Chapter 10: Proprietary Estoppel

Additional Material for section 10.7

Davies v Davies

[2016] EWCA Civ 463

Facts: Eirian Davies (B) succeeded in a proprietary estoppel claim, based on assurances made to her by her parents (A)[1] as to rights she would receive in the family farm in Wales. The land was owned by A and the farm business was run until 2002 by a partnership, and then by a company. A number of different assurances had been made to B over the years, starting in 1985 with an assurance that B would inherit the farm from A. That first assurance had been made on the condition that B would work on the farm in return, but B left the farm in 1989. B returned in 1991, and worked on the farm, for which she was paid. There was an assurance in 1998 that B would join the partnership, but that was falsified in 2001, after which B again left the farm. When B returned again to live in a farmhouse on the land, there was an assurance at the end of 2007 that B could continue to live there for the rest of her life; and a promise in 2008 that B would acquire shares in the company through which the farm business was conducted. In 2008, B left a job elsewhere that she had started in 2007 in order to work on the farm, for a salary of £1,500 per month plus payment of rates and the electricity bill for the farmhouse, in which she was already living. In 2009, A showed B draft wills under which B was to be left the land and buildings and a share in the company. In 2010, however, B was shown a new will, in which she did not receive the farm. The relationship between A and B

[1] The claim was against both parents, but as they acted together throughout and their positions were not considered separately in the case, they are referred to for convenience here as simply 'A'.

deteriorated and in 2012, B left the farm for the last time. The net value of the farm and farming business at the time of trial was around £3 million, with most of that value being the value of the land.

A argued that B's equity would be satisfied by a payment of £350,000. This was comprised of: (a) £180,000 to enable B to pay off the mortgage on B's own property, thus giving B secure accommodation for life elsewhere than on the farm; (b) £22,000 as profits to which B would have been entitled had she been made a partner in the business in 1998; (c) £120,000 as a half share of the profits made by the company from 2008–12; (d) a further £28,000 to make up for underpayment for the work B had done on the farm in the years before she received a salary. B argued instead that she was entitled to the farm and the business.

At first instance, the judge found that it would not be appropriate for the farm and business itself (still owned and run by A) to be transferred to B, and instead ordered that B be paid £1.3 million, which was 'just over or under one third of the net value of the farm and farming business', considering that to be a 'fair reflection of the expectation and detriment and other factors [identified in the judgment]'. One of those other factors mentioned by the judge was the 'significant role' of A in bringing B's expectation to an end when the parties fell out in 2012.

B now accepted that a money award would be appropriate, but A argued on appeal that the first instance award was too high, pointing out that it was 'equivalent to £65,000 after tax for every year [B] worked on the farm'. The Court of Appeal reduced the award to a sum of £500,000.

Lewison LJ

[38]–[39]

Inevitably any case based on proprietary estoppel is fact sensitive; but before I come to a discussion of the facts, let me set out a few legal propositions:

(i) […]

(vi) […] the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result.[2]

(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.[3]

(viii) Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application.[4] In particular there must be a proportionality between the remedy and the detriment which is its purpose to avoid.[5]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.[6]

(ix) In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion.[7] However the discretion is not unfettered. It must be exercised on a principled

[2] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8, [56].

[3] *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988, [51] and [53].

[4] *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988, [65].

[5] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8, [28] (citing from earlier cases) and [56].

[6] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8, [50] and [51].

[7] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8, [51].

> basis, and does not entail what HH Judge Weekes QC memorably called a 'portable palm tree.'[8]

There is a lively controversy about the essential aim of the exercise of this broad judgmental discretion. One line of authority takes the view that the essential aim of the discretion is to give effect to the claimant's expectation unless it would be disproportionate to do so. The other takes the view that the essential aim of the discretion is to ensure that the claimant's reliance interest is protected, so that she is compensated for such detriment as she has suffered. The two approaches, in their starkest form, are fundamentally different.[9] Much scholarly opinion favours the second approach.[10] Others argue that the outcome will reflect both the expectation and the reliance interest and that it will normally be somewhere between the two.[11] Logically, there is much to be said for the second approach. Since the essence of proprietary estoppel is the combination of expectation and detriment, if either is absent the claim must fail. If, therefore, the detriment can be fairly quantified and a claimant receives full compensation for that detriment, that compensation ought, in principle, to remove the foundation of the claim.[12] Fortunately, I do not think that we are required to resolve this controversy on this appeal.

