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Thorner v Major (2009): Proprietary Estoppel and Inheritance

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In Franz Kafka's novel, *The Castle*, the protagonist struggles to be admitted to a mysterious castle with an impenetrable bureaucracy. At one point he meets an official named Burgel, who explains that if, by some improbable coincidence, a party manages to surprise at night the one official who is authorised to deal with his case, his plea will be granted:

> You just have to picture the situation correctly. Sitting there is the party whom one has never seen, always awaited, awaited with genuine thirst ... Through his silent presence alone, he invites one to invade his poor life ... On a quiet night an invitation like that is enchanting. One accepts it and has then actually ceased to be an official. The situation then is such that it soon becomes impossible to turn down a request. Strictly speaking, one is desperate, and speaking even more strictly, quite happy. Desperate, for the vulnerability with which one sits there waiting for the party's plea, knowing that one must grant it as soon as it is uttered, even if it should ... literally tear apart the official system[.][1]

In respect of challenges to a testator's decisions about his or her property, it also seems to make a considerable difference how the claim is put. It is rather difficult, for example, to challenge a will on the basis of undue influence[2] or on

[*] I am grateful for the comments of Professor Mary Donnelly and Professor Ben McFarlane, as well of the participants in the workshop associated with this volume. An earlier version of this paper was given at 'Wealth, Families and Death: Socio-Legal Perspectives on Wills and Inheritance', a workshop held in the International Institute for the Sociology of Law, Oñati, Spain, 25-26 April 2013. The usual caveats apply.

[1] *The Castle*, first published 1926; (Schocken Books, New York, 1998; translated by M Harman) 269.

[2] The equitable doctrine of undue influence (which governs challenges to transactions between living people) does not apply and instead the courts apply a 'probate' version of the doctrine, the requirements of which 'are more onerous and are not well known': P Ridge, 'Equitable Undue Influence and Wills'

the basis that the testator lacked the requisite mental capacity.[3] It is also far from easy for an adult child (or other adult who is not the spouse or cohabitant) of the deceased to make a successful claim under the Inheritance (Provision for Family and Dependants) Act 1975, the legislation that allows family members and dependants to seek increased provision from a deceased person's estate.[4] If, however, the claimant is able to take the alternative route of relying on an expectation of inheritance created by the deceased, allowing him or her to rely on the equitable doctrine of proprietary estoppel, he or she may be able to free himself or herself of the inconvenient limits that restrict other types of claim. As will emerge in the course of this chapter, although the case is not quite a decade old at the time of writing, *Thorner v Major* seems clearly to represent a landmark in this area of the law, having consolidated the role of proprietary estoppel as a potential restraint on freedom of testation.[5] The chapter focuses primarily on the law of England and Wales but – as an illustration of the

(2004) 120 LQR 617, 621. On another potential invalidating feature, see B Sloan, 'Burdens, presumptions and confusion in the law on want of knowledge and approval' [2017] *Conveyancer & Property Lawyer* 440. For further discussion of testamentary undue influence and the requirement of knowledge and approval, see Law Commission *Making a Will* (Consultation Paper 231, 2017) 130–162.

[3] Note *Banks* v *Goodfellow* (1870) LR 5 QB 549, where a will was upheld although the testator's suffered from 'certain fixed delusions' involving evil spirits. This landmark case is discussed in Juliet Brook's chapter in this volume. See also Law Commission (n 2) 18–48, and text to (nn 117–121).

[4] Note the recent Supreme Court decision in *Ilott v The Blue Cross* [2017] UKSC 17, [2017] 2 WLR 979, discussed in Brian Sloan's chapter in this volume. The claimant in the case, who was the daughter of the testatrix, obtained an award of £50,000 out of a net estate valued at £486,000. Some indication of the greater prospects offered by proprietary estoppel is provided by the fact that the claimant in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 was awarded a farm worth over £2million (representing 75% of the intestate's estate), although he was only the first cousin once removed of the intestate. Note also the New Zealand's Law Reform (Testamentary Promises) Act 1949, discussed by Nicola Peart in her chapter in this volume.

[5] See generally the thoughtful discussion in B McFarlane, 'Proprietary Estoppel: Undermining the Law of Succession?' in B Häcker and C Mitchell (eds), *Current Issues in Succession Law* (Oxford, Hart Publishing, 2016). McFarlane suggests (ibid 77–78) that, rather than 'undermin[ing] the law of succession', the law of proprietary estoppel 'supports the continued existence of [the strict rules of succession law] by ensuring that they do not become a source of palpable injustice'. Note, however, that McFarlane emphasises that, in order for it to play the role he envisages for it, 'the doctrine must be carefully limited' (ibid 77).

landmark status of the case in other jurisdictions – it also makes some reference to its impact in Irish law.

In exploring the relevant issues, this chapter emphasises the role played by narrative in this area of the law.[6] Story-telling is relevant, in the first instance, in terms of the stories constructed by the courts, (and indeed by the media in reporting the cases), from the narrative provided by claimants and their lawyers. While an adult child claiming under the Inheritance (Provision for Family and Dependants) Act 1975 will most likely have to rehearse the unglamorous part of 'lame duck',[7] rather more archetypal roles and stories are available in the estoppel context. Of course these stories are immanent in the facts underlying these real life disputes but there is particular scope for them to shape the ultimate result where one is dealing with the application of a very open-ended equitable doctrine.

Another aspect of the role of narrative in the area under discussion relates to the stories that equity tells about itself and the narratives by reference to which equitable intervention is justified in the specific context of proprietary estoppel. All legal systems, including the large number that do not recognise a separate body of law known as 'equity', must address the danger that the universality of legal norms may lead to injustice in individual cases. What is special about common law systems is that the impulse toward particularised justice is reified as a distinct set of rules called 'equity'. When applying 'equity', judges may feel that they have a special permission and obligation to put aside the generally applicable rules and resolve the dispute before them on a more intuitive and non-technical basis. As Lord Denning, who did a fair deal of

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[6] See generally, RM Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4; JB Baron, 'The Many Promises of Storytelling in Law' (1991) 23 *Rutgers Law Journal* 79; DA Farber and S Sherry, 'Telling Stories Out of School: An Essay on Legal Narratives' (1993) 45 *Stanford Law Review* 807. For more recent examples focusing on specific areas of the law, see HW Tang, 'Storytelling in the Law of Unjust Enrichment' in A Robertson and HW Tang, (eds) *The Goals of Private Law* (Oxford, Hart Publishing, 2009); J Benjamin 'The Narratives of Financial Law' (2010) 20 OJLS 787; E Porter 'Gendered Narratives: Stories and Silences in Transitional Justice' (2016) 17 *Human Rights Review* 35.

