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Thorner v Major and The Limits of Proprietary Estoppel*

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In *Yeoman's Row Management Ltd v Cobbe*,¹ the House of Lords appeared to restrict significantly the scope of proprietary estoppel. The House of Lords has now revisited the area in *Thorner v Major*.² While the facts of *Cobbe* had arisen in a purely commercial context, the background to *Thorner* was a family relationship (between first cousins once removed). The protagonists in *Thorner* were Somerset farmers, described by Lord Walker as 'taciturn and undemonstrative men committed to a life of hard and unrelenting physical work ... largely unrelieved by recreation or female company'.³ The appellant, David Thorner, had since 1976 worked long hours without pay on the farm of his father's first cousin, Peter Thorner. In 1990, David's hope of inheriting the farm became an expectation when Peter handed him a document related to two insurance policies and said 'That's for my death duties'. David had been considering various other opportunities at around this time but decided that his future lay with Peter's farm. Later oblique remarks by Peter, 'a man of few words ... who hardly ever spoke in direct terms',⁴ confirmed David in his expectation of inheritance. Peter made a will in 1997, leaving David the farm and his residuary estate. However, apparently after a falling-out with another beneficiary, Peter revoked the will and, despite having been warned by his solicitor of the importance of making a new will, died intestate in 2005. David, who would have inherited nothing under the intestacy rules, relied on the doctrine of proprietary estoppel. He was successful at first instance,⁵ and was awarded the farm and the other assets of the farming business. This award was overturned by the Court of Appeal⁶ but reinstated on appeal to the House of Lords. The two main speeches

* A later version of this commentary was published in (2009) 21 Child and Family Law Quarterly 367.

¹ [2008] UKHL 55.

² [2009] UKHL 18.

³ *Ibid*, [59].

⁴ [2007] EWHC 2422 (Ch), [94] *per* Judge Randall QC at first instance.

⁵ See M Dixon 'Estoppel and Testamentary Freedom' [2008] Conv 65.

⁶ [2008] EWCA Civ 732. See B Sloan 'Estoppel and the Importance of Straight Talking' [2009] Conv 154.

were given by Lords Walker and Neuberger but Lord Scott made some striking remarks in a shorter speech and Lords Hoffman and Rodger also gave short speeches.

The main issue in the House of Lords related to whether, in the circumstances, Peter's representations were sufficient to form the basis of a claim in proprietary estoppel. A secondary, and related, issue was whether there was sufficient certainty in respect of the land to which these assurances related. While the central issues were relatively narrow, the decision is of considerable interest, in particular for two reasons. The first is that the case involved a claim in the context of an expectation of inheritance, a difficult area into which proprietary estoppel has ventured only relatively recently. The second reason is that the decision comes so soon after *Cobbe*,⁷ in which the separate speeches of Lords Scott and Walker had departed considerably (in different ways) from the orthodox understanding of proprietary estoppel. *Thorner* appears to represent a retreat from *Cobbe* but, taken together, the two cases do not justify confidence that the House of Lords has yet come fully to grips with the considerable complexities of proprietary estoppel.

This note will discuss, first, the complex set of issues in relation to whether the representations to the claimant in *Thorner* were sufficiently certain to trigger a proprietary estoppel remedy. It will then consider, in light of his earlier statements in *Cobbe*, the approach of Lord Scott to the question of the scope and nature of proprietary estoppel and its relationship with constructive trusts. Finally, and more briefly, the note will examine issues in relation to the remedy granted in *Thorner*.

Issues of Certainty

The central issue in the case related to the quality of the representations which Peter had made to David. Contrary to the view taken by the Court of Appeal, the House of Lords was unanimously of the view that the representations were

⁷ [2008] UKHL 55.

sufficiently clear to satisfy the requirements of proprietary estoppel. In the only judgment in the Court of Appeal in *Thorner*, Lloyd LJ had taken the view that the representation needed to be ‘clear and unequivocal’, a formulation accepted on appeal by Lords Scott and Neuberger.⁸ Lord Walker preferred a requirement that the representation be ‘clear enough’,⁹ which he admitted was a ‘thoroughly question-begging’ formulation,¹⁰ and this approach was also adopted by Lord Rodger.¹¹ In fact, the requirement of certainty in terms of the defendant’s representations is a multi-faceted one, as will emerge from the discussion which follows. Therefore, any brief statement of an overall test for certainty is likely to be of limited utility. It is necessary to look at the individual aspects of the certainty question and to analyse their Lordships’ approach in each relevant context.

The Oblique Nature of the Representation

All of their Lordships were at pains to emphasise the importance of the context in interpreting the assurances made by Peter, with Lords Rodger, Walker and Neuberger separately describing the facts of the case as ‘unusual’.¹² It was obviously necessary to understand what passed between the parties in the light of their taciturnity and the specific context of their relationship and mode of life. There is, therefore, no objection in principle to the courts’ extracting from what passed between the parties a representation which might form the basis of a proprietary estoppel claim. The courts should surely proceed with a degree of caution, however, when dealing with an oblique representation since such a representation is, of its nature, more difficult for a court to interpret accurately than one spelled out in clear terms (and it is, generally, open to the claimant to seek more clarity before undertaking reliance). Arguably, Lord Walker was a little too brisk in dismissing what he described as ‘the Court of Appeal’s apparent apprehension that floodgates might be opened.’¹³

⁸ [2009] UKHL 18, [18] and [84] respectively.

⁹ *Ibid*, [56].

¹⁰ *Ibid*.

¹¹ *Ibid*, [26].

¹² *Ibid*, [24], [59], [81].

¹³ *Ibid*, [60] *per* Lord Walker. Also, contrast Lord Neuberger’s view *ibid*, [85] that ‘[t]he court should not search for ambiguity or uncertainty’ and that ‘it would be quite wrong to be

Was There a Promise?

In the Court of Appeal, Lloyd LJ concluded that there was no material to justify the trial judge's conclusion that the implicit representation to David in 1990, at the time when the insurance policy document was handed over to him, 'was intended to be relied on or, in other words, was intended as a promise rather than, at most, a statement of present intention, ... as to which there was no commitment.'¹⁴ Lloyd LJ was clearly focusing on the important question of whether there was a promise on the part of the defendant or a mere statement of current testamentary intention. However, Lloyd LJ's emphasis on the idea of whether the representation was 'intended to be relied on' (adopting a phrase used by Robert Walker LJ in *Gillett v Holt*)¹⁵ might lead to the assumption that he believed that a proprietary estoppel claim should fail if the defendant had not subjectively intended that the claimant should rely on the representation. Such an approach would be untenable, since the courts have always (sensibly) focused on the claimant's reasonable interpretation of defendant's representation.¹⁶ However, it is clear that Lloyd LJ favoured the standard objective approach, given that he stressed many times in his judgment that the requirement was that the representation 'must be intended to be relied on, or at least reasonably taken to be so intended'.¹⁷

Lloyd LJ's position (rather caricatured by Lord Scott)¹⁸ was that the trial judge had not explicitly considered the question of whether there was a promise and that there was no material on which he could justifiably have made a finding of fact that there was such a promise.¹⁹ In reaching this conclusion, Lloyd LJ pointed

unrealistically rigorous', with Lloyd LJ's plea [2008] EWCA Civ 732, [69] for 'a certain degree of rigour of analysis' in the application of proprietary estoppel principles, lest testamentary freedom be subverted.

