Davies v. Davies – the Cowshed Cinderella and the clock strikes 12.

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There is much academic debate about how the courts should go about assessing what relief should be granted to satisfy a proprietary estoppel. This doctrine shows 'equity at its most flexible'[1], and one might also think, at its most uncertain. The view, if it ever existed, that this doctrine showed equity simply enforcing specific but informal promises was firmly dispelled by the Court of Appeal in Jennings v. Rice. There the Court of Appeal held that the Court had to assess the right relief. In appropriate circumstances that might mean enforcing the assurance in full. But in other cases it would mean less than that. The two leading judgments, of Aldous LJ and Robert Walker LJ gave guidance as to how the Court should go about evaluating relief, but in different terms. For Aldous LJ the question was one of proportionality, whilst Robert Walker LJ divided cases up into contract-like cases and others; considered that the first question was whether to award the promised benefit; but if that was not proportionate, then one had to consider a range of factors; but even then, the expectation was the starting point. Mantell LJ unhelpfully agreed with both judgments.

What this did not tell us was *how* the court should go about assessing the remedy if it considered that it was not appropriate to award what the claimant reasonably considered he had been promised – the 'expectation measure'. Over

[1] Lord Denning MR in Crabb v. Arun DC [1976] 179

the years the Courts have handed out homely proverbs to assist the parties in this task. But they are not really of much forensic use.

'The court should award the minimum equity to do justice' has been known to law students since Crabb v. Arun DC in 1976, but what does it mean? If it simply means 'Don't award too much' or 'do justice' it begs the question – what is too much? What amounts to justice? It seems to me that it means that the Court should not forget that even equitable wrongdoers have rights; or if you will forgive me, to apply another proverb 'two wrongs do not make a right'. The courts are not in the business of handing out presents to the claimant for virtue or victimhood. What it does not mean is that the entitlement should be reduced below the 'right' or 'just' sum or award. As Robert Walker LJ put it in Jennings v. Rice, 'equity is not constitutionally parsimonious'.

The more modish approach is to say that the award should be 'proportionate'; but proportionate to what?[2] And what does that mean? I'm not sure that judges always know what has to be proportionate. In Jennings Aldous LJ said that there must be proportionality between the expectation and the detriment[3], whereas Robert Walker LJ considered that proportionality should exist between remedy and detriment. In Suggitt v. Suggitt [2012] EWCA Civ 1140 Arden LJ referred to Robert Walker's judgement and said this:

> "In my judgment, this principle does not mean that there has to be a relationship of proportionality between the level of detriment and the relief awarded. What Walker LJ holds in this paragraph is that if the expectations are 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"

[2] 'Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application' - Sir Jonathan Parker in Henry v. Henry [2010] 1 All ER 988 at [65].
[3] At [36]. Where Lewison LJ summarises Aldous' view by saying that there must be proportionality between remedy and detriment (at [38](viii)) that appears to be inaccurate.

The difficulty with any test that correlates two factors is just that is that - it makes the court look at two factors only. The cases indicate that the Court must look at ***all*** the circumstances (see Aldous LJ at [36] and Robert Walker LJ at [48] in Jennings). The point was recognized by Hobhouse LJ in Sledmore v. Dalby (1996) 72 P & CR 196, where he said that to require proportionality is:

> "to say little more than that the end result must be a just one having regard to the assumption made by the party asserting the estoppel and the detriment which he has experienced."

One case I have mentioned is Suggitt v. Suggitt. It was a case of a farming son who does not appear to have been much interested in farming, but claimed the farm on his father's death. He ended up receiving most, but not all of it. An appeal was unsuccessful, with Arden LJ commenting in the terms I have set out above. The general view of the chancery bar was that the outcome at first instance was surprising; but that the outcome of the appeal as to the quantum of the award was not. It is notoriously difficult to challenge decisions which are exercises of discretion, and the assessment of an award by way of estoppel is an exercise of judicial discretion[4].

So that brings us to Davies. Eirian Davies' parents, Mary and Tegwyn, started a pedigree dairy business in West Wales, which was to become the famous Caeremlyn herd. The other welsh place name you need to know is 'Henllan', which is the name of the farm on which the herd was run[5].

