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Proprietary Estoppel and Inheritance: "Enough is Enough"?

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The law of proprietary estoppel has become increasingly assertive in upholding claims where a person has been induced to act to his or her detriment on the basis of an expectation of inheritance.[1] The concern in *Taylor v Dickens*[2] about the danger of issuing every judge with "a portable palm tree"[3] now appears almost quaint, in light of a long line of cases applying proprietary estoppel principles in the relevant context, including well-known decisions such as *Re Basham*,[4] *Wayling v Jones*,[5] *Gillett v Holt*[6] and *Jennings v Rice*.[7] There have been parallel developments in other common law jurisdictions, such as Australia and

* Law Faculty, University College Cork. I would like to thank Professor Ben McFarlane and Dr Mary Donnelly for helpful comments on an earlier draft of this article. The usual caveats apply. The title borrows a phrase from the first instance judgment in *Suggitt v Suggitt* [2011] EWHC 903 (Ch), [57], quoted as text to note 25 below.

[1] See generally Nield "'If you look after me, I will leave you my estate': The enforcement of testamentary promises in England and New Zealand" (2000) 20 Legal Studies 85; Nield "Testamentary Promises: a Test Bed for Legal Frameworks of Unpaid Caregiving" (2007) 58 NILQ 287; Mee "The Limits of Proprietary Estoppel: *Thorner v Major*" (2009) 21 CFLQ 267; Braun "Formal and Informal Testamentary Promises: A Historical and Comparative Perspective" (2012) 76 Rabels Zeitschrift fur Auslandisches und Internationales Privatrecht 994. Note also Thompson "Emasculating Estoppel" [1998] Conv 210; Dixon "Estoppel: A Panacea for all Wills?" [1999] Conv 46.

[2] [1998] 1 FLR 806.

[3] [1998] 1 FLR 806, 820. Note also Hayton "By-passing Testamentary Formalities" (1987) CLJ 215.

[4] [1986] 1 WLR 1498.

[5] [1995] 2 FLR 1029.

[6] [2001] Ch 210.

[7] [2002] EWCA Civ 159.

Ireland.[8] The prospects of claimants were given a further boost by the rather generous approach of the House of Lords in *Thorner v Major*[9] in 2009, which was partly a reaction to the very restrictive (and very confused) vision of proprietary estoppel advanced by the House of Lords in *Yeoman's Row Management Ltd v Cobbe*.[10] Focusing on the two significant Court of Appeal decisions in the inheritance context since *Thorner*, namely *Suggitt v Suggitt*[11] and *Bradbury v Taylor*,[12] this article questions whether the law of proprietary estoppel is being taken too far.

In respect of each of the two cases being studied, this article looks at both the courts' treatment of the law and the application of the law to the facts.[13] It is

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[8] See e.g. *Delaforce v Simpson-Cook* [2010] NSWCA 84 (New South Wales); *Naylor v Maher* [2012] IEHC 408 (available on BAILII) (Ireland).

[9] [2009] UKHL 18.

[10] [2008] UKHL 55. On *Cobbe* and *Thorner*, see McFarlane and Robertson "The Death of Proprietary Estoppel" [2008] LMCLQ 449; Etherton, "Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle" [2009] Conv 104; Dixon "Proprietary Estoppel: A Return to Principle?" [2009] Conv 260; Piska "Hopes, Expectations and Revocable Promises in Proprietary Estoppel" (2009) 72 MLR 998; McFarlane and Robertson "Apocalypse Averted: Proprietary Estoppel in the House of Lords" (2009) 125 LQR 535; Mee "Proprietary Estoppel, Promises, and Mistaken Belief" in Bright (ed) *Modern Studies in Property Law, Volume 6* (Hart Publishing, 2011).

[11] [2011] EWHC 903 (Ch); [2012] EWCA Civ 1140.

[12] [2012] EWCA Civ 1208. There is less to be said about a third post-*Thorner* decision of the Court of Appeal, *Cook v Thomas* [2010] EWCA Civ 227, where Lloyd LJ held that the claimants had not succeeded in the "seriously difficult task" ([48]) of persuading the court to overturn the trial judge's primary findings of fact in a case where the credibility of witnesses was at issue. The case involved an unsuccessful claim against a mother, by her daughter and son-in-law, to be entitled to occupy a farm (along with the mother) until the mother's death and then to inherit the property.

[13] Lloyd LJ suggested that in *Bradbury* "the challenge is as to the application of [proprietary estoppel principles] to the facts of the case": [2012] EWCA Civ 1208, [6]. He believed (*ibid*) that the appeal did "not involve any issue of law as regards proprietary estoppel" but, as the discussion in this article suggests, this does not seem to be accurate.

tempting to defer to the courts' approach to the latter question, which inevitably involves an element of judgement on the part of the trial judge based on having heard the witnesses and also on the part of the appeal court, having seen the relevant transcripts. On the other hand, it is important not to shy away from a consideration of this matter, since the law of proprietary estoppel, as developed by the courts, is favourable to claimants on a number of points of principle and is difficult to justify in theoretical terms[14] and it is possible that the courts tend to be equally generous to claimants in terms of applying the law to the facts. It will be argued that *Bradbury*, in particular, shows a claimant succeeding in circumstances where it is questionable whether the defendant's representation could appropriately form the basis of a proprietary estoppel claim.

A striking feature of both two cases is the extent of the success of the claimants. The claimant in *Suggitt* was the testator's son and the claimants in *Bradbury* were a married couple, the nephew of the testator and his wife. Like the claimant in *Thorner v Major*, whose remedy was worth "some £2.1 million",[15] the claimants in these two cases obtained very valuable remedies. In *Suggitt*, the claimant was held to be entitled to a farm and farm-house valued at over £3 million, while in *Bradbury* the claimants obtained ownership of an historic mansion in Cornwall on 15 acres of ground. In each case, it appears that the expectation remedy granted was disproportionate to the detriment incurred, so

[14] See Gardner and McKenzie *An Introduction to Land Law* (3rd ed) (Hart Publishing, 2012) pp 130-150.

[15] *Thorner v Major* [2008] EWCA Civ 732, [27] *per* Lloyd LJ. The figure was not mentioned in the House of Lords.

that on the basis of *Jennings v Rice*[16] the court should have chosen a lesser remedy. The cases illustrate a willingness on the part of the Court of Appeal to defer to the approach of the trial judge in respect of the selection of a remedy, even where this appears difficult to defend in principled terms. The article argues that the courts should adopt a more measured approach in respect of the remedial issue, with the appellate courts providing a greater level of guidance to trial judges.

