PUMP COURT
CHAMBERS

PROPRIETARY ESTOPPEL: QUANTIFYING AN ESTABLISHED INTEREST

1. On 2 December 2021 the Supreme Court is due to hear the appeal of David and Josephine Guest against decisions made in favour of their son, Andrew Guest, both at first instance before HHJ Russen QC (sitting as a Judge of the High Court)[1] and on appeal to the Court of Appeal[2], when the Guests argued against Andrew's claim for declarations as to entitlement to a beneficial interest of Tump Farm (which legally belonged to David and Josephine) and the farming business carried on there, a declaration that he was entitled to occupy Granary Cottage – a dwelling on Tump Farm – and an alternative claim that the equity over the farm and business should be satisfied in such manner as the court might decree. David and Josephine defended that claim and counterclaimed for possession of Granary Cottage and for an occupation rent to be paid by Andrew from April 2015.

2. The appeal concerns solely the issue of the relief that should be granted once an equitable interest by way of proprietary estoppel has been established. The question for the Supreme Court is whether the Court should give effect to the Claimant's expectation, unless it is disproportionate to do so, or whether the Court should compensate for the value of the detriment suffered by the Claimant. Courts have historically had a broad discretion to determine which of those approaches to relief suits the facts of the case, but the discretion has to be exercised in a reasoned manner.

3. A third proposal was also identified by Lewison LJ at paragraph 39 of the Court of Appeal decision in *Davies v Davies*[3] where the relief granted would fall somewhere between the options of satisfying the expectation and compensating for the detriment.

4. *Davies v Davies* is seen as the current end point in favour of the "compensating for the detriment" argument, whereas the first instance decision in *Guest* (which considered the *Davies* decision), subsequently upheld by the Court of Appeal, provided relief in terms of meeting the Claimant's expectation as set out in his Claim.

[1] [2019] EWHC 869 (Ch); [2019] 1 All ER (D) 106 (Apr)
[2] [2020] EWCA Civ 387; [2021] 1 All ER 503
[3] [2016] EWCA Civ 463; [2017] 1 FLR 1286

5. This note now considers the similarities and differences in *Davies* and *Guest*, considers how they have been applied since their respective decisions, and attempts to anticipate the outcome of the *Guest* Supreme Court appeal.

Davies versus *Guest*: The Facts

Davies

6. In *Davies*, Mr and Mrs Davies ran a dairy farm for over 50 years, farming first in partnership, but in 2002, forming a company to take over the business. The land remained in the ownership of Mr and Mrs Davies. Eirian Davies, the defendants' middle daughter, worked on the farm for many years for low pay, and from the age of 17 it was clear to all concerned that she was the only one of the three sisters who was interested in taking over the farm. It was found at first instance to have been important to Mr and Mrs Davies that the farm should be kept in the family. Her father told that she would one day have the farming business, and her mother told her not to kill the goose that lays the golden eggs. Eirian understood that she would have to work the farm in return for these assurances. She did so from 17 until 21 for no pay, although she had board and lodging at home and money for clothes and leisure and a scooter and use of a car.

7. At 21 years old she left after an argument with her father, married, and reconciled with her parents, coming back to work, but not live, on the farm. Mr and Mrs Davies bought another farm, selling the farmhouse and 22 acres of that farm to Eirian and her husband, where they then lived. Eirian's work on her parents' farm was paid, but not sufficiently to meet the level of work she carried out.

8. In 1997 Mr and Mrs Davies bought more land and discussed with Eirian a partnership agreement, drawing up a draft which Eirian signed, but they did not. She thought that she had become a partner and had also been told that the farm would be left to her. She worked, believing she would be entitled to an equal share of the profits of the business. After a further argument with her father in 2001 she left again and in evidence accepted that her expectation of the farm and the business was dependent on her continuing to work in it. In 2002 Mr and Mrs Davies made a new will providing Eirian's third share of their estate on trust to her

daughters. Her marriage broke down in 2006 and she returned to work at the farm, but left again in 2007 after a further argument, and she obtained a job elsewhere. However, she still engaged in supervision of the milking and working on the farm in the afternoons and on her days off.

9. On Boxing Day 2007 she moved back to the farm, her father having told her it would be her home for life. This was confirmed by her mother telling her later that the house was her pension. Eirian later left her job because her parents promised her shares in their company in July 2008. She again worked long hours for low pay. Those shares were not allotted after Eirian's ex-husband sought child support payments from her, but Mr and Ms Davies executed draft wills showing she would be left the farmland and buildings and a share in the company, this being their intentions. In 2009 a new milking parlour was installed by the Davies for Eirian's benefit. In 2010 following a dispute about further wills being executed by Mr and Mrs Davies, their solicitor assured Eirian that the Davies' intention was that she should continue to live at the farm and ultimately take over its running when they were dead. A further argument took place in 2010 and then in 2012 when Eirian left the farm for the last time.

