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The Continuing Ascension of Estoppel

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The equitable doctrine of estoppel, which forms an intrinsic element of Equity's attempt to prevent instances of unconscionable conduct, is a doctrine that is taking an increasingly active role in commercial disputes. Some of the various forms of estoppel, such as promissory and proprietary estoppel, are relatively well known and play crucial roles in the areas of contract law and land law respectively. The primary purpose of the doctrine, as is implied in its name, is to 'stop' parties reneging on their word and placing the representee in a negative position for having reasonably relied on the representor's assurance or conduct[1].

Beyond the traditional estoppels usually encountered by students and practitioners alike, such as those mentioned above, the doctrine of estoppel is being utilised in the commercial world by claimants seeking to enforce ambiguous or ill-remembered business agreements. The most recent example of this use of the doctrine is seen in *LA Micro Group (UK) v LA Micro Group Inc*[2], where estoppel by conduct was (almost) utilised to try and determine the beneficial ownership of 51% of the shares in a company. Although this update will analyse the impact of *LA Micro* on the doctrine of estoppel, it is first necessary to set out and consider the wider use and impact of estoppel.

Promissory Estoppel

In the context of contract law, Lord Denning infamously resurrected the doctrine of promissory estoppel enunciated in *Hughes v Metropolitan Railway Co*[3]. *Hughes* concerned a notice to compel Metropolitan Railway to repair a property it was a tenant of within 6 months. Roughly a month after being served the notice of repair, Metropolitan Railway proposed purchasing the property, but the negotiations failed. Hughes, the landlord, then demanded that the repairs be completed by the expiration of the original 6-month deadline, not accounting for the time spent negotiating over the sale of the property. The House of Lords, affirming the Court of Appeal, held that the landlord was estopped from enforcing his strict legal right owing to an implied promise brought about by the initiation of negotiations. Lord Cairns summarised the doctrine and stated that:

> "…it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed

[1] Furmston M, *Cheshire, Fifoot, and Furmston's Law of Contract,* 17th edn (Oxford: OUP, 2017) at 132
[2] [2021] EWCA Civ 1429
[3] [1877] 2 AC 439

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> to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."[4]

It must be noted, though, that the House of Lords' judgment in *Hughes* does *prima facie* conflict with the previous House of Lords authority of *Jorden v Money*[5]. Here, the House of Lords had held that the doctrine of estoppel can only apply to misrepresentations of existing fact, not promises of future conduct. Therefore, the conduct in *Hughes* would not be sufficient to give rise to an estoppel given that it concerned future conduct. However, as Furmston points out[6], 3 factors indicate that the apparent discrepancy between the authorities can be resolved. First, given that previously the House of Lords had approved of *Jorden* 4 years before *Hughes*[7], the House of Lords in *Hughes* must have viewed the two the judgments as being consistent. Secondly, given that Metropolitan Railway had only not carried out their repair obligations because of the promises of Hughes, it would be grossly unfair to allow Hughes to acquire such a valuable right as a result of reneging on that promise. Finally, *Hughes* can be interpreted as merely having suspended, and not extinguishing, Hughes' right to demand the premises be repaired. Metropolitan Railway were therefore still under the same obligation, but merely had a stay on the obligations' enforceability, not the extinguishment of the obligation. As a consequence of these reasonable arguments, it can be seen that promissory estoppel does have a sound theoretical basis.

Although Lord Cairns provided a clear and well-reasoned statement of the doctrine of promissory estoppel in *Hughes*, it would be 70 years before the doctrine would become an established element of the law of contract. In *Central London Property Trust v High Trees House*[8], Denning J (as he was then) would resurrect the dormant *Hughes v Metropolitan Railway* in the context of the collection of rent. In *High Trees*, a block of flats had been rented by the High Trees from the Central London Property Trusts. The lease was entered into in 1937, but owing to the outbreak of war, it became impossible to find tenants for all the flats. It was therefore agreed that the annual ground rent would be halved, although an end date to this reduction was not stated. By the end of 1945, and with the end of the war, it became possible to rent out the majority of the flats, and a request to return to the full rent was made by the Central London Property Trusts. However, in addition, they also claimed arrears of £7,916 from High Trees for the rent reduction since 1940, despite the previous agreement.