¹⁴ [2008] EWCA Civ 732, [72].

¹⁵ [2001] Ch 210, 228.

¹⁶ See e.g. [2009] UKHL 18, [78] *per* Lord Neuberger (who noted *ibid* the possibility of a 'rare' case where a claimant might fail, despite having reasonably relied on a representation, because the defendant could not reasonably have expected the claimant to rely on it).

¹⁷ [2007] EWCA Civ 732, [71] (emphasis supplied). The same point is made by Lloyd LJ *ibid*, [54], [61], [62], [74] and see also [35], [38], [58].

¹⁸ [2009] UKHL 18, [17]. See also *ibid*, [78] *per* Lord Neuberger.

¹⁹ [2008] EWCA Civ 732, [72]. Note that the trial judge's conclusion that it was reasonable for David to rely on the representation need not have turned on a finding of fact (immune from

out that there was no evidence that the representation ‘was made for the purpose of persuading David not to pursue some other opportunity’.²⁰ Arguably, Lloyd LJ’s judgment might justifiably be criticised for laying too much emphasis on this question, which is clearly relevant²¹ but not necessarily determinative.²² On appeal, Lord Neuberger did not accept that the trial judge had failed to make a finding of fact that there had been a promise.²³ He also denied that it had been open to the Court of Appeal to hold that it was unreasonable for the trial judge to have made this finding or for him to have found that it had been reasonable for David to have relied on the promise.²⁴ Lord Walker, commenting that ‘[i]n the end it is a short point’, concluded also that there was not ‘sufficient reason for the Court of Appeal to reverse the trial judge’s careful findings and conclusion’.²⁵

Is a Promise Necessary?

As a matter of principle, it seems clear that no successful proprietary estoppel claim should be possible in the testamentary context unless the defendant’s representation can reasonably be understood to involve a promise, explicit or implicit, that the claimant will ultimately inherit on the testator’s death – i.e. not only will the defendant make a will in favour of the claimant, he will also refrain from changing that will prior to his death. An indication that the defendant’s current will leaves property to the claimant, or a promise that the defendant will make such a will, is not in itself an appropriate basis for reliance, unless the

challenge on appeal: see [2008] UKHL 18, [81]-[83] *per* Lord Neuberger) that David had reasonably understood Peter’s oblique representation to amount to a promise. The trial judge could have been proceeding on an erroneous assumption of law, reversible on appeal, that there was no need for a promise. See the discussion in the next subsection below of the issue of whether a promise is required.

²⁰ [2008] EWCA Civ 732, [72].

²¹ Lord Hoffman believed [2009] UKHL 18, [5] that in taking account of this matter ‘the Court of Appeal departed from their previously objective examination’ of the meaning of Peter’s representation. However, in determining what David could reasonably have understood from Peter’s representation, it seems clearly relevant that, *to the knowledge of David*, Peter was unaware of the alternative opportunities which David was considering.

²² See, however, [2008] EWCA Civ 732, *ibid*, [61], showing that Lloyd LJ appreciated this.

²³ [2009] UKHL 18, [76]-[77].

²⁴ *Ibid*, [79].

²⁵ *Ibid*, [60]. See also *ibid*, [26]-[27] *per* Lord Rodger.

defendant can reasonably be taken to have committed himself not to change his mind freely.²⁶

Prior to *Thorner*, significant confusion was created on this point by the leading case of *Gillett v Holt*.²⁷ In that case, Robert Walker LJ (as he then was) accepted academic criticism of *Taylor v Dickens*,²⁸ a case which had emphasised 'the inherent revocability of testamentary dispositions'.²⁹ His Lordship quoted³⁰ the following comment from Swadling:

'[T]he whole point of estoppel claims is that they concern promises which, since they are unsupported by consideration, are initially revocable. What later makes them binding, and therefore irrevocable, is the promisee's detrimental reliance on them. Once that occurs, there is simply no question of the promisor changing his or her mind.'³¹

Robert Walker LJ's adoption of this analysis³² might appear to call into question the requirement of a promise by the defendant to avoid changing his mind until death. However, it is vital to distinguish two separate aspects of the certainty question, since the word 'irrevocable' is ambiguous in a key respect.

Consider a clear representation by a defendant, which does not amount to an enforceable contract, that he will leave his farm to the claimant and that he will not change his mind (or his will), come what may. This promise may be described as 'irrevocable' in the sense that the testator's promise itself does not reserve to him the possibility of changing his mind. This usage of 'irrevocable' distinguishes such a promise from a mere indication of current testamentary

²⁶ See M Dixon 'Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002' in E Cooke (ed) *Modern Studies in Property Law* Vol 2 (Hart Publishing, 2003) pp 180-182, framing the point in terms of the relationship between unconscionability and formality requirements. See generally also, M Thompson 'Emasculating Estoppel' [1998] Conv 210; M Dixon 'Estoppel – a Panacea for All Wills?' [1999] Conv 46; M Thompson 'Estoppel: A Return to Principle' [2001] Conv 78.

²⁷ [2001] Ch 210.

²⁸ [1998] 1 FLR 806 (a first instance decision of Judge Weeks QC which was later compromised on appeal).

²⁹ [2001] Ch 210, 227 *per* Robert Walker LJ.

³⁰ *Ibid*.

³¹ W Swadling [1998] *Restitution Law Review* 220, 220.