Suggitt v Suggitt

John Suggitt was the youngest son of Frank Suggitt, a farmer in North Yorkshire. John was twenty-nine years old when Frank died, leaving his entire estate to John's older sister, Caroline, and expressing the non-binding wish that if, at any time, Caroline felt that John had showed himself "capable of working on and managing my farmland she shall transfer my farmland to him".[17] John made a proprietary estoppel claim on the basis that he had acted to his detriment in reliance on promises of inheritance. He was successful in his claim, both at first instance before HHJ Roger Kaye QC and on appeal to the Court of Appeal. Arden LJ gave the only judgment in the Court of Appeal, with Sullivan LJ and Sir Nicholas Wall concurring. The award in favour of the claimant, of the farmland and one of the farmhouses, was valued at £3.3 million[18] out of an estate of roughly £4 million.[19] Caroline had lived with her father for almost all of her life

[16] [2002] EWCA Civ 159. See Pawlowski "Satisfying the Equity in Estoppel" (2002) 118 LQR 519; Thompson "The Flexibility of Estoppel" [2003] Conv 225.

[17] [2012] EWCA Civ 1140, [3].

[18] [2012] EWCA Civ 1140, [50].

[19] [2011] EWHC 903 (Ch), [8] and [28].

but she had to make do with what was left after John's award, leaving her with an entitlement valued at around one-fifth of what her brother obtained.

There was a curious pattern throughout the first instance judgment whereby the judge would make statements that seemed damaging to John's prospects of success, before promptly making a finding in his favour. Although he ultimately held that the requirement of a representation had been satisfied, the judge admitted that the facts were "not nearly as clear cut" as in *Thorner v Major*.[20] John was not "a very reliable witness"[21] and his evidence as to the promises made was "opaque to say the least".[22] The judge's finding on the representation requirement was not challenged on appeal.[23] As regards the question of reliance, the trial judge commented that "[a]gain I regard John's case and evidence in support as weak".[24] But, the trial judge stated, "enough is enough".[25] He concluded that "the necessary degree of linkage" between the assurances and John's conduct had been established[26] and an attempt to challenge this was rejected by Arden LJ in the Court of Appeal.[27]

On the question of detriment, the work John claimed to have done was "barely, vaguely and weakly particularised".[28] In relation to one significant aspect of the detriment he relied upon, work done on the renovation of Witherholm, one of the farmhouses, "this seems to have been some stripping of

[20] [2009] UKHL 18.

[21] [2011] EWHC 903 (Ch), [38].

[22] [2011] EWHC 903 (Ch), [45].

[23] As noted by Arden LJ: [2012] EWCA Civ 1140, [28].

[24] [2011] EWHC 903 (Ch), [57].

[25] [2011] EWHC 903 (Ch), [57].

[26] [2011] EWHC 903 (Ch), [58].

[27] [2012] EWCA Civ 1140, [32]-[33].

[28] [2011] EWHC 903 (Ch), [59].

wallpaper, clearing rubbish, gutters and work in the garden when he was supposed to be off work sick".[29] The trial judge concluded that "John at least did some work on the farm, he agreed to go to college to learn necessary skills,[30] he helped with the sheep and grain and built up a beef herd".[31] However, "all in all it was nothing like the sort of work done in *Thorner v Major*".[32] The work John did on the farm was limited by the fact that his father, having no faith in him to run the farm, had leased most of it to third parties. At one point, John had "effectively run away to York and spent his inheritance"[33] of £38,000 from a great aunt before returning to the farm after nine months when "the money had run out".[34]

John "did not work for nothing, but he did not work for as much as he might have expected had he been an agricultural worker."[35] On the other hand, John received "substantial benefits" from Frank,[36] who 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.[37] John also received money from grain, sheep and beef cattle sales,[38] as well as from using his father's tractors and machinery to work with subcontractors and third parties.[39] He worked 40 hours a week in a sports shop and also worked in a pub.[40]

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[29] [2011] EWHC 903 (Ch), [59].

[30] He failed to finish this course at an agricultural college. His father paid all the fees: [2011] EWHC 903 (Civ), [14].

[31] [2011] EWHC 903 (Ch), [59].

[32] [2011] EWHC 903 (Ch), [59].

[33] [2011] EWHC 903 (Ch), [55].

[34] [2011] EWHC 903 (Ch), [21].

[35] [2011] EWHC 903 (Ch), [57].

[36] [2012] EWCA Civ 1140, [36] and [40].

[37] [2012] EWCA Civ 1140, [36].

[38] [2011] EWHC 903 (Ch), [59].

[39] [2012] EWCA Civ 1140, [40].

In the end, the trial judge accepted that John "positioned his whole life on the basis of the assurances given to him and reasonably believed by him".[41] This seems to have been a matter of geography more than anything else, with Arden LJ explaining that he "was based on the farm, and that is where he based his life".[42] Arden LJ stated that a successful challenge to the judge's conclusion that the detriment was real and substantial would involve showing that his evaluation of the relevant issues had been perverse. She did not accept that this had been shown and accordingly she upheld the trial judge's decision.

The Remedy

One of the most difficult aspects of the law of proprietary estoppel is the question of how the court should exercise its discretion at the remedial stage.[43] It was argued on appeal in *Suggitt* that the remedy granted by the trial judge was too generous. Arden LJ accepted that the court had to "do the minimum necessary to do justice to the claimant".[44] It was argued that the appropriate remedy would be to compensate John for the unpaid element of his work on the farm and for his work on helping to restore Witherholm. According to Arden LJ,

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[40] [2012] EWCA Civ 1140, [36].

[41] [2011] EWHC 903 (Ch), [59].

[42] [2012] EWCA Civ 1140, [38].

[43] See Gardner 'The Remedial Discretion in Estoppel' (1999) 115 LQR 438; Bright and McFarlane "Proprietary Estoppel and Property Rights" (2005) 64 CLJ 449; Gardner 'The Remedial Discretion in Proprietary Estoppel— Again' (2006) 122 LQR 492; Hopkins "Conscience, Discretion and the Creation of Property Rights" (2006) 26 Legal Studies 475, 493-496; Robertson "The Reliance Basis of Proprietary Estoppel Remedies" [2008] Conv 295; Mee "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" in Dixon (ed) *Modern Studies in Property Law, Volume 5* (Hart Publishing, 2009); Robertson "Unconscionability and Proprietary Estoppel Remedies" in Bant and Harding (eds) *Exploring Private Law* (CUP, 2010).