Denning J, relying on *Hughes*, held that should a party induce another party to believe that they will not enforce their legal rights, the court will estop them from enforcing those rights. *High Trees*, and the doctrine of promissory estoppel, thereby provide an important and effective means of Equity achieving fairness. By requiring contracting parties to abide by the promises they make – even if these go against their fundamental legal rights – those parties who legitimately and reasonably rely on a promise are protected from being deceived.

It should be noted, however, that there are some important limitations to the doctrine. In *Combe v Combe*[9], the Court of Appeal clarified that promissory estoppel could only be used as defence, not a cause of action. In restricting the doctrine to being a 'shield, not a sword', it reduces the

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[4] Ibid, at 448
[5] (1854) 5 HL Cas 185
[6] Furmston M, *Cheshire, Fifoot, and Furmston's Law of Contract,* 17th edn (Oxford: OUP, 2017) at 133-134
[7] The House of Lords gave its approval in *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352
[8] [1947] KB 130
[9] [1951] 2 KB 215

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doctrine to a defence and the number of parties who can utilise the doctrine. Moreover, the promise must be clear and unambiguous[10], preventing loose conversations and cryptic statements from being relied on under the doctrine. Even more restrictive, though, is that some members of the judiciary have questioned the doctrine's theoretical stability. Lord Hailsham LC in *Woodhouse A C Israel Cocoa LTD SA v Nigerian Produce Marketing Co Ltd*[11] commented that the promissory estoppel "may need to be reviewed and reduced to a coherent body of doctrine by the court…But as is common with an expanding doctrine they do raise problems of coherent exposition which have never been systematically explore". Notwithstanding the court's refusal to fully review the doctrine, this is not to say that the Supreme Court will not undertake a review in the future and sweep away the doctrine – meaning it currently rests on deep but possibly insecure roots.

This brief review of promissory estoppel has shown the doctrine to be of great use to contractual parties engaged in a dispute over the enforceability of a parties' legal rights. It has been shown that should a clear and unambiguous promise be made not to enforce legal rights, and the representee has relied upon that promise to their detriment[12], the representor will be estopped from enforcing their rights in line with the promise made. This prevention of unconscionable conduct now plays an important function within the law of contract in regulating parties' actions and ensuring acceptable commercial practices.

Proprietary Estoppel

Equity, through the doctrine of estoppel, also intervenes to prevent unconscionability where the owner of property has expressed a firm intention to an individual that the individual has acquired, or that they will in the future acquire, an interest in the property. The requirements for a proprietary estoppel to arise were laid out *in Taylor Fashions v Liverpool Victoria Trustees*[13], and include that:

1) The legal owner must make an assurance to the claimant that they have, or will acquire, an interest in the property;
2) The claimant must then rely on this assurance; and
3) The claimant must have acted to their detriment as a result of relying on the assurance made by the claimant.

The theoretical basis of this form of estoppel is not certain, however. As Watt[14] acknowledges, there is a divergence in opinion as to what the theoretical basis should be. In one corner, there are those who argue that proprietary estoppel is there to give effect to the claimant's expectations[15], and as stated by Arden LJ[16] and HHJ Matthews[17], the doctrine is similar to contract law, in that it focuses on the expectations of the claimant rather than any losses that was actually suffered. However, Lewison LJ in *Davies v Davies*[18] has stated *obiter* that he preferred the detrimental reliance theory – that proprietary estoppel focuses on the detriment incurred by the claimant and is intended to remedy the losses incurred. Given the diversity of

[10] *Woodhouse A C Israel Cocoa LTD SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741
[11] [1972] AC 741 at 758
[12] *Morrow v Carty* [1957] NI 174; *Emmanuel Ayodeji Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556
[13] [1982] QB 133
[14] Watt G, *Trusts and Equity,* 9th edn (Oxford: OUP, 2020) at 306
[15] Gardner S, *The Remedial Discretion in Proprietary Estoppel – Again,* [2006] LQR 492
[16] *Suggitt v Suggitt* [2012] EWCA Civ 1140
[17] *James v James* [2018] EWHC 43 (Ch)
[18] [2016] EWCA Civ 463

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opinions, equivalence of rank among the opining members of the judiciary, and the similar contemporaneousness of the remarks, these factors suggest that only the Supreme Court will be able to clarify the nature of proprietary estoppel's theoretical basis. However, it must also be noted that whilst the adoption of either theory may have an impact on the remedy the court grants should the requirements be met – with those adopting the expectation theory potentially being more generous than adopters of the detriment theory due to the expansiveness of assurances made compared to the actual detriment incurred - neither impact upon the existence of a proprietary estoppel in the first place.

