy it. This was made known to the claimant, who produced a company which the defendants considered unsatisfactory as it had just recently been formed. The claimant then put forward another company and represented to the defendants that it was to be the tenant knowing that this company was only to be used by the defendants for the purpose of obtaining a reference. In reliance on this false representation, the claimant was let into possession of the flat. Subsequently, the defendants discovered that there was, in fact, no relationship between the claimant and this (second) company. Parker LJ stated:

“Insofar as any conduct of the defendants is relied on, it was conduct which was procured by the false representation of the plaintiff, and it does not therefore lie in his mouth to try and set up any form of estoppel, or agreement by conduct, when such conduct can only have been produced . . . by the misrepresentations of the plaintiff.”

Similarly, in *Murphy v Rayner* [2011] EWHC 1 (Ch), a carer could not rely on assurances made by the man she had looked after for the provision of property and investments as the assurances made by him had been made on the basis of her dishonest conduct towards him. She had falsely represented an adult family relative as her own daughter and he had made payments for her education in India. He also assisted in the purchase of property in India for the benefit of the relative. The court held that, in light of her dishonest conduct, the claimant could not reasonably rely upon any assurances given to her. Moreover, there was no unconscionability in resiling from the assurances as circumstances fundamentally changed when the true position was discovered. The claimant was also liable to repay the sums paid to her as a result of her false representations.

In *Yeo v Wilson*, (unreported, LTL 27 July 1998, Case Ref CH 1997 Y 4026), the claimant again did not succeed even though the elements of assurance and detrimental reliance were proven. In this case, equitable relief was denied because of the oppressive manipulation and bullying of an elderly owner by the claimant.

### **Misconduct subsequent to the court hearing**

It seems that, once the court has granted the estoppel claimant a remedy, it will only be in a very rare case that the award is likely to be revoked. In *Williams*, mentioned earlier, the defendants' established equitable licence to occupy a cottage for life was held not to be determined by their subsequent misconduct towards the legal owner. According to Lord Denning MR, only in an extreme case might an equitable licence be revoked. Similarly, Goff LJ concluded that excessive user or bad behaviour towards the legal owner could not bring the equity, once established by a decision binding on the legal owner, to an end or forfeit it. The appropriate remedy in such cases is an action for nuisance, trespass or an injunction restraining the improper conduct. However, where the court's remedial order is, by its nature, for a limited period only or determinable upon a condition, the court would need to consider whether, in the events which had happened, the equity had determined or it had expired or been determined by the happening of the condition: see also, *Hardwick v Johnson* [1978] 1 WLR 683.

### **Non-compliance with a condition forming the basis of the estoppel**

It is possible for the claimant's misconduct to take the form of non-compliance with an agreement which forms the basis of the estoppel. This may be illustrated by the Australian case of *Vinden v Vinden* [1982] 1 NSWLR 618, where the Supreme Court of New South Wales held that a licence, revocable at its inception, could become irrevocable as a result of the conduct of the parties. In that case, the claimant was unable to retire and continue to live in his home because he could not meet the financial obligations involved. The defendant, his son, offered to meet all those obligations, thus allowing his father to retire and keep the house. The claimant accepted the offer by retiring and allowing the defendant to make the payments. The defendant was also allowed to live in the house. The Supreme Court concluded that, whilst the defendant continued to meet the financial obligations, his licence to occupy the house was irrevocable.

The decision illustrates the principle that a party cannot enforce an estoppel equity while being himself in default of an agreement which underlays the estoppel. Thus, in *Beaton v McDivitt* (1988) 13 NSWLR 162, another Australian case, the principle in *Vinden* was applied so as to deny the claimant equitable relief who had failed to maintain a road despite his agreement to do so with the legal owner.

### **Points for the practitioner**

1. Unconscionability refers to the court's broad equitable jurisdiction to either deny a remedy or modify it given all the circumstances of the case. The claimant's rights in equity, therefore, do not necessarily crystallise forever at the time when the equitable right comes into existence. Indeed, subsequent events occurring after the relevant assurance is made may have an important influence on how the claimant's equity may be satisfied (if at all) at the hearing.
2. An estoppel claimant's misconduct towards the legal owner prior to the hearing may affect his/her entitlement to equitable relief. In other words, an estoppel claim may be barred or modified for "want of clean hands".
3. There may be no unconscionability in a legal owner withdrawing an assurance when the basis on which it was made has altered over time.
4. No estoppel will arise if the legal owner's assurance relied on by the estoppel claimant has been procured by the latter's false representations or oppressive manipulation.
5. Once the court has granted the estoppel claimant a remedy, it will only be in a very rare case that the award is likely to be revoked as a result of the claimant's misconduct. The appropriate remedy in such cases is an action for nuisance, trespass or an injunction restraining the improper conduct.

6. It is possible for the claimant's misconduct to take the form of non-compliance with an agreement which forms the basis of the estoppel.

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