



## Betting the farm — Remedial roulette in proprietary estoppel: *Guest v Guest* [2022] UKSC 27

*Michael J R Crawford\**

The dispute in *Guest v Guest*<sup>1</sup> will be depressingly familiar to anyone with a passing familiarity with proprietary estoppel. David, the patriarch of a farming family, promised to leave the better portion of the farm to his eldest son, Andrew, who would, it was envisaged, ultimately leave it to his children. In reliance on this promise first made to him as a teenager, Andrew dedicated the better part of his life to working on the family farm, receiving meagre wages and foregoing the opportunity to strike out on his own. Decades later, David and Andrew fell out. David excised Andrew from his will, dashing his expectations of inheritance. Because David's promise was never committed to writing and, even if it had been, was too uncertain to constitute a contractual offer,<sup>2</sup> Andrew's only hope of redress lay in proprietary estoppel.

Andrew succeeded at trial. The judge ordered that the farm and its related business be sold and awarded Andrew expectation damages calculated as a proportion of each.<sup>3</sup> This order was upheld by the Court of Appeal. David appealed to the Supreme Court of the United Kingdom on the ground that the award far exceeded the 'minimum equity' required to do justice to Andrew. Resolution of the appeal thus required the Court to tackle the most vexed question in the law of estoppel: whether the 'equity' that arises from detrimental reliance on a non-contractual or otherwise unenforceable promise requires an order that holds the promisor to his promise, or merely reverses the claimant's detriment.

The basic argument in favour of the reliance approach concerns the monopoly of contract over the enforceability of promises. If, as Lord Briggs suggested,<sup>4</sup> the law only enforces promises that amount to contractual warranties,<sup>5</sup> a court cannot order specific performance or award expectation damages in response to the breach of a non-contractual or otherwise unenforceable promise. Although there are numerous examples of courts enforcing a claimant's expectation in estoppel cases, these can be explained as pragmatic concessions to the difficulty of quantifying the claimant's true reliance loss.<sup>6</sup>

Despite this, Lord Briggs, with whom Lady Arden and Lady Rose agreed, held that the English law of proprietary estoppel never disclosed a preference

---

\* School of Law, University of Sydney. Email: michael.j.crawford@sydney.edu.au.

1 [2022] UKSC 27.

2 *ibid* [177] (Lord Leggatt).

3 *ibid* [88] (Lord Leggatt).

4 *ibid* [4].

5 To this should be added promises under seal.

6 See Andrew Robertson, 'The Reliance Basis for Proprietary Estoppel Remedies' [2008] *Conveyancer* 295.

for the reliance measure. To the contrary, it has sought to remedy the ‘unconscionability’ caused by the repudiation of a non-contractual promise by enforcing the recipient’s expectation.<sup>7</sup> According to his Lordship, the error in the detriment-based approach lies in its failure to distinguish the defendant’s wrong from the claimant’s harm.<sup>8</sup> Whilst the claimant’s detrimental reliance makes it unconscionable for the defendant to resile from his promise, the relevant harm is not the reliance, which antedates the promisor’s repudiation, but the defendant’s ‘non-fulfillment of the promise thereafter’.<sup>9</sup> According to Lord Briggs, the detriment-based approach, sets ‘the traditional English approach ... completely on its head’.<sup>10</sup>

This does not invariably require a court to specifically enforce the relevant promise or order the promisor to pay its money equivalent as damages. A court always retains a discretion to order some lesser remedy where satisfaction of the claimant’s expectation is out of all proportion to the detriment that she has suffered.<sup>11</sup> Lord Briggs gave the example of someone who secures a commitment by her carer to nurse her at low wages for the remainder of her life on the assurance that the carer will inherit her mansion. If the promisor dies three months later, not having altered her will, ‘some compensation less than the mansion would be sufficient to remedy any unconscionability’.<sup>12</sup> Lest this be viewed as an invitation to reopen the detriment enquiry, Lord Briggs emphasised that the ‘concept of proportionality’ is ‘no more and no less than a useful cross-check for potential injustice’,<sup>13</sup> and will only apply where the detriment can be accurately quantified.<sup>14</sup>

What made *Guest* remedially difficult was not a gross disproportion between the reliance and expectation measures, but the problem of ‘futuraity’. David’s promise was that Andrew would inherit some viable portion of the farm as a testamentary gift. Unlike cases in which the promisor has died and the claim is made against the executor of his estate,<sup>15</sup> David was alive and continuing to farm at the time Andrew commenced proceedings. Although it created a ‘clean break’ between the parties, the trial judge’s order that the farm be sold was thus to hold David to a promise he never made, giving Andrew more than his expectation and causing ‘unjust hardship’<sup>16</sup> to David and his dependents.