[44] [2012] EWCA Civ 1140, [42].

however, "[t]hat would have done the minimum, yes indeed, but it would not have done justice to the claimant given the assurances he had, on the judge's findings, been given and his acting to his detriment".[45] For Arden LJ, the real issue related to proportionality. In relation to this issue, she noted the well-known remarks of Robert Walker LJ in *Jennings v Rice*.[46] Robert Walker LJ had commented that, where there had been an informal bargain between the parties, it would be natural for the court to fulfill the claimant's expectation. He then went on as follows:

> "But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way."[47]

According to Arden LJ, "this principle does not mean that there has to be a relationship of proportionality between the level of detriment and the relief awarded".[48] Instead, she interpreted it to mean that, if it could be shown that the claimant's expectation was "out of all proportion" to the detriment he or she

[45] [2012] EWCA Civ 1140, [42].

[46] [2002] EWCA Civ 159.

[47] [2000] EWCA Civ 159, [50], quoted by Arden LJ [2012] EWCA Civ 1140, [43]. Arden LJ went on (*ibid*, [44]) to reiterate Robert Walker LJ's phrase about the satisfying the equity in "another and *generally* more limited way" (emphasis supplied). However, this formulation is odd because, if an expectation remedy is being eschewed because it would be "out of all proportion", it is difficult to see why the court would ever choose an alternative remedy which was *not* more limited than the expectation.

[48] [2012] EWCA Civ 1140, [44].

incurred, then the court could chose a lesser remedy than fulfilling the claimant's expectation.[49]

Arden LJ did not consider that in principle the court could "interfere with the exercise by the judge of his evaluation of what was out of all proportion unless it is shown to have been clearly wrong".[50] An attempt was made to argue that the court should have awarded John only a limited proportion of the farmland (and here Arden LJ mentioned her own figure of 75%). However, this point had not been put to the trial judge or included in the grounds of appeal and, when this was pointed out, counsel declined to press the point. The lesson seems to be that if counsel is arguing that the court should depart from the starting point of an expectation remedy, he or she should try to identify the full range of possible alternative methods of calculating the remedy. In fact, it is not clear that it is reasonable to expect this of counsel, given how wide-ranging the court's discretion appears to be.

Arden LJ considered that the real question was whether the judge was correct to award John the farmhouse known as Wellfield, along with the farmland. The trial judge had concluded that the father "did not necessarily make any promises about the farm houses", of which there were three.[51] "Equally" the trial judge "had no doubt Frank did not want John to be homeless".[52] Therefore, the judge concluded that the promise was of "the farmland and (by implication)

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[49] This approach to proportionality is also supported by the decision of the High Court of Australia in *Giumelli v Giumelli* (1999) 196 CLR 101 and has been restated by the New South Wales Court of Appeal in *Delaforce v Simpson-Cook* [2010] NSWCA 84, [3] *per* Allsop P; [59], [77]-[78] *per* Handley AJA.

[50] [2012] EWCA Civ 1140, [45].

[51] [2011] EWHC 903 (Ch), [56].

[52] [2011] EWHC 903 (Ch), [56].

somewhere to live".[53] As the appropriate house to include in the award, the judge chose Wellfield, the house where John and his family had been living at the time of his father's death. Arden LJ felt that "it was a matter for the judge whether the promises made by implication included a place to live, because he had heard all the evidence".[54] She did not think that his finding "was perverse or such that this court should interfere".[55]

Unfortunately, Arden LJ's reasoning seems flawed. Although she stated the issue as being whether the expectation-based remedy granted by the judge was "out of all proportion to the detriment which the claimant has suffered",[56] she went on to argue in the next paragraph of her judgment that "[s]ince the promise was that John should have the farmland unconditionally, I do not consider that to grant him the farmland … could be said to be out of all proportion".[57] In other words, she was arguing that the expectation relief granted was not "out of all proportion" to the *expectation* of (instead of the detriment incurred by) the claimant. Shortly afterwards, Arden LJ mentioned that she had taken into account that "both the farmland and Wellfield are very valuable", with an aggregate value of £3.3 million and with Wellfield alone being worth some £760,000.[58] She continued by stating that "[h]owever, the fact is that, on the judge's findings, the assurances were made and the values only reflect the assurances".[59] Once more, this seems to miss the point. The relevant

[53] [2011] EWHC 903 (Ch), [61].

[54] [2012] EWCA Civ 1140, [49].

[55] [2012] EWCA Civ 1140, [49].

[56] [2012] EWCA Civ 1140, [44].

[57] [2012] EWCA Civ 1140, [45].

[58] [2012] EWCA Civ 1140, [50].

[59] [2012] EWCA Civ 1140, [50].

question is whether the values represented by the assurances (which translated into the reasonable expectation of the claimant) are disproportionate to the *detriment* incurred by the claimant.[60]

Interestingly, the trial judge felt that his award to John "more than meets his reasonable expectations".[61] It is acceptable, when handing over one's own cash, to assert that one has been more than generous in dealing with the recipient. However, to regard generosity as a virtue in itself is quite inappropriate when one is dealing with someone else's money, in this case, Caroline's. It is not clear why the concession by the trial judge that his chosen remedy exceeded John's reasonable expectations was not a ground for upholding the appeal against the extent of the remedy.[62]

Arden LJ's apparent view on the primacy of the expectation remedy seems inconsistent with the more nuanced position indicated by the leading authority of *Jennings v Rice*[63] (which itself places more emphasis on the

[60] Compare the comment of Arden LJ in *Ottey v Grundy* [2003] EWCA Civ 1176, [58] that "the relationship between the promise and the remedy must be proportionate". In that case, Arden LJ also acknowledged (*ibid*, [57]) that "[t]he remedy must be proportionate to the detriment suffered". However, it does not appear to be coherent to suggest that the remedy must be proportionate both to the detriment *and* to the promise: see Mee "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" in Dixon (ed) *Modern Studies in Property Law, Volume 5* (Hart Publishing, 2009), pp 404-408. See also Gardner 'The Remedial Discretion in Proprietary Estoppel— Again' (2006) 122 LQR 492, 498-500.

[61] [2011] EWHC 903 (Ch), [62].

[62] See Mee "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" in Dixon (ed) *Modern Studies in Property Law, Volume 5* (Hart Publishing, 2009), p 391 regarding as "relatively uncontentious" the proposition that the claimant's reasonable expectation must represent a cap on the extent of the remedy.

[63] [2002] EWCA Civ 159.

expectation remedy than seems to be desirable).[64] It also seems to be inconsistent with her own statement in *Ottey v Grundy* that "the promise, even if of a specific property, is only a starting point".[65] It is unfortunate that Arden LJ made no attempt to compare the detriment incurred by the claimant with the extent of the remedy granted to him. When one attempts this exercise, it is very difficult to see how the remedy – valued at £3.3 million – was not disproportionate to the claimant's detriment. According to Arden LJ, "[t]he highest the judge put it was that there was some measure of detriment".[66] In fact, the trial judge felt that "John's problem is he wants the maximum for the minimum".[67] If this was John's failing, it seems that he came to the right courts.