[7] R Kerridge with AHR Brierley, *Parry and Kerridge: The Law of Succession*, 13th edition (London, Sweet & Maxwell 2016) [8.62].

violence to the law in the name of equity, commented in a proprietary estoppel case, 'Equity comes in, true to form, to mitigate the rigours of strict law.'[8]

In *Thorner v Major*, the House of Lords gave approval, at the highest level of the judicial system, to the vision of proprietary estoppel that had been developed in a series of lower court cases. This vision involves, to an extent, the celebration of the rejection of principled analysis, and the fetishising of 'flexibility'. The justificatory narrative here draws upon the Greek myth of Procrustes, son of Poseiden, who invited passing travelers to stay with him. If the guest was too short for his iron bed, Procrustes stretched him to fit; if he was too tall, Procrustes chopped off his feet. In a highly influential modern statement of the theoretical basis of proprietary estoppel, Oliver J rejected the idea of forcing proprietary estoppel 'into a Procrustean bed constructed from some unalterable criteria'.[9] In fact, the label 'proprietary estoppel' subsumes a number of distinct principles – acquiescence in another's mistake, resiling from a promise, and denying the truth of one's previous representation of fact.[10] Oliver J's unfortunate method of sidestepping this complexity was to state a unifying principle of 'unconscionability', pitched at a sufficiently high level of generality that it could cover all three distinct principles.[11] Reliance on this shapeless concept has created much confusion in the law of proprietary estoppel[12] but it also leaves a wide scope for claimants to weave attractive narratives to support their attempt to override the testator's exercise of his testamentary freedom. While highlighting the importance of narrative in this area of the law, this chapter's sympathies are with the idea of a more cautious

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[8] *Crabb v Arun UDC* [1976] Ch 179 (CA) 187. Contrast PBH Birks 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) *University of Western Australia Law Review* 1, 22: 'One large-scale danger to the rationality of our law lies in the exaggeration of the historical mission of equity to do justice, as though it had some special licence to ignore the requirements of legal certainty.'

[9] *Taylors Fashions v London Victoria Trustees Ltd* [1982] 1 QB 133n, 154.

[10] See text to (nn 38-39).

[11] [1982] QB 133n, 151–152: 'a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment'.

[12] Note eg the failure of the House of Lords in *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 to grasp the basics of the doctrine. See the text to (nn 59−61).

and rigorous approach to equitable intervention in cases fitting within the fact pattern of *Thorner v Major*.

The structure of the chapter is as follows. The next section will explain the facts of *Thorner v Major*. The section after that attempts to set *Thorner* in its wider context, discussing the requirements of proprietary estoppel and the role of that doctrine in the context of succession law. This is followed a discussion of a leading Irish case that was heavily influenced by *Thorner*, *Naylor v Maher*,[13] the facts of which raise interesting issues concerning the proprietary estoppel jurisdiction as shaped by *Thorner*. Next, consideration is given to the significance of *Thorner*, including an examination of the potential impact of the case on freedom of testation. Finally, some concluding observations are offered, reflecting in general terms on the impact of *Thorner* as a landmark decision in this area of the law of succession.

I. The Story of *Thorner v Major*[14]

The main characters in *Thorner* were two Somerset farmers. They were 'taciturn and undemonstrative men committed to a life of hard and unrelenting physical work … largely unrelieved by recreation or female company'.[15] Since 1976, David Thorner had worked long hours without pay on the farm of Peter Thorner, his father's first cousin. Peter was 'a man of few words … who hardly ever spoke in direct terms'[16] and the representations relied upon by David were very oblique. In 1990, Peter handed David a document related to two insurance policies, saying 'That's for my death duties'. David interpreted this as an indication that he would inherit the farm. He had been considering various other opportunities at around this time but decided that his future lay with Peter's farm. Later remarks by Peter confirmed David in his expectation of inheritance. As the first instance judge explained:

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[13] *Naylor v Maher* [2012] IEHC 408; [2018] IECA 32.

[14] For a doctrinal analysis of the case, see J Mee 'The Limits of Proprietary Estoppel: *Thorner v Major*' [2009] *Child & Family Law Quarterly* 367.

[15] [2009] UKHL 18 [59] (Lord Walker).

[16] [2007] EWHC 2422 (Ch) [94] (Judge Randall QC).

> Peter would point out to him little things about the farm which would only be of relevance to someone … who would be there after Peter had gone, and the undocumented knowledge in his head was no longer available. … One such remark was when Peter made a point of drawing to David's attention a cattle trough which, he explained to him, never froze up in winter.[17]

Some of these indications were given in front of other people.[18] 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 would have received nothing under the intestacy rules, and Peter's property would instead have gone to blood relations (sisters and nieces) to whom he was not close. David relied on the doctrine of proprietary estoppel. He was successful at first instance, and was awarded the farm and the other assets of the farming business.

This decision was overturned by the Court of Appeal.[19] Lloyd LJ felt that:

> there are dangers unless the established requirements of proprietary estoppel are applied with a certain degree of rigour of analysis. Otherwise not only the strict requirements of the Wills Act as to how to give effect to testamentary intentions, but also the basic proposition of freedom of testamentary disposition, might be subverted.[20]

While he acknowledged that 'David had a strong moral claim to inherit Peter's farm', Lloyd LJ concluded that, if David's claim were permitted to succeed, 'the ingredients of proprietary estoppel in such cases would have been diluted in such a way as to create a dangerous precedent.'[21] However, the first instance decision was unanimously reinstated on appeal to the House of Lords.

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[17] ibid [98] (Judge Randall QC), quoted by Lord Walker [2009] UKHL 18 [43].

[18] [2007] EWHC 2422 (Ch) [128] (Judge Randall QC).

[19] [2008] EWCA Civ 732.

[20] ibid [69].

[21] ibid [75].

The main doctrinal obstacle to David's argument was that there had been no clear-cut promise that he would inherit the farm. However, the first instance judge, and ultimately the House of Lords, emphasised the personality of the parties and the indirect way in which they, and other farmers in the area, were wont to communicate with each other. This reticence seems to be prevalent in other rural areas, since an Irish judge has also commented on 'that natural courtesy (which John Millington Synge[22] associated with the west of Ireland) which often results in an unwillingness to pursue discussion to a logical and perhaps harshly expressed commercial conclusion'.[23] The trial judge in *Thorner* was, according to Lord Walker, 'sensitive to the complexities of human nature'.[24] Lord Neuberger felt that:

> [I]t would be quite wrong to be unrealistically rigorous when applying the 'clear and unambiguous' test [in respect of the requirement of a representation]. The court should not search for ambiguity or uncertainty, but should assess the question of clarity and certainty practically and sensibly, as well as contextually.[25]

A related problem was that any promise that had been (obliquely) made was likely to have been intended to be conditional to some extent. However, Lord Walker noted the observation of Hoffmann LJ in *Walton v Walton*[26] that proprietary estoppel 'looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept.'[27] As Lord Hoffmann (as he had then become) commented enigmatically, in a

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[22] Irish dramatist, author of 'The Playboy of the Western World' (first performed, causing a riot, in 1907).

[23] *McCarron v McCarron* unreported, Irish Supreme Court, 13 February 1997, p 9 of the transcript (Murphy J). Finding, on facts somewhat similar to those in *Thorner v Major*, that an enforceable contract had been created, Murphy J noted (ibid) that 'in some, particularly rural areas, a meeting of minds can be achieved without as detailed discussion as might be necessary elsewhere'.

[24] [2009] UKHL 18 [32].

[25] ibid [85].

[26] *Walton v Walton*, unreported, Court of Appeal, 14 April 1994.

