Proprietary Estoppel and Competing Equities

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Let us begin with a simple scenario. Suppose X is the freehold owner of a large country house set in five acres of land. He promises A that he will execute a will leaving the house in his will when he (X) dies. In reliance on this promise, A spends an amount of his own money in building an extension onto the property. A few years later, X makes the same promise to B, who also relies on the promise by carrying out essential repairs to the house at her own expense.[1] X dies without having made a will and so his estate passes to those who are entitled under his intestacy. Both A and B claim that they have acquired an equity on the facts relying on the doctrine of proprietary estoppel. **Suppose instead that X, in our scenario, had made a will leaving all his property in favour of C, a third party, and that A and B had been given similar assurances regarding the same property prior to X making his will. The position remains largely the same and both claimants, A and B, would have competing equities against X's estate which would require the court's determination. How then would the court resolve the competing equities of the parties *inter se*?[2]**

There is no authority which specifically deals with this kind of scenario, although the case of *Suggitt v Suggitt*[3] considered a not too dissimilar situation where a son successfully claimed a share of his father's estate despite the terms of the latter's will which left everything to his daughter. The estate comprised 400 acres of farmland, a farmhouse and two other properties. At the time of the deceased's death, the son had been living in the farmhouse with his family and the daughter was living in one of the other properties with her child. In his will, the deceased expressed the wish, but without imposing a trust, that if at any time, in the daughter's opinion, the son showed himself capable of managing the farmland, she was to transfer it to him. The daughter, however, never effected a transfer of the property. Despite this, the son succeeded in his proprietary estoppel claim based

[1] The scenario may not be an uncommon one. As Robert Walker LJ opined in *Gillett v Holt* [2001] Ch 2010: "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 . . ."

[2] This article is not concerned with the related question as to how an estoppel equity can be protected against third parties. So far as registered land is concerned, s.116 of the Land Registration Act 2002 provides that an equity by estoppel has proprietary status and is capable of binding successors in title but subject to the rules about the effect of dispositions on priority. In unregistered land, the position is governed by the doctrine of notice.

[3] [2012] EWCA Civ 1140.

on his father's repeated unconditional promises that the farmland would be his at some point after the former's death. The Court of Appeal, agreeing with the trial judge, held that the son had acted to his detriment in reliance on these promises and in the expectation that he would inherit the farmland. It is noteworthy, however, that the deceased's assurances related to only a part of the estate which was not occupied by the daughter. Moreover, the daughter was not seeking to raise a competing estoppel equity against the estate; on the contrary, her claim to inheritance arose solely under the deceased's will as legal owner of the various properties (including the farmland) vesting in her as sole beneficiary under the will. The issue of competing equities in relation to the same property did not, therefore, arise for consideration albeit, as a matter of proportionality, the son was held entitled to the farmland as against the daughter.

Undoubtedly, one solution to the problem of competing estoppel equities is to apply the well-established first in time rule. This clearly has the advantage of simplicity but, as the writers will seek to argue, it is likely to give rise to arbitrary and, therefore, unsatisfactory outcomes in most cases.

The nature of an estoppel equity

It has been said that "in order to provide a remedy the court must first find a right which has been infringed".[4] Thus, in the context of a proprietary estoppel claim, a distinction is drawn between the granting of the remedy by the court necessary to satisfy the equity and the equity (or right) itself which arises when the conscience of the legal owner is affected by the parties' conduct.[5] It is the element of detrimental reliance that renders it unconscionable for the legal owner to act in a manner inconsistent with his promise. The estoppel equity, therefore, crystallises as soon as the legal owner seeks to back on the basic assumption which underlies the dealings between the parties. In terms of timing, it predates the court hearing in much the same way as the institutional constructive trust which arises as soon as the claimant has acted to his (or her) detriment in reliance on the parties' express or inferred common intention in relation to the property.[6]

The distinction, therefore, between right and remedy is crucial. The former creates, in effect, a cause of action in equity which allows the claimant to be heard in court and, if appropriate, to have the claim enforced by means of either a proprietary or compensatory award – in essence, the equity remains "inchoate" in so far as any remedy in favour of the estoppel claimant will be prospective only and originate from the court's order. It is now also beyond doubt that, at least in relation to registered land, an estoppel equity has the effect from the time the equity arises of creating an interest capable of binding successors in title.[7] Such an equity is, therefore, proprietary in nature and is treated as a full equitable interest.

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[4] *Re Sharpe (A Bankrupt)* [1980] 1 WLR 219, at 225, per Browne-Wilkinson J.