The actual requirements of a successful proprietary estoppel claim, much like the requirements for promissory estoppel, are for the most part uncontroversial and simple to determine. For example, in relation to the requirement for an assurance, it is clear that repeated assurances that an individual will inherit[19], that an individual will be able to build a larger property if they built on the legal owner's land[20], and passively permitting a neighbour to mistakenly build on land owned by the legal owner all constitute an assurance. Thus, there is no firm or restrictive concept of what will constitute an assurance, and a multitude of varying types of conduct can form the basis of the requisite assurance. Despite this flexibility, it must be remembered that the assurance must be clear an unequivocal, ensuring that informal or cryptic references to granting an interest will not suffice and that misunderstandings should be kept to a minimum[21].

Detriment, whilst more problematic, is still similarly possible to define both from a theoretical and practical perspective. Frustratingly, as stated in *Gillett v Holt*[22], detriment is 'not a narrow or technical concept', meaning that although definable, it includes a wide range of potential elements[23]. This means it is a concept 'incapable of reduction to pounds and pence'[24], and 'must be approached as part of a broad enquiry…'[25]. Examples of recognised detriment include the abandonment of an education[26], the forsaking of an opportunity[27], the incursion of building expenses[28], and the provision of services as a nanny[29]. Consequently, although the forms in which detriment may occur are myriad, it is apparent that it must constitute a worsening of the claimant's position. In *Davies v Davies*[30], the nature of detriment was summarised as being sufficiently 'unconscionable for a promise not to be kept either wholly or in part'. This too, like many aspects of estoppel, is a vague characterisation that provides large amounts of discretion to trial judges to interpret detriment in light of their own views. It is not, therefore, possible to define detriment in the context of proprietary estoppel beyond vague statements of requiring 'unconscionability' and 'sufficiency', although in practice the requisite detriment will likely be apparent.

The most drastic variation between between promissory and proprietary estoppel, though, is the remedies available should an estoppel be established. Whilst under promissory estoppel the remedy is limited to preventing a contracting party from enforcing their contractual rights,

[19] *Gillett v Holt* [2001] CH 210
[20] *Inwards v Baker* [1965] 1 All ER 446
[21] *Thorner v Major* [2009] 1 WLR 776 at 780, 794; Bevan C, *Land Law,* 2nd edn (Oxford: OUP, 2020 at 304
[22] *Gillett v Holt* [2001] CH 210 at 232
[23] *Lloyd v Sutcliffe* [2008] EWHC 1329 (Ch)
[24] *Habberfield v Habberfield* [2019] EWCA Civ 890
[25] *Gillett v Holt* [2001] CH 210 at 232
[26] *Gillet v Holt* [2001] CH 210
[27] *Lloyd v Dugdale* [2001] EWCA Civ 1754
[28] *Ramsden v Dyson; Powell v Benney* [2007] EWCA Civ 1283
[29] *Greasely v Cooke* [1980] 1 WLR 1306
[30] [2016] EWCA Civ 463, citing *Thorner v Major* [2009] UKHL 18 at [29]

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under a proprietary estoppel the courts have a plethora of potential remedies. These range from no remedy, to monetary compensation[31], a charge over the land[32], a life interest[33], to the conveyance of the freehold[34].

In determining the appropriate remedy, the courts must assess any benefit the claimant has enjoyed – for if the benefit outweighs any detriment, no remedy will be awarded. This was illustrated mostly clearly in *Sledmore v Dalby*[35], where the advantages of living in a property rent-free for part of the week for 18 years outweighed detriment sustained of undertaking repair work on the property. *Sledmore* can be contrasted with *Southwell v Blackburn*[36], where it was found that giving up a secured tenancy to move in with a partner on the assurance that they would have a home and a right of occupation amounted to a remedy of £28,500. The courts must, therefore, take all factors into consideration when determining the appropriate and proportionate remedy – leading to potential arbitrariness, with first instance judges having little to no guidance, beyond their own gut reactions and personal beliefs, to assist them in making the appropriate order. The key distinguishing characteristic of this discretion, as noted by Virgo[37], is that unlike promissory estoppel which merely 'suspends' the enforceability of contractual rights, proprietary estoppel can be utilised as a 'sword' and new rights be acquired by the claimant.

