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Proprietary Estoppel, Promises and Mistaken Belief

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Introduction

The decision of the House of Lords in *Yeoman's Row Management Ltd v Cobbe*[1] represents a curious turn in the development of the law of proprietary estoppel. Taking its first opportunity to pronounce upon the doctrine of proprietary estoppel since the seminal decision in *Ramsden v Dyson* in 1866,[2] the House of Lords in *Cobbe* put forward an unexpectedly restrictive view of the scope of the doctrine. The case 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 as part of an arrangement whereby he would develop the land and sell it on (although not all the details of the arrangement had been worked out). 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. Cobbe's proprietary estoppel claim failed in the House of Lords, although he did succeed in obtaining remuneration for his time and effort under restitutionary principles.

While the actual result in *Cobbe* was regarded with approval by most commentators, the reasoning of both Lord Scott and Lord Walker (who gave the only substantive judgments) has been the source of controversy. The approach of both of their Lordships was seriously at odds with previous authority and, if taken seriously, would have resulted in a far less potent doctrine of proprietary estoppel.[3] As it happened, *Cobbe* was swiftly followed by another House of Lords decision. In *Thorner v Major*,[4] the factual background was rather different. David Thorner had worked without pay for many years on the farm of his father's cousin, Peter Thorner, on the basis of oblique indications that he would inherit the farm on Peter's death. When Peter died intestate, David succeeded in establishing a claim to the farm on the basis of proprietary estoppel. In *Thorner,* Lord Walker described the

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

2 (1866) LR 1 HL 129 (HL).

3 See eg 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.

4 [2009] UKHL 18, [2009] 1 WLR 776. See eg B McFarlane and A Robertson, 'Apocalypse Averted: Proprietary Estoppel in the House of Lords' (2009) 125 LQR 535; N Piska, 'Hopes, Expectations and Revocable Promises in Proprietary Estoppel' (2009) 72 MLR 998; J Mee, 'The Limits of Proprietary Estoppel: *Thorner v Major*' (2009) 21 CFLQ 367.

proposition that *Cobbe* had '…severely curtailed, or even virtually extinguished, the doctrine of proprietary estoppel' as '…a rather apocalyptic view',[5] giving the impression, without actually committing himself, that he regarded this proposition as mistaken. There seem to be clear inconsistencies between *Cobbe* and *Thorner* and, following the two decisions, aspects of the law of proprietary estoppel are left in some doubt.

Although Lord Scott and Lord Walker approached the question from different angles, the view taken in each of their speeches in *Cobbe* appears to have been that the claimant (C) could not succeed in a proprietary estoppel claim unless he acted in the belief that he had a legally enforceable right against the defendant (D). In other words, there could be no remedy under proprietary estoppel in a case where C simply trusted in D's promise, rather than mistakenly believing that he was taking no risk because he was protected by a legal entitlement. This chapter argues that the result of accepting the approach in *Cobbe* would effectively be that the law would no longer recognise the principle expressed in Lord Kingsdown's speech in *Ramsden v Dyson*, which (although often described as representing the 'expectation' limb of proprietary estoppel) essentially turns on the making of a promise by D. While, in fact, a case could be made for taking the dramatic step of discarding this principle, which it will be suggested is one of a number of distinct principles subsumed by proprietary estoppel, the House of Lords in *Cobbe* did not appear to grasp the significance of the question and, therefore, addressed neither the weight of contrary authority nor the key issues of principle. Therefore, it is probably best that the unorthodox views expressed in the case should be forgotten or, at least, shelved until they can be revisited by the Supreme Court with the benefit of an awareness of the extent to which they run counter to the current of authority since the 1960s. The contrasting outcomes in *Cobbe* and *Thorner v Major*, and an extra-judicial contribution by Lord Neuberger,[6] raise the possibility that the requirement of belief in a legal entitlement could be applied in the commercial context but not in the 'domestic' context. This possibility is also considered in this chapter and it is concluded that, despite its superficial plausibility, it would not represent a desirable development for the law. This is, in part, because it seems to be an oversimplification to assume that more intrusive equitable intervention is appropriate in the domestic, as compared to the commercial, context.

Cobbe and Mistaken Belief

The approach in *Cobbe*

The view that C cannot succeed unless C believed that he or she had a legal entitlement to an interest in D's land emerges with particular clarity from the speech of Lord Walker. Only Lord Brown expressed agreement with Lord Walker in

[5] [2009] UKHL 18, [2009] 1 WLR 776 [31].
[6] Lord Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' (2009) 68 CLJ 537.

Cobbe, while Lord Mance and Lord Hoffmann agreed with Lord Scott, and Lord Brown agreed with Lord Scott as well as with Lord Walker. Lord Walker commented that the type of case at issue often has '…at least a flavour of mistake, or at any rate what restitution lawyers call misprediction (Mr Cobbe predicted, wrongly, that Mrs Lisle-Mainwaring [the defendant] would not withdraw from the non-binding arrangement)'. He then asked himself: 'Was it also necessary for Mr Cobbe to believe, wrongly, that Mrs Lisle-Mainwaring had no legal right to withdraw from it?'[7] Lord Walker concluded that it was indeed necessary that the claimant should have believed that he had a legally enforceable right. Lord Walker emphasised the view of Lords Cranworth and Wensleydale in *Ramsden* that an agreement which was known to be binding only in honour could not form the basis of a valid claim.[8] Although, according to his Lordship, the language of Lord Kingsdown's key statement of principle in his dissenting speech in *Ramsden v Dyson* was 'not without ambiguity' on the point, the rest of his speech indicated that '…Lord Kingsdown's reading of the facts was that the tenants believed (wrongly) that they had a legal right to a long lease, and that that was of critical importance'.[9] Lord Walker felt that, in *Plimmer v Mayor of Wellington*, this requirement had also been applied and found to be satisfied.[10]

His Lordship conceded that the relevant point had been made less frequently in the context of '…cases with more of a domestic or family flavour'[11] but he felt that the requirement was also applicable in such cases. He insisted that '…in those cases in which an estoppel was established, the claimant believed that the assurance on which he or she relied was binding'.[12] Lord Walker was willing to accept 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'.[13] However, Lord Walker believed that it was not a coincidence that the matter cropped up more frequently in the commercial context than in the family context. He explained 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'.[14]

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[7] *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 [63].
[8] Ibid [53].
[9] Ibid, [64].
[10] Ibid [65], referring to *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699 (PC) 712.
[11] Ibid [66].
[12] Ibid.
[13] Ibid [67]. Lord Walker suggested that such cross-examination had taken place in *Gillett v Holt* [2001] Ch 210 (CA) 229. In fact, however, this cross-examination seems clearly to have been directed to the question of whether D's representations were 'binding' in the sense of amounting to a promise (as opposed to a statement of current testamentary intentions), rather than to the distinct question of whether this promise was believed by the claimant to be legally binding. Unfortunately, these two questions have not always been clearly distinguished. See further *Mee* (n 4) 370-372 (discussing ambiguity in *Gillett* in respect of the idea of irrevocability). See also (n 42).
[14] Ibid [68].