In the circumstances of *Suggitt*, it seems that there could have been no objection to a conclusion that an expectation remedy would have been disproportionate and a consequent decision to award a non-expectation remedy valued at (say) £330,000, one-tenth of what was actually given. This would have left the claimant with a large lump sum to compensate for his detriment. If his father had not made any promises to him, how else could the claimant have behaved? What could he, apparently without any special qualifications, drive or ambition, have done that would have allowed him to accumulate that very

[64] See e.g. Mee "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" in Dixon (ed) *Modern Studies in Property Law, Volume 5* (Hart Publishing, 2009).

[65] [2003] EWCA Civ 1176, [58]. On *Ottey*, see Thompson "Estoppel and Proportionality" [2004] Conv 137.

[66] [2012] EWCA Civ 1140, [40].

[67] [2011] EWHC 903 (Ch), [59].

considerable sum before the age of thirty?[68] To award the claimant property valued at £3.3 million seems grossly disproportionate.

Having considered the surprising approach in *Suggitt*, the discussion now turns to *Bradbury v Taylor*,[69] a case decided by the Court of Appeal a few months later.[70] *Bradbury* also demonstrates the courts' liberality in relation to the remedial issue in this kind of case. In addition, the case illustrates a different form of generosity towards the claimant, in relation to the question of when a representation should be regarded as sufficient to form the basis of a successful proprietary estoppel claim in the inheritance context.

Bradbury v Taylor

The defendant in *Bradbury*, Bill Taylor, was the owner of Lower Manaton, a large house in Cornwall with 15 acres of grounds. He had been director of Art History as Sheffield Hallam University before his retirement and lived alone in the house after the death of his wife in 1997. He became concerned about living alone after the theft of a prized lawnmower (and a chainsaw) from outbuildings at the house. Starting at the end of 2000, he sought to persuade his nephew Roger and Roger's wife, Denise, to move to the house with their two children. The house

[68] Compare the discussion of the absence of superior alternative prospects for the claimant in *Murphy v Rayner* [2011] EWHC 1 (Ch) [290]-[295] *per* HHJ Cousins QC. A different approach has been taken in the recent case law from New South Wales: note the view of Allsop P in *Delaforce v Simpson-Cook* [2010] NSWCA 84, [5], accepted in *Walsh v Walsh* [2012] NSWCA 57, [26] *per* Meagher JA, that it is not fatal that the claimant "cannot show that he or she would have been better off in the posited alternative reality".

[69] [2012] EWCA Civ 1208.

[70] *Suggitt* was decided in June 2012 and *Bradbury* in October 2012. Note Lloyd LJ's brief comments concerning *Suggitt* in his judgment in *Bradbury* [2012] EWCA Civ 1208, [53] ("not helpful to argue about the facts of one case by comparison with those of another").

was sufficiently large to allow it to be divided into two separate living areas. Roger had long favoured such a move but Denise was much less keen because her extended family was based in Sheffield and their elder child was already at school there.[71] According to Roger and Denise, Bill persuaded them to move to Cornwall on the basis of a promise that he would leave the house to them. In August 2001, they moved away from Sheffield, at a cost to Denise's family ties. They lived rent-free in the house and were able to let out their own house in Sheffield for a time.[72] They made some contribution to Bill's care, "even though individual instances may not have amounted to a great deal".[73] In addition, Roger made a number of improvements to the property, from which his family benefited, spending almost £100,000 as well as contributing his own time. These improvements, however, increased the value of the property by only £46,000.

Relations between the parties deteriorated and Bill sought a declaration that Roger and Denise had no beneficial interest in the property and were no more than licencees or tenants. Bill died a few months later and, when the matter came to trial, HHJ Griggs found in favour of Roger and Denise, holding them to be entitled to receive the house subject to the payment of inheritance tax. This decision was unanimously upheld by the Court of Appeal, with Lloyd LJ giving the only judgment.[74] Although Lloyd LJ's judgment does not refer to the relevant figures, newspaper reports indicate that the house was valued at £800,000 (of a

[71] [2012] EWCA Civ 1208, [10].

[72] [2012] EWCA Civ 1208, [51].

[73] [2012] EWCA Civ 1208, [26].

[74] Richards and Elias LJJ concurring.

total estate worth over £1,000,000) and that the inheritance tax amounted to almost £160,000.[75]

"A Friendly Arrangement"?

For present purposes, the first point of interest in *Bradbury* relates to the requirement of a representation. The judge accepted Denise's account of a series of conversations with Bill, in which he was regarded by the judge as having "enticed"[76] her and Roger to move to the house in Cornwall. The trial judge found Roger to be "a distinctly unsatisfactory witness in many respects" and had "considerable reservations about his evidence as a whole".[77] The judge "also made some criticisms of that of Denise, while saying that she was a more impressive witness than Roger".[78] A difficulty in the way of the estoppel claim was the existence of a draft letter from Bill to Roger, in Bill's handwriting, dated July 23rd 2001 (shortly before Roger's family moved to Cornwall in August 2001). The letter was only in draft form and it was not possible to tell to what extent the final version might have differed from the draft.[79] Roger and Denise denied having received any letter along these lines from Bill and, indeed, Denise

[75] See e.g. "Late academic's estate left to 'the last person' he would have wanted", Daily Telegraph, 4th October 2012; http://www.telegraph.co.uk/news/newstopics/howaboutthat/9586411/Late-academics-estate-left-to-the-last-person-he-would-have-wanted.html (accessed 10th May 2013).

[76] [2012] EWCA Civ 1208, [27], quoting a passage from the first instance judgment.

[77] [2012] EWCA Civ 1208, [21].

[78] [2012] EWCA Civ 1208, [7]. Although Bill had died before the case came to trial, he had made a witness statement, of which the judge was "somewhat critical": *ibid*.

[79] [2012] EWCA Civ 1208, [14].

insisted that she never would have moved to Cornwall if she had received such a letter from Bill.[80]

The draft letter purported to "write out the terms of my offer to you to live here".[81] It explained that the family would have the use of one section of the house and the use of the extensive garden. They would pay no rent but would have to cover their own expenses and half of the rates, insurance and security costs. The draft letter then stated that:

> "I did not expect any thanks (nor did I get any!): instead I was given a number of conditions including decorating the kitchen, gutting the bathroom, signing a contract that I should not change my mind & guaranteeing that no one should be allowed to contest your occupancy when I am dead."

The letter insisted that the question of alterations should be discussed when the family had moved in. It then concluded with the following:

> "If you were paying rent, say £150 per week, there would be need for a contract. As it is there will be no contract, as this is a friendly arrangement.
>
> My offer (I have not changed my mind) still stands.

[80] [2012] EWCA Civ 1208, [40].

[81] [2012] EWCA Civ 1208, [13].