10. The first instance Judge dealt with the matter by way of a split hearing, first determining that Eirian had established an equity (which decision was unsuccessfully appealed by Mr and Mrs Davies) and then determining the remedy, which was again appealed, and is the subject of the discussion in this note.

Guest

11. In *Guest* Andrew had worked on Tump Farm since he was sixteen and spent 33 years working there full-time for a low agricultural wage which, at one point, he brought to the attention of the Agricultural Wages Board, he having been unable to negotiate effectively with David about his income. He also had the benefit of the farming partnership providing a home at Granary Cottage for him and his family and paying for certain other living expenses. David had encouraged Andrew and his younger son, Ross, to work together on a quadbike venture on Tump Farm's land, which was successful for a while, until a dispute arose between Ross and Andrew. David, Andrew and Ross had all worked together running Tump Farm and another farm – Dayhouse – under a farming business tenancy (although Andrew argued he did the

majority of the paperwork, administration and management of the business, making it profitable), but in 2012 it was agreed that the partnership would become two informal partnerships, with David and Andrew running Tump Farm, and David and Ross running Dayhouse Farm. Each son would have a 50% share of profits of "their" farm, with the other 50% going to David and Josephine Guest.

12. Disputes arose regarding transfers of assets and equipment between the businesses. This later extended into a dispute between David and Andrew as to Andrew agreeing to pay a tax bill of David's only if David entered into discussions about the succession of the farming business. The relationship soured between David and Andrew, and David and Josephine removed him as an heir under their Wills, dissolved the farm partnership with him and then sought to charge him a rent for him running the farm business and to live in Granary Cottage. In April 2015 Andrew indicated that he was considering a legal avenue in proprietary estoppel and he issued his claim on 25.08.2017.

13. During the 33-year-period of their working together, David would shut down arguments with Andrew by telling him that one day the farm would be Andrew's but for the moment, it was David's. David also made no secret of his intention to leave the farm to the next generation, which was said by Andrew to be him alone until Ross showed an interest in farming, when the intention extended to Ross as well. In fact, David's Will made in 1981 provided that the farmland and its business should be shared between Andrew and Ross, with a pecuniary legacy to be raised by Andrew and Ross and paid to their sister, and David's actions and representations to Andrew did not conflict with the intentions in that Will. In 2014 there were various recorded conversations between David and Andrew in which Andrew referred to David leaving the farm to each of him and Ross, and him running the business as his own, with David as a sleeping partner in his lifetime, none of which statements met with any opposition from David (nor Josephine). The Court found that these amounted to sufficient assurances that Andrew would run the farm in due course and ultimately inherit it (subject to Ross' interest).

14. In the course of the judgment, the Judge referred repeatedly to paragraph 38 of Lewison LJ's judgment in *Davies* in which he set out 9 principles to be applied in proprietary estoppel cases:

"(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 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 at [29].

(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].

(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 P. & C. R. 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] (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].

(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 F. L. R. 806 (a decision criticised for other reasons in Gillett v Holt)."

Davies **versus** ***Guest*****: The Outcome**

Davies

15. In *Davies* it was held that:

    (a) This was not a case in which the expected benefit and the expected detriment were equivalent or not disproportionate as there had been a number of different representations made, when Eirian left the farm for a second time in 2001 she had given up on it and had no expectations regarding the farm, and thirdly her expectation of the farm and the business was dependent on her continuing to work in it, which did not happen. In short, she had not positioned her whole life and the direction of it around the defendants' representations (para. 32).

    (b) Eirian had raised an equity that needed to be satisfied and expectation was the appropriate starting point. According to the first instance judge, the nature of the expectation shifted, but the essence of it was that Eirian was the only person who could fulfil her parents' wishes of keeping the family business going (para 33).

16. As far as the remedy was concerned, at first instance, Eirian's parents argued it could be satisfied by £350k, which would pay off her mortgage on her own property, and would award her a share of the partnership and company property. The Judge disagreed with them, and awarded her a lump sum of £1.3m, that being a third of the net value of the farm and farming business.

17. On appeal to the Court of Appeal, that was reduced to £500k, the Court finding that the Judge was far too broad brush and failed to analyse the facts with sufficient rigour, nor did he explain his conclusion sufficiently. Lewison LJ accepted Eirian's counsel's argument that where the expectation is a starting point for the remedy, 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 (para 41).

18. Lewison LJ's analysis was that the assurance in 1985 was that Eirian would inherit the farm, but that expectation was upon her remaining and working there, and, given her age, that must have meant several decades of work. She did not perform her side of the bargain there. As far as the assurance that she was a partner, she could expect a participation in profits and exposure to losses during the subsistence of the partnership, but she also expected to inherit the farm. When her expectation was dashed, she left the farm again, and had no expectation as regards the farm, until she came back to live at it, when her expectation was that she could live there rent free for life.