In his speech in *Cobbe*, Lord Scott did not address the point as directly as Lord Walker. However, a requirement that C believed that he was legally entitled to an interest in D's land appears to follow logically from Lord Scott's overall analysis of proprietary estoppel. Departing from pre-existing orthodoxy, Lord Scott took literally the phrase 'proprietary *estoppel*'.[15] He insisted that, like other estoppels, a proprietary estoppel '…bars the object of it 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'.[16] Lord Scott's notion that proprietary estoppel is a true estoppel seems to lead, as a matter of principle, to a requirement that C have believed in the assertion of fact (or of fact mixed with law) by D which is alleged to form the basis of the estoppel. If D's representation was not believed by C, and acted upon, it would not be reasonable to regard D as having been estopped by virtue of having made it. This suggests that, for a proprietary estoppel claim to succeed, C must have believed that he was legally entitled to the interest in D's land which was the subject of D's representation. From various comments made in the course of his speech, it seems clear that Lord Scott did indeed believe that a proprietary estoppel claim could not be based on a promise which C knew to be legally unenforceable.[17] It should be noted, however, that his Lordship did approve of cases such as *Inwards v Baker*[18] and *Plimmer v Mayor of Wellington*[19] which might be seen as based on a promise by D; his Lordship's reasoning was that, where D has stated that C's license to occupy D's land is irrevocable, D can be estopped from denying that this is so.[20]

Lord Walker, *Ramsden v Dyson* and the *probanda*

Upon closer inspection, it seems that Lord Walker's approach in *Cobbe* may have been unwittingly influenced by the same thinking which inspired the discredited *probanda* stated by Fry J in *Willmott v Barber*.[21] The first of the five *probanda* requires that '…the plaintiff must have made a mistake as to his legal rights', (the other *probanda* being (2) that C has acted on the faith of his mistaken belief; (3) that D knew of the existence of his own inconsistent right; (4) that D knew of C's mistaken belief; (5) that D encouraged C's detrimental action, either directly or by abstaining from asserting his right).[22] Although, in *Cobbe*, Lord Walker indicated no

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[15] Contrast C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (7th edn Sweet and Maxwell, London 2008) 699.
[16] *Cobbe* (n 7) [14].
[17] See ibid [15]; [27], [37].
[18] [1965] 2 QB 29 (CA).
[19] (1884) 9 App Cas 699 (PC).
[20] *Cobbe* (n 7) [22] and note also his Lordship's rationalisation of the decision in *Crabb v Arun DC* [1976] Ch 179 (CA).
[21] (1880) 15 Ch D 96 (Ch). For discussion of the demise of the *probanda*, signalled by *Taylor Fashions v London Victoria Trustees Ltd* [1982] QB 133n (Ch), see K Gray and S F Gray, *Elements of Land Law* (5th edn OUP, Oxford 2009) 1207-1210. Note also the discussion of the *probanda* by Patten LJ in *Lester v Woodgate* [2010] EWCA Civ 199 [27]-[39].
[22] (1880) 15 Ch D 96 (Ch) 105-106.

support for any aspect of the *probanda*, and in fact went out of his way to comment negatively on their influence,[23] he did rely on the majority judgments in *Ramsden v Dyson*. However, it appears that Fry J derived his *probanda* from those majority judgments, which are actually the source of the idea, inconsistent with the thrust of modern proprietary estoppel jurisprudence, that a mistake on C's part is a prerequisite to any remedy in (what is now known as) proprietary estoppel.

It is well known that the majority in *Ramsden v Dyson* stated the principle behind the 'mistake limb' of proprietary estoppel, which applies '[i]f a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error'.[24] On the face of it, there was no possibility that the claimant in *Ramsden* could succeed on the basis of this principle because he had not been mistaken as to the ownership of the land. He knew that he was a tenant at will but his case was based on the proposition that he had been led to expect that he would be able to obtain a more substantial lease. What is interesting is that both Lord Cranworth and Lord Wensleydale[25] envisaged a means whereby a claimant who had not made a mistake in an obvious sense, but who had been led by D's promise to believe that he had a legal right to the land, could succeed by analogy with the principle applicable in cases of mistake. Lord Cranworth explained that the trial judge (who had upheld C's claim) had concluded that C had built his house '…in the belief, created or encouraged'[26] by D that C was at any time entitled to call for a new lease. If Lord Cranworth had accepted Lord Kingsdown's principle, it would have been obvious why this interpretation of the facts would have led to a remedy for C. However, Lord Cranworth felt it necessary to explain that the trial judge must have considered that, on this interpretation of the facts, the case fell within the mistake principle because D had been aware of C's mistaken belief in a legal entitlement and had failed to intervene.[27] Lord Wensleydale reasoned in a similar way.[28] In the end, however, since both judges believed that C had not been mistaken as to his rights and that D had not known or believed that C was acting on the basis of a mistake, they refused any remedy to C.

Thus, for the majority judges, a contractually unenforceable promise by D was not significant in itself but mattered only insofar as it might have created a mistaken belief in a legal entitlement on the part of C.[29] This is because, on the majority's

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[23] *Cobbe* (n 7) [56]-[58].
[24] *Ramsden v Dyson* (1866) LR 1 HL 129 (HL) 140-141 (Lord Cranworth). Note the very similar formulation by Lord Wensleydale at 168.
[25] Lord Westbury agreed with Lord Cranworth, as did the fifth judge, Lord Brougham (who was not present to give a speech).
[26] *Ramsden* (n 24) 142.
[27] Ibid.
[28] Ibid 169.
[29] This same strategy of trying to explain promises in terms of mistakes is evident in certain cases where an attempt was made to apply the *probanda* in cases involving promises. See *Griffith v Williams* (1978) 248 EG 947 (CA) 949; *Coombes v Smith* [1986] 1 WLR 808 (Ch) 818; *Stilwell v Simpson* (1983) 133 NLJ 894; *Matharu v Matharu* (1994) 68 P & CR 93 (CA) 102-103. Note also *Crabb* (n 20) 192.

view, even if D had created or encouraged C's belief by making a promise, it was necessary (i) that C believed wrongly that he had a legal entitlement and (ii) that D knew that C did not have a legal entitlement. This makes it very unlikely that the difference between Lord Kingsdown and the other four members of the House of Lords was simply on the correct interpretation of the facts. It would have made no sense for Lords Cranworth and Wensleydale to explain that C could succeed if the above two conditions were satisfied if they thought that, in addition, C could succeed where neither condition was satisfied.

Interestingly, when Lord Walker suggested in *Cobbe* that the difference in *Ramsden* between Lord Kingsdown and the majority judges was on the correct reading of the facts and not on the law,[30] he was doing so on the opposite basis to judges in earlier cases such as *Crabb v Arun District Council*.[31] In those previous cases, the assumption was that the majority judges in *Ramsden* would have had no objection in principle to the broad expectation principle expressed by Lord Kingsdown, whereas Lord Walker's conclusion was that Lord Kingsdown shared the majority judges' view that, in all cases including those involving a promise, C must have acted on the basis of a mistaken belief in a legal entitlement. In the current author's view, both attempts to downplay the differences between Lord Kingsdown and the majority judges in *Ramsden* are misguided. The consequences of Lord Walker's approach, however, seem to be more serious. The pre-*Cobbe* rationalisation of *Ramsden* simply involved airbrushing out of the picture some early support for the universal applicability of the *probanda*, thus making the conventional modern understanding of proprietary estoppel seem to have a firmer historical basis. However, Lord Walker's reading of *Ramsden* led him, at the same time as rejecting the *probanda* out of hand, to try to reintroduce an important aspect of them in the form of a requirement of mistaken belief.

It will be necessary shortly to consider the status of the approach in *Cobbe* as a matter of authority and principle. Prior to this, however, it is necessary to prepare the ground by sketching out a taxonomy that would identify the different principles subsumed under 'proprietary estoppel'. This will allow for a better understanding of the limitation on the scope of proprietary estoppel which would result from an acceptance of the approach in *Cobbe*.

