PROPRIETARY ESTOPPEL – A USEFUL ALTERNATIVE IN ToLATA CLAIMS

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Proprietary Estoppel arises where one party spends money on property belonging to another in the expectation or belief, which is encouraged by the other party, that by doing so they will acquire an interest in it. This often arises in situations where the legal owner creates or encourages an expectation that the other party will have an interest in land in reliance on which the other party acts to their detriment. Being an equitable remedy it is concerned with preventing unconscionable conduct and as such the Court must look at the matter in the round.

The doctrine is aimed at preventing a person from insisting on their strict legal rights where:-

- A representation, promise or assurance that the claimant has, or will acquire rights in respect of specified property;
- Reliance on it; and
- Detriment to the claimant in consequence of their reasonable reliance, i.e. reliance on the promise or assurance with a sufficient link between the promise and the conduct constituting the detriment (the promise or assurance does not have to be the sole inducement) (Suggitt v Suggitt (2011) EWHC 903).
- Unconscionability "that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine......the court must look at the matter in the round." (Gillett v Holt (2000) 2 FLR 266)

Whilst a representation has to be clear and unequivocal for the purposes of proprietary estoppel (Thorner v Major [2009] UKHL 18), the court has to take a broad approach in order to establish whether it would be unconscionable for a party to renege on something which they had allowed or encouraged the other party to believe.

The elements of proprietary estoppel should not be rigidly compartmentalised as it is essential to consider them altogether in one evaluation. (Davies v Davies [2014] EWCA Civ 568)

Thus unconscionability permeates all the elements of proprietary estoppel rather than being a discrete feature of it.

“It is the detrimental reliance which makes the promise irrevocable and leads to the conclusion, at the end of a broad enquiry, that repudiation of the assurance is unconscionable.’

Southwell v Blackburn (2014) EWCA Civ 1347

In contrast to that of a Constructive Trust which requires there to be a common intention in proprietary estoppel a representation may give rise to a misapprehension on a party which is not shared by the legal owner:
“There are circumstances in which it is not possible to infer any agreement, arrangement or understanding that the property is to be shared beneficially but in which nevertheless equity has been prepared to hold that the conduct of an owner in allowing a claimant to expend money or act otherwise to his detriment will be precluded from denying that the claimant has a proprietary interest in the property... claims based on proprietary estoppel are more likely to arise where the claimant has acted after an informal promise has been made to him.”

*Yaxley v Gotts* [2000] Ch 162

For example where a cohabitant had given a number of evasive excuses as to why a property was not held in joint names and believed that they had an interest in the property and acted to their detriment in reliance upon that belief. The owner deliberately failed to disabuse them of their mistaken belief and a proprietary estoppel had arisen (*Van Leatham v Brooker & Caradoc Estates* (2006) 2 FLR 495)

To be entitled to a remedy based on proprietary estoppel, the person seeking such remedy must have an expectation of a “certain interest in land” (*Yeomans Row Management Ltd v Cobbe* [2008] UKHL 55).

Whilst an assurance from the legal owner as to some future rights in land can be expressed or impliedly made, such assurance must be a clear one; what is ‘clear’ depends upon the context but the assurance itself need not be unequivocal. (*Thorner v Major & others* (2009) UKHL 18)

Thus the assurance has to be viewed contextually so that the relevant question is what the claimant would reasonably have understood the legal owner to mean by his words and acts.

The “promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made.” (*Walton v Walton* (unreported) 14/4/94).

The assurance given must also relate to identified property. For example a promise made to give “financial security during my life and financial security on my death” did not represent an assurance to have an interest in any particular asset. (*Layton v Martin* (1986) 2 FLR 227).

Similarly a statement to the effect that the Claimant would never want for anything was held insufficient to give rise to an estoppel (*Lissimore v Downing* (2003) 2 FLR 308) (see also, *James v Thomas* [2007] EWCA Civ 1212, (the phrases ‘this will benefit us both’ and ‘you will be well provided for’ held not to constitute a promise of some property interest but merely a representation that the parties were making their life together as man and wife)

However a promise that “it’ll all be yours one day” was regarded as sufficiently linked to the subject property to justify a claim to it by way of estoppel (*Wayling v Jones* (1995) 2 FLR 1029).

A promise that a person may be allowed to stay in a house for as they wish also raises an equity in that person’s favour *Greasley v Cooke* [1981] 1 WLR 1306.

In *Coombes v Smith* [1986] 1 WLR 808, an assurance given by the defendant to his female cohabitee that he would always ‘provide her with a roof over her head’ was held insufficient to constitute a representation that she was legally entitled to security of tenure against his wishes.
In Bennett v Bennett (unreported) 18 May 1990, the Court of Appeal held that a mere verbal statement by the legal owner that he ‘didn’t want [the claimant] out’ could not have been reasonably understood by her as an assurance that she could remain for the rest of her life. The statement simply suggested that the legal owner was prepared to let her stay in the property for the time being and that he would, therefore, have the right to ask her to leave on reasonable notice.

A similar conclusion was reached in Bostock v Bryant (1990) 61 P & CR 23, where the claimant was told by her uncle: ‘don’t worry about the future, you’ll be alright’. This was held by the Court of Appeal to be too vague to amount to an assurance that she could live in the house as long as she wished.

In, Southwell v Blackburn (2014) EWCA Civ 1347 the Court of Appeal held that the legal owner’s assurance that the claimant ‘would always have a home and be secure in this one’ and that she ‘would have the sort of security that a wife would have, in terms of accommodation at the house’ was enough to support the finding that she would have security of rights of occupation in the house which would be recognised even in the event of the breakdown of the parties’ relationship.

