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Proprietary Estoppel and Family Assets

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The three main elements

There is an academic debate about whether 'proprietary estoppel' is best understood as a single unified principle or as an umbrella term covering multiple similar but distinct principles.

There are three main elements: (1) the making of a representation or assurance to the claimant; (2) reliance on it by the claimant; and (3) detriment to the claimant in consequence of his reasonable reliance. See paragraph [29] in *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776.

The representation/assurance has to relate to identified property, though in a relatively wide sense. In *Re Basham (Deceased)* [1986] 1 WLR 1498 a claim succeeded in relation to the whole residue of an estate including a cottage.

But this is not a cause of action where you establish each of the elements and then win.

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Key principles

A succinct summary of some key points can be found at paragraph [38] of *Davies v Davies* [2016] EWCA Civ 463; [2016] 2 P&CR 10. The points stated there are not controversial.

Proprietary estoppel is an equitable doctrine, and depends on the overarching idea of unconscionability. The three elements need to be considered in the round.

What is the minimum equity required to avoid an unconscionable result? This might be everything the claimant reasonably expected to get, or it might be a lot less. This is also put as a question of proportionality.

The claim is a fragile one, and can be overtaken by changed circumstances.

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Three different strands?

One of the ways that proprietary estoppel cases can be categorised is by the nature of the representation or assurance.

Acquiescence cases can be based on silence, amounting to an implicit representation as to current rights. It involves someone acting on a (mistaken) belief as to their rights, and the person with the contrary right being aware of that and standing by rather than asserting their contrary right. See *Willmott v Barber* (1880) 15 ChD 96.

Representation cases involve an express representation as to current rights.

Assurance/promise cases (or, a representation as to the future) are not limited to current rights, and frequently concern future inheritance. It is these cases which now garner most attention, and are the main focus of this talk.

Typical kinds of case

1. **Disputes between neighbouring landowners.** These will very often be based on acquiescence or on representations about existing rights, but a claim based on a promise to grant a particular right in the future is not out of the question.
2. **Claims to inherit a home, especially a shared home.** A common kind of case involves providing care and assistance (and perhaps giving up other opportunities) on the strength of a promised inheritance. It is not always a family member; see *Jennings v Rice* [2002] EWCA Civ 159; [2002] WTLR 367.
3. **Claims to inherit a family business.** In particular, family farms generate a steady flow of reported cases about proprietary estoppel; a recent example is *Guest v Guest* [2020] EWCA Civ 387; [2020] 1 WLR 3480.

On the other hand, commercial transactions are very unpromising territory; see *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752.

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Concerns in assessing the merits

- How clear and consistent is the recollection of what exactly was said? While tacitly communicated assurances can suffice, as in *Thorner v Major*, it is not easy to rely on them. Beware of impressions and assumptions that have scant factual foundation. Weaknesses in this area may be exposed by the new Practice Direction 57AC about witness statements for trial.

- How inherently likely is the claimed assurance, promise or bargain? Consider the personalities of the individuals and the circumstances.

- Was something that was said a mere statement of intention that was subject to change, rather than something that could reasonably be relied on? If something was said that was intended to be relied on, what is the reason it was not formalised?

- Were there any qualifications or provisos (perhaps implicit)?

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Concerns in assessing the merits

- Is there a justification for resiling on the representation or assurance, such as the intended beneficiary not keeping up their end of the bargain? Has there been any change of circumstances which might justify not meeting the expectation in full?

- How weighty is the detriment, compared with any countervailing benefits? A recurring example is ordinary household maintenance carried out by someone living there free of charge.

- Was the detriment incurred rashly or unforeseeably?

- Where the parties subsequently entered into a written agreement which does not refer to the substance of the representation/assurance, if it cannot be reconciled or very convincingly explained then this is a red flag.

Subsequent agreements

There is an unresolved point regarding the effect on a proprietary estoppel claim (assuming it is otherwise meritorious) of a subsequent agreement which does not fulfil or record the representation or assurance.

Whittaker v Kinnear [2011] EWHC 1479 (QB) was a case where a property was sold at an undervalue in reliance (it was said) on assurances, but those assurances were not included in the sale contract. A proprietary estoppel claim was held to be sufficiently viable that it should not be disposed of summarily. (Such a case might also be argued to give rise to a constructive trust; see *Bannister v Bannister* [1948] 2 All ER 133.)

Horsford v Horsford [2020] EWHC 584 (Ch) was a farming case where the proprietary estoppel claim failed altogether. The trial judge also commented that it was inconsistent with a partnership deed which had been entered into so that the farm could be bought out – not acquired free of charge.

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The remedy

The court has extremely wide flexibility in fashioning a remedy to avoid an unconscionable result, or how to 'satisfy the equity'. Simpler remedies are that an asset shall belong to the claimant, or that the claimant shall be paid a sum of money.

A slightly more elaborate example can be found in *Campbell v Griffin* [2001] EWCA Civ 990; [2001] WTLR 981. The claimant sought a "home for life" but was awarded a fixed charge of £35,000 secured against the property and was required to give up possession.

A very much more elaborate example can be found in *Moore v Moore* [2018] EWCA Civ 2669; [2019] WTLR 233 at paragraphs [36] to [39]. The award was successfully appealed, but not on the ground that it was formulated in a way that was beyond the court's jurisdiction.

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The remedy

The nature of the award (overturned on appeal) in *Moore v Moore*:

(1) transfer of the partnership interest of the defendant (the claimant's father), who was still alive, to the claimant;
(2) the claimant to grant a licence to reside free of charge in the farmhouse to the defendant and his wife, on specified terms;
(3) the claimant to pay £200 a week to the defendant and his wife while either/both of them still lived;
(4) the claimant to pay for the reasonable costs of nursing care for the defendant and his wife if and when such a need arose.

The Court of Appeal favoured a clean break solution, but remitted the detail for further consideration (including of tax). The original expectation, which was premised on harmony until the death of the claimant's parents could not be adhered to.

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What remedy is likely?

Assuming that the claim succeeds, the following are particularly important factors:

- The clarity of the expectation (that is, the reasonable expectation).
- The length of time over which the expectation was held.
- The gravity of the detriment actually incurred (set against countervailing benefits received).
- The extent to which the detriment incurred was part of an understood *quid pro quo* for what was expected to be received (sometimes called a 'quasi-bargain' case).
- Changes of circumstances, particularly where the original plan can no longer be carried out. What fresh arrangement should be made instead that does justice to both sides?
- Practicality, including tax consequences.

Third parties

A complication arises where the subject property is not simply owned by the party who gave the assurances.

Habberfield v Habberfield [2019] EWCA Civ 890, which is a farming case of general interest, neatly avoided this complication. The farm was owned by the claimant's parents, who were in partnership. The claimant's father had assured her that she would in due course receive the farm if she continued to work on it (with some provisos). The trial judge found that the assurances were made with the knowledge and authority of the mother so the consequences were the same for her.

Once the equity has arisen then, although it has an 'inchoate' nature until adjudicated on by the court, it is a proprietary interest that can bind successors in title; see section 116 of the Land Registration Act 2002 and *Henry and Mitchell v Henry* [2010] UKPC 3.

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