

Proprietary Estoppel:  
Which way is the wind blowing?

Kate Selway QC  
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# Davies-v-Davies [2016] EWCA Civ 463

## 9 statements of principle (Lewison LJ, para. 38):

(i) Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part: [Thorne v Major \[2009\] UKHL 18, \[2009\] 1 WLR 776](#) at [57] and [101].

(ii) The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance: *Thorne v Major* at [29].

(iii) However, [and this is where it gets tricky] no claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined, and whether there is a distinct need for a “mutual understanding” may depend on how the other elements are formulated and understood: [Gillett v Holt \[2001\] Ch 210](#) at 225; [Henry v Henry \[2010\] UKPC 3; \[2010\] 1 All ER 988](#) at [37].

(iv) 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: *Gillett v Holt* at 232; *Henry v Henry* at [38].

(v) There must be a sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability: *Gillett v Holt* at 232.

(vi) Thus 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].

(vii) 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].

(viii) 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].

(ix) 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* ).

# Guest-v-Guest

**[2019] EWHC 869 (Ch) and [2020] EWCA Civ 387 (CA)**

- The Guest family had farmed Tump Farm since 1938, first as tenants and then, from the 1960s, as owners.
- David Guest and his mother were partners until the early 1990s, and then David and his wife Josephine farmed in partnership together.
- They had three children, Andrew, Jan, and Ross. This litigation concerned the expectations of the eldest son.
- Andrew left school in 1982 at the age of 16 and worked full time at the Farm until 2015; 33 years.
- As Andrew grew older he took on more and more responsibility at the farm., well beyond that of an agricultural worker on a basic wage.
- Andrew married Tracey in 1989.
- Brother Ross, 11 years younger, began to help out once he was old enough.

# Representations

- In the 1980s the representations by David were fairly general and changed over time.
- *"It's my farm, when you take over you can do what you want"*
- David made no secret of his intention to leave the Farm to the next generation.
- Andrew's expectation of inheriting the whole Farm changed when Ross started to show an interest in farming
- It was not in David's nature to discuss details any proposed succession.
- Andrew told the farm accountant it was a difficult subject to discuss with his father.

**Were David's representations sufficiently clear?**

**Did it matter that Andrew's expectations changed over time?**

# The private language of the family

*Guest-v-Guest*, CA's judgment, para. 54:

*David and his father had a communication problem. This accounted in large part for the breakdown of relations, **but was also very significant when it came to assessing whether or not there was a "clear enough" assurance that Andrew would inherit the Farm or some interest in it.** The judge no doubt had in mind his earlier discussion of [Thorner v Major](#) and [Gillett v Holt](#). He said at [137]:*

*"Looking at the matter "in the round", as the courts have been required to do since [Gillett v Holt](#), **whether or not an assurance is of sufficient clarity is to be judged objectively. This necessarily involves consideration of the context and reflection upon how the person to whom the assurance was made (the claimant) might have been expected to interpret it and act upon it: see the speeches [in [Thorner](#)] of Lord Rodger (at [26]), Lord Walker at [56]-[57]) and Lord Neuberger (at [80]). An objective assessment of the parties' position and the drawing of permissible inferences may mean that a proprietary estoppel claim is sustained by a statement or series of statements which to an outsider, lacking knowledge of the relationship between "representor" and "representee", could appear more Delphic than clear and unequivocal."***

At para. 57, the CA approved of the reasoning of the judge below:

*"260. In all the circumstances, on my assessment of the evidence, Andrew has proved that **a clear enough assurance was made by his father, during conversations over a number of years and with the tacit support of his mother later made clear by her entry into the Ladysmith Farming Partnership, that he would inherit a substantial share of Tump Farm***

*However, Andrew's own evidence supports the conclusion that statements made to him by his father to the effect that " one day this will all be yours " were neither meant as or understood by Andrew to be an assurance that the ownership of Tump Farm would pass to him, exclusively, without any provision being made out of it for Ross or Jan. Although the assurances were specific enough in identifying the farm, and until the late 1990's Andrew alone was assumed within the family to be the successor to the business, **the extent of Andrew's promised inheritance was left open. Nevertheless, it was to be a significant share in the farm, as is evident from the family's expectation (after 1997) that Andrew and Ross would farm side-by-side.***

*Accordingly, although I accept that David did not tell Andrew about the detail of his 1981 Will, I reject David's position that he never had cause to correct Andrew's (suggested) misunderstanding because he had no reason to believe that Andrew held it. In my judgment, David clearly encouraged Andrew to believe he would benefit substantially from Tump Farm. On the basis of what I have said in paragraph 143 above, that is sufficient for a potential estoppel to be raised."*

## A sliding scale?

In *Davies-v-Davies*, Lewison LJ said that in proprietary estoppel cases where the claimant's expectations were uncertain, because the nature of the assurance was imprecise, and it was unclear what weight was to be put on the expectations it could be useful working hypothesis to apply a sliding scale by which the clearer the expectation, the greater the detriment and the longer the passage of time during which the expectation was reasonably held, the greater would be the weight that should be given to the expectation.

But it would be wrong to attempt mathematical precision.

## Wide variation

There remains wide variation in the main elements of the doctrine, which means that it will not always be equitable to give full effect to a claimant's expectations:

See Robert Walker LJ in *Jennings-v-Rice* [1992] EWCA Civ 159 where he distinguished 2 types of case:

- (1) where the claimant's expectations and the element of detriment will have been defined with reasonable clarity and
- (2) those where "the claimant's expectations are uncertain" or "the court ... 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 the (1) the court was likely to vindicate the claimant's expectation, because there is something approaching a bargain and the claimant will have performed his side of it. In (2) the court might still take the expectation as a starting point, but no more than that.

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