[27] ibid [19]-[21], quoted by Lord Walker in *Thorner v Major* [2009] UKHL 18 [56].

somewhat different context, in *Thorner*: 'The owl of Minerva spreads its wings only with the falling of the dusk.'[28] The effect of this reasoning is that liability can attach to the breach of promises that, because they are subject to complex unspoken qualifications and conditions, would be too uncertain to attract contractual liability.[29]

The trial judge exercised his discretion in relation to the remedial question to grant David the farm and associated assets and this was not seriously challenged in the House of Lords. Although the speeches in the House of Lords did not put a precise value on the award, in the Court of Appeal it was described as having a net value of 'some £2.1 million'.[30] A newspaper report of the House of Lords decision put the value of the assets obtained by David at £2.3 million, subject to an inheritance tax bill of around £300,000.[31] Taking its value as £2 million after tax, the remedy amounted to a generous £133,333 after tax for each year of work on the farm since the key 1990 representation. David was clearly extremely hard-working and 'thoroughly decent',[32] but it seems speculative to suggest that, if he had devoted his efforts to the other business opportunities which were available to him around 1990, he would have amassed anything like £2 million by 2005.

David came across as a 'painfully honest witness', impressing the trial judge 'very favourably'.[33] He had worked for over thirty years without payment on Peter's farm (although roughly half of this period pre-dated any promise of inheritance). In addition to his work on Peter's farm, he also worked on his father's farm. The trial judge refers a stage when was working 18 hours a day, 7 days a week. Yet '[d]espite working such punishing hours, David lived off what

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[28] [2009] UKHL 18 [8], using this phrase from the preface to GWF Hegel's *The Philosophy of Right* (1820) to make the point that: '[p]ast events provide context and background for the interpretation of subsequent events and subsequent events throw retrospective light upon the meaning of past events.'

[29] See B McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Oxford, Hart Publishing, 2015).

[30] [2008] EWCA Civ 732 [27].

[31] L Salkeld, 'Labourer is handed £2.3 million farm where he worked unpaid for 25 years' *Daily Mail* (25 March 2009). On the question of whether proprietary estoppel awards attract inheritance tax, see B McFarlane, *The Law of Proprietary Estoppel* (Oxford, OUP, 2014) 598-601.

[32] [2009] UKHL 18 [53] (Lord Walker), reporting the description of him by counsel for the other side.

[33] [2007] EWHC 2422 (Ch) [20] (Judge Randall QC).

he was not embarrassed to call "pocket money" given to him by his parents'.[34] One witness mentioned that he had 'never met a more trustworthy man or a harder worker'.[35] Even if there had been no promise of inheritance by the deceased, many would regard it as a desirable result if the succession law rules could somehow be overturned so as to favour David. Therefore, it is not surprising that the qualms of the Court of Appeal were swept aside and the House of Lords brought the story to a happy conclusion by granting the farm to the decent and guileless claimant.[36]

II. Setting *Thorner* in Context

A. The Requirements of Proprietary Estoppel

The doctrine of proprietary estoppel, the application of which is not limited to the succession context, can be traced back to the decision of the House of Lords in *Ramsden v Dyson*.[37] As the current author has suggested elsewhere,[38] it is possible to identify three distinct principles that have been (somewhat arbitrarily) grouped together under the heading of proprietary estoppel. This line of argument has been further developed by Ben McFarlane in *The Law of*

[34] ibid [68].

[35] ibid [63].

[36] Note that counsel for the claimant in the recent case of *Gee v Gee* [2018] EWHC 1393 (Ch) [28], sought to fit his client into the mould of David Thorner, portraying that client as 'a countryman without guile or sophistication', who had answered certain questions 'in an entirely artless manner'. A postscript to the story of *Thorner v Major*, which does not reflect badly on David's character but which does seem to disrupt the expected flow of the narrative, is that he sold the farm to Sainsbury's, which in May 2014 obtained planning permission to build a supermarket with a sales area of 23,000 square feet: B McFarlane, *The Law of Proprietary Estoppel* (n 31) 2. In October 2015, Sainsbury's announced that they were abandoning the plan: http://cheddarvillage.co.uk/sainsburys-statement-regarding-steart-farm/ and, in June 2018, they instead sought outline planning permission to build 60 houses on the site: www.thewestonmercury.co.uk/news/sainsbury-s-hopes-to-build-60-houses-in-cheddar-1-5554375.

[37] *Ramsden v Dyson* (1866) LR 1 HL 129.

[38] 'Proprietary Estoppel, Promises, and Mistaken Belief' (n 10) 181–183.

Proprietary Estoppel.[39] The principle that is likely to be relevant in the type of case under discussion has been described by McFarlane as the 'promise-detriment' principle (and has also been called the 'expectation limb' of proprietary estoppel). In order to be successful under this principle, the claimant must show that:

(1) The defendant made a promise (or an 'assurance' or 'representation') that the claimant would become entitled to an interest in land, or other identified property, belonging to the defendant;[40] and
(2) the claimant has changed his position in reliance on the promise
(3) in a way that would be to his detriment if the promise were not fulfilled.

An 'equity' is then said to arise in favour of the claimant which the court must decide how best to satisfy.

Unlike in relation to promissory estoppel,[41] it is not the case that proprietary estoppel is 'a shield not a sword'.[42] Therefore, a wide range of remedies are possible, including eg obtaining the ownership of the disputed property or being granted a monetary remedy or being allowed an indefinite licence to occupy land. The obligation of the court has traditionally been seen as to grant the minimum remedy necessary to satisfy the equity. However, in practice, the courts have tended to require the defendant to fulfill his promise or, in other words, to give effect to the claimant's expectation as reasonably derived from the defendant's promise. Following *Jennings v Rice*,[43] it has been accepted that the expectation remedy is the starting point but that, if such a

[39] (Oxford, Hart Publishing, 2014), ch 1. See also B McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 *Current Legal Problems* 267; B McFarlane and P Sales 'Promises, Liability, and Detriment: Lessons from Proprietary Estoppel' (2015) 131 LQR 610.

[40] On balance, it can be concluded that the House of Lords in *Thorner* confirmed the need for a promise, rather than a representation that did not amount to a commitment: see Mee, 'The Limits of Proprietary Estoppel' (n 14) 370–372.

[41] This doctrine, often seen as part of the law of contract, grew from the decision of Lord Denning (then Denning J) in *Central London Property Trust v High Trees House Ltd* [1947] KB 130.

[42] This frequently invoked metaphor is intended to convey the fact that the doctrine can only be used in a defensive manner and cannot, of itself, constitute a cause of action.

