Proprietary Estoppel - Satisfying the Equity

Mark Pawlowski looks at the proper approach to granting relief under the doctrine of proprietary estoppel

The Supreme Court in *Guest v Guest* [2022] UKSC 27 was asked to consider two questions: (1) whether a successful claimant's expectation of inheriting a family farm was an appropriate starting point when considering a remedy; and (2) whether the remedy granted, namely, payment of a lump sum which would in effect result in the sale of the farm, went beyond what was necessary in the circumstances.

Facts

The case concerned a dairy farm in Monmouthshire which was run by the Guest family since 1938. The first appellant, David, was married to the second appellant, Josephine. The respondent, Andrew. was their eldest son. The appellants also had another son, Ross, also a farmer, and a daughter, Jan. Andrew left school in 1982, aged 16, and worked full time at the farm for 33 years having been promised by the appellants that he would inherit a substantial (but unspecified) share of the farm sufficient to enable him to continue a viable farming business after his father's death. However, from 2008, the relationship between Andrew and his parents began to deteriorate.

In 2014, David and Josephine made wills excluding any entitlement for Andrew. In 2015, they offered Andrew terms for carrying on working on the farm under a farming business tenancy. Andrew rejected those terms on grounds of affordability and left the farm in the same year. In 2017, Andrew started legal proceedings seeking a declaration of entitlement to a beneficial interest in the farm by virtue of proprietary estoppel.

HH Judge Russen QC, sitting as a judge of the High Court, ruled in Andrew's favour finding that an assurance was made to him over many years that he would inherit a substantial share of the farm which he had relied on, working hard on the farm for little financial reward: see, [2019] EWHC869 (Ch). He ordered that David and Josephine make a lump sum payment to Andrew of 50% of the market value of the farming business and 40% of the market value of the farm. The consequence of that order was that the farm would have to be sold in order to realise the lump sum payable to Andrew. David and Josephine appealed to the Court of Appeal where their appeal was dismissed: see, [2020] EWCA Civ 387.

Court of Appeal ruling

The leading judgment was given by Floyd LJ (with whom Newey and Arnold LJJ agreed). His Lordship began by setting out the key principles applicable to a claim in proprietary estoppel as summarised by Lewison LJ in *Davies v Davies* [2016] EWCA Civ 463, at [38]:

- Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part

- The ingredients necessary to raise an equity are: (1) an assurance of sufficient clarity (2) reliance by the claimant on that assurance and (3) detriment to the claimant in consequence of his reasonable reliance

- However, no claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined, and whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood

- Detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances

- There must be a sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability

- Thus, the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result

- In deciding how to satisfy any equity, the court must weigh the detriment suffered by the claimant in reliance on the defendant's assurances against any countervailing benefits he enjoyed in consequence of that reliance

- Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application. In particular, there must be a proportionality between the remedy and the detriment which is its purpose to avoid. This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way

- In deciding how to satisfy the equity, the court has to exercise a broad judgmental discretion. However the discretion is not unfettered. It must be exercised on a principled basis

In terms of how the equity should be satisfied, Floyd LJ, citing *Jennings v Rice* [2002] EWCA Civ 159, identified the court's task "as the fashioning of a remedy that is appropriate in all the circumstances of the case to satisfy the equity that has arisen, and so to avoid an unconscionable result": at [48]. Significantly, in *Jennings*, Robert Walker LJ distinguished between those cases where "both the claimant's expectations and the element of detriment will have been defined with reasonable clarity", and those where "the claimant's expectations are uncertain" or "the court … is not satisfied that the high level of the claimant's expectations is fairly derived from his deceased patron's assurances, which may have justified only a lower level of expectation": at [44]. In the former class of case the court was likely to vindicate the claimant's expectation, because there is something approaching a bargain and the claimant will have performed his side of it. In the latter class of case, the court might still take the expectation as a starting point, but no more than that. He stated, at [50]:

> " . . .there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or 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."

In *Davies*, mentioned earlier, Lewison LJ suggested also that "a useful working hypothesis" was to apply "a sliding scale by which the clearer the expectation, the greater the detriment and the longer the passage of time during which the expectation was reasonably held, the greater would be the weight that should be given to the expectation": at [41].

Interestingly, in *Guest*, three alternative remedies were proposed by David and Josephine as being adequate to avoid an unconscionable result. First, it was argued that Andrew should be compensated by a sum representing the extent to which the value of the farm had increased as a result of Andrew's contribution on the basis that this would be a fair way of compensating Andrew, given that his "real complaint" was that his efforts on the farm had not been properly appreciated or rewarded. This was rejected by Floyd LJ as it paid no regard to the nature of the assurance which Andrew was given. This was not that his efforts and dedication would be generously rewarded in the event that they bore fruit, by reference to any increase in the value of the land - rather, it was that he would inherit a sufficient interest in the farm to enable him to farm himself. Moreover, the proposed remedy focused attention entirely on what David and Josephine had gained as a result of promising something to Andrew which they did not subsequently deliver. That was more appropriate to an action in unjust enrichment as opposed to a claim in proprietary estoppel. In any event, the proposed remedy would require a factual enquiry which was not undertaken at the trial (because it had not been suggested): at [81].

