HOUSE OF LORDS SESSION 2008–09
[2009] UKHL 18

on appeal from:[2008]EWCA Civ 732

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Thorner (Appellant) *v* Majors and others (Respondents)

Appellate Committee

Lord Hoffmann
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Neuberger of Abbotsbury

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LORD HOFFMANN

My Lords,

1. The appellant David Thorner is a Somerset farmer who, for nearly 30 years, did substantial work without pay on the farm of his father's cousin Peter Thorner. The judge found that from 1990 until his death in 2005 Peter encouraged David to believe that he would inherit the farm and that David acted in reliance upon this assurance. In the event, however, Peter left no will. In these proceedings, David claims that by reason of the assurance and reliance, Peter's estate is estopped from denying that he has acquired the beneficial interest in the farm. The judge found the case proved but the Court of Appeal reversed him.

2. Such a claim, under the principle known as proprietary estoppel, requires the claimant to prove a promise or assurance that he will acquire a proprietary interest in specified property. A distinctive feature of this case, as Lloyd LJ remarked in the Court of Appeal (at paragraph 65), was that the representation was never made expressly but was "a matter of implication and inference from indirect statements and conduct." It consisted of such matters as handing over to David in 1990 an insurance policy bonus notice with the words "that's for my death duties" and other oblique remarks on subsequent occasions which indicated that Peter intended David to inherit the farm. As Lloyd LJ observed (at paragraph 67), such conduct and language might have been consistent with a current intention rather than a definite assurance. But the judge found as a fact that these words and acts were reasonably understood by David as an assurance that he would inherit the farm and that Peter intended them to be so understood.

3. The Court of Appeal said, correctly, that the fact that Peter had actually intended David to inherit the farm was irrelevant. The question

was whether his words and acts would reasonably have conveyed to David an assurance that he would do so. But Lloyd LJ accepted (at paragraph 66) that the finding as to what Peter would reasonably have been understood to mean by his words and acts was a finding of fact which was not open to challenge. That must be right. The fact that he spoke in oblique and allusive terms does not matter if it was reasonable for David, given his knowledge of Peter and the background circumstances, to have understood him to mean not merely that his present intention was to leave David the farm but that he definitely would do so.

4. However, the Court of Appeal allowed the appeal on the ground that the judge had not found that the assurance was intended to be relied upon and that there was no material upon which he could have made such a finding. The judge had found that David had relied upon the assurance by not pursuing other opportunities but not, said Lloyd LJ, that Peter had known about these opportunities or intended to discourage David from pursuing them.

5. At that point, it seems to me, the Court of Appeal departed from their previously objective examination of the meaning which Peter's words and acts would reasonably have conveyed and required proof of his subjective understanding of the effect which those words would have upon David. In my opinion it did not matter whether Peter knew of any specific alternatives which David might be contemplating. 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. If David did then rely upon it to his detriment, the necessary element of the estoppel is in my opinion established. It is not necessary that Peter should have known or foreseen the particular act of reliance.

6. The judge found (at paragraph 98) not only that it was reasonable for David to have understood Peter's words and acts to mean that "he would be Peter's successor to [the farm]" but that it was reasonable for him to rely upon them. These findings of fact were in my opinion sufficient to support the judge's decision.

7. The judge held that the equity in David's favour created by the proprietary estoppel required a declaration that Peter's personal representatives held the farm with its chattels, live and dead stock and cash at bank on trust for David absolutely. The personal representatives

object on two grounds. First, they say although the judge placed reliance on the incident of the handing over of the insurance policy in 1990, the assurance was not unequivocal until affirmed by later words and conduct, after which the detriment suffered by David was a good deal less than if one took the whole period from 1990 until Peter's death and therefore did not justify an award of the whole farm.

8. I do not think that the judge was trying to pin point the date at which the assurance became unequivocal and I think it would be unrealistic in a case like this to try to do so. There was a close and ongoing daily relationship between the parties. Past events provide context and background for the interpretation of subsequent events and subsequent events throw retrospective light upon the meaning of past events. The owl of Minerva spreads its wings only with the falling of the dusk. The finding was that David reasonably relied upon the assurance from 1990, even if it required later events to confirm that it was reasonable for him to have done so.

9. The second ground of objection is that the farm when Peter died in 2005 was not the same as it was in 1990. In between, he had sold some land and bought other land. I agree with my noble and learned friends Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury that changes in the character or extent of the property in question are relevant to the relief which equity will provide but do not exclude such a remedy when there is still an identifiable property. In the present case, I see no reason to question the judge's decision that David was entitled to the beneficial interest in the farm and the farming business as they were at Peter's death.

10. I would therefore allow the appeal and restore the decision of the judge.

LORD SCOTT OF FOSCOTE

My Lords,

11. I have had the advantage of reading in draft the opinions on this appeal of my noble and learned friends Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury and am in broad agreement with

their reasons for allowing this appeal. I want, however, to add some thoughts of my own and will, for that purpose, gratefully adopt the description and analysis of the facts of the case provided by Lord Walker.

12. In *Crabb v Arun District Council* [1976] Ch.179 Scarman LJ (as he then was) said, at p 192, that if the plaintiff, Mr Crabb, had any such right as he had claimed, in the event successfully, "it is an equity arising out of the conduct and relationship of the parties". In the present case the relationship of the parties was a familial one – Mr Peter Thorner, the owner of Steart Farm, had no wife or children and was a first cousin of the father of Mr David Thorner, who claimed upon his cousin's death to have a right to inherit the farm – and the significance and implications of the conduct of David and Peter respectively in the years leading up to Peter's death have to be assessed in the context of that familial relationship. David's many years of unpaid work on the farm and assistance with the management of Peter's farming business took place in the context of that relationship. Peter's remarks to David, and to others, regarding David's eventual inheritance of the farm were, in the context of that relationship, unsurprising. Similarly, David's expectation of that inheritance, fed by his years of unpaid work and his understanding of his cousin's remarks and intentions, was unsurprising. The issue that has arisen is whether, Peter having in the event died intestate, David has a right in equity, arising out of his and Peter's conduct and relationship to claim the farm.

13. The case for David, as pleaded, relied primarily on proprietary estoppel and extended not simply to Steart Farm but to the whole of Peter's net estate (see para 19 of the Amended Particulars of Claim). However the judge, Mr John Randall QC sitting as a Deputy Judge of the High Court, confined David's equity, quite rightly in my opinion, to Steart Farm, its live and dead stock and associated chattels and the working capital standing to the credit of the farm account with the Bank. The judge founded his judgment on the proprietary estoppel that had been pleaded. The Court of Appeal, too, concentrated on proprietary estoppel and the submissions that have been addressed to your Lordships have likewise concentrated on proprietary estoppel. It should be noted, however, that paragraph 20 of the Amended Particulars of Claim had claimed, in the alternative, an equity "which should be satisfied in such manner as the Court thinks just".

14. One of the features of the type of cases of which the present case is an example is the extent to which proprietary estoppel and

constructive trust have been treated as providing alternative and overlapping remedies and, while in no way disagreeing with my noble and learned friends' conclusion that David can establish his equity in Steart Farm via proprietary estoppel, I find it easier and more comfortable to regard David's equity as established via a remedial constructive trust. I will return to this later.

15. Lord Walker, in paragraph 29 of his opinion, identified the three main elements requisite for a claim based on proprietary estoppel as, first, a representation made or assurance given to the claimant; second, reliance by the claimant on the representation or assurance; and, third, some detriment incurred by the claimant as a consequence of that reliance. These elements would, I think, always be necessary but might, in a particular case, not be sufficient. Thus, for example, the representation or assurance would need to have been sufficiently clear and unequivocal; the reliance by the claimant would need to have been reasonable in all the circumstances; and the detriment would need to have been sufficiently substantial to justify the intervention of equity. On the factual findings made by the judge each of the three elements had been present in the period 1990 until Peter's death in 2005. Having referred to the various remarks made by Peter to David in 1990 and thereafter the judge expressed his conclusions in paragraphs 94, 98 and, finally, 111(d) of his judgment:

> "… I am satisfied that … Peter was intending to indicate to David that he would be Peter's successor to Steart Farm, upon his death, and that David's understanding to that effect was correct. I find that this remark and conduct on Peter's part strongly encouraged David, or was a powerful factor in causing David, to decide to stay at Barton House and continue his very considerable unpaid help to Peter at Steart Farm, rather than to move away to pursue one of the other opportunities which were then available to him, and which he had been mulling over …" (para 94)

> "I find this and other such remarks encouraged the expectation which David had formed … that he would be Peter's successor to Steart Farm, upon his death, and encouraged David to continue with his very considerable unpaid help to Peter there. I am also satisfied that it was reasonable for David to understand them and rely on them in that way …" (para 98)

and

> "I am also … satisfied that all these remarks further encouraged the expectation which David had formed that he would be Peter's successor to Steart Farm, upon his death, and encouraged David to continue with his very considerable unpaid help to Peter there, and … that it was reasonable for David to understand them and rely on them in that way …" (para 111(d))

16. Lloyd LJ, with whose judgment in the Court of Appeal Ward LJ and Rimer LJ agreed, accepted not only the judge's findings of primary fact but accepted also the inferences drawn by the judge from those findings. They were, said Lloyd LJ, "in effect immune from challenge" (para 66). But the Lord Justice was not satisfied that the judge's factual findings constituted a sufficient basis for a successful proprietary estoppel claim (see para 67). His doubt appears to have been based on the absence of an explicit finding that Peter had *intended* David to rely on his (Peter's) remarks (see para 72)

> "… the judge did not in terms consider whether the implicit statement which he found to have been made in 1990, to the effect that Peter intended David to succeed to the farm on his death, was intended to be relied on."

