Latest developments in proprietary estoppel

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Basic principles

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- 3 main ingredients: representation; reliance; detriment
- Unconscionability
- Wide discretion in satisfying the equity

- Let's invent a scenario to kick things off…
- So, Client A (Angela) comes to you and says that her mother has died, and before her mother died a number of things happened concerning her mum's house:

Promises, promises…

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- **A)** Angela thinks she might have contributed to the purchase price for the house, but it was bought a long time ago after Angela's dad (and mum's husband) had died. However Angela says she really isn't sure whether any money which she gave her mum went directly towards the house or not. She says she was helping her mum out generally with her finances and giving and lending her bits of money around that time after her dad's death, but can't really be sure (at least at the point when she comes to see you) whether any of it was used on the house or not.

Promises, promises …

- She thinks, anyway, that she agreed with her mum that it was her mum's intention that half of the property would be hers, but, equally she is not sure about that either. Further, around the time of the purchase there was much discussion about Angela living in the property with her mum, after the purchase she did not live there, but did stay occasionally…

Promises, promises …

- **B)** Angela then goes on to tell you that her mum used to say "Angela, when I die you will be well looked after, very well looked after", and that on different occasions she would say "Angela you don't need worry about anything, after I'm gone, you will have a nest egg to make sure you're alright" (at which point her mum would gesture to her house when they were in it). Angela also tells you that her mum, on a number of occasions, stated "all my house, everything, will be yours if you come and look after me".
- Let's also pretend that Angela made some sort of great sacrifice in reliance of these utterances, like giving up a well paid job in the city to go home and look after her mother…

- **C)** Following her return home Angela's finances take a drastic turn for the worse – from the high living and flash lifestyle of a city professional, her funds soon deplete compared to the time when she was able to lend her mother money. By the time of her mother's death Angela has very little. Soon after her mum's death, and much to Angela's surprise, she discovers that the only will her mum ever made was some thirty years ago when Angela and her mum had briefly fallen out, and the will leaves everything to her BROTHER…

Reminder

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- In practice, it is not always clear exactly which legal categories sets of facts best fit into. Keep a look out for related claims which can arise from the same kind of facts which lend themselves to proprietary estoppel.
- For example, constructive trusts and Inheritance (Provision for Family and Dependants) Act 1975 causes of action…

Proprietary estoppel in earnest

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- Etymological assistance…
- People often pick upon the 'stop' element of estoppel
- 'Estoppel' is from the old French word 'estouppail' which means 'bung' or 'stopper'. So the image which I like to think of is a cork being put into a bottle of wine – being stopped up in that sense – or even the phrase "put a cork in it"…

Representations & Pleading

Fielden v. Christie Miller [2015] EWHC 87 (Ch)

Can a representation capable of founding a proprietary estoppel be made by 1 of 3 trustees?

The unanimity principle

- Unless provided to the contrary in the trust instrument, trustees must act unanimously
- That being so, is there a need to plead agency?

The unanimity principle

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"*Elementary fairness requires that before a person can be bound by the acts of another purporting to act on his behalf, that other must have authority to bind him in the matter. Whether he has will depend on the usual principles of agency. This applies, in my judgment, as much in the field of estoppel as it does in other contexts.*" [26]

The unanimity principle

- "In the language of estoppel, there is nothing unconscionable in a person denying what another has come to believe and acted upon to his detriment if that person has not, either himself or through his agents, allowed the other to reach that belief. It is not therefore sufficient simply to plead that Mr Jodrell "appeared" to be speaking on behalf of all three trustees. The pleading must go further." [26]

The unanimity principle

- "It must set out, in respect of each trustee at the time of the representation which is said to ground the estoppel, what facts and matters are relied upon (whether at the time the representation was made or subsequently) for saying that that trustee was bound by the representation in question."[26]

The unanimity principle

- "In the case before me the question is whether it is sufficiently pleaded that Mr Jodrell was the agent at all of his two co-trustees, in the sense either **(1)** that they had authorised him to make the representations in question on their behalf (specifying how that authority arose), or **(2)** they stood by knowing that he had made the representations but acquiesced in them

The unanimity principle

- (specifying the circumstances in which they stood by and acquiesced), or **(3)** by their actions (specifying what those actions were) they put Mr Jodrell in a position in which he appeared to be authorised to make the representations on their joint behalves. That requires a pleading setting out the facts and matters which, if proved at the trial, will entitle the court to conclude that he did have that authority."[25]

The Non-Fettering Principle

Also raised in *Fielden v. Christie Miller* :

" When the power is fiduciary, the donee must exercise his judgment according to the circumstances as they exist at the time … Any form of undertaking as to the way in which the power will be exercised in future will be ineffective."

– Lewin on Trusts quoted in Fielden.

Tentative conclusion

- This principle does not defeat the proprietary estoppel claim because of the flexibility of the remedy
- In any event – it was a novel point not suitable for strike out (that was the context in which it was raised)

Tentative conclusion

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- "I have come to the view that, as baldly stated by Mr Wilson, the non-fettering principle does not operate to defeat Stephen's equity if the ingredients of the estoppel which he asserts are otherwise established." [39]

Davies - Detriment

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Davies v. Davies [2014] EWCA Civ 568

The "Cowshed Cinderella" case

Preliminary issue on first appeal: was there an equity in Eirian's favour?

