Estoppel In The Irish Courts - The Ebb And Flow Of Unconscionability: Recent Developments

Introduction

> "The Equity has been differently expressed from time to time. In *Dillwyn* v. *Llewelyn*, it was expressed as operating through providing valuable consideration which in the circumstances established a contract. In *Plimmer* v. *Wellington Corporation*, it was expressed as making a revocable licence irrevocable. It has also been expressed from time to time as operating by a form of estoppel. The foundation of it, however, in all these instances, is the recognition by the court that it would be unconscionable in the circumstances for a legal owner fully to exercise his legal rights."[1]

What gives rise to a valid estoppel in equity? This soul-searching question has been asked on many occasions and the answer appears to be quite elusive. Irish Equity students are taught that estoppel arises in different guises and that its components and the subsequent relief obtainable under its aegis depend on the type of estoppel raised. Thus, traditionally, we speak in terms of promissory estoppel being available in the context of legal relations; giving rise to personal rights; and being capable of use only as a sword and not a shield. In contrast, consideration of proprietary estoppel tends to centre on the constituent elements of assurance, reliance and detriment, with our eyes fixed firmly on the greater rewards, in terms of proprietary interests, available at the end of this equitable route. In recent years, however, particularly in light of Australian developments, considerable attention has been focused on unconscionability's place in the estoppel framework. Is there a need for separate types of estoppel or should we really talk in terms of "one overarching doctrine" or an estoppel "shorn of

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[1] *Ward* v. *Kirkland* [1967] Ch 194, at page 235.

limitations"?[2] In Ireland, this debate has tended to occur in academic more so than legal circles. Recent case law has, however, provided food for thought and while it may be premature to say that Ireland has opted for a new estoppel, it certainly cannot be denied that equitable discretion is alive and well in the Irish courts as far as estoppel is concerned.

In this paper, I propose to do two things: firstly, to consider the recent estoppel case law in the context of succession law, illustrating the progressive approaches adopted by both the High and Supreme Courts, particularly in light of recent English decisions. Secondly, to place the current developments into context, thereby illustrating that although well versed in the traditional doctrines of equity, this has not prevented Irish judges from taking a pragmatic approach, where required, and thereby stretching the boundaries of equity's jurisdiction.

When Testamentary Promises Ring Hollow

Three cases, in particular, merit consideration and provide interesting counterweights, arising as they do at different points in the succession law chain. In the first, *Smyth* v. *Halpin*,[3] a disappointed beneficiary sought to challenge his father's will, when despite promises to the contrary, the deceased left the family home to another sibling. By contrast, the lack of a will setting out the deceased's intentions in *McCarron* v. *McCarron*,[4] resulting from intestacy, presented the Supreme Court with an interesting dilemma. Although in this case, an equitable result was reached through the use of the doctrine of part performance, the court made some noteworthy comments with regard to the doctrine of estoppel. Finally, the decision of Costello P in *Re JR*,[5] dealing with the interaction of promissory and proprietary estoppel, has caused a lot of ink to be spilt with commentators singularly in agreement with the High Court's ultimate result, but divided with respect

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[2]*Commonwealth of Australia v. Verwayen* (1990) 170 CLR 394, at page 410 per Mason CJ and *Amalgamated Investment and Property Co v Texas Commerce International Bank Ltd.* [1982] QB 84 at page 122 per Lord Denning, respectively.

[3][1997] 2 ILRM 38.

[4]Unreported, Supreme Court, 13 February 1997.

[5][1993] ILRM 657.

both to the appropriateness of the learned judge's reasoning and its significance in terms of the future development of the doctrine.

Smyth v. Halpin

In *Smyth*, Geogeghan J summed up the current approach of the Irish Courts' to estoppel, stating:

> *As I understand the authorities, the court is at large as to how to best it will protect the equity and of course it has to consider what the equity is.* In this case the clear expectation on the part of Mr Smyth was that he would have a fee simple in the entire house. The protection of the equity arising from the expenditure therefore requires in this case that an order be made by this Court directing a conveyance of that interest to him.[6]

The circumstances giving rise to Felix Smyth's equity were quite straightforward. In 1983 and again in 1987, on the occasion of Felix's engagement the deceased had advised him to take the family homestead and extend it rather than building a new house. His father had reasoned that the property would be the plaintiff's after his mother's death and had counselled Felix saying "what would you be doing with two places?" On the strength of these promises, the plaintiff engaged an architect to design a self contained extension of the family home (with the overall intention that one day the house would be occupied entirely by the plaintiff), and incurred expenditure in its construction with the help of a building society loan.[7]

For his part, the deceased made a number of wills during his lifetime: the 1966 version omitted Felix entirely in favour of his brother, but by 1976, the testator clearly intended that the plaintiff would ultimately receive both the house and surrounding lands. By 1986, this had been altered slightly to allow his sisters an option to a half-acre site on the family land for the purpose of building homes, which option would lapse four years after the death of their father. The testator's penultimate will in 1991, however, showed a complete *volte face*:

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[6]See note 3, *supra*, at page 44.