Lord Briggs solution was to propose two alternative remedies. The first was to place the farm on trust and grant David a life interest and Andrew an interest in remainder, thus better reflecting the substance of the promise made by father to son. The second was an early, and tax-inefficient, sale of the farm. To prevent Andrew from receiving more than his expectation, his share of the proceeds of any sale must be discounted to reflect the premature receipt of his

---

7 *Guest* (n 1) [52].

8 *ibid* [10]–[11], [70].

9 *ibid* [70].

10 *ibid* [53].

11 *ibid* [10], [72].

12 *ibid* [10]. See also the examples at [76].

13 *ibid* [72].

14 *ibid*.

15 See, for instance, *Thorner v Major* [2009] UKHL 18.

16 *Guest* (n 1) [78].

interest. To be spared ‘the injustice of having to sell up and leave early’,<sup>17</sup> David and his wife were entitled to choose between the two remedies.

Whereas Lord Briggs firmly rejected the proposition that the detriment theory ‘forms any part of the law of England’,<sup>18</sup> the minority judgment of Lord Leggatt, with whom Lord Stephens agreed, was more circumspect about the appropriate remedy in what he called ‘property expectation claims’.<sup>19</sup> Lord Leggatt stressed that detrimental reliance cannot be an independent ground for enforcing promises that do not amount to binding contracts or to agreements that fail to satisfy the formality requirements mandated by Parliament.<sup>20</sup> His Lordship remarked that a ‘property expectation claim is not a form of contract lite’.<sup>21</sup>

On Lord Leggatt’s view, the ‘basal principle’ animating proprietary estoppel is not the enforcement of legally unenforceable promises, but avoiding the detriment that the claimant will suffer if the promise, upon which he or she reasonably relied, is not kept.<sup>22</sup> This can be achieved either by satisfying the claimant’s expectation, whether through specific relief or equitable compensation, or by awarding her reliance damages.<sup>23</sup> The difficult question is which is to be preferred. According to Lord Leggatt, ‘[w]here there is more than one means of avoiding detriment to the claimant, the court should in principle adopt whichever remedial approach imposes the least burden on the defendant’.<sup>24</sup> Courts need not, however, confine themselves to the reliance measure in all cases. Consistently with the pragmatic exception noted above, a court may satisfy a claimant’s expectation where her reliance loss is too difficult to quantify.<sup>25</sup>

Like Lord Briggs, Lord Leggatt was much exercised by the issue of Andrew’s ‘accelerated benefit’. On his Lordship’s view, the trial judge erred by failing to sufficiently discount the award to reflect the benefit to Andrew, and the burden to David and his dependents, of prematurely receiving the monetary equivalent of his promised portion of the farm.<sup>26</sup> Lord Leggatt concluded that the only way of preventing the detriment to Andrew was an award of equitable compensation, ‘calculated to put Andrew, so far as money can do it, in as good a position as if he had not built his career on those promises’.<sup>27</sup> His Lordship quantified Andrew’s reliance loss at £610,000,<sup>28</sup> a sum which, though smaller than the value of his promised share of the farm, would certainly require David to sell the farm.

Lord Briggs’ majority judgment marks an important point of convergence between English and Australian law. Although the High Court’s decision in

---

17 *ibid* [104].

18 *ibid* [71].

19 *ibid* [155].

20 *ibid* [178].

21 *ibid* [183].

22 *ibid* [189]–[190].

23 *ibid* [191]–[195], [256].

24 *ibid* [197]. See also [256].

25 *ibid* [200]–[202].