³² [2001] Ch 210, 228: 'it is the other party's detrimental reliance on the promise which makes it irrevocable.'

intention which involves no commitment on the part of the testator not to change his mind. It has been submitted above that a representation must be 'irrevocable' in this sense to trigger a proprietary estoppel claim.³³ The alternative sense of 'irrevocable' is to mean legally binding. This raises a quite different set of issues. Leaving aside for a moment the estoppel jurisdiction, it is clear that this sense of 'irrevocable' is not satisfied even by a definite promise by the testator to leave property to the claimant and never to change his mind (assuming, as one must in the context under discussion, that the promise does not constitute an enforceable contract). It would only be after the claimant has acted to his detriment so as to trigger a proprietary estoppel claim that the promise would become 'irrevocable', and then only in a limited sense, given that the estoppel remedy need not necessarily involve requiring the defendant to fulfil his promise.³⁴

Thus, Swadling's point in the passage quoted by Robert Walker LJ in *Gillett* can only be that it is inappropriate to make 'irrevocability' in the second sense a requirement of the proprietary estoppel doctrine, since this kind of 'irrevocability' is conferred only by the operation of that doctrine in favour of a claimant. The problem is that, while this second type of irrevocability cannot sensibly be required, the first type of irrevocability logically *must* be required. While Robert Walker LJ seems to have conflated the two types of irrevocability at certain points in his judgment in *Gillett*, it seems that he did require irrevocability of the first type, pointing out that '[e]ven when the promise or assurance is in terms linked to the making of a will ... the circumstances may make clear that the assurance is more than a mere statement of present (revocable) intention, and is tantamount to a promise.'³⁵ He was satisfied that 'the assurances given ... were intended to be relied on'³⁶ (putting the requirement of a promise in the terms which were later adopted by Lloyd LJ in *Thorner*). Thus, overall, it appears that *Gillett* does not stand in the way of a

³³ The discussion for the moment ignores the complex issues surrounding conditional representations.

³⁴ See the discussion under the heading 'Remedial Issues' below.

³⁵ [2001] Ch 210, 227-228.

³⁶ *Ibid*, 228.

requirement that the defendant be reasonably understood to have promised not to change his mind.

The Court of Appeal in *Thorner* clearly required such a promise and the House of Lords seems to have taken the same view of the law. Lord Hoffman accepted that it was necessary that David should have reasonably understood from Peter's representation 'not merely that [Peter's] present intention was to leave David the farm but that he definitely would do so'.³⁷ Lord Rodger looked for 'an assurance that [David] was to inherit the farm and that he could rely on it'³⁸ and, along the same lines, Lord Walker required that the assurances 'were intended to be taken seriously and to be relied on'.³⁹ The two *dicta* just quoted are, unfortunately, not entirely clear-cut because they are framed in terms of reliance and the very point at issue is whether it can be reasonable in the testamentary context for a claimant to rely on a representation which does not constitute a promise. Lord Neuberger clearly felt that there was a promise on the facts but appeared to reserve his position on the possibility of a claimant being entitled to 'appropriate compensation' even in the absence of an irrevocable promise.⁴⁰ Since the point did not arise for decision, his Lordship did not find it necessary to discuss it in detail and it is not easy to divine his Lordship's precise line of thought. On the whole, then, it appears that the House of Lords accepted the necessity for a promise, subject to a possible reservation on the part of Lord Neuberger. This is a welcome development, although it would have been helpful if the confusion in *Gillett* had been directly addressed.

Must the Claimant Believe the Promise to Be Legally Binding on the Defendant?

In the course of the preceding discussion, it has been mentioned that it would not be sensible for the law to require that the defendant's representation should be 'irrevocable' in the sense of being legally binding. However, in *Yeoman's Row Management Ltd v Cobbe*,⁴¹ Lord Walker appeared to impose a requirement that

³⁷ [2009] UKHL 18, [3].

³⁸ *Ibid*, [26].

³⁹ *Ibid*, [60].

⁴⁰ *Ibid*, [89].

⁴¹ [2008] UKHL 55.

the claimant must believe that the defendant's promise is legally binding. Since the approach of Lord Walker in *Cobbe*, if taken seriously, would have a significant practical impact, it is necessary to consider it in some detail and to assess whether in *Thorner* his Lordship adhered to his earlier views.

The facts of *Cobbe* involved an experienced property developer, Cobbe, who had reached an agreement in principle with the owner of certain land under which Cobbe would pursue an application for planning permission in respect of the land and, if the planning permission were obtained, the land would be sold to Cobbe at an agreed price. Not all the details of the arrangement had been worked out and both parties were aware that the agreement was binding only 'in honour'. As it turned out, once the planning permission had been obtained through Cobbe's extensive work, the land-owner sought to raise substantially the price Cobbe would have to pay for the land, ultimately triggering litigation between the parties. The House of Lords differed from the trial judge and the Court of Appeal, which had been willing to give a remedy which would effectively have fulfilled Cobbe's expectation under the 'gentleman's agreement' between the parties, instead restricting him to relief on a *quantum meruit* basis for the work he had done in obtaining the planning permission.

Lord Walker's view in *Cobbe* was that 'hopes by themselves are not enough'⁴² and that a claimant must believe that the defendant's assurance was 'binding and irrevocable'.⁴³ While this note has already discussed in detail the ambiguity in the idea of an 'irrevocable' assurance (in the context of a discussion of *Gillett*), it is clear from a reading of his Lordship's speech in *Cobbe* that he is referring here to a representation which is regarded by the claimant as being legally binding.⁴⁴ His Lordship commented that the requirement under discussion emerged most clearly in cases arising in the 'commercial context'. He went on to suggest that

⁴² *Ibid*, [66].

⁴³ *Ibid*.

⁴⁴ See e.g. his reference *ibid*, [64] to Lord Kingsdown's view in *Ramsden v Dyson* (1866) LR 1 HL 129 as to the 'critical importance' of the fact that 'the tenants believed (wrongly) that they had a legal right to a long lease'; note also Lord Walker's comment *ibid*, [65] that the claimant in *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699 believed he had 'a right to security of tenure'. See also B McFarlane and A Robertson 'The Death of Proprietary Estoppel?' [2008] LMCLQ 449, 452 interpreting Lord Walker's speech in the same way as the text to this footnote.

the reason why the issue was less prominent in cases in the 'domestic or family' context, although the requirement was applicable there also, was that '[t]he typical domestic claimant does not stop to reflect (until disappointed expectations lead to litigation) whether some further legal transaction (such as a grant by deed, or the making of a will or codicil) is necessary to complete the promised title.'⁴⁵ The attempt to explain away the 'domestic' cases seems, with all due respect, rather implausible⁴⁶ and it is not clear how Lord Walker's views in *Cobbe* can be squared with his willingness to uphold the claim in *Thorner*. It cannot credibly be suggested that David Thorner believed that his promised title to the land was already 'complete' without the need for the making of a will. Nor would he have to 'stop to reflect' for long to realise that, even if a will were made by Peter, it could be revoked at any future point.⁴⁷

It is true that, on the facts as accepted by the House of Lords, David believed that Peter's representations were 'irrevocable' in the first sense discussed above, in that they involved a promise that Peter would not change his mind (at least without good reason) rather than merely representing an expression of his current testamentary intention. However, did David really believe that Peter's promise was binding in the different sense required by Lord Walker in *Cobbe*, i.e. binding and irrevocable in law? To some extent the type of belief required seems to be self-fulfilling,⁴⁸ in that if David believed the promise was binding, then it would become 'binding' under proprietary estoppel but, if he did not hold the relevant belief, then the promise would have no legal significance despite all the detriment he incurred. Lord Walker's approach in *Cobbe* would appear to require a high level of faith in the legal system on the part of a claimant, who (despite probably having very limited legal knowledge) would have to feel sure in

⁴⁵ [2009] UKHL 18, [68].

