

“Promises, Promises”: Must they be kept?

Proprietary Estoppel in the context of Estate Litigation

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INTRODUCTION

1. The law with respect to proprietary estoppel in Canada has recently been clarified and confirmed by the Supreme Court of Canada. In *Cowper-Smith v Morgan* 2017 SCC 61 a family dispute over promises made with respect to an inheritance were resolved with reference to the equitable remedy of proprietary estoppel. In this case, a sister promised a brother that if he moved back to Canada from England in order to care for an aging parent, the sister would allow the brother to purchase her share of the family home on the death of their mother. However, the sister resiled from this promise, and argued successfully in the BC Court of Appeal that because she did not own the property at the time that she made that promise, proprietary estoppel could not arise.
2. The Chief Justice, writing for the majority, held otherwise and enforced the sister’s promise to sell to her sibling her share in the family home on the death of their mother, beginning her judgment with a description of the purpose of equitable remedies generally: “Equity enforces promises that the law does not.” In another victory the son was allowed to purchase the house at the price it was at when the mother died, a much lower value than the price at the time of the resolution of the lawsuit in the Supreme Court of Canada 11 years later.
3. She framed the equitable remedy of proprietary estoppel in the following terms at para. 15:

15 An equity arises when

(1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property;

(2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and

(3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word:

[citations omitted]....the representation may be express or implied....[w]hen the party responsible for the representation or assurance possesses an interest in the property sufficient to fulfill the claimant's expectation, proprietary estoppel may give effect to the equity by making the representation or assurance binding.”

4. I note that the remedy presumed by Madam Justice McLachlin is the specific performance of the promise.

THE BRITISH CASES

5. Madam Justice McLaughlin relied upon a few English cases, decided within the last few decades, that have clarified the necessary ingredients for a remedy of proprietary estoppel.

Gillett v Holt & Anor. [2000] EWCA Civ. 66 (Tab 3)

6. In this case, a young man at the age of 12 befriended an older farmer, who had no children or nieces or nephews. They formed a strong bond which lasted for 40 years. The plaintiff, Mr. Gillett, was encouraged by Mr. Holt to leave school and work for him full time in 1955 when he was 15 years of age. In 1964 Mr. Gillett married and there was some friction in accepting this change. There was evidence of an estate plan leaving a farm to Mr. Gillett and his wife, and evidence of comments made to him promising him the farm. However Mr. Holt in 1992 decided that he did not, after all, wish to leave Mr. Gillett anything at all. Mr. Holt became close friends with a young solicitor and sought to make his new friend his residuary beneficiary. Accusations of embezzlement were lobbed at Mr. Gillett, who was investigated by the police, but no charges were laid, and no evidence was ever produced to substantiate the charges
7. Against this background, the English Court of Appeal overturned the lower court's finding that Mr. Gillett's case in proprietary estoppel could not succeed with the following reasoning:
 - There was no positive evidence to prove misconduct on the part of Mr. Gillett and the court viewed it as a situation of Mr. Holt looking for reasons to justify his change in plans (page 9/21);
 - "the whole point of estoppel claims is that they concern promises which, since they are unsupported by consideration, are initially revocable. What later makes them binding, and therefore irrevocable, is the promisee's detrimental reliance on them. Once that occurs, there is simply no question of the promisor changing his mind..." (12/21 citing [1998] Restitution Law Review 220 W J Swadling).
 - "it is the other party's detrimental reliance on the promise which makes it irrevocable..." (14/21)
 - The analysis of whether Mr. Gillett was substantially underpaid is beside the point;
 - "The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment

need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial..." (16/21);

- "the issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded..." (16/21)

8. The court then provided an example that can be used to illustrate the concept of detrimental reliance:

"...If ... a man is encouraged to build a bungalow on his father's land and does so, the question of detriment is, so long as no dispute arises, equivocal. Viewed from one angle (which ignores the assurance implicit in the encouragement) the son suffers the detriment of spending his own money in improving the land which he does not own. But viewed from another angle (which takes account of the assurance) he is getting the benefit of a free building plot. If and when the father (or his personal representative) decides to go back on the assurance and assert an adverse claim then ... if the assertion is allowed, his own original change of position will operate as a detriment...."

[Emphasis added] (17/21)

9. Mr. Gillett quite simply did not seek employment elsewhere, worked to improve Mr. Holt's land, and took no steps to secure his future wealth, because of the trust that the promises would be fulfilled. This meant it was tricky to introduce evidence of what his financial position would be if he had not relied upon Mr. Holt's promises.
10. The court dealt with the question, what would have happened, had the promisee been told flat out by the promisor, I might change my mind in the future?

