BRIEFING NOTE

Thorner v Majors and others [2009] UKHL 18

Introduction

The House of Lords has recently handed down its judgment in Thorner v Majors and others [2009] UKHL 18; The Times, 26 March 2009. The case concerns the doctrine of proprietary estoppel and will henceforth be the leading case on the application of that doctrine in the non-commercial context. It is to be contrasted with the House of Lords' decision in Cobbe v. Yeomans Row Management Ltd [2008] 1 WLR 1752 which concerns the application of proprietary estoppel in a commercial context.

Facts

The facts in Thorner were fairly straightforward. David Thorner was a Somerset farmer who, for 29 years, worked without pay on a farm owned by his father's cousin, Peter. From 1990 to 2005 Peter encouraged David to believe that he would inherit the farm. In particular, in 1990 Peter handed David two assurance policies on his life saying "That's for my death duties". In the event Peter died intestate, so his estate fell to be divided between his siblings under the rules of intestacy. David issued proceedings claiming a beneficial interest in the farm under the doctrine of proprietary estoppel.

The claim was successful at first instance. The trial judge held that Peter, by various indirect remarks and conduct, "encouraged the expectation which David had formed that he would be David's successor to [the farm] upon his death and encouraged David to continue with his very considerable unpaid help to Peter there; and those remarks were reasonably understood and relied upon by David in that way". It was ordered that David should receive the land, buildings, live and dead stock and other assets of Peter's farming business but should indemnify Peter's personal representatives in respect of the IHT payable on the farm.

The first instance decision was reversed by the Court of Appeal. It was held that Peter's indirect remarks and conduct were not sufficiently clear and unequivocal to establish any proprietary estoppel in his favour. It was also noted that the trial judge had not found that the assurance was intended by Peter to be relied upon by David, and it was held that there was no material upon which the trial judge could have made such a finding.

The judgment of Lord Walker

The House of Lords allowed David's appeal and reinstated the order made by the trial judge.

The leading judgment was given by Lord Walker, who noted that the appeal raised two main issues: first, the quality of the representation made to David; and second, whether the claim must fail if the land to which the assurance relates has been inadequately identified.

On the first issue, Lord Walker noted (at para.54) that there was some authority for the view that the "clear and unequivocal" test did not apply to proprietary estoppel. His Lordship preferred to say (at para.56) that in order to establish a proprietary estoppel the relevant assurance must be "clear enough". What amounts to sufficient clarity will depend on the context. It was noted (at para.59) that the context of the present was

unusual in that it involved two "taciturn and undemonstrative" countrymen. In that context it was held (at para.60) that the trial judge had been entitled to find that Peter's assurances, objectively assessed, were sufficiently clear and were intended to be relied upon. The Court of Appeal had not given sufficient weight to the advantage that the first instance Judge had in seeing and hearing the witnesses.

On the second issue, Lord Walker held (at para.62) that whilst the extent of the farm was liable to fluctuate, the common understanding of Peter and David was that Peter's assurance related to "whatever the farm consisted of at Peter's death". It was noted that the same would have applied, barring any restrictive language, under s.24 of the Wills Act 1837 if Peter had made a specific devise of the farm.

The other judgments

All four of the other Law Lords gave reasoned judgments, but two in particular stand out. The first is the judgment of Lord Scott, who, only months previously, had given the leading judgment in Cobbe. Lord Scott held on the first issue that the question whether the representations made by Peter were intended by him to be relied upon by David depended upon an objective, rather than a subjective, assessment of his intentions. If it was reasonable for the representee to have relied upon the representations, then it would not generally be open to the representor to say that he had not intended the representee to rely upon them.

Lord Scott also indicated that his preference would be to decide cases involving representations concerning future benefits, which are in a sense conditional, via the doctrine of remedial constructive trusts; and confine the doctrine of proprietary estoppel to cases where the representation is unconditional.

The other judgment of note was given by Lord Neuberger, in particular because of the two grounds on which he distinguished Thorner from Cobbe. The first ground was that the claim in Cobbe failed because it was uncertain what right, if any, the claimant had been promised in the property; whereas in Thorner there was no doubt that David had been promised the farm as it existed on Peter's death. Second, the relationship between the parties in Cobbe was commercial and the claimant was a highly experienced businessman; whereas in Thorner the relationship between Peter and David was familial, and neither had much commercial experience.

Discussion

A comparison of Cobbe and Thorner reveals a sharp dividing line between the application of proprietary estoppel in the commercial and non-commercial contexts. In the former, it will generally be difficult for a claimant to succeed because the court's emphasis is likely to be on the need for certainty in commercial dealings. The arrangements between the parties are more likely to be reduced to writing, and so there is less scope for relying upon assurances arising out of indirect statements and conduct. Moreover, as Cobbe demonstrates, it is not generally reasonable for a businessman to rely upon an agreement which he appreciates is not legally binding.

In contrast, a proprietary estoppel claim in a non-commercial context will generally be easier to establish. The court in that context is more likely to emphasise the need for fairness. Whether an oral representation is sufficiently clear will depend upon the context in which it is given, but Thorner suggests that the court is likely to take a fairly generous approach. It is also likely to be easier to argue that a claimant who does not have commercial experience was reasonable in relying on an assurance.

There are however a number of issues which are left unresolved. First, the distinction between promissory estoppel and proprietary estoppel remains unclear. In Cobbe Lord Scott had suggested (at para.14) that the latter was a "sub-species" of the former, but in Thorner Lord Walker stated (at para.67) that he had "some difficulty" with that observation. This is unfortunate because the distinction is important in practice: whilst promissory estoppel can only be used as a shield not a sword, proprietary estoppel can be used to found a cause of action.

Second, the relationship between proprietary estoppel and constructive trust remains problematic. As noted above, Lord Scott stated his preference for deciding cases involving promises of future benefits via the doctrine of remedial constructive trust, but this suggestion was not adopted by any of the other Law Lords. It will remain to be seen whether this suggestion will be adopted in future cases. Clearly the safer course in practice is for a claimant to plead both causes of action.

Third, the effect of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 on proprietary estoppel claims is still unclear. That section renders void any agreement for the acquisition of an interest in land which does not comply with certain prescribed formalities, although s.2(5) makes an exception for resulting, implied and constructive trusts. In Cobbe Lord Scott (at para.29) left open the question whether a claimant could rely on proprietary estoppel to enforce an agreement to which s.2 applied but which did not comply with the prescribed formalities. In Thorner Lord Neuberger noted (at para.99) that the question did not arise because there was no agreement to which s.2 could have applied.

Finally, it is interesting to speculate what would have happened in Thorner if Peter had attempted to sell or otherwise dispose of the farm before he had died. It is notable that Lord Scott doubted (at para.19) that the estoppel arising in David's favour would have prevented Peter from selling the farm to fund medical treatment or care in his old age. If however Peter had fallen out with David and decided to make an *inter vivos* gift of the farm to a third party, then presumably the position would be different. Lord Neuberger suggested (at para.88) that the relief to which David would be entitled in such circumstances would be "a matter for the court, to be assessed by reference to all the facts", citing Gillett v. Holt [2001] Ch 210 as an example.

ALEX TROUP
St. John's Chambers
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