[5] It is the element of detriment that renders it unconscionable for the legal owner to act in a manner inconsistent with his promise. The estoppel equity, therefore, crystallises as soon as the legal owner seeks to go back on the basic assumption which underlies the dealings between the parties.

[6] See generally, *Lloyds Bank plc v Rosset* [1991] 1 AC 107.

[7] See, s.116 of the Land Registration Act 2002. In unregistered land, the notice doctrine will apply: see, *ER Ives Investment v High* [1967] 2 QB 379; *Inwards v Baker* [1965] 2 QB 29, at 37; *Voyce v Voyce* (1991) 62 P & CR 290, at 295 and *Hopgood v Brown* [1955] 1 WLR 213, at 225 and 231. See also generally, M. Pawlowski, *The Doctrine of Proprietary Estoppel*, (1996, Sweet & Maxwell), at pp. 130-141.

The first in time rule

It is a well-established maxim of equity that "where the equities are equal the first in time prevails". The basic rule, therefore, is that equitable interests rank in the order of creation.[8] So, if two parties have competing equitable rights in the same property, and neither has the legal estate, the right which was created first enjoys priority.[9] The absence of notice of the earlier interest by the party who acquired the later interest is irrelevant, even if he has given value.[10] In *Cave v Cave*,[11] a sole trustee purchased land out of trust moneys in breach of trust. The conveyance was made in the name of his brother, who created first a legal mortgage and then an equitable mortgage. It was held that the legal mortgagee had priority by virtue of his legal estate, but that the basic rule applied to give the beneficiaries under the trust priority to the equitable mortgagee.

The rule has the advantage of certainty, but it also reflects the fact that A (in the above scenario) has a better claim over B because it is the element of detriment that renders it unconscionable for the legal owner to act in a manner inconsistent with his promise to A and make similar representations to B.[12] On this reasoning, the equity will be treated as having arisen when A acts to his detriment. Alternatively, the estoppel equity crystallises as soon as X seeks to go back on his promise to A in favour of B.[13] On either reasoning, A has the better equitable claim.

But despite its apparent simplicity, the first in time rule may have little to do with the fairness of a particular case. In our scenario, for example, why should B be necessarily denied a remedy simply because his equity came later in time? After all, the same promise has been made to both A and B and both claimants have acted in reliance on the promise and suffered detriment so as to trigger a successful estoppel claim. Would not a fairer outcome reflect the equities of both claimants?

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[8] *Qui prior est tempore potior est jure* – he who is earlier in time is stronger in law: see, *Barclays Bank Ltd v Bird* [1954] Ch 274, at 280 and *Macmillan Inc v Bishopsgate Investment Trust (No 3)* [1995] 1 WLR 978, at 999-1000, per Millett J. The first in time rule, subject to exceptions, also applies in the context of registered land: see, s.28(1) of the Land Registration Act 2002. The two main exceptions are to be found in s.29 (registrable dispositions of a registered estate made for valuable consideration) and s.30 (registrable dispositions of a registered charge made for valuable consideration).

[9] See, for example, *Willoughby v Willoughby* (1756) 1 Term Rep. 763. "An equitable owner, in the absence of special circumstances, takes subject to all equities prior in date to his own estate or charge": *Liverpool Marine Credit Co v Wilson* (1872) LR 7 Ch App 507, at 511. The rationale for the rule is stated to be that "every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more": *Phillips v Phillips* (1861) 4 De G. F. and J. 208, at 215, per Lord Westbury LC.

[10] *Macmillan Inc v Bishopsgate Investment Trust (No 3)* [1995] 1 WLR 978, at 1000, per Millett J. The party with the later interest cannot gain priority as a bona fide purchaser of the legal estate without notice if he has not acquired the legal estate.

[11] (1880) 15 Ch D 639.

[12] This accords with the approach taken in cases where the claimant is relying on a common intention constructive trust: see, for example, *Stack v Dowden* [2007] UKHL 17.

[13] See, *Gillet v Holt* [2000] 2 All ER 289. The element of unconscionability arises when the legal owner seeks to depart from the assumption which he permitted the claimant to make: *Crabb v Arun District Council* [1976] Ch 179, at 195, per Scarman LJ, and *Lim Teng Huan v Ang Swee Chan* [1992] 1 WLR 113, at 117, (PC), per Lord Browne-Wilkinson.

