Property, Trusts and Estates Team Seminar 2024

Everything you always wanted to know about Proprietary Estoppel but were afraid to ask …

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THE WINTERS' TALE

A Proprietary Estoppel Refresher and Case Study
Winter v Winter [2023] EWHC 2393 (Ch)

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Winter v Winter: Background (1)

(**Judgment**, esp. [10]-[38])

- Winter family – Cs: Richard and Adrian; D1: Philip; brothers – father (Albert); mother (Brenda)
- Family ran business from farm(s) near Bridgwater, sons worked in family business from early age onwards, each had share in business since parents formed partnership with sons in 1988, which held nearly all business land, and later company
- Father died 2017 (mother died 2001, last will left her business share to sons equally); father's last will dated 2015 left nearly his whole estate to D1, after falling out with Cs
- Since father's death, company ceased trading, land sold or to be sold, business to be wound up

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Winter v Winter: Background (2)

- Cs brought claim against D1 and Second Defendant (executor of 2015 will, neutral stance) on (inter alia) the basis of proprietary estoppel, along the following lines
- Father and mother had made assurances to sons to the effect that, if they committed their lives to working in the family business, parents would leave business interests to sons equally
- In reliance on the assurances, Cs had devoted their lives to working in the family business, inc. doing hard work, for long hours, with low wages, over many years and given up alternative careers
- It was unconscionable for the assurances to be reneged on, so an equity arose in Cs' favour which was to be satisfied by father's shares in business being held for sons in equal shares
- D1 opposed each element of claim
- Trial: July 2023, 4 days, High Court in Bristol, Zacaroli J; Judgment: Sep 2023

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Proprietary Estoppel: Overview

1. Assurance
2. Reliance
3. Detriment
4. Unconscionability
5. Remedy

But not "*watertight compartments*"

Thorner v Major [2009] UKHL 18; [2009] 1 WLR 776, at [15], [29], [56] & [84]

Davies v Davies [2016] EWCA Civ 463; [2017] 1 FLR 1286, at [38]

Guest v Guest [2022] UKSC 27, [2022] 3 WLR 911, at [71]-[80]

Gillett v Holt [2001] Ch 210 (CA), at pp.225 & 232

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Assurance: Principles

- Assurance of some interest in property of sufficient clarity, dependent on context: *Thorner v Major* at [56]
- Assurance: promise, representation or acquiescence

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Assurance: Application

Judgment, esp. [87]-[108] & [109]-[111], including:

- The things expressly said by Albert and Brenda "*to justify requiring the sons to work long hours, for low wages, ploughing profits back into the business, included at least that they were all working as a family for everybody together, i.e. for their common good, that everything was done for the family, and that the sons were working for their future*"

- A "*point often repeated by Albert and Brenda was that they treated, and intended to treat, all the sons equally. As Philip accepted, he understood this as referring not merely to the present, but also to the future, for which they were all working hard, and reinvesting profits*"

- "*Albert and Brenda did make assurances to Richard, Philip and Adrian which were reasonably understood by them to mean that if they committed to working in the family business the business and its assets would ultimately – i.e. after Albert and Brenda had gone – be divided equally among them*"

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Reliance: Principles

- Reasonable reliance on assurance: *Thorner v Major* at [29]
- The assurance relied on does not have to be the sole inducement for the detriment; once it is established that the assurance was made and there has been detriment from which inducement of the claimant may be inferred, then the burden shifts to the defendant to establish that he did not rely on the assurance: *Wayling v Jones* (1993) 69 P&CR 170 at p. 173

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Reliance: Application

Judgment, esp. [112]-[121], including:

- "*In my judgment, reliance is clearly established in this case. It is common ground that each of Richard and Adrian did in fact devote their working lives, from before they left school until Albert's death in 2017, to working in the family business. I consider that at least an inducement to them doing so was the fact that assurances were made by Albert and Brenda, as I have interpreted them above*"

- "*[T]he assurances made by the parents … was a factor that induced Richard and Adrian to continue working for the family business over such a long period*" and this "*remained a factor in the later years, when Richard and Adrian devoted a proportionately greater amount of time to the business than Philip. Had they understood that, in so doing, they were not to receive any part of Albert's share when he died, I think they would have acted differently*"

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Detriment: Principles

Detriment "*is not a narrow or technical concept. The 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… Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded… the essential test of unconscionability…*": *Gillett v Holt* at p.232

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Detriment: Application

Judgment, esp. [122]-[136], including:

- The detriment of Cs' lifetime commitment to working on the farm, including their giving up the chance to build an alternative life elsewhere, was not capable of being quantified; while the countervailing benefits were largely capable of being quantified, it was not possible to conduct a meaningful comparison with the detriment suffered
- By reference to the underlying question, it would be unconscionable to renege on the assurances made and relied on over many years, especially because of the continuing commitment by Cs for a long time even after they had already acquired their shares in the business, when they did not take other options then open to them