The Lord Justice went on, in paragraphs 73 and 74, to say this -

> "73. It may be that the judge was too much influenced by the fact that Peter did intend that David should inherit the farm, remained of that view, put it into effect by his 1997 will, and did not change his intention despite the revocation of that will …
>
> 74. In my judgment … David's claim in the present case does not satisfy the tests for [a proprietary estoppel] claim, because the statement made implicitly in 1990, as recorded by the judge, did not amount to a clear and unequivocal representation, intended to be relied on by David, or which

> it was reasonable for him to take as intended to be relied on by him …"

17. My Lords there seems to me, if I may respectfully say so, to be an inconsistency between, on the one hand, the Lord Justice's acceptance of the judge's finding that it was reasonable for David to have relied on Peter's representations that he (David) would inherit Steart Farm and, on the other hand, the Lord Justice's conclusion that no representation had been made by Peter that it had been reasonable for David to have taken as *intended* to be relied on. Whether the representations made by Peter to David about the ownership of Steart Farm after his (Peter's) death were intended by Peter to have been relied on by David must surely depend upon an *objective* assessment of Peter's intentions in making the representations. If it is reasonable for a representee to whom representations have been made to take the representations at their face value and rely on them, it would not in general be open to the representor to say that he or she had not intended the representee to rely on them. This must, in my opinion, particularly be so if, as here, the representations are repeated or confirmed by conduct and remarks over a considerable period. There may be circumstances in which representations cannot reasonably be taken to have been made with any intention that they should be acted on, or with any intention that, if acted on, rights against the representor would ensue, but a finding that it was reasonable for the representee to have relied on the representations, and to have acted to his or her detriment in that reliance, would, in my opinion, be inconsistent with the existence of any such circumstances. It could not be thought reasonable for a representee to rely on a representation that, objectively viewed, was not intended by the representor to be relied on. To put the point in context, the judge's factual finding that it was reasonable for David to have relied on Peter's representation that he (David) would inherit Steart Farm, a finding accepted by Lloyd LJ, carries with it, in my opinion, an implicit finding that it was reasonable for David to take the representation as intended by Peter to be relied on.

18. As to the requirement that a representation, if it is to found a claim based on proprietary estoppel, must be clear and unequivocal, a requirement that I certainly accept, there seem to me to be two respects in which Peter's representation to David that on Peter's death David would inherit Steart Farm might be thought to be lacking in the requisite certainty. First, there is the question as to the identity of Steart Farm. A contract for the sale of Steart Farm, if in writing, signed by the parties and stating the price, would not lack contractual certainty provided that evidence were available to identify as at the date of the contract the

agricultural unit that constituted Steart Farm. A representation by Peter that David would, on Peter's death, inherit Steart Farm cannot, at the time the representation was made, be accorded a comparable certainty. Farm boundaries are not immutable. They change, with purchases of additional fields and/or sales of fields that were part of the farm. Steart Farm, excluding land of which Peter was merely the tenant, ranged from 350 acres in 1976 to 460 acres in 2005 when Peter died. It could not be supposed that in, say, 1990 when perhaps the most important of the representations that David would inherit Steart Farm was made by Peter, Peter was representing also that he would not alienate any part of Steart Farm. And, indeed, in the period between 1990 and his death in 2005 Peter both sold land (for development), which thereupon ceased to be part of Steart Farm, and acquired land which was incorporated into and became part of Steart Farm. Peter's representation that David would inherit Steart Farm speaks, at least where Peter remained the owner of an agricultural entity known as Steart Farm, as from his death and if, at that time, evidence were available to identify Steart Farm with certainty, David's claim to be entitled in equity to Steart Farm cannot, in my opinion, be rejected for want of certainty of subject matter. What the position would have been, and what right could have been claimed by David, if, in say 2004, Peter had decided to give up farming and to sell the whole of Steart Farm does not arise and need not be decided. It may well be, however, that in that event, David would succeed in establishing a proprietary claim in equity and to consequential relief (c/f *Gillett v Holt* [2001] Ch.210).

19. The second "certainty" problem about a representation that David would inherit Steart Farm, a problem inherent in every case in which a representation about inheritance prospects is the basis of a proprietary estoppel claim, is that the expected fruits of the representation lie in the future, on the death of the representor, and, in the meantime, the circumstances of the representor or of his or her relationship with the representee, or both, may change and bring about a change of intentions on the part of the representor. *Gillett v Holt* was such a case. If, for example, Peter had become, before his death, in need of full time nursing care, so that he could not continue to live at Steart Farm or continue as a farmer and needed to sell Steart Farm or some part of it in order to fund the costs of necessary medical treatment and care, it seems to me questionable whether David's equity in Steart Farm, bred from the representations and conduct in evidence in this case, would have been held by a court to bar the realisation of Steart Farm, or some sufficient part of it, for those purposes. I do not, of course, imagine for a moment that, in the circumstances I am postulating, David would have raised any objection. However, the conceptual possibility of a dispute arising in the circumstances postulated has to be borne in mind. Would it really be the

case that the representations made by Peter, relied on and acted on by David as they were, would have barred the use of Steart Farm as a source of funding for the needs of Peter in a decrepit old age? For my part, I doubt it. But it is an odd sort of estoppel that is produced by representations that are, in a sense, conditional.

20. These reflections invite some thought about the relationship between proprietary estoppel and constructive trust and their respective roles in providing remedies where representations about future property interests have been made and relied on. There are many cases in which the representations relied on relate to the acquisition by the representee of an immediate, or more or less immediate, interest in the property in question. In these cases a proprietary estoppel is the obvious remedy. The representor is estopped from denying that the representee has the proprietary interest that was promised by the representation in question. *Crabb v Arun District Council* (supra) seems to me a clear example of such a case. The Council had represented that Mr Crabb would be entitled to have access to the private road at gateway B and had confirmed that representation by erecting gateposts and a gate across the gateway. Once Mr Crabb, in reliance on that representation, had acted to his detriment in selling off a portion of his land so that his only means of access to and egress from his retained land was via gateway B, it was too late for the Council to change its mind. The Council was estopped from denying that Mr Crabb had the necessary access rights. *Ramsden v Dyson* (1866) LR 1HL 129 is another case, straightforward if viewed through the spectacles of the jurisprudence that has emerged since, of proprietary estoppel. In cases where the owner of land stands by and allows a neighbour to build over the mutual boundary, representing either expressly or impliedly that the building owner is entitled to do so, the owner may be estopped from subsequently asserting his title to the encroached upon land. This, too, seems to me straightforward proprietary estoppel. There are many other examples of decided cases where representations acted on by the representee have led to the representor being estopped from denying that the representee had the proprietary interest in the representor's land that the representation had suggested. Constructive trust, in my opinion, has nothing to offer to cases of this sort. But cases where the relevant representation has related to inheritance prospects seem to me difficult, for the reasons I have given, to square with the principles of proprietary estoppel established by the *Ramsden v Dyson* and *Crabb v Arun District Council* line of cases and, for my part, I find them made easier to understand as constructive trust cases. The possibility of a remedial constructive trust over property, created by the common intention or understanding of the parties regarding the property on the basis of which the claimant has acted to his detriment, has been recognised at least since *Gissing v*

Gissing [1971] AC 886 (see particularly Lord Diplock, at p 905). The "inheritance" cases, of which *Gillett v Holt* [2001] Ch.210, *In re Basham* [1986] 1 WLR 1498 and *Walton v Walton* (1994 C.A. unreported) and, of course, the present case are good examples, are, to my mind, more comfortably viewed as constructive trust cases. Indeed I think Mr Edward Nugee QC, sitting as a High Court judge in *In re Basham*, was of the same opinion. After stating the proprietary estoppel principle (at p 1503) he went on (at p 1504)

> "But in my judgment, at all events where the belief is that A is going to be given a right in the future, it is properly to be regarded as giving rise to a species of constructive trust, which is the concept employed by a court of equity to prevent a person from relying on his legal rights where it would be unconscionable for him to do so."