⁴⁶ Lord Walker had earlier suggested (*ibid*, [67]) that '[i]t may possibly be that some of the domestic cases might have been decided differently if the nature of the claimant's belief had been an issue vigorously investigated in cross-examination.'

⁴⁷ Note that, in *Gillett* [2001] Ch 210, 227 Robert Walker LJ mentioned that the claimant had 'candidly' admitted that he 'well understood' the inherent revocability of testamentary dispositions.

⁴⁸ Compare J Getzler 'Quantum meruit, estoppel, and the primacy of contract' (2009) 125 LQR 196, 202-203.

advance that his claim would necessarily succeed because the promise was legally binding.

Lord Walker made no reference in his speech in *Thorner* to a requirement that the claimant had to believe that the defendant's representation was legally binding. While the position is regrettably unclear, the fact that Lord Walker was willing to uphold David's claim in *Thorner*, with no mention of a requirement which could well have been fatal to that claim, suggests that his Lordship intended to retreat from his position in *Cobbe* (which, after all, enjoyed limited support in the House of Lords).⁴⁹ This suggests a restoration of the pre-*Cobbe* position whereby a proprietary estoppel claim is available to domestic claimants who simply have trusted the defendant and believed in his promises without seeing the need to obtain a legally binding assurance or without addressing their minds to the question of whether the promise they had obtained was actually binding in strict law.

A difficulty is that, even if one might feel sympathy for a trusting claimant in the family context, it would not seem acceptable to provide a remedy for a claimant such as the experienced property developer in *Cobbe*, who was well aware that the defendant had not made a legally binding commitment. While it may be fair to designate Cobbe as a 'commercial risk-taker',⁵⁰ it also seems possible to describe David as a 'domestic risk-taker' (without intending any pejorative connotation by this). The point is even clearer in the case of the successful claimant in *Gillett*, who seems to have been fully aware of the precariousness of his position from a legal standpoint. He went to the defendant seeking more formal assurances as to his expectation of inheritance but was rebuffed. Nonetheless, he and his wife decided to rely on the fact that the defendant was 'a man of his word', ultimately triggering 'bitterly fought and ruinously expensive litigation'.⁵¹ After *Cobbe* and *Thorner*, one is left wondering how to justify the

⁴⁹ Only Lord Browne (who also agreed with Lord Scott) agreed with Lord Walker in *Cobbe*.

⁵⁰ A Goymour 'Cobbling Together Claims where a Contract Fails to Materialise' [2009] CLJ 37, 40.

⁵¹ [2001] Ch 210, 228 *per* Robert Walker LJ.

House of Lords' view that *Cobbe* should lose but David Thorner should succeed.⁵² There is an obvious temptation to rely on the labels 'commercial' and 'domestic' to do the explaining.⁵³ However, this is not really good enough – the factual boundary between 'commercial' and 'domestic' cases is far from secure and, in any event, one would require an explanation, by reference to principle, of the specific features of the two sets of cases which are to be regarded as justifying differential treatment. There is much analytical work to be done here, which it is not possible to attempt within the confines of this note.^{53A} It must suffice to note that the decision in *Cobbe* itself can be reconciled with *Thorner* on the basis that the promise in *Cobbe* was insufficiently certain in a different way, in that it was to enter into an agreement in relation to the sale of the disputed land on terms which remained to be agreed fully (and which could not be settled by the courts by reference to any past pattern of dealings between the parties).⁵⁴

The Problem of Conditionality

It seems implausible to infer from what Peter said and did on the facts of *Thorner* that he was promising that David would inherit the farm 'come what may'. As Hoffman LJ recognised in *Walton v Walton*,⁵⁵ representations in this kind of case 'are often subject to unspoken and ill-defined qualifications'.⁵⁶ There seems likely to have been an implicit condition that David would continue providing his labour on the farm. Had he suddenly decided to move to Australia, his prospects of inheritance would probably have evaporated. Also, surely Peter would not have intended to bind himself to leave the farm to David in the event that, e.g., David were to assault him in the course of a row or to humiliate him in front of

⁵² It would, of course, be possible to argue that the right approach in *Cobbe* would actually have been to uphold the proprietary estoppel claim to the extent of a remedy based on the detriment incurred by Cobbe, rather than to have granted essentially the same remedy to him on the basis of what Getzler note 48 above, 203 describes 'as a casual and permissive approach to quantum meruit and unjust enrichment claims'.

⁵³ See the remarks of Lord Neuberger in a somewhat different context in *Thorner* [2009] UKHL 18, [96]-[97], [100] and note also the emphasis which Baroness Hale placed in *Stack v Dowden* [2007] UKHL 17 on the distinction between the commercial and domestic contexts.

^{53A} [Added note (February 2012): see further, J Mee 'Proprietary Estoppel, Promises and Mistaken Belief' in S Bright (ed) *Modern Studies in Property Law Volume 6* (Hart Publishing 2011). Note also N Hopkins 'The relevance of context in property law: a case for judicial restraint' (2011) 31 *Legal Studies* 175].

⁵⁴ [2008] UKHL 55, [23] *per* Lord Scott.

⁵⁵ Unreported, Court of Appeal, 14 April 1994.

⁵⁶ *Ibid*, para 19; quoted by Lord Walker [2009] UKHL 18, [57].

members of the local farming community. One must also consider the complications which could have arisen if David had married or if Peter had married again⁵⁷ or had decided he wanted to give up farming. Finally, there is the possibility, adverted to by Lord Scott, that Peter might have needed to sell some of the farm to fund nursing care for himself.⁵⁸ It cannot be assumed that the parties were blind to all of these contingencies (although not all of them may have been present to their minds).

The point is that the representation to be spelled out from Peter's comments and actions seems to have been, at most, that Peter intended to leave David the property and, if David kept up his side of the bargain by continuing his work on the farm, Peter would not change his mind without good reason. The parties may have understood that ultimately it was Peter's decision since it was his farm to give – after all, he was a 'strong and proud personality' and, in the words of one witness, 'as long as Peter was breathing he would always be in charge'.⁵⁹ The fact that the representation was qualified in a variety of indeterminate ways, making it a highly subjective question as to whether or not any future withdrawal from it would be defensible, gives considerable weight to the view that it was not sufficient to form the basis of a proprietary estoppel claim. On this view of the matter, David worked without pay on the farm on the basis of the belief that, although Peter had effectively reserved the right to disinherit him, it was highly likely that nothing would go wrong and so he very probably would ultimately inherit – not necessarily an irrational basis for action but not one which should not be regarded as triggering a proprietary estoppel remedy.⁶⁰ As has been seen, the House of Lords did not favour this view, emphasising that, even if the representations in the case were such that various possible changes in

⁵⁷ Peter had been married twice in the past but had no children.

