Down on the farm

Rebecca Cattermole highlights the current position on the doctrine of estoppel in the context of recent case law

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The case of *Moore v Moore* [2016] is the most recent illustration of the treatment of proprietary estoppel by the courts and, once again, shines a spotlight on farming businesses and the perils of informal arrangements. It is a somewhat typical case: a father has promised his share in the family farm to a son who, in turn, has devoted his whole life to it but, following a souring of relations, the father has sought to resile from that promise. The court found that the son was entitled to an equitable interest in the father's share of the farm and assets by way of proprietary estoppel.

The law of proprietary estoppel – a term which only came into use in the second half of the twentieth century – can be somewhat mystifying at times. The concept that a representation, a promise as to the future, or even acquiescence, may lead to an entire farm going into the ownership of another party can strike some as shocking; in many cases, it will be perceived as a multimillion-pound windfall. Yet, as said in *Jennings v Rice* [2002]:

> ... the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result.

The decision in *Moore* is not considered to be particularly controversial (legally speaking that is; other members of the Moore family would think otherwise). Much of the case turned on the credibility of the witnesses and the evidence. Indeed, the presentation of the evidence came in for some criticism by the trial judge, Mr S Monty QC, who was sitting as deputy judge of the Chancery Division. By all accounts, it was extensive, running to some 13 lever-arch files, as well as supplementary bundles being produced during the course of the trial. Some criticism was levied against both parties as regards the expert evidence, which ran to 136 pages and annexed four lever-arch files of documents. Vast swathes of evidence were not put in cross-examination at trial, so disregarded by the trial judge, and statements contained passages which were either comment or opinion evidence.

Inevitably, many of the other cases to which reference is made here are appellate decisions; the case of *Moore* was held in the High Court and for that reason it serves as a useful reminder to advisers that careful thought should be given to the marshalling and focus of the evidence. This article, therefore, seeks to take a practical approach to the law of proprietary estoppel in the context of *Moore*.

Facts in *Moore*

Moore concerned an arable farm in Wiltshire run by four generations of the family. In the 1960s two 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, had 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 before the court was Stephen's claim of equity over the farming business, including the freehold land, operated by the partnership. Stephen's sister, Julie, and her husband, Andrew, supported Roger's case.

The 'test' of proprietary estoppel

There is probably no comprehensive and uncontroversial definition of proprietary estoppel. In *Thorner v Major* [2009], Lord Walker considered that the doctrine is based on three main elements:

> ... a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.

It is said, however, that a distinction must be made between three different strands of the law of proprietary estoppel: acquiescence, representation and promise. The reason for this is that what needs to be proved in relation to each will differ.

In short, acquiescence arises where:

- A adopts a particular course of conduct;
- A adopts that course in reliance on a mistaken belief as to their current rights;
- B stands by knowing of A's belief and B's own right;
- B fails to assert that right; and
- A would suffer a detriment if B asserts that right.

Representation is relatively straightforward in that it is a true form of estoppel; the effect is to preclude B from denying the truth of B's representation. There is no requirement of knowledge of the true state of affairs; Lord Evershed MR in *Hopgood v Brown* [1955] said that is limited to acquiescence.

Assurance/promise

The most commonly encountered strand of estoppel with which we are concerned here is the promise-based estoppel: that is, a promise or an assurance made by a party as to their future conduct. The House of Lords decision in *Thorner* confirmed the existence of this type of proprietary estoppel, although note that in *Snell's Equity* (para 12-036) it is considered that a promise-based estoppel is not a true form of estoppel:

> ... certainly, its effect is not limited to precluding A from asserting a fact or exercising a right. It is clear that the promise-based principle provides a cause of action.

Certainly, the evidence must be directed in the first place as to the assurance or promise which was alleged to have been given, what was said, how it was made, by whom and to whom, and when. The assurance or promise must be *sufficiently* clear. There is no requirement that it must be based on an existing legal relationship (see *Thorner* at para 61), but it is necessary to look at whether what has been said is merely evincing an intention, which in itself needs to be looked at in context, and thus the evidence needs to set the scene. Those oft-repeated words, 'this will all be yours when I am gone anyway', for example, have been treated differently. On the one hand, they have been construed as an intention and, since intentions are of no importance, were held to be irrelevant to the question whether there was a representation. The question in all cases is whether words and acts would reasonably convey an assurance that the party in question would inherit (see *Thorner*). In *Moore*, 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.

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The importance of including the circumstances in which the promise has been made is most striking in *Thorner*, where various oblique remarks had been made by the claimant's cousin which led the claimant to at first hope and later to expect that he would inherit the cousin's farm. In normal circumstances that may not be considered to be sufficiently clear, but the surrounding circumstances here were quite unusual. Lord Walker describes the relationship thus:

> ... 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.

