FARM LAW

FARM LAW NOTES

Changing with a changing world

"In June, people voted for change – change is going to come." With those words, at the Conservative Party conference in Birmingham at the beginning of October, Prime Minister Theresa May reaffirmed her sentiment, expressed on entering Downing Street, that "Brexit means Brexit".

For 20 years the UK negotiated long and hard to be accepted as a member of the European Union, as it became, dismantling the bulk of the residue of the British Empire as part of the process. For 40 years, it enjoyed the benefits of membership from within, but an increasing dislike of the way in which the EU developed led the people ultimately to say "Enough – we want out".

The process, as is by now common knowledge, is begun by "triggering" Article 50 of the Treaty on European Union, which results in membership ceasing after two years, unless all 27 remaining members agree to extend that deadline. Mrs May has now said that notice under art.50 will be served no later than the end of March next year.

The constitutional questions which we discussed in *Farm Law* No.231 (June/July 2016) are, at the time of writing, working their way through the courts, but do not affect the fundamental question of whether or not we leave the EU. Gina Miller, the principal claimant in judicial review proceedings, expressed the hope that the action "will force a more informed debate on Brexit and its implications" but, speaking on BBC's *Today* programme, she emphatically rejected the suggestion that it was an attempt to seek a second referendum. "That's such a broken record", she said, "we are all Leavers now".

The point is simply that, constitutionally, the Royal Prerogative, exercised through the government acting as executive, does not extend to deciding on withdrawal or giving notice under art.50; those powers are vested in and exercisable only by Parliament.

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detrimental to the character of the local landscape and wider contexts" as well as contrary to national and local policy.

In July 2010, the Burges submitted a claim for compensation. The Council responded by offering to pay to upgrade the conservatory foundations. The Burges, on professional advice, gave notice that the only alternative to removal of the tree was the demolition of the conservatory and its re-erection on improved foundations. That work was undertaken in 2013.

The Council sought to avoid full liability on the grounds that the foundations of the conservatory were inadequate and would have failed in any event.

Law – The question in this case of compensation for loss or damage caused by refusal of consent under a TPO is dealt with by Town and Country Planning Act 1990, s.203, in conjunction with art.9 of the TPO in question.

Section 203 permits a local authority to make provisions in a TPO and art.9 provided specifically for compensation for refusal of consent thereunder, save that none would be payable for loss or damage which was reasonably foreseeable or which was the fault of the applicant's failure to take reasonable steps to avert or mitigate it.

Decision – The burden of proof was on the Burges that damage was a direct consequence of the Council's failure to consent to the removal of the oak tree. On that matter, the Tribunal was easily satisfied.

However, the main issue was the application or otherwise of the exceptions under art.9, as to which the burden of proof was on the Council.

As to the foreseeability of damage, the relevant point in time was when the consent was refused. On the facts, it was clear at that time in 2010 that the oak tree was causing damage and there was a real risk that it would cause future damage.

The main argument of the Council was that at the time the conservatory was built, in 2003, the depth of foundation was inadequate and damage would have been reasonably foreseeable given the proximity of the oak tree. The Burges, it alleged, ought to have constructed the conservatory in accordance with NHBC guidelines, even though those guidelines did not at that time apply to the erection of conservatories.

Analysis of the position confirmed that not until 2003 (after the conservatory had been built) did NHBC guidance include conservatories in the list of "permanent constructions" to which they applied.

However, in the Tribunal's view, while that did not bear significantly on the suggestion that the Burges should themselves have foreseen the prospect of damage, it was for the Council to show that they knew, or ought to have known, that there was a real risk of damage from the oak tree and it had failed to do so.

The Burges were awarded compensation which was quantified at £25,000, including interest but excluding costs.

FOCUS

The detritus of family conflict

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As Dickens wrote in *Great Expectations*, "Take nothing on its looks; take everything on evidence. There's no better rule". Reading the recent case of *Roger Moore v Stephen Moore* [2016] EWHC 2202 (Ch) reminded me of a scene in *Monty Python and the Holy Grail*:

Father: *One day lad, all this will be yours!*

Son: *What? The curtains?*

Amusing as that may be, I was swiftly brought down to earth by the depressing reality of farming family disputes caused by the dangers of a lack of forward planning, an unwillingness to put formal structures in place, and an inability to communicate with one another. It is widely reported that such disputes are on the increase and a trawl through decisions in the High Court and Court of Appeal is littered with the detritus of such conflicts (see e.g. *Davies v Davies* [2016] EWCA Civ 463; *Stuggett v Stuggett*). Moore is the most recent.