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Unconscionability: Principles

- Unconscionable in the circumstances to deny the interest assured: *Guest v Guest* at [74]

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Unconscionability: Application

Judgment, esp. [137]-[145], including:

- Findings on detriment also led to a finding of unconscionability
- Neither later changes in circumstances nor a finding on the conduct of one of the Cs towards his father removed the unconscionability arising from so many years of detrimental reliance on the assurances which had grown the business

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Remedy: Principles

- If an equity has arisen, the court has discretion as to how to satisfy it
- But the normal starting point is to assume the simplest way to remedy the unconscionability is to hold the assuror to the assurance (especially where there is essentially a quid pro quo of assurance and detriment)
- Unless, inter alia, the assuror can prove that enforcement of the assurance would be out of all proportion to the cost of the detriment, such that the remedy should be limited having regard to the same

Guest v Guest at [71]-[80]

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Remedy: Application

Judgment, esp. [146]-[149], including:

- The appropriate remedy in a case where assurances were made and acted on over so many years was to give full effect to the assurances; and, if Cs' expectation generated by the assurances was to receive a one-third share of their parents' interests, that was the appropriate remedy, given they had relied to their detriment in that expectation
- It should not make a difference that the sons already have some share, nor should other circumstances raised; so the executors of the Deceased's estate would hold his shares in the business on trust for the sons in equal shares

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Contractual Estoppel

Judgment, esp. [150]-[153]

- Judge also rejected D1's argument that Cs' case was barred by contractual estoppel by virtue of their participation in the partnership and company, cf. *Horsford v Horsford* [2020] EWHC 584 (Ch)

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Appeal in *Winter v Winter*

- Appeal to the Court of Appeal by D1
- Scheduled to be heard this summer

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Proprietary Estoppel and the LP(MP)A 1989

Christopher Hare

Scheme of LP(MP)A 1989, s 2

- A "contract for the sale or other disposition of an interest in land" must satisfy the formality requirements of the LP(MP)A 1989, s 2, namely:

  (a) must be "in writing" (s 2(1));

  (b) the agreement's or disposition's express terms must be incorporated "in one document" or "in each" exchanged contract (s 2(1)). Incorporation by reference suffices (s 2(2));

  (c) the relevant document "must be signed by or on behalf of each party to the contract (s 2(3));

- Given that such a contract "can only be made in writing", the effect of non-compliance is that the agreement has no contractual effect. According to the Law Commission, the principal merit of this approach is that "[a] simple, straightforward rule that contracts concerning land cannot be made orally would remove all these causes of confusion": see Law Comm No 164, *Formalities for Contracts for Sale etc of Land* (1987), [4.2].

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Critique of LP(MP)A 1989, s 2

- The apparent simplicity of the LP(MP)A 1989 scheme has attracted criticism, namely that the increased focus on formality (compared to Law of Property Act 1925, s 40) heightened the severity of the consequences for non-compliance; the LP(MP)A 1989 failed to implement the Law Commission's proposals properly; and inadequate consideration was given to the protection of contracting parties who acted in good faith in the belief that they were party to a binding contract relating to land;

- The criticism has been trenchant at the highest level: see Neuberger, "The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity" (2009) 68 CLJ 537, 545 ("[n]ow that the Law Commission, by needlessly meddling, Parliament, with misconceived drafting, and the courts, through inconsistent decisions, have had their wicked ways with section 2, we are worse off than we ever were with section 40").

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Softening LP(MP)A 1989, s 2

Despite the criticism of the LP(MP)A 1989, there nevertheless exist a number of "safety valves" that soften its hard edges:

(a) rectification of the contract for the disposition of land remains possible, so as to ensure statutory compliance: see LP(MP)A 1989, s 2(4);

(b) parties may conclude a "collateral" contract concerning related matters as part of a larger composite transaction: see *Grossman v Hooper* [2001] EWCA Civ 615, [21] (contract for the sale of curtains and carpets); and

(c) an express statutory saving provides that "nothing in this section affects the creation or operation of resulting, implied or constructive trusts": see LP(MP)A 1989, s 2(5). There are a number of established instances where the formality requirements of the LP(MP)A 1989 should not be allowed to preclude the independent operation of trusts: (i) "common intention" constructive trusts over the family home: see *Jones v Kernott* [2012] 1 AC 776; (ii) agreements to create trusts over land that are subsequently denied: see *Rochefoucauld v Boustead* [1897] 1 Ch 196; and (iii) co-operative acquisitions: see *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372.

A Role for Proprietary Estoppel?

