

PROPRIETARY ESTOPPEL

Expectations and promises...

Mark Pawlowski considers the recent case of Thorner v Curtis, which examines whether there has to be an express promise to raise a proprietary estoppel claim



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'Where the assurances relied on fell significantly short of express promises, it is all the more important for a claimant to support their case with clear and substantial detrimental reliance and corroborating evidence as to the meaning and intention of the deceased's words or conduct.'

Although the modern approach is to explain the doctrine of proprietary estoppel in terms of the general concept of 'unconscionability', it is evident that a claim of this nature will fail unless the court is satisfied that the claimant has proven the three essential elements of an assurance, reliance and detriment. In *Attorney-General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987], the Privy Council, whilst recognising the trend away from any strict application of rigid criteria in this context towards a more flexible test of unconscionability, nevertheless held that all three elements of the estoppel had to be satisfied. More recently, in *Gillett v Holt & anr* [2000] Robert Walker LJ also made clear that the doctrine should not be subdivided into watertight compartments (as the various elements of assurance, reliance and detriment were often intertwined) but that, for the sake of clarity and convenience, it was still appropriate for the court to conduct its analysis by reference to the various component parts of the claim.

This approach is echoed in the most recent ruling on the subject in *Thorner v Curtis & ors* [2007], where Mr John Randall QC (sitting as a deputy judge of the High Court) emphasised that, despite looking at each component separately, the court must also stand back and look at the claim in the round in order to decide whether the conduct of the defendant had given rise to an estoppel and, if so, what should be the minimum equity necessary to do justice to the claimant to avoid a disproportionate result (see also *Uglov v Uglov & ors* [2004]). The key issue in *Thorner*, however, was whether, in a case where an estoppel is raised so as to restrict testamentary freedom of action, it was necessary for the claimant to establish an express promise (as opposed to merely an

expectation or belief) that they will become entitled to some right or interest in the land in question. It is this aspect of the claim, therefore, which forms the basis of this article.

Types of assurance

There is no doubt that an assurance may take a variety of different forms. As was indicated by Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982], it may involve simply standing by in silence whilst one party unwittingly infringes the other's legal rights: see *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* [1981], which concerned conscious silence. Alternatively, it may take the form of active encouragement upon the footing of some unilateral or shared legal or factual supposition: see *JT Developments Ltd v Quinn* [1991], which concerned the encouraging of an expectation of a new lease. As these cases demonstrate, the range of conduct which may qualify as a relevant assurance is both wide and far-reaching.

It is now clear that an assurance may be spelt out of an agreement which is legally unenforceable for uncertainty of terms. So, in *Lim Teng Huan v Ang Swee Chuan* [1992] the agreement (which was void for uncertainty) was nevertheless held to constitute evidence of the parties' intentions and it was to be inferred that the claimant had completed the construction of the subject house in reliance on that agreement (see also, more recently, *Cobbe v Yeomans Row Management Ltd* [2005] and *Kinane v Mackie-Conteh* [2005]).

It is also now well established that a claim will not fail simply because the right or interest to be secured has not been precisely or expressly identified at the time of the assurance. It is not, therefore, a requirement that there be an expectation

of some precise legal term. In *Inwards v Baker* [1965], for example, the son had spent money on building a bungalow on his father's land in the expectation, induced by his father, that he would be allowed to stay there as his home. The father had said to his son: 'Why don't you build the bungalow on my land and make it a bit bigger?' Interestingly, the equity arising from the son's expenditure did not fail simply because the interest to be secured had not been expressly indicated by the father.

Vague assurances

In several cases the assurance relied upon has been characterised as too vague or uncertain to give rise to the claimant's expectation. A good example is *Coombes v Smith* [1986], where an assurance given by the defendant to his female cohabitee that he would always 'provide her with a roof over her head' was held insufficient to constitute a representation that she was legally entitled to security of tenure against his wishes. Similarly, in *Negus v Bahouse* [2008], HHJ Kaye QC (sitting as a judge of the High Court) held that an assurance by the deceased to the claimant that if anything happened she would 'have a roof over her head' was insufficient to spell out a specific common intention in respect of the deceased's flat so as to give rise to a constructive trust in her favour.