19. Thereafter she also expected an interest in the company, but that did not own the land, and must have superseded expectation of partnership (para 46). The later expectations regarding the draft will shown to her were also negated by the fact of the actual wills and other testamentary propositions of which Eirian was aware (and which caused argument) (para 47).

20. Lewison LJ at paragraph 48 noted the different and sometimes mutually incompatible expectations, and they were changing and uncertain, although the first instance Judge found that the essence of the expectation did not change. The Court of Appeal disagreed.

21. Lewison LJ then noted that the ingredient of detrimental reliance fluctuated as well, in particular regarding the provision of rent-free accommodation for life (paragraph 52), but the Court of Appeal did not interfere with the Judge's finding that the detriment Eirian suffered amounted to working long hours for low pay and her giving up the opportunity to work shorter

hours elsewhere in an environment of her choosing, and free of the difficult working relationship with her parents.

22. Lewison LJ agreed that a monetary award was appropriate to satisfy the equity, but considered that the Judge had not properly taken into account the nature of the offer made by the Davies and had given far too much to remedy Eirian's disappointment:

    a. The Davies had satisfied the offer of the life interest by making provision for paying off Eirian's mortgage;
    b. They had satisfied her expectation of a share of partnership profits and company shareholding.
    c. They had not satisfied her expectation of an inheritance to a sufficiently high level, although her expectation on that front was too high, but some allowance would be made for that;
    d. They had not satisfied her non-financial detrimental reliance of her curtailed ability to work shorter hours in an environment of her choice, but that could be done by a modest financial award.

    To do so, Lewison LJ and the Court overall awarded her a sum of £500k. Eirian's application for permission to appeal to the Supreme Court was refused.

Guest

23. In *Guest*, the first instance decision deals with remedy from paragraph 282 onwards. The Judge did not regard Andrew's equity as being built upon an assurance of a quasi-contractual character as the promised extent of Andrew's inheritance of Tump Farm was too uncertain, taking into account his own recognition of his siblings' expectations of their share of their parents' estate (para. 283). Andrew was not aware until the proceedings began that his father had intended, from 1981 onwards, that the farm, its land and its business should be shared between him and Ross upon his parents' death.

24. At paragraph 285 the Judge determined that Andrew's equity was to be measured against the current extent of Tump Farm, including parts that had been leased by David (but notably not sold by him) to a solar panel farm operator. The Court found that David had clearly intended to keep the land as a whole within his estate.

25. As Andrew and his family had fallen out, the Judge found that it was appropriate to identify relief that would achieve a clean break between them (para. 286). That might involve a sale or all or part of Tump Farm, resulting in a failure to mitigate tax, as David had sought from around 2000. The Judge found that Andrew should bear tax consequences (para. 287).

26. The remedy granted was a lump sum payment to Andrew providing for:
    a. 50% after tax of the market value of the dairy farming business or 50% of the actual value realised by or apportioned to the sale of that business in consequence of the judgment;
    b. 40% after tax of the market value of the freehold land and buildings at Tump Farm, subject to a life interest in favour of the parents and the survivor of them, or 40% after tax of any actual value realised by the sale of that property, with the parents first being credited with the notional value of the life interest;
    c. The percentage share payable to Andrew is net of any taxes payable by the parents in respect of their realisation of sale proceedings or would properly have been payable on a sale of the dairy business and / or Tump Farm.

The Guest Appeal to the Court of Appeal

27. As it appeared inevitable to David and Josephine Guest that to meet the first instance judge's order they would have to sell their farm, they appealed both against the finding that Andrew had established an equity and on the question of remedy. They were granted permission to appeal by Males LJ only on the question of remedy. They argued (para 65 of the judgment):
    a. the Judge had been wrong to hold that the appropriate approach to relief was to base the remedy on the claimant's expectation;
    b. the relief granted went beyond what was necessary to avoid an unconscionable result or the minimum equity to do justice. The "current equity" could and should be satisfied by a charge on the farming business or on the farm for a sum representing the extent to which the business had been enhanced by Andrew's contribution over and above that which was

required by his employment and / or to compensate Andrew for the loss of opportunity to save money to buy a house, and such other sum as the Court felt necessary to avoid an unconscionable result; and

c. insofar as any equity was 'anticipatory', it could be satisfied by the making of a declaration or by the grant of injunctive relief allowing for the issue of whether or not to grant further relief and the extent of that relief should be considered in the light of all circumstances as at the date of the Guests' death.

28. The Guests argued that the Judge had to determine the extent of the equity by reference to what an objective bystander might consider was the arrangement the owner of the land / property must have intended, so as to avoid an unconscionable result and that he had not done this. Floyd LJ (with whom Newey LJ and Arnold LJ agreed) rejected this argument (para [70-71]), noting that there were two stages to the consideration of proprietary estoppel cases:

a. Had the Claimant established that an equity arose?

b. If so, how should the equity be satisfied in order to do justice.

