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doi:10.1017/S0008197323000119

PROPRIETARY ESTOPPEL IN THE SUPREME COURT: BANQUO'S GHOST?

THE facts of *Guest v Guest* [2022] UKSC 27, [2022] 3 W.L.R. 911 fitted a familiar pattern. For over 30 years, Andrew worked and lived on Tump Farm, owned by his parents, David and Josephine, for low wages. David promised Andrew (taking account of other familial expectations) a sufficient share of the farm to enable him to run a viable farming business on the parents' deaths. The parents made wills accordingly. But following a falling out, Andrew was removed from the wills and left Tump Farm. The judge's undisturbed conclusion ([2019] EWHC 869 (Ch)) was that Andrew had made out a proprietary estoppel claim against his still-living parents: he had relied to his detriment on David's non-contractual promises, such that it was unconscionable for David to resile from them. The case invited the Supreme Court to consider a fundamental question, effectively for the first time in living memory at the highest level: should successful estoppel claimants like Andrew generally have their expectations fulfilled, should they generally be limited to having their detriment reversed, or was the correct approach a third way? The precise answer divided the panel, which issued two lengthy judgments (lacking explicit direct engagement with each other) over 10 months after the one-day hearing.

Leading the majority, Lord Briggs (with whom Ladies Rose and Arden agreed) identified the objective of an estoppel remedy as compensating for the unconscionability caused by the defendant promisor in repudiating their representations. The preferable and simplest way of remedying that unconscionability was to assume (not *presume*) that claimants should have their expectations fulfilled. This was to be the "starting point" in "many cases", although "considerations of practicality, justice between the parties and fairness to third parties may call for a reduced or different award" (at [94]). Lord Briggs grounded his approach in previous case law, identifying satisfying expectations as the "main driver of the remedy" (at [22]). Following a detailed review, he concluded that "there is not a single English authority favouring the approach that the essential aim of the remedy was to protect the claimant's reliance interest and therefore to compensate for the detriment" (at [52]). Inter alia, he emphasised that the "minimum equity"-based approach in *Crabb v Arun District Council* [1976] Ch. 179, 198 was not about identifying expectation and detriment and then awarding whichever was cheaper for the defendant. Rather, Scarman L.J. in *Crabb* was concerned with the "minimum equity *to do justice*" (emphasis added), with "justice" meaning remedying the unconscionability in the repudiation of the

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promise. The analysis was, on Lord Briggs' account, "all about fine-tuning the fulfilment of the expectation . . ., and nothing to do with valuing and then compensating for the detriment" (at [25]). He described the apparent preference for compensating detriment in some Australian authorities as a "momentary wobble" (at [60]).

Lord Briggs also criticised a detriment-oriented approach on principle. Detriment is difficult to value: in many circumstances, awarding market wages for work undertaken plus interest would not recognise the true cost of not pursuing alternative opportunities. Focusing on detriment fails to acknowledge the repudiation of the promise as the "unconscionable wrong" (at [53]), mistakenly treating the detriment as the relevant harm instead. It replaces the "flexible conscience-based discretion aimed at producing justice" with a more "mechanical task" (at [53]).

If, however, the defendant could prove (the burden being on them at this stage) that satisfying the expectation would be out of all proportion to the detriment suffered, Lord Briggs held that the court might legitimately be constrained by the detriment. Disproportionality would affect the justice between the parties, justifying a departure from the starting point. For example, if someone with no expectation of an early death promised (without ensuring) that their carer would inherit their mansion, it would be unnecessary to award the carer the mansion if the promisor died only months later. But Lord Briggs cautioned that proportionality is "no more nor less than a useful cross-check for potential injustice" (at [72]). The dictum that "[p]roportionality lies at the heart of the doctrine . . . and permeates its every application" (*Henry v Henry* [2010] UKPC 3, at [65]) now seems overstated, despite Lord Briggs' citation of it. He expressed "some surprise" (at [42]) at the characterisation of proportionality as "the most essential requirement" in framing the remedy in *Jennings v Rice* ([2002] EWCA Civ 159, at [36]).