They had three daughters, but only one of them, Eirian, was really interested in dairy farming, and she was very good at it. She was and is exceptionally talented with animals[6]. The relationship between parents and daughter was from time to time very difficult. The chronology was not straightforward. The judge found that from 1985, when Eirian was 17, she was led to believe that she would have the farming business; and that it was unlikely that anyone distinguished between the

[4] Jennings v. Rice at [51]; see Davies [2016] Lewison LJ at [38] (ix).
[5] Caeremlyn Farm was May and Tegwyn's home.
[6] I would add that Tegwyn was also a formidable farmer. Mary was a forceful farmer's wife, who ran a turkey business from Caeremlyn.

business and the land from which it traded. She was then living at home and receiving some benefits from her parents. However in 1989 Eirian and her parents fell out over Eirian's choice of boyfriend, and Eirian lived elsewhere for a short while. The parties then reconciled, and Eirian went back to work on the farm. Eirian married in 1990 and moved on to and ran her own small-holding and household, but continued to work for her parents at Henllan, doing milking (for which she was paid) and animal insemination and general husbandry (for which she was not). In 1997 she signed a partnership agreement with her parents and believed that they had signed it too. In 1998 she sold her own property and moved into rent fee accommodation at Henllan. She spent some money improving it, and was paid £3,000 per year. She was told that the farm would be left to her. In 2001 whilst heavily pregnant Eirian discovered that her parents had not signed the partnership deed. She left the farm to live and work elsewhere. She accepted that she had 'given up on Henllan'. Her parents executed wills leaving two thirds of their estates to their other daughters, and one third to Eirian's children.

In 2006 Eirian divorced her husband and in 2007 was asked back to work on the farm on the promise of rent free accommodation. She and her family moved back to Henllan Farmhouse. In 2008 she was promised a half share in the trading company that was by then running the business. She gave up her job[7] and then worked full time on the farm, receiving a wage. In 2009 she was shown her parents draft wills under which Eirian was to receive the land and a share in the company, but by 2010 it appeared that they had resiled from this. Matters proceeded in bad humour until a punch up in the milking parlour in 2012 when the litigation started.

The trial judge heard a split trial. A four day trial[8] (unsuccessfully appealed by Mary and Tegwyn[9]) held that Eirian had established an estoppel. At the relief stage Eirian claimed the bulk of the farm. She was a farmer and that was what

[7] She had obtained a job as a reproductive technician with a leading livestock company.
[8] [2013] EWHC 2623 (Ch)
[9] [2014] EWCA Civ 568. The Court of Appeal suggested that a split trial (liability- relief) was not to be advised.

she had been led to believe she would receive. The net value of the business that she claimed[10] was £4 million. Mary and Tegywn argued that Eirian should receive £350,000, which was the net value of the reliance that they calculated Eirian had given up.

The Judge concluded that it was disproportionate to award Eirian the expectation because:

- A number of different representations had been made during the relevant period;
- When Eirian left in 2001 she had to an extent 'given up' on Henllan;
- Her expectation was dependent on her continuing to work, but that had not happened;
- Eirian had not 'positioned her whole life' on the basis of the assurance.

He concluded that a proportionate remedy was to award a lump sum in the amount of £1.3 million[11].

The Court of Appeal (Patten, Lewison and Underhill LJJ) allowed Mary and Tegwyn's appeal and reduced Eirian's award to £500,000. So where had the trial judge gone wrong? And how did the Court of Appeal come to a different view?

The Court of Appeal's approach was to take the trial judge's quite short conclusion that £1.3 million was the proportionate award, and to assert that his judgment adopted too broad brush an approach and 'lacked rigour'[12]. Once they had come to that conclusion, then it was open to them to substitute their own view of the appropriate award. But the decision that the decision 'lacked rigour' was, besides being insulting, not grounds of appeal. The job of an appellate court is not to mark the stylishness or prolixity of the judgment below, but to assess whether the judge had gone wrong. In general terms, a judge only goes

[10] Although Mary and Tegwyn pleaded poverty (if the farm was transferred) they had other assets, and refused to disclose the value of the other property they held.
[11] Although not stated, the likelihood is that this was one third of the net value of the farm given that there were three daughters. There were also farms in the agreed valuation evidence for this sum.
[12] At [42]

wrong if he makes a legal mistake or comes to a factual conclusion that is outside the ambit open to a judge who hears the evidence and weighs matters up. Here the Court of Appeal does not disagree with the judge's approach – paragraph 38 sets out nine points of principle that will no doubt be referred to in many cases as a helpful summary in future years, but contains nothing new. Nor does the Court say that the judge went wrong (in the appellate sense) in the sum he reached, although having read Lewison LJ's analysis of the assessment of a proper sum, one might conclude that this lay behind the judgment. There are, besides the difference in result, three points which indicate that this was so.