And at p 1505E he referred to the detriment "that the plaintiff must prove in order to raise a constructive trust in a case of proprietary estoppel". For my part I would prefer to keep proprietary estoppel and constructive trust as distinct and separate remedies, to confine proprietary estoppel to cases where the representation, whether express or implied, on which the claimant has acted is unconditional and to address the cases where the representations are of future benefits, and subject to qualification on account of unforeseen future events, via the principles of remedial constructive trusts.

21. I am satisfied, however, that this case would, on the factual findings made by the judge and accepted by the Court of Appeal have justified a remedial constructive trust under which David would have obtained the relief awarded him by the judge. I would allow the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

22. I have had the great advantage of considering in draft the speech to be delivered by my noble and learned friend, Lord Walker of Gestingthorpe. I agree with it and add just a brief comment on the first point.

23. Lord Walker has quoted passages and sketched other points from the judgment of the deputy judge, Mr John Randall QC. Much of that judgment is devoted to portraying the relationship between the late Mr Peter Thorner and the appellant, Mr David Thorner, who was his first cousin once removed. At all relevant times Peter was taciturn, while David was content to assist Peter on his farm year after year for nothing, even though his only income was pocket money from his father. By most standards, the situation was unusual. But it is precisely that unusual situation which provides the context in which the remarks which lie at the heart of the case of proprietary estoppel fall to be interpreted.

24. Given the actual situation, there was never going to be what Mr Simmonds described as a "signature event", such as a family wedding or christening, at which Peter would make a dramatic announcement, in front of the assembled family, about the destination of his estate. Indeed, since Peter was in the habit of saying so little, it was scarcely to be expected that he would ever address the matter directly. But the judge found – and the Court of Appeal accepted - that, by his oblique remarks on a number of occasions, Peter had intended to indicate to David that he was to inherit Steart Farm. David interpreted Peter's remarks in the way that he intended.

25. The contention for the respondents was that, even though David had correctly interpreted Peter's remarks as assurances about inheriting the farm, his remarks were not "clear and unequivocal". There was therefore no way of saying that they were intended to be relied on and they could accordingly not give rise to an estoppel. I would reject that contention.

26. 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. Against that background, respectfully adopting Lord Walker's formulation, I would hold that it is sufficient if what Peter said was "clear enough". To whom? Perhaps not to an outsider. 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.

27. As can be seen from paras 94 and 98 of his judgment, the judge, who enjoyed "those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case" (*Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35, 37, per Lord Shaw of Dunfermline), held that it was indeed reasonable for David to understand those remarks in that way and to rely on them by going on working, for nothing, for many years. Not only can I not come to a clear view that the judge was plainly wrong in this conclusion, but I see no reason to doubt that he was right.

28. For these reasons, as well as for those to be given by my noble and learned friend, Lord Neuberger of Abbotsbury, I would allow the appeal and restore the deputy judge's order.

LORD WALKER OF GESTINGTHORPE

My Lords,

The issues

29. This appeal is concerned with proprietary estoppel. An academic authority (Simon Gardner, An Introduction to Land Law (2007) p101) has recently commented:

> "There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither)."

Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: 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 (see Megarry & Wade, Law of Real Property, 7th edition (2008) para 16-001; Gray & Gray, Elements of Land Law, 5th edition (2009) para 9.2.8; Snell's Equity, 31st edition (2005) paras 10-16 to 10-19; Gardner, An Introduction to Land Law (2007) para 7.1.1).

30. This appeal raises two issues. The first and main issue concerns the character or quality of the representation or assurance made to the claimant. The other (which could be regarded as a subsidiary part of the main issue, but was argued before your Lordships as a separate point) is whether, if the other elements for proprietary estoppel are established, the claimant must fail if the land to which the assurance relates has been inadequately identified, or has undergone a change (in its situation or extent) during the period between the giving of the assurance and its eventual repudiation.

31. I should say at once that the respondents to the appeal did not contend that this House's decision in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752 ("*Cobbe*") has severely curtailed, or even virtually extinguished, the doctrine of proprietary estoppel (a rather apocalyptic view that has been suggested by some commentators: see for instance Ben McFarlane and Professor Andrew Robertson, "Death of Proprietary Estoppel" [2008] LMCLQ 449 and Sir Terence Etherton's extrajudicial observations to the Chancery Bar Association 2009 Conference, paras 27ff.) But *Cobbe* is certainly relevant to the second issue. The respondents' case is that in *Cobbe* this House reaffirmed the need for certainty of interest which has, it is argued, been part of the law since *Ramsden v Dyson* (1866) LR 1 HL 129. The respondents argue that *Re Basham* [1986] 1 WLR 1498 was wrongly decided so far as it extended, not just to the deceased's cottage, but to the whole of his residuary estate.

The facts

32. The facts were found by the deputy judge, Mr John Randall QC, in a long and carefully-organised reserved judgment. His judgment shows, to my mind, that he took full advantage of seeing and hearing the witnesses who gave evidence before him. He was sensitive to the complexities of human nature as they appeared from the evidence which Mr David Thorner (the claimant and the appellant before your Lordships) gave about himself and about the late Mr Peter Thorner (whose personal representatives are the respondents). He found the claimant to be a "painfully honest" witness. It is noteworthy that in the Court of Appeal, Lloyd LJ (with whom Ward and Rimer LJJ agreed) expressly accepted the deputy judge's findings of fact (para 66):

> "The finding as to what was said and done is one of primary fact, which is not open to challenge, nor is it

> sought to be challenged. The finding as to what Peter meant by what he said and did is one of inference, but the judge's ability to draw the inference was based on other evidence, above all as to what Peter was like, which he had and we do not. It is therefore also, in effect, immune from challenge. I proceed on the footing of the judge's finding that Peter did intend to indicate to David that the latter would inherit the farm."

For simplicity (and without intending any disrespect) I shall follow the deputy judge and Lloyd LJ in referring to the claimant, his father (Jimmy), his deceased cousin (Peter) and other members of the family by their first names.

33. The account that follows is a summary, and inevitably one that loses some of the nuances, of the fuller findings made by the deputy judge. It also draws on the agreed statement of facts and issues ("the agreed statement") prepared for your Lordships.

34. The Thorners are a farming family living in Somerset. Jimmy and Peter were first cousins. Peter was born in 1927 and Jimmy was ten years older. David was born in 1949 and so was 22 years younger than Peter. Peter was married twice but had no children. His first wife Sarah, to whom he was devoted, died in 1976 from Crohn's disease. In 1977 Peter married his housekeeper but they separated within two years, and were divorced in 1986.

35. Sarah owned Steart Farm, on the edge of the village of Cheddar in Somerset. She had inherited it from her parents, and on her death Peter inherited it from her. It was then about 350 acres in extent, including some rough grazing on the Mendip Hills. Until 1988 Peter had a dairy herd, beef cattle and sheep. But by then his health was no longer good (he had a recurrent hernia, and also breathing difficulties) and in 1988 he sold the dairy herd and his milk quota. In 1992 (when he was aged 64) he was farming 583 acres, some of it rented by him as tenant. In 1998 he sold the sheep and in the course of the next year he granted some three-year farming business tenancies over most of the land, continuing to farm about 160 acres himself, primarily for beef. The agreed statement records that 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.

36. I now go back in time to 1976. After Sarah's death David, who was then aged 26 and already had eleven years' practical experience of farming, began to help Peter at Steart Farm. He continued to do so, without any remuneration, until Peter's death 29 years later. David was at this time living and working at his father's farm at Coxley, between Wells and Glastonbury. For this he received "pocket money" (latterly, it seems, £30 a week) from his father. David has never married. Apart from farming, horses were his main interest, so far as he had time for any other interests while working on Jimmy's farm (for pocket money) and Peter's farm (for nothing).

