Competing Equities: A Thorny Issue

Mark Pawlowski takes a critical look at the first in time rule as a means of resolving the problem of competing estoppel equities

Let us assume that X is the freehold owner of a large country house. He promises A that he will execute a will leaving the house to A when he (X) dies. In reliance on this promise, A spends an amount of his own money in building an extension onto the property. A few years later, X makes the same promise to B, who also relies on the promise by carrying out essential repairs to the house at her own expense. X dies without having made a will and so his estate passes to those who are entitled under his intestacy. Both A and B claim that they have acquired an equity on the facts relying on the doctrine of proprietary estoppel. How would the court resolve the competing equities of the parties *inter se*?

The first in time rule

It is a well-established maxim of equity that "where the equities are equal the first in time prevails". The basic rule, therefore, is that equitable interests rank in the order of creation: *Barclays Bank Ltd v Bird* [1954] Ch 274, at 280. So, if two parties have competing equitable rights in the same property, and neither has the legal estate, the right which was created first enjoys priority. The absence of notice of the earlier interest by the party who acquired the later interest is irrelevant, even if he has given value. *Macmillan Inc v Bishopsgate Investment Trust (No 3)* [1995] 1 WLR 978, at 1000. The rule has the advantage of certainty, but it also reflects the fact that A (in our scenario, above) has a better claim over the land than B. It is the element of detriment that renders it unconscionable for the legal owner to act in a manner inconsistent with his promise to A by making similar representations to B. On this reasoning, the equity will be treated as having arisen when A acts to his detriment. Alternatively, the estoppel equity crystallises as soon as X seeks to go back on his promise to A in favour of B. On either reasoning, A has the better equitable claim.

But despite its apparent simplicity, the first in time rule may have little to do with the fairness of a particular case. In our scenario, for example, why should B be necessarily denied a remedy simply because his equity came later in time? After all, the same promise has been made to both A and B and both claimants have acted in reliance on the promise and suffered detriment so as to trigger a successful estoppel claim. Would not a fairer outcome reflect the equities of both claimants?

The exception to the first in time rule

Under the exception, the question of which of two (or more) competing equities should prevail depends on the conduct of each equitable claimant in relation to the others. Where all are equally innocent, priority, as we have seen, is determined by the order at which the equities arose in time. But the position is different where the equities are not equal. In *Abigail v Lapin* [1934] AC 491, at 504, a decision of the Privy Council on appeal from the

High Court of Australia, Lord Wright opined that "apart from priority in time, the test for ascertaining which incumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim." So, returning to our scenario, if A has misrepresented the position to B and induced B to act to her detriment in the belief that there is no earlier equitable title, B will have the better equity over A. Suppose, for example, that A had been approached by B asking about X's intentions as to who should become entitled to the house after X's death and A had informed B that she could go ahead with the repairs to the property as the house would be hers. No doubt, A's behaviour would displace the usual order of priority between the parties. Indeed, in these circumstances, A can be said to be estopped, as against B, from setting up his own prior equitable title.

Although such an approach may be appropriate in relation to unregistered land, the position may not necessarily be the same in relation to registered titles. In relation to registered land, s.28 of the Land Registration Act 2002 preserves the first in time rule by providing that the priority of an interest is not affected by a later disposition even if that disposition is entered on the register, except for the priority enjoyed by registered dispositions made for valuable consideration under ss.29 and 30 of the 2002 Act. Interestingly, the Law Commission in its 2001 Report, "Land Registration for the Twenty-First Century", (Law Com No 271, 2001), at para 5.5, stated this statutory priority rule to be an "absolute one" contrasting the uncertainties of the equitable rule that an interest first in time has priority only if the equities are equal. If that is correct, then this would seem to rule out the possibility of a later equitable holder successfully arguing for a reversal of priority in circumstances where the holder of an earlier equity has been guilty of some misconduct which has prejudiced the former's claim. In the writer's view, however, it would be surprising if s.28 were to be interpreted by the courts in this way given the existing body of case law which has allowed for the determination of competing equities to be resolved by a broader examination of the conduct of both parties.

A flexible approach?

The equitable exception to the first in time rule will, clearly, not avail a later estoppel claimant in all cases. Where the equities are equal, the basic rule will prevail. What is needed, therefore, is a more flexible approach which would allow the court to acknowledge both estoppel claims (assuming these are made out on the facts) and determine the competing equities from the standpoint of the conscience of the parties and how best (if at all) to satisfy the equities. The outcome, therefore, would be dependent on doing justice between the claimants (so as to avoid an unconscionable result) and arriving at a solution which reflects the merits (or otherwise) of both claims. On this approach, in our scenario, the equities which would arise from X's promise to both A and B would generate the right of each claimant to be heard in court and, if appropriate, to have his (and her) claim enforced by an appropriate award.

