An Easement by Estoppel

Joyce v Epsom and Ewell Borough Council [2012] EWCA Civ 1398

Professor John Mee

In many proprietary estoppel cases, the claimant expects to inherit or otherwise become the owner of some of the defendant's land. Less commonly, however, the interest that the claimant is led to expect may take the form of an easement, as in the well-known case of *Crabb v Arun District Council*.[1] In such a case, the successful claimant may become entitled to the easement he expected to acquire, although in principle other forms of remedy are possible, including a monetary remedy to compensate for expenditure undertaken on the strength of the relevant representation. The decision of the Court of Appeal in *Joyce v Epsom and Ewell Borough Council*[2] raises a number of issues in relation to the application of proprietary estoppel principles in this kind of case. The decision has some echoes of *Crabb*, with the claimant becoming entitled to the grant of an easement, without payment in return, from the defendant Council. A complicating factor in cases of this kind is that members of the public may have higher expectations when dealing with a public body such as a Council and, at some level, this may encourage the courts to look more favourably on the claimant's position.[3] However, the claimant's success in *Joyce* was only a qualified one, since he did not obtain the unrestricted right of way he sought but one that was limited to the needs of the existing house on the site. Interestingly, the claimant was a successor in title of the person whom the Council had led to act to his detriment, although the issues raised by this did not need to be considered in detail by the court.

The Facts and the Decision

The relevant dispute arose in the context of the development of a supermarket complex by Sainsbury's in Epsom. A local resident, Geoffrey Holborn, objected to

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[1] [1976] Ch 179.

[2] [2012] EWCA Civ 1398.

[3] Note Lawton LJ's disapproval of the "high-handed and discourteous" behaviour of the defendant in *Crabb v Arun District Council* [1976] Ch 179, 191 (see also *ibid*, 189 *per* Lord Denning MR) and note also Davis LJ's reference in *Joyce* to a "good council": [2012] EWCA Civ 1398, [46].

the development, expressing concerns about its impact on the traffic on the road on which his house stood. He suggested that the Council build a service road behind his house, which would allow him an alternative means of access to his house. The Council was supportive of the development and provided the service road that Mr Holborn had sought. He was allowed to take a small extra strip of land and, at Sainsbury's expense, gates were installed to allow him to access the service road. He then "constructed a paved or hard-core driveway from his new gate at the rear of 111 East Street to a pre-fabricated garage which he had moved to stand" in the appropriate place.[4] This took place around 1993. After this, Mr Holborn made use of the rear access via the gates. No formal easement was ever sought by him nor granted by the Council.

Mr Holborn subsequently sold the property and, in 2000, the purchasers in turn sold on to the claimant, Martin Joyce. Mr Joyce was a property developer, with ambitions to develop the property, possibly as a block of flats. He corresponded with the Council in relation to the question of access. He considered that, as Mr Holborn's successor in title, he was entitled to an unrestricted right of way over the service road. However, the Council indicated in 2010 that it was only willing to grant him a right limited to the needs of the current house, in return for a payment of £5,000.[5] Unfortunately, "[p]ragmatic compromise … eluded the parties".[6] Mr Joyce brought an action based on proprietary estoppel and was unsuccessful before HHJ Reid QC in the County Court. In the Court of Appeal, it was held that Mr Joyce was entitled to the grant of a right of way, without payment, but that this would be limited to serving a single house on the property. Davis LJ gave the only judgment, with Treacy LJ and Dyson MR concurring.

The issues raised by the judgment include whether it was crucial that the defendant have been aware of the claimant's detrimental reliance; whether there had been an unconscionable denial by the defendant of the claimant's entitlement; the significance of the fact that the claimant was a successor in title of the person who had been led to act to his detriment by the Council; the question of the appropriate remedy for the claimant; and, finally, the impact of

[4] [2012] EWCA Civ 1398, [21].
[5] [2012] EWCA Civ 1398, [23].
[6] [2012] EWCA Civ 1398, [1].

countervailing benefits enjoyed by the claimant. These issues will now be considered in turn.