The potential arbitrariness of the "first in time" approach is vividly illustrated in several other related equitable doctrines. Under the so-called rule in *Clayton's* case,[14] for example, where a trustee mixes the funds of two separate trusts, or an innocent volunteer mixes trust money with his own money, in an active bank account, withdrawals out of the account are presumed to be made in the same order as payments in (i.e., first in, first out). To take a simple example, a fraudulent trustee pays £5,000 from trust fund A into his current bank account (where there are no other moneys) and next day pays the same amount into the account from trust fund B. A few days later, he dishonestly withdraws £5,000 for his own use. Applying *Clayton's* case, the entire loss will fall on trust fund A because A's money was the first to be paid in and, hence, is deemed to be the first out. As early as 1923, an American judge[15] ventured to suggest that "to adopt [the fiction of first in, first out] is to apportion a common misfortune through a test which has no relation whatever to the justice of the case". Whilst, undoubtedly, providing a "rule of convenience",[16] the case has been criticised judicially[17] and is the subject of a number of exceptions. In *Barlow Clowes International Ltd v Vaughan*,[18] the Court of Appeal refused to apply the rule to a situation where moneys, which had been paid towards various investment plans, were misapplied leaving a substantial shortfall in the amount available for distribution to the investors. Although refusing to overrule *Clayton's* case, the Court concluded that, where the application of the rule would be impractical or would result in injustice between the competing parties, or would be contrary to the parties' (express or implied) intention, it fell to be displaced if a preferable alternative method of distribution was available.

The rule in *Dearle v Hall*[19] provides another example of the application of the first in time rule to determine priority between competing equitable claims to the same asset. The rule states that, where the equitable owner of an asset purports to dispose of his equitable interest on two or more occasions, and the equities are equal between the rival claimants, the claimant who first notifies the trustee of the asset will have the prior claim. The case itself concerned the priority of mortgages of an equitable interest in land, but the rule also applies to mortgages and assignments of equitable interests in pure personalty and to equitable assignments of debts. The principle differs from the first in time rule only in so far as priority is dependent not on the date of the interest's creation, but on the date of notice to the trustees or debtor. Here again, the rule has been the subject of both judicial[20] and academic[21] criticism.

The exception to the first in time rule

[14] *Devaynes v Noble*; *Baring v Noble* [1816] 1 Mer 572; [1814-23] All ER Rep 1.

[15] *Re Walter J Schmidt & Co, ex p Feuerbach* [1933] 298 F 314, at 316, per Judge Learned Hand.

[16] *Re Diplock's Estate, Diplock v Wintle* [1948] 1 Ch 465, at 553-554, per Lord Greene MR.

[17] See, *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22 and *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch). See further, M. Pawlowski, "The Demise of the Rule in *Clayton's* Case", [2003] 67 Conv. 339.

[18] [1992] 4 All ER 22.

[19] (1828) 3 Russ 1. The rule is currently adopted in s.137 of the Law of Property Act 1925.

[20] See, for example, *Ward v Duncombe* [1893] AC 369, where Lord Macnaghten opined that "the rule in *Dearle v Hall* has on the whole produced at least as much injustice as it has prevented". The Law Commission, in the wider context of priority rules relating to security interests, has recommended the abolition of the rule and its replacement with a system of registration: see, Law Commission Report, *Company Security Interests*, (Law Com No 296, 2005).

[21] See, for example. R. Goode, *Commercial Law*, (4th ed., 2010).

Under the exception,[22] the question of which of two (or more) competing equities should prevail depends on the conduct of each equitable claimant in relation to the others. Where all are equally innocent, priority, as we have seen, is determined by the order at which the equities arose in time. But the position is different where the equities are not equal. In *Taylor v Russell,*[23] Kay J suggested that nothing less than gross negligence must be shown by a later equitable claimant against a prior holder of an equity to reverse the normal order of priority. This would include cases where the earlier claimant has been guilty of misrepresentation or fraud, which has induced the creation of another equitable title. In *Abigail v Lapin*,[24] a decision of the Privy Council on appeal from the High Court of Australia, Lord Wright opined that "apart from priority in time, the test for ascertaining which incumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim." The following passage from the judgment of Knox CJ in the High Court of Australia[25] was adopted by his Lordship as setting out the relevant principles for resolving the competition between competing equitable interests in land:

> ". . . . the possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless the act or omission proved against him has conducted or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was not in existence."

Dixon J, in the High Court,[26] explained the position in the following terms:

> "The act or default of the prior equitable owner must be such as to make it inequitable as between him and the subsequent equitable owner that he should retain his initial priority. This in effect means that his act or default must in some way have contributed to the assumption upon which the subsequent legal owner acted when acquiring his equity."

Similarly, in *Shropshire Union Railways and Canal Company v R*,[27] Lord Cairns put the matter this way:

> "My Lords, that pre-existing equitable title may be defeated by a supervening legal title obtained by transfer. And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title."

