

YOUR FLEXIBLE FRIEND

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Introduction

1. Here, said Lord Denning, equity is displayed at its most flexible. ¹ Judges love flexibility, because it enables them to arrive at what they think is the just result. But as we all know flexibility has its price. The price is uncertainty and the unpredictability of advising a client. As Lord Gardiner once said in interview: ²

“Nothing is worse when people go to a solicitor and he says “I cannot tell you what the answer is. It entirely depends on what judge we get.””

2. The courts have recognised the tensions between these two poles. As Mummery LJ put it in *Cobbe v Yeomans Row Management Ltd* ³:

“A doctrine designed to grant relief for unconscionable conduct covers a wide spectrum of situations and needs to be flexible. As it potentially affects property rights and interests, it needs to be certain. The imprecise limits of the doctrine and its relationship to more precise concepts of contract, property and trust law commend a cautious approach. It would be unwise, on the one hand, to cramp the court's competence to achieve just outcomes in as many cases as possible. On the other hand, simply doing what the court thinks is just and equitable on the facts of each individual case is liable to increase uncertainty in matters affecting property, in which certainty is important. Unpredictability and inconsistency also make it difficult for parties in actual or prospective litigation to obtain the sufficiently solid advice for negotiating sensible settlements.”

3. If Lord Denning was the Christopher Columbus who first made landfall on the modern law of proprietary estoppel, our Chairman tonight is the Amerigo Vespucci who found the vast continent beyond and mapped its coastline; as well as the Lewis and Clark who penetrated its interior. My paper is an exercise in sustained plagiarism. Almost everything I say tonight has already been said by him.

¹ *Crabb v Arun District Council* [1976] Ch 179, 189

² Quoted in Paterson: *The Law Lords* p.125

³ [2006] 1 WLR 2964

4. As he said in *Jennings v Rice*⁴ the court must take a principled approach, and cannot exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case. What then are the principles?
5. In *Yaxley v Gotts*⁵ Robert Walker LJ pointed out that at a high level of generality there is much common ground between the doctrines of proprietary estoppel and the constructive trust; and that in the area of a joint enterprise for the acquisition of land (which may be, but is not necessarily, the matrimonial home) the two concepts coincide. There are, however, areas in which the two do not coincide, as Robert Walker LJ also pointed out. When a landowner stands by while his neighbour mistakenly builds on the former's land the situation is far removed (except for the element of unconscionable conduct) from that of a fiduciary who derives an improper advantage from his client.
6. There is one further area in which the two do not coincide; namely the available remedies. If the court finds that a common intention constructive trust exists, the legal owner holds the property on trust for the claimant, either in its totality or to the extent of an undivided share (which is what is usually argued for in a case where a couple have lived together in the property). If the court finds that the case is not one of a common intention constructive trust, but that a proprietary estoppel arises, the court has a wider power to craft and impose whatever remedy it considers to be equitable in the circumstances of the particular case. That remedy may take the form of declaring that the claimant shall become the beneficial owner of the property or of a share in it (thus having the same effect as a finding that there is a constructive trust), but it may take other forms. For example, the court may leave the legal title and the beneficial ownership where they are but require a sum of money to be paid to the claimant.
6
7. I do not propose to say anything about the remedies where a common intention constructive trust is in question. That issue is about to be the subject of a

⁴ (2003) 1 P & CR 100

⁵ [2000] Ch 162

⁶ *Lalami v Crump Holdings Ltd* [2007] EWHC 47 (Ch)

decision of the House of Lords in *Stack v Dowden* in which both Lord Walker and Lord Neuberger were members of the judicial committee. Anything I said would simply be a hostage to fortune, so discretion is the better part of valour.

The theory

8. The remedy that the court selects is one whose purpose is to satisfy the equity that has arisen under the doctrine of proprietary estoppel. That equity arises where the claimant has an expectation of having or acquiring an interest in property and has acted to his detriment in reliance on that expectation. There has been academic debate whether the fundamental aim of this form of estoppel is to fulfil the claimant's expectations, or to compensate him for his detrimental reliance on the defendant's non-contractual assurances, or is some intermediate objective; and (following on from the identification of the correct principle) the nature of the discretion which the court exercises in granting a remedy to the claimant. In the way in which the modern court approaches the fashioning of the remedy, an article by Dr Simon Gardner ⁷ has proved highly influential. As is explained in the article, there are two alternative theoretical bases of relief. These are often referred to as expectation relief and detriment-reliance relief. The former is based on the premise that a proprietary estoppel claim requires to be met by the vindication of the Claimant's expectation interest i.e. by the award to the Claimant of the interest assured to him or her by the Defendant. The latter is based on the premise that the equity is satisfied by the vindication of the Claimant's reliance interest by granting relief which reflects the detriment suffered by the Claimant in reliance on the Defendant's assurance. Dr Gardner argues that the English cases tend to favour the expectation approach, but tempered where necessary to achieve a just result. ⁸
9. Robert Walker LJ made an important contribution to the debate in *Jennings v Rice*. As he pointed out the difficulty is that proprietary estoppel can apply in a wide range of factual situations. So no formula is likely to prove workable. Sometimes the assurances, and the claimant's reliance on them, have a

⁷ The Remedial Discretion in Proprietary Estoppel (1999) 115 LQR 438. Dr Gardner returned to the theme in The Remedial Discretion in Proprietary Estoppel - Again (2006) 122 LQR 492.

⁸ *Teomans Row Management Ltd v Cobbe* [2006] 1 WLR 2964 per Dyson LJ

consensual character falling not far short of an enforceable contract. In a case of that sort both the claimant's expectations and the element of detriment to the claimant will have been defined with reasonable clarity. A typical case would be an elderly benefactor who reaches a clear understanding with the claimant (who may be a relative, a friend, or a remunerated companion or carer) that if the claimant resides with and cares for the benefactor, the claimant will inherit the benefactor's house (or will have a home for life). In a case like that the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate. In a case of that sort the appropriate remedy may well be to vindicate the claimant's expectations and to award him the interest in the property that he was led to believe that he would acquire.

10. However the claimant's expectations may not be focused on any specific property. If the claimant's expectations are uncertain then their specific vindication cannot be the appropriate test. A similar problem arises if the court, although satisfied that the claimant has a genuine claim, is not satisfied that the high level of the claimant's expectations is fairly derived from his deceased patron's assurances, which may have justified only a lower level of expectation. In such cases the court may still take the claimant's expectations (or the upper end of any range of expectations) as a starting point; but it is no more than a starting point. However, that does not mean that the court should in such a case abandon expectations completely, and look to the detriment suffered by the claimant as defining the appropriate measure of relief. Indeed in many cases the detriment may be even more difficult to quantify, in financial terms, than the claimant's expectations. Detriment can be quantified with reasonable precision if it consists solely of expenditure on improvements to another person's house, and in some cases of that sort an equitable charge for the expenditure may be sufficient to satisfy the equity. But the detriment of an ever-increasing burden of care for an elderly person, and of having to be subservient to his or her moods and wishes, is very difficult to quantify in money terms. Moreover the claimant may not be motivated solely by reliance on the benefactor's assurances, and may