Awareness of Detrimental Reliance

There was no challenge in the Court of Appeal to the trial judge's finding that the Council had induced Mr Holborn to believe that he would be entitled to the right of access.[7] While the evidence was insufficient to establish that Mr Holborn had ceased to oppose the development on this basis, the requirement of detrimental reliance was satisfied by his construction of the driveway and moving of the garage.[8] One of the two grounds advanced by the trial judge for refusing the claim was that the Council had been unaware of this detrimental reliance. Davis LJ did not accept the validity of the trial judge's inference from the documents that the Council had lacked the relevant knowledge. Furthermore, he did not agree that lack of knowledge on the part of the Council would have been significant given that the Council was aware of Mr Holborn's intention to act in the relevant manner.

Davis LJ noted that counsel for the Council had "very fairly … acknowledged that cases of encouragement are capable, depending on the circumstances, of standing in this respect on a different footing from cases based on acquiescence".[9] This makes sense given that in cases based on the acquiescence principle "[t]he reason for equitable intervention is … that D has failed to act when he was aware that C was acting to C's detriment on the basis of a mistake concerning D's rights".[10] Unfortunately, Davis LJ missed the opportunity to draw a clear distinction between the acquiescence principle and the promise/encouragement principle, falling back on the mantra that "ultimately, of course, all depends on the particular facts of the individual case".[11] The potential for confusion would be reduced if the courts were willing to separate out the distinct principles subsumed under the vague heading of

[7] [2012] EWCA Civ 1398, [30].
[8] [2012] EWCA Civ 1398, [31].
[9] [2012] EWCA Civ 1398, [39].
[10] Mee "Proprietary Estoppel, Promises and Mistaken Belief" in Bright (ed) *Modern Studies in Property Law*, Volume 6 (Hart Publishing, 2011) p 182.
[11] [2012] EWCA Civ 1398, [39].

proprietary estoppel.[12] While knowledge on the part of the defendant is central to the acquiescence principle, in respect of claims based instead on reliance upon a promise it is logically sufficient if (as was the case in *Joyce*) it was reasonably foreseeable that the claimant would act to his or her detriment.

Unconscionable Denial of the Claimant's Entitlement

The second basis for the trial judge's finding in favour of the Council was that it had not been established that it had acted unconscionably since "[t]here is no evidence that [the claimant] is being prevented from using the road or that the Council proposes to do so".[13] The judge concluded that the Council was merely refusing to execute a grant of an easement in favour of the claimant, save on certain terms. Davis LJ "simply d[id] not understand this as a relevant basis for the overall conclusion".[14] According to Davis LJ, the fact that the Council had not yet sought to interfere with the use of the service road did not impact on "the issue of unconscionability arising from the Council's initial conduct at the time and then its subsequent resiling from its position" when it wrote to Mr Joyce seeking £5,000 in return for the grant of the easement.[15]

Thus, Davis LJ concluded that the Council had unconscionably denied the claimant's entitlement, even though there was no suggestion that it proposed to interfere with his ability to access his property using the service road. The issue seems to turn on the extent of the entitlement the claimant was led to expect. In theory, one could envisage a case where, based on the defendant's representations, the claimant could reasonably expect only to be allowed to enjoy undisturbed access but could not expect to be granted a formal easement. However, *Joyce* seems not to fall into this category, given that Mr Holborn was, to the knowledge of the Council, concerned about the impact of events on the value of his property if he should wish to sell it.[16] The Council's position was that Mr Holborn was a tolerated trespasser or, at most, had a revocable licence.[17] On this

[12] See Mee "Proprietary Estoppel, Promises and Mistaken Belief" in Bright (ed) *Modern Studies in Property Law*, Volume 6 (Hart Publishing, 2011).
[13] Quoted [2012] EWCA Civ 1398, [34].
[14] [2012] EWCA Civ 1398, [42].
[15] [2012] EWCA Civ 1398, [42].
[16] [2012] EWCA Civ 1398, [9] and [51].
[17] [2012] EWCA Civ 1398, [43].

view, neither he nor his successors in title could sell the property with the benefit of the relevant right nor would it be possible for them to plan any development on the basis of the right's existence. In the circumstances, Davis LJ's approach was not surprising.