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[8] *Taylor v Dickens* [1998] 1 FLR 806 (a decision criticized for other reasons in *Gillett v Holt*).

[9] See *Cobbe v Yeoman's Row Management Ltd* [2006] EWCA Civ 1139, [2006] 1 WLR 2964, [120] (reversed on a different point [2008] UKHL 55, [2008] 1 WLR 1752.

[10] See *Snell's Equity* (33rd edn) [12-048]; Wilken and Ghaly, *Waiver Variation and Estoppel* (3rd edn) [11.94]; McFarlane, *The Law of Proprietary Estoppel* [7.37]; McFarlane and Sales, 'Promises, Detriment, and Liability: Lessons from Proprietary Estoppel (2015) 131 LQR 610.

[11] Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 492.

[12] Robertson, 'The Reliance Basis of Proprietary Estoppel Remedies' [2008] Conv 295.

Lewison LJ's analysis helpfully sets out differing approaches to determining the extent of a right arising through proprietary estoppel. We set out those approaches in section 10.7.1. In the case itself, Lewison LJ felt that it was unnecessary to decide which approach is correct, presumably as on the facts all three lead to the same result he reached: B should receive £500,000, rather than the £1.3 million awarded at first instance. The key steps in his reasoning are set out below, and it will be seen that, whilst not deciding which general approach to calculating the extent of B's right is correct, Lewison LJ did identify some aspects of the judge's reasoning which were wrong.

[41]–[42]

[…] it is not entirely clear […] what the court is to do with the expectation even if it is only a starting point. [Counsel for B] suggested that there might be 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 should be the weight given to the expectation. I agree that this is a useful working hypothesis.

Nevertheless, in my judgment the judge in this case applied far too broad a brush and failed to analyse the facts with sufficient rigour. Nor, to my mind, did he explain why he reached the conclusion that he did. Although he said that he took 'expectation' as an appropriate starting point, he did not explain which expectation out of the many he found he regarded as the starting point.

[At [43]–[47], Lewison LJ then pointed out that A's initial assurance in 1985 that B would inherit the farm was conditional on B continuing to work on the farm, which B did not do, as she left the farm in 1989. B then later had an expectation of joining the partnership, but that belief was held only from 1998 to 2001, and was falsified in 2001, after which B again left the farm. When she returned to live on the farm at the end of 2007, she was told she could live rent free in

the farmhouse for life, but nothing was said about her inheriting the farm. There were discussions in 2008 about B receiving shares in the company, but, as B knew, the company did not own the farmland. In 2009, B was shown the draft will in which the farm was left to her, but this was '*a draft rather than an executed will which was only "an indication" of their intention "at that time"*'.]

[48]–[53]

What we have, then, is a series of different (and sometimes mutually incompatible) expectations, some of which were repudiated by [B] herself [when leaving the farm], others of which were superseded by later expectations. This is far removed from a case like *Gillett v Holt*[13] where the same unambiguous testamentary assurance was repeated many times publicly over a long period of years; or a case like *Thorner v Major*[14] which followed the same pattern […]

I turn next to the question of detrimental reliance. As the judge rightly said, this was not a case in which [B] 'positioned her whole life on the basis of her parents' assurances' […]

The judge identified two broad strands in the detriment that [B] suffered:

(i) Working for long hours on the farm without full payment; and

(ii) Had she not worked on the farm she would have been able to work shorter hours in a working environment of her choosing and she would have been free of the difficult working relationship she had with her parents.

[Lewison LJ then analysed A's argument for a payment of £350,000, broken down into four distinct elements and set out above with the facts of the case. On (a), he noted that the freehold value of the farmhouse in which B had been promised accommodation for life was £300,000 and so the value of B's expectation would have to be less than that, '*scaled down to some extent to reflect*

[13] [2001] Ch 201 (CA).