26 *ibid* [268].

27 *ibid* [277].

28 *ibid* [282].

*Commonwealth v Verwayen*<sup>29</sup> is generally regarded as a paragon of the ‘minimum equity’ approach, the Court has since made clear that, all else being equal, a court will satisfy the claimant’s equity by holding the defendant to his non-contractual promise.<sup>30</sup> As Lord Briggs noted of the decision in *Sidhu v Van Dyke*, ‘[t]hus did the seed of a detriment-based aim of the remedy in proprietary estoppel, sown in *Verwayen*, fall on hard Australian ground and wither away’.<sup>31</sup>

As a matter of principle, there seems little to choose between the approach of Lords Briggs and Leggatt. If the claimant’s detrimental reliance makes it unconscionable for the promisor to resile from his representation, then the obvious remedy is to ‘estop’ him from doing so. Granting the claimant some version of an expectation remedy is particularly compelling in those cases in which the claimant’s detrimental reliance is the *quid pro quo* for the defendant’s promise, and the only thing preventing the bargain from being a binding contract is a want of certainty or a failure to comply with formalities where the promise concerns an interest in land. On the other hand, enforcing the promisee’s expectation appears to violate the basic principle, unchallenged in *Guest*, that ‘a promise is not enforceable unless it is made as part of a contract’.<sup>32</sup> As Lord Briggs conceded, the triumph of the expectation theory is as much a matter of precedent as principle. The detriment theory is perfectly respectable, it is simply that, ‘the cases show that equity did not take that course, and there is no good reason for doing so now’.<sup>33</sup>

Unfortunately, the dispute in *Guest* is not unusual amongst farming families. As Martin Dixon has shown,<sup>34</sup> and Lord Leggatt noted,<sup>35</sup> a very large percentage of proprietary estoppel cases concern disputes over family farms. Whilst remedial certainty is desirable, the law’s ultimate objective should be prevention rather than (imperfect) cure. This requires that families such as the *Guests* be encouraged or ‘nudged’ into formalising their succession plans. Whilst, as Lord Leggatt noted,<sup>36</sup> this can be a source of offence or embarrassment, the awkwardness of asking one’s father to sign a contract or settle a trust is trivial when compared to the acrimony and waste caused by a protracted dispute over a promise that, though sincerely given, is not legally binding.

It is unlikely that the law’s remedial approach to non-contractual promises will encourage the patriarch of a farming family to visit his local solicitor.<sup>37</sup> Even if the law took the drastic step of denying claimants any remedy,

---

29 (1990) 170 CLR 394.

30 See, for instance, *Sidhu v Van Dyke* (2014) 251 CLR 505, 530 [85] (the Court).

31 *Guest* (n 1) [60].

32 *ibid* [4] (Lord Briggs).

33 *ibid* [71].

34 See Martin Dixon, ‘Proprietary Estoppel: The Law of Farms and Families’ [2019] *Conveyancer* 89, 90.

35 *Guest* (n 1) [172].

36 *ibid* [187].

37 One possible argument is that creating a presumption in favour of enforcing the promise will generate certainty and thus encourage settlement. However, as Lord Briggs notes, the primary bar to settlement is not remedial uncertainty but animosity between the family members: *ibid* [82]. This is, of course, another argument in favour of prophylaxis as the goal.

informal intra-family arrangements will continue because people regard the natural bonds of loyalty between family members as sufficient guarantees of performance. The solution must instead lie in using public information campaigns and other forms of social pressure to change local mores and normalise formal estate planning. Just as it is accepted that executing wills, powers of attorney and advanced care directives are painful but inevitable obligations of adulthood,<sup>38</sup> families such as the Guests must come to accept that responsible succession planning requires more than uttering the words, ‘One day my son, all this will be yours.’<sup>39</sup>

---

38 Every year, Michael Heller devotes one class of his JD Property course to ‘How to Be a Grownup’, in which he exhorts his students to create just such an ‘estate plan’: Michael Heller and James Salzman, *Mine!: How the Hidden Rules of Ownership Control Our Lives* (Doubleday 2021) 228–29.

39 *Guest* (n 1) [1] (Lord Briggs).