If the Lords want the glory of deciding on such major changes to the law, they must also take on the responsibilities that go with it. And these responsibilities now remain for others to perform. There is no reason to fear a "flood of claims", for while a majority of the Lords ignored the need for certainty of transaction, no doubt the rest of the judiciary will not. But liability has now been stated in such broad terms that the judges will be forced down very strange by-ways in their efforts to limit it. There is no risk of the floodgates opening; the real pity is the legal fees that will be wasted in establishing the precise conceptual basis for closing them.

STEVE HEDLEY

PROPRIETARY ESTOPPEL AND WILLS

WHEN is a promise to benefit someone on one's death an enforceable promise? This was the question for the High Court in *Gillett* v. *Holt and Another* [1998] 3 All E.R. 917. As Carnwath J. recognised, the difficulty lies in reconciling proprietary estoppel with the principle that "[s]ubject to specific exceptions (such as for dependants), the right to decide, and change one's mind as to, the devolution of one's estate is a basic and well understood feature of English law".

The defendant was a farmer who never married. In the 1950s the plaintiff, then in his teens, started to work for the defendant and they became close friends. There was talk of the defendant adopting the plaintiff. From time to time from the mid-1960s onwards the defendant assured the plaintiff that he would receive the whole, or substantially the whole, of his estate when he died. In 1983 the defendant gave the plaintiff and his wife 20 per cent. of the shares in his farming business. The picture changed in the early 1990s when the defendant met Mr. Wood, the second defendant. A strong relationship developed and Mr. Wood moved in with the defendant. The defendant had made a will which provided that almost all his estate was to pass to the plaintiff but this will was now revoked. Several new wills were made until, in 1995, the defendant made his current will, under which the plaintiff was to receive nothing.

The plaintiff argued that the defendant was bound to bequeath his estate to him: he had been led to believe that the defendant would do so, and had acted on this belief to his detriment in accepting unreasonably low pay for thirty years. His claim failed. Carnwath J. explained:

> [I]n the application of [proprietary estoppel] to statements about the intended contents of a will, the facts must be looked at against the ordinary presumption that such intentions are subject

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> to change . . . [T]he plaintiff needs to show words or conduct by the prospective testator, which go beyond mere statements of intention, and which, having regard to all the circumstances, he can reasonably claim to have regarded as amounting to an irrevocable promise by the prospective testator as to how his estate would be disposed of.

No such promise could have been apprehended by the plaintiff: "He must have been aware that his expectations, however reasonable, were dependent on [the defendant's] continuing good will . . .".

Taylor v. *Dickens* [1998] 1 F.L.R. 806 involved a similar claim. Mrs. Parker told the plaintiff that she was leaving him her residuary estate. He stopped taking any pay for his work as her handyman/gardener. A will was made in the promised terms. However, Mrs. Parker executed a new will shortly before she died under which the plaintiff received a £1,000 legacy instead. The plaintiff sought a declaration that he was entitled to the residuary estate. His Honour Judge Weeks, sitting as a High Court judge, stated: "[I]t is not sufficient for A to believe that he is going to be given a right over B's estate if he knows that B has reserved the right to change his mind. In that case, A must also show that B created or encouraged a belief on A's part that B would not exercise that right." The plaintiff "knew that wills were revocable and that Mrs. Parker could change her mind", and Mrs. Parker had done nothing to lead him to believe that she had abandoned this right. The plaintiff was unsuccessful. This requirement for the promise to be coupled with an apparent abandonment by the testator of the right to change his mind seems indistinguishable from Carnwath J.'s "irrevocable promise" requirement.

Is the approach any different where the promise concerns future rights which are to take effect other than on death? Judge Weeks relied heavily on *Attorney General of Hong-Kong* v. *Humphrey's Estate (Queen's Gardens) Ltd.* [1987] A.C. 114. Proprietary estoppel did not operate in that case either, but the agreement between government and company was expressly "subject to contract": the testator in *Taylor* v. *Dickens* made no reference to her right to alter the will. It might just be, therefore, that a promise of rights to be granted during the owner's lifetime, once acted upon, will be binding if the owner did not expressly reserve the right to change his mind, whilst an explicit abandonment of this right is required before a promise of rights under a will can be enforced. After all, the operation of proprietary estoppel would be much restricted if the *Taylor* v. *Dickens* and *Gillett* v. *Holt* approach were applied in all cases involving promises as to future rights.

The courts in *Gillett* v. *Holt* and *Taylor* v. *Dickens* had to

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distinguish *In re Basham (deceased)* [1986] 1 W.L.R. 1498 and *Wayling* v. *Jones* (1993) 69 P. & C.R. 170. In the earlier cases the disappointed beneficiary was successful in relying on proprietary estoppel, even though it is difficult to see any "irrevocable promise" or abandonment of the testator's right to change his mind. Judge Weeks pointed out that they "were both cases where a person said they would make a will and did not. This is a case where a person said she would make a will and did." Surely the better explanation is that in *Gillett* v. *Holt* and *Taylor* v. *Dickens* the owner promised to bestow an interest on the claimant and then changed his mind, whereas in *In re Basham* and *Wayling* v. *Jones* the owner made the same promise, did nothing to suggest a change of mind but died before the necessary steps were taken. Where there is no evidence of a decision to go back on the promise, the power to revoke becomes irrelevant, and so there is one less hurdle to overcome in establishing proprietary estoppel. Carnwath J. seems to have taken this view: in the two earlier cases "the promisors' intentions, on which the plaintiff had relied, had remained unchanged until death, and there was no suggestion they had ever considered changing them".

Carnwath J. went on to find that the plaintiff's wages were not unreasonable. Hence, the plaintiff had not acted to his detriment and the claim was dismissed on this ground as well. This is unsurprising: it will always be more difficult to establish unconscionability without detriment and, as Carnwath J. accepted, unconscionability is "the overriding principle". Unfortunately, his Lordship also spoke of the need for "some mutual 'understanding' as to the *quid pro quo* for the promise". The courts have often referred to a need for the owner to know that the claimant was acting, or likely to act, on the encouraged belief. But it is going too far to suggest that the acts in reliance on the belief must have been seen by the parties as consideration for the promised interest. This bargain analysis was used by Lord Diplock in explaining the common intention constructive trust in *Gissing* v. *Gissing* [1971] A.C. 886, 905D, but was later rejected (see, in particular, Nicholls L.J. in *Lloyds Bank* v. *Rosset* [1989] Ch. 350, 381). It would be strange if the requirement for a bargain should now be introduced into the closely related doctrine of proprietary estoppel.

Responding to the question "When is a promise to benefit someone on one's death binding?" by answering "When the promise is irrevocable" or "When the right to change one's mind has been abandoned" can only be a beginning. The question will be revisited many times in future case law if, as must be expected, more use is made of proprietary estoppel by disappointed beneficiaries.

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