The Judge would not have to define or quantify the precise extent of the equity. He had a broad discretion to award what was necessary to avoid an unconscionable result. The "true measure of the equity" test was satisfied by considering proportionality (para. 76).

29. The "unconscionable result" test was equivalent to a reasonable objective bystander test, but the objective bystander would take into account all the circumstances, including the expectation of and detriment to the claimant, and would not just consider the owner's point of view (para. 77).

30. Floyd LJ rejected the Guests' argument that the Judge should have awarded Andrew a remedy based on the increased value of the farm, rather than on his expectation, as that argument was based on there being an insufficiently clear representation to Andrew, which the Judge had rejected, finding that there had been a sufficiently clear assurance to Andrew that he would inherit a sufficient interest in Tump Farm to allow him to farm there (**para 79**). That assurance was found to have been intended to be, and was, acted upon, and to repudiate it was unconscionable.

31. Floyd LJ went on to consider the alternative remedies now proposed by the Guests and held:
    a. (para. 81) that the proposal that he should only receive a sum representing the extent of the increase in the value of the Farm as a result of Andrew's efforts was unfair as it took no account of the nature of the assurance given – i.e. that he would inherit sufficient to farm himself, rather than that his work and dedication would be rewarded in the event that his efforts bore fruit by way of an increase in the land's value. This was more appropriate in an action for unjust enrichment, which this was not;
    b. (para. 82) that an approach to compensation based on Andrew's loss of opportunity to work elsewhere was also unfair. The detriment or loss suffered by a claimant persuaded to take a poorly remunerated position (rather than a job elsewhere) on the strength of a promise of an interest in land is not met by a quantifiable difference in wages, but the Judge has to take account of a large and perhaps unquantifiable loss of opportunity justifying a much greater award.

32. Floyd LJ stated in terms at the end of paragraph 82 that where a claimant had largely performed his side of the bargain reached with the defendant, it would be fair to meet the claimant's (reasonable) expectation of that which he had been promised. The effect is that even though this was not a case where the parties formed a quasi-contract at the outset, when one looked at the point when the defendants' assurances were repudiated, the claimant had performed his role over time in return for that assurance, and his expectation should be met.

33. As far as the "current and anticipatory equity" argument was concerned, the Court of Appeal rejected the notion that a declaration and an injunction were sufficient remedies (para 88). Firstly, the Guests had not established nor argued that the Judge could not accelerate Andrew's entitlement, and they would have to show the Judge had gone outside of his wide discretion in doing so. Secondly, the Judge was right to consider all the factors involved and find a way towards a clean break, allowing for Andrew to run his own farm now, rather than deferring and working in a salaried position. He did this and balanced it against the Guests' needs. In doing so he did not go outside of the bounds of his discretion.

34. On 15 December 2020 the Supreme Court (Lady Black, Lady Arden and Lord Stephens) granted the Guests permission to appeal.

Decisions since *Davies* and *Guest*

Moore (by his litigation friend) v Moore[4]

35. As was recorded in the *Guest* Court of Appeal decision, subsequent to *Davies* the Court of Appeal considered the appropriate remedy in the case of *Moore (by his litigation friend) v Moore* [2018] EWCA Civ 2669; [2019] 1 FLR 1277. The Court included Floyd LJ, although Henderson LJ gave the judgment of the Court.

36. In that case Stephen, the son of Roger, was defending Roger's claim for a declaration that their farming partnership had been dissolved by notice given and for an order that the partnership be wound up. Stephen argued that Roger had promised him repeatedly and for as long as Stephen could remember that the farm and its assets would be his own day, and that Stephen understood the promises to mean that Roger intended that Stephen would take over Roger's role in the farming enterprise and, upon the later of Roger or Pamela's death (Pamela being Roger's wife and Stephen's mother), Stephen would inherit Roger's interest in the farm, his interest in the partnership, and the farm assets, and would be the fourth generation custodian of the farm by the Moore family. Stephen's case was also that his claim was subject to adequate provision being made for Pamela for the remainder of her life, should she outlive Roger. Stephen's case was supported by his uncle Geoffrey, a retired partner of the Farm partnership, who had retired and given Stephen his share of the farm on the basis that it would all ultimately come to Stephen.

37. Stephen again set out particulars of detrimental reliance upon those assurances made to him, including that he had committed himself completely to the best interests of the farm and the partnership, had not explored opportunities elsewhere, had accepted that he would not be able to save nor secure a home elsewhere on his income, and worked for rates of pay below that which he could have earned doing similar work elsewhere.