"It is entirely a matter of conjecture what the future might have held for the Gilletts if in 1975 Mr. Holt had (instead of what he actually said) told the Gilletts frankly that his present intention was to make a will in their favour, but that he was not bound by that and that they should not count their chickens before they were hatched. Had they decided to move on, they might have done no better. They might...have found themselves working for a less generous employer. The fact is that they relied on Mr. Holt's assurance, because they thought he was a man of his word, and so they deprived themselves of the opportunity of trying to better themselves in other ways...Although the [trial] judge's view was that detriment was not established, I find myself driven to the conclusion that it was amply established. I think that the judge must have taken too narrowly financial a view of the requirement for detriment, as his reference to "the balance of advantage and disadvantage" ([1998] 3 All ER at p 936) suggests. Mr. Gillett and his wife devoted the best years of their lives to working for Mr. Holt and his company, showing loyalty and devotion to his business interests, his social life and his personal wishes, on the strength of clear and repeated assurances of testamentary benefits.... Then in 1995 they had the bitter humiliation of summary

dismissal and a police investigation of alleged dishonesty which the defendants called no evidence to justify at trial....I would find it startling if the law did not give a remedy in such circumstances.”(18/21).

11. In the result Mr. Gillett was given freehold ownership of the farm that was promised to him and significant cash to allow him to establish and run the farm.

Thorner v Major [2009] UKHL 18

12. Unlike *Gillet*, *Thorner* does not involve a would be benefactor who changes his mind, but rather a deceased who seems to have accidentally died intestate. His next of kin was not the second cousin who had spent decades working with him on his farm, and to whom the farm was promised. Therefore the cousin brought a claim in proprietary estoppel against the next of kin.
13. The representations, or assurances, in this case were extremely oblique. At one point he handed his second cousin, the Plaintiff, a few documents, and stated “this is for my death duties” or words to that effect.
14. These were the only words used to convey the promise that the second cousin would inherit the farm.
15. In *Thorner*, Lord Rodger of Earlsferry found as follows:
 - “The contention for the respondents was that, even though David had correctly interpreted Peter’s remarks as assurances about inheriting the farm, his remarks were not “clear and unequivocal.” There was no way of saying that they were intended to be relied on and they could accordingly not give rise to an estoppel. I would reject that contention. (page 11 para 25)
 - Even though clear and unequivocal statements played little or no part in communications between the two men, they were well able to understand one another. So, however clear and unequivocal his intention to assure David that he was to have the farm after his death, Peter was always likely to express it in oblique language. Against that background...I would hold that it is sufficient if what Peter said was “clear enough.” To whom? Perhaps not to an outsider. What matters, however, is that what Peter said should have been clear enough for David, whom he was addressing and who had years of experience in interpreting what he said and did, to form a reasonable view that Peter was giving him an assurance that he was to inherit the farm and that he could rely on it. (para. 26).
 - The actual promise made to David in that case involved Peter handing him two assurance policies on his life and stating “That’s for my death duties”. The court found that this expression was correctly understood by David as meaning that he would be Peter’s successor to the farm.
 - Ultimately the court found that “to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context. I respectfully concur in the way

Hoffmann LJ put it in *Walton v Walton* (in which the mother's "stock phrase" to her son, who had worked for low wages on her farm since he left school at fifteen, was "You can't have more money and a farm one day."). Hoffmann LJ stated at para. 16

"The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made." (para 56 of *Thorner*)

"...[equitable estoppel] does not look forward into the future and guess what might happen. It looks backward from the moment when the promise falls to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept." (para. 57 of *Thorner*, citing Lord Hoffmann in *Walton*).

What is reasonable reliance?

16. In *Thorner*, the House of Lords describes it as "unsurprising" that the younger man would expect to inherit the farm, given his many years of unpaid work and his understanding of his cousin's remarks to that effect. The Plaintiff in *Thorner* was often paid the equivalent of pocket money.
17. Further, the House of Lords suggested in that case that it can be difficult, when reviewing a relationship that goes back decades, to pinpoint the exact moment when the promise became unequivocal. As with *Thorner*, in this case "there was a close and ongoing daily relationship between the parties. Past events provide context and background for the interpretation of subsequent events and subsequent events throw retrospective light upon the meaning of past events. The owl of Minerva spreads its wings only with the falling of dusk." In other words, the court can and should look at the whole context of the relationship when deciding whether it was reasonable for a claimant to rely upon a promise.

Was there a detriment to the Claimants as a result of their reliance?