In *Bennett v Bennett* [1990] the Court of Appeal held that a mere verbal statement by the legal owner that he 'didn't want [the claimant] out' could not have been reasonably understood by her as an assurance that she could remain for the rest of her life. The statement simply suggested that the legal owner was prepared to let her stay in the property for the time being and that he would, therefore, have the right to ask her to leave on reasonable notice. A similar conclusion was reached in *Bostock v Bryant* [1990], where the claimant was told by her uncle: 'Don't worry about the future, you'll be alright.' This was held by the Court of Appeal to be too vague to amount to an assurance that she could live in the house as long as she wished.

In *Layton v Martin* [1986] the deceased, a married man, asked the claimant to live with him, offering 'what emotional security I can give, plus financial security during my life and... after my death'. In reliance on this statement, the claimant provided various domestic

services until the deceased's death. Her claim for financial provision based on proprietary estoppel was dismissed on the ground that the deceased's representations did not relate to any specific assets. Scott J said:

A representation that 'financial security' would be provided... is not a representation that she is to have some equitable or legal interest in any particular asset or assets... What assets? His assets for the time being, answered counsel for the [claimant]. The proposition has only, in

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my view, to be put to be seen to be untenable.

As a general rule, therefore, although absolute legal precision is not necessary, the assurance made by the legal owner must relate to some specific property or to some part of the owner's property. This has been re-iterated in the more recent case law, in particular *Lissimore v Downing* [2003], where the court held that unspecific statements made by the defendant that 'she [the claimant] would never want for anything', that 'he would take care of her', or 'he had looked after his other girlfriends and she would not be different' did not found a proprietary estoppel. Such statements were insufficient because they were not expressed in terms which enabled any objective assessment to be made of what was being promised – see also, most recently, *James v Thomas* [2007], where the phrase 'this will benefit us both' was held not to constitute a promise of some property interest.

It is apparent, however, that proprietary estoppel is not limited to acts done in reliance on a belief relating to an existing right, but may extend to acts done in reliance on a belief that future rights will be granted: see *Re Basham (dec'd)* [1986]. Accordingly, an estoppel can be raised in relation to the grant of rights over a residuary estate. This has now, of course, been fully endorsed by the Court of Appeal in *Gillett v Holt*.

Curtis decision

The deceased owned a farm of substantial value and also had considerable savings. He made a will in 1997 leaving the residue of his estate (including his farm) to the claimant, but later revoked the will and died intestate. From 1976 onwards, the claimant had worked increasingly at the deceased's farm for no remuneration and by the 1980s had come to hope that he might inherit the farm.

His claim, based on proprietary estoppel, centred on various hints and

remarks which the deceased had made over the years, which he argued led him to believe that he was to inherit the property. In 1990 the deceased had handed the claimant a bonus notice relating to two policies on the deceased's life saying that 'that's for my death duties'. The claimant's case was that, at this point, his hope had matured into an expectation of inheritance and that, in reliance on that expectation, he had acted to his detriment by working on the farm. The main issue, therefore, was whether there had to be an express promise to found an action in estoppel.

The deputy judge reviewed a number of authorities clearly pointing to the conclusion that an actual promise was not an essential prerequisite to the benefit of a proprietary estoppel. So, in *Ramsden v Dyson* [1866] Lord Kingsdown made reference to a verbal agreement 'or what amounts to the same thing, an expectation, created or encouraged.' In *Taylor Fashions* Oliver J stated that proprietary estoppel is aimed at:

... ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment...

