

## **Proprietary Estoppel: Principles and Remedies Update**

### Pinning down the doctrine

*“Whilst it is possible to give a general formulation for the doctrine, it really operates only at a relatively high level of abstraction”*: **Snell’s Equity** (2020) (34<sup>th</sup> ed).

### The purpose of the doctrine

*“Underpinning the whole doctrine of proprietary estoppel is the idea that promises should be kept”*.

Lewison LJ in **Habberfield v Habberfield** [2019] EWCA Civ 890

*“The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result, and a disproportionate remedy cannot be the right way of going about that”*.

Aldous LJ in **Jennings v Rice** [2003] 1 P & CR 8

### Origins of the doctrine

1. The term was introduced for the first time in **Snell’s Equity** (1966) (26<sup>th</sup> ed.) and was shortly afterwards adopted by Danckwerts LJ in **ER Ives Investment Ltd v High** [1967] 2 QB 379: *“There is another equitable ground on which Mr. High’s rights may be protected, which has nothing whatever to do with the Land Charges Act. It is discussed in Snell’s Equity (26th ed.) under the name “proprietary estoppel,” and the comment is made that “the doctrine thus displays equity at its most flexible.”*

As a cause of action

2. The doctrine then evolved rapidly and, by 1975 had been established as giving rise, when arising, to a cause of action.

*“When Mr. Millett, for the plaintiff, said that he put his case on an estoppel, it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppel and estoppel. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action”.* Lord Denning MR in **Crabb v Arun District Council** [1975] 3 WLR 847.

Modern formulation of the doctrine

3. The first modern formulation came in **Taylor’s Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd** [1982] QB 133:

*It is “... an approach which is directed ... at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment”:*

4. The current formulation which has, subsisted since 2009 is found in **Thorne v Major** [2009] 1 WLR 776, where Lord Walker noted that the consensus was that proprietary estoppel:

*“is based on three main elements ... a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.”*

Summary of the applicable principles

5. More recently, in 2016, the principles applicable to a claim in proprietary estoppel have been very helpfully summarised by Lewison LJ in **Davies v Davies** [2016] EWCA Civ 463 at paragraph [38] of his judgment:

*“Inevitably any case based on proprietary estoppel is fact sensitive; but before I come to a discussion of the facts, let me set out a few legal propositions:*

- i) *Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part: **Thorner v Major** [2009] 1 WLR 776 at [57] and [101].*
- ii) *The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance: **Thorner v Major** [2009] 1 WLR 776 at [29].*
- iii) *No claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined, and whether there is a distinct need for a ‘mutual understanding’ may depend on how the other elements are formulated and understood: **Gillett v Holt** [2001] Ch. 210 at 225; **Henry v Henry** [2010] 1 All ER 988 at [37].*
- iv) *Detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances: **Gillett v Holt** at 232; **Henry v Henry** at [38].*



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- v) *There must be a sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability: **Gillett v Holt** at 232.*
- vi) *The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result: **Jennings v Rice** [2003] 1 P & CR 8 at [56].*
- vii) *In deciding how to satisfy any equity the court must weigh the detriment suffered by the claimant in reliance on the defendant's assurances against any countervailing benefits he enjoyed in consequence of that reliance: **Henry v Henry** at [51] and [53].*
- viii) *Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application: **Henry v Henry** at [65]. In particular, there must be a proportionality between the remedy and the detriment which is its purpose to avoid: **Jennings v Rice** at [28] and [56]. This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way: **Jennings v Rice** at [50] and [51].*
- ix) *In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion: **Jennings v Rice** at [51]. However, the discretion is not unfettered. It must be exercised on a principled basis, and does not entail what HH Judge Weekes QC memorably called a 'portable palm tree': **Taylor v Dickens** [1998] 1 FLR 806.*

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Elaboration on the principles

6. Lewison LJ's list of principles is sufficiently comprehensive, and the principles are sufficiently explained, that little further elaboration is required.
7. The following points are, however, worth making.

**(a) An assurance**

8. The assurance can consist of three kinds: (i) acquiescence, (ii) a representation or (iii) a promise.

Acquiescence

*“The classic example of proprietary estoppel, standing by whilst one’s neighbour builds on one’s land believing it to be his property, can be characterised as acquiescence”*: per Lord Neuberger in **Fisher v Brooker** [2009] 1 WLR 1764.

9. Bearing in mind that proprietary estoppel gives rise to a cause of action for a remedy, the important point to note with an acquiescence-based claim is that the maximum extent of relief is identified: namely, a remedy which will put B in the position B would have been in had B’s mistaken belief (arising out of A standing by) been correct.

A representation

10. This strand of assurance should be treated with some caution. A proprietary estoppel claim arising out of a representation is perilously close to a case of estoppel by representation. Estoppel by representation does not give rise to a cause of action.
11. A representation-based estoppel merely precludes A from denying the truth of the representation that he made to B.

12. On that basis, if B wishes to use proprietary estoppel as a cause of action based on a representation, B needs to show that the requirements of either the acquiescence or promise-based strands have been met, for example by showing that, given the context in which it was made, A's statement that "this land is yours", amounts to a commitment that A will not seek to assert an inconsistent right to that land.