[43] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501.

remedy would be disproportionate to the detriment incurred by the claimant, the court will choose an alternative remedy.[44]

B. Proprietary Estoppel and Inheritance[45]

It was not until comparatively recently that the promise-detriment principle was applied in the context of promises of succession. In *Taylor v Dickens*,[46] judicial concern was expressed on the basis that a will is, of its nature, revocable,[47] so that potential claimants should be aware that the testator might change his or her mind. In *Taylor*, the claimant's wife 'gave evidence that on no less than three occasions she told him not to count his chickens before they were hatched' in respect of his expectation of inheriting from a woman for whom he worked as a gardener and handyman.[48] Rejecting the claim, HHJ Judge Weeks warned of the dangers if one were to 'forget the law of contract and issue every civil judge with a portable palm tree'[49] (to facilitate the dispensing of discretionary 'palm tree' justice). However, this cautious approach was not accepted in later judgments.[50] Claimants were successful on the basis of promises of inheritance in a series of cases including *Re Basham*,[51] *Wayling v Jones*,[52] and *Gillett v Holt*.[53] This trend was consolidated in *Thorner v Major*.

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[44] For more detailed discussion of the remedial issue, see J Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in M Dixon (ed), *Modern Studies in Property Law: Vol 5* (Oxford, Hart Publishing, 2009).

[45] See generally A Braun 'Formal and Informal Testamentary Promises: A Historical and Comparative Perspective' (2012) 76 *Rabels Zeitschrift fur Auslandisches und Internationales Privatrecht* 994.

[46] *Taylor v Dickens* [1998] 1 FLR 806 (Ch).

[47] See *Vynior's Case* (1609) 8 Co Rep 81b, 82a.

[48] [1998] 1 FLR 806 (Ch) 822. Compare the comment of Carnwath J at first instance in *Gillett v Holt* that it would be odd if 'the plaintiff's proprietary rights should be diminished merely because he was unfortunate enough to have a wife who (as in *Taylor v Dickens)* regularly reminded him "not to count his chickens before they were hatched"': [1998] 3 All ER 917 (Ch) 929.

[49] [1998] 1 FLR 806 (Ch) 820. Note also D Hayton, 'By-passing Testamentary Formalities' [1987] CLJ 215.

[50] As noted by Robert Walker LJ in *Gillet v Holt* [2001] Ch 210 (CA) 227, *Taylor v Dickens* was compromised on appeal.

[51] *Re Basham* [1986] 1 WLR 1498 (Ch).

[52] *Wayling v Jones* [1995] 2 FLR 1029 (CA).

[53] *Gillett v Holt* [2001] Ch 210 (CA).

There have been parallel developments in the law of proprietary estoppel in Ireland, exemplified by *Naylor v Maher*[54] (which is discussed further below), as well as in other common law jurisdictions such as Australia.[55]

III. The Significance of *Thorner*

A. *Thorner* as Landmark

There are at least two senses in which *Thorner v Major* counts as a landmark case. First, it is the only decision of the House of Lords/Supreme Court to uphold a claim on the basis of the promise-detriment principle. In the 19th century case generally cited as the origin of proprietary estoppel, *Ramsden v Dyson*,[56] the majority of the House of Lords did not recognise the promise-detriment principle. Instead, the principle considered was what has later been described as 'the mistake limb' of proprietary estoppel, which is triggered when the defendant sees that the claimant is improving the defendant's land, in the mistaken belief that it belongs to the claimant, and the defendant fails to intervene.[57] The only mention in *Ramsden* of a principle that might correspond to the promise-detriment principle occurs in the brief dissenting speech of Lord Kingsdown. As the current author has pointed out elsewhere, there is an element of rewriting history in the conventional account of the development of proprietary estoppel, which suggests that Lord Kingsdown dissented only on the facts, so that it can be assumed that the rest of the House of Lords regarded the promise-detriment principle as part of the law.[58] On a fair view, *Thorner* represents the first acceptance by the House of Lords of that principle.

Secondly, *Thorner* is significant because it followed closely upon another House of Lords case, *Yeoman's Row Management Ltd v Cobbe*,[59] which – in the context of a commercial dispute not involving any promise of inheritance –

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[54] *Naylor v Maher* [2012] IEHC 408; [2018] IECA 32.

[55] See eg *Delaforce v Simpson-Cook* [2010] NSWCA 84.

[56] (1866) LR 1 HL 129.

[57] For discussion of this doctrine, see K Low, 'Nonfeasance in Equity' (2012) 128 LQR 63. Note that the claim based on this principle was unsuccessful in *Ramsden*.

[58] Mee, 'Proprietary Estoppel, Promises, and Mistaken Belief' (n 10) 184–186.

[59] [2008] UKHL 55, [2008] 1 WLR 1752.

took a very restrictive view of the scope of the promise-detriment principle. The factual basis of the claim in *Cobbe* was weak and it was justifiably rejected. Unfortunately, however, the speeches in the case were unsatisfactory, with both Lord Scott and Lord Walker stating the law in confused and restrictive terms.[60] This led some commentators to question whether *Cobbe* signaled the 'death of proprietary estoppel'.[61] In *Thorner*, however, the House of Lords essentially ignored the restrictive aspects of *Cobbe*, with Lord Walker referring dismissively to the 'rather apocalyptic view that has been suggested by some commentators' to the effect that *Cobbe* had 'severely curtailed, or even virtually extinguished, the doctrine of proprietary estoppel'.[62] Despite the tone of Lord Walker's remarks, it is difficult to deny that *Cobbe* had departed from the approach that had been developed by the lower courts in the preceding case law, so that *Thorner* takes on added importance as an authority at the highest level which discounts the restrictive approach of *Cobbe*.

B. *Thorner* as High-Water Mark

In a rather different sense, *Thorner* is significant in the development of the expectation limb of proprietary estoppel because the case seems to represent a high-water mark in terms of generosity in relation to the key requirement of a promise or assurance by the defendant. It will be recalled that Peter Thorner never made an explicit promise to David that he would inherit the farm. Instead, the requirement of a promise or assurance was held to be satisfied on the basis of oblique statements. The first instance judge, whose view was upheld by the House of Lords, relied strongly on the fact that the parties were taciturn and undemonstrative. The argument was essentially that, if Peter had wanted to make a promise to David, he would not have made it in express terms but would have conveyed his meaning indirectly. Peter's lack of directness was illustrated in evidence by the example that 'when Peter said "What are you

[60] For detailed discussion, see Mee (n 58) 177–188.

[61] See 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] *Conveyancer & Property Lawyer* 104, 116–20.

[62] [2009] UKHL 18 [31].

doing tomorrow?" he generally meant "Would you come and help me tomorrow?"'[63]

However, it is arguable that there was more to the matter than the fact that Peter was 'a man of few words'.[64] Why assume that Peter's cautious mode of expression was a purely verbal phenomenon and did not reflect a more general reluctance to commit himself, making it unlikely that he would promise to leave the farm to David with no possibility of changing his mind? It seems significant that the example of Peter's obliqueness mentioned earlier in the previous paragraph is also an illustration of his expectation that others would accommodate themselves to his requirements. The first instance judge referred to 'Peter's apparent ability to secure unpaid help on Steart Farm from quite a number of people' (although he did not regard Peter's conduct as cynical),[65] and one witness commented that 'as long as Peter was breathing he would always be in charge'.[66] It is quite possible to interpret Peter's words and actions to have meant, in effect: 'I am currently planning to leave the farm to you and, in light of this, I expect you to work without pay to help me. But, of course, I'll change my mind if I choose. It's my farm.' On this view, it would not have been reasonable for David, in light of his knowledge of Peter's character, to interpret Peter's words and conduct as amounting to a promise that would put it out of Peter's power to exert any more control over the situation. If Peter had really done no more than convey his current (revocable) intention to leave the farm to David and to demand that David continue to work for him for free, no remedy under the promise-detriment principle should have arisen in David's favour.