- Beyond the "safety valves" expressly anticipated by the LP(MP)A 1989, should proprietary estoppel similarly operate as a "safety valve"?
- Certainly, the Law Commission appeared to anticipate a wider application of equitable principles: see Law Comm No 164, *Formalities for Contracts for Sale etc of Land* (1987), [5.4] ("However, the principles of equity have never allowed English law to be so harsh. Are there other solutions than that which might have been provided by part performance? We believe that there are, and that the courts would use doctrines of estoppel to achieve very similar results where appropriate to those of part performance"). Unfortunately, the decision cited by the Law Commission in support of this proposition (*Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169, 179) applied *promissory*, rather than *proprietary*, estoppel.
- There is nothing in the *Hansard* debates between 9 March 1989-26 July 1989 that may cast further light on the parliamentary intention in this regard.
- In the absence of clear guidance, the judicial approach has understandably lacked consistency.

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The Negative Answer I

- Given the absence of express statutory saving in the LP(MP)A 1989 for proprietary estoppel and the risk of contradicting the terms of the LP(MP)A 1989, a negative answer to the question of whether proprietary estoppel has any role may have a superficial appeal.

- This was the answer preferred (obiter) by Lord Scott (with whom Lords Hoffmann, Brown and Mance concurred) in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752, [29]: "My present view, however, is that proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute …". See also *Yaxley v Gotts* [2000] 1 Ch 162; *Kinane v Mackie-Conteh* [2005] EWCA CIV 45; *Anderson Antiques (UK) Ltd v Anderson Wharf (Hull) Ltd* [2007] EWHC 2086, [33].

- This view was not formally disapproved in *Thorner v Major* [2009] 1 WLR 776, [99]-[100], although Lord Neuberger suggested that there might be a distinction between invoking proprietary estoppel in a commercial/contractual setting and in a familial/non-contractual setting, as proprietary estoppel is less at risk of contradicting the LP(MP)A in the latter situation than in the former.

The Negative Answer II

- Similarly, in *Guest v Guest* [2022] 3 WLR 911, [178] Lord Leggatt (obiter) appears to provide some support for the approach in *Cobbe* that proprietary estoppel should not be permitted to undermine LP(MP)A 1989: "In any case, the statutory provisions which require a valid disposition of an interest in land or authority to transfer property on death to be in writing and comply with other formal conditions of validity contain no exception for informal promises on which detrimental reliance has been placed. Describing failure to keep such a promise as 'unconscionable' cannot justify disregarding law laid down by Parliament".

- Despite high-level support for limiting proprietary estoppel's role within the context of the LP(MP)A 1989, there are difficulties with the approach suggested in *Cobbe:*

  (a) proprietary estoppel cannot be excluded *tout court*, given that the remedial outcome may involve the imposition of a constructive trust, which is permitted by LP(MP)A 1989, s 2(5). There is accordingly a lack of predictability in relation to when proprietary estoppel might function in this context, which is at odds with traditional concerns over the discretionary allocation of property rights (see *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [47]);

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The Negative Answer III

(b) *Cobbe* operates in an inconsistent manner by potentially permitting estoppels that are more far-reaching by imposing a constructive trust, but paradoxically excluding those estoppels that operate in a more limited fashion by simply reversing any detriment suffered;

(c) *Cobbe* risks giving more legal vibrancy to arrangements falling short of a contract than valid contracts that fail to comply with the LP(MP)A 1989;

(d) *Cobbe* is premised upon the LP(MP)A declaring the relevant contract "void", but the LP(MP)A 1989 does not state this in explicit terms. Rather, "the wording of s 2 simply means that a non-complying agreement does not have *contractual* effect; that is not inconsistent with allowing the agreement to be used as part of a different non-contractual claim": see McFarlane, Hopkins and Nield, *Land Law* (5th ed, OUP, 2021), 267;

(e) *Cobbe* is in tension with the approach of Lord Briggs in *Guest v Guest* [2022] 3 WLR 911, [75]: "[t]he second (remedy) stage will normally start with the assumption (not presumption) that the simplest way to remedy the unconscionability constituted by the repudiation is to hold the promisor to the promise"; and

(f) *Cobbe* is inconsistent with other areas in which estoppel has been allowed to temper strict statutory or contractual rights (see *Actionstrength Ltd v International Glass Engineering* [2003] 2 AC 541; *Rock Advertising v MWB Exchange Centres* [2019] AC 119).