⁵⁸ [2009] UKHL 18, [19].

⁵⁹ [2007] EWHC 2422 (Ch), [40]. See also *ibid*, [101], discussing Peter's reasons for falling out with, and disinheriting, another of the beneficiaries under his 1997 will.

⁶⁰ Thus, the requirement of 'reasonable' reliance is not necessarily satisfied by 'rational' action consequent upon a representation. Note that a testator who makes a false statement of his current testamentary intention (thus, without making a promise, inducing the claimant to act) could, in principle, be liable in the tort of deceit: see *Cobbe* [2008] UKHL 55, [3]-[4] *per* Lord Scott.

circumstances would have justified Peter in failing to fulfil his promise, none of these disruptive events took place and so no problem arose.

Their Lordships, therefore, relied strongly on the 'retrospective nature of the assessment which the doctrine of proprietary estoppel requires'.⁶¹ This has a superficial plausibility but it presupposes that the courts could find a defensible method of dealing with the difficult questions which would arise if a defendant in such a case were to resile from his representations during his lifetime. Such questions did indeed arise in *Gillett v Holt*⁶² and, in the view of Lord Neuberger,⁶³ had been dealt with in a 'masterly' fashion by Robert Walker LJ, who awarded the claimant a very substantial remedy, albeit one which did not fully reflect his expectations and which was discounted to some extent to allow for the fact that it was being granted prior to the death of the testator.

Lord Walker mentioned in *Thorner*⁶⁴ that the claimant in *Gillett* might have accepted (and, by implication, might have been required by the court to accept) a reduction in his expectations had he not been so 'abruptly and humiliatingly dismissed'. This hints at the uncomfortable proposition that a defendant could be punished in proprietary terms for unkindness in the way in which he resiles from his representation. The subjective nature of the inquiry also potentially leaves a court open to the charge of being influenced by irrelevant considerations. It could be contended that the determination of *Gillett* was coloured to a degree by judicial disapproval of the friendship which had arisen between the defendant, an elderly gentleman farmer, and a much younger man, which had 'developed into something of an obsession, which was of concern to [the defendant's] family and other friends'.⁶⁵ Would the claimant in *Gillett* have had to be content with a lesser remedy if Mr Holt's change of heart towards the claimant had resulted instead from a decision to marry a widow of his own age? In the context of ancillary relief upon divorce, the law has conceded that it is not

⁶¹ [2009] UKHL 18, [65] *per* Lord Walker.

⁶² [2001] Ch 210.

⁶³ [2009] UKHL 18, [88].

⁶⁴ *Ibid*, [65].

⁶⁵ In the words of the trial judge, quoted by Robert Walker LJ [2001] Ch 210, 222.

sensible to try to allocate fault in terms of the reasons for the breakdown in a personal relationship. There is surely some danger that equity may end up straying into a quagmire by requiring judges to reach conclusions on the reasons why a personal relationship has deteriorated to the extent that the defendant now finds it reasonable to go back on his representations to the claimant.

Even leaving aside the problem that the court may be required to venture into highly subjective territory in assessing whether there has been a breach of a promise not to change one's mind without good reason, there remains the underlying difficulty that, once a promise is subject to extremely open-ended conditions, it becomes less plausible to regard it as sufficient to form the basis of any form of legal liability for the promisor. Imagine that a testator makes a 'promise' that he will leave his farm to the claimant unless he feels like changing his mind. The testator then dies some years later, not having changed his mind but having made an invalid will in favour of the claimant. Would it be sensible to allow the claimant to base a proprietary estoppel claim on the argument that, while the defendant reserved the right to change his mind on a whim, he never did change his mind, so that the accidental failure to allow the claimant to inherit the property constitutes a breach of the 'promise'? The answer appears to be no, and while this example clearly involves taking the element of conditionality to an extreme level, it does appear relevant to the case of a promise, as apparently in *Thorner*, not to change one's mind without some 'good' reason. Much as one would like to see a claimant such as David winning his case, it may be that the promise which he reasonably understood Peter to be making was subject to too many uncertain conditions to make it a proper foundation for a proprietary estoppel claim.

Certainty in Relation to the Subject Matter of the Representation

A further issue in *Thorner* concerned the question of whether there was sufficient certainty surrounding the subject matter of the representations made by Peter, given that the identity of the farm had changed over the years as certain fields were disposed of and others acquired. As Lord Walker pointed out, it is an essential feature of proprietary estoppel that the representation 'should relate to

“identified property”⁶⁶. This limitation on the scope of proprietary estoppel is historical in origin but has an important impact in modern times: it separates proprietary estoppel from promissory estoppel, which can apply irrespective of the subject matter of the promise but which cannot be used as a ‘sword’. Thus, a claim based on a promise of ‘financial security’,⁶⁷ or a promise to make an *inter vivos* payment of a specified sum of money, would not trigger a remedy under proprietary estoppel (nor could it lead to a remedy under promissory estoppel because that doctrine cannot constitute a cause of action in itself).⁶⁸ The limitation on proprietary estoppel under discussion seems, however, to have been weakened in the context of testamentary promises, with a claim being upheld in *Re Basham*⁶⁹ where the representation related to the defendant’s residuary estate (admittedly including his cottage). None of the Law Lords felt that the limited degree of uncertainty associated with the subject matter of the representation constituted a valid objection to David’s claim. Lord Neuberger, for example, emphasised that ‘focussing on technicalities can lead to a degree of strictness inconsistent with the fundamental aims of equity’.⁷⁰

There is a wider significance to the ‘identified property’ requirement since, if it were to be discarded, one would almost inevitably arrive at an Australian-style unified equitable estoppel which can be used as a sword in respect of all representations.⁷¹ Only Lord Walker appeared alive to this aspect of the issue but he was content to leave open the question of whether *Re Basham* had been wrongly decided.⁷² Nonetheless, the question will have to be confronted at some point. The requirement that proprietary estoppel must relate to (identifiable) property is the main barrier to the use of equitable estoppel as a sword in the context of all types of promise – it may be essentially arbitrary but it is what keeps proprietary estoppel in the property law textbooks and, for the most part,

⁶⁶ [2009] UKHL 18, [61]. For an older treatment of some of the relevant issues, see C Davis ‘Proprietary Estoppel: Future Interests and Future Property’ [1996] Conv 193.

⁶⁷ As in *Layton v Martin* [1986] 2 FLR 227, cited by Lord Walker [2009] UKHL 18, [63].

⁶⁸ See e.g. *Combe v Combe* [1951] 2 KB 215 (no remedy under promissory estoppel in respect of a promise to make financial payments).

⁶⁹ [1986] 1 WLR 1498.

⁷⁰ [2009] UKHL 18, [98].