It may be true that the appellate courts in *Thorner* had limited scope to interfere with the holding in favour of David because the first instance judge had found as a fact (or at least as an inference from the basic facts) both that Peter had indirectly promised that he would leave the farm to David, and that it was reasonable for David to have relied on that promise.[67] However, in terms

[63] [2007] EWHC 2422 (Ch) [32].

[64] ibid [31].

[65] ibid [33].

[66] ibid [40].

[67] See [2009] UKHL 18 [6] (Lord Hoffmann); [17] (Lord Scott); [27] (Lord Rodger); [60] (Lord Walker); [76]–[83] (Lord Neuberger).

of the future impact of the case, it probably does not greatly matter if its result is explicable on the basis of the first instance judge's interpretation of the unusual facts of the case. The message likely to be taken by lower court judges in future cases is that a claim can succeed even if the evidence of a promise is uncertain or indirect. This was a concern for Lloyd LJ in the Court of Appeal but the House of Lords was dismissive of his argument that the requirements of proprietary estoppel had to be applied with 'a certain degree of rigour of analysis'.[68] Lord Walker commented that:

> 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.[69]

However, it is arguable that Lord Walker's remarks betray a naivety about the practical effect of the decision in *Thorner* on the likelihood that a disappointed (non-) beneficiary in a broadly analogous fact-situation will bring a claim based on proprietary estoppel. There have been at least 23 cases since *Thorner* involving proprietary estoppel claims based on promises of inheritance, with seven of these being decided in 2018 alone.[70] In terms of a snowballing effect, it is interesting to note that the claimant in the recent case of *Habberfield v*

[68] [2008] EWCA Civ 732 [69].

[69] [2009] UKHL 18 [60].

[70] See *Moore v Moore* [2018] EWCA Civ 2669; *Gee v Gee* [2018] EWHC 1393 (Ch); *Thompson v Thompson* [2018] EWHC 1338 (Ch); *Dobson v Griffey* [2018] EWHC 1117 (Ch); *Culliford v Thorpe* [2018] EWHC 426 (Ch); *Habberfield v Habberfield* [2018] EWHC 317 (Ch); *James v James* [2018] EWHC 43 (Ch). The older cases are: *Ritchie v Joshlin* [2009] EWHC 709 (Ch); *Gill v Woodall* [2009] EWHC 3778 (Ch) (aff'd on different grounds: [2010] EWCA Civ 1430); *Macdonald v Frost* [2009] EWHC 2276 (Ch); *Clarke v Meadus* [2010] EWHC 3117 (Ch); *Cook v Thomas* [2010] EWCA Civ 227; *Shirt v Shirt* [2010] EWHC 3820 (Ch); *Murphy v Rayner* [2011] EWHC 1 (Ch); *Webster v Ashcroft* [2011] EWHC 3848 (Ch); *Suggitt v Suggitt* [2012] EWCA Civ 1140; *Bradbury v Taylor* [2012] EWCA Civ 1208; *Turner v Phythian* [2013] EWHC 499 (Ch); *Creasey v Sole* [2013] EWHC 1410 (Ch); *Wright v Waters* [2014] EWHC 3614 (Ch); *Rawlings v Chapman* [2015] EWHC 3160 (Ch); *Davies v Davies* [2014] EWCA Civ 568 and [2016] EWCA Civ 463; *McGuinness v Preece* [2016] EWHC 1518 (Ch).

Habberfield[71] explained that she had been 'unaware that a claim of this kind could be brought until … she heard about a newspaper article concerning the *Davies v Davies* case'.[72]

This kind of case typically involves a change of mind (a point that will be explored further later in this chapter), so that there will usually have been a long period in which it was envisaged that the claimant would be the one to inherit. In light of this, it is arguable that it will nearly always be possible for a claimant to cobble together some remarks, or alleged remarks, made over the years by the deceased defendant which a sympathetic court can construe as amounting to the necessary promise. An example is provided by another 2018 case, *Gee v Gee*,[73] where the claimant pleaded 'six particular representations',[74] none of which was very impressive.[75] In response to counsel's argument that these representations were 'a thin basis for a proprietary estoppel claim',[76] Birrs J responded that:

> Counsel is right to emphasise that this is only a very few instances spread over a long period of time. However the claimant explained that these were not the only instances which he thought had occurred, rather he was sure his father had given him the assurance he contended for and these were the particular incidents he could now remember.[77]

The fact that a claimant has convinced himself that he has received an assurance, even if he cannot remember the details, does not seem to be a secure basis for interfering with a testator's intended disposition of his property.

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[71] *Habberfield v Habberfield* [2018] EWHC 317 (Ch).

[72] ibid [81], referring to *Davies v Davies* [2016] EWCA Civ 463 (see also [2014] EWCA Civ 568).

[73] [2018] EWHC 1393 (Ch).

[74] ibid [21].

[75] For example, on one occasion (ibid) 'there was a discussion between various farmers about the inheritance of their farms and [D] agreed, within [C]'s hearing, that such farms should pass to the son who stayed on the farm and worked and farmed there'.

[76] ibid [111].

[77] ibid.

The effect of overly generous treatment of claims would be to subvert the wishes of the deceased by depriving his or her intended beneficiaries of their inheritance, as well as to increase the likelihood of divisive litigation whenever a family member feels aggrieved at his or her treatment by the deceased.[78] An example of a case which suggests that the law may indeed have gone too far is provided by *Suggitt v Suggitt*[79] ('Prodigal son wins £3m in battle over farmer's will').[80] John Suggitt, the successful claimant in this case, was 29 years old when his father died. His claim 'depended almost entirely on oral statements made by Frank [the father]', who was dead and not in a position to contradict his assertions (although those assertions were contradicted by what Frank had told third parties). John was not 'a very reliable witness' and 'he frequently did not answer the questions asked, tended to exaggerate, be argumentative, self-serving and evasive in his answers'.[81] John's evidence as to the promises made was 'opaque to say the least'.[82] In relation to the issue of reliance, the trial judge regarded 'John's case and evidence in support as weak'.[83] On the question of detriment, the work John claimed to have done was 'barely, vaguely and weakly particularised';[84] John was 'a disappointment to his father'[85] and was apparently regarded by him as 'lazy'.[86] He failed to finish a course paid for by his father at an agricultural college. Later, he had 'effectively run away to York and spent his inheritance'[87] of £38,000 from a great aunt before returning to

[78] Compare D Hacker 'Disappointed "Heirs" as a Socio-Legal Phenomenon' (2014) 4(2) *Oñati Socio-legal Series* 243.

[79] *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] WTLR 1607.

[80] See C Brooke 'Prodigal son wins £3m in battle over farmer's will: Sister loses appeal to her "lazy" brother', *Daily Mail* (online), 21 June 2012. For a detailed critique of the case (on which this paragraph draws), see J Mee, 'Proprietary estoppel and inheritance: enough is enough?' [2013] *Conveyancer & Property Lawyer* 280, 281–286.

