

15.3.2 Proprietary Estoppel

The House of Lords returned to the subject of proprietary estoppel, after considering it last year in *Cobbe v Yeoman's Row Management Ltd.* [2008] 4 All ER 713. The issues in *Thorner v Major and others* [2009] 1 WLR 776, were whether a clear and unequivocal representation had been made to David Thorner and whether the property interest that he claimed had been clearly identified. Both of these had been held to be requirements of estoppel in *Cobbe*.

Thorner v Major and others [2009] 1 WLR 776

Peter Thorner owned Steart Farm, near Cheddar in Somerset. His younger cousin, David Thorner, helped him run the farm and worked without pay for 29 years. Peter indicated by various remarks to David that David would inherit the farm when he died, an example being giving David details of life assurance policies and saying: "That's for my death duties." Peter, however, never made any definite statement to David that he would inherit the farm. Unknown to David, Peter had made a will to this effect in 1997, but he revoked it and died intestate in 2005. Other relatives claimed the farm under the intestacy rules, as Peter had no wife or children.

HELD:

Their Lordships accepted that a representation had been made.

Lord Rodger at p. 786:

"Even though clear and unequivocal statements played little or no part in communications between the two men, they were well able to understand one another. So, however clear and unequivocal his intention to assure David that he was to have the farm after his death, Peter was always likely to have expressed it in oblique language... What matters, however, is that what Peter said should have been clear enough for David, whom he was addressing and who had years of experience in interpreting what he said and did, 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."

Whether a representation has been made all depends upon the facts and the context of the case.

Lord Walker at p. 795:

"In this case the context, or surrounding circumstances, must be regarded as quite unusual. The deputy judge heard a lot of evidence about 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. The deputy judge seems to have listened carefully to this evidence and to have been sensitive to the unusual circumstances of the case."

The size of the farm fluctuated over the years, and the defendants had used this to argue that it was not clear what property had been "promised" to Peter. It was held that the property had been clearly identified.

Lord Walker at pp. 795 – 796:

“In my opinion it is a necessary element of proprietary estoppel that the assurances given to the claimant (expressly or impliedly, or, in standing-by cases, tacitly) should relate to identified property owned (or, perhaps, about to be owned) by the defendant...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 is no reason to doubt that their common understanding was that Peter’s assurance related to whatever the farm consisted of at Peter’s death...”

This case could be distinguished from ***Cobbe v Yeoman’s Row Management Ltd.*** [2008] 4 All ER 713.

Lord Neuberger at pp. 803 – 804:

“However, there was total uncertainty as to the nature or terms of any benefit (property interest, contractual right, or money), and, if a property interest, as to the nature of that interest (freehold, leasehold, or charge), to be accorded to Mr Cobbe.”

“Secondly, the analysis of the law in ***Cobbe’s*** case was against the background of very different facts. The relationship between the parties in that case was entirely at arm’s length and commercial, and the person raising the estoppel was a highly experienced businessman. The circumstances were such that the parties could well have been expected to enter into a contract, however, although they discussed contractual terms, they had consciously chosen not to do so. They had intentionally left their legal relationship to be negotiated, and each of them knew that neither of them was legally bound.”

“In these circumstances, I see nothing in the reasoning of Lord Scott in ***Cobbe’s*** case which assists the defendants in this case. It would represent a regrettable and substantial emasculation of the beneficial principle of proprietary estoppel if they were artificially fettered so as to require the precise extent of the property the subject of the alleged estoppel to be strictly defined in every case. Concentrating on the perceived morality of the parties’ behaviour can lead to an unacceptable degree of uncertainty of outcome, and hence I welcome the decision in ***Cobbe’s*** case. However, it is equally true that focusing on technicalities can lead to a degree of strictness inconsistent with the fundamental aims of equity.”

Some commentators feared that ***Cobbe*** had so restricted proprietary estoppel that it would be little used in future. ***Thorner v Major*** indicates that that is not so, particularly in non-commercial, domestic or family cases.

Estoppel can also be used as a defence, but the same three elements are required. There must be a representation, reliance on that representation and acting to one’s detriment. Detriment is essential, as shown by another House of Lords case, ***Fisher v Brooker***.

Fisher v Brooker 2009 WL 2207452

Fisher had composed and played the organ part on the original recording of the 1967 pop hit “A Whiter Shade of Pale” by the group *Procol Harum*. Thirty-eight years later, he claimed copyright for his contribution and his rightful share of future royalties. The leader of *Procol Harum*, Brooker, defended the claim by saying that it

would be unfair to the defendants for Fisher to bring his case after this lengthy delay.

HELD:

Their Lordships did not consider that Fisher was estopped from bringing his claim. Brooker had suffered no detriment, because he had received the full royalties for thirty-eight years.

Lord Neuberger at para 69:

"This was a point which the judge well appreciated...he said that 'it would be a wholly extravagant and unjust result to deprive Mr Fisher for the future of his interest in the work's musical copyright on the basis of the estoppels that have been pleaded,... when for almost 40 years the respondents have enjoyed the fruits of that copyright interest without the need to account for any part of them to Mister Fisher'."