⁷¹ The leading Australian case is *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

⁷² [2009] UKHL 18, [63].

out of the contract books (where it might not be welcomed by contract law scholars concerned with the integrity of the doctrine of consideration). Since the limitation is defensible, if at all, on the basis of pragmatism, dismissing it as a technicality would be to miss the point. There has already been a somewhat casual erosion of the rule that proprietary estoppel must relate to identified 'land' rather than other forms of property.⁷³ It remains to be seen whether, through an incremental increase in its scope, proprietary estoppel might eventually come into more open conflict with the contractual doctrine of consideration.

Proprietary Estoppel and Constructive Trusts

In his relatively short speech in *Thorner*, Lord Scott offered some surprising comments on the nature of proprietary estoppel and its relationship with constructive trusts. Interesting issues arise concerning the relationship between these views and those which Lord Scott had expressed in the House of Lords' earlier decision in *Cobbe*. Lord Scott took the controversial view in *Cobbe* that the label 'proprietary estoppel' should be taken seriously, so that the doctrine could only apply where the defendant was prevented from 'asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel'.⁷⁴ However, in *Thorner*, what was the proposition of fact or of fact and law which Peter was estopped from denying? He had not represented that he had already transferred the farm to David or that his promises, although not in writing, could be treated as a binding contractual commitment; he had merely promised, in effect, that he would leave the farm to David and that he would not change his mind (at least without good reason). The effect of the decision in *Thorner* was to hold him to that promise, not to prevent him from denying anything. Nonetheless, despite expressing a preference for resolving this type of case in another manner (explained below), Lord Scott 'in no way disagree[d]' with the view of the other Law Lords that David could succeed on the basis of proprietary

⁷³ See *Cobbe* [2008] UKHL 55, [14] *per* Lord Scott; *Thorner* [2009] UKHL 18, [61] *per* Lord Walker.

⁷⁴ [2008] UKHL 55, [14].

estoppel.⁷⁵ This suggests that his current view is merely that there is a ‘more comfortable’⁷⁶ alternative to the application of proprietary estoppel in cases where, in *Cobbe*, he appeared to deny the availability of any remedy.

Notwithstanding the apparent change of mind which has just been noted, it can hardly be said that, in his speech in *Thorner*, Lord Scott embraced the textbook orthodoxy in this area of equity. Having noted the complex nature of the representation in cases such as *Thorner*, he commented that it is ‘an odd sort of estoppel that is produced by representations that are, in a sense, conditional’.⁷⁷ In his view, it is ‘easier’ and ‘more comfortabl[e]’ to regard situations where the representation is that the claimant will become entitled to property in the future, rather than to a ‘more or less immediate’ interest, as constructive trust cases.⁷⁸ The type of constructive trust his Lordship had in mind was ‘a remedial constructive trust over property, created by the common intention or understanding of the parties regarding the property on the basis of which the claimant has acted to his detriment, [which] has been recognised at least since *Gissing v Gissing* [1971] AC 886 (see particularly Lord Diplock, at p 905).’⁷⁹ Lord Scott emphasised that, as well as relying on proprietary estoppel, David had also claimed ‘an equity “which should be satisfied in such manner as the Court thinks just”’.⁸⁰ This indicates that, contrary to the traditional understanding, Lord Scott sees a distinction between proprietary estoppel and the equitable doctrine under which reliance on a representation raises an equity in favour of a claimant which is to be satisfied as the court sees fit.

Lord Scott’s approach prompts a number of observations. It should first be observed that the *Gissing v Gissing* ‘common intention’ constructive trust is not conventionally regarded as a ‘remedial’ (as opposed to an institutional)

⁷⁵ [2009] UKHL 18, [14]. Lord Scott had begun his speech (*ibid*, [11]) by expressing his ‘broad agreement’ with the reasons put forward by Lord Walker and Lord Neuberger for allowing the appeal.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*, [19].

⁷⁸ *Ibid*, [20].

⁷⁹ *Ibid*.

⁸⁰ *Ibid*, [13].

constructive trust.⁸¹ As Lord Browne-Wilkinson explained in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,⁸² '[u]nder an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it' but, under a remedial constructive trust, 'the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.'⁸³ There has, however, been no suggestion in the case law that the retrospective operation of the common intention constructive trust lies at the discretion of the court. Lord Scott's approach has no apparent relationship with the controversy over the possibility of using the constructive trust as a discretionary 'remedy' for unjust enrichment (an idea which English law has not yet embraced).⁸⁴ With all due respect, his Lordship's use of the heavily freighted term 'remedial constructive trust', while it might quicken the pulse of restitution scholars of a certain theoretical persuasion, seems likely in this context simply to add another layer of confusion.

Secondly, Lord Scott appears to invert the orthodox understanding of the relationship between proprietary estoppel and the common intention constructive trust. The consensus, prior to these two recent House of Lords decisions on estoppel at any rate, has been that proprietary estoppel involves a significant element of discretion at the remedial stage.⁸⁵ The advantage of the common intention constructive trust, from a claimant's point of view, is that the remedy invariably takes the form of a constructive trust over the disputed property, with the shares reflecting those commonly intended by the parties (or, to oversimplify a complex point, the shares which the parties must be taken to have intended).⁸⁶ Thus, in *Hyett v Stanley*,⁸⁷ one sees the defendant (unsuccessfully) seeking to have the case resolved under proprietary estoppel, rather than under common intention constructive trust principles, in the hope

⁸¹ This was recently confirmed in *Qayyum v Hameed* [2009] EWCA Civ 353, [41] *per* Etherton LJ.

⁸² [1996] AC 669.

⁸³ *Ibid*, 714-715.

⁸⁴ See e.g. *Re Polly Peck International plc (in Administration) (No 2)* [1998] 3 All ER 812. Note also *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch), [273]-[274] *per* Etherton J.

⁸⁵ See *Jennings v Rice* [2002] EWCA Civ 159 and the other authorities cited in note 89 below.

⁸⁶ See generally *Stack v Dowden* [2007] UKHL 17.

⁸⁷ [2003] EWCA Civ 942.

that the exercise of the court's discretion will lead to a lesser remedy for the claimant under proprietary estoppel.