### A promise

13. This is described in **Snell's Equity** as the most practically significant part of the modern law of proprietary estoppel. It ties in with Lewison LJ's statement in **Habberfield v Habberfield**.
14. The promise must relate to property, or an interest in property – typically, "this land will be yours". It has recently been made clear that a promise to pay money without more cannot support a claim in proprietary estoppel: **Sami v Taskin** [2018] EWHC 1400 (Ch).
15. Although the expectation created by the promise is an important factor, as appears below in this paper, it should not be assumed that function of proprietary estoppel is to make good the expectation.

### **(b) Reliance**

16. Following a comprehensive analysis of the cases, the authors of **Snell's Equity** state that:

*"... in almost all of the cases in which B's claim has succeeded, the finding of reliance has been, on the facts, compatible with a test of asking if, but for A's promise, B would still have adopted the course of conduct now claimed to give rise to the risk of detriment".*

17. So A might be able to defeat a proprietary estoppel claim by showing, on the facts, that B would have done what he did anyway.
18. Not surprisingly, the reliance must be reasonable: see, in particular, Lord Neuberger in **Thorner v Major** at paragraphs 74 to 80.

**(c) Detriment**

19. It is important not to blur the distinction between reliance and detriment. While incurring expense on another's land may be said to be an acting to one's detriment, that is not the relevant detriment. It is an act in reliance.

20. The true position in relation to detriment is stated at **Snell's Equity** at paragraph 12-044:

*"A proprietary estoppel can arise only if B shows that, as a result of a course of conduct adopted in reliance on A's acquiescence, representation or promise, B would now suffer a detriment if A were wholly free to assert A's right against B. ... The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption that led to it were deserted".*

**(d) Identifying the appropriate remedy**

21. This involves applying the 4 principles identified by Lewison LJ in **Davies v Davies** at (vi) to (ix). That is to say, the court exercises a broad discretion to achieve a proportionate remedy which will avoid an unconscionable outcome.

22. Unconscionability is clearly a crucial element. Indeed, in **Murphy v Burrows** [2004] EWHC 1900 (Ch) the Court held that absence of unconscionability is fatal to the Claimant's claim.

23. Unconscionability is to be assessed objectively: see **Guest v Guest** [2020] 2 P. & C.R. 10. An unconscionable result will normally appear to be so to an objective bystander. The bystander takes into account all the circumstances, including the expectations of, and detriment to, the Claimant. He does not look at the matter solely through the eyes of the owner.

24. A central issue which the Court will invariably have to address is the Claimant's expectation.
25. When it comes to the Claimant's expectation, two approaches are possible. On the first approach, the starting point is that B's expectation will be protected, and a departure from this is permitted only if it is clear that such an order would impose a disproportionate burden on A. On the second approach, there is no presumption in favour of making B's expectation good, and the extent of relief will be determined principally by the need for such relief to do no more than ensuring that B suffers no detriment as a result of B's reasonable reliance on A; although B may be left to suffer some detriment if A can show that such an outcome would not, on the facts, "shock the conscience of the court".
26. Although there has been some support in the past for the first approach, it now seems clear from recent Court decisions that the second approach is likely to prevail. Lewison LJ was explicit on this in **Habberfield v Habberfield**: *"the expectation is not determinative of the relief to be granted"*.
27. An example of a case where monetary compensation was considered to be a proportionate result which avoided an unconscionable outcome was **Campbell v Griffin** [2001] EWCA Civ 990. In that case, A1 and A2 had come to rely for daily assistance on B, their lodger. They later assured B that he had a home for life. B provided devoted care for A1 and A2 for at least four years, as well as incurring significant out-of-pocket expenses on their behalf. The Court of Appeal rejected B's claim that he was entitled to a life interest in the land, on the grounds that such a result would be disproportionate. The Court recognised that B had both a moral and legal claim on the property, but it was not so compelling as to demand total satisfaction, regardless of the effect on other persons with claims on A1 and A2's estate. Instead, the Court held that B was entitled to a sum of £35,000, to be charged on the property, being a sum, though not by itself sufficient to enable B to buy a freehold house in the locality, but a sum which would assist him with rehousing himself.



28. Making good the Claimant’s expectation is more likely to be regarded as the appropriate remedy where the assurances and reliance “have a consensual character falling not far short of an enforceable contract” and where B has performed B’s side of the parties’ “quasi-bargain”. In such a case, “subject to countervailing considerations, the court is likely to vindicate the claimant’s expectations”: see Lewison LJ in **Habberfield v Habberfield** at paragraphs [61] and [62].

**(e) Evading the requirement for formality?**

29. Section 2 of the **Law of Property (Miscellaneous Provisions) Act 1989** provides that contracts for the sale or other disposition of an interest in land must satisfy certain formal requirements as to writing and signing.

30. A promise-based proprietary estoppel is often closely akin to an agreement to transfer land.

31. It has been argued that section 2 of the 1989 Act imposes a prima facie bar on claims, based on proprietary estoppel, to give effect to a promise to sell land, and that they can be made, if at all, only by means of a constructive trust.

32. The contrary argument to this is that no proprietary estoppel claim is caught by section 2, as the section regulates the requirements of a contract for the sale or other disposition of an interest in land, and a proprietary estoppel claim, even if promise-based, is distinct from a contractual claim. Although there is no decision directly on the point, the authors of **Snell’s Equity** point out that there are no examples in the case law of an otherwise valid proprietary estoppel claim failing simply because of the effect of section 2. The better view is therefore that a proprietary estoppel claim based on a promise, is not precluded by the formal requirements of section 2.

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