In many other cases, the promise may not have been witnessed by anyone other than the claimant. That was the situation in *Moore*, where the promises made by Roger to Stephen had only been witnessed by Stephen and his wife Jackie but at separate times. The judge undertook a detailed and rigorous analysis of the facts and

found the evidence of Stephen and Jackie to be reliable and convincing. On addition, and of some importance, was that their evidence was consistent with the evidence given by other witnesses, such as Roger's brother and the accountant. In contrast, the evidence of Pamela (Roger's wife), Julie (Roger's daughter) and Andrew (Julie's husband) was found to be vague. Indeed, the judge went so far as to say that Pamela took advantage of Roger's mental decline, which did her no credit. Stephen's evidence that he was promised the farm and the business was accepted.

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The sufficient clarity of the promise also extends to the identity of the land. Lord Walker said in *Thorner*:

> ... 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... It is the relation to identified land of the defendant that has enabled proprietary estoppel to develop as a sword, and not merely a shield: see Lord Denning MR in *Crabb v Arun District Council* [1976] Ch 179, 187.

Farm and other land may very well fluctuate in size over time. The question is what had been the common understanding between the parties. In *Thorner*, the assurance was that the claimant would inherit the farm. It was accepted that both parties had known that the extent of the farm was liable to fluctuate, according to sales and purchases of parcels from time to time, as development issues arose and tenancies came and went. The common understanding between the claimant and his cousin was that the cousin's assurance related to whatever the farm consisted of at his death.

In contrast, in *Shirt v Shirt* [2013], the various assertions made by a father to his son, that 'the farm was coming to him' and 'the farm is yours if you want to work for it', were limited to the farm business and not the land. The trial judge, with whom the Court of Appeal declined to interfere, considered that if what was said meant to refer to the land itself this would have led to some formalization of the arrangement.

Interestingly, in *Moore*, it was argued that any promise made by Roger was conditional on Stephen's good behaviour. This was given short shrift by the trial judge: the farm business had gone from strength to strength and the allegations were so trivial as to be of no effect. Of course,

that may very well have been because the allegations which were pleaded had not been put in cross-examination and were disregarded. But that provides a salutary warning as to careful planning of the evidence. A desire to paint a claimant in a bad light may backfire spectacularly if your evidence cannot be substantiated or is abandoned at the eleventh hour.

Pre-litigation correspondence

One further point which arose in *Moore* which is highly relevant, particularly to lawyers advising at an early stage, relates to the content of pre-litigation correspondence. In *Shirt*, the claim had been rejected because there was correspondence from the claimant's solicitors proposing an arrangement that was inconsistent with the estoppel claim; it was cited as one of the factors that ran against promises having been made. *Moore*, on the other hand, produced a different result. The pre-litigation correspondence from Stephen's solicitors had not suggested any proprietary estoppel claim. Indeed, the first occasion proprietary estoppel was raised was in the defence and counterclaim. The trial judge considered that the question was whether the promises were made and there was clear evidence they had been. He accepted Stephen's explanation that the correspondence was indicative of him trying to meet and discuss matters outside of court with a view to getting Roger to agree with the farming arrangements as they had been undertaken before.

Reliance

The causal link between the assurance/promise and the detriment suffered – that is, reliance – will need to be pleaded (*Gillett v Holt* [2000]). Once, however, it has been established that promises were made, and that there has been conduct by the claimant of such a nature that inducement may be inferred, then the burden of proof shifts to the defendants to establish that the claimant did not rely on the promises (*Wayling v Jones* [1995]).

Reliance is therefore of some importance in the defence of a claim based on proprietary estoppel. The evidence presented will need to show that the claimant had not relied on the promise. In *Campbell v Griffin* [2001], a friendly rapport between a lodger and his elderly landlords over time grew into a much closer, family-type relationship, with assurances of a home for life being given by the landlords. Mr Campbell undertook tasks for his landlords of such a nature that they could not be ascribed to even the friendliest of lodgers. There was a strong presumption that the assurances given to him were influencing his conduct. The fact that Mr Campbell agreed, under skilful cross-examination, that he would not in any event have ignored his elderly landlord 'if he had been lying on the floor, and had not eaten for two days' was not sufficient to rebut that presumption.

Moreover, the promises relied on do not have to be the sole inducement for the conduct: it is sufficient if they are an inducement (*Wayling*). In cases of this sort it is inevitable that claimants should be asked hypothetical questions of the 'what if' variety, but the court is not bound to attach great importance to the answers to such hypothetical questions.

Robert Walker LJ said this in *Campbell*:

> The court must of course pay close attention, and give due weight, to the oral evidence given by the witnesses who have lived through the events into which the court has to enquire. But it would do no credit to the law if an honest witness who admitted that he had mixed motives were to fail in a claim which might have succeeded if supported by less candid evidence.

In the *Moore* case, the judge had found that 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

The detriment suffered need not consist of the expenditure of money or other quantifiable financial detriment as long as it is something substantial (*Gillett; Henry v Henry* [2010]). The failure to receive an expected benefit does not, however, constitute a detriment. The issue of detriment is judged at the moment when the person who has given the assurance seeks to resile from it (*Gillett*).