[7]In order to obtain the loan the site had to be transferred into Felix's name - a matter of importance not lost upon the High Court judge.

under the new terms Felix would receive only the lands absolutely, subject to his mother's life interest and the reversion in the family home was now left to the second defendant (his sister, Regina) absolutely. The last will, executed in 1992, essentially confirmed this state of affairs apart from devising a right of way to Felix. It appears that Felix learnt only of his father's change of heart at the reading of the will after his death.

The plaintiff sought the transfer of the reversionary interest in the house to him on the basis of proprietary estoppel with an alternative claim for monetary compensation in respect of his expenditure on the property. Holding that the plaintiff could not ground his action in contract, Geogeghan J turned his mind to estoppel and whether it would be appropriate to order a transfer of the reversionary interest, on the grounds that the granting of this remedy would, 'involve permitting estoppel to be used as a sword and not merely a shield and would also be an exceptional inroad into the well established principle that equity will not complete an uncompleted (sic) gift.'[8]

Citing *Inwards* v. *Baker*[9] and *Pascoe* v. *Turner*,[10] the Court ruled that on the facts of the case before it an estoppel did arise in this particular instance. Quoting from the judgment of Lord Denning in *Inwards*, Geogeghan J emphasised the discretionary nature of the remedy:

> It is an equity well recognised in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as a result of that expenditure he will be allowed to remain there. It is for the Court to say in what way the equity can be satisfied.[11]

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[8]See note 3, *supra*, at page 44-45.

[9][1965] 1 All ER 446.

[10][1979] 2 All ER 945.

[11][1965] 1 All ER 446, at page 449. Indeed the facts of *Baker* were in many ways quite similar to *Smyth* in that the father in the former had encouraged his son to build his bungalow on family land when the latter's plan to buy his own site proved too expensive. When the father died in 1951 it transpired that in his 1922 will he had left all his property to others.

According to the court, any reasonable person with knowledge of the Smyth family would have assumed that the intention at all material times was that the entire house would become the property of the plaintiff upon the death of his parents. Indeed, the learned judge went so far as to state that he found it 'difficult to conceive that the plaintiff would ever have adopted his father's suggestion in relation to the extension to the house if it was not understood that he was to become the ultimate owner of the entire house.'[12]

Clearly in *Smith*, to allow the deceased to frustrate Felix's expectations from the grave, having caused him to believe that the house would be his and having stood by and encouraged him to act to his detriment, would have been unconscionable in any sense of the word. In such a case, one can justify the intervention of Equity on the basis that to stand by and allow the testator to change his will at this stage would result in the succession legislation being used as an engine of fraud, particularly when considered in light of what had transpired between the parties. This begs the question, however, as to whether the court should draw a distinction between a situation where on the one hand there is a will but a testator or testatrix has exercised his or her prerogative to revoke certain bequests and the case where there is a complete failure to make a will on the other hand? Arguably, the latter represents the common situation in which many disappointed beneficiaries may find themselves – namely, as the recipients of well meaning promises of provision, binding in a moral sense, but which fail to materialise in a legal sense when the promisor dies intestate.

McCarron v. McCarron

This second situation arose in the case of *McCarron* v. *McCarron*. Here the deceased, a farmer, died intestate in 1992. The plaintiff, his first cousin once removed, had assisted him on the land since 1976, in a response to a request to the plaintiff's father to *"send out somebody to give me a hand with hay and do odd bits of turns."* While the plaintiff did eventually enjoy other paid employment he continued to work wage-free for the deceased on a continuous basis for a period of 16 years until the latter's death. The issue of remuneration was only

[12]See note 3, *supra*, at page 40

broached in 1980 - four years after the plaintiff joined the deceased. In that year it was alleged that an agreement had been made that the plaintiff would inherit all the lands (consisting of the 'home farm' and the 'outside place') in return for his work. The plaintiff also gave evidence of another conversation between himself and the deceased, this time in 1984, whereby the latter surveying his lands, had commented, *"You'll be a rich man some day, Kevin, this is all yours."*

Upon the death of his cousin, the plaintiff sought an order of specific performance of the alleged agreements referred to above, or alternatively, claimed relief on the basis of proprietary estoppel as a result of the deceased's representations to him and his conduct in reliance on those promises.