For similar reasons, his Lordship rejected an approach to compensation based on Andrew's loss of opportunity to work elsewhere. In his view, the loss or detriment suffered by a

claimant who is persuaded to take a poorly remunerated position on the strength of a promise of some interest in land is not limited to the quantifiable difference in wages. There was a large, but unquantifiable, element attributable to loss of opportunity which would, in many cases, make it just to award sums far greater than any sum based on the wage differential. In a case where the claimant had largely performed his side of the bargain, it was fair to take what the claimant was promised as a rough proxy for what he had lost: at [82]. The third alternative remedy, which involved limiting the form of relief to the grant of the farm business tenancy (offered to Andrew in 2015), was also rejected as it came nowhere near to satisfying the equity, being for a fixed term with no guarantee of renewal: at [90]. According to his Lordship, therefore, the judge at first instance had been correct in fashioning a remedy giving important weight to Andrew's expectation. His Lordship stated, at [86]:

> "Whilst it was not a case where the parties had made a quasi-contractual arrangement at the outset, it was a case where, looking back from the moment when the assurance was repudiated, the overall outcome came close to the expected reciprocal performance of the acts requested in return for the assurance. The judge was, therefore, entitled to take Andrew's expectation as a strong factor in deciding how to satisfy the equity. He was not bound to abandon expectation in favour of some more limited form of remedy."

It was also suggested on behalf of the appellants that that the trial judge ought not to have accelerated Andrew's expectation, because it was only ever an expectation that he would inherit upon the deaths of David and Josephine. Any "current equity" could be satisfied by a declaration, and any "anticipatory equity" fell to be dealt with at the time of such deaths. Here again, his Lordship was not persuaded. It was apparent that this was a case where there was no prospect of the parties continuing to work and live together in close proximity. Deferral would perpetuate the situation in which Andrew was required to take up salaried employment away from the farm, for an indefinite period. Andrew had expected to take over running the farm on his father's retirement, yet did not expect to inherit anything until his parents' deaths. An immediate sale would prejudice David and Josephine in some ways, although it would release capital to fund their retirements. That was the background against which the trial judge decided to accelerate Andrew's entitlement, whilst at the same time making allowance for a life interest in the farmhouse for the parents and mitigating the tax impact of paying Andrew's entitlement now. In those circumstances, it was apparent that the trial judge had not exceeded the bounds of his discretion by devising a clean break solution in the present case. He was well aware that the need for a sale was a sad consequence of the breakdown in relations, and was part of what was, in all the circumstances, necessary to avoid an unconscionable result. The appellants appealed to the Supreme Court.

Supreme Court ruling

Interestingly, the Supreme Court allowed the appeal in part substituting alternative remedies of either putting the farm into trust in favour of the appellants' children or paying

compensation to Andrew now but with a reduction properly to reflect his earlier than anticipated receipt. The appellants were to be entitled to choose between these options.

Lord Briggs, with whom Lady Arden and Lady Roase agreed, considered that the court should start by determining whether going back on the promise was unconscionable at all in the circumstances: at [74]. If it was, the court should then proceed on the assumption that the simplest way to remedy that unconscionability was to enforce the promise to transfer the property in question, but it may have to consider alternatives such as providing a monetary equivalent, for example, if the property has been sold or if its transfer would cause injustice to others. On this point, his Lordship approved Walker LJ's analysis in *Jennings* between 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. According to Lord Briggs, at [77]:

> "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."

If, therefore, the enforcement of the promise, or monetary equivalent, would be out of all proportion to the detriment to the claimant, then the court would invariably need to limit the remedy. However, this did not mean that it should seek precisely to compensate for the detriment to the claimant. If the remedy involved acceleration of a future promised benefit, it would generally require a discount for accelerated receipt. Finally, the court should consider in the round whether a particular remedy would do justice in the circumstances, by considering whether the owner would be acting unconscionably if they were to confer the proposed benefit on the claimant: at [74]-[80].

Applying these principles, Lord Briggs rejected the appellants' argument that the trial judge was wrong to adopt an approach based on Andrew's expected inheritance. However, he concluded that the trial judge did not adequately discount the sum awarded to reflect the fact that Andrew would receive compensation earlier than he had expected to inherit an interest in the farm: at [92]-[100]. Considering the remedy afresh, his Lordship concluded that 50% of the farming business (Andrew being already entitled to 50% of the business under his partnership with his parents) and 40% of the farm once Andrew's parents had died was an appropriate division for the purpose of making good his parents' promise, which could be achieved by putting the farm into trust for their children subject to a life interest in the parents' favour; or, if a clean break was preferred, there could be a sale of the farm and a payment of compensation on the lines the trial judge ordered but with sufficient discount to reflect the early receipt: at [101]. In his Lordship's words, at [104]:

> "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."

Conclusion for practitioners

The Supreme Court has confirmed that the purpose of proprietary estoppel is to prevent or compensate for the unconscionability of a person going back on a promise upon which another person has relied to their detriment. However, the aim of the remedy in such cases is not based on compensating for the detriment suffered by the claimant. According to Lord Briggs, although the remedy should not be out of all proportion to the detriment suffered without good reason, this only serves as a useful "cross-check" for potential injustice. The correct approach is to begin by examining whether to enforce the promise provides the simplest way to remedy the unconscionability. If, however, circumstances made strict enforcement of the promise unjust, the court should consider limiting the remedy by providing a monetary equivalent.

Points for the practitioner

1. The task of the court in proprietary estoppel cases is to fashion a remedy that is appropriate in all the circumstances of the case to satisfy the equity that has arisen, and so to avoid an unconscionable result.

2. If the enforcement of the promise would be out of all proportion to the detriment suffered, the court may need to limit the remedy.

3. If the remedy involves acceleration of a future promised benefit, it will generally require a discount for the accelerated receipt.

4. Ultimately, the court should consider in the round whether a particular remedy would do justice in the circumstances.

Mark Pawlowski is a barrister and professor emeritus of property law, School of Law, University of Greenwich.