Because of his view that proprietary estoppel is truly an 'estoppel', Lord Scott sees it as capable of leading only to the defendant being estopped from denying the truth of a particular statement of fact or of fact and law. This requires Lord Scott to disavow the existence of any remedial discretion in relation to proprietary estoppel (in the teeth of *Jennings v Rice*⁸⁸ and a number of other Court of Appeal authorities⁸⁹ which Lord Scott neither discusses nor attempts to overrule) and to assume that the only possible remedial outcome is that the defendant is estopped from denying the claimant the proprietary interest claimed.⁹⁰ If Lord Scott is not to restrict greatly the scope of proprietary estoppel, he is obliged to reclassify instances of proprietary estoppel which do not fit his theory. Thus, having been pushed down in the context of proprietary estoppel, the discretionary balloon pops up under the heading of the common intention constructive trust, which is now recast as 'remedial' and discretionary. This reclassification raises the unresolved question of what is to happen to the existing (admittedly very unsatisfactory) body of rules known as the common intention trust. While it might indeed be a step forward to collapse the common intention trust into proprietary estoppel, this would involve discarding the independent features of the common intention trust (including its lack of remedial flexibility). However, the House of Lords made no move at all in that direction in the recent case of *Stack v Dowden*,⁹¹ with Lord Walker's previous enthusiasm for a synthesis having cooled.⁹²

A third comment relates to Lord Scott's reliance for support on certain remarks of Judge Nugee QC in *Re Basham*⁹³ where the deputy High Court judge cited *Re*

⁸⁸ [2002] EWCA Civ 159.

⁸⁹ See *Sledmore v Dalby* (1996) 72 P & CR 196; *Gillett v Holt* [2001] Ch 210; *Campbell v Griffin* [2001] EWCA Civ 990; *Ottey v Grundy* [2003] EWCA Civ 1176; *Powell v Benney* [2007] EWCA Civ 1283.

⁹⁰ See further discussion under the heading 'Remedial Issues' below.

⁹¹ [2007] UKHL 17.

⁹² *Ibid*, [37].

⁹³ [1986] 1 WLR 1498.

*Cleaver*⁹⁴ and related authorities on mutual wills (and on secret trusts and comparable doctrines) and asserted that, at least in cases involving a promise of future property, proprietary estoppel 'is properly to be regarded as giving rise to a species of constructive trust'.⁹⁵ The analogy drawn in *Re Basham* with the doctrine of mutual wills appears to have been intended to justify extending proprietary estoppel to cases where the claimant expects an interest, not in identified land, but in the residuary estate of the defendant.⁹⁶ In fact, it is difficult to see how introducing the idea of constructive trusts advances this argument. The conventional position is that the court has a discretion in proprietary estoppel cases in relation to the choice of remedy, so that ultimately the claimant may, or may not, end up acquiring an interest in the property covered by the representation. Therefore, it does not seem necessary or tenable to regard that property as subject to a constructive trust prior to the court's ultimate determination of the remedy, *a fortiori* where the representation covers whatever property the claimant might be left with at the time of his death. Moreover, it should be pointed out that the references in *Re Basham* to constructive trusts have significantly confused the debate on the relationship between proprietary estoppel and the common intention (and other established forms of) constructive trust. Speaking in terms of the constructive trust as a possible remedy for estoppel makes it very easy to confuse (i) an application of pure proprietary estoppel principles leading (on this usage) to the grant of a 'constructive trust' as remedy and (ii) an application of conceptually distinct principles, such as those underlying the common intention trust or the so-called '*Pallant v Morgan* equity',⁹⁷ also leading to the creation of a constructive trust.

In the end, and with great respect, Lord Scott's analysis seems likely only to create unnecessary confusion. It is much simpler merely to recognise that the term 'proprietary estoppel', although well-established, is not to be taken literally.⁹⁸ This obviates the need for a wholesale rearrangement of the doctrines

⁹⁴ [1981] 1 WLR 939.

⁹⁵ [1986] 1 WLR 1498, 1504.

⁹⁶ See the discussion of the issues raised by such cases in the text to and following note 66 above.

⁹⁷ [1953] Ch 43. On this, see e.g. N Hopkins 'The *Pallant v Morgan* "Equity"?' [2002] Conv 35.

⁹⁸ As is pointed out clearly in C Harpum, S Bridge and M Dixon *Megarry and Wade: The Law of Real Property* 7th ed (Sweet and Maxwell, 2008), p 699.

in this area simply in order to make good the 'estoppel' part of the proprietary estoppel label. A case can certainly be made for discarding the common intention constructive trust, and even for abolishing proprietary estoppel,⁹⁹ but these arguments must be considered on their merits rather than in terms of their impact on relatively minor issues of terminology. It is significant that, unlike in *Cobbe*, Lord Scott's views in *Thorner* did not enjoy any support from the other Law Lords and the speech of Lord Walker, with which Lords Rodger and Neuberger expressed agreement, contains a postscript¹⁰⁰ which dissents from one aspect of Lord Scott's position in *Cobbe*, i.e. his curious assertion that proprietary estoppel is a sub-category of promissory estoppel.¹⁰¹

Remedial Issues

Another significant aspect of *Thorner*, in terms of qualifying the impact of *Cobbe*, relates to the remedies for proprietary estoppel. As mentioned above, Lord Scott's explanation in *Cobbe* of proprietary estoppel as a 'true' estoppel has the consequence that the remedy must inevitably be the fulfilment of the claimant's expectation (as reasonably derived from the defendant's representations). However, in *Thorner*, Lord Walker clearly adhered to the more orthodox view that the court has a discretion in terms of the remedy for proprietary estoppel.¹⁰² Lord Walker, unsurprisingly given his contribution in the leading case of *Jennings v Rice*,¹⁰³ had taken the same view in *Cobbe*.¹⁰⁴ As has already been noted, it is apparent in *Thorner* that the balance of support has switched away from the views of Lord Scott to those of Lord Walker, so that it appears to be clear that the court does retain a discretion in relation to proprietary estoppel remedies.¹⁰⁵

Finally, it is worth commenting on the actual remedy in the case, although this was not considered in any detail by the House of Lords. The speeches show no

⁹⁹ See S Gardner *An Introduction to Land Law* (Hart Publishing, 2007) pp 121-122.

¹⁰⁰ [2009] UKHL 18, [67].

¹⁰¹ [2008] UKHL 55, [14].

¹⁰² [2009] UKHL 18, [66].

¹⁰³ [2002] EWCA Civ 159.

¹⁰⁴ [2008] UKHL 55, [55].

¹⁰⁵ Note, however, Lord Neuberger's reference [2009] UKHL 18, [95] to the concept of a 'floating charge' in the context of the issue of certainty in relation to the subject matter of the representation – on one reading, this could provide indirect support for the idea that the remedy must be the fulfilment of the expectation.

concern about the extent of the remedy, with Lord Walker commenting that there was no ground on which to challenge the trial judge's exercise of discretion on this point.¹⁰⁶ The award to David of the farm and associated assets had a net value of 'some £2.1 million'.¹⁰⁷ It may be doubted whether this remedy was truly the minimum necessary to satisfy the equity which had arisen in favour of David and, on one view, could be regarded as disproportionate within the terms of *Jennings v Rice* (which emphasised that an expectation remedy should not be granted if it would be disproportionate to the detriment incurred by the claimant). The remedy amounted to £140,000 tax free for each year of work on the farm since the key 1990 representation. It is clear that David, although extremely hard-working and 'thoroughly decent',¹⁰⁸ was not a hard-headed businessman and it seems unlikely that, if he had devoted his efforts to the other business opportunities which had presented themselves around 1990, he would have amassed anything like £2 million by 2005.