The Supreme Court, affirming the decision of the High Court, found that the various statements by the deceased gave rise to an oral agreement to leave the property to the plaintiff such that the latter's unpaid toil on the farm amounted to sufficient acts of part performance enabling the court to grant a decree of specific performance.[13] Murphy J, in giving judgment, considered *obiter*, the potential of the doctrine of estoppel in such a situation. Describing it as 'a still evolving doctrine', he considered that there was nothing in principle against recovery by a plaintiff who has acted to his detriment in ways other than the expenditure of money. Commenting that the expenditure of time or labour on another's land could equally give rise to detriment, the learned judge felt it would be within the court's power to quantify the work done in this manner for the purpose of granting an estoppel. Significantly, the judge noted the flexibility of the remedy, pointing out that the court would have a number of options open to it should it decide that an equity arose in the plaintiff's favour.[14]

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[13]The facts, therefore, are in contrast with *Smyth* where the High Court praised Felix for not attempting to make the 'very convenient case' that there was some sort of reciprocal care agreement under which Felix would inherit the house in return for looking after his parents in their old age. The lack of such an argument added to the overall credibility of the plaintiff's evidence, according to the judge.

[14]Murphy J suggested that adequate compensation might take the form of a charge or lien on the lands for a sum equivalent to reasonable remuneration for the services rendered. See Breen, "Proprietary Estoppel: Equity's Aid to Those Left Behind" (1998) 16 *ILT* 133.

In light of these cases, a number of observations can be made: firstly, in both cases the courts were prepared to give effect to the frustrated expectations of the beneficiaries in relation to future property under the doctrine of proprietary estoppel. The use of this very doctrine has not proved as fruitful for English litigants in similar circumstances.[15]

Secondly, there is a consciousness on the part of the judiciary that in satisfying the equity, the court has a duty to find the 'minimum equity necessary to do justice' - in *Smyth* this amounted to the transfer of the fee simple reversion. The indication in *McCarron*, albeit obiter, is that in some circumstances the court will do justice merely by imposing a lien or charge. This gives the court freedom to adapt the remedy to fit the circumstances and thus avoids the hammer and the nut syndrome. Indeed, it is submitted that had Weeks J in *Taylor v. Dickens*[16] taken a leaf out of Murphy J's proportionate remedies approach, a fairer result would have ensued in that latter case.

Thirdly, the dichotomy between proprietary and promissory estoppel survives intact, particularly in the hands of Geogeghan J who demonstrates his awareness of the characteristics of proprietary estoppel at the outset of his judgment.[17] His approach is very much in line with that of O'Hanlon J in the earlier case of *Association of General Practitioners v. Minister for Health*, where the orthodox view of promissory estoppel not creating a cause of action was reasserted. In that case, the learned judge in reviewing the scope of promissory estoppel in the context of legitimate expectation claim, commented that the doctrine of equitable or promissory estoppel cannot create any new cause of action where none existed before, and that it is subject to the qualification that:

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[15]Note in particular the similar cases of *Taylor v. Dickens* [1998] 1 FLR 806 (currently under appeal), dealing with the revocation of a bequest and *Jones v. Watkins* [1987] Court of Appeal Transcript [LEXIS] where the plaintiff was unsuccessful in claiming a farm upon the intestacy of a neighbour (though it appears that the plaintiff caused his own downfall, being an unreliable witness in his own cause). See *infra* at note 36 and accompanying text.

[16]*Ibid.*

[17]Commenting at pages 42-43 that 'the granting of [proprietary estoppel] would effectively involve permitting the estoppel to be used as a sword and not merely a shield...'.

(1) the other party has altered his position;
(2) the promisor can resile from his promise on giving reasonable notice (not necessarily formal notice) allowing the promisee a reasonable opportunity of resuming his position; and
(3) the promise becomes final and irrevocable only if the promisee cannot resume his position.[18]

One, therefore, might be forgiven for assuming that estoppel in Ireland travels very much along the traditional textbook lines of proprietary and promissory estoppel, blinkered in respect of contemporary developments in other jurisdictions. Certainly, estoppel in its traditional forms have received comprehensive judicial consideration. Thus, for proprietary estoppel an assurance is required upon which reliance is placed but that reliance or expectation must be reasonable.[19] Moreover, some form of detriment should ensue,[20] although as is made clear in *McCarron*, there is a certain leeway as to what constitutes such detriment in that it need not be of the monetary form and may, for instance, be evidenced in terms of a loss caused by providing labour or services in relation to the lands of another.