It is interesting to contrast the facts of *Joyce* with the situation which arose in the recent Irish case of *Board and Management of All Saints Church of Ireland National School v Courts Service*.[18] The dispute concerned the right to access a school through the grounds of a court-house. The Courts Service, asserting that the school enjoyed only a revocable licence, was willing to grant an irrevocable licence subject to limitations as to the hours at which access would be permitted and the categories of person who could use it. The school's board of management was only willing to agree to this on condition that it did not prejudice, or involve a denial of, what it considered to be its right of way. Although the judge found it difficult to see "how the position of the school would be adversely and unreasonably prejudiced" by the Courts Service's proposal, the dispute led to "costly litigation". Ultimately, Peart J held, on the basis of estoppel principles, that an equitable easement had arisen in favour of the school, which was limited in terms of the hours in which it could be used and by reference to safety considerations. This case resembled *Joyce* in that the estoppel claim succeeded notwithstanding the defendant's willingness to allow the claimant's access to continue. However, it seems that, in the different circumstances of the Irish case, where the right claimed seems to have been specifically linked to the use of the property as a school, the willingness of the defendants to give an *irrevocable* licence should have prevented the claimant school from successfully insisting on obtaining an easement on the basis of proprietary estoppel.

The Position of a Successor in Title of the Claimant

Potentially, the most interesting issue in *Joyce* could have been the question of whether the benefit of the inchoate equity in favour of Mr Holborn passed to his successors in title. However, it had been common ground before the trial judge that "the claimant effectively stood in the shoes of Mr Holborn and was entitled to the benefit of any proprietary estoppel" which arose in favour of Mr

[18] [2011] IEHC 274 (Irish High Court; available on BAILII).

Holborn.[19] This meant that it was not possible to make an argument based on this point before the Court of Appeal, so that the issue was not ventilated. While there is little English authority on the point,[20] it has been suggested that "the preferable view is that the benefit of the equity is transferable to third parties, so that a successor in title is entitled to claim an inchoate 'equity' on the ground of an earlier assurance made to, and relied upon by, his predecessor".[21]

The question has received less attention than the issue of whether an estoppel equity can bind a successor in title of the defendant.[22] The latter issue was recently reviewed by the Court of Appeal, in the context of an equitable easement acquired by estoppel, in *Chaudhary v Yavuz*.[23] The comparative lack of consideration of the position of a successor in title to the claimant is understandable because, while a proprietary estoppel claim will normally be focused on land belonging to the defendant, it is only in a minority of cases that the claim will be for the benefit of specific land belonging to the *claimant*. The most obvious examples are situations, such as *Joyce*, involving the promise of a right of way over the defendant's land for the benefit of the claimant's land. In such cases, it makes sense to think in terms of the possible rights of a purchaser from the claimant.

Matters are complicated by the fact that the remedy may not take the form of fulfilling the claimant's expectation[24] – so that, in principle, instead of an easement benefitting the claimant's land, the remedy may take the form of an entitlement to a monetary payment. In such cases at least, it is difficult to see why the benefit of the equity should automatically pass to a purchaser of the claimant's land. Imagine if the claimant in *Crabb*,[25] who lost access to his land due to the defendant Council's failure to grant him a promised right of way over the Council's land, had paid a neighbouring land-owner £30,000 to grant him an

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[19] [2012] EWCA Civ 1398, [28].
[20] Note *ER Ives Investment Ltd v High* [1967] 2 QB 379 where Lord Denning MR suggested (*ibid*, 395) that successors in title could also avail themselves of the equity but Winn LJ (*ibid*, 403) declined to address the issue. See also *Brikom Investments v Carr* [1976] QB 467, 484-485 *per* Lord Denning MR.
[21] Gray and Gray *Elements of Land Law* 5th ed (OUP, 2009) p 1236 (footnotes omitted).
[22] Note s.116 of the Land Registration Act 2002 and see e.g. McFarlane "Proprietary Estoppel and Third Parties after the Land Registration Act 2002" (2003) 62 CLJ 661.
[23] [2011] EWCA Civ 1314, noted by McFarlane "Eastenders, Neighbours and Upstairs Downstairs: Chaudhary v Yavuz" [2013] Conv 74.
[24] *Jennings v Rice* [2002] EWCA Civ 159.
[25] [1976] Ch 179.

easement so that he could access the land after all. If the claimant then sold his land to a third party with the benefit of this new easement, not mentioning his grievance against the Council, it would seem quite wrong that the benefit of the estoppel claim should pass to the purchaser. If, on the other hand, the court concludes that the remedy should take the form of an easement, it is easier to argue that this should benefit a successor in title. However, the suggestion that the successor in title's position depends simply upon the type of remedy triggered by the estoppel claim is complicated by the possibility that, in exercising its remedial discretion, a court might feel entitled to take into account the fact that the claimant has parted with the land, perhaps choosing a monetary remedy when it would otherwise have chosen a remedy in the form of an easement. Such a choice by the court would seem more defensible where the successor in title had purchased the land with no expectation of benefitting from the alleged easement.

