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Proprietary Estoppel and Farming Cases

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Topics Covered

- The principles in outline
- Some of the leading cases from previous years
- Lessons from recent cases

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.

We are particularly focused here on proprietary estoppel in its form of the claimant asserting that they should be awarded some substantial interest in property they do not already have.

There are three main elements: (1) the making of a representation or assurance to the claimant relating to identified property; (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.

But this is not a cause of action where you establish each of the elements and then win as a result. It is an equitable jurisdiction.

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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. This decision is among the farming cases in recent years, but the principles as stated are more widely applicable.

- The three main elements are those stated in *Thorner v Major*. However, the three main elements are not 'watertight compartments'.

- Proprietary estoppel is an equitable doctrine, and depends on the overarching idea of unconscionability. The three elements need to be considered in the round. It does seem plausible from reading the cases that more compelling facts on detrimental reliance can shore up a less clear case on the promise or assurances.

- However, though it need not be monetary, detriment must be substantial. In some ways, non-monetary detriment can be stronger.

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Key principles

- Detriments must be weighed against any countervailing benefits received. In farming cases this may be free accommodation, income earned for work, or other profits realised.

- In considering reliance, a causal link between the assurance and the detriment must be shown. Proprietary estoppel is not for rewarding people who have been promised something and have suffered some unrelated hardship.

- The assessment of the substance of the claim is retrospective looking back from when the promise became due to be performed (or, in some cases, when a promise about the future is resiled from in the present).

- The merits can therefore fluctuate and the claim is a fragile one, vulnerable to changes in circumstances. It cannot be 'banked'.

Key principles

- Determining the remedy is an exercise involving a 'broad judgmental discretion'.
- The court does not operate under a 'portable palm tree'. The discretion must be exercised in a principled way.
- The key question is 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.
- However, what proportionality means in this context is elusive. How is it to be understood in a principled way without the court simply deciding on an award that seems to the judge to produce a fair outcome (which risks looking like a portable palm tree has made an appearance)?

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Key principles

- Lewison LJ: "There is a lively controversy about the essential aim of the exercise of this broad judgmental discretion. One line of authority takes the view that the essential aim of the discretion is to give effect to the claimant's expectation unless it would be disproportionate to do so. The other takes the view that essential aim of the discretion is to ensure that the claimant's reliance interest is protected, so that she is compensated for such detriment as she has suffered."

- Lewison LJ: "…there might be a sliding scale by which the clearer the expectation, the greater the detriment and the longer the passage of time during which the expectation was reasonably held, the greater would be the weight that should be given to the expectation. I agree that this is a useful working hypothesis."

Why farming cases?

Many of the 'modern' reported cases about proprietary estoppel concern farms. This is very noticeable when reading or hearing about cases in this area since *Thorner v Major* was decided by the House of Lords in 2009 (though *Gillett v Holt* [2001] Ch 210 is also an important case).
Why is this?

- A lot of value is generally at stake, often millions, especially where there is development potential (but not only then).
- Farms are often family enterprises. The unfavourable decision in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752 – in a more commercial context – is less of a barrier.
- However, quite often dealings are informal and much is assumed rather than reduced to clear, binding agreements.
- Strong emotional commitments making a 'carve up' difficult.

Proprietary estoppel is often raised in other kinds of cases, but it seems that they result in reported decisions much less frequently.

Thorner v Major

Apart from being the case in which the House of Lords considered and confirmed the three main elements, what is special about this case?

There are two points which especially stand out in my opinion:

- It was no obstacle in satisfying the requirement for there to be identified property that the precise composition of the farm varied over time (as commonly happens with farms). The concept of 'the farm' was clear enough in the circumstances.

- The claim was successful despite a lack of clear, express assurances. This has encouraged claimants to bring claims which are very nebulous in this respect. But not all claimants are found to be "painfully honest" witnesses who worked as hard and for as long as David Thorner. The circumstances and personalities are key: it will not always be the case that "oblique and allusive" terms will be held to amount to an "unequivocal" assurance.

Suggitt v Suggitt

Suggitt v Suggitt [2012] EWHC 903 (Ch); [2012] WTLR 1841 is not especially recent any more, but I think it is an important case in understanding one of the important reasons why outcomes in farming cases vary so much. From paragraph [59] of the first instance judgment:

"…all in all it was nothing like the sort of work done in Thorner v Major*. John's problem is he wants the maximum for the minimum."*

"John had also benefitted much more than he attempted to portray, from working for the Teasdale's, from grain sales, from sheep sales and from beef cattle sales."

"Nevertheless, save for the break in York, it is, in my judgment, fair to say, as does Miss Reed, that John positioned his whole life on the basis of the assurances given to him and reasonably believed by him."

The award of land worth £3.3m was upheld on appeal.

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Moore v Moore

Moore v Moore [2018] EWCA Civ 2669; [2019] WTLR 233 involved a successful appeal against the remedy awarded.