Re JR

In some ways, therefore, the third authority, *Re JR*[21] provides an interesting counterbalance and raises some interesting questions as to the future direction of equitable estoppel in Ireland. *Re JR* concerned an application by the committee of a 73-year-old ward of court to sell his dilapidated home in order to cover his residential and medical bills. The respondent, JR's 48-year-old cohabitee, sought to thwart the sale on the grounds of an existing proprietary interest in the property. The

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[18][1995] 2 ILRM 481, at page 492.

[19]*Haughan v. Rutledge* [1988] IR 295 where the plaintiffs laid out money on the construction of a horse track in the hope and expectation that the defendant would continue to make lettings of the track to them. The High Court ruled that as this expectation was neither created nor encouraged by the defendant, the plaintiffs had no claim which could be enforced at law or in equity.

[20]*Dunne v. Molloy* [1976-77] ILRM 266.

[21][1993] ILRM 657.

evidence revealed that the parties, having met in a psychiatric hospital, had lived together as man and wife for 12 years until the ward was taken into care in 1990. From the beginning of their relationship JR had maintained the respondent and represented to her that he would look after her and that she would have a home for the rest of her life. In 1988, he had made a will bequeathing the house to her, and had presented it to her on her birthday, stating, "it's not my house now, it's our house and eventually it will be your house."[22]

In deciding the case, Costello P went to great lengths to distinguish between promissory estoppel (through careful consideration of the Privy Council's decision in *Maharaj v. Chand*[23]) and proprietary estoppel (with reference to *Greasley v. Cooke*[24] and *Re Basham*[25]). According to the judge:

> A promissory estoppel will arise where by words or conduct a person makes an unambiguous representation as to his future conduct, intending that the representation will be relied on, and to affect the legal relations between the parties and the representee acts or alters his or her position to his or her detriment the representor will not be permitted to act inconsistently with it...If the subject matter of the representation is land, no right or interest in the land results from this estoppel – a personal right is vested in the representee which will preclude the representor from enforcing a title to the land.[26]

However, he noted that a proprietary estoppel differed from this substantially, describing it as a situation 'where one person (A) has acted to his detriment on the faith of a belief, which was known to and encouraged by another person (B), that he either has or is going to be given a right in or over B's property, B cannot insist on his strict legal rights if to do so would be inconsistent with A's belief.'[27]

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[22]*Ibid*, at page 660.

[23][1986] AC 898.

[24][1980] 1 WLR 1306.

[25][1987] 1 All ER 405.

[26][1993] ILRM 657, at pages 660–661.

[27]*Ibid*.

In light of this approach, Costello P's judgment is all the more bizarre. Professing to decide the case on the basis of promissory estoppel, he held that the commencement of cohabitation upon the strength of JR's representations constituted detriment on the part of the respondent, in so far as she must have relinquished accommodation elsewhere (although there is no evidence in support of this finding).[28] It would, he held, be 'plainly inequitable' for the ward to renege on that promise at this stage thereby giving rise to an equity in favour of the respondent. Switching midstream, the judge went on to consider (in the traditional language of proprietary estoppel) the nature of the respondent's equity and how best it could be satisfied.

Whatever about the incursion of detriment in promissory estoppel,[29] the introduction of Lord Scarman's *Crabb* criteria certainly bring to mind his Lordship's admonishment that while the distinction between promissory and proprietary estoppel may be of assistance to those who teach law, such categorisation is not of the slightest assistance in solving particular problems in particular cases! The court ruled that justice required the selling of the property and ordered that a smaller house

[28]This finding is all the more interesting given that Costello P subsequently refused to find that the events of 2 November (when JR presented his will to the respondent) conferred any additional or enforceable rights upon her. Categorizing the gift as imperfect, he held that no constructive trust arose as it was not the ward's intention to confer an immediate beneficial interest on her and that equally estoppel could not assist the respondent on the ground that she was unable to produce evidence indicating that she had acted to her detriment following on from JR's conversation in 1988 when he executed his will. See further Coughlan [1993] 15 *DULJ* 188.