In that case, a beneficiary who was absolutely entitled to railway shares allowed them to stand in the name of a single trustee and entrusted him with the custody of the certificates. It was

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[22] It would appear that the first in time rule for the purposes of registered land is an "absolute one" subject only to the exceptions provided in ss.29 and 30 of the Land Registration Act 2002: see, Law Commission Report, "Land Registration for the Twenty-First Century", (Law Com. No. 271, 2001), at para. 5.5, discussing s.28 of the 2002 Act. It seems, therefore, that, on a strict reading, no question arises as to whether the competing equities are equal in registered land.

[23] [1891] I Ch 8, at 17.

[24] [1934] AC 491, at 504, (Privy Council).

[25] See, (1930) 44 CLR 166, at 183-184. See also, *IAC (Finance) Property Limited v Courtenay* (1963) 110 CLR 550, at 575-6, (High Court of Australia), and *J & H Just (Holdings) Property Ltd v Bank of New South Wales* (1971) 125 CLR 546, (High Court of Australia). For a commentary on the Australian case law, see, P. Holland, (1971) Melbourne University Law Review, Vol. 8, 181.

[26] (1930) 44 CLR 166, at 204.

[27] (1875) LR 7 HL 496, at 507-508.

argued that the beneficiary was bound not merely by a valid legal transfer of the shares by the trustee, but also by an equitable dealing or contract which the trustee might choose to enter into. The House of Lords rejected this argument holding that, in order to take away a pre-existing equitable title, "something tangible and distinct", having the "strong and grave" effect of producing such a result, must be clearly proved to have taken place.[28] Accordingly, the burden of such proof lies on the person seeking to displace the previous equitable title. In *Rice v Rice*,[29] for example, the equities were not equal. In that case, a vendor handed the title deeds to a purchaser without receiving the purchase money. Though the vendor still retained an equitable interest (i.e., his vendor's lien for the purchase price), it was held that a later equitable mortgagee of the property without notice of the lien had priority though later in time because the vendor had led him to believe that there was no competing equitable interest.

So, returning to our scenario, if A has misrepresented the position to B and induced B to act to her detriment in the belief that there is no earlier equitable title, B will have the better equity over A. Suppose, for example, that A had been approached by B asking about X's intentions as to who should become entitled to the house after X's death and A had informed B that she could go ahead with the repairs to the property as the house would be hers. No doubt, A's behaviour would displace the usual order of priority between the parties. Indeed, in these circumstances, A can be said to be estopped, as against B, from setting up his own prior equitable title.[30]

Although such an approach may be appropriate in relation to unregistered land, the position may not necessarily be the same in relation to registered titles. In relation to registered land, s.28 of the Land Registration Act preserves the first in time rule by providing that the priority of an interest is not affected by a later disposition even if that disposition is entered on the register, except for the priority enjoyed by registered dispositions made for valuable consideration under ss.29 and 30 of the 2002 Act. Interestingly, the Law Commission in its 2001 Report[31] stated this statutory priority rule to be an "absolute one" contrasting the uncertainties of the equitable rule that an interest first in time has priority only if the equities are equal. If that is correct, then this would seem to rule out the possibility of a later equitable holder successfully arguing for a reversal of priority in circumstances where the holder of an earlier equity has been guilty of some misconduct which has prejudiced the former's claim. In the writers' view, however, it would be surprising if s.28 were to be interpreted by the courts in this way given the existing body of case law which has allowed for the determination of competing equities to be resolved by a broader examination of the conduct of both parties. Indeed, this has been the approach adopted in several of the Commonwealth jurisdictions.

The Commonwealth experience

In Australia, New Zealand and Canada, the courts have taken a more holistic approach in applying the exception to the first in time rule to competing equities. The High Court of Australia, for example, whilst acknowledging that, as a general rule, equitable interests take

[28] Ibid, at 507, per Lord Cairns.

[29] (1854) 2 Drew 73.

[30] See, *Ashburner's Principles of Equity*, (2nd ed., 1933, Butterworth & Co Publishers Ltd), by D. Browne, at p. 57. See also, *Freeguard v The Royal Bank of Scotland plc* (1998) 79 P & CR 81, (concept close to estoppel used to postpone earlier interest to a later one).