- First, there is a well-known head of appeal which specifically deals with a judgment providing 'inadequate reasons' (see Bassano v. Battista [2007] EWCA Civ 370) but no reference was made to this;
- Secondly, there is no reference to the 'wide ambit of discretion' open to the trial judge as referred to by Arden LJ in Suggitt
- Thirdly, and this may be bad luck on Eirian's part, Lewison LJ[13] gave permission for the first appeal, and Patten LJ permission for the second. They gave Eirian a hard time on the appeal, whilst Underhill LJ was rather more positive.

It seems to me that all of the matters that the Court criticised the Judge for not specifically considering were in fact considered in his judgment; most of them were referred to by the Judge when discussing why he was not persuaded to award Eirian the expectation interest.

Historically, there are a number of cases where the Court has 'plucked a figure out of the air' (or if one prefers, adopted a broad brush and un-rigorous approach) in making award by way of satisfaction of a proprietary estoppel – see for example Henry v. Henry where the Privy Council awarded half of the land sought and Campbell v. Griffin [2001] EWCA Civ 990 where having castigated

[13] Lewison LJ has a track record of taking a fairly strict view on estoppels – e.g. see his comment in Shirt v Shirt [2012] EWCA Civ 1029 at 56 that formal requirements for agreements for the transfer of land exist for a reason – to prevent half remembered conversations from being relied on years later.

the judge for giving a short *ex tempore* judgement on a complicated case ('at the end of a long hot day') Robert Walker LJ awarded the claimant £35,000 with no explanation as to its relevance to detriment or reliance at all. It may be, and undoubtedly is the case, that Davies was a more complex case than either of these, but the principle remains the same. As long as the judge takes the relevant factors into account, his decision should be challengeable only if it was plainly wrong. Unless the Court of Appeal were going to say that, they should have left it alone.

As to the correct approach to adopt, Lewison LJ noted[14] that there is currently an academic dispute between the view that the function of proprietary estoppel is to protect the expectation of the claimant; and that the function of the award should be focussed on that; and that the other view is that the function is to remedy the detrimental reliance [15]. Having set up these two approaches (and stated that academic writing favoured the latter) he then said that there was no need to resolve the dispute, thus flagging it up as an argument that may be available in the future.

However, whilst the tenor of Lewison LJ's comments appear to favour the compensating reliance approach; the distinction is not as clear-cut as Lewison LJ indicates. First, I don't see how the Court can avoid giving weight to the expectation unless it repudiates the approach adopted in Jennings v. Rice. Secondly, there is a middle course noted by Lewison LJ which is that advanced by Professor Simon Gardner[16] that the outcome reflects both the expectation and the reliance interest, and will normally be somewhere between the two. Thirdly,

[14] This was not referred to by either party, but raised by the Court in the judgment. On behalf of Eirian I did not want to encourage the Court to examine an approach other than the holistic one adopted by the trial judge.

[15] See para. 39. It seems to me that the second approach, although 'supported by the majority of academics' is fallacious. It depends on the reasoning that because an estoppel can only arise where there is a detrimental reliance, removal of the detrimental reliance is what is called for. The fallacy arises because estoppel also requires an assurance; and satisfying that will also discharge the estoppel.