18. The detriment suffered by Mr. Gillett essentially amounts to a quantification of the value of the road not taken; how can anyone know with any certainty what Howard's fortunes would have been had he not been encouraged to stay home and work on the family farm?
19. Sometimes this is not the case; you may have a fact patten wherein it is quite simple to quantify the path not taken. If so, in order to use the remedy of proprietary estoppel, you should look closely at whether the value of the path not taken (the "detrimental reliance") is proportionate to the value of the promise. See further below.

Remedy for Proprietary Estoppel

20. As already mentioned, in the British Columbia Court of Appeal case of *Wolff v Canada (Attorney General)* 2017 BCCA 30, the court held that the reasonable expectations of the claimants should provide the starting point for fashioning a remedy:

29. Similarly, it is clear that this court's discussion of reasonable expectation in *Idle-O Apartments* was in the context of the appropriate remedy once the extent of the equity is determined:

[75] That said, there is no doubt that the claimant's reasonable expectations will usually be a very important factor, and perhaps the primary factor, in the fashioning of a remedy for proprietary estoppel...

21. In the previous British Columbia Court of Appeal case on proprietary estoppel, *Sabey v Rommel*, 2014 BCCA 360 the difficulty with imposing a remedy in proprietary estoppel was that the detriment suffered by the claimant was somewhat sketchy. The claimant had not given up career opportunities to work on the farm, rather, he had pursued a career in accounting. Accordingly, while the BCCA sent it back for a determination of the value of his two and a half years of underpaid labour, to which he was entitled as an unjust enrichment, they did not grant the remedy of the transfer of the farm to him.

22. In *Sabey* the Court of Appeal described the 30 years spent by the claimant in *Thorner* as being detrimental reliance that was so clear that it was not an issue on appeal, and similarly described the 38 years spent by Mr. Gillett on Mr. Holts land as clearly establishing detrimental reliance.

23. There is another English case which helps to illustrate the importance of the extent of the detrimental reliance at the remedy stage of the analysis. In *Jennings v Rice* [2002] EWCA Civ 159 a man was asked by an older woman for a great deal of help, including finally sleeping in her house each night so she did not have to go into a nursing home.

24. The court found that he was entitled to a remedy, but that the extent of his detrimental reliance was important, and a promise that was made out of all proportion to the reliance would not be enforced:

- “It is no coincidence that these statements of principle refer to satisfying the equity (rather than satisfying, or vindicating, the claimant's expectations). The equity arises not from the claimant's expectations alone, but from the combination of expectations, detrimental reliance, and the unconscionableness of allowing the benefactor (or the deceased benefactor's estate) to go back on the assurances. There is a faint parallel with the old equitable doctrine of part performance, of which Lord Selbourne said...

“In a suit founded on such part performance, the defendant is really ‘charged’ upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself...”

- So with proprietary estoppel the defendant is charged with satisfying the equity which has arisen from the whole sequence of events...

50. To recapitulate: 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 fulfill 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.

25. To illustrate the occasions when an assurance should not be used to fashion a remedy, the court in *Jennings* asked, what if the elderly lady had promised the fellow her house, but then died one month later? The detrimental reliance would be insignificant. That is why the extent of the detrimental reliance must play into the remedy stage of the analysis. It is also why the claimant in *Sabey* wasn't given the farm: his two and a half years of underpaid labour just wasn't enough to justify an award of a farm worth over one million dollars.

CONCLUSION ON REMEDY

26. In *Gillett*, the court commented on the fact that ordinarily one is not bound to any promises that one makes with regard to one's testamentary intentions. However, that is not always the case:

In the generality of cases that is no doubt correct, and it is notorious that some elderly persons of means derive enjoyment from the possession of testamentary power, and from dropping hints as to their intentions, without any question of an estoppel arising. But in this case, Mr. Holt's assurances were repeated over along period ... and some of them...were completely unambiguous. ...to my mind [the attempt to pin down the benefactor] is highly significant...I find it wholly understandable that Mr. and Mrs. Gillett, then ten years married and with two young sons, may have been worried about their home and their future depending on no more than oral assurances, however emphatic, from Mr. Holt. The bitterly fought and ruinously expensive litigation which has ensued shows how right they were to be worried. But Mr. Gillett, after discussing the matter with his wife and his parents, decided to rely on Mr. Holt's assurances because "Ken was a man of his word." Plainly the assurances given on this occasion were intended to be relied on and were in fact relied on. In any event reliance would be presumed....(13/21)...

27. Note that in both Sabey and in Jennings, the courts decided that a promise had been made; that the promise had been relied on; that a remedy should be given, BUT crucially that the value of the promise was disproportionate to the detrimental reliance suffered by the claimant. The claimant in both cases got something. What they got, however, bore more relationship to the value of the detrimental reliance, rather than the value of the promise.