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The Positive Answer I

Although the negative answer may have high-level support, more recent authority appears to accept that proprietary estoppel is not at odds with LP(MP)A 1989:

(a) there has been a tendency for subsequent lower courts to treat Lord Scott's comments in *Cobbe* as non-binding obiter: see *Whittaker v Kinnear* [2011] EWHC 1479 (QB), [30] ("notwithstanding Lord Scott's dicta in *Cobbe*, proprietary estoppel in a case involving a sale of land has survived the enactment of s 2 of the 1989 Act". See also *Herbert v Doyle* [2008] EWHC 1950 (Ch), [15];

(b) LP(MP)A 1989, s 2 "is concerned only with the requirements of a valid contract for the sale or other disposition of an interest in land" and is accordingly silent on the operation of proprietary estoppel: see *Farrar v Miller* [2018] EWCA Civ 172, [57];

(c) reliance upon an estoppel does not involve enforcing any informal agreement contrary to the LP(MP)A, but rather the non-contractual "equity" that arises by virtue of unconscionable behaviour: see *Muhammed v ARY Properties Ltd* [2016] EWHC 1698 (Ch), [49] (s 2(5) is a "red herring, because proprietary estoppel is not about enforcing a contract at all"); *Sahota v Prior* [2019] EWHC 1418, [26]-[29];

The Positive Answer II

(d) limits on the operation of proprietary estoppel in the context of the LP(MP)A 1989 were criticised by Hugh Sims KC in *Thandi v Saggu* [2023] EWHC 2631 (Ch):

(i) there should be no difference between whether proprietary estoppel is being used offensively or defensively (at [135]);

(ii) there is "no clear dividing line between commercial cases and informal family cases", such as has been used to distinguish *Cobbe* and *Thorner* (at [136]);

(iii) there is "no reason why simply because the parties intended a contract, which then failed through non-compliance under section 2(1), this should preclude a party from inviting the court to grant equitable relief to prevent any unconscionability", since "[i]n that scenario the party relying on the estoppel is not circumventing section 2(1). They are simply being put back into a non-contractual position" (at [137]); and

(iv) if "free from authority to do so", the Judge "would also be inclined to conclude that this should be so in a 'contractually related' case and whether or not the relief which is granted may closely resemble the relief that the party had obtained if they could have enforced a contract which was rendered invalid by section 2(1)" (at [139]). Consider *Dudley Metropolitan Borough Council v Dudley Muslim Association* [2016] P&CR 10, [31]; *Howe v Gossop* [2021] EWHC 637 (Ch), [64].

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The Year in Review

A look at some of the many proprietary estoppel cases from the last 12 months, including proprietary estoppel where you might not expect to find it

Ollie Murrell

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Steels v Steels

[2023] EWHC 2985 (Ch) – Fancourt J

Assurances

- 1996: Deceased told his two sons they could live in the property as long as they wanted, so long as things worked out
- 2006: Deceased asked his sons why they wanted to move out when they had everything they needed at the property
- Limited assurances
- No assurance that the position would never change

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South Tees Development Corp v PD Teesport
[2024] EWHC 214 (Ch) – Rajah J

Reasonable Reliance

- Commercial agreement that South Tees could build a roundabout partially on PD Teesport land in return for a right of access
- Oral expressions of the agreement were unqualified
- Email expressions of the agreement were qualified as subject to an agreement being drafted
- Oral agreement: not intended to be relied upon
- Written agreement: no reasonable reliance on agreements made in analogous terms to 'subject to contract'

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Hughes v Pritchard
[2023] EWHC 1382 (Ch) – HHJ Keyser KC

Unconscionability

- Symbiotic relationship
- Overall assessment of unconscionability accounted for testator's desire to make equal provision for children and business failure
- Relevance of the promisee having predeceased the promisor

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Spencer v Spencer
[2023] EWHC 2050 (Ch) – Rajah J

Remedy

- Deceased promised his son that he would inherit the family farm
- Quarry later added to farmland; Deceased was in the process of unlocking agricultural value
- Appropriate remedy:
    - "If you get what you asked for, you should give what you offered"
    - Son entitled to the farm and the agricultural value of the quarry
    - Inheritance Tax should be apportioned in accordance with the value each part received/retained

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Company v Tenant

Landlord and Tenant

- Director of Company told Tenant “You can live here rent free for the rest of your life”
- Board-approved letter signed by the Managing Director which stated Tenant could live in the property for life so long as she paid rent
- Tenant cancelled housing benefits 6 months later and stopped paying rent
- Promissory estoppel or proprietary estoppel?
- Countervailing benefits?
- Reasonable reliance?

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Centaur Property Estates v Scott

[2023] EWHC 2712 (Ch) – Leech J

Easements and Rights of Way

- Agreement that Mr Scott would have the right to park in parking spaces of Centaur's and Centaur would have a right of way over Mr Scott's land
- Centaur granted leases and licences which allowed holders to use the right of way
- Commercial agreements and PE – how much caution is needed?
- Detriment and symbiotic relationships?
- The appropriate remedy?

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Further thoughts?

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