[4] 2018] EWCA Civ 2669; [2019] 1 FLR 1277

38. At first instance both sides accepted that the 9 principles set out at paragraph 38 of Lewison LJ's judgment in *Davies* (above) should be applied as a summary of the applicable law.

39. As regards the discussion about the remedy, Henderson LJ considered carefully the judgment of Walker LJ in *Jennings v Rice*[5] and in particular the points made at paragraphs 49 – 52 of that judgment:

> *"49. It is no coincidence that these statements of principle refer to satisfying the equity (rather than satisfying, or vindicating, the claimant's expectations). The equity arises not from the claimant's expectations alone, but from the combination of expectations, detrimental reliance, and the unconscionableness of allowing the benefactor (or the deceased benefactor's estate) to go back on the assurances.*
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> *50. To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response it to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way.*
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> *51. But that does not mean that the court should in such a case abandon expectations completely, and look to the detriment suffered by the claimant as defining the appropriate measure of relief. Indeed in many cases the detriment may be even more difficult to quantify, in financial terms, than the claimant's expectations...Moreover the claimant may not be motivated solely by reliance on the benefactor's assurances, and may receive some countervailing benefits (such as free bed and board). In such circumstances the court has to exercise a wide judgmental discretion.*
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> *52. It would be unwise to attempt any comprehensive enumeration of the factors relevant to the exercise of the court's discretion, or to suggest any hierarchy of factors. In my view they include, but are not limited to… misconduct of the claimant… or particularly oppressive conduct on the part of the defendant… To these can safely be added the court's recognition that it cannot*

[5] [2002] EWCA Civ 159; [2003] 1 P. & C. R. 8 at [56].

compel people who have fallen out to live peaceably together, so that there may be a need for a clean break; alterations in the benefactor's assets and circumstances, especially where the benefactor's assurances have been given, and the claimant's detriment has been suffered, over a long period of years; the likely effect of taxation; and (to a limited degree) the other claims (legal or moral) on the benefactor or his or her estate. No doubt there are many other factors which it may be right for the court to take into account in particular factual situations."

40. In considering the first instance Judge's remedy, the Court of Appeal considered there were a number of serious difficulties with his approach and the regime he put in place to implement it:

(a) Stephen's expectation was a future one and could only have been subject to such reasonable provision as Roger might choose to make for Pamela, both before and after her death;

(b) The need for a clean break is compelling in circumstances where a family has fallen out and cannot live peaceably together;

(c) This is not a case where the promise amounted to an arrangement falling not far short of an enforceable contract where the Court's response is to fulfil the claimant's expectations. This is a case in which Stephen could only have expected to inherited the farm on the death of the surviving parent and after provision had been made for that parent. Had the claim been made at that point where Stephen had worked on the farm throughout and there was no material change in circumstances, then that would be a reasonable outcome, but there had been changes in circumstances, in that Roger's deteriorating health meant that the partnership had to end and that relationships had broken down.

(d) A court can accelerate an entitlement, but it must not be (as it was here) at the expense of proper provision for the owners of the land during the remainder of their lives, where Stephen's expectation was that he would have the farm on their death. Where there was to be an acceleration of entitlement, then there must also be full and generous protection for Roger and Pamela during the remainder of their lives.

(e) The Judge was wrong to make no provision for the tax consequences of the acceleration. There was no evidence presented to him on this point, which was a fundamental problem in this case. Tax consequences always need to be taken into consideration, just as in

divorce cases. Nor was there any up-to-date values of the assets available, which needed to be considered in relation to availability for division and tax consequences.

(f) The impact of the costs order made had not been properly considered by the Judge.

(g) Overall the judge did not reach a conclusion that was proportionate and fair to Roger and Pamela as well as to Stephen and the judge should have adjourned to allow for further evidence and argument on the remedy to be imposed.

41. Because the tax and value information was not available, even at appeal stage, the matter would have to be remitted for further consideration as to remedy, but the parties and the Judge were then given guidance as to outcome and settlement by the Court of Appeal (see paragraphs 102 onwards):

(a) Roger's share in the land and partnership assets should be transferred to Stephen, subject to the raising of a lump sum for Pamela and the impact of taxation.

(b) The lump sum should allow Pamela to rehouse herself comfortably in appropriate accommodation of her own choice, enjoy a reasonable income and have sufficient capital to enjoy holidays and occasional luxuries, to provide for Roger, to make gifts and have a cushion for contingencies.

(c) The lump sum should be raised in a matter of months and may involve a sale of part of the farm or otherwise borrowing against the equity in the farm.

(d) Tax advice will be needed on the most efficient way of raising the lump sum and of transferring Roger's interest to Stephen.

(e) IHT / CGT liabilities must be borne by Stephen and he must indemnify Roger and his estate for those liabilities.

(f) The lump sum should take into account local housing costs, and in that case the likely figure lay somewhere between £1-2m (where the farm was worth at least £10m), and the payment of that sum should bear interest at a reasonable rate from the date of the first instance judgment until the date of payment.

