Proprietary Estoppel

Which way is the wind blowing with reference to:

(i) the clarity of the promise; and

(ii) reliance ??

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Some opening words….

- A brief history of the development of the doctrine
- Are the facts of Thorner so rare ?
- What this talk is not….
- An explanation of the notes accompanying this talk.

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1. Promises, promises……

Thorner v Majors [2009] UKHL 18 – Summary of the essential facts.

- Owner, Peter inherited farm on wife's death (1976) and David (P's cousin once removed and then aged 26) started to work on P's farm, and did so without remuneration until P's death in 2005 - 29 years !

- At the time, D was also working at his father's farm for "pocket money", but gave this up in 1986 to concentrate on working at P's farm.

- By 1988, P's health was no longer good, and he had sold the dairy herd and milk quota

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P was described as a “man of few words”, P had literacy issues, and kept his business and financial affairs to himself – “taciturn”

During 1980s D came to hope that he might inherit the farm.

That ‘hope became expectation’ based on a series of assurances:

(1) The handing by P to D of a Prudential policies to pay P’s death duties; and

(2) various remarks made in conversation between them believed to imply that D would have a long term involvement with the farm.

(1) The Policies

- The Policy was a Prudential Bonus Notice for 2 insurance policies taken out on P's life.
- P was still only in his 60s
- Handed over with the words "That's for my death duties"
- Judge at first instance concluded from the context and the nature of P that this marked a watershed in the relationship between P and D, where previous hints of inheritance were firmed up.

(2) “The other remarks” (paras 43 and 45)

- P’s remarks to D were such as to carry with them the implication that D would have a long term interest in the farm, because the remarks would have little relevance otherwise.

- These included the observation that a particular cattle trough did not freeze up in winter (!!)

  The conclusion of Lord Walker on the 15 years of dealings was a short point: having regard to the significant review by the judge at first instance, and his opportunity to see the witnesses, there was no ground for interference by the Court of Appeal on the findings – para [60]

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The conclusion of Thorner, as regards the promise, has been distilled…..Davies v Davies EWCA Civ 463, per Lewison LJ: “

(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….

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The Owl of Minerva

“Past events provide context and background for the meaning and interpretation of subsequent events and subsequent events throw retrospective light upon the meaning of past events. The Owl of Minerva spreads its wings only with the falling of dusk” – para [8], per Lord Hoffman.

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"(ii) The ingredients necessary to raise an equity are:

(a) an assurance of sufficient clarity….."

"I would prefer to say (while conscious that it is a thoroughly question-begging formulation that establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity in a case of this sort, is hugely dependent on the context." – para [56] per Lord Walker.

- *The issue of the background was important to Lord Neuberger also – para [80]*

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Lord Neuberger approves the test of “clear and unequivocal” subject to 3 qualifications (paras [84]-[86]:

- That the effect of words or actions must be assessed in their context.
- The Court should approach ambiguity practically and sensibly, as well as contextually, and should not search for the ambiguity – this being consistent with the approach that the representee need only establish that he reasonably understood the assurance to be one upon which he could reasonably rely.
- There may be ambiguous assurances, but the person ought not be denied relief, though it may go to the question of relief.

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"(iii) However, no claim based upon proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance…."

"When a judge, sitting alone, hears a case of this sort his conclusion as to the meaning of spoken words will be inextricably entangled with his factual findings about the surrounding circumstances" – para [58] per Lord Walker.

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How unusual are the facts in Thorner ?

“I do not share the Court of Appeal's apparent apprehension that floodgates might be opened, because cases like this are fairly rare, and trial judges realise the need to subject the evidence (whether as to assurances, as to reliance or as to detriment) to careful, and sometimes sceptical, scrutiny….”

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Cases where the recollection as to precise dates and times of assurance is unclear, but Claimant successful.

- Suggitt v Suggitt [2011] EWHC 903 (Ch) – per HHJ Kaye QC.

  "the fact that the promise may be oblique, allusive or vague does not matter provided it was unambiguous…." (para 42)

- Thompson v Thompson [2018] EWHC 1338 (Ch)

  "As the cases make clear, these questions cannot be put into watertight compartments: a more holistic approach is required" – para [147] – HHJ Davis-White QC.

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Cases where P.E. failed because the assurance was a mere ‘statement of indication’

- James v James [2018] EWHC 43 (Ch) -

  Enquiry of the Testator as to whether to buy additional land because *“I will be farming it one day”*

- Cook v Thomas [2010] EWCA Civ 227 -

  ”..because you know this is all going to be your when I am gone anyway”

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(2) Reliance

Back to Davies v Davies [2016] EWCA Civ 463….

……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….”

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However:

- Once, following assurance, detriment as a fact is shown, the courts will readily infer reliance (MeGarry & Wade - The Law of Real Property (2019) @ para 15-019 and cites Grant v Edwards [1986] Ch 638 to show that the onus switches to the landowner to show that there was no reliance.

- Indeed, there are number of cases where as a matter of shorthand, the consideration of detriment and reliance have been elided, e.g.

    - Gee v Gee [2018] EWHC 1393 (Ch)
    - Habberfield v Habberfield [2018] 317 (Ch)
    - James v James (supra).

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’Positioning of life’ cases

Possibly the easiest cases to demonstrate reliance.

- Suggitt v Suggitt (supra)
- Moore v Moore [2016] EWHC 2202 (Ch)

Farming cases where C has devoted himself to the interests of the farm.

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