[14] [2009] UKHL 19, [2009] 1 WLR 776.

the difference between a personal entitlement to a home for life and a freehold capital asset'.[15] On (b)–(d), the judge's view was that they ignored the fact that B had expected to inherit the land, and not just have a share of the business, but that there was no basis for saying that B had been made a definite, sustained promise of inheriting the land, and the sums offered by A in relation to the business represented 85 per cent of the overall current value of the company. He then rejected the judge's point that the conduct of A in the breakdown of the relationship with B could be relevant to the size of the award.]

[62]–[69]

So far as [A's] 'significant role of brining [B's] expectation to an end'[16] is concerned, it is inherent in almost every claim based on proprietary estoppel that the representor or promisor has resiled from the representation or promise that he has made. It is, therefore, always the representor or promisor who has a significant role in bringing the expectation to an end. But there is no warrant (and no authority that we were shown) for increasing a monetary award on that account […]

How then did the judge bridge the gap between [A's] offer of £350,000 and his award of £1.3 million? The only explanation, based on the judge's own reasoning, is that he attributed a value of close to £1 million to the non-financial aspects of the detrimental reliance and/or that (although not expressly mentioned) he ascribed a very large value to the disappointment of [B's] expectation of inheriting the land (as opposed to the business and the herd).

Let me take the last element first […] Accepting that she had an expectation of inheritance, it was in my judgment an expectation which was at a high level and could not fairly be derived from what she was told between 2009 and 2012.[17] It cannot carry much weight in an overall

[15] [58].

[16] This was the phrase used by the judge at first instance.

[17] See *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8, [47].

assessment. I am prepared to accept that some award must be made under this head, but in my judgment it will be a relatively modest one.

The non-financial detrimental reliance that the judge identified was that [B] 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 this 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. To the contrary, he found expressly that this was not a case in which [B's] whole life was positioned on the representations […] Again I accept that some award must be made under this head, but in my judgment it will be a relatively modest one.

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[18] should be given. But that is not this case, not least because the judge rejected the claim for the transfer of assets in specie.

Neither of these factors is capable of precise valuation, but since it is now common ground that the ultimate award will be a purely monetary one, we must do the best that we can. In different situations, the court is often called upon to award compensation for non-pecuniary losses, and the difficulty of assessment is no bar to an award.

Finally […] to the extent that the offer includes compensation for past expectations (in particular, the partnership element, the company element, and the underpayment element) some additional sum must be allowed to reflect delay in payment and the changes in value of money since those expectations were created. On the other hand, in so far as a monetary award covers future expectations it must be discounted for early payment.

[18] [In this context, 'relief in specie' means enforcement of A's assurance.]

> Taking all these factors into account I would increase [A's] offer by a further £150,000 making a total award of £500,000. I would thus allow the appeal and reduce the judge's award from £1.3 million to £500,000.

The extract above demonstrates that, on Lewison LJ's view, the result in *Davies v Davies* would have been the same on each of the three possible general approaches to determining the extent of B's rights. On the first approach, which has fulfilling A's assurance as a starting point, and departs from that only where it would be disproportionate to give B such a right (see section 10.7.3), such a departure was warranted, given the shifting nature of A's assurances and the fact that B's detriment was either capable of being quantified, or only moderate, and was not as extensive as in a case (such as, for example, *Gillett v Holt* or *Thorner v Major*) where B could be said to have positioned his or her whole life on A's assurances. On the second approach (see section 10.7.4), where the immediate and sole focus is on avoiding possible detriment to B, then again the extent and nature of the detriment was such that the judge's award had to be reduced. On the third approach (see section 10.7.5), of reflecting both expectation and detriment, again the somewhat weak expectation and the relatively limited detriment would both argue for a reduction in the judge's award.

Lewison LJ did express some sympathy for the second approach as '*logical*', and the final award in the case does seem to be focussed on the extent of B's detriment, which is of course consistent with that approach.[19]

[19] For the argument that the Court of Appeal should instead have made direct use of the concept of unconscionability to make a larger award in B's favour on the facts of *Davies*, see Samet, *Equity: Conscience Goes to Market* (Oxford: OUP, 2019) 101-103.