37. David worked very hard at Peter's farm. From 1986 (after Jimmy had given up farming) most of David's time was spent helping Peter at his farm, in a variety of tasks from night-time calving to farm paperwork of all sorts. David also provided Peter (who was on his own from about 1979) with companionship and emotional support. Peter particularly needed help with paperwork for reasons that the deputy judge described in a passage (quoted by Lloyd LJ) which is also relevant to the first issue in the appeal:

> "31. Peter was described in evidence as 'a man of few words.' There are perhaps two relevant aspects to that. First, Peter was a relatively private man who generally kept his thoughts about his business and financial affairs to himself. Second, he had literacy problems, not finding reading easy, and finding writing particularly difficult. He never took to paperwork, and regarded the increasing amount required as an unwelcome imposition, although that may well have been as much a generational matter as a reflection of his literacy problems. There is however also some evidence that once 'cattle passports', movement records and the like became mandatory, he was concerned that the paperwork from his farm should be right. I detect no necessary inconsistency between these various features of the evidence.
>
> 32. There is evidence from a number of witnesses (including David, Richard Adams and Graham Livings) which I accept, that Peter was not given to direct talking. The simplest example (though it went a good deal further than this) is that when Peter said 'What are you doing tomorrow?' he generally meant 'Would you come and help me tomorrow?' Indeed Mr Selby, a long-serving

> police officer in the Avon & Somerset Constabulary, observed that lack of directness in conversation is a common feature he has encountered more generally when speaking to farmers in the area. I will not speculate as to whether it is confined to farmers in this area of Somerset. In assessing whether there is any significance to be attached to the somewhat indirect manner in which a number of Peter's statements now relied [on] by David were expressed or communicated, this is a factor to [be] borne in mind."

38. Resisting the temptation to quote more of the judgment (which has many acute observations on the evidence) I set out the balder terms of para 11 of the agreed statement:

> "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 whatever from Peter. But Peter considered himself entitled to David's help and expected David to do whatever he asked. David was at Peter's beck and call."

39. In 1986 Jimmy gave up farming and David moved with his parents to Barton House, a house with four acres of land. It was closer (about ten minutes' drive) to Peter's farm. For a short time David kept some horses and calves there but in 1987 he allowed his brother Kevin (who had a young family) to take over the use of this land. David told Kevin that he was becoming more and more involved at Steart Farm, where he believed his future lay.

40. So I come to the deputy judge's findings which are directly relevant to the first issue. Paragraphs 12 and 13 of the agreed statement are in the following terms:

> "During the 1980's David came to hope that he might inherit Steart Farm. That hope became an expectation in 1990 when Peter gave him the 1989 Prudential Bonus Notice on two assurance policies on his own life and said

> 'That's for my death duties'. By so doing Peter intended to indicate to David that he would be Peter's successor to Steart Farm upon his death and that David's understanding to that effect was correct. This remark and conduct on Peter's part strongly encouraged David or was a powerful factor causing him to decide to remain with his parents in Somerset (even though they had given up their own farm) and continue his very considerable unpaid help to Peter at Steart Farm, rather than move away to pursue one of the other opportunities which were then available to him, and which he had been considering. There was no evidence that Peter knew of those opportunities.
>
> Over the following years Peter made other remarks to David which were based on the unspoken mutual understanding and which encouraged the expectation which David had formed that he would be Peter's successor to Steart Farm upon his death and encouraged David to continue with his very considerable unpaid help to Peter there; and *those remarks were reasonably understood and relied upon by David in that way.*"

The words in italics are qualified by a footnote to the effect that the respondents' counsel (but not the appellant's counsel) regard them as an inference which an appellate court can re-open.

41. In amplification of this I should, I think, set out some of the deputy judge's crucial findings in his own words. These passages were quoted by Lloyd LJ also. The first covers the position down to 1990:

> "86. During the 1980's David came to hope that he might inherit Steart Farm. As he put it in evidence, from 1985 Peter 'made various noises that made me think that I might well inherit, but nothing very definite.' Significantly, the evidence of Richard Adams, who saw quite a lot of Peter in the first half of the 1980's, is that 'By the mid-80's I had no doubt that Peter intended David to have the farm. I cannot point to any specific statements from that period, it was more a question of the nature of their relationship'."

42. This is what the deputy judge said about the Prudential bonus notice:

> "94. One day in 1990, when Peter was still only in his early 60's, he handed David a Prudential Bonus Notice, relating to two policies on Peter's life which appear then to have had a value of about £20,000 between them, and said 'That's for my death duties'. David duly retained the document, the original of which was disclosed to the defendants' former solicitors, and (after it was eventually retrieved from a file, during the course of the trial) a copy of which is now exhibited. One can only speculate as to whether the timing was coincidental, or whether Peter had heard from a mutual contact that David was considering other career avenues at about that time, and felt that he should say something to encourage David to continue helping him at Steart Farm (David makes an observation to similar effect in his witness statement). This simple action and short accompanying comment by Peter marked something of a watershed, in that it was the first direct reference made by Peter to David with regard to matters concerning his estate and passing and marked the point at which David's hope of inheriting (born of the various hints referred to in para 86 above) became an expectation. Given the clear picture which has emerged from the evidence of Peter as a man of few words, who generally maintained his privacy about his personal financial affairs (even David only learnt after his death of the extent of his monetary resources), and who hardly ever spoke in direct terms, I am satisfied that in making such a remark, and handing such a document to David to keep, Peter was intending to indicate to David that he would be Peter's successor to Steart Farm, upon his death, and that David's understanding to that effect was correct. I find that this remark and conduct on Peter's part strongly encouraged David, or was a powerful factor in causing David, to decide to stay at Barton House and continue his very considerable unpaid help to Peter at Steart Farm, rather than to move away to pursue one of the other opportunities which were then available to him, and which he had been mulling over."

43. David's mother Dorothy died in 1992. Her death was a heavy blow to Jimmy, and David did his best to support his father. In relation to this period (about the mid-90's) the deputy judge found:

> "98. From time to time, Peter made remarks to David in conversation which, though not saying so directly, carried with them the implication that David was to have [a] continuing long-term involvement with Steart Farm. Peter would point out to him little things about the farm which would only be of relevance to someone with such an involvement (as they were of no immediate relevance at the time they were made), and which it was only necessary to communicate to someone who would be there after Peter had gone, and the undocumented knowledge in his head was no longer available. The underlying context of such remarks was of course the remark made in 1990 coupled with the handing over of the bonus notice, which I have already dealt with, and David's continuing heavy commitment to wholly unremunerated work on Steart Farm. Understandably, the evidence does not date these remarks with any precision. One such remark was when Peter made a point of drawing to David's attention a cattle trough which, he explained to him, never froze up in winter. I find that this and other such remarks encouraged the expectation which David had formed (in the circumstances I have already explained) that he would be Peter's successor to Steart Farm, upon his death, and encouraged David to continue with his very considerable unpaid help to Peter there. I am also satisfied that it was reasonable for David to understand them and rely on them in that way. That being the case, it is unnecessary for me to undertake the somewhat artificial exercise of attempting to make a specific finding, in respect of each of Peter's more indirect remarks, as to whether Peter positively intended each such remark to convey to David the meaning, and bring about the reliance, which it did."

44. In 1997 Peter made a will, drafted for him by his solicitors. He left pecuniary legacies totalling £225,000, and the whole of his residuary estate to David. David knew nothing about this, although he was named as sole executor. But a year later Peter fell out with one of the pecuniary legatees and (apparently for that reason) telephoned his solicitor saying that he wanted to cancel his will. He said he would arrange to make another will. His solicitor correctly advised him by letter that if he

wished to revoke the will by destruction he would have to do it himself, that the consequence would be an intestacy, and that he should consider making a new will as soon as possible. With his letter the solicitor sent Peter the 1997 will. It has never been found, and the deputy judge inferred that Peter did destroy it. He never made a new will, and died intestate, on 13 November 2005, a week after Jimmy's death. It was David who found him dead at Steart Farm.

45. Towards the end of his life Peter made further remarks to David similar to those recorded in para 98 of the judgment. The deputy judge was satisfied (para 111) that all these remarks further encouraged David to continue to give unpaid help to Peter, and that it was reasonable for David to understand them and rely on them in that way. I need not set out the details of this evidence.

The proceedings below

46. At trial all the elements of proprietary estoppel, as pleaded by David, were in issue: assurances, reliance and detriment. I have already set out the deputy judge's findings as to the oblique assurances that Peter made to David.

47. As to detrimental reliance, the deputy judge remarked (para 129):

> "Though hope only became expectation in 1990, it is at least relevant background that by then David had already put in a huge amount of unpaid work at Steart Farm, over the preceding fourteen or so years."

He concluded (para 131):

> "With regard to all that David did at Steart Farm, and in looking after Peter, for the further fifteen or so years up to his death, there is again no need for me here to repeat the various relevant findings I have already made earlier in my judgment. David's contribution was not only unremunerated, but also far in excess of that made by any of the others who helped at Steart Farm, whose roles I

> have reviewed in paras 74-80 above. He was encouraged to continue with his considerable and unremunerated commitment to this work by what was said and done by Peter on the various occasions I have already identified. There is a clear and sufficient link between that encouragement from Peter and what David did for him and on his farm."