A taxonomy of proprietary estoppel

This section attempts briefly to map out what appear to be the three principles within the territory which proprietary estoppel covers (although no attempt is made to state all the requirements of a successful claim under each principle, whether as a matter of principle or of current law). As will be seen, the three principles are based respectively on acquiescence, representation and promise. Each principle provides a distinct basis for legal intervention, although it is possible

[30] *Cobbe* (n 7) [52].
[31] *Crabb* (n 20) 194. See also *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699 (PC) 711.

that more than one principle could be triggered by a given set of facts. It could also be argued, on the basis of an expansive vision of unconscionability not shared by the current author, that a remedy may be available in certain cases that fall outside the scope of the three principles identified here.[32] However, the possible existence of such cases, which would probably be comparatively rare in any case, does not affect the substance of the arguments put forward in this chapter.

The taxonomy presented here differs to some extent from Gray and Gray's commonly cited three-fold classification (adopted by Lord Walker in *Cobbe*),[33] which divides the doctrine into (1) the 'imperfect gift' cases, (2) the 'common expectation' cases, and (3) the 'unilateral mistake' cases. According to Gray and Gray, '[t]hese cases alike present the essential characteristics of proprietary estoppel, but each class of case in its turn gives a heightened emphasis to one or other of the constituent elements of representation, reliance and unconscionable disadvantage'.[34] The current author's view is that the overall category of 'proprietary estoppel' is not a helpful one and that it is questionable whether the three distinct principles described below in fact share 'essential characteristics'.

Acquiescence

C acts to his detriment in the mistaken belief that he has an interest in land which in fact belongs to D. D realises what is happening and does not correct C's mistake.

The acquiescence scenario is clearly covered by the fundamental statements of principle by the majority in *Ramsden v Dyson*.[35] This category, which the older cases also refer to in terms of 'lying by', has also been recognised in cases arising outside the context of disputes over land.[36] Attempts to categorise D's failure to act as a representation by silence due to the fact that he was under a duty to speak[37] (so that this category could be subsumed within the representation principle, discussed below) serve only to confuse the matter. In fact, nothing which can be construed as a representation needs to be communicated from D to C, so that the principle can apply in a case where C was unaware that D was observing events and C could not, therefore, have read anything into D's failure to intervene.[38] The reason for equitable intervention is not the fact that D has led C to act to his detriment by means of a representation or promise but rather that D has failed to act when he was aware that C was acting to C's detriment on the basis of a mistake concerning

[32] Perhaps in certain circumstances where C has made a mistake to which D has not contributed and D was not aware of his own rights (so that neither the representation principle nor the acquiescence principle would apply). See also (n 42), in respect of whether a claim could arise in respect of something falling short of a promise.
[33] *Cobbe* (n 7) [48] and following.
[34] *Gray and Gray* (n 21) 1202.
[35] *Ramsden* (n 24) 140-141 (Lord Cranworth); 168 (Lord Wensleydale).
[36] See eg *Proctor v Bennis* (1887) 36 Ch D 740 (CA) 759-761 (Cotton LJ); 761-762 (Bowen LJ); 765-766 (Fry LJ).
[37] *De Bussche v Alt* (1878) 8 Ch D 286 (CA) 314.
[38] Note *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17 [24].

D's rights (although the precise scope of the principle is in need of further analysis).[39]

Representing

D makes a representation to C to the effect that C has an interest in D's land. C acts to his detriment on the basis of this representation.

In this scenario, D is responsible for C's belief that C has rights over D's land. This means that, unlike in the previous category of case, it is not crucial that D have been aware of his own rights. The basis for legal intervention in this second scenario is that, having made a representation as to the facts or as to the state of D's own rights, D should not be permitted to resile freely from that representation if C has acted to his detriment on the basis of it. There is a clear overlap here with the legal doctrine of estoppel by representation. However, cases of this nature have sometimes been classified under the heading proprietary estoppel, notably in *Taylor Fashions v London Victoria Trustees Ltd*.[40] Possible limitations on the scope of estoppel by representation, eg in terms of whether it applies to representations of law rather than of fact, can effectively be sidelined if a case is analysed under the vaguer rubric of proprietary estoppel. It is not possible within the scope of this chapter to address the difficult issues which arise concerning the borderline between estoppel by representation and proprietary estoppel. It is intended only to note that the representation principle is clearly distinct, in principle, from acquiescence and promising, and that some, even if not all, examples of it have been regarded by the courts as falling within the ambit of 'proprietary estoppel'.

Promising

D promises C that C will acquire an interest in D's land and C acts to his detriment on the basis of this promise.

This is Lord Kingsdown's principle from *Ramsden v Dyson*. The grounds for equitable intervention in this situation must be seen as the proposition that, once C has relied to his detriment on a promise, D should not be able to resile freely from it. Significantly, traditional equitable discourse has not tended to acknowledge openly the role of promise in proprietary estoppel. Gray and Gray's third category, 'common expectation', appears to correspond to the current sub-heading. However, instead of discussing the idea of a promise by D, Gray and Gray explain the relevant principle as applying to '…the situation where… [D] and [C] have consistently dealt with each other in such a way as reasonably to cause… [C] to rely on a shared

[39] The current author disagrees with the proposition that this category is '…an extension of, though not different in principle from, the positive statement estoppels': P Matthews, 'The Words Which Are Not There: A Partial History of the Constructive Trust' in C Mitchell (ed), *Constructive and Resulting Trusts* (OUP, Oxford 2010) 27 (citing A K Turner (ed), *G Spencer Bower: The Law Relating to Estoppel by Representation* (3rd edn Butterworths, London 1977) [290]).

[40] [1982] QB 133n (Ch). Note also Judge Nugee QC's frequently quoted definition of proprietary estoppel: *Re Basham* [1986] 1 WLR 1498 (Ch) 1503.

supposition that he would acquire rights of some kind in… [D]'s land'.[41] Taking it that Gray and Gray are accurately reflecting the language in the cases, this shows equity favouring a curiously indirect way of describing the relevant type of case, which generally involves D simply making a promise or promises to C. The supposition on C's part that he will acquire rights in D's land has normally been created by D's promise and whether D 'shares' this supposition (or, instead, plans to break his promise) does not seem relevant.[42]

How the approach in *Cobbe* fits into the taxonomy

In terms of the taxonomy which has just been sketched out, the impact of taking *Cobbe* seriously would seem to be that the last of the three principles, Lord Kingsdown's promise principle, would effectively be eliminated from the law. It will be recalled that Lord Scott's view was that, like other estoppels, proprietary estoppel bars the object of it from asserting something that stands in the way of a right claimed by the person relying on the estoppel.[43] This shows that he was thinking in terms of the first two of the three principles identified above. Lord Scott's formulation leaves no room for proprietary estoppel to operate on the basis of a promise, rather than a representation or assertion, by D. This is not to say that C could never succeed in a case involving a promise by D. If D's promise to C reasonably gave C the impression that he had an entitlement to rights over D's land, then D could be regarded as having made a representation to C to this effect, so that the case would fall within the representation principle.[44]

In relation to Lord Walker's presentation of the matter, the introduction of a requirement of a mistaken belief on the part of C appears to have much the same effect in terms of eliminating any independent significance for a promise by D. There does, however, seem to be some degree of difference between the two approaches. Consider a situation where D makes a promise to C in respect of D's land and, although D cannot (on a reasonable interpretation of his words and conduct) be regarded as having made any representation to this effect, C forms the view that the promise is legally binding and acts to his detriment on this basis. No claim would appear to lie under Lord Scott's approach, since D cannot be regarded as having made a representation of fact or law, the truth of which he could be estopped from subsequently denying. Under Lord Walker's approach, however, it appears that C

[41] *Gray and Gray* (n 21) 1204.

