

# 5 Stone Buildings

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## Remedies in proprietary estoppel claims: where are we now?

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## An overview

- For a claimant in a proprietary estoppel case, establishing an equity is just the beginning: the court can grant relief in a myriad of ways and the claimant may not get what they were expecting.
- Lively controversy (academic and judicial) about whether the remedy should be aimed at satisfying the claimant's expectations or compensating for detriment
- Four recent major Court of Appeal decisions: *Davies v Davies*, *Moore v Moore*, *Habberfield v Habberfield*, *Guest v Guest*
- Evidence that court can and will cut down remedy as compared with claimant's expectations
- Numerous factors which can influence it to do so

## Recap on estoppel principles

- Pithy statement by Lewison LJ in *Davies v Davies* [2016] EWCA Civ 463 at [38].
- Need (a) assurance of sufficient clarity (b) reliance by claimant on that assurance, (c) detriment to claimant in consequence of reasonable reliance (d) unconscionability
- Detriment does not need to be financial, so long as it is something substantial. ‘Countervailing benefits’ can be taken into account in analysing the detriment.
- Elements cannot be separated from each other; essence of doctrine is to do what is necessary to avoid an unconscionable result: *Jennings v Rice* [2002] EWCA Civ 159 at [52] and [56].

## The portable palm tree

*'In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion... 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.'*



Lewison LJ in *Davies* at [38]

## Satisfying the equity: the principles

- Judgment by Lord Walker in *Jennings v Rice* [2002] EWCA Civ 159 still of huge influence (para 49 onwards);
- ‘Quasi-contract’ case: court naturally looks to satisfy expectations
- If C’s expectations uncertain, extravagant or out of all proportion to the detriment which C has suffered, equity can be satisfied in another (and generally more limited) way. Reinterpreted in *Habberfield* [2019] EWCA Civ 890.

## Satisfying the equity: the principles (2)

- If court does not think C's expectations should be fulfilled, that does not mean court should abandon expectations completely, look to detriment. Reasons:
  - often not possible to quantify detriment,
  - C may not be motivated solely by reliance on assurances,
  - C may receive countervailing benefits
- Means court is given wide judgmental discretion
- Reference in authorities to '*minimum equity to do justice to the plaintiff*' (Crabb v Arun DC [1976] Ch 179) - does not require the court to be parsimonious, but court must also do justice to D.

## Satisfying the equity: the principles (3)

- There is no exhaustive list of factors relevant to discretion, and no hierarchy. However, the factors can include:
  - Conduct of C/ D (equitable defences available, e.g. laches, see consideration in *Horsford v Horsford* [2020] EWHC 584 (Ch))
  - Need for clean break? See *Moore v Moore*
  - Alterations in D's assets and circumstances
  - Likely effect of taxation
  - Other claims (moral and legal) on D and his estate



## Renewing the debate over remedies: *Davies [2016]*

- Para 39: Lewison LJ on the ‘lively controversy’. Is the essential aim to:
  - Give effect to C’s expectation unless it would be disproportionate to do so?
  - Ensure C’s reliance interest is protected, so that she is compensated for detriment suffered?
  - Reflect both expectations and reliance interest... and end up somewhere between the two?
  - Lewison - logically much to be said for the second approach, but court declined to answer the question it had posed! Instead - idea of ‘sliding scale’



## Renewing the debate over remedies: *Davies* (2)

*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.*

*‘The sliding scale’*

## Renewing the debate over remedies (2)

Lord Walker in *Jennings*:

*‘The need to search for the right principles cannot be avoided. But it is unlikely to be a short or simple search because... proprietary estoppel can apply in a wide variety of factual situations, and any summary formula is likely to prove to be an over-simplification.’*

## Renewing the debate over remedies (3)

- Various views:
  - Henderson LJ in *Moore*: detriment approach ‘logically attractive’, but hesitant to give it primacy (cases fact sensitive and proportionality has prominent role to play)
  - *James v James* [2018] EWHC 43 (Ch), [51]: ‘*Proprietary estoppel is a doctrine which, like the law of contract, focusses on expectations created rather than losses suffered.*’
  - *Guest*: Floyd LJ - court reluctant to answer question posed in such stark terms, more focused on fashioning remedy which is appropriate, avoids unconscionable result.
  - Academic views quoted in *Habberfield v Habberfield* [2019] EWCA Civ 890
    - Risks of detriment-based approach?
    - Give effect to quasi bargain if fulfilled (party autonomy), in other cases look to fulfil detriment? E.g. if period of reliance in *Thorner* had only been 6 months, claim satisfied by reasonable remuneration?
    - Idea of party autonomy given support by Lewison LJ in *Habberfield* - para 68.

