Proprietary Estoppel: Hopes by Themselves are Not Enough[1]

5 Stone Buildings

Joseph de Lacey

Sam Chandler[*]

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Introduction

Proprietary estoppel remains the subject of ongoing and lively debate. It is more than 150 years on from the seminal exposition of the doctrine in *Ramsden v Dyson*,[2] but its critical aspects—the ingredients of an estoppel, the satisfaction of the equity, the fundamental objective of the doctrine—continue to be pored over by judges, academics and practitioners.

The very concept of proprietary estoppel—often referred to in broad terms as a "doctrine"—itself evades definition. Assistance might be provided by a consideration of the terms "proprietary" and "estoppel". However, while "proprietary" indicates that the doctrine applies only to proprietary rights, such as a right to or over land, chattels or choses in action,[3] "estoppel" is of little help. In *Yeomans Row* Lord Scott of Foscote described an estoppel as follows:

> "An 'estoppel' bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel."[4]

However, as explained in *Snell's Equity*:

> "… the most important of the doctrines comprising equitable estoppel do not, in fact, operate as true estoppels: they do not necessarily lead to a party's being precluded from denying the truth of a particular state of affairs".[5]

Indeed, the "foundational cases" on the doctrines did not involve the use of the term "estoppel" at all. Rather, it is suggested by the editors of *Snell* that the various forms of equitable estoppel (of which proprietary estoppel is one), may be seen as emanations of a jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable.[6]

Most lawyers are also unlikely to advise clients that the doctrine may be of use on the ground that it will prevent another party from asserting a particular set of facts or points of law (or both). More likely

[1] *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55; [2008] 1 W.L.R. 1752; [2008] W.T.L.R. 1461 at [66] per Lord Walker of Gestingthorpe.
[*] Joseph de Lacey and Sam Chandler are barristers in practice at 5 Stone Buildings, Lincoln's Inn, London WC2A 3XT.
[2] *Ramsden v Dyson* [1866] L.R. 1 H.L. 129.
[3] *Yeoman's Row* [2008] UKHL 55 at [14] per Lord Scott.
[4] *Yeoman's Row* [2008] UKHL 55 at [14].
[5] J. McGhee and S. Elliott (eds), *Snell's Equity*, 34th edn (London: Sweet & Maxwell, 2020), para.12–001. See also *Ramsden v Dyson* (1866) L.R. 1 H.L. 129.
[6] McGhee and Elliot, *Snell's Equity*, 34th edn (2020), para.12–010.

they will explain that the doctrine may be used to uphold a promise made by A to B in relation to rights over or interests in particular land or property, in circumstances where there can be no serious suggestion that a binding contract has been made (usually because of a lack of consideration or want of some formal requirement).

Proprietary estoppel has been defined as a basis for a grant of relief,[7] and a principle with "something in common with estoppel".[8] Often it is simply said by the courts that a piece of land is "subject to a proprietary estoppel",[9] or that a party "claimed that there was a proprietary estoppel claim",[10] which does not tell you very much.

All however appear to agree that there is no comprehensive and uncontroversial definition,[11] and that it is perhaps best seen as comprising three discrete principles, each with its own specific requirements:[12] a promise, assurance, or act of acquiescence in relation to property by the legal owner (Party A), reliance on that promise, assurance or acquiescence by another person (Party B), and detriment to Party B in consequence of his (reasonable) reliance.[13] The other element, which is not always mentioned as one of the core ingredients, is unconscionability, which serves the purpose of

> "unifying and confirming, as it were, the other elements. If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again".[14]

The lack of any comprehensive and agreed definition reflects the fact that proprietary estoppel applies to a very wide variety of factual situations.[15] It is not limited to the classic case of the farmer and his hard-working unpaid child. That is not the only relationship which leads to unfairness of a type which "shocks the conscience of the court". The doctrine therefore needs to be flexible and capable of operating in different contexts, a desirable objective which a doctrine with overly rigid requirements or defined parameters might struggle to fulfil. Whilst a headache for the adviser, that must be a good thing.

