

Clarifying the law of proprietary estoppel

MARK KEENAN and CLAIRE PINDER examine in detail the House of Lords' judgment in *Thorner v Major* [2009].

“ Oblique assurances by a farmer of an intention to leave a farm to a cousin, who had worked full-time without any remuneration on the farm for 29 years, could constitute a sufficiently clear and unequivocal representation to establish a proprietary estoppel when the farmer ultimately died intestate” – *Thorner v Major and Others* [2009] UKHL 18 (*Thorner 2009*).

As an adviser to the elderly, you will be aware that challenges to wills are on the increase. There has been a 200 per cent increase in contested will cases since 2004. There are many reasons for this, for example, an aging population more prone to mental illness or more complex family arrangements. Undoubtedly, the press has also played a part in raising awareness. Probate claims now receive the same type of coverage as high-profile divorce cases.

A case that has received widespread coverage in the press concerned Somerset farmer, David Thorner. The notoriously tricky legal concept of proprietary estoppel was the central issue. This equitable doctrine works to prevent someone suffering a detriment where there has been reliance on a representation or assurance. The case has provoked some lively debate on the doctrine and the extent to which it is available to encroach on the fundamental principle of testamentary freedom, which still exists in English law. The case went all the way to the House of Lords, an earlier Court of Appeal decision was overturned and Mr Thorner won. The House of Lords' decision has now clarified the more ambiguous elements of the doctrine.

The facts

The Thorners farmed land near Cheddar in Somerset called Steart Farm. The



farm had been passed down through the family. David's father's cousin, Peter, had owned the farm since the 1970s, when he had inherited it from his first wife. Peter had no children of his own and had divorced his second wife in 1986, after a brief marriage. His first wife, Sarah, to whom he had been devoted, had died of Crohn's disease in 1976.

When Peter inherited the farm, it was about 350 acres in extent. Until 1988, Peter had a dairy herd, beef cattle and sheep. In 1988, he sold the

dairy herd and his milk quota. By 1992, he was farming 583 acres, some of it rented by him as a tenant. In 1998, he sold the sheep and, in the course of the next year, he granted some farming tenancies over most of the land, while continuing to farm about 160 acres himself. At Peter's death in 2005 (aged 77), the farm comprised 560 acres, including 120 acres of which Peter was only the tenant. Of this total, 400 acres were let out by Peter and 160 acres were in hand.

When Sarah died in 1976, David, who was then aged 26, began to help Peter at Steart Farm. He continued to do so, without any remuneration, until Peter's death 29 years later.

By 1985, David was working 18 hours a day, seven days a week on his father's farm and Steart Farm, with Steart Farm taking up more than half his time. David lived with his parents, received pocket money from them and received no payment from Peter. Peter apparently considered himself entitled to David's help and expected David to do whatever he asked. David was described as being at Peter's "beck and call". David also provided Peter with companionship and emotional support.

It was during the 1980s that David came to hope that he might inherit Steart Farm. That hope became an expectation in 1990, when Peter gave him a Prudential Bonus Notice on two

David claimed that Peter's estate was bound by conscience, as Peter was during his life, to give him Steart Farm, and he asserted the claim by way of proprietary estoppel. He claimed this on the basis that for over 15 years he had acted to his considerable detriment relying on an expectation, repeatedly encouraged by Peter, that he (David) would inherit Peter's estate – such that it became unconscionable for this not to happen. The defendants in the case were the executors of Peter's will, Peter's sisters Winifred and Ena, and his niece, Lesley.

At first instance, before John Randall QC, sitting as a deputy judge of the High Court, David succeeded in his claim and, broadly speaking, was awarded the farm (*Thorner v Curtis and Others* [2007] EWHC 2422 (Ch)). The decision was appealed and that appeal was upheld. David appealed to the House of Lords.

which the assurance relates has been inadequately identified, or has undergone a change in situation or extent, during the period between the giving of the assurance and its eventual repudiation.

Assurances and representations

In the Court of Appeal, Lord Justice Lloyd quoted with approval Lord Denning's statement in *Sidney Bolsom Investment Trust Ltd v E Karmios & Co* ((London) Ltd [1956] 1 QB 529 at 540-1): "In order to work as an estoppel, the representation must be clear and unequivocal, it must be intended to be acted on, and in fact acted on," (*Thorner v Major and Others* [2008] EWCA Civ 732 at para 38).

The Court of Appeal concluded that the statement made implicitly by Peter to David (on which David said he relied) did not amount to a clear representation,



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assurance policies on his own life and said: "That's for my death duties."

Over the following years, Peter made other remarks to David that David said were based on an unspoken mutual understanding, encouraging the expectation that David had formed that he would be Peter's successor to Steart Farm on his death and also encouraged him to continue helping Peter without pay.

In 1997, Peter made a will leaving the residue of his estate, including Steart Farm, to David. Subsequently, however, Peter decided to destroy his will (having fallen out with someone to whom he had left a specific sum of money to in his will), and the will was returned to him for that purpose by the solicitors who had been holding it.

After Peter's death in November 2005, neither it nor any other will were found. By law, Peter's estate devolved to his blood relatives in accordance with the Intestacy Rules.

