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Proprietary Estoppel
Quantifying Established Detriment

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WHAT IS PROPRIETARY ESTOPPEL?

- 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 A 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.

Balcombe LJ in *Wayling v Jones* (1993) 69 P & CR 170 at p.172 citing Edward Nugee QC sitting as a DHCJ in *Re Basham (Deceased)* [1987] 1 All ER 405

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WHAT IS PROPRIETARY ESTOPPEL?

THORNER V MAJOR [2009] 1 WLR 776

- A makes a representation or assurance to B.
- B relies upon that representation or assurance.
- Detriment to B as a consequence of his reliance.
- It was reasonable for B to rely upon that representation or assurance.

Lord Walker of Gestingthorpe considering the "scholarly consensus"; *Thorner v Major* [2009] 1 WLR 776 [29]

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ASSURANCE OR REPRESENTATION

- Acquiescence: *Dann v Spurier* (1802) 7 Ves 231 at 235-6, 32 ER 94 at 95 per Lord Eldon LC: *"this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement…"* approved by Lord Walker at para. 55 *Thorner v Major*
- How to establish the assurance / representation? Paras. [56 – 57] *Thorner v Major* considering *Walton v Walton* (14th April 1994, unreported, per Hoffman LJ):

  "the promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made."

  "Equitable estoppel … does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept."

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DAVIES v DAVIES
[2016] EWCA Civ 463

- *(Eirian) Davies v Davies* [2016] EWCA Civ 463: C worked over many years for low pay on her parents' farm. Her parents caused her to have expectations that the farm would become hers. But there were disagreements between her and her parents and she came and went. She suffered some pecuniary detriment in reliance on her parents' representations, but other detriment, such as working elsewhere was more difficult to quantify and she had not positioned her whole life around the representations. Her parents argued that £350k would satisfy the equity, at first instance she was awarded £1.3m (net value of farm and business). On appeal that was reduced to £500k.

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DAVIES v DAVIES

[2016] EWCA Civ 463; [2017] 1 FLR 1286

Per Lewison LJ at [38] (a)

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] UKHL 18, [2009] 1 WLR 776, [2009] 2 FLR 405, 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] UKHL 18, [2009] 1 WLR 776, [2009] 2 FLR 405, at [29].

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DAVIES v DAVIES

[2016] EWCA Civ 463; [2017] 1 FLR 1286

Per Lewison LJ at [38] (b)

III. However, 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] UKPC 3; [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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[2016] EWCA Civ 463; [2017] 1 FLR 1286

Per Lewison LJ at [38] (c)

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. Thus the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result: *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501, at [56].

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DAVIES v DAVIES

[2016] EWCA Civ 463; [2017] 1 FLR 1286

Per Lewison LJ at [38] (e)

(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* [2002] EWCA Civ 159, [2003] 1 FCR 501, at [28] (citing from earlier cases) 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].

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DAVIES v DAVIES

[2016] EWCA Civ 463; [2017] 1 FLR 1286

Per Lewison LJ at [38] (f)

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 His Honour Judge Weekes QC memorably called a "portable palm tree": *Taylor v Dickens* [1998] 1 FLR 806 (a decision criticised for other reasons in *Gillett v Holt*).'

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MOORE v MOORE [2018] EWCA CIV 2669

- *Moore v Moore* [2018] EWCA Civ 2669: C worked consistently on his parents' farm in the expectation he would eventually receive it. C became a partner in the business in 2003 and in 2007 his parents executed mirror wills leaving his father's interest in the farm on the death of the survivor of his parents. His relationship with his parents broke down, his parents revoked their wills and his father dissolved the partnership.
- At first instance, the judge found that C had been promised the farm, partnership and assets and had acted to his detriment in reliance on the promise. The first instance judge considered that he should mirror the arrangement which would have obtained if the dispute had not arisen. He ordered the transfer for the business and property to C, subject to a licence to occupy the farmhouse in favour of his parents and an order that C pay his father £200 per week and cover his parents' care costs. Held, by the CA, that this accelerated and thereby exceeded his future expectation. He did not have an absolute right to capital and income while his parents were alive. He continued to be locked in a continuing financial relationship with his mother and a clean break would be better. The order also failed to take account of tax consequences.
- The CA did not substitute a decision, however, and remitted it for further consideration despite the costs on both sides being said to be £2.5m by that point.