Obviously, the quantification of the remedy in this case was not driven by a desire to offset the claimant's detriment but rather to give effect to his expectation and, by way of justifying this, the first instance judge made the familiar argument that it would be 'a virtually impossible task' to quantify the monetary value of David's contribution over the years.¹⁰⁹ Thus, unsatisfactorily, the claimant is given the highest possible remedy (reflecting his expectation) because of the practical difficulties in calculating the lesser remedy which he might more justly be granted. Though this feature was not emphasised by any of the courts in *Thorner*, it is arguable that the case involved an implicit 'bargain', which under the analysis of Robert Walker LJ in *Jennings v Rice*¹¹⁰ would point in favour of an expectation remedy. However, the 'bargain' analysis does not appear to withstand close analysis.¹¹¹ It is hard to escape the feeling that a factor

¹⁰⁶ [2009] UKHL 18, [66].

¹⁰⁷ [2008] EWCA Civ 732, [27].

¹⁰⁸ [2009] UKHL 18, [53] *per* Lord Walker, reporting the description of him by counsel for the other side.

¹⁰⁹ [2007] EWHC 2422 (Ch), [142] *per* Judge Randall QC.

¹¹⁰ [2002] EWCA Civ 159, [45], [50].

¹¹¹ On this point (and on the remedial question generally), see J Mee 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in M Dixon (ed) *Modern Studies in Property Law* Volume 5 (Hart Publishing 2009, forthcoming). See generally also E Cooke 'Estoppel and the

in the extent of the claimant's remedy was the fact that Peter had never, so far as the courts could tell, deliberately changed his mind and decided to disinherit David.¹¹² However, it seems clear that, as a matter of principle, it should make no difference whether the defendant failed to honour his promise deliberately or through inadvertence.¹¹³ It seems unlikely that the courts would have upheld an attempt by David to hold out for the full satisfaction of his expectation if, on his death-bed, Peter had told him that he had changed his mind about leaving him the farm but would give him (say) £1 million to offset his detriment. If that would have been the case, it would not be possible to justify the far higher award actually made in the case.

Conclusion

Lord Walker pointed out in *Thorner* that the respondents had not attempted to argue that *Cobbe* had 'severely curtailed, or even virtually extinguished, the doctrine of proprietary estoppel (a rather apocalyptic view that has been suggested by some commentators[])'.¹¹⁴ Notwithstanding this remark, it remains true that, if the speeches in *Cobbe* were to be taken seriously, proprietary estoppel would indeed be significantly restricted.¹¹⁵ It would, in fact, be far from the end of the world if some principled restrictions were to be placed on the expansion of the scope of proprietary estoppel, particularly in the context of testamentary promises. It is tempting to assume, when first contemplating the doctrine, that its flexibility is an unalloyed advantage and that, in the realm of equity, it is appropriate for the court to have a broad discretion to do justice

Protection of Expectations' (1997) 17 Legal Studies 258; S Gardner 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 LQR 438 and 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 492; A Robertson 'Reliance and Expectation in Estoppel Remedies' (1998) 18 Legal Studies 360; 'The Reliance Basis of Proprietary Estoppel Remedies' [2009] Conv 295; M Thompson 'The Flexibility of Estoppel' [2003] Conv 225. Note also the extra-judicial contribution of Lord Walker 'Which Side "Ought to Win"? – Discretion and Certainty in Property Law' (2008) 6 Trust Quarterly Review 5.

¹¹² Lord Neuberger emphasised this feature of the case [2009] UKHL 18, [102]; see also *ibid*, [87]-[89]. Note the concern of Lloyd LJ in the Court of Appeal that this factor had overly influenced the trial judge: [2008] EWCA Civ 732, [73].

¹¹³ As pointed out by Lloyd LJ [2008] EWCA Civ 732, [73].

¹¹⁴ [2009] UKHL 18, [31].

¹¹⁵ See, in addition to the discussion earlier in this case note, the work of the commentators to whom Lord Walker referred: B McFarlane and A Robertson 'The Death of Proprietary Estoppel?' [2008] LMCLQ 449; T Etherton 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle' [2009] Conv 104, 116-120.

between the parties who appear before it. However, further reflection leads to serious doubts.

It is obvious that, as Lord Walker emphasised in *Cobbe*, 'the courts should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel.'¹¹⁶ However, even in the family context, there is plenty of room for concern (and, in any case, it is questionable whether the precise boundary between 'family' and 'commercial' cases can be identified reliably). The existence of an open-ended discretionary estoppel jurisdiction may lead to family quarrels becoming exponentially more bitter through a descent into litigation. A family member who feels ill-used upon a relative's death may be inclined to swallow his disappointment and get on with his life until he learns of the possibility that, if the court sees things his way, he may obtain a remedy against the other people in the family. The issues discussed in this case note demonstrate that a great deal depends on the court's response to highly subjective issues. Moreover, the uncertainty surrounding the conceptual basis of a claim in proprietary estoppel, including the failure of the courts to date to deal adequately with the issue of remedies, makes it very difficult for the parties to avoid the expense and trauma of a court hearing by reaching an amicable settlement.

Thus, there would be much to be said for a more rigorous approach to proprietary estoppel, which would preserve its beneficial aspects but would confine its scope within defensible limits. Unfortunately, however, this objective is easier to state than to achieve. While the House of Lords may have been attempting something along these lines in *Cobbe*, the quality of the reasoning in that case was, with all due respect, disappointing and *Thorner* appears to show a clear retreat from the most contentious aspects of the earlier decision. In fact, even though Lord Scott was probably right in *Cobbe* to fear that proprietary estoppel was in danger of 'becoming unprincipled and therefore unpredictable',¹¹⁷ the practical consequence of the case and its sequel, *Thorner*,

¹¹⁶ [2009] UKHL 18, [81].

¹¹⁷ [2008] UKHL 55, [28].

may be further growth in the doctrine, particularly in the (broadly defined) family context. Lord Hoffman enlivened his speech in *Thorner* with a quote from Hegel: 'The owl of Minerva spreads its wings only with the falling of the dusk'.¹¹⁸ However, in terms of the impact of *Cobbe* and *Thorner* on the development of proprietary estoppel, the more apposite quote may come from Nietzsche: 'What does not kill me, makes me stronger.'¹¹⁹

¹¹⁸ From the preface to *The Philosophy of Right* (1820), quoted by Lord Hoffman [2009] UKHL 18, [8] to make the point that subsequent events were relevant to an assessment of whether it was reasonable for David to have relied on Peter's representations.

¹¹⁹ From *Twilight of the Idols* (1888).