In the Moore *case, the judge had found that it was plain that Stephen had relied on promises by basing his life on the farm and not searching for alternative employment.*

Inevitably, there will be a significant degree of overlap with reliance and detriment. Each case will very much depend on its own facts, and in *Moore* the factual assertions as to detriment were not challenged in cross-examination. It is useful, nonetheless, to see what amounted to detriment on Stephen's part:

- He could have found a role elsewhere, undoubtedly better paid with better accommodation.
- He did not enjoy expensive holidays or have an expensive lifestyle.
- The car which had caused much grievance on the part of Roger had been purchased and was owned by the partnership.
- His children were not privately educated, in contrast to his sister's children, whose school fees were paid by the partnership on the basis that they would not be able to rely on the farm as a source of income.
- He had long working hours.

Relief

Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application (*Henry*), and there must be a proportionality

between the remedy and the detriment which is its purpose to avoid (see *Jennings*).

The authorities are in conflict as to how the court should exercise its discretion. This dilemma is succinctly summarised by Lewison LJ in *Davies v Davies* [2016]:

> There is a lively controversy about the essential aim of the exercise of this broad judgmental 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 for such detriment she has suffered.

In *Suggitt v Suggitt* [2012] Arden LJ adopted the first approach, namely that the claimant's expectation would be protected and a departure from the expectation would be permitted only if it was clear that such an order would impose a disproportionate burden on the defendant. The decision came in for much criticism from academics and practitioners alike, and it was considered that Arden LJ had applied the wrong test.

In *Davies*, the Court of Appeal overturned the decision of the judge at first instance as to the amount awarded. The Court of Appeal had already held in its earlier decision that the daughter was entitled to equitable relief of her parents' dairy farm. The question of relief was thereafter considered by the trial judge, who awarded the daughter a third of the value of the farm. On appeal that financial award was reduced further. The Court of Appeal promulgated a sliding scale: where the claimant's expectations were uncertain, or where the court was not satisfied that the high level of the claimant's expectations was fairly derived from the assurances relied upon, the court could still take the claimant's expectations as a starting point. However, it was not entirely clear from *Jennings* what the court was to do with the expectation. It was a useful working hypothesis to take a sliding scale by which the clearer the expectation, the greater the detriment, and the longer the passage of time during which the expectation was reasonably held, the greater would be the weight that should be given to the expectation.

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Difficulties will arise where there have been a series of changing, uncertain or incompatible expectations, some of which had been superseded by later expectations, or where the promisor has sought to bring that expectation to an end. In addition, non-monetary detriment is more difficult to assess and may be incapable of precise valuation, although should not be a bar to an award.

In *Moore*, the judge agreed that the relief should mirror as closely as possible the arrangements which would have been obtained if the dispute had not arisen: Stephen would take over the farming; the assets would be in his name alone but with fixed sums being paid to Roger and Pamela; and Roger and Pamela would remain at the farmhouse, unless they decided to move to another house on the land.

An attempt was made to argue that since Stephen had received Geoffrey's share of the farm to the value of £5m and he had behaved badly, depriving him of Roger's share would not be unconscionable. This was rejected: the bad behaviour argument did not get off the ground given the evidence, and the transfer of Geoffrey's share was irrelevant.

Conclusion for practitioners

Although the law of proprietary estoppel engenders a plethora of esoteric and nuanced arguments, in practical terms, the evidence and the way in which it is presented is crucial to the case. As has been demonstrated, these cases are factually sensitive and heavily dependent on context. The difficulty faced by the unsuccessful party at trial is that appellate courts will not interfere unless the trial judge had misdirected themselves, or they had reached a conclusion which could not reasonably be reached (perversity) (see generally per Clarke LJ as he then was in *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] paras 12–23, in a passage approved by the House of Lords in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007]). Some commentators may go so far as to suggest that a doctrine as powerful and unpredictable as proprietary estoppel should not be left to one trial judge. It is not a view to which I subscribe, but it emphasises the need for advisers to consider the gathering and presentation of evidence carefully, taking into account the necessary criteria for a claim. ■

Assicurazioni Generali SpA v Arab Insurance Group (BSC)
[2002] EWCA Civ 1642
Campbell v Griffin & ors
[2001] WTLR 981
Crabb v Arun District Council
[1976] Ch 179
Datec Electronics Holdings Ltd & ors v United Parcels Service Ltd
[2007] UKHL 23
Davies & anor v Davies
[2014] EWCA Civ 568;
[2016] EWCA Civ 463
Gillett v Holt & anor
[2000] WTLR 195
Henry & anor v Henry
[2010] WTLR 1011
Hopgood v Brown
[1955] EWCA Civ 7
Jennings v Rice & ors
[2002] WTLR 367
Moore v Moore
[2016] EWHC 2202 (Ch)
Shirt v Shirt
[2013] WTLR 317
Suggitt v Suggitt & anor
[2012] WTLR 1607
Thorner v Major & ors
[2009] WTLR 713
Wayling v Jones
[1995] 2 FLR 1029