[31] See, Law Commission Report, "Land Registration for the Twenty-First Century", (Law Com. No. 271, 2001), at para. 5.5, discussing s.28 of the 2002 Act.

priority in order of date, has accepted the broader principle of doing justice between the parties in resolving the competing claims of equitable claimants. In the leading case of *Heid v Reliance Finance Corporation Property Limited*,[32] Mason and Deanne JJ (in their joint judgment) explained the proper approach in these terms:

> "For our part, we consider it preferable to . . . accept a more general and flexible principle that preference should be given to what is the better equity in an examination of the relevant circumstances. . . To say that the question involves general considerations of fairness and justice acknowledges that, in whatever form the relevant test be stated, the overriding question is '. . . whose is the better equity, bearing in mind the conduct of both parties, the question of any negligence on the part of the prior claimant, the effect of any representation as possibly raising an estoppel and whether it can be said that the conduct of the first or prior owner has enabled such a representation to be made . . . '"

Moreover, in determining "whose equity is better", the whole conduct of both parties may be taken into account irrespective of the time when it occurred.[33] This has been applied in the more recent case of *Perpetual Trustee Co Ltd v Smith*,[34] where the Federal Court of Australia took into account a variety of factors in considering the competing equities. The court's search for the best (or better) equity, necessarily involving a determination of the most meritorious claim, has also been adopted by the Court of Appeal of New Zealand in *Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd*,[35] involving competing equitable mortgages, where Tompkins J (giving the judgment of the court), stated:[36]

> "The Court is, after all, concerned with the demands of fairness and justice. The preferable approach, where there is subsequent conduct of a kind that equity will regard as significant, will be to consider the whole picture at the time of the decision and to fix priorities according to which party then is perceived as having the better equity."

Here again, however, the first in time rule is seen as the starting point with the onus of proof resting squarely on the second equity holder as the party seeking to reverse the order of priority. Thus, if contrary to the basic rule, the later claimant is to be preferred, the onus lies on him to show why that should be the case. It is only in deciding whether the equities should be reversed, therefore, that the court embarks on the question of what is fair and just between the parties.

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[32] (1983) 154 CLR 326, at 341. See also, *Cash Resources Australia Property Limited v BT Securities Ltd* [1990] VR 576, at 586, where Brooking J held that the competing equities had to be determined by applying broad principles of right and justice. See also, *Person-to-Person Financial Services Property Ltd v Sharari* [1984] 1 NSWLR 745, at 746-747 and *Taleb v National Australia Bank Ltd* (2011) 82 NSWLR 489, at [33]-[41]. See, generally, Meagher, Gummow and Lehane's *Equity Doctrines and Remedies*, (5th ed., 2015), LexisNexis Butterworths, pp. 327-336.

[33] See, *Clark v Raymor (Brisbane) Property Ltd (No 2)* (1982) Qd R 790, (Full Court of Queensland), at 791 and 797.

[34] (2010) 273 ALR 469, (Federal Court of Australia). The court approved the following passage from *Rice v Rice* (1853) 2 Drew 73, at 78-79: "in examining [the relative equities of two parties] [the court] must apply the test, not of any technical rule or any rule of partial application, but the same broad principles of right and justice which a Court of Equity applies universally in deciding upon contested rights."

[35] [1995] 1 NZLR 129.

[36] Ibid, at 137.

Although the judgment in *Australian Guarantee* has been criticised academically[37] as giving rise to a discretionary jurisdiction to apportion loss as between several equitable claimants (and, hence, creating the potential for uncertainty and increased litigation), it does, in the writers' view, offer the court the ability to consider the merits of each claim by reference to a range of factors which are not necessarily limited to the conduct of the holder of the earlier equitable interest. Not surprisingly, this holistic merit analysis has also been adopted in Canada where all equitable principles are considered in determining priority between competing equitable claims. Thus, in *McDougall v MacKay*,[38] the Supreme Court of Canada, whilst accepting the basic first in time rule, held that it did not prevail in all cases. Anglin J put the matter this way:[39]

> "I fully recognise that a court of equity will not prefer one equity to another on the mere ground of priority of time until it has found by examination of their relative merits that the is no other sufficient ground of preference between them; that such an examination must cover the conduct of the parties and all the circumstances; and that the test of preference is the broad principle of right and justice which courts of equity apply universally."