From this brief overview of proprietary estoppel[38], it has been demonstrated that it is a substantial and impactful doctrine – a form of estoppel that goes well beyond the confines of promissory estoppel. In granting the courts a substantial level of discretion in establishing an estoppel (through the potentially arbitrary requirement of detriment) and an even greater degree of discretion over the remedies that can should an estoppel be proven, proprietary estoppel provides a very useful mechanism to claimants seeking to acquire an interest[39].

This overview of both forms of estoppel has also demonstrated some of the diversity of contexts in the doctrine of estoppel operates, and the critical role in plays in ensuring fairness between respective parties – especially the acquisition of an interest in land. Moreover, though, it has shown that since Lord Denning's resurrection of *Hughes* in the mid-1940s, estoppel has continued to grow and interact with a multitude of contexts.

Estoppel by conduct

In addition to the pre-existing broad scope that the doctrine of estoppel has, the courts have recently sought to expand its reach even further. In *LA Micro Group UK v LA Micro Group INC*[40] the Court of Appeal considered the utilisation of estoppel by conduct to resolve a dispute over the beneficial ownership of shares in a company, LA Micro UK – a novel potential use of the doctrine and is an illustration of the ever-expanding realm of estoppel.

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[31] *Lloyd v Sutcliffe* [2008] EWHC 1329 (Ch)
[32] *Campbell v Griffin* [2001] EWCA Civ 2001
[33] *Inwards v Baker* [1965] 1 QB 29
[34] *Pascoe v Turner* [1979] 1 WLR 431
[35] [1996] EWCA Civ 1305
[36] [2014] EWCA Civ 1347
[37] Virgo G, *The Principles of Equity and Trusts,* 4th edn (Oxford: OUP, 2020) at 329
[38] See McFarlane B, *The Law of Proprietary Estoppel,* 2nd edn (Oxford: OUP, 2020); Barnes M, *The Law of Estoppel,* (Oxford: Hart, 2020)
[39] It should be remembered, however, that proprietary estoppel is limited to domestic, and not commercial, claims: *Yeoman's Row Management v Cobbe* [2008] UKHL 55
[40] [2021] EWCA Civ 1429

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Before analysing the impact of *LA Micro,* it is first necessary to detail the pertinent facts so as to comprehend the judgment, as these are vital to determining whether such an estoppel arose. The case itself concerned a dispute between Mr Frenkel, Mr Lyampert and Mr Bell – all of whom were business partners and one time friends. The Appellant, LA Micro Inc (US) was owned and controlled by Mr Lyampert and Mr Frenkel. The Respondent, LA Micro Ltd (UK), was an English company of which Mr Bell was a director and shareholder of 49% of the company's shares. The dispute centred on the remaining 51% of the UK company's shares – who owned beneficially owned them? Two submissions were made to the court concerning the ownership of the shares: either the shares were owned by the US company, or they were owned by Mr Bell and Mr Lyampert personally.

The US company was formed in 2001 by Mr Frenkel and Mr Lyampert to sell 'high-end computer parts'[41]. It soon started selling parts to a company owned by Mr Bell, and striking up a working relationship, it was agreed between Mr Bell, Mr Frenkel and Mr Lyampert that a new company in the UK would be set up in 2004 by Mr Bell. The US and UK companies would supply each other with parts at cost price, with the eventual selling company keeping the profits. In the negotiations, it was agreed that Mr Bell would own 49% of the new UK company, but ownership of the remaining 51% was not definitively determined at this point. Upon the UK company commencing operations and becoming profitable, 50% of the profits were kept by Mr Bell and 25% of the profits were paid to companies owned Mr Frenkel and Mr Lyampert respectively.

In 2010 Mr Frenkel and Mr Lyampert's relationship collapsed, and Mr Frenkel sought to dissolve the US company. During this period Mr Bell gave evidence claiming that Mr Frenkel phoned him stating that "It's your business and I want nothing to do with it"[42], and after Mr Bell flew to the US to discuss the situation with both partners, Mr Frenkel was alleged to have repeated to Mr Bell that "The company [i.e. UK] is yours. I want nothing to do with it.[43]" It was found by the trial judge HHJ Jarman that Mr Bell understood these statements to mean that Mr Frenkel had no interest in the UK company. It was then agreed between Mr Bell and Mr Lyampert that the profits should be split equally between the two of them.