(g) Pending payment of the lump sum and Pamela's rehousing, the weekly payment made to Pamela and Roger should increase.

(h) Once the lump sum is paid, Pamela should be responsible for her own health and care costs, but Stephen should continue to be responsible for Roger's care costs, paid promptly and without any set off.

(i) The lump sum payable by Stephen must be assessed without any reference to any unsatisfied costs liabilities in Stephen's favour. Thereafter the Judge can decide whether and to what extent there should be any set off against Stephen's liability to pay the lump sum in respect of any costs liability owed to him by Roger.

Habberfield v Habberfield[6]

42. As in *Davies, Habberfield* concerned one of four daughters, Lucy, bringing proceedings against her mother, Jane, wherein Birss J found that, after 30 years of working on the family farm, Lucy had established an equity based on proprietary estoppel that demanded a remedy. That remedy was, at first instance, a cash payment equivalent to the value of the farmland and buildings (but excluding the farmhouse) which would amount to £1,170,000. This would mitigate the potential inheritance tax problems with separating the farmhouse from the land and would mean that Jane would not be forced from her home where the cash could be raised without selling the whole property. It transpired that the property would probably have to be sold in order that Lucy could receive her remedy in Jane's lifetime, but Birss J considered that the need for a clean break and Lucy's desire to farm meant that the money should be paid within 14 days, with enforcement being stayed pending the sale of the farm.

43. Jane appealed the decision and Lucy cross-appealed regarding the Judge's dismissal of some allegations of detriment and offers previously made to her.

44. Lewison LJ, giving the Court's judgment recorded that the correct approach in considering the remedy is that it should be proportionate to the detriment suffered, rather than to the expectation (paras.56 - 58), but that the detriment will include quantifiable (in money terms) and non-quantifiable detriment. At paragraph 61 Lewison LJ referred to *Davies* and reference to *Jennings v Rice* in which Robert Walker LJ referred to a class of case where the assurances and reliance had a consensual character not far short of a contract.

[6] [2019] EWCA Civ 890

In those circumstances it would be proportionate to meet the claimant's expectation as the claimant will have "performed his part of the quasi-bargain" (para 62).

45. At paragraph 68 he said:

"Both Mr Wilson and Mr Blohm agreed (rightly in my judgment) that there was no clear point of division between different categories of proprietary estoppel claims. There was a broad spectrum of such claims. Looking back from the moment when assurances are repudiated, the nearer the overall outcome comes to the expected reciprocal performance of requested acts in return for the assurance, the stronger will be the case for an award based on or approximating to the expectation interest created by the assurance. That does no more than to recognise party autonomy to decide for themselves what a proportionate reward would be for the contemplated detriment. As Mr Blohm put it: if you get what you asked for, you should give what you offered.

"69. I regard that approach, with an appropriate degree of flexibility, as well-founded. It rests on the principle that if A and B have made a bargain, which B has kept, then in the absence of countervailing factors, it would be unethical (or, if you prefer, unconscionable) for A not to keep his side of the bargain. Accordingly, I consider that the judge was entitled to take the protection of Lucy's expectation interest as an important factor in deciding how to satisfy the equity."

46. At paragraph 71, in discussing Robert Walker LJ's observation at paragraph 49 of *Jennings v Rice* that the statements of principle refer to satisfying the equity rather than satisfying or vindicating the expectation, that the expectation is not determinative of the relief to be granted, and it is appropriate for a judge to consider whether an expectation interest should be scaled down.

47. Lewison LJ grappled with the difficult situation wherein the first instance judge and then the appeal court had to balance the interests of the claimant realising her remedy in equity in this case as against the defendant 82-year-old mother having to sell her home and move in order to allow for that to happen, rather than the 51-year-old claimant having to await her mother's death before being able to start a farming business in her own right, as she was per the proprietary estoppel assurances entitled to receive.

He was persuaded by Lucy's Counsel that the decision reached by Birss J was not plainly wrong and was within the exercise of his discretion. He records at paragraph 87: *"The question is not whether I would have made the order that the judge made. The question is whether the order lay outside the ambit of his "wide judgmental discretion." With some reluctance, because it is a hard outcome, I have been persuaded that it did not."*

Montreuil v Andreewitch and Another[7]

48. This case concerned the beneficial interests in shareholdings in a property investment and development business. The defendant owned the property investment business and set up a holding company through which he bought various properties and a home in Chelsea. The claimant was his former cohabiting partner with whom he had 5 children. 2 years into their relationship, in 2000, the defendant arranged for the transfer of the ownership of the shares in the holding company from his business partners to the claimant for a notional consideration of £5. He asserted that this was to protect their home from creditors. In 2018, after some years of difficulties in their relationship, the defendant engaged the parties' son in obliging her to sign a "trust document" after the defendant placed intolerable pressure and exercised a campaign of attrition and harassment against the claimant. The document set out that she had no beneficial interest in the shares and was only a bare trustee, holding them for the benefit of the defendant. The parties separated and the claimant left home with 4 of the children.