The facts

Manor Farm is a 650 acre arable farm in Wiltshire run by four generations of the Moore family. In the 1960s brothers, Roger and Geoffrey Moore, started to run the farm as partners, creating what came to be a successful and profitable business. Stephen, the son of Roger, worked on the farm since he was a child and eventually in 2003/04 became an equity partner.

On Geoffrey's retirement, he gave his share to Stephen in return for a payment from the partnership of £500,000. A company, set up for tax reasons, also became a partner. Roger grew ill and was subsequently diagnosed with Alzheimer's. He had to step away from the management of the farm and became increasingly agitated with Stephen and his decisions (particularly the purchase of a new car and tractor).

In 2014 Roger commenced proceedings (with his wife, Pamela Moore, appointed as litigation friend when he lacked capacity), seeking dissolution of the partnership. Save as to the nature of that partnership, the dissolution of the partnership was not contested. The main dispute was Stephen's claim to equity in the farming business, including the freehold land, operated by the partnership. Stephen's sister, Pamela, and her husband, Andrew, supported Roger's case.

The law

Simply put, the principles of a proprietary estoppel claim are neatly set out by the House of Lords in *Thorner v Major* [2009] UKHL. There are three essential ingredients: (a) an assurance of sufficient clarity; (b) reliance by the claimant on that assurance; and (c) detriment to the claimant in consequence of the reasonable reliance.

The detriment suffered need not consist of the expenditure of money or other quantifiable financial detriment as long as it is something substantial (*Gillett v Holt* [2001] EWHC Ch 210; *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988) but there must be a sufficient causal link between the assurance relied on and the detriment asserted.

The question which needs to be asked is whether (and, if so, to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it (the concept of "unconscionability"): *Gillett v Holt*. As the Court of Appeal said in *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P&CR 8: "…the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result".

There must, however, be a proportionality between the remedy and the detriment which it is its purpose to avoid (see *Jennings v Rice*). In *Henry v Henry*, the advice of the board was that "Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application". There is some controversy as to whether Arden LJ in *Suggett v Suggett* applied the correct test although that issue did not arise in the present case of *Moore v Moore*.

How is the court to exercise to exercise its discretion? Lewison LJ explained the conflicting authorities thus in *Davies v Davies* at [39]:

"There is a lively controversy about the essential aim of the exercise of this broad judgemental discretion. One line of authority takes the view that

the essential aim of the discretion is to give effect to the claimant's expectations unless it would be disproportionate to do so. The other takes the view that the essential aim of the discretion is to ensure that the claimant's reliance interest is protected, so that she is compensated such detriment she has suffered."

Application of the principles to the Moore case

There was no significant dispute between the parties as to the law but it was more a case of its application to the facts of the case.

The question whether promises were made by Roger to Stephen to the effect that Stephen would one day have Roger's share of the farm and the assets was a factual issue which depended on the judge's evaluation of the evidence and the witnesses.

It has been suggested by some academics that a claim based on proprietary estoppel is too important to be left to a trial judge at first instance! Here, it is difficult to criticise the judge given the detailed and rigorous analysis of the facts. In short, he found the evidence of Roger and Jackie to be reliable and convincing notwithstanding that the promises made by Roger to Stephen had only been witnessed by Roger and his wife.

Of importance, however, was that their evidence was consistent with the evidence given by other witnesses, such as Roger's brother. In contrast, the evidence of Pamela, Julie and Andrew was found to be vague and the judge went so far as to say that Pamela took advantage of Roger's mental decline, which did her no credit. The sum of the evaluation was that Stephen's evidence that he was promised the farm and the business was accepted.

Pre-litigation correspondence

Interestingly, the pre-litigation correspondence from Stephen's solicitors, which did not suggest any proprietary estoppel claim, and the fact the first occasion it was raised was in the defence and counterclaim, had no impact. In *Shirt v Shirt* [2012] EWCA Civ 1029 a claim to an estoppel had been rejected because there was correspondence from the claimant's solicitors proposing an arrangement which was inconsistent with the estoppel claim and was cited as one of the factors which pointed against promises having been made.

But that oft repeated phrase "each case is different and turns on its own facts" was pertinent here. The question was whether the promises were made and there was clear evidence they had been. The judge accepted Stephen's explanation that the correspondence was indicative of him trying to meet and discuss matters with a view to getting Roger to agree with farming as they had before outside of court.

Intention

Likewise, the words "this will all be yours when I am gone anyway" was not indicative of an intention. In contrast, such words in other cases have been construed as intention and since intentions are of no importance, were held to irrelevant to the question whether there was a representation.