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HABBERFIELD v HABBERFIELD [2019] EWCA Civ 890

- *Habberfield v Habberfield* [2019] EWCA Civ 890; [2019] ITELR 96: Lucy worked on her parents farm from the time she left school in 1983. Her parents assured her that once they could no longer run the farm the business would pass to her, subject to provision for other family members, including that title to the farmhouse would remain with her parents during their lifetime. Lucy rejected the offer of a LLP in 2008, in 2013 she left the farm, in 2014 her father died, and in 2016 Lucy filed action seeking transfer of the farm and assets of the farming business. There had been assurance and detrimental reliance (£220k). To satisfy the equity the judge ordered an immediate cash payment of £1.1m in an attempt to avoid negative tax consequences of severing the farmhouse from the land and to prevent Lucy's mother from having to leave the house. Her mother appealed arguing that the LLP offer satisfied the equity, that the award was disproportionate to Lucy's loss of £220k, and that any award should be deferred until after Jane's death as to raise the sum the farm and farmhouse would have to be sold.
- Lucy's mother's appeal was dismissed. Her rejection of the 2008 proposals and keeping working did not mean she received nothing, nor was it suggested her inheritance would be forfeited. She relied upon the earlier assurances.
- Was the relief granted by the court out of all proportion to the detriment suffered? This had to be balanced against the protection of Lucy's expectation interest. If A and B made a bargain which B had kept, in the absence of countervailing factors, it is unconscionable for A not to keep his side of the bargain.
- A cash award is within the judge's discretion. There was enough left over to rehouse Lucy's mother.

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GUEST v GUEST [2020] EWCA Civ 387; [2021] 1 All ER 503

- Andrew worked long hours for his father, David, on Tump Farm for 33 years for low wages. Andrew managed the farm and drove the business, but clashed with David in their vision of it.
- Throughout his period of working there, David would shut down arguments with Andrew by telling him that one day the farm would be his, but for the moment it was David's. He also made no secret that the farm would go to the next generation.
- At first instance, the Court referred repeatedly to the checklist at paragraph 38 in *Davies.* He found that an equity had arisen, that Andrew had met his side of the bargain, and that the remedy was to provide Andrew with that which he could have expected to have received upon his parents' death, namely 50% after tax of the market value of the dairy farming business and 40% after tax of the market value of the freehold land and buildings at Tump Farm, subject to a life interest in favour of his parents and each of them.
- This did not meet Andrew's original expectation, but did meet the position in his evidence and his parents' original intentions per their 1981 Wills, which must have been in David's mind when he made representations to Andrew.
- David (and Josephine)'s appeal to the CA failed, but they were granted PTA by the Supreme Court on 15.12.2020. On 02.12.2021 that appeal will be heard.

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MONTREUIL V ANDREEWITCH & ANOR
[2020] EWHC 2068 (Fam); [2021] 2 FLR 165

- Mr Andreewitch owned a property investment business and set up a holding company through which he bought various properties and a home in Chelsea.
- 2 years into his relationship with his cohabiting partner, he transferred to her (Ms Montreuil) all the shares in that holding company for a notional consideration of £5, asserting this was to protect their home from creditors.
- Some 18 years later, there were difficulties in the relationship, and Mr Andreewitch was found to have waged a campaign of attrition and harassment against Ms Montreuil. He engaged their son in obliging her to sign a "trust document" stating that she had no beneficial interest in the shares. The parties separated and she left the home with 4 of their 5 children.
- She then issued claims for a determination of her beneficial interest in the company, stating that she was the full beneficial owner, as well as the legal owner, or that the defendant was estopped from denying her ownership, or that there was a CICT, with a fallback claim under schedule 1 Children Act 1989.
- Cobb J determined that she was the sole beneficial owner of the shares, and would have been prepared to find that he had made material representations to her about her financial security in the property, that she had acted to her detriment on those representations, and Mr Andreewitch was estopped from denying her claim.
- The estoppel remedy was the entire shareholding.