49. Having left, the claimant issued a CPR part 7 claim for a determination of her beneficial interest in the company, arguing that she was the full legal and beneficial owner as of the 2000 transfer, or alternatively that the defendant was estopped from denying her beneficial ownership, or that there was a common intention constructive trust and she was entitled to at least 50% of the shares and / or the family home, with a fall-back claim under Schedule 1 of the Children Act 1989 for a housing fund for her and three of the children.

[7] [2020] EWHC 2068 (Fam); [2021] 2 FLR 165

50. The defendant later purported to transfer ownership of the shares to the couple's son, whereafter the claimant obtained a freezing order, which the defendant breached, being then the subject of committal proceedings for contempt, the outcome of which was undermined by the trial judge, Lieven J, having failed to remind him of his right to silence.[8]

51. Cobb J, in the property law proceedings determined that the claimant was the sole beneficial owner of the entirety of the shares in the company, that the purported registration of the shares in the son's name was invalid and of no effect, and required the defendant to register the shares in the claimant's name and to procure the taking of all necessary steps to achieve that outcome. He found:

    a. That in the absence of a declaration of trust, there is a presumption that the beneficial interests follow the legal title[9] and this applies to assets other than real property as well.
    b. Where property is held within a company, the company may be taken to have shared the parties' intentions, such that the company holds the property on trust in accordance with the shares agreed between the parties or determined by the court.[10]
    c. The relevant event was the transfer of shares, not the earlier purchase of the property.
    d. The outcome of this case was based on findings of fact arising from the Court's assessment of the credibility of the parties. The defendant had not been honest and had not discharged the burden of proving on the balance of probabilities that the beneficial interest should not follow the law.
    e. In July 2000 the parties understood and intended that the claimant would be the legal and beneficial owner of the shares, the claimant purchased the shares for £5, and the defendant was estopped from claiming otherwise.[11]
    f. The Court would have been prepared to find that the defendant had made material representations to the claimant about her financial security in the property. The claimant had acted to her detriment upon those representations. In those circumstances, the defendant would, in any event, have been estopped from denying her claim. The remedy would have been the entire shareholding or a sizeable proportion of that shareholding.

[8] Andreewitch v Montreuil [2020] EWCA Civ 382
[9] *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858
[10] *Chan Pui Chun v Leung Kam Ho* [2003] EWCA Civ 1075; [2003] 1 FLR 23
[11] *Prime Sight v Lavarello* [2013] UKPC 22

g. There was never any agreement, arrangement or understanding that the shares were to be shared beneficially, and any claim based on a common intention constructive trust would have failed.

Hughes v Pritchard and others[12]

52. In this case the High Court considered a family dispute regarding the validity of the late Evan Hughes' third and final Will, executed when he was suffering dementia and was grieving for his son, Elfed, who had died some months earlier. That Will provided that Evan would leave some land to his other son, Gareth. Elfed's widow, Gwen, and her son Stephen, contended that the Will was invalid on the grounds of lack of testamentary capacity, want of knowledge and approval, and or undue influence exerted by Gareth, or otherwise that the relevant land was subject to a proprietary estoppel claim by Elfed Hughes estate whereby the land belongs in equity to that estate.

53. During his life, Elfed had worked very long hours, both in Evan's building company and on his farmland, looking after the livestock. As his sons grew up they also worked on the farm. Elfed bought farmland next to his father and farmed both as a single unit. Evan had for many years made known to his family what would happen with his assets. Gareth and his sister, Carys, would receive the shares in the building company, and Elfed would receive the farmland. Two Wills were executed by Evan to that effect (in 1990 and in 2005).

54. Gareth ran the building company after Evan's retirement in 2003, but it ran into financial difficulty in 2013-14. Meanwhile, Elfed had persuaded his son, Geraint, to farm with him, Geraint giving up much better paid work elsewhere to do so, and, when Geraint asked for a pay rise, was told by Elfed not to ask as everything would be his one day.

55. From 2014 Evan's cognition deteriorated and in December 2015 (shortly after Elfed's death) he was assessed for cognitive impairment, it being found that it was moderately severe.

[12] [2021] EWHC 1580 (Ch) per HHJ Jarman QC

He changed his Will in 2016 with Gareth's assistance. Prior to doing so, after Elfed's death, he had dinner with Gwen and Stephen and assured them that he wanted to carry on the arrangement he had had with Elfed, with them in Elfed's stead and that nothing would change in regard to the land. Geraint was told this as well by Evan at the end of 2015 at a formal meeting where the future of the farm was the issue. When Geraint sought payment he was told by Evan that he would be looked after and that he should not look for specific payment as they would own everything one day. Various witnesses provided evidence that Elfed (and his family) would receive the land and stock, and Gareth and Carys would obtain the company shares.