[29]This is a matter of some debate still in Ireland. Arguably, detriment is not an essential element of promissory estoppel - see Sheridan (1958) MLR 185, cogently arguing that while promissory estoppel will most frequently succeed where there is detriment to the promisee in reliance on the original representation, enforcement of the original obligation may be inequitable without any detriment (in the narrow sense) and that the categories of what is inequitable can never be closed.' See also the views of Denning J (writing extra-judicially in (1952) MLR 1, at page 6.). However, the presence of detriment in evidential terms obviously makes the case much more arguable - see *McCambridge v. Winters*, unreported, High Court, 28 May 1984 (adopting the contrary views of Diplock J in *Lowe v. Lombank Ltd* [1960] 1 WLR 196 as a correct statement of the law in this jurisdiction).

be bought in JR's name in which the respondent would have a right to reside, without prejudice to any rights which would arise under the ward's will in due course (in the absence of revocation).

Does this case represent an acceptance of the merger theory of estoppel? Is it a tentative indication that the Irish bench view the many faces of estoppel as now constituting a seamless doctrine, providing in the words of Mason CJ "that a court of common law or equity may do what is required...to prevent a person who has relied on an assumption...from suffering detriment in reliance upon [it] as a result of the denial of its correctness"?[30] The consensus of most Irish writers is that it does not. Arguably, Costello P's failure to refer to, much less consider the implications of adopting authorities such as *Verwayen*[31] or *Walton Stores*[32] would lead one to classify the decision as more an exercise in judicial pragmatism than a serious attempt at unifying the doctrine of estoppel. Some writers have criticised the judge's use of promissory estoppel in this manner on the basis that reliance on proprietary estoppel would have achieved the same result and would have been totally unexceptional.[33] Others, while equally unsure as to the rationale behind the High Court's approach, have speculated as to the judge's motives.[34] Whatever his method of reasoning, there is no dispute that the judge reached a very equitable result: freeing up much needed capital for the maintenance of the ward, yet at the same time

[30]*Commonwealth v. Verwayen* (1990) 170 394, at page 413.

[31]*Commonwealth v. Verwayen* [1990] 170 CLR 395.

[32]*Walton Stores (Interstate) Ltd. v. Maher* [1988] 164 CLR 387.

[33]Coughlan, "Swords, Shields and Estoppel Licences" [1993] 15 *DULJ* 188 at p. 201.

[34]It has been submitted that Costello, aware of the doubtful evidence presented to him in respect of the respondent's detriment, followed the only authority opened to him on the point - *Maharaj*. The difference between the two cases being that the Privy Council relied on promissory estoppel in the latter case to emphasize that only a personal right was being awarded to the plaintiff which therefore did not infringe existing statutory regulations which forbade proprietary dealing in the property without statutory consent. See Mee, "Lost in the Big House: Where Stands Irish Law on Equitable Estoppel?" (1998) XXVIII Ir Jur 186, who argues that although this special factor was absent in *Re JR*, the desire to follow *Maharaj* possibly provides an explanation for Costello's choice of promissory estoppel.

providing for the respondent in line with JR's wishes and without prejudice to his testamentary intentions. Surely this is a classic illustration of the flexibility of equity, which in the words of *Boustead Trading* "does justice according to the circumstances of the case"?[35]

Unearthing the Minimum Equity Necessary to do Justice

It is interesting to compare the approach of the Irish High Court with that of the English High Court in the recent case of *Taylor v. Dickens* where proprietary estoppel was argued unsuccessfully.[36] In *Taylor*, a disappointed beneficiary sought to challenge the final will of his former employer. The deceased (an elderly widow in her eighties) had promised to leave her property to the plaintiff, her gardener. From the date of her promise, the plaintiff expressly refrained from charging her for his services and devoted more attention to her, as she became frailer. True to her promise, the deceased changed her will to favour Mr. Taylor and so matters remained for a number of years. However, at some point in time, the testatrix began to regret her decision. She expressed her belief to friends and her solicitor that Mr. Taylor was treating the property as if it was already his and she feared that he only visited her because of his impending inheritance. Fearing also that he would not respect her wishes in relation to the property, she changed her will to favour another carer instead of the plaintiff, but made a conscious decision not to inform him of her change of heart. Indeed, the plaintiff only became aware of the new provisions of the will after the testatrix's death. Before Weeks J, the plaintiff claimed entitlement to the property on the grounds of proprietary estoppel, or alternatively, damages.