In *Gillett* Robert Walker LJ referred to cases where 'the assurance is more than a mere statement of present (revocable)

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[testamentary] intention, and is tantamount to a promise'. Again, in *Jennings v Rice* [2002] Robert Walker LJ (at para 44) added further that the cases showed:

... a wide range of variation in both of the main elements, that is the quality of the assurances which give rise to the

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claimant's expectations and the extent of the claimant's detrimental reliance...

All these passages indicated that there was no absolute requirement that the assurance should necessarily amount to an actual promise made in terms as such. On the contrary, it was apparent that the relevant representation could take the form of simple encouragement in a belief (either, as mentioned earlier, by words or conduct, or passively – by remaining silent). In the words of the deputy judge (at para 19):

The court must not allow itself to be tied down with semantics – an assurance is an assurance whether made expressly by words spoken or written, or made by implication from words spoken or written or from conduct. The 'broad inquiry' (as to the ultimate question of unconscionability) which the court must make in any such case will include consideration of whether assurances (or expectations encouraged) by whatever means were indeed 'tantamount to' promises.

The deputy judge, however, was also keen to emphasise that, where the assurances relied on fell significantly short of express promises, it was all the more important for a claimant to support their case with clear and substantial detrimental reliance and corroborating evidence as to the meaning and intention which the claimant imputes to the deceased's words or conduct.

In the instant case, the claimant's expectation that he would inherit the

farm was incremental and took place over many years. At first, the claimant had only a mere hope of inheritance, which only later developed into an expectation that he would inherit. This was marked in 1990 by the handing over of the bonus notice to the claimant, indicating for the first time that the deceased was intending that the

claimant should succeed to the farm. Later, this expectation matured further into what the deputy judge described as, an 'unspoken mutual understanding' between the parties. Looking at the matter in the round, the deputy judge had no hesitation in concluding that the deceased's words and conduct gave rise to an estoppel in the claimant's favour. Moreover, the minimum equity to do justice to the claimant (and avoid an unconscionable result) was to award the claimant the land and buildings, live

and dead stock and other chattels representing the deceased's farm.

Conclusion for practitioners

In *Thorner* there was strong corroborative evidence from various remarks and acknowledgements made by the deceased himself that he intended to act in accordance with the claimant's expectations regarding inheritance of the farm.

In addition, it was abundantly apparent that the claimant had engaged in a huge amount of unpaid work at the farm over many years in reliance on this expectation. The handing over of the bonus notice (with the deceased's accompanying remarks) was particularly significant, as this strongly encouraged the claimant to stay on at the farm and continue his unpaid work rather than pursue other opportunities elsewhere. The case is therefore significant because it highlights the need to examine the various component elements of proprietary estoppel as an entire package and not in isolation from one another.

As Robert Walker LJ observed in *Jennings*, the doctrine 'applies only if these elements, in combination, make it unconscionable for the person giving the assurances... to go back on them'. ■

Attorney-General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd [1987] AC 114
Re Basham (dec'd) [1986] 1 WLR 1498
Bennett v Bennett (Unreported, 18 May 1990)
Bostock v Bryant (1990) 61 P&CR 23
Cobbe v Yeomans Row Management Ltd & ors [2005] WTLR 625
Coombes v Smith [1986] 1 WLR 808
Gillett v Holt & anr [2000] WTLR 195
Inwards v Baker [1965] 2 QB 29
James v Thomas [2007] EWCA Civ 1212
Jennings v Rice [2002] WTLR 367
JT Developments Ltd v Quinn (1991) 62 P&CR 33

Kinane v Mackie-Conteh [2005] WTLR 345
Layton v Martin [1986] 2 FLR 277
Lim Teng Huan v Ang Swee Chuan [1992] 1 WLR 113
Lissimore v Downing [2003] 2 FLR 308
Negus v Bahouse [2008] WTLR 97
Ramsden v Dyson (1866) LR 1 HL 129
Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council (1981) 41 P&CR 179
Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] QB 133
Thorner v Curtis & ors [2008] WTLR 155
Uglov v Uglov & ors [2004] WTLR 1183