[42] A possible reason for not speaking in terms of 'promise' is the idea that a claim in proprietary estoppel could successfully be founded on something less than a promise (as well as on a promise). For discussion of some of the relevant issues, see S Nield, 'Estoppel and Reliance' in E Cooke (ed), *Modern Studies in Property Law: Volume 1* (OUP, Oxford 2003) 84-86, 88-89; *Mee* (n 4) 370-372. Although it is not possible or necessary to pursue the point in detail in the present chapter, the current author's view is, to the contrary, that it is wrong in principle to suggest that a mere expression of current intention, which does not contain an implied promise to give effect to the relevant intention, could form the basis of a claim in proprietary estoppel.

[43] *Cobbe* (n 7) [14].

[44] Moreover, Lord Scott would presumably also have accepted that C could, in suitable circumstances, obtain a defensive remedy under promissory estoppel on the basis of a promise by D.

could make a successful claim, given that he has satisfied the requirement of having a mistaken belief in a legal entitlement. Thus, while Lord Walker's approach comes close to eliminating Lord Kingsdown's principle from the law (except insofar as it overlaps with the other two principles), it does not appear to do so entirely.

The position as a matter of authority

The view that Lord Kingsdown's principle does not form part of the law is not a novel one. The conventional wisdom on the acceptance of Lord Kingsdown's principle into the law of proprietary estoppel blames confusion generated by the *probanda* for any opposition to the principle. In an influential account, Gray and Gray suggest that for '…the 100 years following *Willmott v Barber*, Fry J's five probanda were to impose a strait-jacket on the development of proprietary estoppel',[45] given that they '…came to be applied indiscriminately to all forms of estoppel claim … thereby dramatically curtailing the availability of estoppel-based remedies'.[46] This '[d]ogmatic insistence on the five probanda'[47] finally fell from favour after the 'watershed'[48] represented by *Taylor Fashions*. The assumption in this account is that Lord Kingsdown's principle was recognised by the law in the nineteenth century, as indicated by *Plimmer v Mayor of Wellington*,[49] but that Fry J '…without making explicit reference to any existing case law',[50] had confused matters with his overly strict approach. It may be, however, that this account puts too much emphasis on the *probanda* and overstates the ineluctability of the acceptance of Lord Kingsdown's principle.

An alternative narrative is as follows. In his dissenting speech in *Ramsden*, Lord Kingsdown briefly articulated a principle which seems to correlate to the modern 'expectation limb' of estoppel. Because he had the support of none of his colleagues, Lord Kingsdown explained that he would not deliver the 'very full' statement that he had prepared of the grounds for his conclusions. Instead, he gave a truncated statement of his views, setting out '…in a very few words what I understand to be the law upon the subject, and the effect generally which the evidence has produced on my mind'.[51] Thus, it is difficult to be sure what precisely his Lordship had in mind (and whether, for example, he intended his principle to have the broad scope subsequently attributed to it or, instead, envisaged some limitation upon it). It is possible to speculate that, if Lord Kingsdown had stated his views at length and attempted to defend them by reference to principle and existing authority, the doctrine of proprietary estoppel might have developed very differently. The one authority relied upon by Lord Kingsdown was the part performance case of *Gregory*

[45] *Gray and Gray* (n 21) 1207.
[46] Ibid.
[47] Ibid.
[48] Ibid 1209.
[49] (1884) 9 App Cas 699 (PC).
[50] *Gray and Gray* (n 21) 1207.
[51] *Ramsden* (n 24) 170.

v Mighell.[52] Subsequently, in *Plimmer*, Lord Kingsdown's principle was applied by the Privy Council but it seems to be stretching the point to see this one decision as entrenching the principle in the law, in the face of the lack of support from the majority of the House of Lords in *Ramsden*, especially as the principle does not appear to have been applied again for another 80 years.[53]

It is possible that the *probanda* constrained the development of the law on proprietary estoppel in an indirect way, as a result of the emphasis placed on them by Spencer Bower in his well-known work on *Estoppel by Representation*.[54] However, for many decades, there does not appear to be any indication in the case law that the reason why Lord Kingsdown's principle was not being applied was as a result of a misunderstanding created by the *probanda*. Even in more modern times, there is not a large number of cases where the *probanda* were 'dogmatically' applied to exclude the 'expectation limb' of proprietary estoppel, so as to defeat a claim.[55] Some of the pre-*Taylor Fashions* cases which mention the *probanda* doubt their strict applicability.[56] It may be that the reason why the courts did not apply Lord Kingsdown's principle lay more in their view of the acceptability of that principle than in any confusion caused by the *probanda*.

The final acceptance of Lord Kingsdown's principle occurred only in a series of modern cases beginning with *Inwards v Baker*[57] where it was adopted, with limited analysis, by Lord Denning's Court of Appeal. There subsequently developed a very substantial body of case law, albeit never at House of Lords level, applying the principle. In *Taylor Fashions,* the universal application of the *probanda* was rejected by Oliver J. In terms of the facts of the case, the important point to establish was that the representation principle, the second in the tripartite classification suggested above, could apply even though not all the *probanda* were satisfied because D was not aware of C's mistake or of his own rights. However, Oliver J's comments were clearly also directed against the idea of insisting that C must always be mistaken as to his rights (this being the first of the *probanda*, which was actually satisfied on the facts of *Taylor Fashions*). In a famous statement of principle, Oliver J argued that:

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[52] (1811) 18 Ves 328.
[53] An earlier authority, using the language of contract and consideration in the context of an imperfect gift, is *Dillwyn v Llewelyn* (1862) 4 De GF & J 517. See *Matthews* (n 39) 30-40 for an argument that Lord Kingsdown's approach finds support in the earlier case law.
[54] See eg G Spencer Bower, *The Law Relating to Estoppel by Representation* (1st edn, London 1923) 351-359 (discussing estoppel by acquiescence/encouragement in the context of land).
[55] See *E & L Berg Homes Ltd v Grey* [1980] 1 EGLR 103 (CA); *Stilwell v Simpson* (1983) 133 NLJ 894; *Coombes v Smith* [1986] 1 WLR 808 (Ch) (cases in which the claim would arguably have failed for other reasons). Note also *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 (HL) 884-885.
[56] See eg *Electrolux Ltd v Electrix* (1954) 71 RPC 23 (CA); *Shaw v Applegate* [1977] 1 WLR 970 (CA).
[57] [1965] 2 QB 29 (CA).

> …[T]he more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson*… principle – whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial – requires 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 than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.[58]

Although Oliver J's formulation of principle in *Taylor Fashions* has been widely praised, it appears in fact to be distinctly unhelpful in terms of facilitating the coherent development of the law in this area. The obvious criticism of the *probanda*, or rather of the idea of applying them to all 'proprietary estoppel' cases, is that the *probanda* do not make sense when applied to a claim based on representation or promise rather than on acquiescence. Oliver J's response to the confusion between the different principles indicated by the inappropriate application of the *probanda* was, unfortunately, not to separate out the distinct principles but instead to state an 'unconscionability' test which was pitched at a sufficiently high level of generality that it could cover all three principles. Thus, he unified the different principles under the heading of 'the *Ramsden v Dyson*… principle'. But why should they be considered as one? It is true that the acquiescence principle and Lord Kingsdown's promise principle both happen to emanate from different speeches in the same case (*Ramsden v Dyson*) but this is truly 'immaterial' in analytical terms. The confusing term 'proprietary estoppel', which clearly misled Lord Scott in *Yeoman's Row v Cobbe*,[59] enshrines no coherent principle and so, in itself, appears to offer no theoretical justification for unifying a number of distinct principles.