Yours"[82]

Against the estoppel claim, it was argued that this draft letter, although described as setting out the terms of Bill's offer, made no provision for the position after Bill's death. However, Lloyd LJ pointed out that the letter did make clear that there had been discussion of this matter since it referred to attempts to get Bill to sign a contract that he would not change his mind and that the family's occupation would not be disturbed after his death. Lloyd LJ felt that it was natural that the letter would concentrate on the practicalities of sharing the property.

It seems remarkable that the trial judge concluded that "[i]t matters not whether Bill actually sent them such a letter, although on balance I am inclined to the view that he did".[83] If indeed Bill had sent a letter to Roger setting out the terms of his offer, just prior to the family's coming to live in the house, surely such a letter would be of crucial importance in assessing the claim. If, as the judge was inclined to conclude, a letter had been sent, then an explanation was clearly required as to why its existence was being denied by the estoppel claimants. It seems implausible that they would have forgotten its existence, given that it would have been sent at a key time in their discussions with Bill and given Denise's emphatic statement that she would never have moved to Cornwall if she had received such a letter.[84] If they had received it, and had not honestly forgotten about it, the only other explanations – both damaging to their claim –

[82] [2012] EWCA Civ 1208, [13].

[83] Quoted [2012] EWCA Civ 1208, [25].

[84] Note though that Lloyd LJ believed that Denise's comments in this respect "can[not] necessarily be taken as particularly revealing": [2012] EWCA Civ 1208, [40]-[41].

would appear to be that they were both lying about the matter or only Roger was lying, having received the letter at the time and not revealed it to Denise for fear that she would decline to move to Cornwall.

Leaving aside this point, the contents of the draft letter seems to have been important in a way not recognised by the trial judge or by the Court of Appeal. Denise had "wanted at least something in writing as an assurance of Bill's intention" and it was arguable that Roger had asked for a contract or the equivalent.[85] It is true that Roger maintained "that Bill had agreed to provide such a letter but never did",[86] although it is not clear that this evidence was accepted by the trial judge. In the draft letter, Bill stated that "there will be no contract, as this is a friendly arrangement".[87] Lloyd LJ was not impressed with arguments based on this issue. However, the reasons he advanced for this were not convincing. One rather weak argument made by Lloyd LJ was that Bill's comment in the draft letter that "My offer (I have not changed my mind) still stands" could be seen as meeting Denise's concern that he would change his mind. However, this point – which was also made by the trial judge[88] – seems misconceived. Bill had previously complained in the draft letter of not having receiving any thanks when he made his offer orally, instead being subjected to various demands. However, despite this, he was still holding to the offer and, in this context, he explained that he had not changed his mind. The concern expressed by Denise was, obviously, not that he would change his mind about the offer before she had a chance to accept it but rather that he would change his

[85] [2012] EWCA Civ 1208, [38].

[86] [2012] EWCA Civ 1208, [24]; see also [40].

[87] [2012] EWCA Civ 1208, [13].

[88] Quoted [2012] EWCA Civ 1208, [25].

mind about leaving the house to herself and Roger *after* they had committed themselves by moving into the house.

Lloyd LJ's main argument was that the judge had found that there had been a prior oral representation by Bill to Denise (and through her to Roger) that he would leave the property to them if they came to live in the house. Lloyd LJ felt that, in light of this, it was open to the judge to find that "neither the letter, nor [Bill's] failure to put anything down in writing, amounted to a communication to [Roger and Denise] that he reserved to himself the right to deal with the property as he thought fit in his will".[89]

Arguably, this is too simplistic an approach. Even if there has been a prior oral representation, what should a claimant make of a subsequent letter setting out the terms of the defendant's offer and insisting that there should be no contract as what is proposed is "a friendly arrangement"? It is difficult to see how one party to a friendly arrangement, which is expressly not to be governed by a contract, can expect to sue the other party if the things subsequently go wrong. Similarly if, when someone makes a promise to me, I ask for confirmation in writing and the promisor refuses, this casts light on the nature of the promise that is being made to me, so that the situation is different to that which would have prevailed if there had just been the initial promise and no request on my part for confirmation. If someone is making a promise but is unwilling when asked to put it in writing or to sign a contract, this may (depending always on the circumstances as a whole) send a signal to the promisee that this is not the kind of promise that can be enforced in the legal sphere but rather amounts only to a moral commitment.

[89] [2012] EWCA Civ 1208, [44].

The question of the significance of a refusal to formalise an assurance also arose in the well-known case of *Gillett v Holt*[90] but the circumstances were rather different in that case. In *Gillett*, the claimant had asked the defendant for something in writing to confirm that he was going to inherit the farm as had previously been indicated to him. The defendant had refused, saying that it was unnecessary.[91] The claimant was disappointed but decided to accept the defendant's assurances on the basis that the defendant was "a man of his word".[92] It was argued that this incident was damaging to the claimant's case but Robert Walker LJ held that, in fact, the significance of the incident "goes the other way" and supported the claimant's position.[93] It is true that, in assessing the significance of a refusal to given a written commitment or to sign a contract, all the circumstances must be looked at and it is possible that a defendant could, at the same time as refusing to confirm his promise in more formal terms, reiterate the oral promise in such a way as to make clear that his promise is intended to be binding at more than a moral level. However, what may have been more important in *Gillett* was the fact that the claimant had already relied on the promises by the time of the relevant incident. The first promise relied upon in the case had been made 11 years earlier and the claimant and his wife had already sold their own home on the basis of the promises that they would inherit.[94] Robert Walker LJ felt that the claimant, by the time of the relevant

[90] [2001] Ch 210.

[91] [2010] Ch 210, 219.

[92] [2010] Ch 210, 219.

[93] [2010] Ch 210, 228.

[94] [2010] Ch 210, 234.

incident, already "had an exceptionally strong claim on Mr Holt's conscience".[95] If the defendant's reluctance to formalise the promise only becomes an issue after the claimant has already suffered irrevocable detriment, it is easier to justify the claimant's decision not to press the issue of a formal commitment (since the claimant has already committed himself and may be in too weak a position to make a stand on the issue).

By way of contrast, in *Bradbury*, the apparent refusal to formalise the promise came before the claimants had acted in any way to their detriment on the basis of the promise. Unlike in *Gillett*, they had no claim on the promisor's conscience and could simply have declined to make the move to Cornwall if they did not want to proceed in the absence of a legally binding commitment. They might have decided to continue anyway, on the basis that it was likely that no problems would arise and, as well as enjoying the benefits of living rent-free in the house, they would most likely inherit the highly valuable property when Bill (who was already in his 80s) passed away.[96] In such an event, however, they should have no claim under the law of proprietary estoppel.