## Applying the principles in practice

- Many cases - e.g. farming cases - expectations/detriment persist for decades -> court more likely to grant expectation interest. E.g. *Thorner v Major* [2009] UKHL 18.
- However, increasing numbers of cases available where award didn't match the expectation interest for one reason or another

## Expectation cases

- *Thorner v Major* [2009] UKHL 18 (work on farm without pay for c. 15 years, awarded farm land and other assets with value of £3.05m, subject to IHT)
- *Suggitt v Suggitt* [2012] EWCA Civ 1140 (unpaid work on farm for over 20 years, C ‘positioned whole life’ around inheriting it, receives farm land and house worth £2.885m)
- *Guest v Guest* [2020] EWCA Civ 387 - claimant expected to inherit sum which would enable him to farm on his own account; court rejects argument that he should be given sum which reflects increased value he contributed to farm/ his detriment. Period of detriment of 30 years.
- *Lothian v Dixon* [2014] - expectation of whole of residue (£1m) awarded, despite only detriment of 18 months!

## Detriment cases

- *Jennings v Rice*:
  - Expectation: Deceased would ‘see him all right’ (C) and said ‘this will all be yours one day’ (ref to house and furniture worth £435k)
  - Award of £200k
  - Detriment: gardener/ handyman -> many years assisting and caring for deceased, no pay from late 1980s until death (1997)
  - 1994-1997 - stays overnight unpaid on sofa
  - £200k intended to reflect cost of full-time nursing care
  - House unsuitable for C’s needs (would only need to spend £150k to buy one for himself)

## Detriment cases (2)

- *Powell v Benney* [2007] EWCA Civ 1283
  - Expectation: two properties, together worth £280k (out of estate of £285k).
  - Award: £20,000.
  - Detriment: (1) expenditure on properties (including repairs) (2) shopping/ cooking / nursing care for deceased, gave him money. But: allowed to make use of properties as they wished, provided with keys. Mr Powell provided music/ bible lessons there.
  - Not required to do detrimental acts; not a bargain case. Countervailing benefits had to be taken into account
  - Award reflected expenditure, work by Mr Powell, rounded up to reflect Mr and Mrs Powell's disappointment



## Reasons for cutting down the expectation

- Uncertain/ varying expectations: *Davies*
- Need to provide for others with a claim upon the estate: *Moore v Moore* [2018] EWCA Civ 2669
- Need to provide for a clean break amongst parties/ warring family members: *Moore, Campbell v Griffin* [2001] EWCA Civ 990
- Refusing to take benefits offered by D/ change of circumstances: *Habberfield v Habberfield* [2019] EWCA Civ 890;
- *Horsford v Horsford* [2020] EWHC 584: no equity, but if there had been one, would have been extinguished when C entered into partnership agreement concerning farm which set out the parties' rights.

## Strategies for the Defendant

- Are the expectations uncertain?
- What about countervailing benefits? Must be causally linked to the reliance on the promise: *Henry v Henry* [2010] UKPC 3.
- Equity satisfied? Benefits already taken under Will etc;
- Moral claims of others? Important in lifetime cases especially.
- Can you quantify the detriment, compare with expectations? But danger of approach:
  - Many aspects of detriment non-quantifiable, Cs' tactics often include framing the detriment in this way, see e.g. *Suggitt* and following cases, *Lothian*
- Importance of tax impact: see *Moore*. Tax generally borne by C

## Back beneath the palm tree... what would you do?

- Time for a Zoom jury!
- Tom works at a boutique bed and breakfast on the island as a handyman for Pamela; he is paid £15 an hour
- 2.5 years before Pamela's death, she takes him aside and says he will inherit the bed and breakfast; she then repeats this statement several times in later months



## Back beneath the palm tree... what would you do? (2)

- Shortly before the promise, the manager of the bed and breakfast retires, leaving Pamela and Tom as the only two people working there
- After the promise Tom says he works “24/7” at the B&B, doing the work of the departed manager and more; he sleeps on site to provide security; he also starts caring for Pamela, who is in her early 70s. He is unpaid for all this extra work and says that it impeded his family and social life (he is now divorced).
- The court finds he told Pamela that he would look after her for the rest of her days - knowing that she could live many more years yet
- The court finds that given Tom’s rate of pay, he missed out on around £70,000 of pay with all the unpaid work he did. He was still paid for his previous role as handyman.
- Pamela dies suddenly and unexpectedly, having forgotten to execute a will drafted for her leaving Tom the B&B. Instead he receives £100,000 under her previous Will, with the remainder going to Pamela’s son, who lives back in the UK. Although the B&B is loss making, the land on which it stands is worth £1.5m. What should Tom be awarded?

How much would you award Tom as the Judge?

- (a) Nothing
- (b) £70,000
- (c) Between £70,000 and £250,000
- (d) Between £250,000 and £500,000
- (e) Between £500,000 and £1m
- (f) Between £1m and £1.5m
- (g) The full £1.5m, no ifs or buts!

## Some thoughts

- Bargain case?
- Expectations seem certain
- But short period of detriment
- Quantifiable detriment small - but open-ended commitment? See *Lothian*.  
Other non-quantifiable elements?
- Countervailing benefits - pay; amount received under Will
- Not a case where C helped D to build up value of business

Personal view!: non-quantifiable detriment would lead to an award, but  
£1.5m = too much

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Thank you –any questions?

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