However these complexities are to be resolved, it does seem that the position of the successor in title must depend on the extent of the remedy to which the original claimant would have been entitled.[26] In *Joyce*, it was argued on behalf of the Council that "a licence personal to Mr Holborn for the duration of his ownership would suffice to satisfy the equity arising".[27] Such a remedy was rejected by Davis LJ as insufficient "[g]iven all the circumstances".[28] This rejection seems reasonable in light of the fact (already mentioned above) that Mr Holborn had clearly been concerned about the potential effect of the Sainsbury's development on the resale value of his house.[29] Limiting the remedy to the duration of his ownership would, arbitrarily, have penalised him if he had wished to sell the house in the short term. If, however, this kind of remedy had been appropriate on the facts, then – even if there were a rule that the benefit of

[26] It is possible in theory that, even if the original equity did not pass to the successor in title, a new equity could arise in his or her favour. However, can it be said in such circumstances that the defendant has made a representation *to the purchaser*, so as to trigger liability in proprietary estoppel? And what would happen to the original claimant's equity? Unless it was extinguished upon the creation of the 'new' equity (in which case it looks rather like there has been a transfer of the equity after all), the defendant would seem to be liable twice over for one representation.
[27] [2012] EWCA Civ 1398, [53].
[28] [2012] EWCA Civ 1398, [53].
[29] [2012] EWCA Civ 1398, [9] and [51].

the equity will pass to a successor in title – there would have been no benefit left to rely upon after a transfer.

The Remedy

The restricted remedy actually chosen by Davis LJ, a right of way limited to the needs of the current house, was the one that the trial judge indicated he would have given had he regarded the estoppel claim as well-founded.[30] No payment was to be required in return for the easement, which makes sense given that such a payment does not ever seem to have been contemplated by the parties. In this respect, the facts of *Joyce* were more straightforward than those of *Crabb v Arun District Council*,[31] where it was initially envisaged that the claimant would have to pay the Council for the easement.[32]

The restricted nature of the easement acquired by the claimant in *Joyce* seems to have been appropriate on the facts. There had not, at the time of the original events, been detailed discussion as to the type of right of way that would be given to Mr Holborn. However, there was no reason to believe that Mr Holborn had wished for a more extensive right of way. Furthermore, an unlimited right of way would impose more onerous maintenance obligations on the Council, which retained ownership of the service road.[33] Thus, the remedy was not really more restrictive than Mr Holborn's reasonable expectations as induced by the Council's conduct at the time. If Mr Holborn had sought to formalise the arrangement at the time, in all likelihood he would not have looked for, nor would the Council have been willing to grant him, an unlimited right of way.

Countervailing Benefits

A final issue, which is ultimately linked with the remedial issue even though Davis LJ did not present it as such, relates to the countervailing benefits enjoyed

[30] [2012] EWCA Civ 1398, [49].
[31] [1976] Ch 179.
[32] The claimant in *Crabb* was not required to pay for the easement that he ultimately acquired on the basis of proprietary estoppel because his loss due to having been denied the right of way for a number of years "must surpass any sort of sum of money which the plaintiff ought reasonably ... to have paid the defendants in order to obtain an enforceable legal right": [1976] Ch 179, 199 *per* Scarman LJ.
[33] [2012] EWCA Civ 1398, [52].

by Mr Holborn and his successors in title. Davis LJ saw no reason to interfere with the trial judge's conclusion that there had been detrimental reliance by Mr Holborn despite the fact that counsel had sought to emphasise the benefits he had received. Davis LJ commented that "the only real benefit to Mr Holborn was the access to and over the service road: and of course it is the extent of his entitlement to this access which is precisely the matter in dispute".[34] At a later point, Davis LJ denied that "the lapse of time" could have any effect on the Council's position. He insisted that "it is both counter-intuitive and unprincipled that an apparent right arising and exercised in reliance on the assurance given by the Council to Mr Holborn has become something of a 'lesser' right, and the equity arising has somehow diminished, simply by virtue of long exercise".[35]