Subsequently in 2012, Mr Bell, whilst giving evidence in a dispute between Mr Frenkel and Mr Lyampert, did however acknowledge that Mr Frenkel still had an interest in the UK business by stated that "The owners, so far as I understand it, are myself, Mr Lyampert and Mr Frenkel"[44]. Mr Bell then sought clarify these comments in 2015, stating that Mr Lyampert and Mr Frenkel's ownership was via the US company, not individually[45], and in 2016 reaffirmed this statement by writing to Mr Frenkel stating that he believed the US company was the beneficial owner of 51% of the UK company's shares.

In his submissions, Mr Frenkel principal argument was that Mr Bell had been estopped from denying his 25% beneficial ownership in the UK company as result of the statement made in during the 2012 dispute between Mr Frenkel and Mr Lyampert. Hence, the submission was that as Mr Bell had acknowledged Mr Frenkel as possessing a beneficial interest in the UK company in the course of litigation, he could no longer back track from that position.

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[41] Ibid, at 3
[42] Ibid, at 9
[43] Ibid, at 9
[44] Ibid, at 16
[45] Ibid, at 16

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The Court of Appeal acknowledged that Equity does intervene through the doctrine of estoppel should one party in litigation undertake certain conduct[46]. The doctrine had previously been summarised by Viscount Radcliffe in *Kok Hoong v Leong Cheong Kweng Mines Ltd*[47], where His Lordship stated:

> "A litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned."

Consequently, estoppel by conduct operates where a litigant makes a statement or adopts a position that permits them to obtain a desired outcome, and then prevents them from rejecting and abandoning the adopted position or statement. An example of such conduct is *Gandy v Gandy*[48], where a husband had covenanted in a deed of separation from his wife to pay an annuity and expenses to trustees to cover the upkeep of his two daughters. The husband then attempted to claim he was not bound by the covenant owing to his wife being granted custody of the children. It was held by the Court of Appeal that "It would be wrong in my opinion to allow him to take advantage of a decision given on one construction, whether accepted by him or argued by him, and to give another decision in his favour on the ground that this was not the true construction"[49] and that "It would be playing fast and loose with justice if the court allowed that."[50] Consequently, the husband was prevented from going back on a position previously adopted in litigation.

What is therefore apparent is that in order for this form of estoppel to arise, 2 requirements must be present – a) the party's conduct must have been the means by which they procured the desired outcome, and b) that the circumstances must place the court in a position by which they have no choice but to compel the party to abide by that conduct[51]. As was also noted by the Court of Appeal, this form of estoppel is there to protect the integrity of the litigation process and prevent parties from making contradictory submissions to different courts – in other words to ensure that other parties to the litigation are faced with a coherent and sustained submission[52]. However, this also means that much like proprietary estoppel and identifying the appropriate remedy, it must also be approached in general terms and grant the judicial a large scale of discretion. Meaning, of course, it can be a very unpredictable doctrine.

Within the context of the appeal, it was submitted by Mr Frenkel that owing to the doctrine Mr Bell was prevented from going back on his statements made in the 2012 litigation – statements that differed from those made previously - that Mr Frenkel had a beneficial interest in the UK company. It was contended that Mr Bell had relied upon these statements and had received a benefit from his reliance by through his continuing ownership of the UK company.

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[46] Ibid, at 19
[47] [1964] AC 993
[48] (1884) 30 Ch D 57
[49] Ibid, per Cotton LJ at 80
[50] Ibid, per Bowen LJ at 82
[51] [2021] EWCA Civ 1429 at 22
[52] Ibid, at 24

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The Court of Appeal, however, rejected these submissions on the basis that his statements were not directly in issue in the 2015 litigation, and had not been fundamental to succeeding in the litigation – thereby not meeting the criteria[53].

Conclusion

Notwithstanding the Court of Appeal's rejection of the claim in *LA Micro,* the detailed statement of, and analysis applied to, estoppel by conduct demonstrates the importance the doctrine has. By potentially restraining litigants where their conduct has been instrumental in acquiring a judgment or order, Equity is able to protect the integrity of the ligation process and ensure a fair and even contest between the parties to the ligation.

More importantly, however, *LA Micro* also illustrates the continuing ascension of estoppel. Whilst promissory and proprietary estoppel remain the most widely known forms of estoppel, and their impact upon the law of contract and land is well documented, less well known forms of estoppel, such as estoppel by conduct, continue to pay and important and ever expanding role within English law.

[53] Ibid, at 33

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