The court held that it had no jurisdiction to grant the plaintiff a remedy. Damages, it held, would be inappropriate as there was no contract between the parties and even if it could be argued that there was an oral agreement as to the transfer of land, it would be unenforceable in light of the provisions of the Law of Property

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[35][1995] 3 MLJ 331, at page 344.

[36][1998] 1 FLR 806.

(Miscellaneous Provisions) Act 1989 which required such contracts to be in writing. Turning to the issue of proprietary estoppel, Weeks J felt that equally no case could be made here - the testatrix had done as she had promised: she had made a will in favour of the plaintiff. She had never promised not to revoke this promise, however, and there were no grounds on which the plaintiff could argue that she had ever encouraged him to hold such a belief.[37] In the words of Weeks J:

> There is no equitable jurisdiction to hold a person to a promise simply because the court thinks it unfair, unconscionable or morally objectionable for him to go back on it. If there were such a jurisdiction, one might as well forget the law of contract and issue every civil judge with a portable palm tree. The days of justice varying with the length of the Lord Chancellor's foot would have returned.[38]

Dismissing the plaintiff's claim, the judge held that there was "nothing unfair, unjust or morally objectionable in [the testatrix's] change of will." A number of comments may be made in relation to *Taylor*. It is obvious from the tone of the judgment that rightly or wrongly, the court did not think very much of the plaintiff. Great sympathy, however, is bestowed upon the testatrix. From the evidence, it appears that she (a) made a conscious decision to alter her will in the full knowledge that this would affect the expectations of the plaintiff,[39] (b) decided then to refrain from telling him of his change of fortunes, despite the

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[37]Great emphasis was placed in this regard by the judge on the scepticism of the plaintiff's wife, who on more than one occasion had cautioned her husband, 'not to count his chickens before they hatched.' Contrast the comments of Carnwarth J in the later case of *Gillet v Holt* [1998] 3 All ER 917 where he placed less store on the subjective intention of the promisee, opting instead for a broader approach under which a plaintiff would be required to prove on the basis of objective criteria that the testator's promise amounted to an irrevocable one.

[38]*Taylor, supra* note 36 at page 820.

[39]Such knowledge can justifiably be attributed to the deceased in light of her earlier comments to friends that she thought that the only reason that the plaintiff came to call upon her was on account of his inheritance. Regardless of the veracity of the deceased's fears, these comments certainly go to illustrating a recognition on her part that the plaintiff's actions were in part, at least, in reliance on her promise to leave him the house.

prompting of friends and neighbours that she should tell him, and (c) proceeded after the event to accept the company and services of the plaintiff without making him wise as to her change of heart.[40]

Clearly, the rationale behind the freedom of testation principle is that a testator/testatrix reserves the right up until the time of his/her death to change or revoke their will. However, Equity, through the doctrine of estoppel, will intervene where to allow a testator to rely on his strict legal rights would be unconscionable in light of what has transpired between the parties. While obviously the court should not undertake such intervention lightly, arguably once there is cogent evidence before it, the court has a duty to satisfy the equities arising. To find that the facts of the case raise no equity in Mr. Taylor's favour is quite extreme. He was led to believe he would acquire an interest in land, and he acted in reliance on the faith of that belief. The promisor knew of his reliance (to the extent perhaps of exaggerating it)[41] and did not dissuade him from his belief even after the revocation of the relevant provision of the will.[42] The real question concerns the extent of the detriment suffered. Arguably the only detriment here was the free provision of labour or services. This, however, would be sufficient under both Irish and English law.[43] Relief should therefore have been forthcoming. The form of the relief would very much depend on the court's view of estoppel's role - either that of fulfilling expectations

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[40]The judge justified such actions on the testatrix's part, describing her as "in acute pain, lonely, frightened of a confrontation with a younger man, desperate to die in her own house and anxious to have the house preserved after her death in the way in which she would wish."

[41]The deceased had voiced her opinion to friends that Mr. Taylor only waited upon her because of his promised inheritance, although in evidence one friend stated that the eventual carer who inherited the house, "along with Mr. Taylor" were the closest persons to the deceased.

[42]The testatrix, despite the urging of her friends, took what she described as the "coward's way out" and refrained from mentioning the matter to the plaintiff at all. One cannot help but recall the words of Slade LJ in *Warnes v Hedley*, unreported English Court of Appeal, 31 January 1984, where he commented that "... in some circumstances passive conduct, even if unaccompanied by any words, may suffice to constitute the relevant encouragement, if the facts are such that it is reasonable for the other party so to construe it."