He went on (in para 132, which contained a review of the expert evidence on farm finance and management) to reject the submission that David had actually done less than he was asserting at trial. Detrimental reliance is no longer at issue in the appeal.

48. The deputy judge's order was that David should receive the land, buildings, live and dead stock and other assets of Peter's farming business, including about £24,000 in the farm's current account, but should indemnify Peter's personal representatives in respect of inheritance tax payable on Steart Farm (parts of which had development value exceeding the agricultural value). The order also directed an account of income to be taken.

49. The personal representatives appealed with permission granted by Mummery LJ. There were four grounds of appeal, the first three all reflecting different lines of attack on the issue of assurances: that there was no clear promise; that the bonus certificate incident was insufficient; and that the judge placed undue weight on David's expectation and the detriment suffered by him; the fourth ground attacked the quantum of relief as exceeding the minimum necessary to satisfy the equity.

50. So in the Court of Appeal the argument centred on whether the oblique assurances given by Peter to David, in 1990 and on numerous subsequent occasions, were sufficient to found a proprietary estoppel. In his discussion of the authorities Lloyd LJ referred to *J T Development Ltd v Quinn* [1991] 2 EGLR 257, 261 (Ralph Gibson LJ) and *Uglow v Uglow* [2004] WTLR 1183, para 9 (Mummery LJ) as supporting the application to proprietary estoppel of the observations (in relation to estoppel by representation generally) of Lord Denning MR in *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529, 540-541 (a case about statutory notices relating to business tenancies):

> "But 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. And when I say it must be 'intended to be acted upon,' I would add that a man must be taken to intend what a reasonable person would understand him to intend. In short, the representation must be made in such circumstances as to convey an invitation to act on it."

51. It was ultimately on this ground, as I read Lloyd LJ's judgment, that he decided (with the concurrence of Ward and Rimer LJJ) that the appeal must be allowed. The crux of his decision seems to be in para 72:

> "In the present case, the judge did not in terms consider whether the implicit statement which he found to have been made in 1990, to the effect that Peter intended David to succeed to the farm on his death, was intended to be relied on. Since he was unable to find that the implicit statement was made for the purpose of persuading David not to pursue some other opportunity, it seems to me that there was no material on the basis of which the judge could have found, if he had asked the question, that the implicit statement was intended to be relied on or, in other words, was intended as a promise rather than, at most, a statement of present intention, which might well be maintained in fact (as it was, although not in the event carried through), but as to which there was no commitment."

This reasoning was reiterated, with a warning that diluting the ingredients of proprietary estoppel would be a dangerous precedent, at the very end of the judgment (para 75).

The main issue before the House

52. In this House Mr McDonnell QC based David's appeal primarily on the deputy judge's findings as to the adequacy of the assurances given to David. He submitted that the Court of Appeal erred (in the passage set out in the last paragraph) because the "clear and unequivocal" test did not apply in proprietary estoppel; and that in any case the test was, if necessary, satisfied. He relied on the decision of the

Court of Appeal in *Walton v Walton* (14 April 1994, unreported) as a more helpful practical statement of the test in a case of this sort.

53. Mr Simmonds QC submitted (on the main point) that the correct construction of the words used by Peter was a question of law, not fact. While recognising that little is gained by comparing the facts of one case with another, he observed that the facts of the present case are very different from those in *Walton v Walton* or *Gillett v Holt* [2001] 1 Ch 210. Mr Simmonds emphasised that David (whom he described as a thoroughly decent man) had never pressed Peter for any explicit promise as to his (David's) expectation. It was not reasonable he said, for David to understand Peter's comments as he did, or to rely on his understanding of them. Mr Simmonds had other submissions, as to the identity of the promised subject-matter, that I will come to later.

54. There is some authority for the view that the "clear and unequivocal" test does not apply to proprietary estoppel. That view was expressed by Slade LJ in *Jones v Watkins* (26 November 1987, unreported). The same view has been expressed in at least the past three editions of Treitel, Law of Contract. The current (12th) edition (2007) by Mr Edwin Peel, in a passage comparing promissory and proprietary estoppel, states (para 3-144):

> "Promissory estoppel arises only out of a representation or promise that is 'clear' or 'precise and unambiguous'. Proprietary estoppel, on the other hand, can arise where there is no actual promise: eg where one party makes improvements to another's land under a mistake and the other either knows of the mistake or seeks to take unconscionable advantage of it."

55. The present appeal is not of course a case of acquiescence (or standing-by). David does not assert that he can rely on money which he has spent on the farm, or improvements which he has made to it. His case is based on Peter's assurances to him. But if all proprietary estoppel cases (including cases of acquiescence or standing-by) are to be analysed in terms of assurance, reliance and detriment, then the landowner's conduct in standing by in silence serves as the element of assurance. As Lord Eldon LC said over 200 years ago in *Dann v Spurrier* (1802) 7 Ves 231, 235-236:

> "this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement."

56. I would prefer to say (while conscious that it is a thoroughly question-begging formulation) that to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context. I respectfully concur in the way Hoffmann LJ put it in *Walton v Walton* (in which the mother's "stock phrase" to her son, who had worked for low wages on her farm since he left school at fifteen, was "You can't have more money and a farm one day"). Hoffmann LJ stated at para 16:

> "The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made."

57. Hoffmann LJ enlarged on this, at paras 19 to 21:

> "But in many cases of promises made in a family or social context, there is no intention to create an immediately binding contract. There are several reasons why the law is reluctant to assume that there was. One which is relevant in this case is that such promises are often subject to unspoken and ill-defined qualifications. Take for example the promise in this case. When it was first made, Mrs Walton did not know what the future might hold. Anything might happen which could make it quite inappropriate for the farm to go to the plaintiff.
>
> But a contract, subject to the narrow doctrine of frustration, must be performed come what may. This is why Mr Jackson, who appeared for the plaintiff, has always accepted that Mrs Walton's promise could not have been intended to become a contract.

> But none of this reasoning applies to equitable estoppel, because it does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept."

58. Mr Simmonds submitted that the meaning of spoken words is, not less than the meaning of written words, a question of law. Attractively though he put this submission, I have to say that in the circumstances of this case I feel a degree of unreality about the distinction. The rule about construction of documents being a question of law was established for pragmatic reasons (see *Carmichael v National Power Plc* [1999] 1 WLR 2042, 2048-2049). The commercial, social or family background against which a document or spoken words have to be interpreted depends on findings of fact. When a judge, sitting alone, hears a case of this sort, his conclusion as to the meaning of spoken words will be inextricably entangled with his factual findings about the surrounding circumstances (and the same would have been true if Peter had written a note, "This is for my death duties").

59. 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.

60. I respectfully consider that the Court of Appeal did not give sufficient weight to the advantage that the trial judge had in seeing and hearing the witnesses. They concentrated too much, I think, on the 1990 incident of the bonus notice. That was certainly an important part of the narrative. For David it marked the transition from hope to expectation. But it did not stand alone. The evidence showed a continuing pattern of conduct by Peter for the remaining 15 years of his life and it would not be helpful to try to break down that pattern into discrete elements (and then treat each as being, on its own, insignificant). To my mind the deputy judge did find, in paras. 94 and 98 of his judgment, that Peter's assurances, objectively assessed, were intended to be taken seriously and to be relied on. In the end it is a short point; I do not think that there

was sufficient reason for the Court of Appeal to reverse the trial judge's careful findings and conclusion. I do not share the Court of Appeal's apparent apprehension that floodgates might be opened, because cases like this are fairly rare, and trial judges realise the need to subject the evidence (whether as to assurances, as to reliance or as to detriment) to careful, and sometimes sceptical, scrutiny (*Jones v Watkins* is a good example of an exaggerated claim that was rightly dismissed by the Court of Appeal on the ground of no sufficient detriment).

The identity of the farm

61. 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. That is one of the main distinguishing features between the two varieties of equitable estoppel, that is promissory estoppel and proprietary estoppel. The former must be based on an existing legal *relationship* (usually a contract, but not necessarily a contract relating to land). The latter need not be based on an existing legal relationship, but it must relate to *identified property* (usually land) 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 DC* [1976] Ch 179, 187.

62. In this case the deputy judge made a clear finding of an assurance by Peter that David would become entitled to Steart Farm. The first, "watershed" assurance was made in 1990 at about the time that Peter made an advantageous sale of one field for development purposes, and used part (but not the whole) of the proceeds to buy more agricultural land, so increasing the farm to the maximum at about 582 acres (some merely tenanted by Peter) which Peter farmed in 1992. 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 (as it would have done, barring any restrictive language, under section 24 of the Wills Act 1837, had Peter made a specific devise of Steart Farm). This fits in with the retrospective aspect of proprietary estoppel noted in *Walton v Walton*.