Similarly, in the case of Hammond v Mitchell [1999] 1 WLR 1127, the words spoken were: ‘don’t worry about the future because when we are married, it will be half yours anyway and I’ll always look after you’. These expressions were held to give rise to a common intention that the claimant was to be entitled to a beneficial share in the property registered in her male partner’s sole name.

Where there is any ambiguity then that ambiguity should not deprive a person who reasonably relied on it (an objective test) but the relief may be accorded on the basis of the least beneficial interpretation!

Whether there is detrimental reliance is an evaluative judgment and whether a claimant suffers detriment must be judged at the point where the person who gave the assurance seeks to go back on it.

Ultimately the question is whether looked at in the round, in the circumstances that have happened, it would be unconscionable for the promise or assurance not to be kept.

Whether the detriment itself is sufficiently substantial must be judged by whether it would be unjust or inequitable to allow the assurance to be disregarded. 
(Davies v Davies [2014] EWCA Civ 568)

The recent case of Southwell v Blackburn (2014) EWCA Civ 1347 reiterated as follows:-

- detriment is not a narrow or technical concept;
- detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial;
- the need to show detriment must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances;
- there must be sufficient causal link between the assurance relied on and the detriment asserted;
- the issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it;
- whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded - that is, again, the essential test of unconscionability;
• the detriment alleged must be pleaded and proved. Proprietary estoppel ... does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept.

Thus Proprietary Estoppel requires a clear representation or assurance which is relied upon, and in all the circumstances it is reasonable to rely upon, in consideration of which there has been detriment to the person so reliant of sufficient substance to justify an equitable remedy. There must also be a sufficient link between the promises relied upon and the conduct which constitutes the detriment.

As far as the interrelationship with Express Trusts are concerned in Clarke v Meadus (2010) EWHC 3117 the argument that an express declaration within a deed was capable of being overridden by a proprietary estoppel in favour of the claimant as a result of promises and representations made after the deeds were executed was accepted. Thus formal documents setting out a party’s beneficial interest are not immutable or incapable of being effected by subsequent events amounting to proprietary estoppel.

This is an important consideration as in the absence of rectification or rescission through fraud, mistake or undue influence; proprietary estoppel is the only other doctrine by which an Express Declaration of Trust can be set aside.

In the case of Oxley v Hiscock, it was that to a large extent there was no difference between arguments based upon constructive trust as opposed to that of proprietary estoppels:

“Once it is recognised that what the Court is doing in cases of this nature is to supply or impute a common intention as to the parties’ respective shares (in circumstances in which there was, in fact, no common intention) on the basis of that which, in the light of all the circumstances (including the acts and conduct of the parties after the acquisition) is shown to be fair it seems to be very difficult to avoid the conclusion that an analysis in the terms of proprietary estoppel will necessarily lead to the same results; and that it may be more satisfactory to accept that there is no difference, in cases of this nature, between constructive trusts and proprietary estoppel”.

However, in the case of Stack v Dowden (2007) 1 FLR 1858, Lord Walker disagreed “I am now rather less enthusiastic about the notion that proprietary estoppel and ‘common interest’ constructive trusts can and should be completely assimilated. Proprietary estoppel consists of asserting an equitable claim against the conscience of the ‘true’ owner. The claim is a ‘mere equity’. It is to be satisfied by the minimum award necessary to do justice which may sometimes lead to no more than a monetary award. A ‘common intention’ constructive trust by contrast is identifying the true beneficial owner or owners and the size of their beneficial interest.”

This was further backed up in the case of Q v Q (2008) EWHC 1974 where it was held that Proprietary estoppel and constructive trust remained distinct concepts as there was a significant difference between the nature of reliefs available under either concept. Under proprietary estoppel the Court has to decide “the minimum equity to do justice between the parties” (Crabb v Arun DC (1976) Ch 179) in the particular circumstances of the case whereas a constructive trust leads to a declaration of beneficial ownership.

What about quantum of award in a successful claim?
• The value of the equity will depend upon (a) all the circumstances of the case, including (b) expectation and (c) detriment. *(Jennings v Rice [2002] EWCA 159)*
• The court must balance the proportionality of the expectation with that of the detriment incurred. 'Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application.' *(Henry v Henry [2010] UKPC 3)*
• When considering detriment this must be balanced against any relevant benefit enjoyed by the claimant. The court is not simply concerned with financial detriment but looks at all the circumstances in the round.
• When there is a clear understanding between the parties, falling short of a contract, 'In such a case the court’s natural response is to fulfil the claimant’s expectations. 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.' *(Henry v Henry [2010] UKPC 3)*
• The question of preventing unconscionable conduct permeates all considerations. *(Gillett v Holt [2001] Ch 210)*
• The end result must be a just one having regard to the assumption made by the party asserting the estoppel and the detriment which he has experienced *(Sledmore v Dalby (1996) 72 P&CR 196)*

In essence a successful claimant may be awarded the interest he believed he would acquire or, if the circumstances dictate, a lesser interest.

Finally, the case of *Davies v Davies* [2014] EWCA Civ 568 emphasises that proprietary estoppel claims require a holistic approach and split trials should be avoided.

**Summary of Principles**

A claimant relying on proprietary estoppel must show a clear and unequivocal assurance in relation to the family home in order to raise an equity in their favour. The relevant question is what the claimant would reasonably have understood the legal owner to mean by their words and acts.

Although detriment need not be financial, the claimant may fail if any benefits accruing to them as a consequence of the relationship outweigh the detriment suffered.

**Practice Point:** - In many cases there is a clear tactical advantage of pleading, in addition to a main claim to a constructive trust, an alternative case based on proprietary estoppel.