Davis LJ may ultimately have been correct to believe that the benefits enjoyed by Mr Holborn and his successors in title were not sufficient to affect their entitlement to an easement as a remedy for the proprietary estoppel claim. However, the generality of Davis LJ's remarks raises concerns. It seems wrong to suggest that "of course" it is not necessary or permissible to take account of a benefit to the claimant in the form of enjoying, for a period, the right he is claiming. Consider a case where a claimant is promised that he will be able to occupy a luxury apartment, rent-free, for the rest of his life. He then expends £50,000 on repairs to the apartment. After ten years, the owner seeks to recover possession of the apartment. On these facts, it is quite possible that the benefits received by the claimant – in the form of rent-free occupation of the apartment for ten years – could be said to outweigh his detriment.[36] Contrary to Davis LJ's apparent view in *Joyce*, it is not possible to ignore the benefit received by the claimant on the basis that the question of the claimant's right to occupy the apartment "is precisely the matter in dispute". However, if the claimant were to be denied a remedy in the hypothetical case just described, it would not really be the case that the claimant's right has been affected by "lapse of time" or "has somehow diminished, simply by virtue of long exercise". The right explanation would be that, if the matter had been considered by the court just after the claimant had incurred his detriment, the remedy chosen by the court would have

[34] [2012] EWCA Civ 1398, [31].
[35] [2012] EWCA Civ 1398, [45].
[36] Compare *Sledmore v Dalby* (1996) 72 P & CR 196.

been less extensive than allowing him to remain in the apartment rent-free for ten years.[37] Therefore, if the question arises after the claimant has had that benefit, it is not appropriate to grant him any further entitlement – the benefits he has already received have exhausted his equity. Davis LJ's comments arguably suggest an assumption on his part that the appropriate remedy will invariably be to satisfy the reasonable expectation of the claimant, as derived from the defendant's assurance.[38] This assumption would be inconsistent with cases such as *Jennings v Rice*[39] but seems to resonate with the approach of Arden LJ in the recent case of *Suggitt v Suggitt*.[40]

Conclusion

While not revolutionary in its ramifications, the judgment of Davis LJ in *Joyce* provides us with a comparatively rare example of the application, by an appellate court, of the principles governing the acquisition of an easement by proprietary estoppel. It would not be quite right to suggest that the difference between the parties was only £5,000, since the Council wanted that sum in return for a more limited easement than that sought by Mr Joyce, but nonetheless the dispute was a relatively minor one. Yet, unable to reach a settlement, the parties went all the way to the Court of Appeal. The case reminds us that there is a cost to equity's insouciant attitude to formalities. On a strict view, it was Mr Holborn's fault that he failed to insist upon the grant of an easement in his favour and Mr Joyce's own problem if, when buying from Mr Holborn, he failed to investigate whether the relevant easement had been granted. One can understand why, more than 16 years after the original events, the Council might have been sceptical about the merits of Mr Joyce's demands. Equally, given the open-textured nature of proprietary estoppel and the lack of

[37] If, however, at that time, the court would have concluded that a remedy in the form of an indefinite right to occupy the apartment would not have been disproportionate, then subsequent benefit to the claimant in terms of enjoyment of the relevant right could not, of itself, diminish the remedy to which the claimant would be entitled when his or her estoppel claim was ultimately determined.

[38] Taking account of countervailing benefits creates difficulties for the approach that regards the fulfillment of the expectation as the automatic remedial response. Note the discussion in Mee "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" in Dixon (ed) *Modern Studies in Property Law* Volume 5 (Hart Publishing, 2009), pp 398-400.

[39] [2002] EWCA Civ 159.

[40] [2012] EWCA Civ 1140. Note also *Bradbury v Taylor* [2012] EWCA Civ 1208.

clarity on the question of remedies, it is also possible to see why Mr Joyce was not inclined to back down. As often seems to be the case when proprietary estoppel is invoked, the result was expensive litigation.

Professor John Mee
University College Cork