63. The situation is to my mind quite different from a case like *Layton v Martin* [1986] 2 FLR 227, in which the deceased made an unspecific promise of "financial security". It is also different (so far as concerns the award of the whole of the deceased's residuary estate) from *Re Basham* [1986] 1 WLR 1498. Your Lordships do not need to decide whether *Re Basham* was correctly decided, so far as it extended to the residuary estate, and I would prefer to express no decided view. But on this point the deputy judge in *Re Basham* relied largely on authorities about mutual wills, which are arguably a special case.

64. Mr Simmonds relied on some observations by my noble and learned friend Lord Scott of Foscote in *Cobbe* [2008] 1 WLR 1752, paras 18 to 21, pointing out that in *Ramsden v Dyson* (1866) LR 1 HL 129, 170, Lord Kingsdown referred to "a *certain* interest in land" (emphasis supplied). But, as Lord Scott noted, Lord Kingsdown immediately went on to refer to a case where there was uncertainty as to the terms of the contract (or, as it may be better to say, in the assurance) and to point out that relief would be available in that case also. All the "great judges" to whom Lord Kingsdown referred, at p 171, thought that even where there was some uncertainty an equity could arise and could be satisfied, either by an interest in land or in some other way.

65. In any event, for the reasons already mentioned, I do not perceive any real uncertainty in the position here. It is possible to imagine all sorts of events which might have happened between 1990 and 2005. If Peter had decided to sell another field or two, whether because of an advantageous development opportunity or because the business was pressed for cash, David would have known of it, and would no doubt have accepted it without question (just as he made no claim to the savings account which held that part of the proceeds of the 1990 sale which Peter did not roll over into land). If Peter had decided in 2000 to sell half the farm in order to build himself a retirement home elsewhere (an unlikely hypothesis) David might well have accepted that too (as the claimant in *Gillett v Holt* might have accepted a reduction in his expectations, had he been asked to do so rather than being abruptly and humiliatingly dismissed: see [2001] Ch 210, 229). But it is unprofitable, in view of the retrospective nature of the assessment which the doctrine of proprietary estoppel requires, to speculate on what might have been.

66. Apart from his principled attack based on uncertainty, Mr Simmonds, realistically, did not criticise the deputy judge's decision to award David the whole farm and the whole of the farming assets. There

is no ground on which to challenge the judge's discretion in determining the remedy. I would allow the appeal and restore the judge's order.

Postscript

67. I wish to add a brief postscript as to *Cobbe*. It will be apparent from this opinion that I have some difficulty with Lord Scott's observation (in para 14 of his opinion in that case) that proprietary estoppel is a sub-species of promissory estoppel. But the terminology and taxonomy of this part of the law are, I acknowledge, far from uniform. The index to the first (1923) edition of George Spencer Bower's Law relating to Estoppel by Representation contains in its index the entry '"EQUITABLE ESTOPPEL", a meaningless expression', a view which is developed at length in the text, with Lord Selborne LC attracting particular criticism (at p.14) that "a jurist so nice and discriminating in his phraseology" should have used the expression in *Citizen's Bank of Louisiana v First National Bank of New* Orleans (1873) LR 6 HL 352, 360. At the other extreme one of the leading 20th-century cases, *Crabb v Arun DC*, shows a "virtual equation of promissory estoppel and proprietary estoppel", as Oliver J noted in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co. Ltd* [1982] 1 QB 133, 153. But this is not the place for any prolonged discussion of terminology or taxonomy.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

68. I have had the benefit of reading in draft the opinion of my noble and learned friend, Lord Walker of Gestingthorpe. For the reasons he gives, I too would allow this appeal. However, partly because the issues are of some importance, and partly out of deference to the excellent written and oral arguments presented on behalf of the respondents, I shall give my views in my own words.

The factual background

69. The relevant findings of the Deputy Judge and of the Court of Appeal are fully set out in Lord Walker's opinion, and I shall therefore only identify the core conclusions. At [2007] EWHC 2422 (Ch), para 94, the Deputy Judge said that, by handing over the Prudential Bonus Notice in 1990, and saying that it was for his death duties, "Peter was intending to indicate to David that he would be Peter's successor to Steart Farm, upon his death, and that David's understanding to that effect was correct". In para 98, the Deputy Judge said that "this and other such remarks encouraged the expectation which David had formed … that he would be Peter's successor to Steart Farm, upon his death, and encouraged David to continue with his very considerable unpaid help to Peter there." The Deputy Judge also said that "it was reasonable for David to understand [such remarks by Peter] and rely on them in that way".

70. In the Court of Appeal, Lloyd LJ (who gave the only reasoned judgment, with which Ward and Rimer LJJ agreed) referred at [2008] EWCA Civ 732, para 66 to the Deputy Judge's finding that Peter was "a man of few words, who generally maintained his privacy about his personal financial affairs … and who hardly ever spoke in direct terms". He then said that there was, quite rightly, no challenge to any of the Deputy Judge's findings of primary fact. He went on to say that, in relation to the statement made in 1990, the Deputy Judge's "finding as to what Peter meant by what he said is one of inference", and that, given that it "was based on other evidence", it was "in effect, immune from challenge".

71. However, at [2008] EWCA Civ 732, para 72, Lloyd LJ suggested that the Deputy Judge "did not in terms consider whether the implicit statement…. to the effect that Peter intended David to succeed to the farm on his death, was intended to be relied on". He then said that the Deputy Judge "was unable to find that the implicit statement was made for the purpose of persuading David not to pursue some other opportunity". Accordingly, Lloyd LJ concluded, "there was no material on the basis of which the Judge could have found …. that the implicit statement was intended to be relied on, or… was intended as a promise rather than, at most, a statement of present intention, which might well be maintained ..., but as to which there was no commitment."

The issues in this appeal

72. David's contention that he is entitled to the freehold of Steart Farm is, and was at first instance and in the Court of Appeal, founded squarely on proprietary estoppel, whose main elements are often summarised as being, in brief, assurance, reliance and detriment, as Lord Walker more fully explains. The issues in the present case really focus on the quality or nature of the assurance required before a proprietary estoppel can be established.

73. The respondents advanced two reasons why this appeal should fail, both of which involved contending that the estoppel found by the Deputy Judge could not be made good. First, that the appellant ("David") could not establish that he had reasonably relied on any assurance made to him by Peter Thorner ("Peter"). This was on the basis that any statement made by Peter was insufficiently clear to found an estoppel - effectively the ground relied on by the Court of Appeal. Secondly, that, even if reasonable reliance could be established, the nature of the property referred to in any assurance relied on was too imprecise to found a proprietary estoppel. I shall consider these two arguments in turn.

Reasonable reliance.

74. The conclusion reached by the Court of Appeal, and supported by the respondents, rests on the proposition that a statement by A that he will leave certain property on his death to B could have one of two meanings. It might constitute an assurance that this is what A is binding himself to do; in other words, it might be a commitment by A to leave the property to B. Or it might be no more than a statement of A's current intention, which can be subject to change with the passage of time, with or without a change of circumstances. (In that connection, it seems to me, in agreement with both parties to this appeal, that there is nothing special, as a matter of principle, in relation to a statement about leaving property in a will as against any other statement about one's future actions.) The Court of Appeal's reasoning was that, as a statement must be a "clear and unambiguous" assurance to found an estoppel, a claim such as that raised in this case could only succeed if it could be established that the statement relied on was clearly expressed so as to have the former, not the latter, meaning.

75. The Court of Appeal came to the conclusion at [2008] EWCA Civ 732, para 72 that the Deputy Judge had not found, and that he could not on the evidence have found, that the statements on which David had

relied amounted to assurances which could found the estoppel claimed. The "implicit statements", to use Lloyd LJ's formulation, could not reasonably have been relied on as "clear and unambiguous" promises that Peter would leave the farm to David; they could have meant that it was merely his present intention to do so. On that basis, which the respondents support, the estoppel claim was rejected by the Court of Appeal.

76. I do not agree with the Court of Appeal's view that the Deputy Judge failed to make the finding in question. As I have mentioned, at [2007] EWHC 2422 (Ch) the Deputy Judge expressly said that, by handing over the Bonus Notice and saying what he said in 1990, "Peter was intending to indicate to David that he *would be* Peter's successor to Steart Farm" (para 94), and that this and other statements encouraged David to believe "that he *would be* Peter's successor to Steart Farm" (para 98). Crucially, the Deputy Judge also said that it was "reasonable for David [so] to understand them and rely on them in that way" (para 98).