To conclude this sketch of the reception of Lord Kingsdown's principle, following *Taylor Fashions* the principle was applied with increasing frequency in the High Court and in the Court of Appeal in cases such as *Wayling v Jones*,[60] *Yaxley v Gotts*,[61] *Gillett v Holt*,[62] *Campbell v Griffin*,[63] *Jennings v Rice*,[64] *Ottey v Grundy*[65] and *Powell v Benney*.[66] This substantial body of case law indicates that, up until *Cobbe*, the standard case falling under the 'expectation limb' of proprietary estoppel involved the making of a promise to C, upon which C relied to his or her detriment. Despite

[58] [1982] QB 133n (Ch) 151-152.
[59] *Cobbe* (n 7) [16].
[60] (1993) 69 P & CR 170 (CA).
[61] [2000] Ch 162 (CA).
[62] [2001] Ch 210 (CA).
[63] [2001] EWCA Civ 990.
[64] [2002] EWCA Civ 159, [2003] 1 P & CR 100.
[65] [2003] EWCA Civ 1176.
[66] [2007] EWCA Civ 1283.

Lord Walker's view in *Cobbe*, it is really quite untenable to suggest that in these cases the courts were silently insisting upon (and, implausibly in many cases, finding to be satisfied) a requirement that C had believed in the existence of a legal entitlement. The courts did tend to speak in terms of a 'belief' on the part of C but this was a belief '…that he either has or is going to be given a right in or over B's property' rather than necessarily a belief in a legal entitlement to the right.[67] The assumption of the courts, as encapsulated in a comment by Goff J in *Holiday Inns Inc v Broadhead*, was that '…mistake is not an essential element'.[68]

Only a year after *Cobbe*, the House of Lords decided *Thorner v Major*,[69] where a claim, in the 'domestic' context, was unanimously upheld on the basis of (oblique) promises by D. In his speech in *Thorner*, with which Lords Rodger and Neuberger expressed agreement, Lord Walker did not restate his views in *Cobbe* as to the need for a belief on the part of C that he was legally entitled to an interest in D's land (although neither did he explicitly resile from them). Similarly, the speeches of the other Law Lords in *Thorner* appeared to take the conventional pre-*Cobbe* view, which makes no requirement of a belief in legal entitlement on the part of C but is satisfied with a promise on the part of D upon which C relies.[70] While focusing his remarks on the narrow questions at issue in *Thorner*, Lord Neuberger remarked that '…much of the reasoning in *Cobbe*… was directed to the unusual facts of that case'.[71] Even Lord Scott appeared to retreat significantly from the view as to the nature of estoppel which he had expressed in *Cobbe*. He did not dissent from the conclusion of his brethren that the claimant was entitled to succeed on the basis of proprietary estoppel but merely found it 'easier and more comfortable' to regard the claimant's remedy as arising via a constructive trust (an approach betraying an unconventional understanding of the law of constructive trusts).[72]

Overall, the better view seems to be that there is no requirement, as the law currently stands, that C must have a belief in a legal entitlement. However, the position will continue to be complicated by what was said by the House of Lords in *Cobbe*, and never overtly retracted,[73] and it is possible that future cases will take up the approach favoured in *Cobbe*. Given this possibility, it is important to assess, as a matter of principle, the attractiveness or otherwise of that approach.

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[67] *Re Basham* [1986] 1 WLR 1498 (Ch) 1503.
[68] (1974) 232 EG 951 (Ch) 1087.
[69] [2009] UKHL 18, [2009] 1 WLR 776.
[70] See eg *Thorner* (ibid) [2] C must prove 'a promise or assurance' (Lord Hoffmann).
[71] Ibid [99].
[72] Ibid [14]. For discussion of Lord Scott's views in *Thorner* on what he termed 'the remedial constructive trust' arising under the principle in *Gissing v Gissing* [1971] AC 886 (HL), see *Mee* (n 4) 378-381.
[73] See eg *Capron v Government of Turks and Caicos Islands* [2010] UKPC 2 [33], where Lord Kerr quoted a heretical passage from Lord Scott's speech in *Cobbe* (n 7) [14], describing it as '…a succinct summary of the principle'.

The place of Lord Kingsdown's principle in the legal system

The question of whether Lord Kingsdown's principle should be excised from the law is a very large one, which can only be touched upon in the current chapter. It is not difficult to identify why the acceptance of the promise principle might create difficulties for the legal system. The principle enters territory covered by the law of contract, arguably undermining the doctrine of consideration. While it is true that the remedy provided by proprietary estoppel does not invariably take the form of enforcing the promise, this is only a partial response to the relevant concern (and the cases still show a questionable bias in favour of awarding an expectation remedy).[74] There is also the major question of why this principle, with the potential to be used as a cause of action, should be recognised in respect of promises involving land (and, according to recent cases, other forms of property)[75] but not in respect of other promises, where only the defensive doctrine of promissory estoppel is available.

It does seem that in the future, if the law in this area is to be made defensible as a matter of principle, it will be necessary either to go forward or turn back; in other words, either the courts should follow the Australian approach of collapsing the distinction between proprietary and promissory estoppel, thus creating a doctrine which would not discriminate arbitrarily between promises involving land/property and other promises,[76] or else the courts should (which is perhaps difficult to imagine) row back from the jurisprudence of the last forty years or so and decisively eliminate Lord Kingsdown's principle from the law. In the meantime, a desirable development would be to move towards a more open recognition of the fact that this aspect of 'proprietary estoppel' is promise-based. This reality is somewhat obscured by the language conventionally used in discourse on equity, eg by the tendency to speak in terms of 'common expectation' and to describe D's promise as a 'representation' or an 'assurance'. The lack of clarity is exacerbated by the fact that three distinct principles, based respectively on acquiescence, representation and promise, form part of proprietary estoppel and a virtue is made of the fact that all three can be blurred together under the 'flexible' unconscionability slogan.

Rather than pursuing any further the very general question of whether Lord Kingsdown's principle should remain part of our legal system, it is proposed to narrow the focus and turn to a consideration of the possibility, raised by *Cobbe*, that perhaps proprietary estoppel goes too far in an obviously objectionable way and so, to avoid clearly undesirable outcomes, needs to be restricted. In *Cobbe*, Lord Scott appears to have been influenced by the fact that it does not seem right that C should succeed where he knew that D's promise was binding in honour only.[77] Lord Walker

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[74] See generally J Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in M Dixon (ed), *Modern Studies in Property Law: Volume 5* (OUP, Oxford 2009).
[75] See eg *Cobbe* (n 7) [14] (Lord Scott); *Thorner* (n 69) [61] (Lord Walker).
[76] The leading case is *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387 (Aus HC).
[77] *Cobbe* (n 7) [27].

also insisted in *Cobbe* that '[i]t is not enough to hope, or even to have a confident expectation, that the person who has given the assurances will eventually do the proper thing… [H]opes by themselves are not enough'.[78] These views highlight a potential difficulty for the orthodox theory of proprietary estoppel. Prior to *Cobbe*, most commentators would have rejected the idea of a requirement that C must believe in the legal enforceability of D's promise. However, at the same time, it does not seem right that C should be able to obtain a remedy on the basis of a mere hope that D would behave in a certain way. If one emphasises the proposition that D's promise is, to C's knowledge, not legally binding, it begins to look overly generous to provide C with a remedy if C chooses to take the risk of relying on that promise – particularly if the promise is made in a 'commercial context' (although, in fact, it is difficult to see why, if the force of this point were accepted, it would not also be relevant in the domestic context).