[81] [2011] EWHC 903 (Ch) [38].

[82] ibid [45].

[83] ibid [57].

[84] ibid [59].

[85] ibid [55].

[86] ibid [46].

[87] ibid [55].

the farm after nine months when 'the money had run out'.[88] The work he did on the farm was limited by the fact that the father, having no faith in him to run the farm, had leased most of it to third parties. He 'did not work for nothing, but he did not work for as much as he might have expected had he been an agricultural worker. On the other hand as an agricultural worker he would have had his own living expenses.'[89] His father provided a house for John and his family, as well as paying the utility bills and doing the basic weekly shop for John's and his wife and children.[90] Frank had promised Caroline, John's sister, that he would make her a rich woman on his death; 'she had lived all her life with him after his divorce, save for the two years that she was in Holland and in University'.[91] She had to make do with what was left after John's award of £3.3 million, which was confirmed by the Court of Appeal; this left her with an entitlement valued at around £0.66 million, one-fifth of what her brother obtained.

IV. Spreading the Story – *Naylor v Maher:* 'Step-Son Wins Father and a Farm'[92]

This section looks at *Thorner's* impact in the neighbouring jurisdiction of Ireland, where *Thorner* was applied in the leading case of *Naylor v Maher*.[93] As well as being instructive in respect of the role of narrative in these cases, *Naylor* raises some wider issues concerning the post-*Thorner* law of proprietary estoppel, to which the discussion will return later. The claimant in the case, Willie Naylor, had worked for 'minimal remuneration' for close to 40 years on a farm in County Tipperary that belonged to the testator. The claimant believed the testator to be his step-father and it was only after the testator's

[88] ibid [21].

[89] ibid [57].

[90] [2012] EWCA Civ 1140 [36].

[91] ibid [25].

[92] A O'Faolain and B Duggan, *Irish Independent*, 18 September 2012 (newspaper report).

[93] [2012] IEHC 408; [2018] IECA 32. Other Irish cases involving proprietary estoppel claims in the context of farm inheritance include *Coyle v Finnegan* [2013] IEHC 463; *Finnegan v Hand* [2016] IEHC 255; *K v K* [2018] IEHC 615.

death that the claimant learned that the testator was, in fact, his biological father. Ultimately, the testator left the 120 acre farm (as well as a house and the residue of the estate after various legacies) to the claimant's sister, Jean, and the claimant received only a legacy of €150,000. He successfully relied upon proprietary estoppel to claim the farm.

The claimant had left school at the age of 14, unable to read or write and went to work full-time on the disputed farm. Conditions were primitive on the farm at this stage. As O'Keeffe J put it: 'The water did not come until the 1970s' (referring to the absence until then of running water).[94] When he was 17, the claimant went to Dublin for six months to facilitate 'professional consultations and assistance in relation to his learning difficulties'.[95] While the claimant was in Dublin he 'worked diligently and was most resourceful in the jobs he obtained'.[96] At that point, according to O'Keeffe J at first instance, the claimant was 'likely to have had an open mind' about pursing a career away from the family farm.[97] However, the claimant's brother then decided to move to England and the claimant was recalled by the testator to work on the farm in his place. It seemed that the testator had health difficulties throughout his life and he left the physical work on the farm to the claimant who 'had a natural aptitude at farming'.[98] The claimant had a close relationship with the testator, although the latter was 'a gruff man with whom one would not win an argument' and who 'was not a man one would tell what to do'.[99] Upon his return to work on the farm, the claimant questioned the low wages he was receiving, given that in Dublin he had been 'getting the big money'[100] (a reference to the £25 to £30 per week he had been earning in his three jobs in the city).[101] In response, the testator indicated that 'you will be farming for yourself' and the promise that the claimant would inherit the farm was repeated, in more explicit terms, on

[94] [2012] IEHC 408 [178].

[95] ibid [16].

[96] ibid [404].

[97] ibid.

[98] ibid.

[99] ibid [52].

[100] ibid [41].

[101] ibid [16].

numerous subsequent occasions.[102] The claimant continued to work on the farm over the decades.

The claimant's sister, the defendant, lived nearby. She learned during the testator's lifetime that she was the natural child of the testator but believed that it was 'not her place' to tell her siblings but rather that this was up to her parents.[103] O'Keeffe J described as 'unimpressive' her evidence as to why she had not informed the claimant, noting that doing so would have allowed the claimant to discuss the issue of his own parentage with the testator.[104] Overall, he 'found her evidence and demeanour to the court as a whole uncooperative and calculated to confuse the court'.[105] This contrasted with the claimant, whose evidence was 'not exaggerated, but controlled' and 'truthful'.[106] While a negative picture of the defendant's character emerges from the judgment, it can also be seen that she did a great deal for her parents. When their mother contracted cancer in the 'mid-1990s', the defendant cared for her until her death in 2001.[107] She also cared for the testator in the final years of his life. From 2000 to 2005, 'she would have the dinner ready for him in the evening and at night time he would go to the pub' and she would bring him home 'at midnight'.[108] In 2005, the testator fell and cracked three ribs. The defendant would visit him in hospital for six hours a day and lived with him for some months upon his discharge and 'would be on call for him'. Her routine 'as a carer for him in late 2005 and through 2006, was to go up to his house in the morning, get his breakfast, bring up the oxygen machine from his room, take his blood, put him on a nebuliser, take out the ashes, light the fire and bring in turf.'[109]

A will that the testator had made in 2005 left the farm to the claimant. However, in 2006, five months before his death, the testator changed his will so that the farm went to the defendant and, as has been mentioned, the claimant

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[102] ibid [40]–[51].

[103] ibid [231].

[104] ibid [428].

[105] ibid.

[106] ibid [403].

[107] ibid [188].

[108] ibid [194].

[109] ibid.

would take only a gift of €150,000. One witness for the claimant had been a friend of the defendant and stated that she had 'had many discussions about the deceased where the defendant did the talking and she did the listening'.[110] According to this witness, the defendant had said that she wanted the testator to change his will. The defendant was reported as having said that 'the deceased had asked her what she would do with a farm and that she had replied that she wouldn't mind putting on a pair of wellies'.[111] Following the making of the new will, the defendant, who was 'absolutely ecstatic', had announced to her friend that she 'had got the lot'. The friend asked about the defendant's brother and, according to her evidence, the defendant replied: 'F*** Willie, I am the one looking after'.[112]

In terms of the proprietary estoppel issue, there were many similarities with the facts of *Thorner v Major*. In this case, however, the representations were more clear-cut than in *Thorner* and it is not surprising that the claimant was successful in his claim. The most striking aspect of O'Keeffe J's resolution of the case is that he did not believe that there was any basis on which the court could deprive the claimant of his bequest of €150,000. He reasoned that '[t]he unfulfilled commitment and obligation of the deceased to the plaintiff pursuant to the various commitments made by him, is a matter and entitlement that is separate from the bequest'.[113] Thus, O'Keeffe J was willing to give the claimant (the hero of the tale) a bonus of €150,000 in addition to the farm, at the expense of the defendant (clearly its villain). This aspect of the judgment was overturned on appeal as 'unduly severe'.[114]

In narrative terms, the story of Willie Naylor is rather similar to that of David Thorner. One difference is that the story in the judgment in *Naylor* is

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[110] ibid [142].