[16] See The remedial discretion in proprietary estoppel – again (2006) LQR 492. Simon Gardner's earlier article was analysed by Robert Walker LJ in Jennings v. Rice.

there is much authority for the proposition that the court must simply stand back, have regard to all of the circumstances, and then do what is right:

> *"The aim is, as Sir Arthur Hobhouse said in Plimmer v Wellington Corporation (1884) 9 App.Cas. 699, 714, to "look at the circumstances in each case to decide in what way the equity can be satisfied."*

(Robert Walker LJ, Gillett v. Holt [2000] 3 WLR 815, at 839)

Lewison LJ then quoted Robert Walker LJ in Jennings v. Rice at [47]:

> *"…* [Where] *the claimant's expectations are uncertain (as will be the case with many honest claimants) then their specific vindication cannot be the appropriate test. A similar problem arises if the court, although satisfied that the claimant has a genuine claim, is not satisfied that the high level of the claimant's expectations is fairly derived from his deceased patron's assurances, which may have justified only a lower level of expectation. In such cases the court may still take the claimant's expectations (or the upper end of any range of expectations) as a starting point, but unless constrained by authority I would regard it as no more than a starting point."*

He commented 'What is not entirely clear from this passage is what the court is to do with the expectation even if it is only a starting point'. I don't see the problem. It seems clear to me that Robert Walker viewed the award of the expectation as both the upper limit of the award, and also the default, or presumption; but that it could be reduced if appropriate. As we were asked about it in argument, we suggested that the expectation could be given 'weight' related to the length of time the expectation was held, its clarity and the detriment incurred, and Lewison LJ said this was useful[17] (and we are grateful for that). But it seems to us to be obvious common sense. Some academics criticise this on the basis that one is comparing and contrasting apples and pears; but that is why judges judge – they have and use judgment – and academics criticise. They don't.

[17] At para. [41]

When it comes to the Court's (detailed and rigorous) re-examination of the merits of Eirian's claim, there are three particular points that should be noted. The first is that as we have seen Eirian 'gave up on her expectation' when she left in 2001. According to the Court of Appeal (adopting the appellants' approach), the consequence of this was that Eirian was not entitled to have her expectation for the period 1986 to 2001 taken into account in assessing her award[18]. The question we would ask is – why not? The judge had regard to this factor in not awarding the expectation; but unless the appellants changed their position in reliance on the lack of any claim (which was not asserted) Eirian was surely entitled to have her expectation for that period given such weight as the judge thought appropriate. And fourteen years of long antisocial and underpaid hours tending cattle from the age of seventeen does earn some very significant equity.

Secondly, Lewison LJ thought it was tasteless or inept (and certainly wrong) for the judge to have had regard to the role of Mary and Tegwyn in bringing Eirian's employment to an end[19]. Ordinarily this may be right. Certainly, in cases such as these the Court will be keen to avoid hearing irrelevant evidence of family dispute. However, where the agreement between the parties is in the nature of an agreement between the parties (as was the case here – Eirian had to work if she was to get the farm) the Court suggested that a failure on the part of Eirian to perform the deal was a reason why she should not receive her expectation[20]. If that contractual analogy were right, then it would follow that whenever a relationship broke down before death, expectation should not be awarded. But on the contractual analogy, blame is important. If the reason for the breakdown is the defendant's misbehaviour, there is no reason why the claimant should not get what she had been promised, at least where there was 'substantial performance' (and there undoubtedly was here).

[18] See paras. [50], [51] and [64]
[19] At [42].
[20] At [43].The references to Eirian repudiating the agreement after 4 years ignores the return to work from 1990 to 2001.

Thirdly, the Court made the point that the later promises concerned the business; and that although one might have thought it required a farm to be run on, that could have been on a tenanted basis[21]. What the Court missed was that by the time of the trial the relationship between the parties was so bad that when the judge canvassed this as a possibility both counsel said it was impossible.

Fourthly, we noted with interest that the Court assessed the value of such expectation as was to be compensated for, and the non-financial aspects of Eirian's detrimental reliance at £150,000[22]. There was no analysis as to why £150,000 was the right sum for these elements. It just was.

It is likely that the judgment will be of most interest not for its analysis but for its tenor. The Court of Appeal has sent a message that awards, and particularly substantial awards, must be fully reasoned and I think, if not an award *in specie*, should tend towards compensation for detriment. Where the expectation is (as is often the case in these days of substantial property values) well in excess of the financial detriment, a failure to obtain the expectation may well mean that the value of the claim will drop off a cliff. It encourages the Court to assess the price of everything, whilst knowing the value of nothing.

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[21] See [60]
[22] At [69].