Wills & Estates
Winter Term 2019

Lecture Notes – No. 4

CONTRACTS: PROMISES TO LEAVE THE CLAIMANT A GIFT IN A WILL

A common enough situation arises: a person promises to leave another a gift in his or her Will in exchange for something (personal care, marriage, some favour, etc). Conceptually there is merely a straight-forward case. If the contract is broken, the plaintiff can sue the Estate in damages. The difficulty, of course, is that Estate may not be able to pay either at all or completely given that there may be other creditors. In the past, cases arose where there was insufficient protection for spouses or dependants (*Synge*, below), on equitable doctrines (part performance, estoppel), or the principle of restitution (*Degleman*, below).

Synge v Synge
[1894] 1 QB 466; cb, 117

The most familiar of all estate litigation: 2nd wife v children of first marriage. The husband induced the 2nd wife to marry him by promising her that she would inherit the house and land as a life tenant after he died. She married him in reliance. He then conveyed the property to his daughters from his first marriage. The second wife sued and was successful in damages. Kay LJ held that the claim might have been made against the daughter but the plaintiff sought only damages from the husband:

> **Sir R. Synge had all his lifetime to perform this contract; but, in order to perform it, he must in his lifetime make a disposition in favour of Lady Synge. If he died without having done so, he would have broken his contract. The breach would be omitting in his lifetime to make such a disposition. True, it would only take effect at his death; but the breach must take place in his lifetime, and as by the conveyance to his daughters he put it absolutely out of his power to perform this contract. Lady Synge, according to well-known decisions… had a right to treat that conveyance as an absolute breach of contract, and to sue at once for damages; and as this Court has both legal and equitable jurisdiction, we are of opinion that such relief should be granted.**
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> We have not before us the materials for assessing such damages. The amount must depend on the value of the possible life estate which Lady Synge would be entitled to if she survived her husband. Their comparative ages would, of course, be a chief factor in such a calculation. There must be an inquiry as to the proper amount of damages.

Part Performance

Certain types of agreements must be in writing to be enforceable under the *Statute of Frauds*, RSO 1990, c. S.19.

The doctrine of part performance is an equitable doctrine that was used to deal with claims based, inter alia, on ineffective transactions. In *Steadman v. Steadman*, [1976] A.C. 536, 558 Lord Simon said:

> [This doctrine] was evoked when, almost from the moment of passing of the Statute of Frauds, it was appreciated that it was being used for a variant of unconscionable dealing, which the statute itself was designed to remedy. A party to an oral contract for the disposition of an interest in land could, despite performance of the reciprocal terms by the other party, by virtue of the statute disclaim liability for his own performance on the ground that the contract had not been in writing. Common Law was helpless. But Equity, with its purpose of vindicating good faith and with its remedies of injunction and specific performance, could deal with the situation. The Statute of Frauds did not make such contracts void but merely unenforceable; and, if the statute was to be relied on as a defence, it had to be specifically pleaded. **Where, therefore, a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as it was put, allow the Statute of Frauds "to be used as an engine of fraud." This became known as the doctrine of part performance — the "part" performance being that of the party who had, to the knowledge of the other party, acted to his own detriment in carrying out irremediably his own obligations (or some significant part of them) under the otherwise unenforceable contract.**

[Approved in *Hill v. Nova Scotia (Attorney General)* [1997] 1 S.C.R. 69. For a recent case applying the doctrine see *Frisgo Development Inc. v. Brower*, 2009 ABQB 463].

Quantum Meruit, Proprietary Estoppel, and Unjust Enrichment

In most cases in which the claim is brought against the Estate based on the acts of the deceased, the approach today would be through the action for unjust enrichment.

In ***Degleman v Guaranty Trust Co. of Canada*, [1954] S.C.R. 725 [cb, 122],** a disappointed nephew was promised a testamentary gift by an aged aunt in exchange for his services. The aunt didn't leave the gift and the nephew sued on the promise. The Supreme Court of Canada held that the claim for the services rendered was valid notwithstanding that the oral promise was not enforceable given its obvious non-compliance with formalities. Cartwright J for the majority held:

> In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.

Rand J held for the concurring minority:

> There remains the question of recovery for the services rendered on the basis of a *quantum meruit.* On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

Given that there was no contract between the aunt and the nephew, what is the ultimate rationale for liability in *Degleman*? It can't be the contract alleged to have existed; both the majority and the concurring minority rejected a contractual basis for relief. Rather than contract, then, it was the principle of unjust enrichment (the retention of a benefit without valid reason) that best rationalized liability in the Court's view.

The law of unjust enrichment in Canada has moved on substantially since *Degleman v Guaranty Trust Co. of Canada*. There is no doubt that there exists an independent action for unjust enrichment in Canada that is not parasitic on an established common law, equitable, or statutory cause of action. That such established law is brought into unjust enrichment as 'juristic reasons' to disallow an otherwise unjust retention of a benefit is not to limit the action for unjust enrichment to those categories. Pragmatically, this ensures that well settled doctrine remains valid but allows for more coherent development. Thus, rather than talking of an 'action for *quantum meruit*' in respect of the services at issue in *Degleman*, we now more usefully speak of remedies properly arising as a response to a valid contract (on which damages may be calculated on a *quantum meruit* basis) or remedies arising on a successful action in unjust enrichment (which might be remedied with a money award to the same ends). We no longer have to rely on *quantum meruit* as an indistinct concept that describes the variety of factors that might support the remedy outside conventional contract, whether in law or equity or otherwise. Rather, we ventilate the inquiry through the law of unjust enrichment which provides for a more structured approach. Thus, at the very least, we can now say with confidence:

> A remedy based upon unjust enrichment may be ordered where there is
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> (a) a benefit to or enrichment of one party, and
> (b) a corresponding detriment to or deprivation suffered by the other party, and
> (c) the absence of any juristic reason for the benefit or enrichment to be retained.
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> The 'juristic reason' involves consideration of (i) traditional categories that would allow the benefit to be retained and (ii) fact-specific reasons and new categories of general application that would allow the benefit to be retained tested on both the reasonable expectations of the parties and public policy considerations.