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HUGHES V PRITCHARD & OTHERS

[2021] EWHC 1580 (Ch) per HHJ Jarman QC

- This was a claim regarding the validity of a Will which was found to be invalid for want of testamentary capacity.
- Notwithstanding that finding, the Court went on to consider the other arguments put before it, in case it was wrong on that point.
- One of those claims was that a parcel of land which was said to have devolved by that invalid Will to the son of the deceased, Gareth, in fact belonged to another deceased son's (Elfed) estate by virtue of a proprietary estoppel arising in favour of Elfed.
- Elfed had worked the land, being promised and assured throughout his life by Evan, his father (the deceased) that it would come to him. He persuaded his own son, Geraint, to leave his much-better remunerated job to join him in working that land on the basis that Evan had promised it to them. This was confirmed by Evan to Geraint after Elfed's death, but at a point where Evan had been diagnosed with dementia and was in grief.
- In considering PE, the Court noted two "clearly established principles":
    a) the maximum relief is what is needed to honour the promise;
    b) expectations arising from the promise will not necessarily be honoured and the court will not grant relief out of all proportion to the detriment.
- Considering *Habberfield,* if the parties have made a bargain which one party has kept to, in the absence of countervailing factors, it is unethical / unconscionable for a party to avoid his side of the bargain.

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PICKERING V HUGHES

[2021] EWHC 1672 (Ch) per Andrew Lenon QC sitting as a DHCJ.

- The Court rejected an implied trust claim combined with a proprietary estoppel argument.
- The checklist at paragraph 38 of Lewison LJ's judgment in *Davies* considered.
- There was no agreement, representation, nor common intention that those claiming an interest in Wood House had such an interest, despite giving up their own home and carrying out substantial works at their own expense to that property.
- Even if they had suffered a detriment, that argument did not support their contention that there had been such an agreement, assurance, intention or representation, since the detriment was outweighed by the benefit of living rent-free for over 30 years in a much more impressive and commodious home than that which they owned elsewhere.
- The current occupant of Wood House (one of those asserting an interest) was liable for some 3 years' worth of occupation rent to the Claimant, as valid notice terminating their licence to reside there had been served in 2017, with the notice period ending in 2018.

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WHAT WILL THE SUPREME COURT DECIDE? (1)

- The checklist at paragraph 38 of Lewison LJ's judgment in *Davies* is a correct summary of the law.
- That quasi-contractual arrangements where one party has fulfilled their side of the bargain and the other side has resiled from doing so will be remedied by meeting the expectation.
- But that will only be where the expectation is proportionate to the detriment suffered.
- Benefits obtained will be taken into account and discounted from any remedy.
- The benefit obtained may obliterate a detriment, e.g. where there has been proper remuneration for work done, or where someone has had the benefit of living rent-free in impressive and commodious accommodation for the price of some renovations and maintenance to that accommodation.

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WHAT WILL THE SUPREME COURT DECIDE? (2)

- Where the assurance or representation changed over time, then the expectation is likely to have changed with it. It may be disproportionate for a claimant to cling to the promise of an earlier assurance that conflicts with a later one. But where there is continued reliance on those assurances and commensurate detriment suffered, an equity will arise that will have to be met, albeit that the equity to be met may move further away from the expectation held.
- In meeting the remedy, the parties in asking for it and the Court in granting it must be alive to the consequences of it, including the impact on both the claimant and the defendant, and the tax consequences of it, and take those factors into account when considering the proportionality of the remedy.

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