It is the thesis of this article, however, that the discretionary jurisdiction adopted by the Commonwealth cases does not go far enough and that, in the specific context of claims based on proprietary estoppel, the better approach is to determine the claimants' competing equities by reference to the mechanism of "unconscionability" which, as we know, forms one of the key (and underpinning) elements of the proprietary estoppel doctrine. **In other words, the parties' respective claims would not be determined by any order of priority, but instead both claims would be treated as having equal status allowing the resolution of the problem to be resolved at the date of the hearing. It is as this stage, it is submitted, that the court is best equipped to consider the parties' respective claims without any pre-determined onus of proof in favour of the earlier claimant and by reference to all the circumstances including those leading up to the hearing itself.**

Applying proprietary estoppel doctrine

The equitable exception to the first in time rule will, clearly, not avail a later estoppel claimant in all cases.[40] Where the equities are equal, the basic rule will prevail. What is needed, therefore, is a more flexible approach which would allow the court to acknowledge both estoppel claims (assuming these are made out on the facts) and determine the competing equities from the standpoint of the conscience of the parties and how best (if at all) to satisfy the equities. The outcome, therefore, would be dependent on doing justice between the claimants (so as to avoid an unconscionable result) and arriving at a solution which reflects the merits (or otherwise) of both claims.

On this approach, in our scenario, the equities which would arise from X's promise to both A and B would generate the right of each claimant to be heard in court and, if appropriate, to have his (and her) claim enforced by an appropriate award. As mentioned earlier, the equity merely

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[37] See, A.J. Oakley, "Judicial Discretion in Priorities of Equitable Interests", (1996) 112 LQR 215, at 219.

[38] (1922) 68 DLR 245, (Supreme Court of Canada).

[39] Ibid, at 249. The passage was applied by Blair JA in the Ontario Court of Appeal: see, *Canada Life Assurance Co v Kennedy* (1979) 21 OR (2d) 83, at 95.

[40] As noted earlier, it is debatable whether the exception applies to registered land: see, s.28 of the Land Registration Act 2002.

attracts the discretion of the court – it remains "inchoate" until such time as the court actually decrees a specific interest or award in favour of the estoppel claimant. However, each party's estoppel interest would, as we have seen, have proprietary status before any court order in accordance with s.116 of the Land Registration Act 2002 which provides that an equity by estoppel "has effect from the time the equity arises as an interest capable of binding successors in title". Although the provision refers only to registered land, it is unlikely that a different position applies in unregistered land.[41] However, such interests are not registrable under the Land Charges Act 1972 and so depend on the doctrine of notice.[42] In registered land, on the other hand, estoppel rights will be overriding if coupled with occupation.[43] They can also be protected by notice.[44]

Given, however, that the competing equities would no longer need to be ranked in order of priority, the court's primary function would be limited to determining what remedy or remedies (if any) to apply to the given circumstances of the case. Significantly, the court would not be faced with the difficult task of deciding "whose equity is better" by reference to the most meritorious claim. In the writers' view, this fails to address the point that both claims may be equally meritorious in the absence of any factors swaying the balance in favour of one or other of the parties. After all, in our scenario, the same promise has been made to both A and B and both claimants have acted in reliance on the promise and suffered detriment as a result. Apart from the timing of the equities, both appear to have an equal claim to X's property. The matter, therefore, resolves itself into determining the appropriate response by way of remedy and not by means of determining the order of priority of the competing equities.

In terms of the appropriate remedy, therefore, since A and B have incurred expenditure in improving the property, it is likely that both would be entitled to have their equities satisfied in a manner which would compensate them for their detrimental reliance. In terms of proportionality, this would necessarily entail granting each claimant a monetary award or a charge over the property proportionate to their financial outlay. In this scenario, the award of monetary compensation would operate as a default remedy given that shared ownership or occupation of the house between A and B is unlikely to be feasible or realistic.[45] Alternatively, the court may be minded to satisfy the equities by granting each claimant a beneficial interest

[41] This is the view taken in Hanbury & Martin, *Modern Equity*, (19th ed., 2012), Sweet & Maxwell, by Jill E. Martin, at p. 954, where it is stated that "section 116 does not operate to pre-empt the court's decision as to the appropriate remedy, which could still be a money payment rather than some right over land". If the court orders a proprietary remedy, the interest so created by the application of the estoppel doctrine will, according to its nature and any requirements of registration and formality, bind third parties.

[42] Occupation will normally give constructive notice of the interest. Once proceedings are issued, the estoppel claim may be registered as a pending land action under s.5(1) of the Land Charges Act 1972: see, *Haselmere Estates v Baker* [1982] 1 WLR 1109.

[43] See, s.29 and para. 2, Schedule 3 to the Land Registration Act 2000. In the case of first registration of title: see, para. 2, Schedule 1. Estoppel rights may also be overreached by a disposition by two trustees: see, *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (2000) 80 P & CR 256.

[44] In the absence of the registered proprietor's consent, a unilateral notice may be entered: see, ss.34 and 35 of the Land Registration Act 2002.