Significantly, the court would not be faced with the difficult task of deciding "whose equity is better" by reference to the most meritorious claim. In the writer's view, this fails to address the point that both claims may be equally meritorious in the absence of any factors swaying the balance in favour of one or other of the parties. After all, in our scenario, the same promise has been made to both A and B and both claimants have acted in reliance on the promise and suffered detriment as a result. Apart from the timing of the equities, both appear to have an equal claim to X's property. The matter, therefore, resolves itself into determining

the appropriate response by way of remedy and not by means of determining the order of priority of the competing equities.

In terms of the appropriate remedy, therefore, since A and B have incurred expenditure in improving the property, it is likely that both would be entitled to have their equities satisfied in a manner which would compensate them for their detrimental reliance. In terms of proportionality, this would necessarily entail granting each claimant a monetary award or a charge over the property proportionate to their financial outlay. In this scenario, the award of monetary compensation would operate as a default remedy given that shared ownership or occupation of the house between A and B is unlikely to be feasible or realistic. Alternatively, the court may be minded to satisfy the equities by granting each claimant a beneficial interest in the property under a constructive trust. Another solution, given that the parties' personal circumstances may be very different, would be to order an outright transfer of the property to one of the claimants (who had a greater need for the property) and to award the other a charge over the same postponed until sale or the happening of some other event: see, for example, .*Sledmore v Dalby* [1996] 72 P & CR 196.

What the above illustrations demonstrate is that the competing equities can be satisfied without necessarily creating any conflict between the respective awards made to the parties. In particular, it may be possible to satisfy both equities by awarding a remedy to each claimant which does not involve a fulfilment of their original expectations. This can be achieved, as we have seen, by means of a monetary award, or the imposition of a constructive trust which enables both parties to acquire an equitable interest in the property reflecting their detrimental reliance. Clearly, the court would seek to avoid creating competing rights as remedies even if this meant adopting a default position as between the parties in order to fulfil the overall objective of doing justice between the parties. Indeed, such a response would reflect the current judicial trend towards proportionality and, hence, greater flexibility in determining the appropriate award in proprietary estoppel cases.

U**nconscionability**

It should not be forgotten also that the concept of "unconscionability" is now seen as a vital component (additional to proving assurance and detrimental reliance) in establishing a successful proprietary estoppel claim. As Robert Walker LJ emphasised in *Gillet v Holt* [2000] 2 All ER 289, at 301, the prevention of unconscionability "permeates all the elements of the doctrine" so that "the court must look at the matter in the round". It has been held, for example, that the estoppel claimant's misconduct towards the legal owner may affect his or her entitlement to relief: *Williams v Staite* [1979] Ch 291, at 300-301, and *J Willis & Son v Willis* (1986) 277 EG 1133. In particular, no estoppel will arise if the assurance relied on by the estoppel claimant has been procured by latter's false representations: *Idebrando de Franco v Stengold Ltd*, unreported, May 14, 1985, Court of Appeal. In the context of our scenario, therefore, this would suggest that, as between A and B, the former would be denied relief if he misrepresented the position to B and induced B to act to her detriment in the belief that there is no earlier equitable claim. The point here is that, instead of applying a narrow exception to the first in time rule, the court is able to exercise flexibility in determining how to resolve the equities in accordance with established principles governing proprietary estoppel. Most importantly, the court is able to respond to the circumstances of each case by doing what is necessary to prevent an unconscionable result. This, in turn, may warrant the

court in concluding that, despite the similar promises made to both A and B, the "first" (or "second") equity should prevail in determining the correct award.

Conclusion

The inherent problem in applying the first in time rule in our scenario is that it itself generates a potentially unfair result by automatically giving preference to one estoppel claimant over the other despite each claimant having a potentially valid and meritorious claim to have his (or her) equity determined by the court. As mentioned at the beginning of this article, why should the later claimant be necessarily denied a remedy simply because his or her equity came later in time? Given that the same promise has been made to both A and B and both claimants have acted in reliance on the promise and suffered detriment, should not justice demand an appropriate outcome which reflects the equities of both claimants?

Points for the practitioner

1. The courts have not yet had to grapple with the thorny problem of competing equities in the context of claims founded on proprietary estoppel. At first glance, the first in time rule appears to provide a simple solution by automatically favouring the earlier equity on the ground that the right which was created first enjoys priority.

2. Although the rule is mitigated, at least in relation to unregistered land, by an exception which allows for the reversal of priorities if the earlier claimant has been guilty of inequitable behaviour towards the later claimant, it is apparent that the exception is of limited application and will not assist in most cases.

3. The better approach is for the court to acknowledge the estoppel claims of *both* competing claimants as having equal status and determine how best to satisfy the respective equities by adopting a flexible approach which would allow it to consider all the circumstances (including the parties' conduct) in arriving at a just result. In addition to the mechanism of unconscionability, which now pervades all aspects of the proprietary estoppel doctrine, the availability of a range of remedies also provides the court with the ability to mould the appropriate relief to meet the needs of each individual case.

4. Indeed, the more competing equities in a given scenario, the more appropriate it becomes to apply a discretionary holistic approach, already grounded in proprietary estoppel doctrine, to determining the respective claims of the parties.

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