With that in mind, and following a short exposition of the relevant principles (in the next section), this article will examine three recent cases in which proprietary estoppel was relied on as a ground for relief.[16] It will then consider what those cases can tell us about how proprietary estoppel works, and where the law might be going. It will then consider whether the successful application of the doctrine can have any impact on a person's liability to tax in respect of the relevant property.

The requirements of a successful proprietary estoppel claim or defence

Most will be familiar with the three principal "ingredients" of proprietary estoppel: promise, or representation, or acquiescence; reasonable reliance; and detriment in consequence of such reliance.[17] Unconscionability is the fourth, crucial element.

A review of these requirements is a tempting place to start. And yet even a detailed analysis of each requirement does not tell you much about the answer to the key question: what is it that a successful proprietary estoppel claim achieves? This is important, as there is a tendency to think that if you can meet the threshold tests for each of the core ingredients, your client may be home and dry, walking off with the deeds to the family farm. That may not be the case at all.

[7] *Yeoman's Row* [2008] UKHL 55 at [3].
[8] *Re Basham* [1986] 1 W.L.R. 1498, 1503; [1987] 1 All E.R. 405.
[9] *Pickering v Hughes* [2021] EWHC 1672 (Ch) at [4].
[10] *Ottey v Gundy* [2003] EWCA Civ 1176 at [2]; [2003] W.T.L.R. 1253.
[11] *Macdonald v Frost* [2009] EWHC 2276 (Ch) at [9]; [2009] W.T.L.R. 1815.
[12] McGhee and Elliot, *Snell's Equity*, 34th edn (2020), para.12–033.
[13] *Thorner v Major* [2009] UKHL 18; [2009] 1 W.L.R. 776 at [29] Lord Walker.
[14] *Yeoman's Row* [2008] UKHL 55 at [92] per Lord Walker.
[15] *Jennings v Rice* [2002] EWCA 159; [2002] W.T.L.R. 367 at [44] per Walker LJ.
[16] *Pickering* [2021] EWHC 1672 (Ch); *Nazir v Jagota* [2021] EWHC 2291; *Sangha v Sangha* [2021] EWHC 1599.
[17] *Murphy v Rayner* [2011] EWHC (Ch) 1 at [256].

There are two overarching questions that are answered by an analysis of the three (or four) principal ingredients of proprietary estoppel claims—first, has an equity arisen by virtue of the promise, reliance and detriment, and secondly, what relief is required to satisfy that equity? A recognition by the court of that equity, and a ruling as to the relief required to satisfy it, are the end goals of any proprietary estoppel claim.

So, when does the relevant equity arise? In the seminal case of *Jennings v Rice* it was explained that it arises once the elements of a proprietary estoppel are established.[18] The equity

> "arises not from the claimant's expectations alone, but from the combination of expectations, detrimental reliance and the unconscionableness of allowing the benefactor (or the deceased's estate) to go back on the assurances".[19]

This equity has been described as a "mere equity".[20] A "mere equity" is an

> "… inchoate right binding on specific property. In functional terms, to say that a person has a 'mere equity' in relation to property means that the property is susceptible to an equitable proprietary claim if and when the claimant elects to enforce it. The claimant must perform some further legal act to cause his claim to crystallise as an equitable interest".[21]

So, a "mere equity"—but not an equitable interest, at least not yet.

Once it is established that an equity has arisen, the court then needs to determine what relief is appropriate to satisfy that equity.[22] The usual test here is that the equity is to be satisfied by the "minimum award necessary to do justice".[23] This is a crucial point—proving your case on promise, detriment and reliance does not necessarily get you home. It may create the equity, but whether that equity is satisfied in a way that would satisfy your client is an entirely different question. It may be that, when the court looks back at what happens, the appropriate relief is not very much at all.