There seems to be a willingness by the courts – reflecting an artificial and technical approach to the estoppel defendant which contrasts with equity's far more understanding approach to the estoppel claimant – to assume that a person who explicitly refuses to enter a contract is merely excluding legal liability of a contractual kind but is still assuming potential liability under the law of

[95] [2010] Ch 210, 234.

[96] Interestingly, Denise explained that one of the reasons for moving to Cornwall was to "show Bill that they were committed to continuing to run Lower Manaton after he died": [2012] EWCA Civ 1208, [23]. It is difficult to see how this motive can be squared with her argument that the family had moved into the house on the basis of an informal bargain that would entitle them to the house if they came to live in it.

proprietary estoppel. However, the truth seems to be that a person, not versed in the details of the law of contract and of equity, who explains that he or she is not willing to put a promise in writing or to sign a contract may (depending on the circumstances) be indicating that he or she is not willing to take on *any* legal liability in respect of the promise. Thus, if Bill, as part of a "friendly arrangement" which expressly ruled out contractual liability, did make a promise to leave the property to the family on his death, he may have been "reserving to himself the right to deal with the property as he saw fit in his will" in the sense that he was communicating that he was not willing to be sued if he left the property to someone else. This would not be inconsistent with his having made a moral commitment, so that he was clearly not reserving the right, in a moral sense, to break the promise.

There is a wider point here, that the development of proprietary estoppel should not undermine the important distinction between the moral concept of promise and the legal concept of contract.[97] People should be allowed the freedom to make a promise that is to operate only in the moral sphere, without the prospect of triggering litigation (including a proprietary estoppel claim). The law of contract allows people to preserve a degree of "personal detachment", enabling them to deal with each other without needing to place personal trust in each other. In contrast, the moral idea of a promise allows people to build inter-personal trust and respect.[98] Kimel argues that "to make a promise is to invite

[97] See further, Mee "Proprietary Estoppel, Promises, and Mistaken Belief" in Bright (ed) *Modern Studies in Property Law, Volume 6* (Hart Publishing, 2011) pp 195-197.

[98] See Kimel *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, Oxford 2003). See also Shiffrin "The Divergence of Contract and Promise" (2007) 120 Harv L Rev

personal trust, and to accept the promise, take it seriously and rely on it is to give that trust".[99] The role of promising as a "building block of personal relations"[100] would be compromised if the law did not leave space for people to trust each other, with every instance of reliance on a promise instead being coloured by the implicit threat of legal proceedings. It is hard to see how it makes a significant difference that the potential legal proceedings would be based on the law of proprietary estoppel rather than the law of contract – and it should be remembered that, even in the context of promises of inheritance, the dispute may arise during the defendant's life, so that his or her final years may be blighted by litigation.[101]

The Remedy

On appeal, it was argued that the remedy of fulfilling the claimants' expectation of inheriting the property was disproportionate, especially in light of the benefits received by the claimants during Bill's lifetime. Lloyd LJ explained that this argument did not involve a challenge to the trial judge's finding that the claimants had acted to their detriment. "Instead", he explained, "it involves an argument that in so doing either they suffered no detriment or, more relevant to the issue of remedy, such detriment as they suffered is to be balanced against the

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708; Pratt "Contract not Promise" (2007–08) 35 Fla St U L Rev 801; Bagchi "Separating Contract and Promise" (2010-11) 38 Fla St UL Rev 709.

[99] Kimel *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, Oxford 2003), p 77.

[100] *Ibid*.

[101] The defendant in *Bradbury* died, at the age of 90, on the day before the case was due to come on for trial: [2012] EWCA Civ 1208, [1]. The defendant in *Cook v Thomas* [2010] EWCA Civ 227 (see note 12 above) was 92 when she won her case.

advantage they gained and should be found not to be substantial."[102] Perhaps this reflects the manner in which the argument was presented by counsel, but it seems clearly to overstate what was required for the relevant argument to succeed.

The argument that the remedy obtained by the claimants (valued at £640,000) was disproportionate clearly did not require it to be shown that the claimants suffered no net detriment or that their net detriment was "not … substantial". As has been discussed earlier in this article, the proportionality issue requires a comparison of the extent of the (net) detriment with the extent of the expectation remedy.[103] Even if the net detriment is substantial, an absence of proportionality may clearly still exist if the expectation remedy is far more substantial. Oddly, in discussing the remedial issue, Lloyd LJ seemed to focus on the question of whether there was *any* net detriment to the claimants, emphasising that the trial judge had been entitled to conclude that the works done on the house, although beneficial to Roger's family in the immediate term, constituted detrimental reliance.[104] Possibly, Lloyd LJ took the view that requirement of detriment should be evaluated without reference to any countervailing benefits received by the claimant and that it would only be at the remedial stage that the detriment would be balanced against such benefits, possibly leading to the denial of any remedy. Unfortunately, this approach may have facilitated an erroneous assumption on the part of Lloyd LJ that an expectation remedy should be granted unless, balancing the detriment and the

[102] [2012] EWCA Civ 1208, [49].

[103] See text following note 45 above.

[104] [2012] EWCA Civ 1208, [49].

countervailing benefits, the result was that the claimants had suffered no substantial net detriment.

Lloyd LJ noted that, in terms of balancing the detriment and the countervailing advantages obtained by the family, "there are several elements to which no conventional or measurable value can be assigned".[105] A key problem in the law governing the remedies for proprietary estoppel is that the inevitable difficulty in putting a monetary value on certain types of detrimental reliance, and of countervailing advantage, is treated as entirely the defendant's problem. If Roger's work and expenditure on the family home had stood alone, there would have been a relatively straightforward argument that the remedy should take the form of monetary compensation (which should probably not have been limited by reference to the amount which the work increased the value of the property). However, Denise also suffered the detriment of "living a long way from her family".[106] Counterbalancing this was "the advantage of living in a house with large and pleasant grounds where the children could play more freely than in Sheffield".[107] One could reach different conclusions when attempting to weigh these points up against each other – certainly, it is easy to imagine a case where a reverse move, from rent-free occupation of a historic mansion with 15 acres of gardens in Cornwall to a terraced house in Sheffield[108] (even if near one's extended family), would be recognised as detrimental reliance.

[105] [2012] EWCA Civ 1208, [49].

[106] [2012] EWCA Civ 1208, [49].

[107] [2012] EWCA Civ 1208, [49].