It seems, however, that there is a solution to this apparent problem. It appears that, even on an understanding of proprietary estoppel which does not require that C believes that he has a legally enforceable right, it would not be appropriate to provide a remedy against D where it is clear that D's promise is not one which will have any legal consequences. The point is that it is possible to qualify a promise in a way which changes the intended consequences of a breach. Imagine that I promise you that I will do something for you and, seeing you look doubtful, I add the words, 'I am serious about this promise, so much so that I am giving this crisp five pound note to our friend, Bill, telling him to give it to you if I should fail to perform'. These added words qualify the promise, in the sense that we now have a different understanding of the consequences of my not fulfilling it. It is similar if I promise you 'on my honour' or describe our agreement as 'a gentleman's agreement'. The implication here is that, if I do not perform, you are entitled to regard me as dishonourable or, in the latter case, as not a gentleman at all but rather as a bounder and a cad. The disincentive to my non-performance is the possibility that you, and anyone who hears of the matter, will think less of me. In a case where we might otherwise have imagined that legal consequences would attach to my promise, it may now be clear that the consequences of non-performance will relate only to my reputation. If, however, I make an unqualified promise, I do not restrict the consequences of the non-fulfillment of my promise and it remains possible, in principle, that legal consequences (in the realm of proprietary estoppel) could attach to that promise.[79] Thus, the fact that the promise itself is qualified by reference to the promisor's honour (or in some parallel way) may provide a reason, independent of a possible requirement that C must believe that he has a legal entitlement, why no estoppel remedy should be available.

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[78] Ibid [65]-[66].

[79] At a more general level, it seems that part of the conceptual complexity which arises in this area concerns the difficult relationship between the moral concept of promise and the legal concept of contract. See generally eg D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, Oxford 2003); S Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harv LRev 708; M Pratt, 'Contract not Promise' (2007-08) 35 Fla St U L Rev 801.

It is also possible to see similar issues arising in the context of a promise which is made, explicitly or implicitly, subject to contract. If one business person makes an apparent promise to another business person in circumstances where both parties are aware that no binding contract can arise unless it is reduced to writing, it will often be the case that the promise in question has the same status as a promise 'in honour',[80] in that the parties understand that the consequence of a breach of the promise will lie at the level of damage to the business or personal relationship between the parties. If such is the nature of the relevant 'promise' then, like a promise upon D's honour, it is not the kind which could trigger a proprietary estoppel claim. On the other hand, it is not difficult to envisage examples, in the commercial as well as the domestic sphere, where the promise is not qualified in the manner under discussion. An example is provided by the facts of the leading Australian case of *Waltons Stores (Interstate) v Maher*,[81] where Maher acted to his detriment on the basis of an assurance from Waltons Stores that the promised deal would proceed and that the exchange of contracts required to create a binding contract would occur as a matter of course.[82]

The fact that some apparent promises are, in fact, qualified in such a way as to preclude a remedy in proprietary estoppel seems to undercut the plausibility of the suggestion that there must be a requirement of mistaken belief in a legal entitlement in order to prevent a person obtaining a remedy on the basis of 'mere hopes'. What seems to be required is simply a promise which, in the sense under discussion, is unqualified. It certainly seems to be true that the restrictive approach put forward in the speeches in *Cobbe* was not necessary to a satisfactory resolution of the case. Depending on the true interpretation of the facts, the case could have been resolved on the basis (i) that the parties understood that D's promise was effectively subject to contract or (ii) that, even if D's promise was an unqualified one, it was essentially that C would acquire the land on reasonable terms, in circumstances where the court would be unable to devise reasonable terms by reference to past dealings between the parties[83] or (iii) that the result actually reached in *Cobbe* should have been justified on the basis of upholding D's proprietary estoppel claim and granting a detriment-based remedy as the minimum equity required to do justice (it being difficult to understand how C could have been entitled to the restitutionary remedy

[80] See Lord Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' (2009) 68 CLJ 537, 541.

[81] *Waltons Stores (Interstate)* (n 76). It is not relevant for present purposes that, on the facts of the case itself, the expectation induced in C was not that he would acquire an interest in D's land but rather that D would take a lease of C's land.

[82] Compare Dixon's argument that gives central place to formal requirements, and an implicit or explicit secondary agreement to disregard them, in the rationale for upholding proprietary estoppel claims: M Dixon, 'Confining and Defining Proprietary Estoppel: the Role of Unconscionability' (2010) 30 LS 408; M Dixon, 'Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability' in E Cooke (ed), *Modern Studies in Property Law: Volume 2* (Hart Publishing, Oxford 2003). Space does not permit a detailed engagement with Dixon's interesting argument. The current author does not, however, accept Dixon's thesis, preferring to emphasise the need for a promise which is not limited in the manner discussed in the text.

[83] See *Cobbe* (n 7) [23].

he actually received from the House of Lords if he could obtain no estoppel remedy because he had assumed the risk of obtaining no recompense in the event that the deal fell through).[84]

The remainder of this chapter will be given over to a consideration of another comparatively narrow issue, as to whether it might be appropriate to draw a distinction between the commercial and the domestic contexts in terms of the application of a requirement of mistaken belief in legal entitlement (or, which is close to the same thing, whether such a distinction should be drawn in terms of applying Lord Kingsdown's principle).

A possible distinction between domestic and commercial cases

The contrast between the actual results in *Cobbe* and *Thorner v Major* suggests the possibility of drawing a distinction between the commercial and the domestic spheres, with a requirement of mistaken belief being applied only in the commercial context. This approach might involve the concession that certain cases, eg *Crabb v Arun DC*,[85] were wrongly decided but it would leave untouched the larger number of modern cases in the domestic context. In a recent extra-judicial contribution, Lord Neuberger has supported the idea of drawing this kind of distinction.[86] Lord Neuberger noted that:

> Ben Macfarlane and Andrew Robertson have suggested that *Cobbe* represented 'the death of proprietary estoppel,' not so much because the decision was wrong but because the reasoning precluded a proprietary estoppel claim unless the claimant believed that he had a legally enforceable claim.[87] I agree – and, at least in a commercial context, what's wrong with it?[88]

Lord Neuberger felt, however, that '…at least in many domestic cases, it would be inappropriate to require strict adherence to a rule that the claimant must have believed that he had a legally enforceable right'.[89] Lord Neuberger's logic appears to be that claimants in the family situation may often face an '…emotional or social impediment to insisting on some form of legally binding protection', they may not have easy access to legal advice, and often it would be 'somewhat unreal' to expect

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[84] For criticism of the restitution law aspects of the decision, see J Getzler, 'Quantum Meruit, Estoppel, and the Primacy of Contract' (2009) 125 LQR 196.
[85] *Crabb* (n 20).
[86] *Neuberger* (n 80). Note also Lord Neuberger's remarks in *Thorner* (n 69) [96]-[100], which strongly emphasise the importance of context but which are, on the face of them, limited to the issue of certainty as to the property which is the subject of D's representation.
[87] *McFarlane and Robertson* (n 3).
[88] *Neuberger* (n 80) 543.
[89] Ibid 544.

them to insist upon a commitment in writing.[90] It is not entirely clear whether Lord Neuberger would apply the requirement at all in the context of 'domestic' cases or whether he would apply it but (in some unexplained way) not 'strictly'. Lord Neuberger's distinction between the commercial sphere and the domestic context has some echoes of certain remarks of Baroness Hale in *Stack v Dowden*,[91] a case where Lord Neuberger, in fact, showed less enthusiasm for drawing a distinction between the two spheres.[92] On balance, for reasons which will now be explored, the current author feels that Lord Neuberger's suggestion is not a felicitous one.