77. In my judgment, those findings clearly indicate that the Deputy Judge was of the opinion, contrary to the view expressed by the Court of Appeal, that the statements he found to have been made by Peter were reasonably understood by David to indicate that Peter was committing himself to leaving the farm to David, and were reasonably relied on by David as having that effect. Such a reading is strongly supported by the Deputy Judge's observations at [2007] EWHC 2422 (Ch), para 125, that, if it was necessary to make such a finding, he would have regarded Peter's statement in 1990 as "tantamount to an assurance to David", and that he did "not accept" that it was "ambiguous".

78. Although Lloyd LJ also expressed himself at [2008] EWCA Civ 732, para 72 by reference to what Peter intended when he made the statements in question, it seems to me, and I understood Mr Andrew Simmonds QC, who appeared for the respondents, to accept, that, if the statements were reasonably understood by David to have the effect which the Deputy Judge found, namely an assurance, and David reasonably acted on that understanding to his detriment, then what Peter intended is not really germane. That is supported by a consistent line of authority – see for instance per Lord Denning MR in *Crabb v Arun District Council* [1976] Ch 179, 187F and 188C (citing his earlier observations in *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225, 242. See also: *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529, 540-541, quoted by Lord Walker at

para 50 of his opinion), and per Oliver J in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note)* [1982] QB 133, 151H-152A. It may be that there could be exceptional cases where, even though a person reasonably relied on a statement, it might be wrong to conclude that the statement-maker was estopped, because he could not reasonably have expected the person so to rely. However, such cases would be rare, and, in the light of the facts found by the Deputy Judge, it has not been, and could not be, suggested that this was such a case.

79. Furthermore, if (as I think) Lloyd LJ also held at [2008] EWCA Civ 732, para 72 that it was not open to the Deputy Judge to find that it was reasonable for David to have understood the statements as he did or to have relied on those statements as he did, I do not consider that those were conclusions which were properly open to the Court of Appeal. It is, at any rate at first sight, a little surprising that, having concluded at [2008] EWCA Civ 732, para 66, that it was not open to them to interfere with the Deputy Judge's logically anterior findings, including his inferences as to the meaning of the statements, the Court of Appeal then concluded, at [2008] EWCA Civ 732, para 72, that it was open to them to interfere with the subsequent inferences the Deputy Judge had drawn. I accept that there is no necessary inconsistency between the two conclusions, but, particularly given the full and careful consideration given to all the issues by the Deputy Judge, and the very close connection between the issues involved, the contrast between the views expressed in those two paragraphs is striking.

80. Perhaps more importantly, the meaning to be ascribed to words passing between parties will depend, often very much, on their factual context. This is particularly true in a case such as this, where a very taciturn farmer, given to indirect statements, made remarks obliquely referring to his intention with regard to his farm after his death. At trial, there was much evidence about the relationship between Peter and David, and about Peter's character. Consequently, the Deputy Judge was far better able than any appellate tribunal (even with the benefit of transcripts of the evidence) to assess not only how the statements would have been intended by Peter and understood by David, but also whether any such understanding and any subsequent reliance by David were reasonable. His very full and careful judgment demonstrates that the Deputy Judge took full advantage of this ability, as the observations of Lloyd LJ at [2008] EWCA Civ 732, para 66 effectively acknowledge.

81. That does not, of course, mean that the Court of Appeal had no power to reverse the first instance decision on the ground that David's

understanding of, or reliance on, Peter's statements was unreasonable. However, particularly in a case such as this, where the facts are unusual and the first instance judge has made full and careful findings, an appellate court should be very slow indeed to intervene. It may well be that the Court of Appeal took the view, advanced before your Lordships, that the question of how Peter's statements should reasonably have been understood was a matter of law, and was therefore an issue on which an appellate court was freer to intervene than on questions of primary fact (such as what was said by Peter or how it was understood by David) or of inferences from primary fact (such as what Peter, who could not of course give evidence, intended when making the statements).

82. However, such a view is inconsistent with the illuminating analysis in the opinion of my noble and learned friend Lord Hoffmann in *Carmichael v National Power Plc* [1999] 1 WLR 2042, 2048E - 2051C. This shows that (a) the interpretation of a purely written contract is a matter of law, and depends on a relatively objective contextual assessment, which almost always excludes evidence of the parties' subjective understanding of what they were agreeing, but (b) the interpretation of an oral contract is a matter of fact (I suggest inference from primary fact), rather than one of law, on which the parties' subjective understanding of what they were agreeing is admissible.

83. The reason for this dichotomy is partly historical. Juries were often illiterate, and could therefore not interpret written contracts, whereas they could interpret oral ones. But it also has a good practical basis. If the contract is solely in writing, the parties rarely give evidence as to the terms of the contract, so it is cost-effective and practical to exclude evidence of their understanding as to its effect. On the other hand, if the contract was made orally, the parties will inevitably be giving evidence as to what was said and done at the relevant discussions or meetings, and it could be rather artificial to exclude evidence as to their contemporary understanding. Secondly, and perhaps more importantly, memory is often unreliable and self-serving, so it is better to exclude evidence of actual understanding when there is no doubt as to the terms of the contract, as when it is in writing. However, it is very often positively helpful to have such evidence to assist in the interpretation of an oral contract, as the parties will rarely, if ever, be able to recollect all the details and circumstances of the relevant conversations.

84. It should be emphasised that I am not seeking to cast doubt on the proposition, heavily relied on by the Court of Appeal (e.g. [2008]

EWCA Civ 732, paras 71 and 74), that there must be some sort of an assurance which is "clear and unequivocal" before it can be relied on to found an estoppel. However, that proposition must be read as subject to three qualifications. First, it does not detract from the normal principle, so well articulated in this case by Lord Walker, that the effect of words or actions must be assessed in their context. Just as a sentence can have one meaning in one context and a very different meaning in another context, so can a sentence, which would be ambiguous or unclear in one context, be a clear and unambiguous assurance in another context. Indeed, as Lord Walker says, the point is underlined by the fact that perhaps the classic example of proprietary estoppel is based on silence and inaction, rather than any statement or action – see per Lord Eldon LC ("knowingly, though but passively") in *Dann v Spurrier* (1802) 7 Ves 231, 235-6 and per Lord Kingsdown ("with the knowledge … and without objection ") in *Ramsden v Dyson* LR 1 HL 129, 170.

85. Secondly, it would be quite wrong to be unrealistically rigorous when applying the "clear and unambiguous" test. The court should not search for ambiguity or uncertainty, but should assess the question of clarity and certainty practically and sensibly, as well as contextually. Again, this point is underlined by the authorities, namely those cases I have referred to in para 78 above, which support the proposition that, at least normally, it is sufficient for the person invoking the estoppel to establish that he reasonably understood the statement or action to be an assurance on which he could rely.

86. Thirdly, as pointed out in argument by my noble and learned friend Lord Rodger of Earlsferry, there may be cases where the statement relied on to found an estoppel could amount to an assurance which could reasonably be understood as having more than one possible meaning. In such a case, if the facts otherwise satisfy all the requirements of an estoppel, it seems to me that, at least normally, the ambiguity should not deprive a person who reasonably relied on the assurance of all relief: it may well be right, however, that he should be accorded relief on the basis of the interpretation least beneficial to him.

87. It was also argued for the respondents that, if there was an estoppel as the Deputy Judge had decided, difficulties could have arisen if Peter had changed his mind before he died. The short answer to that argument is, of course, that Peter's intention that David should inherit the farm appears never to have changed: Peter certainly never communicated to David or to anyone else that he had changed that intention. On the contrary: in 2002, twelve years after the original

commitment and three years before he died, Peter was still making it clear to his solicitor, in David's presence, that David would inherit the farm (saying that "we" wanted the deeds in one place as it "would be better" for David). Thus, for at least fifteen years from 1990 to 2005, through assurances made from time to time, Peter made it clear to David that he would inherit the farm on Peter's death, and, up to, indeed at, the moment that those assurances fell to be fulfilled, they remained in force.

88. I should add that, if Peter had changed his mind before he died, the question as to what, if any, relief should have been accorded to David would have been a matter for the court, to be assessed by reference to all the facts. An example of such a case is *Gillett v Holt* [2001] Ch 210, where my noble and learned friend, then Robert Walker LJ, had to consider just such an issue, and did so in a masterly judgment, to which I shall have to revert on the second issue on this appeal.