Simultaneously, Lord Briggs saw "real merit" (at [77]) in Lord Walker's "spectrum" ([2008] Singapore Journal of Legal Studies 229, 239) between (at one end) "bargain" cases where promise and required detriment are both well-defined and (at the other) cases where one or both are much less certain. Lord Briggs thought bargain cases were "likely to generate the strongest equitable reason" for full enforcement where the required detriment is fully performed, "regardless of a disparity in value" between expectation and detriment (at [77]). This is apparently a significant qualification of his view that expectations out of all proportion to detriment should not be fulfilled.

On Lord Briggs' analysis, to suggest that the court faced a binary choice of satisfying expectations or reversing detriment was inimical to the flexible and pragmatic nature of the doctrine. He recognised the particular difficulty in finding an appropriate remedy for cases, like the present, where a promise regarding the future (such as on the death of the promisor) is

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repudiated before the expected performance date. But the need to abandon full entitlement in such a case did not justify a move straight to compensating detriment. Rather, Lord Briggs held that the solution may be a "discount for acceleration of the expectation" (at [79]). This would reduce Andrew's award in recognition of the fact that he would be receiving (part of) his promised inheritance before either parent had died.

The judge had awarded Andrew a lump sum of around £1.3 million before tax, comprising 50 per cent of the value of the farming business (to which he was already entitled via a partnership) and 40 per cent of the value of the farm itself, each after tax, subject to a life interest in the farmhouse for the parents. The Court of Appeal upheld the award ([2020] EWCA Civ 387). The shares were modelled on David's (revoked) will. Lord Briggs held that this was a case at the end of the "spectrum" giving Andrew a prima facie entitlement to fulfilment of expectation. Via acceleration, however, the judge's award impermissibly exceeded that expectation, and imposed on the parents the unjust prospect of selling the farm. Exercising the remedial discretion afresh, Lord Briggs distinctively concluded that David and Josephine should be allowed to choose the precise remedy. They could either give Andrew a reversionary interest in the farm, subject to life interests for themselves in the whole farm (not merely the farmhouse), or they could give an appropriately discounted payment to effect a clean break. The trust terms or the discount would be determined in the Chancery Division if not agreed.

The minority were represented by Lord Leggatt, supported by Lord Stephens. For them, the focus of the estoppel remedy was preventing the claimant from suffering detriment. The correct approach was to place the least burden on the defendant promisor while still preventing the detriment. Lord Leggatt was seemingly influenced by his scepticism about proprietary estoppel as a cause of action (despite the appeal's limited scope). He opined that "what the law regards as unconscionable is not [the promisor's] failure to keep a non-binding promise", but their "failure to accept responsibility for the consequences of [the promisee's] reasonable reliance" (at [191]). He gave *Southwell v Blackburn* [2014] EWCA Civ 1347 as an example of a case where the promisee is put where they would have been if they had not relied on the promises, a valid way to address the unconscionability. In deciding between the two permissible methods, awarding expectation or reliance loss, Lord Leggatt held that "equity permits a court to do what is required, but no more . . ., to prevent detriment" to the relying promisee (at [197]). He was comfortable with an expectation-based award in a case like *Thorner v Major* ([2009] UKHL 18, noted [2009] C.L.J. 518) where the promise has fallen due for performance, the reliance loss is difficult to quantify, and the promise's value is not clearly disproportionate to the reliance

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loss. But on the facts of *Guest*, enforcing the promise was not an option and the remedy should be an estimate of Andrew's reliance loss. Lord Leggatt made such an estimate in a detailed appendix and would have substituted a monetary award of £610,000.

Lord Briggs's judgment, which must realistically now represent the law, preserves equity's remedial generosity in the face of the requirements of a valid contract and the formality requirements for the disposition of estates and/or interests in land. The majority perhaps hoped that their "starting point", albeit controversial, would reduce the flow of estoppel litigation to which the minority referred. With respect, however, such are the qualifications associated with the starting point that this hope might be forlorn. In any event, *Guest* will not reduce the sheer impact of proprietary estoppel on properly advised protagonists.

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https://doi.org/10.1017/S0008197323000119 Published online by Cambridge University Press