



PRACTICE GROWTH AND PROPRIETARY ESTOPPEL

This article follows a well received lecture on this topic and its aim is to identify how solicitors can help their clients and expand their practices by focussing of proprietary estoppel (“PE”).

It is important to understand that PE is not limited to land issues as a matter of pure principle¹ and therefore the commercial sphere is one ripe for consideration as to the applicability of PE claims where, for instance, contract will not run. Otherwise PE can certainly apply in the commercial context of land transactions as well as all the usual suspects.

As to basics we need:

- (i) Promise or representation or assurance - and silence can do.
- (ii) Reliance – which can be presumed
- (iii) Detriment – which must be “substantial”

I will focus on the farming community although the same may be true of many family based ventures; partly because farmer’s sons² are the classic example of PE in practice and also partly because of the way the principles and practice development issues involved are so stark in this area.

The farming community is ageing and, in part, this is symptomatic of young people being less attracted by farming. The loss of the family farm through lack of successors means the older generation is working harder to encourage the younger generation to take over.

Farm land values have gone through the roof and peaked in 2014 at just shy of £10k/acre³.

Commonly PE claimants are between 40 and 60. A farming son faced with a broken promise of the farm from his father faces an interesting choice:

- (i) Run a PE claim and if successful he “scoops the pool” of a valuable farm to farm and/or retire on the valuable proceeds; or
- (ii) No PE claim and an impossible burden of buying their own farm – hence a tenancy of another farm is their best hope.

None of this is lost nowadays on the farming community.

The result is that parents **DO** encourage the next generation to stick with farming and they **DO** use hackneyed phrases such as *“one day this will all be yours”*.

¹ See McFarlane on the Law of Proprietary Estoppel §10.61

² This is simply because I see at least 9 farmer’s sons to each farmer’s daughter – a well known example of the latter is the first Davies v Davies case below.

³ Per Savills. My own view is that with the dramatic fall in the pound and common mention of foreign investors circling the UK property market it may well be that a further price hike is on the cards.



The children **DO** know they are being offered something important and valuable. This is especially true when couples start to cohabit or live together because, for instance, a young man's "prospects" are very much in the forefront of the parents' thoughts if not those of the younger generation themselves.

So you can start with the working hypothesis in any farming family that at some time something akin to a promise or assurance has been given. It may already have been formalised by a will or a partnership or suchlike – but maybe not!

To set the scene for the key parts of this note I want to look at a few cases starting with the two Davies v Davies cases⁴. Both PE claims originated from west Wales, both came in front of the same Chancery judge in Cardiff and in both he made what could be characterised as a generous award in favour of the applicant child.

In the first [2016] EWCA Civ 463 the daughter claimant was awarded £1.3m by the Judge. As Counsel observed that amounted to £65kpa after tax for the years she had worked on the farm. The C of A interfered because of the lack of analysis as to how this figure was reached. They adopted a largely empirical approach to the award which came to £350k and added £150K for difficult to quantify aspects to reach a new total award of £500k.

In the second [2015] EWHC 1384 the Judge gave the son the farm but we obtained permission to appeal (but the case then settled) on these interesting points:

- (i) At what date should detriment be assessed – in the normal course it is when the claimant knows the promise has been broken/falsified⁵; and
- (ii) Should detriment after that date be ignored

Notice therefore that it may be useful to notify that the promise will not be fulfilled in the parent's lifetime to stop detrimental reliance running on⁶.

PE cannot be used to circumvent the planning regime (e.g. "the planning officer promised I would get permission") – Mayor etc LB Bexley v Maison Maurice [2006] EWHC 3192.

This leads onto Fielden v Christie-Miller [2015] EWHC 87 where a PE claim against trustees could only succeed if the promise/assurance had been made by all the trustees. This is because trustees must act unanimously and one trustee cannot bind the other absent agency. Consequently, the promise must be pleaded against each trustee.

This may be a fruitful area of defence because so much land is jointly held and, frankly, often in traditional farming cases the mother has been treated as a silent assenter in the past to whatever the husband has said or done. Maybe all change!

⁴ Surprisingly there was yet a third of the same name last year [2016] EWCA Civ 1226 on PE but it was fairly run of the mill with an award of £68k against an asset value of £170k for a barn and land the subject of the claim.

⁵ In this case it occurred when he was told what was actually in his father's will.

⁶ It also raises another aspect in that if the detriment is part of an ongoing composite plan (e.g. raising herd quality to an economic watershed), is the representee entitled then to complete the exercise and count post breach detriment in the scales of the detriment suffered?



Minimising PE Risks

Three points:

- (i) Timing – when to advise
- (ii) Analysis – where is the client placed at present
- (iii) Strategy – what actions to take

Timing

Times to review whether a PE risk might exist include:

- (i) Making a will
- (ii) Entering an LPA
- (iii) Entering/exiting a partnership
- (iv) Buying/selling/leasing land

You would do well to have a checklist⁷. Suggested components (non-exclusive) are:

- (i) Is anyone following you on the farm?
- (ii) Are they a partner?
- (iii) Is the land inside or outside the partnership?⁸
- (iv) Are the working children paid a wage (and if low, why low)?
- (v) Are there any promises or understandings about the land and what will happen to it when you retire/die?
- (vi) Have there been any discussions about this?
- (vii) What do you think the working children expect (and why)? – an especially useful question.
- (viii) Have the children put anything into the farm or given up other opportunities?⁹
- (ix) Have the children undertaken responsibilities to others (e.g. marriage) and was anything said at this time as to the future?
- (x) What about other who have a claim or your bounty? – the classic problem for farmers is if they give the farm to one child there may be very much lower benefits available to the other children i.e. equality is unachievable.
- (xi) Are you the sole owner?