[108] [2012] EWCA Civ 1208, [49]. The details that their house in Sheffield was part of a terrace and that Lower Manaton was a Grade II listed building are mentioned in "Late academic's estate left to 'the last person' he would have wanted", Daily Telegraph, 4th October 2012;

The point is that it is almost impossible to quantify the extent of the net detriment associated with the choice that Denise was induced to make. This means that it could be considered to be very significant, so that even a very large expectation remedy would not be disproportionate, or else it could be considered not very significant at all on balance. The tendency in the estoppel case law, illustrated again in this case, is towards the former approach. This leads to the paradox that reliance that is uncontroversially detrimental, e.g. substantial expenditure which cannot be recouped if defendant resiles from his promise, may ultimately assist a claimant less than reliance which takes the form of a "life choice" and which is difficult to quantify in monetary terms.

Lloyd LJ concluded that the trial judge had correctly directed himself as to the law and had "carried out an evaluative exercise as regards the benefits and disadvantages".[109] This is strange, given that Lloyd LJ had earlier quoted the trial judge's explicit conclusion that "this is not a case in which I should engage in an exercise of seeking to evaluate the various benefits and detriments suffered", since such a task would be difficult and "artificial in the extreme".[110] The trial judge had, in fact, seemed to reach his conclusion by a rather different route. He felt that this was "precisely the sort of case envisaged by Robert Walker LJ in *Jennings v Rice* at paragraph 45 of his judgment where the expected benefit and the expected detriment were in general and in an imprecise way equivalent, or at any rate not obviously disproportionate", so that it was appropriate to fulfill the

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http://www.telegraph.co.uk/news/newstopics/howaboutthat/9586411/Late-academics-estate-left-to-the-last-person-he-would-have-wanted.html (accessed 10th May 2013).

[109] [2012] EWCA Civ 1208, [51].

[110] Quoted by Lloyd LJ [2012] EWCA Civ 1208, [28].

claimant's expectation.[111] Robert Walker LJ had been contemplating a case involving a bargain, falling short of a contract, and had described the "typical case" of someone who moves in with an elderly person and cares for that person in the expectation of inheriting the house.[112] In such a case, in the view of Robert Walker LJ, the existence of the informal bargain indicates that the fulfillment of the claimant's expectation would not be disproportionate.

The facts of *Bradbury* differed considerably from this scenario, in that the claimants provided only very limited care for Bill, although they did incur other forms of detriment. Nonetheless, the claim did appear to be based on an informal bargain of the type envisaged by Robert Walker LJ. However, as has been argued in detail elsewhere, there are problems with Robert Walker LJ's "bargain" analysis.[113] For example, even where the parties envisage a quid pro quo, this does mean that there is no element of gift in the transaction – the donor may wish to confer a gift while receiving a particular benefit in partial return. However concerned he was at the theft of his prize lawn-mower, Bill probably did not see himself as involved in a roughly equal exchange, whereby the benefits he received from the arrangement were comparable to the benefits to Denise and Roger in terms of free accommodation in the house *and* inheriting the very valuable house on his death.

In any event, Lloyd LJ seemed unwilling to engage to any great extent with the challenge that had been made to the trial judge's choice of remedy. Counsel had argued that "the case was not to be treated as a case of a quasi-

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[111] Quoted [2012] EWCA Civ 1208, [28].

[112] *Jennings v Rice* [2002] EWCA Civ 159, [45].

[113] Mee "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" in Dixon (ed) *Modern Studies in Property Law, Volume 5* (Hart Publishing, 2009), pp 411-415.

bargain, as well as saying that, even if it was, the benefit accorded by the order was disproportionate".[114] Lloyd LJ responded that he did "not find that a very useful enquiry in the circumstances of this case".[115] He could accept that there could be different levels of similarity between the relevant representations and a contractual bargain but, once the judge had the material facts in mind and understood the law, "it is inherently difficult to show that the judge has misdirected himself in coming to a conclusion as to the appropriate remedy".[116] Lloyd LJ may have been made more cautious by his experience in *Thorner v Major*, when his judgment in the Court of Appeal,[117] reversing the trial judge's decision, did not appear to be very well received in the House of Lords.[118] In any event, he found no error in the judge's reasoning or conclusion in *Bradbury*.

Interestingly, Lloyd LJ commented that the remedy chosen by the trial judge had required the claimants to bear the inheritance tax on the house, "which plainly reduces the value of the award to them, and might be said to reduce it below what they might reasonably have expected".[119] This is striking because it is possible to read *Jennings v Rice* as providing at least some level of guidance to trial judges: the expectation remedy is the starting point but, if this would be disproportionate, a lesser remedy must be chosen by reference to a range of factors (some of which were identified by Robert Walker LJ).[120]

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[114] [2012] EWCA Civ 1208, [52].

[115] [2012] EWCA Civ 1208, [52].

[116] [2012] EWCA Civ 1208, [52].

[117] [2008] EWCA Civ 732.

[118] See e.g. [2009] UKHL 18, [17] *per* Lord Scott; [60] *per* Lord Walker; [76]-[81] *per* Lord Neuberger.

[119] [2012] EWCA Civ 1208, [50].

[120] [2002] EWCA 159, [50]-[52].

However, Lloyd LJ seemed perfectly content that, apparently without suggesting that he had concluded that a full expectation remedy would be disproportionate or identifying factors that had guided him to make the relevant modification to the remedy, the trial judge in *Bradbury* departed from a remedy based on the claimant's reasonable expectations by deducting £160,000 in inheritance tax.[121] This contributes further to the impression that the question of a remedy in cases of this nature is too much at large.

The Appellate Courts and the Remedial Jurisdiction

The approach in *Suggitt* and *Bradbury* lends support to Gardner's point that the remedial discretion in proprietary estoppel, not being properly capable of audit, is not consistent with the idea of the rule of law.[122] The relevant approach is reminiscent of the Supreme Court's emphasis in *Jones v Kernott*, in the context of the uncertain common intention constructive trust doctrine, on the point that "[t]he trial judge has the onerous task of finding the primary facts and drawing the necessary inferences and conclusions, and appellate courts will be slow to overturn the trial judge's findings."[123] Judging from Lloyd LJ's observations in *Bradbury*, it seems possible that the Court of Appeal would have been equally unwilling to interfere if, having made the same findings of fact, the trial judge had decided that an expectation remedy (valued at £800,000 if no inheritance tax were to be deducted) would have been have been disproportionate to the detriment suffered and decided instead to grant a monetary remedy of, say,

[121] Note, though, that one of the factors identified by Robert Walker LJ in *Jennings* was "the likely effect of taxation": [2002] EWCA Civ 159, [52].

[122] "The Remedial Discretion in Proprietary Estoppel – Again" (2006) 122 LQR 492, 509-512.

[123] [2011] UKSC 53, [36] *per* Lord Walker and Lady Hale.