[45] See, for example, *Burrows & Burrows v Sharp* (1991) 23 HLR 82, where the equity, at the time of the trial, could have been satisfied either by an order giving the claimants a right to live in the property or by an order for the refund to them of their expenditure on the premises. In reality, however, the former type of order was quite unworkable in view of the breakdown in relations in the family.

in the property under a constructive trust. In *Hussy v Palmer*,[46] for example, the majority of the Court of Appeal concluded that the claimant had an equitable interest in the defendant's house proportionate to the sum which she had expended on building an extension onto the property in reliance on the promise that she would be entitled to live there for the rest of her life. Lord Denning MR alluded to the possibility of using the constructive trust as a mechanism for satisfying the estoppel equity. He stated:[47]

> "In those [proprietary estoppel] cases it was emphasised that the court must look at the circumstances of each case to decide in what way the equity can be satisfied. In some by an equitable lien. In others by a constructive trust."

Another solution, given that the parties' personal circumstances may be very different, would be to order an outright transfer of the property to one of the claimants and to award the other a charge over the same postponed until sale or the happening of some other event. In *Sledmore v Dalby*,[48] for example, the Court of Appeal, in determining the "minimum equity" to do justice to the estoppel claimant, held that it was no longer inequitable (at the date of the hearing) for the legal owner to allow the claimant's expectation to be defeated by permitting the owner to enforce her legal rights to the property. In reaching this conclusion, the Court performed a balancing exercise, weighing the owner's needs and financial situation against the present use of the property made by the estoppel claimant and his need for the accommodation. The result was a finding that the effect of the claimant's equity had been fully extinguished by the date of the hearing. In our scenario therefore, adopting a similar balancing exercise, the court may be minded to subordinate B's claim to ownership of the property in favour of an outright transfer to A (given A's greater need for the property), but at the same time affording B a more modest award in the form of an equitable share in the eventual proceeds of sale.

On the other hand, changing our scenario slightly, if A had been promised the house and B had later been told that she would be entitled to a long lease of a cottage situated on X's land, both equities (in so far as they no longer relate to the same property) could be satisfied in full by giving effect to the parties' respective expectations. Similarly, if instead of being promised a lease of the cottage, X had promised B a right of way over X's land so as to enable her to gain easier access to her neighbouring property, there would be little difficulty in satisfying her equity by the grant of an easement in her favour.[49] As we know, the cases[50] on proprietary estoppel show that the aim is not necessarily to compensate for detrimental reliance or to protect expectations. The objective is to do what is necessary to avoid an unconscionable result, taking into account all the circumstances relevant to the court's discretion. Indeed, in these last two scenarios, as mentioned earlier, the issue of competing equities does not strictly

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[46] [1972] 1 WLR 1286. See also, *Ungurian v Lesnoff* [1990] Ch 206 and *Preston and Henderson v St Helen's Metropolitan Borough Council* (1989) 58 P & CR 50, Lands Tribunal.

[47] See, [1972] 1 WLR 1286, at 1290, approved in *Pearce v Pearce* [1977] 1 NSWLR 170, at 177, per Helsham CJ, (Supreme Court of New South Wales). See also, *Re Basham (dec'd)* [1986] 1 WLR 1498, at 1504, where Mr Edward Nugee QC opined that a constructive trust was an appropriate remedy in proprietary estoppel cases "at all events where the belief is that A is going to be given a right in the future". See further, *Re Sharpe (A Bankrupt)* [1980] 1 WLR 219.

[48] [1996] 72 P & CR 196.

[49] See, *Crabb v Arun District Council* [1976] Ch 179 and *ER Investments Ltd v High* [1967] 2 QB 379.

[50] See, for example, *Thorner v Majors* [2009] UKHL 18; *Jennings v Rice* [2002] EWCA Civ 159; *Jiggins v Brisley* [2003] EWHC 841 (Ch); *Ottey v Grundy* [2003] EWCA Civ 1176.

arise as the promises made by X to A and B (although differing in time) relate to different items of property.

What the above illustrations demonstrate is that the competing equities can be satisfied without necessarily creating any conflict between the respective awards made to the parties. In particular, it may be possible to satisfy both equities by awarding a remedy to each claimant which does not involve a fulfilment of their original expectations. This can be achieved, as we have seen, by means of a monetary award, or the imposition of a constructive trust which enables both parties to acquire an equitable interest in the property reflecting their detrimental reliance. Clearly, the court would seek to avoid creating competing rights as remedies even if this meant adopting a default position as between the parties – significantly, such a response would still accord with the overall objective of doing justice between the parties. It would also reflect the current judicial trend towards proportionality and, hence, greater flexibility in determining the appropriate award in proprietary estoppel cases.