The first point relates to Lord Neuberger's justification for his suggested approach. He explained that:

> In the original cases such as *Dann* v. *Spurrier*,[93] *Ramsden* v. *Dyson* and *Rochdale Canal Co* v. *King*,[94] the basis of the estoppel claim was the plaintiff's mistaken belief that he was legally entitled to a property interest. Why should it be any different where the claimant believes he will receive a property interest?[95]

At this point, his Lordship seems to fall into the trap of confounding the different principles subsumed under the banner of proprietary estoppel. The 'original cases' to which he refers applied the acquiescence principle. Seeking to extend the mistake requirement appropriate in the acquiescence context to cases involving a promise by D, rather than a mistake by C, is redolent of the tendency in some earlier cases to apply the *probanda* to any possible case of proprietary estoppel. The answer to the question 'why should it be any different?' in the promise context as compared to the acquiescence context is that there are two different principles at issue and that, in terms of the logic of the promise principle, there is no obvious justification for the imposition of a mistaken belief requirement.[96]

The second problem relates to Lord Neuberger's emphasis on the question of ease of access to legal advice. Lord Walker had referred in *Cobbe* to this issue[97] but only to explain why the requirement of a mistaken belief was more likely to be satisfied in the domestic context. As a matter of logic, it is difficult to see how the fact that commercial claimants are less likely to satisfy a requirement of mistaken belief

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[90] Ibid 542.
[91] [2007] UKHL 17, [2007] 2 AC 432 [42], [69]. On *Stack* and the idea of 'context', see N Hopkins, 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 LQR 310; B Sloan 'Proprietary Estoppel: Recent Developments in England and Wales' (2009) 22 Singapore Academy of Law Journal 110, 123-128.
[92] *Stack* (ibid) [107].
[93] (1802) 7 Ves 231.
[94] (1853) 16 Beav 630.
[95] *Neuberger* (n 80) 543.
[96] In the context of promissory estoppel, which is also based on a promise by D (not to enforce his or her strict legal rights), there is no indication that a similar requirement applies in the commercial context.
[97] *Cobbe* (n 7) [66] and [68].

would serve to justify imposing such a requirement on them. In respect of the promise principle, what is crucial is that C has trusted D to keep his promise, something to which the availability of legal advice is not directly relevant. It might be argued that a different type of restriction should be imposed, to the effect that C could not obtain a remedy unless it was reasonable for him to have trusted D to keep his promise. This could conceivably lead to different results in the commercial context as compared to the domestic context, since it might be seen as reasonable to trust a friend or relation but not a business associate. However, this seems highly speculative – it might actually be objectively less reasonable to trust an unreliable or vindictive relative than to trust a fair-minded business partner (and, in general, the question of whether it is 'reasonable' to trust someone seems very difficult to assess). It seems more plausible that equity would simply make it a requirement that C actually did trust D (since otherwise there would be no reliance on D's promise), with this being seen as less likely, as a factual matter, to have happened in the business context where C may well have understood that D's apparent promise was effectively 'subject to contract'.

A third issue is that, in fact, the superficially plausible distinction between the commercial and the domestic contexts is not a reliable one. The two often blur together, as for example in a case like *Yaxley v Gotts*[98] where the parties entering into a business arrangement were '…friends of long-standing'. Similarly, into which category would one have placed *Cobbe* if the parties had been, say, cousins or siblings? In reality, the parties are more likely to trust each other if they are friends or relations or if they have built up a personal relationship over a series of business dealings over a long period. To talk of a reluctance to apply estoppel principles in '…a commercial arm's length context'[99] is not very helpful because, to the extent that one party has genuinely trusted the other, the parties cannot be said to have been dealing at arm's length.

A fourth point relates to Lord Neuberger's argument that '…certainty and clarity are particularly important' in the business context, so that it is '…probably all to the good' that proprietary estoppel will not often assist a claimant in the commercial context where '…judges should be slow to encourage the introduction of uncertainties based on their views of the ethical acceptability of the behaviour of one of the parties'.[100] There is obviously force in the point that certainty is important in a commercial context. However, a number of counter-arguments may be made against Lord Neuberger's position. His argument, reflecting that of Lord Scott in *Cobbe*, assumes that the doctrine of proprietary estoppel would, unless restricted in the manner under discussion, allow judges, unconstrained by principle, to give expression to idiosyncratic views as to what is unconscionable or unethical.[101] However, it is not really true that beyond the acquiescence and

[98] [2000] Ch 162 (CA).
[99] *Neuberger* (n 80) 542.
[100] Ibid 543.
[101] *Cobbe* (n 7) [17].

representation principles lies only an uncharted wasteland ruled by judicial moral indignation. What is at issue is whether a specific principle, Lord Kingsdown's promise principle, should be recognised alongside the acquiescence and representation principles (or, at least, recognised without being eviscerated by a requirement of mistaken belief). While the promise principle is by no means devoid of uncertainty, it has been applied by the courts for the past forty years and cannot be said to leave judges entirely free to indulge their idiosyncratic ethical preferences. Moreover, it must be asked whether certainty, in the sense of freedom from legal liability imposed by judges based on their personal ethical views, is not equally important in the domestic context. An actor in the commercial context is, after all, in the business of assuming legal liabilities (including on the basis of the making of promises) and may reasonably expect, depending on the extent of his or her commercial activities, at times to become involved in litigation. However, an individual acting in a private capacity will normally not expect to become tangled up in acrimonious litigation.[102]

The preceding argument has links to a fifth and final point. This is the argument that, as well as the fact that the boundary between the commercial and the domestic contexts is not a clear one, it is dangerous to assume glibly that greater equitable intervention is appropriate in the domestic context, as compared to the commercial context. Lord Neuberger suggested that, in the commercial context of *Cobbe*, '…it is not for the courts to go galumphing in, wielding some Denningesque sword of justice'.[103] However, it is not just because it is a commercial premises that you do not want a bull in your china shop. Even in the context of domestic relationships, there are fragile and valuable items that one would like to shield from equity's clumsiness. One of these is trust. In this context, it is interesting to consider Dori Kimel's arguments concerning the relationship between contract and promise.[104] Kimel argues that '…at times, the law best supports valuable social practices by refraining from absorbing their constitutive norms'.[105] In Kimel's view, one of the functions of the law of contract is to allow people to deal with each other without needing to repose personal trust in each other. The enforceability of contracts allows one to preserve a degree of 'personal detachment'. On the other hand, a strength of the concept of a (non-legally binding) promise is that it can foster trust between people. If I promise you that I will do something and, not being forced to do it by the threat of legal sanctions, I complete the 'circle of trust' by living up to my word, you are more likely to trust me in future and our personal relationship is likely to be enhanced generally.

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[102] Contrast *Neuberger* (n 80) 544, arguing that, unlike in the commercial context, '…equity should [not] fear to tread… where the relationship between the parties is such that they cannot be expected to have recourse to contracts'.

[103] Ibid 541.

[104] *Kimel* (n 79). See also S Shiffrin, 'Promising, Conventialism and Intimate Relationships' (2008) 117 Phil Rev 481.

[105] D Kimel, 'The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model' (2007) 27 OJLS 233, 233.