£300,000, attributing £100,000 to the improvements and adding £200,000 to reflect the net detriment to Denise resulting from moving away from Sheffield. Similarly, while the Court of Appeal upheld the very generous remedy favoured by the trial judge in *Suggitt v Suggitt*, it is not clear that, in that case, the court might not also have deferred to the trial judge's view if he had favoured a much more modest remedy in that case. It does not seem right that the law should be set up so that such a wide variety should be tolerated in terms of the remedial choices of trial judges.

By showing that an expectation remedy is not the invariable choice, *Jennings v Rice* removed an element of certainty that some commentators had believed to exist.[124] While the aim was the commendable one of avoiding a disproportionate result, the new position seems distinctly unsatisfactory. *Bradbury* suggests that an appeal court will not interfere if the trial judge has quoted the right extracts from the right appellate judgments and seems to have taken all relevant matters into account. The problem is that the law is not actually clear in this area. One view, while acknowledging the significance of the expectation remedy as a starting point, suggests that the court should take a cautious approach that seeks to avoid a disproportionate remedy and emphasises the need to do the minimum necessary to satisfy the claimant's equity. The alternative view is that a claimant can almost always expect an expectation remedy, so that the proportionality principle is relevant only in rare cases where such a remedy would be grossly disproportionate.[125] These

[124] See e.g. Cooke "Estoppel and the Protection of Expectations" (1997) 17 Legal Studies 258, 271–273; Cooke *The Modern Law of Estoppel* (OUP, 2000) pp 150ff.

[125] There is, in fact, a third view which insists that proportionality should operate not as a negative principle, sometimes indicating the need to depart from an expectation remedy, but

approaches are capable of yielding significantly different results yet, in the absence of clarification from the appellate courts, it could not be said to be perverse or irrational for a trial judge to adopt either of them in an individual case. It is notable that, for good or ill, the Australian courts seem to have chosen between the two approaches, taking the view that the establishment of the primacy of the expectation remedy in *Giumelli v Giumelli*[126] means that the "minimum necessary to satisfy the claimant's equity" principle is no longer good law.[127] On the other hand, in *Suggitt*, Arden LJ explicitly accepted the "minimum" principle[128] and seems to have seen no conflict between it and the award of a very generous expectation remedy on the facts of the case.

It seems reasonable to suggest that the appellate courts in England should do more to clarify the law in relation to the remedial question. It is also arguable that they should be somewhat less deferential towards the reasoning of first instance judges in relation to this issue. While trial judges have the benefit of seeing the witnesses, they are also closer to the personalities involved and may be unduly swayed by sympathy for an individual claimant or defendant or may – as seems to have happened in *Suggitt* – over-compensate in an attempt to be fair

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rather as a positive principle that should always guide the court in its task of choosing a remedy. See McFarlane *The Structure of Property Law* (Hart Publishing, 2008) pp 457-466. Compare the comment of Sir Jonathan Parker in *Henry v Henry* [2010] UKPC 3, [65] that proportionality "lies at the heart of the doctrine of proprietary estoppel and permeates its every application".

[126] (1999) 196 CLR 101 (High Court of Australia). See Burns "*Giumelli v Giumelli* Revisited: Equitable Estoppel, the Constructive Trust and Discretionary Remedialism" (2001) 22 Adelaide Law Review 123.

[127] See *Donis v Donis* [2007] VSCA 89, [18]-[19], [32] *per* Nettle JA; *Delaforce v Simpson-Cook* [2010] NSWCA 84, [3] *per* Allsop P; [59] *per* Handley AJA; *Walsh v Walsh* [2012] NSWCA 57, [31] *per* Meagher JA. See also Aitken "The future of the 'minimum equity', and the appropriate 'fault line' in promissory and proprietary estoppel" (2010) 33 Aust Bar Rev 212.

[128] [2012] EWCA Civ 1140, [42].

to a claimant with whom they have no sympathy at all.[129] It would not seem prudent to leave these difficult cases – some of which involve the possible creation of estoppel millionaires – almost entirely to first instance judges, with only limited assistance from the appeal courts.

Conclusion

It is noteworthy that the trial judge in *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".[130] Similarly, in *Joyce v Epsom and Ewell Borough Council*,[131] a proprietary estoppel case decided by the Court of Appeal in the same month as *Bradbury*, Davis LJ complained that "[p]ragmatic compromise has eluded the parties".[132] Perhaps the courts should look to their own decisions rather than marvelling at the inability of the parties to reach a sensible compromise. Proprietary estoppel is a very powerful and a very unpredictable doctrine. In advising John Suggitt in advance, a solicitor might have warned him that he could fail in his claim or receive an intermediate remedy along the lines of *Jennings v Rice* or else, as happened in the case, he might hit the jackpot. How can the parties bargain in the shadow of the law of

[129] *Suggitt* [2011] EWHC 903 (Ch), [62], *per* HHJ Kaye QC: "Although I formed no greatly favourable impression of John as must be apparent, nevertheless I must consider carefully how the equity in this case ought to be satisfied".

[130] [2011] EWHC 903 (Ch), [66].

[131] [2012] EWCA Civ 1398; noted by Mee "An Easement by Estoppel" [2013] Conv 156.

[132] [2012] EWCA Civ 1398, [1] (decided in October 2012). Note also another inheritance case, in which the claimants were unsuccessful, *MacDonald v Frost* [2009] EWHC 2276 (Ch), [7] *per* HHJ Andrews QC: "disappointing that the parties to this litigation have been unable to reach a compromise".

equity when that law is so "flexible"? The unpredictability of proprietary estoppel generates a great deal of additional ("bitterly fought and ruinously expensive")[133] litigation.

In terms of the related issue of generosity to claimants, part of the problem may be that all the fun in equity lies in providing remedies for claimants where "the rigours of strict law" will not allow it.[134] The rhetoric of centuries encourages judges to "temper the harsh wind to the shorn lamb".[135] From the point of view of some judges (although other judges might have a different preference), it could seem 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 property law and succession law. However, there is a cost in terms of the certainty of the law, certainty that would benefit members of the public who would, as a result, never come into contact with the judges administering equity. Despite much reverential talk on the part of legal commentators and judges about equitable flexibility and the prevention of unconscionability, it is not in the public interest for the legal system to tolerate an indulgent and confused proprietary estoppel jurisdiction. It is to be hoped that the trend represented by *Suggitt* and *Bradbury* will not continue and that the courts will begin to take a more restrained and analytical approach.

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[133] *Per* Robert Walker LJ, describing the litigation in *Gillett v Holt* [2010] Ch 210, 228.

[134] *Crabb v Arun District Council* [1976] Ch 179, 187 *per* Lord Denning MR.

[135] See *Murad v Al-Saraj* [2005] EWCA Civ 959, [81] *per* Arden LJ. See also *Pennington v Waine* [2002] 1 WLR 2075, 2087 and 2088 and 2089 *per* Arden LJ (where the wind was not yet described as harsh).