- It was found that there was a promise that the respondent would inherit the whole farm and business following his parents' deaths.
- The respondent had already received something: his brother's share in the partnership (the brother was paid £500,000 out of the partnership). This did not bar the claim.
- Relations between the respondent and his parents had deteriorated.
- The respondent was awarded the farm immediately by the trial judge, subject to various provisos intended to protect the parents' position.
- It was held that this award wrongly sought to replicate what would have happened had no dispute arisen, whereas the assurances envisaged harmonious relations until the parents' deaths. Given that this was no longer possible, proper provision for the parents was needed in the meantime.
- Tax consequences had also not been fully considered.

Habberfield v Habberfield

In *Habberfield v Habberfield* [2019] EWCA Civ 890, the farm was owned by the claimant's parents, who were in partnership.

It was found that the father's assurances were made with the knowledge and authority of the mother so the consequences were the same for her. This deals with potential difficulties where the maker of the assurance does not own all the property. Much the same approach can be found in *Morton v Morton* [2022] EWHC 163 (Ch) at [200].

The claimant had kept her side of the 'quasi-bargain', which was that if she continued to work on the farm a 'viable dairy farm' would be passed to her – subject to qualifications about some provision being made for her siblings. She had positioned her life accordingly and been persuaded not to leave. Tensions arose and an offer was made to her, but short of what she had been assured, and she rejected it. Her claim succeeded and she was awarded a cash sum of £1.17m, reflecting the value of the farmland and farm buildings (but not the farmhouse). The appeal failed.

Horsford v Horsford and *Morton v Morton*

In *Horsford v Horsford* [2020] EWHC 584 (Ch) and *Morton v Morton* [2022] EWHC 163 (Ch) issues arose about the significance of a partnership deed being entered into by the relevant parties after (the bulk of) the relevant assurances. Should this bar a claim?

On the facts of *Horsford* the answer was yes. The deed contained a clause saying that the terms of the deed be *"deemed to have governed the affairs and operation of the Partnership and shall supersede any earlier agreement (written or verbal) that there may have been"*. This was fatal. The claimant was entitled to no more than his rights as partner in accordance with the deed.

On the facts of *Morton* the answer was no. There was no such clause expressly overriding any earlier agreements. Moreover, although the deed prescribed what the parties' rights as partners were (including as to the situation on death) this could be reconciled with assurances that (some of) the mother's interest in the farming partnership would pass by will.

Dawson v Dawson

The extremely recent case of *Dawson v Dawson* [2022] EWHC 341 (Ch) provides lessons for anyone advising over-optimistic claimants. There were three claimants, sisters, seeking to assert an entitlement in respect of a particular 16 acre field. Unlike many cases in this area, none of them had continued to work on the farm beyond young adulthood.

The evidence regarding representations/assurances was described as vague, and the Deputy Master was damning about how it had been prepared: *"It is highly unsatisfactory that their evidence about the alleged representation is identical, and yet they did not seem even know by whom or how those passages came to be written."*

As regards detrimental reliance: *"I consider that they have grossly exaggerated certain features of the past. In particular, they have exaggerated the nature and amount of work that they carried out on the farm, and the allegedly harsh conditions in which they were brought up."*

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Guest v Guest

In this case, judgment is currently awaited from the Supreme Court. The issues on the appeal grapple directly with the controversy referred to by Lewison LJ in *Davies v Davies* regarding proportionality (and by others elsewhere).

The Court of Appeal decision, rejecting the challenge to the trial judge's decision, is *Guest v Guest* [2020] EWCA Civ 387; [2020] 1 WLR 3480. The award was a lump sum payment composed of 50% after tax of the market value of the farming business and 40% after tax of the market value of the farm itself, subject to a life interest in favour of the defendants in the farmhouse. The award reflected the assurances of a 'substantial share' to be inherited. This will require the farm to be sold during the lifetimes of the defendants.

Supposing that it is possible to quantify the detriment, such as by working out a charging rate for the work done or what the claimant could have earned elsewhere, should this operate as a ceiling on the claim? That is what is contended by the defendants. The logic is that if such 'compensation' is given the detriment is cured and so the basis for any greater award falls away.

Guest v Guest

An important lesson from this case is that defendants would be well advised to formulate submissions dealing with the possibility that they may not defeat the claim outright. If the court is not given a comprehensible and worked out alternative basis for an award that is less than giving full effect to the assurances, the trial judge cannot be persuaded by it. A generic fallback position of contending for the award to be reduced without any specifics will not be of great assistance.

My personal prediction is that the Supreme Court will dismiss the appeal. While the logic of the argument seems attractive, in my view it is too unrealistically neat to be treated as an overriding principle (it may well work in some cases). In many of these cases the detriment cannot easily be reckoned in money terms. Interestingly, in *Habberfield* a quantification exercise was actually done, and it was held that *"the best estimate on the material I have of the upper limit of the quantifiable aspects of Lucy's reliance loss £220,000"*. The award in that case was nevertheless worth multiple times that sum, and was upheld on appeal.

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