89. Before turning to that second issue, I should add that, even if Peter's "implicit statement" may have been revocable, as the Court of Appeal thought, I should not be taken as accepting that it would necessarily follow that, once the statement had been maintained by Peter and acted on by David for a substantial period, it would have been open to Peter freely to go back on it. It may be that he could not have done so, at least without paying David appropriate compensation, unless the change of mind was attributable to, and could be justified by, a change of circumstances. It seems to me that it would be arguable that, even assuming that the "implicit statement" was not irrevocable, if, say in 2004, Peter had changed his mind, David would nonetheless have been entitled to equitable relief, in the light of his fourteen or more years of unpaid work on the farm. It is not as if Peter had given any sort of clear indication that statement was revocable. The Court of Appeal considered that it was not clear that the statement was irrevocable, not that it was clear that the statement was revocable. However, that point does not arise for decision in the present case, and I shall say no more about it.

Uncertainty as to the extent of the property

90. Based on the reasoning of my noble and learned friend, Lord Scott of Foscote in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752, paras 18-20 and 28, the respondents contend that the identity of the property the subject of the assurance or statement relied on to found a proprietary estoppel must be "certain". Accordingly, they argue, even if David would otherwise make good his

proprietary estoppel claim, it must fail because the property the subject of the alleged estoppel in this case is not certain enough.

91. So far as the relevant facts of this case are concerned, the extent of the land owned and farmed by Peter varied. When he inherited Steart Farm in 1976, it comprised about 350 acres of freehold low-lying pasture and rough grazing. In 1990, he sold a large field for development, and used the proceeds to buy more land, so that, by 1992, he owned 463 acres, and the farm included another 120 acres which Peter rented. By 1998, he was farming only some 160 acres of that land himself, having let out the remainder on farm business tenancies. As at the date of his death, Peter was in the process of negotiating a sale of some 6 acres to developers.

92. In *Cobbe* [2008] 1 WLR 1752, Mr Cobbe devoted considerable time, effort, and expertise to obtaining planning permission for land owned by Yeoman's Row. Although they reached an oral "agreement in principle", the parties had decided not to enter into a contract, but Mr Cobbe went ahead on the basis, as appreciated by Yeoman's Row, that he expected them to do so once planning permission was obtained. Initially, this was also the intention of Yeoman's Row, but their intention changed about three months before planning permission was obtained, although they did not tell Mr Cobbe until afterwards. Mr Cobbe's estoppel claim failed (although he was entitled to a *quantum meruit* payment). As I see it, Mr Cobbe's claim failed because he was effectively seeking to invoke proprietary estoppel to give effect to a contract which the parties had intentionally and consciously not entered into, and because he was simply seeking a remedy for the unconscionable behaviour of Yeoman's Row.

93. In the context of a case such as *Cobbe* [2008] 1 WLR 1752, it is readily understandable why Lord Scott considered the question of certainty was so significant. The parties had intentionally not entered into any legally binding arrangement while Mr Cobbe sought to obtain planning permission: they had left matters on a speculative basis, each knowing full well that neither was legally bound - see [2008] 1 WLR 1752, para 27. There was not even an agreement to agree (which would have been unenforceable), but, as Lord Scott pointed out, merely an expectation that there would be negotiations. And, as he said, at [2008] 1 WLR 1752, para 18, an "expectation dependent upon the conclusion of a successful negotiation is not an expectation of an interest having [sufficient] certainty".

94. There are two fundamental differences between that case and this case. First, the nature of the uncertainty in the two cases is entirely different. It is well encapsulated by Lord Walker's distinction between "intangible legal rights" and "the tangible property which he or she expects to get", in *Cobbe* [2008] 1 WLR 1752, para 68. In that case, there was no doubt about the physical identity of the property. 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.

95. In this case, the extent of the farm might change, but, on the Deputy Judge's analysis, there is, as I see it, no doubt as to what was the subject of the assurance, namely the farm as it existed from time to time. Accordingly, the nature of the interest to be received by David was clear: it was the farm as it existed on Peter's death. As in the case of a very different equitable concept, namely a floating charge, the property the subject of the equity could be conceptually identified from the moment the equity came into existence, but its precise extent fell to be determined when the equity crystallised, namely on Peter's death.

96. Secondly, the analysis of the law in *Cobbe* [2008] 1 WLR 1752 was against the background of very different facts. The relationship between the parties in that case was entirely 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. What Mr Cobbe then relied on was "an unformulated estoppel ... asserted in order to protect [his] interest under an oral agreement for the purchase of land that lacked both the requisite statutory formalities … and was, in a contractual sense, incomplete" - [2008] 1 WLR 1752, para 18.

97. In this case, by contrast, the relationship between Peter and David was familial and personal, and neither of them, least of all David, had much commercial experience. Further, at no time had either of them even started to contemplate entering into a formal contract as to the ownership of the farm after Peter's death. Nor could such a contract have been reasonably expected even to be discussed between them. On the Deputy Judge's findings, it was a relatively straightforward case:

Peter made what were, in the circumstances, clear and unambiguous assurances that he would leave his farm to David, and David reasonably relied on, and reasonably acted to his detriment on the basis of, those assurances, over a long period.

98. In these circumstances, I see nothing in the reasoning of Lord Scott in *Cobbe* [2008] 1 WLR 1752 which assists the respondents in this case. It would represent a regrettable and substantial emasculation of the beneficial principle of proprietary estoppel if it 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* [2008] 1 WLR 1752. However, it is equally true that focussing on technicalities can lead to a degree of strictness inconsistent with the fundamental aims of equity.

99. The notion that much of the reasoning in *Cobbe* [2008] 1 WLR 1752 was directed to the unusual facts of that case is supported by the discussion at para 29 relating to section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Section 2 may have presented Mr Cobbe with a problem, as he was seeking to invoke an estoppel to protect a right which was, in a sense, contractual in nature (see the passage quoted at the end of para 96 above), and section 2 lays down formalities which are required for a valid "agreement" relating to land. However, at least as at present advised, I do not consider that section 2 has any impact on a claim such as the present, which is a straightforward estoppel claim without any contractual connection. It was no doubt for that reason that the respondents, rightly in my view, eschewed any argument based on section 2.

100. For the same reason (namely the very different nature of the cases), it appears to me unlikely in the extreme that Lord Scott was intending impliedly to disapprove any aspect of the reasoning or decision of the Court of Appeal in *Gillett* [2001] Ch 210. Indeed, Lord Walker, at [2008] 1 WLR 1752, para 66, referred to *Gillett* [2001] Ch 210 with implied approval, and, at para 68, emphasised the distinction between "the commercial context" and "the domestic or family context" (and it is to be noted that, at para 94, Lord Brown of Eaton-under-Heywood agreed with both Lord Scott and Lord Walker). In *Gillett* [2001] Ch 210, 236G, Robert Walker LJ, having observed that the equity arising in that case from assurances continued "down to the time when those assurances were repudiated", said that this was "a long

period and a broad approach is necessary". The facts were far more complex than in this case, because there were many different properties acquired at different times, and because the assurances had been repudiated.

101. As Hoffmann LJ memorably said in *Walton v Walton* (unreported, 14 April 1994), para 21, "equitable estoppel [by contrast with contract]… does not look forward into the future [; it] looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept". Accordingly, the notion that, where the promise relates to "the farm", which is a readily recognisable entity at any one time, there is no reason why it should not apply to that entity as it exists at the date "the promise falls due to be performed", i.e. as at Peter's death..

102. Of course, there may be cases where the facts justify a different conclusion either because the promise had a different meaning at the time it was made, or because intervening events justify giving it a different effect – or even no effect. However, such considerations do not apply in this case. The farm did increase in size, but this had largely happened by 1992, which was only two years after the principal statement on which the estoppel relies; and thirteen years elapsed thereafter, during which that statement, together with subsequent statements by Peter, were relied on by David. Further, the increase in the farm's size was achieved largely by Peter buying more land with money obtained through the sale for development of a much smaller area of the farm. In any event, there is no suggestion that Peter had any wish or moral obligation to leave the farm or any part of it to anyone other than David.

103. It is true that in none of the statements relied on by David made express reference to Steart Farm, but the Deputy Judge interpreted them as having that meaning, and, as Lloyd LJ said at [2008] EWCA Civ 732, para 66, there is no basis for interfering with that conclusion. On the contrary: on the facts of this case, it seems to me to have been an eminently sensible conclusion. Indeed, that point is a neat illustration of the fundamental importance of context to the questions of how a particular statement or action would have been understood, and whether it was "clear and unambiguous".

Conclusion

104. Accordingly, in agreement with all your Lordships, I would allow this appeal and restore the order made by Mr Randall QC in the Chancery Division. I would also agree that the question of costs should be the subject of written submissions, unless it can be agreed.