Analysis

Where is the client with:

- (i) Promises

⁷ Having it signed by the client is a sound scheme.

⁸ So so many partnership disputes I see across my desk involve the issue of what land is or is not in the partnership. It would be sensible at the end of the partnership deed to list land in fact held exclusively for the partnership in a schedule – and to create a supplemental deed whenever land is bought. A signed note (or provision in the deed) of land used by the partnership but not owned is equally a sound scheme.

⁹ For example, in my case of Lisseter (unrep) the client was persuaded away from a computer based career by promises of the farm. After the promise was broken he went into the world of computer with some success thereby providing evidence that he did suffer detriment contemporaneously with the promise.



- (ii) Reliance by the promisee
- (iii) Detriment suffered by the promisee

Be especially careful with the promise because what the promisor may have thought he was saying may be markedly different from what the promisee understood by what was said. Untangling the effect of this and placing it in the context of a viable PE claim is not for the faint hearted¹⁰.

If in doubt it is important to “take the bull by the horns” on the relevant evidence in the client’s lifetime rather than leaving it (and hence depriving competing children of vital evidence now available). Consider a statutory declaration at the least and a video of the clients views on oath is even better.

Strategy

Obviously bottom out the analysis gathering as much evidence as possible and then assess the balance of risks. Take the following situations:

- (i) There is a serious question mark over whether an assurance was given – so focus on clarifying what was said and promised (perhaps even with the promisee) probing whether a promise was made or, for instance, if it was too indefinite.
- (ii) You conclude a promise was made – so focus on minimising its impact e.g. by breaking the compact now (as occurred in Gillett v Holt [2001] Ch 210).
 - Assess the balance of benefits and dis-benefits received/suffered by the promisee (e.g. rent free accommodation). Can the client “up” the benefits now? Could this clearly compensate for the detriments suffered and can it be cross referred to them?
 - Leaving the issue unresolved (“time the great healer”) is very dangerous for all concerned. Explain carefully the pros and cons, have an attendance note and get it signed by the client if possible.
 - Avoiding family strife is an obvious driver but you should emphasis that (i) this may leave a worse problem for the next generation and (ii) may handicap one side of that dispute by denying them the evidence of the promisor.

Other possibilities include:

- (i) Making a will which is conditional.
- (ii) Disposing or dealing with property (including charging) – this may encourage an injunction application by the promisee and also a tracing claim may lie.
- (iii) Acting in deliberate and clear breach of the compact.
- (iv) Frustrating/preventing further detrimental reliance

Seek the advice of Counsel – this is a classic case where Counsel should be used.

¹⁰ See for instance McFarlane ibid §2.94.



Using PE - e.g. looking at a potential PE claim for a child.

Again – has a promise or assurance been given (silence may do)

Remember it is worthwhile considering in the non-land related context and it will work in a commercial land setting,

Classic examples are:

Don't bid against me and if I win we will share it.

One day this will all be yours

The perpetual right to use a jetty (Plimmer)

If you think there might be a claim under the Inheritance (Provision for Family and Dependents) act 1975, its co-traveller is often a PE claim.

Utility of the Remedy

- High authority points to relating the remedy to the detriment¹¹.
- In contrast - day in and day out lower courts simply fulfil the promise (and many are upheld on appeal).
- A very interesting question is whether when a son has a PE claim to the farm this means that immediately before death the farm has no real value to the Deceased's estate – (Lisseter *ibid* on this).
- Possible depreciating effect on probate valuations and IHT liabilities.

Growing the Practice Area

Plainly farmers are now very well aware of PE from national and farming press. What they cannot be sure about is whether it does or might apply to them.

Therefore:

- (i) Have you got a strategy on PE claims?
- (ii) Pinpoint times to raise PE with clients.
- (iii) Prepare a checklist
- (iv) Make clients aware of the need to review the issue soon and your specialisation (including contact with specialist barristers)
- (v) Have at your fingertips the dangers of leaving these issues unresolved in the lifetime of the parents e.g. legal fees/costs, upset within the family post death (especially to the surviving

¹¹ I take full responsibility for failing to persuade the C of A against this in the key case of Jennings v Rice [2003] 1 P&CR 8 and I am glad to see that a number of weighty commentators agree with my views that the C of A used the wrong approach (hope to get it sorted out one day!).



spouse – very common), uncertainty about the outcome, delay in administering the estate etc.

(vi) Have available a list of strategies from “letting sleeping dogs lie” to sorting it out now.

Summary

The key elements are:

- Analysis
- Perhaps strategy
- Giving the quietus to any possible claim
- Mediation
- Litigation

Practice expansion may involve any of these whether a transactional lawyer or litigator.

Use of Counsel – frankly identifying whether there might be a PE claim is the easy part nowadays. Precious little analysis exists as to how to advise a client faced with a potential claim whilst there might be time to deal with it in some strategic manner. Commonly it crosses our desks when the promisor is dead or there has simply been a complete and open breach i.e. too late to try to mitigate the situation.

One possibility might be for the parent to apply to the Ch D for a declaratory judgement against a potential PE claim.

Where even a modest 100acre farm is worth near to £1m these issues need review and the sooner the better despite many farmers being asset rich/cash poor.

Counsel's advice can be dispassionate, analyse the pros and cons and often bring harmony simply because parties clearer as to where they stand rather than being in a fog of possibilities (not that Counsel can always be definitive!).

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