[111] ibid.

[112] ibid [147] (original bowdlerisation). The former friend also reported the defendant as having remarked that, if the testator did not change his will, 'that f***** would see himself in the [nursing] home' (ibid [145]). Note that proprietary estoppel is capable of providing a remedy for a carer seeking an increased share in the estate of the person who was being cared for but it would be necessary for the claimant to establish the making of an appropriate representation. See generally B Sloan, *Informal Carers and Private Law* (Hart Publishing, Oxford, 2013), ch 2.

[113] ibid [426].

[114] [2018] IECA 32 [21] (Peart J).

enriched by the casting of Jean in the role of 'ugly sister' to Willie's Cinderella. The story in *Naylor* is also distinguished by the curious twist whereby the man who had promised to leave Willie the farm turned out to be his father rather than his step-father. Thus, as picked up in the newspaper reporting of the case,[115] the story had the classic dimension of the son seeking his lost father, like Telemachus in search of wandering Ulysses.

V. *Thorner*, Freedom of Testation and the Arc of a Life

Cases like *Thorner* generally involve a change of mind on the part of the defendant, a decision to end the story differently. To others, who do not share the defendant's subjective experience of his or her life, such a change of mind may be difficult to understand. It has long been argued, at a more general level, that freedom of testation is a chimera and that courts use a variety of doctrinal devices to strike down wills of which they do not approve:

> [M]any courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent. Those courts impose upon testators a duty to provide for those ... whom the court views as having a superior moral claim to the testator's assets, usually a financially dependent spouse or persons related by blood to the testator. Wills that fail to provide for those individuals typically are upheld only if the will's proponent can convince the fact-finder that the testator's deviation from normative values is morally justifiable. This unspoken rule, seeping quietly but fervently from the case law, directly conflicts with the oft-repeated axiom that testamentary freedom is the polestar of wills law.[116]

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[115] See text to n 92.

[116] See M Leslie, 'The Myth of Freedom of Testation' (1996) 38 *Arizona Law Review* 235, 236 (footnotes omitted). Her discussion, in the context of US law, assumes the absence of the kind of statutory restriction on testamentary freedom represented by the Inheritance (Provision for Family and Dependants) Act 1975.

The law may be equally reluctant to give effect to a change of mind on the part of a testator that offends assumptions about the appropriate narrative of a person's life. One possible example is provided by *Sharp v Adam*,[117] a case which did not involve estoppel but which has factual similarities to *Thorner* and related estoppel cases. The testator in *Sharp*, who suffered from secondary progressive multiple sclerosis, changed his will so as to leave nothing to his two daughters, instead leaving his stud farm to two trusted employees who had been involved in its operation for a number of years, and giving smaller gifts to one of his carers and to an old friend. While the testator's illness had progressed so far that he was only able to communicate by means of nods and shakes of his head, those around him had no doubt that he was mentally competent. The execution of his will was conducted 'in a quite exemplary fashion' and the so-called 'golden rule'[118] was observed 'in every particular and beyond'.[119] Nonetheless, the decision to leave nothing to his daughters, with whom he did not appear to have quarreled, was regarded as irrational. The Court of Appeal took the view, in reliance on 'the tenuous thread'[120] of one passage in the evidence of a medical expert, that the testator's disease had damaged his brain so as, in the words of the classic test for mental capacity, to 'poison his affections, pervert his sense of right or prevent the exercise of his natural faculties'.[121]

It may be that it is difficult for an outside observer, or a court, to accept that a will accurately reflects the current preferences of the testator where those preferences do not fit with what the testator, for most of his or her life, would have wanted. A person might, in the years of his or her prime, have intended to pass on their farm to their eldest son but might, in their declining years, come to focus more on the immediate present and (along the lines of the facts of *Naylor v Maher*) decide to prefer the daughter who is providing them with day-

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[117] *Sharp v Adam* [2006] EWCA Civ 449, [2006] WTLR 1059.

[118] '[T]hat the making of a will by an old and infirm testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings': ibid [27].

[119] ibid.

[120] ibid [93].

[121] ibid. The relevant test is stated in *Banks* v *Goodfellow* (1870) LR 5 QB 549, 565. See also n 3.

to-day care. In his novel, *Immortality*,[122] Milan Kundera writes about the final period of life, 'the shortest and most mysterious, about which little is known and little is said.'[123] He continues:

> Strength is ebbing, and person is seized by disarming fatigue. Fatigue: a silent bridge leading from the shore of life to the shore of death. At that stage death is so close that looking at it has already become boring. … Not everyone reaches this furthest limit, but whoever does reach it knows that there, and only there, can true freedom be found.[124]

The freedom that Kundera has in mind is the freedom to act inconsistently with what we had previously thought was important, to suddenly cease to care how we are judged by others.

As the philosopher Derek Parfit emphasised,[125] we are inclined to overestimate the identity between current and future selves, so that we may, in an important sense, be different people at 30 and at 75. In thinking about other people's lives, we may be too inclined to look for unbroken continuity of preference and to assume that what they decide to do in their will should reflect what they wanted for the greatest length of time in their lives, not what they want at the time when they make their will, when their horizons may have narrowed and, in a perhaps unappealing way, their priorities may have completely changed. The desire to create a consistent narrative in respect of a person's life may lead the courts to defeat what were, at the end of their lives, the person's true preferences by finding a past commitment where none was really made.

VI. Concluding Observations

[122] (Faber and Faber, London, 1992).

[123] ibid 80.

[124] ibid 80-81.

[125] *Persons and Identity* (Oxford, Clarendon Press 1984).

This chapter has suggested that proprietary estoppel, as applied in the landmark case of *Thorner v Major*, has particular advantages for a claimant, so that (as suggested in the introduction to this chapter) it does indeed make a real difference how a succession claim is presented to the court. The nature of proprietary estoppel as a non-statutory doctrine of private law means that it tends to be concerned with what private law theorists refer to as 'corrective' as opposed to 'distributive' justice.[126] The focus is on the relationship between the claimant and the testator, reflecting a concern with the 'special morality' linking 'the doer and the sufferer'. The sufferer, the claimant, hogs the spotlight in these dramas. The other half of the 'bipolar relationship of liability' envisaged by private law – the testator – is generally dead by the time the matter comes to court.[127] As a result, the testator usually cannot speak for himself or herself and his or her character is revealed only through the testimony of others.

The testator is often portrayed as wielding power, as the person making representations that manipulate the conduct of the claimant. Thus, Robert Walker LJ commented that 'it is notorious that some elderly persons of means derive enjoyment from the possession of testamentary power'.[128] In *Bradbury v Taylor*,[129] the elderly testator was twice described as having 'enticed' the claimants into moving from another part of the country to live in his house. However, his motivations show him as more vulnerable since he seems to 'have felt a need for someone else to be living at the property after a lawnmower which he prized, and a chainsaw, were stolen from outbuildings' at his house.[130] Similarly, the testatrix in *Jennings v Rice*,[131] who was around 90, had 'had a burglary, which must have been a shocking and upsetting experience for her' and, 'determined to go on living in her own house', persuaded the claimant to

[126] See generally E Weinrib, *The Idea of Private Law* (Oxford, OUP, 1995); revised edn (Oxford, OUP, 2012).