Many will be familiar with the debate regarding the "essential aim of the exercise of this broad judgmental discretion".[24] One school of thought is that the starting point is that the expectation should be protected, and departure from that starting point is only permitted if it is clear that an award equal to expectation would be out of all proportion to the detriment suffered.[25] The second approach is that there is no presumption in making good the expectation, and the extent of relief should be no more than is necessary to ensure no detriment is suffered (i.e. by making the relief equal to the actual detriment that was suffered (i.e. low wages) and would be suffered if no award was made). The editors of *Snell* prefer the second approach.[26]

There is little room in this article for an in-depth analysis, but in the writers' view, it is the second approach that is appropriate. As explained in *Jennings v Rice*, "… it would be odd that the amount of the award should be set rigidly at the sum expected by the claimant".[27] And this makes sense when one considers what it is that the doctrine seeks to achieve. It is about preventing someone, usually a landowner, from taking advantage of someone in a weaker position, someone who has, on the assurance of the landowner, suffered in the expectation that something would be given to them in consideration of that

[18] *Jennings* [2002] EWCA 159 at [36] per Aldous LJ.
[19] *Jennings* [2002] EWCA 159 at [49] per Walker LJ.
[20] *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432 at [37] per Lord Walker.
[21] McGhee and Elliot, *Snell's Equity*, 34th edn (2020), para.2–006.
[22] *Crabb v Arun District Council* [1976] Ch. 179, 192–193 per Scarman LJ; [1975] 3 W.L.R. 847.
[23] *Stack* [2007] UKHL 17 at [37] per Lord Walker; [2007] 2 A.C. 432; *Crabb v Arun* [1976] Ch. 179, 198 per Scarman LJ.
[24] *Davies v Davies* [2016] EWCA Civ 463; [2017] 1 F.L.R. 1286 at [39] per Lewison LJ.
[25] J. Mee, "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" in M. Dixon (ed.), *Modern Studies in Property Law* (Oxford: Hart Publishing, 2009), Vol.2.
[26] McGhee and Elliot, *Snell's Equity*, 34th edn (2020), para.12–049.
[27] *Jennings* [2002] EWCA 159 at [21] per Aldous LJ.

suffering. That was what the early cases were all about.[28] The court should look therefore to compensate the detriment suffered. It is, further, the detriment which makes a revocable promise irrevocable. It is the detriment which allows the court to justify the identification of an equity in the property. The finding that a promise has been made only gets one through the first door—it is the scale of the detriment which allows the court's conscience to be "shocked", and which therefore paves the way for a declaration as to a remedy. This can be tested simply by considering what award might be made if there were a clear promise, clear reliance, but clear detriment (of, say, low wages) for only a day or a month. And, if the court fixes the relief by reference to detriment, then there is no danger (as there would be if it were fixed by reference to expectation) of the award being proportionate. As explained by Walker LJ:

> "The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result, and a disproportionate remedy cannot be the right way to go about that."[29]

With this in mind, we can move to the classic formulation of the requirements of a successful proprietary estoppel claim. One useful place to look is the Court of Appeal decision in *Davies v Davies*, in which Lord Justice Lewison LJ provided a cheat sheet for the analysis of proprietary estoppel claims:

(1) Deciding whether an equity has been raised, and, if so, how to satisfy it, is a "retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances that have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part".[30]

(2) The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity, (b) reliance by the claimant on that assurance, and (c) detriment to the claimant in consequence of his reasonable reliance.

(3) No claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined.

(4) Detriment must be something substantial, but it does not need to consist of the expenditure of money or other quantifiable financial detriment.

(5) There must be a sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability.

(6) The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result.

(7) In deciding how to satisfy any equity the court must weigh the detriment suffered by the claimant in reliance on the defendant's assurances against any countervailing benefits he enjoyed in consequence of that reliance.

(8) Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application.[31] In particular there must be a proportionality between the remedy and the detriment which is its purpose to avoid. This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way.