But the question in all cases is whether words and acts would reasonably convey that an assurance that he would inherit (see *Thorner v Major*). Here, the judge commented: "The promises were more than mere assumptions about what might happen. It strikes me as inconceivable that Stephen was not made the promises when it had been plain for years that he was being groomed to take over the farming business as part of Geoffrey and Roger's overarching plan".

And of less significance, the suggestion that this promise was conditional on Stephen's good behaviour was given short shrift: the business had gone from strength to strength and the allegations – presumably those which were pleaded and put in cross-examination – were so trivial as to be of no effect.

Reliance

It was plain that Stephen had relied on promises by basing his life on the farm and not searching for alternative employment. In reliance he had devoted his entire working life to the farm.

Detriment

Reliance and detriment will necessarily overlap. Although each case will very much depend on its own facts – and in this case the factual assertions as to detriment were not challenged in cross-examination – it is useful to see what amounted to detriment in the case:

- He could have found a role elsewhere undoubtedly better paid with better accommodation;
- He did not enjoy expensive holidays;
- He did not have an expensive lifestyle;
- The car had been purchased and was owned by the partnership;
- His children were not privately educated in contrast to his sister's children whose fees were paid by the partnership;
- An attempt was made to rely on a schedule setting out monetary benefits it was said Stephen had received – but again this had not been explored in cross-examination and not adduced as evidence;
- Long working hours.

Unconscionability

It was argued that because Stephen had received Geoffrey's share to the value of £5m and he had behaved badly, depriving him of Roger's share would not be not be unconscionable. This was rejected: the bad behaviour was a non-starter given the evidence; transfer of Geoffrey's share was irrelevant. The question is whether it would be unconscionable for Roger to go back on his promise to Stephen in relation to his share which had nothing to do with Geoffrey's share.

The end?

As I have mentioned above, some criticism has been levied at the appellate courts declining to overturn the court's exercise of discretion as to the remedy to be granted. The question is whether the relief is appropriate and proportionate. Citing *Seward v Seward* [2014] All ER (D) 168, the equitable doctrine should be as flexible as circumstances allow: the aim is look at all circumstances to decide in what way the equity can be satisfied. "Proportionality lies at the heart if the doctrine of promissory estoppel; the court must take into account whether in all the circumstances the promise and the benefit is proportionate to the detriment and the remedy must be proportionate."

The judge agreed that this should mirror as closely as possible the arrangements which would have obtained if the dispute had not arisen. According to Pamela, she and Roger were to receive what always expected until their deaths. Stephen would take over the farming; the assets would be in his name alone but with fixed sums being paid to Roger and Pamela. Roger and Pamela would remain at the farmhouse unless they decided to move to another house on the land.

Trial preparation – a helpful note

By all accounts the evidence presented to the court in Moore was extensive, running to some 13 lever arch files, as well as a number of further documents (including Pamela's diaries for all the relevant years) being produced during the course of the trial. Some criticism was levied against both parties by the judge, Mr S Monty QC, particularly as regards the expert evidence which ran to 136, annexing four lever arch files of documents (which were duplicated elsewhere in the trial bundle). Preparation of bundles involves more than simply copying of all the documents produced by the

parties; it requires careful thought as to the best way in which to present the documents without duplication and entails some agreement between the parties.

There are, however, two further lessons to be learnt regarding preparation of a case. The first concerns the contents of the witness statement. The principal theme running through the evidence of Pamela, Julie and Andrew was Stephen's bad behaviour; a large number of allegations were made against him purporting to show Stephen's unreasonable conduct in relation to the running of the farm, his attitude towards expenditure and his behaviour towards Roger.

In fact, though, very few of the allegations were put to Stephen in cross-examination and they were therefore disregarded by the judge. There may very well have been a good reason why this had happened – the report does not make it clear – but the inclusion of such extensive evidence which was ultimately not relied upon may have been more damaging.

The final lesson concerns drafting: Pamela, Andrew and Julie's statements all contained passages which were either comment or opinion evidence in relation to whether Stephen had suffered a detriment. They have no place in a statement of fact.

Conclusion

Given the newspaper reports – and sadly, some of the comments – this was evidently a highly inflammatory and emotional case for the parties involved. The perception of unequal treatment between siblings, a father with deteriorating health and an ambitious mother did not bode well for this litigation. There is some complaint in academic circles about the use of proprietary estoppel to achieve what is considered to be a windfall.

But in the absence of any contract and proper planning this was probably the only option available to Stephen and, ultimately, it was his evidence which was believed.

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