Consider the facts of *Thorner v Major*[106] where, it will be recalled, David Thorner worked without pay for many years on the farm of his father's cousin, Peter Thorner, on the basis of oblique suggestions that he would inherit the farm. Lord Neuberger pointed out that for David to have sought to formalise the arrangement in a contract '…would have risked harming the relationship with Peter'.[107] It is not clear, furthermore, how a contract could have been drafted which would have addressed the various possible contingencies, eg whereby Peter might become ill and need to fund nursing home care or David might decide to get married and move away from the farm after a dozen years of work. The parties might have felt that, if policed by a contract, they could not have successfully shared the difficult life on the farm. Perhaps an arrangement depending on trust, without the possibility of legal sanctions against either party, represented the most appropriate way of allowing these people to achieve what they wanted. Obviously, an arrangement based on trust carries risks but then so too would any attempt to regulate the parties' dealings by reference to legal concepts.

A possible riposte to the argument that equity's intervention may serve to destroy trust in personal relationships is that the parties are unlikely to be aware of the law of proprietary estoppel at the time they deal with each other, so that equity's intervention comes only after the event – in other words, after a dispute has arisen and trust between the parties has, in any case, already broken down. One gets the impression (particularly in the domestic context) that the courts would prefer to see the principles of proprietary estoppel as 'decision' rules which allow judges to provide relief for a claimant who has acted in ignorance of the existence of the law. One indication of this is the emphasis on a retrospective assessment of unconscionability, summed up cryptically by Lord Hoffmann in *Thorner* when he remarked that '[t]he owl of Minerva spreads its wings only with the falling of the dusk'.[108]

So, perhaps equity's approach depends to some extent on the proposition that, until a dispute has arisen and legal advice has been obtained, C will not be aware of the possibility of a remedy based on proprietary estoppel. This is reminiscent of an idea put forward by Meir Dan-Cohen in a different context; that of 'acoustic separation'.[109] Dan-Cohen reflected on the possibility of a system whereby there was selective transmission of legal rules to citizens, discussing an imaginary system in which only 'conduct rules' were transmitted to ordinary citizens, so that the decision rules were known only to the decision-makers. It is an interesting question as to whether, as a factual matter in the estoppel context, there truly is complete 'acoustic separation', so that a claimant can be assumed not to be aware of the possibility that equity will intervene to rescue the situation after the event. While it

[106] *Thorner* (n 69).
[107] *Neuberger* (n 80) 542.
[108] *Thorner* (n 69) [8].
[109] M Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 Harv LRev 625.

is obvious that most claimants will not know the law, it may be naïve to assume that no claimant will be aware of the law. Leading cases on estoppel, and the common intention constructive trust, are reported in newspapers and even small towns have solicitors who dispense legal advice to claimants or to friends or acquaintances of potential claimants, thus providing a (not entirely reliable) means whereby legal rules can conceivably be transmitted even to claimants who are not schooled in the law. If this seems implausible, it can be pointed out any faithful reader of the Daily Mail would have seen detailed coverage of David Thorner's success at first instance and in the House of Lords (with pictures of the claimant and the farm).[110] While recognising the significance of the phenomenon of 'acoustic separation', the importance of preserving trust in intimate relationships does appear to point in favour of some degree of restraint in terms of the level of equitable intrusion in the domestic context.

Overall, in the current author's view, the distinction between the domestic and commercial contexts is essentially a crude heuristic; a short cut that cannot be depended upon to give reliable results. There may a tendency to infantalise claimants in the so-called domestic sphere, assuming that nothing can be expected of them in terms of safeguarding their own interests, while exaggerating the extent to which actors in the 'commercial sphere' are immune to the human tendency to repose trust in people with whom they have had frequent dealings. It is easy to imagine an individual who is engaged in a business enterprise as a sole trader but is vulnerable to being taken advantage of by a defendant who is able to induce the claimant to trust him or her. It seems that what is important is not whether the context is domestic or commercial but rather how the particular facts match up with the specific requirements of the aspect of proprietary estoppel at issue.

Conclusion

This chapter has considered the restrictive vision of proprietary estoppel which was put forward by Lord Scott and Lord Walker in *Cobbe*. It has explained that the impact of taking their arguments seriously would be the elimination (or, at least, the severe restriction) of one of the three distinct principles subsumed within proprietary estoppel, ie the promise principle stated by Lord Kingsdown in *Ramsden v Dyson*. The chapter has suggested that, although the approach in *Cobbe* runs counter to the current of equitable development over the last forty years, it does highlight important issues of principle surrounding the scope of proprietary estoppel. Despite the tendency to downplay the role of promise within the doctrine,

[110] See L Salkeld, 'Farm labourer inherits £2.3m farm he worked on for 25 years after two-year legal battle over will' *Daily Mail* (London 7 November 2007) <http://www.dailymail.co.uk/news/article-492024/Farm-labourer-inherits-2-3m-farm-worked-25-years-year-legal-battle-will.html> accessed 8 October 2010; 'Labourer is handed £2.3 million farm where he worked unpaid for 25 years' *Daily Mail* (London 25 March 2009) <http://www.dailymail.co.uk/news/article-1164810/Labourer-handed-2-3million-farm-worked-unpaid-25-years.html> accessed 8 October 2010.

the pre-*Cobbe* version of proprietary estoppel ventures into the territory of the law of contract, doing so only in respect of promises related to land/property (without any convincing justification as a matter of principle for this restriction). Rather than seek to deal comprehensively with the very large question as to the merits or otherwise of Lord Kingsdown's promise principle, this chapter has sought to address a more modest set of questions. First, it has pointed out that the particular concern which seems to have animated the judges in *Cobbe* – that it is wrong to allow C to succeed on the basis of a promise which C knows is binding only in honour – can be accommodated within the conventional modern understanding of proprietary estoppel, without any need to eliminate or severely curtail Lord Kingsdown's principle. Secondly, the chapter addresses the seductive suggestion that a distinction should be drawn between the commercial and the domestic contexts, with the restriction upon proprietary estoppel suggested in *Cobbe* applying only in the commercial context. It is concluded, on the basis of a number of different arguments, that this suggestion does not represent a desirable avenue of development for the law. One of the points made against any application of a mistake requirement in the context of the promise principle is that this requirement makes sense only in the context of the acquiescence principle; the suggestion that it should be applied more broadly appears reminiscent of attempts in the past to apply the *probanda* to all proprietary estoppel cases.

We are all familiar with the adage that 'hard cases make bad law'. At one level, it might be best if *Cobbe* were simply written off as a case where a 'soft' or 'easy' case made bad law – it was obvious that the Court of Appeal's decision to make an expectation award in the favour of Cobbe was too generous but, unfortunately, the House of Lords did not focus with sufficient care on what was wrong with such an award under the orthodox doctrine of proprietary estoppel. The subsequent decision in *Thorner v Major*[111] may represent the beginning of a process of (in effect) pretending that *Cobbe* did not happen. Nonetheless, it is difficult to see how confusion will not be caused in the lower courts by the speeches in *Cobbe*. It is surely a testament to the obscurity which has surrounded the role of promise within proprietary estoppel that the House of Lords could take a view of that role in *Cobbe* which was so much at odds with the pre-existing case law. In terms of the future development of the law of estoppel, what is needed is a willingness to separate out for analysis the distinct principles which have, for historical reasons, been grouped together under the heading of proprietary estoppel. The emphasis on 'unconscionability' and 'synthesis', encouraged by the overrated judgment of Oliver J in *Taylor Fashions*, have contributed to the current confused state of the law. Following the debacle represented by *Cobbe*, it is time for a somewhat more reflective approach.

[111] *Thorner* (n 69).