It should not be forgotten also that the concept of "unconscionability" is now seen as a vital component (additional to proving assurance and detrimental reliance) in establishing a successful proprietary estoppel claim. The term has been defined judicially as meaning "an objective value judgment on behaviour"[51] and, as Robert Walker LJ emphasised in *Gillet v Holt*,[52] the prevention of unconscionability "permeates all the elements of the doctrine" so that "the court must look at the matter in the round". It has been held,[53] for example, that the estoppel claimant's misconduct towards the legal owner may affect his or her entitlement to relief. In particular, no estoppel will arise if the assurance relied on by the estoppel claimant has been procured by latter's false representations.[54] In the context of our scenario, therefore, this would suggest that, as between A and B, the former would be denied relief if he misrepresented the position to B and induced B to act to her detriment in the belief that there is no earlier equitable claim. The point here is that, instead of applying a narrow exception to the first in time rule, the court is able to exercise flexibility in determining how to resolve the equities in accordance with established principles governing proprietary estoppel. Most importantly, the court is able to respond to the circumstances of each case by doing what is necessary to prevent an unconscionable result. **This, in turn, may warrant the court in concluding that, despite the similar promises made to both A and B, the "first" (or "second") equity should prevail in determining the correct award. To this extent (and in these limited circumstances), the court's exercise of its discretionary jurisdiction in making an appropriate award may not differ fundamentally from the stance adopted by the Commonwealth courts where, as we have seen, in determining "whose equity is better", the whole conduct of both parties is taken into account irrespective of the time when it occurred.**

The inherent problem in applying the first in time rule in our scenario is that it itself generates a potentially unconscionable result by automatically giving preference to one estoppel claimant over the other despite each claimant having a potentially valid and meritorious claim to have his (or her) equity determined by the court. As mentioned at the beginning of this article, why should the later claimant be necessarily denied a remedy simply because his or her equity came later in time? Given that the same promise has been made to both A and B and both claimants

[51] See, *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, at [28], per Lord Walker.
[52] [2000] 2 All ER 289, at 301.
[53] See, for example, *Williams v Staite* [1979] Ch 291, at 300-301 and *J Willis & Son v Willis* (1986) 277 EG 1133.
[54] See, *Idebrando de Franco v Stengold Ltd*, unreported, May 14, 1985, Court of Appeal, available on Lexis-Nexis.

have acted in reliance on the promise and suffered detriment, should not justice demand an appropriate outcome which reflects the equities of both claimants?

Conclusion

The courts have not yet had to grapple with the thorny problem of competing equities in the context of claims founded on proprietary estoppel. At first glance, the first in time rule appears to provide a simple solution by automatically favouring the earlier equity on the ground that the right which was created first enjoys priority.

Although the rule is mitigated, at least in relation to unregistered land,[55] by an exception which allows for the reversal of priorities if the earlier claimant has been guilty of inequitable behaviour towards the later claimant, it is apparent that the exception is of limited application and will not assist in most cases. Although the Commonwealth cases, as we have seen, have taken a more holistic approach in applying the exception, the better approach, it is submitted, is for the court to acknowledge the estoppel claims of *both* competing claimants as having equal status and determine how best to satisfy the respective equities by adopting a flexible approach which would allow it to consider all the circumstances (including the parties' conduct) in arriving at a just result. In addition to the mechanism of unconscionability, which now pervades all aspects of the proprietary estoppel doctrine, the availability of a range of remedies also provides the court with the ability to "mould the relief" to meet the needs of each individual case.

Indeed, the more competing equities in a given scenario, the more appropriate it becomes, in the writers' view, to apply a discretionary holistic approach, already grounded in proprietary estoppel doctrine, to determining the respective claims of the parties.[56]

[55] As noted earlier, it would appear that the first in time rule for the purposes of registered land is an "absolute one" subject only to the exceptions provided in ss.29 and 30 of the Land Registration Act 2002: see, Law Commission Report, "Land Registration for the Twenty-First Century", (Law Com. No. 271, 2001), at para. 5.5, discussing s.28 of the 2002 Act. It seems, therefore, on a strict reading, that no question arises as to whether the competing equities are equal in registered land.

[56] The writers would argue that, in such circumstances, it would be surprising if s.28 of the Land Registration Act 2002 were to be treated as conclusive in applying the first in time rule. Otherwise, s.28 would require an amendment so as to exclude the application of the first in time rule in relation to proprietary estoppel claims.