15.8 Quantifying the Size of the Equitable Interests

15.8.4 The Whole Course of Dealing

Stack v Dowden [2007] 2 All ER 929 lays down some general principles to enable the courts to decide the size of cohabitants' shares. It is presumed that if the legal estate is held by the couple as joint tenants, then they intend to hold the property in equal shares. It will be for the party disputing this to prove that this was not the common intention and this will be a "very unusual" situation. In such a situation the court must look at "the whole course of dealing" between the couple to decide what shares they intended. The court does not just decide what would be "fair", but what the facts reveal of the couple's intention. The problem with family home cases is that the facts are always different and it can be difficult to predict how these general principles will apply. Two recent cases show this.

In the first case, joint tenants were awarded equal shares.

Fowler v Barron [2008] EWCA Civ 377, [2008] 2 FLR 830

Mr Barron and Miss Fowler lived in an unmarried relationship for twenty-three years and had two children. They had bought a house and put it into joint names. Mr Barron paid the deposit, the balance of the purchase price from the sale of his flat and, although the mortgage was in joint names, he paid it. He also paid for their day-to-day living expenses and, although Miss Fowler worked, her income was spent on herself and the children. They made mutual wills, but never discussed in what proportions they held the house. The trial judge used the principles of resulting trust and, as Mr Barron had paid for the house awarded it all to him.

HELD:

Meanwhile, **Stack v Dowden** had been decided and the Court of Appeal made clear that resulting trust was now the wrong approach.

Arden LJ at para 24:

"It must be remembered that the judge did not have the benefit of the decision of the House of Lords in **Stack**. To recapitulate, the important points decided by the House for the purpose of this appeal were as follows. The legal technique that the

court will use to ascertain whether both joint owners who had been cohabitees had a beneficial interest is that of the common intention constructive trust, rather than that of resulting trust. This will enable the court to take a holistic view of the whole of the parties' conduct so far as it illumines their shared intentions about the ownership of the property. The court will not impose any particular allocation of property on the parties. It is not a question of the court deciding what is *fair* as regards the division of ownership, but of determining what the co-owners shared intentions were as regards beneficial ownership."

Mr Barron had claimed that it was always his intention that Miss Fowler only gained a share of the property in the event of his death. This "secret intention" had never been communicated to Miss Fowler, so there was no common intention. The court did not believe him anyway. He could not disprove the presumption in **Stack v Dowden** that, as they were joint tenants, they held in equal shares. Unlike the actual facts of **Stack**, the couple here did not have separate finances, but lived as a family.

Toulson LJ at para 56:

"The judge in his analysis of the facts looked only at financial matters. That is too narrow an approach when addressing issues of inferred common intention. In this case the property served as a family home for the parties and their children from the time of its acquisition until the time of the breakdown of the relationship. During those seventeen years Miss Fowler contributed to the life and well-being of the family in financial and other ways, to which Arden LJ has referred in fuller detail. In that family context I would reject any argument that a common silent intention should be inferred from the parties' conduct that their property interests were to be varied so as to reduce Miss Fowler's original share."

In the second case, joint tenants were awarded respective shares of 90 per cent and 10 per cent, on a very different set of facts.

Jones v Kernott [2009] E W H C 1713

Ms Jones and Mr Kernott lived together from 1981 to 1993 and had two children. In 1985 they bought a house in joint names for £30,000. Ms Jones paid £6000 towards the cost and in the following year Mr Kernott paid for an extension, which increased the value of the house to £44,000. They paid the mortgage together and Kernott left in 1993. After this Ms Jones paid the mortgage, all the other household expenses and maintained and repaired the house. They cashed and split the proceeds of an insurance policy, so that Kernott could buy another house.

HELD: N. Strauss Q.C. Deputy Judge in the High Court.

The High Court did not wish to interfere with the County Court split of 90% to Ms Jones and 10% to Kernott.

It was recognised in **Stack v Dowden** that a couples' intention as to how to share the property could change.

Stack stressed finding a common intention from the whole course of dealing between the parties, whereas **Oxley v Hiscock** [2005] Fam 211 stated that the shares could be found by looking at the whole course of dealing and deciding what was fair. The judge concluded that sometimes, an examination of the course of dealing would not reveal the common intention of the parties, so then the court had to decide what was fair.

The financial contribution of Ms Jones had been much greater and, as in ***Stack v Dowden*** itself, the couple had kept their finances separate, at least after 1993.

Strauss QC at para 47:

"Similarly, in this case, having initially intended to pool their resources in the usual way, what happened in 1993 was that this intention ceased... So the position after the split in 1993 was that they maintained separate finances to an even more marked degree than the unmarried couple in ***Stack v Dowden***. In my view, the judge was quite right to infer from these facts that they no longer intended equal beneficial ownership, or to impute to them such a change in intention. Thus far there was no need for him to invoke fairness: the change in intention can easily be inferred or imputed from the parties' conduct."

At para 49:

"Since the parties had no discernible intentions as to the amount of the adjustment, they must be taken to have intended that it should be whatever was fair and reasonable, as the judge held."

Financial responsibility for the children could be taken into account when deciding beneficial shares, as indicated by Baroness Hale in ***Stack v Dowden***.

At para 52:

"In this case, the non-payment of maintenance for the children is one feature, although not a particularly central one, of the financial separation between the parties which is of central importance here, as it was in ***Stack v Dowden***."