The law

For David to succeed, he had to establish:

- ♦ A representation or assurance was made to him;
- ♦ He relied on that representation or assurance; and,
- ♦ He suffered detriment in consequence of his (reasonable) reliance on the representation or assurance (*Thorner 2009*, para 29).

This article does not deal with all the elements of proprietary estoppel; rather, it focuses on the two areas that chiefly concerned their Lordships:

- ♦ The nature of the assurance or representation required in order for a person to acquire a proprietary interest in specified property; and,
- ♦ Whether, if the elements of proprietary estoppel are established, the claim will fail if the land to

intended to be relied on by him, or which it was reasonable for him to take as intended to be relied on.

The House of Lords, in reversing the Court of Appeal's decision, agreed that to establish a proprietary estoppel, the relevant assurance had to be clear enough, but said that what amounted to sufficient clarity was significantly dependent on context.

The position in relation to representations or assurances given in proprietary estoppel claims now appears to be as follows.

Assurances can be made in "oblique and allusive terms" (*Thorner 2009* para 3)

It did not matter that Peter spoke in oblique and allusive terms if it was reasonable for David, given his knowledge of Peter and the background circumstances, to have understood that Peter would leave him the farm. There

was no ‘signature event’, for example – Peter never announced that he was going to leave the farm to David.

However, even though clear and unequivocal statements played little or no part in the communications between David and Peter, the House of Lords found that they were able to understand each other well. However clear and unequivocal his intention was to assure David that he was to have the farm after his death, Peter was always likely to have expressed it in oblique language.

To establish a proprietary estoppel the relevant assurance must be “clear enough” to the assuree (Thorner 2009, para 56)

Lord Walker described the evidence as being of “two countrymen leading lives that it may be difficult for many city-dwellers to imagine – taciturn and undemonstrative men committed to a life of hard and unrelenting physical work, by day and sometimes by night, largely unrelieved by recreation or female company,” (Thorner 2009, para 59). Peter was said to be a man of few words and not given to direct talking, and the assurances he gave reflected this.

The Court of Appeal had found that an assurance must be “clear and unambiguous” and that the implicit statements David relied on were insufficient to found an estoppel. The House of Lords disagreed, and held that what Peter said would have been clear enough to David, whom he was addressing and who had years of experience interpreting what he said and did, for David to form a reasonable view that Peter was giving him an assurance that he was to inherit the farm and that he could rely on it. What amounted to sufficient clarity in a case such as this one was “hugely dependent on context”.

The assurances that Peter made to David were assessed in the light of this and it was found that they were intended to be taken seriously and to be relied upon.

The context and background against which the assurances are made are important.

The House of Lords found that past events provided the context and

background for the interpretation of subsequent events and subsequent events threw retrospective light upon the meaning of past events (Thorner 2009, para 8). The evidence was found to show a continuing pattern of conduct by Peter for the remaining 15 years of his life, and that it was not helpful to try to break down that pattern into discrete elements and then treat each as being, on its own, insignificant.

The intention of the assurator is irrelevant.

The fact that Peter had actually intended David to inherit the farm was irrelevant. If it was reasonable for an assuree to take the representations at their face value and rely on them, it would not, in general, be open to the assurator to say that he or she had not intended the assuree to rely on them. This is particularly the case if the assurances are repeated or confirmed by conduct and remarks over a considerable period.

It does not matter if the assurator did not know or foresee that the assurance would be relied on.

It was not necessary that Peter should have known or foreseen the particular act of reliance. It was enough that the meaning he conveyed would reasonably have been understood as intended to be taken seriously as an assurance which could be relied upon (Thorner 2009, para 3).

The identity of the farm

It is a necessary element of proprietary estoppel that the assurances given to the claimant should relate to identified property owned by the deceased. The trial judge, at first instance, had found that both Peter and David knew that the extent of the farm was liable to fluctuate as development opportunities arose and tenancies came and went. There was no reason, however, to doubt that their common understanding had been that Peter’s assurance related to whatever the farm consisted of at Peter’s death. The Court of Appeal did not deal with this issue, since it rejected David’s claim.


The House of Lords agreed with the first instance judge that David should

be awarded the farm as it was on Peter’s death. Their Lordships stated that changes in the character or extent of the property in question were relevant to the relief that equity would provide, but that this did not exclude a remedy where there was still an identifiable property as there was in this case. It was noted that the extent of the farm might have changed, but that there was no doubt as to the subject of the assurance – the farm, as it existed from time to time. Lord Neuberger stated that the nature of the interest to be received by David was clear: it was the farm as it existed on Peter’s death. David was accordingly granted the farm and the farming interest as they were at Peter’s death.

In summary

The nature and extent of the doctrine of proprietary estoppel has been clarified by the House of Lords’ decision.

The law will protect a person who has acted to their detriment in reliance on an assurance, and that assurance need only be “clear enough” between the assurator and assuree.

The Court of Appeal had expressed a fear that the floodgates would be opened if the case was decided in David’s favour, given the nature of the assurances made to him. The House of Lords disagreed with this, and their decision is likely to be one that is seen by some practitioners as a further erosion of the longstanding principle of testamentary freedom, but by many others as the right decision, upholding the spirit of fairness and justice which equity endeavours to defend. 



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