56. The Judge found that the Will was not valid on the basis of lack of testamentary capacity, but in case he was wrong about that, he still went on to consider the other claims. He found that there was no proof of want of knowledge and approval of the Will and the allegation of undue influence was not made out.

57. At paragraph 108 onwards of the judgment, the Judge dealt with the issue of proprietary estoppel. He dealt with the legal principles quickly and discussed carefully the remedy decision. He noted two "clearly established" principles (para. 110):
    a. The maximum extent of 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 which is out of all proportion to the detriment.

58. The Judge considered at paragraph 112 Lewison LJ's point at paragraph 69 of *Habberfield* that if the parties have made a bargain which one party has kept to, then in the absence of countervailing factors, it is unethical or unconscionable for the other party to avoid his side of the bargain.

59. The Judge determined that the evidence supported findings of a sufficient assurance / representation, and a sufficient detriment, both financial (para 117) and non-financial (para 118) and ignored the provision of the "benefit" of a farmhouse many years before to Elfed's family, noting that Evan had provided similar homes to his other children to "set them up."

60. As to remedy, at paragraph 121, the Judge recorded that Elfed had fulfilled his side of the bargain and it was just and proportionate in those circumstances that the corresponding expectation should be fulfilled. Even if the 2016 Will was valid, the land given to Gareth under that Will was subject to an equity in favour of Elfed's estate (and so would have to be transferred to them).

Pickering v Hughes[13]

61. In this matter the Court had to determine an implied trust claim combined with a proprietary estoppel claim regarding a property called "Wood House" wherein the son of the deceased, John, claimed that some 20 years before representations had been made to him that the property would be bought for the benefit of him and his family by his parents, but in his parents' names, that he and his family would move in and fund its complete renovation, with the property passing into John's hands upon the surviving parent's death. In reliance on this promise or shared intention, John and his family had invested significant money, time and effort, and had made their own property elsewhere available to John's parents rent-free because they understood that Wood House was ultimately theirs.

62. At paragraphs 62 to 66 of the judgment, the Judge set out his understanding of the law relating to constructive trusts and to proprietary estoppel. In considering the latter he also set out the "checklist" at paragraph 38 of Lewison LJ's judgment in *Davies* as a statement of the legal principles that applied.

63. In that case, the Judge did not find that there was any agreement, representation, nor common intention that John and his wife should have any interest in Wood House and its associated land. He also found that, even if such a representation had been made, it was only made by the father and not by the mother, who would never have agreed to it.

64. Having made this finding, the Judge went on, in any event, to consider the question of detriment, since it was argued that the subsequent conduct of John and his wife in acting to their detriment supported their case as to the existence of the agreement / understanding.

[13] [2021] EWHC 1672 (Ch) per Andrew Lenon QC sitting as a DHCJ.

John and his wife argued both financial and non-financial detriment. The Judge found against them, recording that their living at Wood House, having swapped their comparatively modest accommodation in their own property elsewhere to do so, represented a significant benefit to them, and that they had lived in this much "more impressive and commodious" accommodation rent-free for over thirty years. He also found that John and his wife's failure to ensure over that period that any agreement or representation as to their ownership rights of Wood House was ever recorded, asserted or referred to in John's parents' Wills reinforced the conclusion that they knew no such agreement or representation was made (paragraph 114).

65. As a result of termination of a licence to occupy that property, John's sister, as executor of his mother's estate and 50% beneficial owner of Wood House, was declared entitled to charge an occupation rent to John's wife and children who still lived there (John having moved out).

Where are we now?

66. When considered together and in looking at subsequent decisions, *Davies* and *Guest* complement one another. The checklist of the law at paragraph 38 of *Davies* is likely to be universally accepted. It has been relied upon in *Guest*, *Moore,* was referred to in *Habberfield* and considered in both *Pickering v Hughes* and *Hughes v Pritchard.* In *Guest* the Court of Appeal and the first instance Court clearly had both the circumstances of *Davies* and the decision of the Court of Appeal in mind when making its decision. The first instance judge must also have considered the *Moore* guidance when making provision for the tax consequences of the outcome.

67. What will the Supreme Court decide? Lewison LJ has been involved in many of the decisions which now drive this area of law and, unless he has gone very significantly wrong, it is likely that his approach will be commended. It makes sense. It is anticipated that, when considering remedy, following the line of authority from *Jennings v Rice*, that the Supreme Court will decide:
    a. 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.
    b. But that will only be where the expectation is proportionate to the detriment suffered.

c. Benefits obtained will be taken into account and discounted from any remedy.

d. 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.

e. 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.

f. 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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Pump Court Chambers
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