[43]*McCaron v McCaron, supra, Greasley v Cooke* [1980] 3 All ER 710.

or remedying the detriment suffered. While Weeks J clearly vetoed the fulfilment of Taylor's expectations of inheriting the house, arguably he should have at least considered recompense for the plaintiff's provision of services on the strength of the promise.[44] If the court truly is at large as to how the equity may be satisfied, it must be prepared to award the minimum equity when it is so required in the case. To leave the plaintiff bereft of any relief (even in the form of monetary compensation) is arguably in the grand scale of things no more equitable than it would have been to leave JR's companion without a home or McCaron without the farm.

Unconscionability in Irish Law

So where does Irish law stand on estoppel? Certainly well versed in traditional doctrine, but very capable of seeing the bigger picture and applying the broader principles of equity. Ireland may not have partaken in the new estoppel but it has adapted the old to allow it the scope to avoid injustice. That is not to say, however, that the concept of unconscionability is a foreign one to Irish courts. Long before the English High Court's decision in *Taylor Fashions*[45] and long before the Australian High Court tackled the issue of a unified doctrine of estoppel in *Walton Stores*[46] and *Verwayen*,[47] the Irish High Court had occasion to consider the relationship between estoppel and unconscionability. While this initial momentum[48] was not pursued with the same vigour as that surrounding the development of Australian unconscionability and while, undoubtedly, Irish judges have not had as many opportunities as their counterparts in other jurisdictions to debate the advisability of opting totally for the merger theory of equitable estoppel, there has

[44]The case of *Taylor v. Dickens* is currently under appeal.

[45]*Taylor Fashions Ltd. v. Victoria & Liverpool Trustees* [1981] 2 WLR 576.

[46]Note 30, *supra*.

[47]Note 29, *supra*.

[48]In *McMahon v. Kerry Co Council* [1981] ILRM 419 (but actually decided in 1974).

been much academic discussion of the judicial approach to what is perceived as one of equity's most flexible remedies.[49]

The case of *McMahon*,[50] decided by the Irish High Court in 1974, brought an interesting twist to the *Ramsden* mistaken stranger category.[51] The plaintiffs took an action against the County Council to recover a plot of land upon which the defendants had erroneously built houses. The land, which had originally been sold to the McMahons by the Council in 1964, had been intended for a secondary school. However, when circumstances changed, the plaintiffs abandoned both the project and the land itself, visiting it rarely. In 1968, on a random visit, the plaintiffs found Council workers preparing the ground for building and following complaints, all work ceased and an assurance was given that a mistake had been made. Upon their next visit in 1973, however, they discovered two houses *in situ* and by the time of the action the defendants had tenants in occupation of these properties. The High Court held that the plaintiffs were estopped from recovering possession of their property on grounds of unconscionability, despite the absence of acquiescence by the plaintiffs and the fact that the defendants had constructive notice of the former's interest in the land. Finding the instant case to fall outside the principles in *Ramsden* v. *Dyson*,[52] Finlay P proceeded to provide the following guidelines when contemplating relief on grounds of unconscionability:

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[49]In general see Brady, "An English and Irish View of Proprietary Estoppel" (1970) *Ir Jur* 239; Breen, "Proprietary Estoppel - Frustrated Expectations and the Doctrine of Unconscionability" (1999) 4 *CPLJ* 9; O'Dell, "Contract - Estoppel and Ultra Vires Contracts" [1992] *DULJ* 123.

[50][1981] ILRM 419.

[51]*Ramsden v. Dyson* (1866) LR 1 HL 129.

[52]*Ibid.* Finlay P noting that there was no question of the plaintiffs remaining wilfully passive in the face of the Council's construction, nor of any form of acquiescence on their part at all (at page 420-421). Indeed, counsel for the defendants had as much as conceded this in his arguments. However, he had urged the court to accept the principle, which should be extended in equity to the facts of the present case, that it would be unconscionable for equity to permit what would in effect be an unjust enrichment of the plaintiffs.