Davies v Davies

- "The core issue in the appeal is whether the judge was right to find that there was any <u>substantial detriment</u> incurred by Eirian in reliance on representations made by Tegwyn and Mary. There are also issues about whether Eirian relied on the representations." [3]

Davies v Davies

- "Because of the way the case has come before us we are only concerned to see whether the judge was right to hold that the threshold for the grant of some equitable relief had been crossed." [28]

Davies v Davies

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- The concept of detriment for the purposes of this doctrine is not a narrow or technical one:
- "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." – quoted in *Davies* from *Gillet v Holt* [31]

Other points to note

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- 1) Whether the claimant has suffered detriment must be judged at the point where the person who gave the assurance seeks to go back on it.
- 2) Whether the detriment is sufficiently substantial must be judged by whether it would be unjust or inequitable to allow the assurance to be disregarded: *Gillett v Holt* at 232E-F.
- In essence, it's a question of <u>conscience</u>.

Forensic accounting?

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- Does the claimant need to prove that if she had pursued an alternative career her earnings would have been greater?
- Better opportunities elsewhere?
- Did Eirian lose out?

Detriment is not purely financial

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"The judge had to determine whether there was substantial detriment by contrasting the rewards of the job at Genus with its better lifestyle with those of working on the farm (including the free accommodation …) with its greater burdens in terms of working hours and more difficult working relationships. I am not at all persuaded that his conclusion as to where the scales came down in this balancing exercise was wrong. " [55]

- The judge's conclusion that there was net detriment to Eirian was one to which he was entitled to come. It was the result of a classic evaluative exercise which he performed with care. [56]
- Practical note in terms of procedure: COA warned against preliminary issues and split trials in proprietary estoppel cases, *Gillett v Holt* makes clear a holistic approach is required.

Davies- quantum hearing

Davies v. Davies [2015] EWHC 015 (Ch)

- HHJ Jarman QC awarded Eirian £1.3 million.
- This was roughly a third of the value of the farm and business. (Eirian was one of three sisters).
- He did not, however, enumerate his reasons in detail…

Quantum appeal

<u>Davies v. Davies</u> [2016] EWCA Civ 463

The appeal of the quantum award.

1st instance award: £1.3m

On appeal: reduced to £500K…

Why the reduction?

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"What we have, then, is a series of different (and sometimes mutually incompatible) expectations, some of which were repudiated by Eirian herself, others of which were superseded by later expectations. This is far removed from a case like *Gillett v Holt* where the same unambiguous testamentary assurance was repeated many times publicly over a long period of years; or a case like *Thorner v Major* which followed the same pattern." [48]

Quantifying the equity

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- "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 & CR 8 at [56].
- 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].
- 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]." [38]

Quantifying the equity

- "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 FLR 806 (a decision criticised for other reasons in *Gillett v Holt*)." [38] – what is it then?

Quantifying the equity

- There is academic dispute as to how best to approach quantifying an equity in PE cases.
- If it is a case which lends itself to the Claimant getting the entirety of the promise – it's easier – where the expectation is clear in a bargaining, quasi-contract case, the expectation should usually be granted.
- *Jennings v Rice*

Quantifying the equity

- Where the expectations are uncertain, expectations are merely a starting point – but what does this mean?
- This posed problems for the COA.
- Leslie Blohm QC proposed a slighting scale, sliding down from the expectations, but...
- In essence the COA in exercising its judgment felt that £1.3m was disproportionate.

What went wrong at 1st instance?

"…the judge in this case applied far too broad a brush and failed to analyse the facts that he found with sufficient rigour. Nor, to my mind, did he explain why he reached the conclusion that he did." [42]

-This probably isn't a very satisfactory analysis.

The calculation of £500K

- Accommodation £180K
- Partnership element £22K
- Company element £120K
- Underpaid wages £28K
- "modest" amount for disappointment
- "modest" amount for giving up ability to work shorter hours in better working environment

Problems with the Davies decision

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- What role should context play on the value of a promise?
- Davies as a repudiated contract?
- "That is quite different from a case in which the claimant did not perform his or her side of the quasi-bargain. Had this been a contract (which of course it was not) Eirian's decision to leave the farm after only four years would surely have been regarded as a repudiatory breach." [43] – is that right?

Problems with the Davies decision

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- "The non-financial detrimental reliance that the judge identified was that Eirian gave up the ability to work shorter hours in a working environment of her choice and freedom from the difficult working relationship she had with her parents. All that is true, but the effect of the rupture is that she is now free to do all that which the judge said that she had given up. He made no finding that any of what she gave up was irretrievable…" [68] – is that right?

Problems with the Davies decision

"In some cases it may well be that the impossibility of evaluating the extent of imponderable and speculative non-financial detriment (for example life-changing choices) may lead the court to decide that relief in specie should be given. But that is not this case, not least because the judge rejected the claim for the transfer of assets in specie."[68]

- Is this a failure of conscience?

- Is this a failure of imagination?