[127] Though sometimes a dispute arises where the testator attempts to resile from his promises during his lifetime: see eg *Gillett v Holt* [2001] Ch 210.

[128] ibid 228.

[129] *Bradbury v Taylor* [2012] EWCA Civ 1208, [2013] WTLR 29 [25] and [27] (Lloyd LJ, quoting from the first instance judgment).

[130] ibid [10].

[131] [2002] EWCA Civ 159.

sleep downstairs in the house.[132] Comparatively rarely do the courts show real sympathy for the testator, as when (in a much criticised judgment) HHJ Weeks explained in *Taylor v Dickens* that:

> [O]ne has to bear in mind that Mrs Parker was 85, in acute pain, lonely, frightened of a confrontation with a younger man, desperate to die in her house, and anxious to have the house preserved after her death in the way in which she would wish.[133]

While, of course, testators (not all of whom are elderly) may engage in manipulation and unconscionable dealing, the power apparently given to them by their wealth may be balanced by other frailties.

The other characters marginalised in these estoppel stories are the other family members who may have claims on the testator's generosity, claims which may be reflected in the will actually made by the testator. The stories that are suppressed as a result might seem as compelling as those of the claimant, if more attention were given to them. In *Naylor v Maher*, despite the unattractive aspects of her behaviour revealed in the judgment, the defendant could have told a convincing story about her years of caring for the testator and of their closeness at the end of the testator's life. However, this is not how proprietary estoppel works. Under the Inheritance (Provision for Family and Dependants) Act 1975, the court must consider the actual and potential financial needs and resources of the beneficiaries under the will and any responsibilities and obligations owed to them by the testator, as well as any physical or mental disability of theirs.[134] There is no obvious scope within the doctrine of proprietary estoppel to weigh up the competing merits of the claims of those who would otherwise be entitled under the claimant's will. Academic commentators have reacted negatively to the circumscribed suggestion by Robert Walker LJ in *Jennings v Rice* that it might be appropriate, only in those cases where it was necessary to devise a lesser remedy for proprietary estoppel

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[132] ibid [6].

[133] [1998] 1 FLR 806 (Ch) 822.

[134] Section 3(1)(c), (d) and (f).

because an expectation remedy would be disproportionate, to consider '(to a limited degree) the other claims (legal or moral) on the benefactor or his or her estate'.[135] This reaction is consistent with the vision of proprietary estoppel as an instrument of corrective justice. It is also significant that the application of the proprietary estoppel doctrine is by no means limited to the succession law context; it is unlikely that it would be doctrinally defensible to argue for a special version of the doctrine in that context which would be sensitive to its impact on other possible beneficiaries in a way which would not apply in other contexts.

With the testator generally out of the way, and the actual beneficiaries under the will at a remove from the main narrative, the spotlight is firmly on the claimant. Once the matter is presented to the court in the form of the claimant's story, it quite quickly comes to seem plausible to disregard the result dictated by the law of succession. In the complex context of a story, the simple succession law idea of a single testamentary intention, expressed formally in a will, is rather limiting. It takes comparatively little to justify the conclusion that, as in *Thorner*, the court should take account of the testator's actual intention, even though it was not expressed in a valid will. When they are applying equity, the rhetoric of centuries encourages judges, like God in the old proverb, to 'temper the harsh wind to the shorn lamb'.[136] From the point of view of a judge, it must be more fulfilling to dispense discretionary justice to the parties before the court than to feel obliged to apply, in a more mechanical way, the strict rules of succession law. However, there is a cost. Stories are inherently unpredictable. The trial judge in *Suggitt v Suggitt*, remarked that '[o]ne of the unfortunate features of this case has been the inability of the parties to compromise an obviously compromisable case'.[137] This, however, seems to overstate the predictability of proprietary estoppel. The 'flexibility' of proprietary estoppel

[135] [2002] EWCA Civ 159 [52]. See eg S Gardner 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 492, 501: 'Relief is about giving concrete effect to a well-founded claim, so the factors determining its scale must be those upon which the claim itself rests'.

[136] See *Murad v Al-Saraj* [2005] EWCA Civ 959 [81] (Arden LJ). See also *Pennington v Waine* [2002] 1 WLR 2075 (CA) 2087, 2088, 2089 (Arden LJ).

[137] [2011] EWHC 903 (Ch) [66].

makes it difficult for the parties to bargain in the shadow of the law, generating a great deal of litigation that is 'bitterly fought and ruinously expensive'.[138]

A final thought is that it may not be possible to sustain in practice the judicial conceit that proprietary estoppel applies only after the event, with equity coming to the aid of trusting parties who acted with no foreknowledge of its rules. The assumption is that proprietary estoppel is a decision-rule (directed to judges), rather than a conduct rule (directed to citizens). In Meir Dan-Cohen's terms, a state of acoustic separation is thought to prevail, whereby potential claimants are unaware of the content of the decision-rule of proprietary estoppel.[139] If that assumption is true, there is no danger that the doctrine will interfere with the development of trust in human relationships by making it impossible to make a promise which is not to be the source of potential legal liability.[140] Also, claimants will not deliberately act so as to build up an estoppel claim but will only think of the legal consequences of their actions after their trust has been betrayed in an unconscionable manner. In 1994, one judge dismissed the possibility that the claimants had fabricated their claim, noting that '[t]he doctrine of proprietary estoppel is a closed book to many lawyers, let alone a builder and a housewife'.[141] However, the doctrine of proprietary estoppel has become much more prominent over the last 20 years, partly as a result of *Thorner v Major*. As McFarlane points out, the case featured in a permanent exhibition at the Supreme Court which is designed to illustrate 'The relevance of the Supreme Court to everyday life.'[142] *Thorner*, and some of the cases that have followed it, were featured in national newspapers, with an emphasis on the generosity of the remedies. These stories make engaging reading. Potential claimants, working on the basis of a hope rather

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[138] *Gillett v Holt* [2001] Ch 210 (CA) 228 (Robert Walker). See also eg *Moore v Moore* [2018] EWCA Civ 2669 [1] (Henderson LJ): 'the dispute has already been ruinous in both human and financial terms'; legal costs estimated at £2.5 million. This point is also made in Mee, 'Proprietary Estoppel and Inheritance' (n 80) 296-297.

[139] 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 *Harvard Law Review* 625.

[140] For discussion of the issue of trust, and the importance of the distinction between promise and contract, see Mee, 'Proprietary Estoppel, Promises, and Mistaken Belief' (n 10) 195-197.

[141] *Durant v Heritage*, unreported, Chancery Division, 20 July 1994 (Lexis) (Judge Park QC).

[142] McFarlane (n 31) 1.

than a promise of inheritance, may decide to make up their own stories, long before the owl of judicial wisdom spreads its wings.