> If a court applying equitable principles is truly to act as a court of conscience then it seems to me unavoidable that it should consider not only conduct on the part of the plaintiff with particular regard to whether it is wrong or wilful but also conduct on the part of the defendant and further more the consequences and the justice of the consequences both from the point of view of the plaintiff and of the defendant.[53]

The learned judge went onto hold that it would be unconscionable for the plaintiffs to recover the land, valued at the time of the trial at £18,000, when they had paid but £60 and had no sentimental attachment to it. Additionally he noted that the land had never been demarcated from the rest of the Council land; that the defendants' mistake was excusable in light of this and needy persons now occupied the houses. Acknowledging the unusual nature of the case before him, Finlay P ordered that the plaintiffs' costs against the defendants be taxed on a solicitor client basis.[54] The result in *McMahon* cannot easily be categorised under any of the traditional headings of proprietary estoppel, causing one eminent Irish writer to comment that the President of the High Court 'literally had to invent a sub-head of proprietary estoppel to achieve an equitable result' in the case.[55]

Yet the underlying theme running through all of these decisions is the doing of justice in the particular circumstances of the case, without perhaps too much attention being paid to strict legal doctrine. There is a creeping unconscionability in nature, if not in name and those who baulk at the very mention of the word (or view it in the vein of Weeks J as nothing more than 'a portable palm tree'[56]) would do well to heed the measured words of Deane J in *Verwayen*, where he noted that:

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[53][1981] ILRM 419, at page 421.

[54]Adding that this was due to the fact that the plaintiffs had asserted 'a clear and well established legal right' and had been defeated in its enjoyment by what he conceived to be 'a novel application of a general equitable principle', at page 424.

[55]Brady, "Judicial Pragmatism and the Search for Justice Inter Partes" (1986) *Ir Jur* 47, at page 56.

[56]*Taylor v. Dickens* [1998] 1 FLR 806 at page 820.

> [T]he prima facie entitlement to relief based on the assumed state of affairs ... must be qualified ... if it appears that that relief would exceed what could be justified by the requirements of conscientious conduct and would be unjust to the estopped party. In such a case, relief [framed on the basis of] the assumed state of affairs represents the outer limits within which the jurisdiction of a modern court to mould its relief to suit the circumstances of a particular case should be exercised in a manner which will do true justice between the parties.[57]

Conclusion

Pushing the boat out in terms of equity's jurisdiction has not posed a problem in the past for Irish judges in the context of estoppel. At a time when other jurisdictions were restricting the availability of *High Trees* estoppel, the High Court, on more than one occasion, was prepared to advocate its use in the absence of contractual relations.[58] Unconscionability, where necessary to achieve a just result, will be relied on by the courts.[59] However, where there is scope to utilise the existing forms of estoppel, and there would be general agreement 'that

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[57][1990] 170 CLR 394, at page 442.

[58]*Cullen* v. *Cullen* [1962] IR 268 where Kenny J employed the doctrine of promissory estoppel in the complete absence of contractual relations. Similarly, in *Moroney* v. *Revenue Commissioners* [1972] IR 372, at p. 378 Kenny J concluded his review of the English authorities up to *Ajayi* v. *Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 by holding that:

> "there is no reason in principle why the doctrine of promissory estoppel should be confined to cases where the representation related to existing contractual rights. It includes cases where there is a representation by one person to another that rights which will come into existence under a contract to be entered into will not be enforced."

[59]*McMahon* v. *Kerry County Council, supra.*

the circumstances in which the doctrine may be used are endless', the academy and bench appear content, at least for the time being, to tread familiar boards.[60]

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[60]Arguably, Ireland is not alone in this approach – see the comments of Hammond J in *Rodney Aero Club Inc* v. *Moore* [1998] 2 NZLR 192, at page 197.

THE DETRIMENT ELEMENT AND THE REINTERPRETATION OF THE EQUITABLE ESTOPPEL DOCTRINE IN MALAYSIA

1. Introduction

> "...the time has come for the courts to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed the circumstances in which the doctrine may operate are endless."[1]

The word estoppel comes from the French word 'estoup' which means plug or stopper.[2] In legal terms estoppel has been described by Lord Denning MR in *Moorgate Mercantile Co Ltd v Twitchings*[3] as a principle of justice and of equity. He said:

> "It comes to this: when a man by his words or conduct has led another to believe in a particular state of affairs, he will not be

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[1]Per Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd*[1995] 3 MLJ 331 (Federal Court).

[2]L, Brown, (editor) *The New Shorter Oxford English Dictionary on Historical Principles* (1993) Volume 1, at page 854.

[3][1976] 1 QB 225, at page 241. Lord Denning made references to the decision of Dixon J in *Grundt v Great Boulder Proprietary Gold Mines ltd* [1937] 59 CLR 641 where Dixon J stressed on injustice as the basis of the rule rather than a formal criteria.