[28] *Plimmer and Another Appellants; and the Mayor, Councillors, and Citizens of the City of Wellington Respondents* (1884) 9 App. Cas. 699.
[29] *Jennings* [2002] EWCA 159 at [56] per Walker LJ.
[30] *Davies* [2016] EWCA Civ 463 at [38] per Lewison LJ.
[31] *Henry v Henry* [2010] UKPC 3; [2010] 1 All E.R 988; [2010] W.T.L.R. 1011 at [65].

(9) In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion, which must be exercised on a principled basis.

There are a few points to pick out from the above before moving on to consider some recent cases of note:

(1) First, Lord Justice Lewison LJ did not start with the classic three-stage test. He began by explaining that the core question is whether an equity has arisen, and if so, how to satisfy it.
(2) Secondly, it is crucial to remember that when advising on a proprietary estoppel claim, you have to look back from the point in time at which the promise fell to be performed and look at what actually happened. Even a broken promise and clear detriment may not—when looked at in the circumstances of what actually happened—come anywhere near to shocking the conscience of the court.
(3) Thirdly, it is a mistake to treat each of the three (or rather four) elements on their own—each touches on the other and each needs to be looked at in the round. Finally, unconscionability is said to be the essential test. But it would be another mistake to pretend that the court does not exercise a wide discretion and that its motivation is to avoid an unconscionable result.
(4) Finally, where a promise has been made, reliance proven and detriment suffered, it may well be that a change in circumstances renders a broken promise entirely conscionable.[32] Think, for example, of a promisor suddenly finding himself liable for care costs which will exhaust the asset promised. See *Germanotta v Germanotta*, where it was held that A should not have to honour a promise "in radically different circumstances than were ever envisaged".[33]

Recent cases

The last year has featured three proprietary estoppel cases of note. These are dealt with in turn in the paragraphs that follow.

Pickering v Hughes

This case concerned competing claims to properties and chattels within the Hughes family.[34] The properties were jointly acquired by the late Nora Hughes (who died in 2017) and her husband Charles (the first defendant). For many years the family—Nora and Charles and their children Lisa, John and David—conducted themselves in relation to the properties on the basis of informal agreements, but in 2015 a dispute led to the creation of two warring "camps": Lisa (the claimant), Nora and David on the one hand, and John and his immediate family and Charles on the other.

The principal issue at trial was the ownership of a property known as Wood House and an adjoining annex, and a parcel of 25 acres of land surrounding it. John claimed that Wood House and the 25 acres were held on constructive trust for him and his wife, or alternatively were "subject to a proprietary estoppel".

In essence, it was alleged by John that prior to the purchase of the land by Nora and Charles an agreement had been made between Nora, Charles, John and John's wife, on terms that: (i) the land would be purchased for the benefit of John and his wife, but in Charles and Nora's names; (ii) John and his wife would move into the property; (iii) they would fund its renovation; and (iv) it would pass to John on Charles's death.

[32] *Davies* [2016] EWCA Civ 463.
[33] *Germanotta v Germanotta* [2012] Q.S.C 116 at [151].
[34] *Pickering* [2021] EWHC 1672 (Ch).

John's evidence was that he had been told by his parents that Wood House and the 25 acres surrounding it was his and was always going to come to him.

Despite these alleged promises, Nora and Charles executed numerous wills over the years which showed that Wood House was consistently treated as an asset of their estates and that the estate of the first to die would pass to the survivor. In fact, in a note dated 15 May 2008, their solicitor had noted that his clients had "no specific wish that John should inherit [Wood House] and it should merely form part of their composite estate".

John had spent around £100,000 in the 1980s improving the property. It appears that, in light of this, and the fact of John's occupation of the property, Nora and Charles's solicitor advised them that it would be sensible to have ownership and occupation regularised in case of future dispute. Charles and Nora never instructed him to take any action.

On 4 March 2015 Nora and Charles executed mirror wills which included specific bequests of a property known as Pond House to Lisa, £1,000,000 to their son David, and the residuary estate to the survivor of Nora and Charles, to be shared between Lisa and John. This reflected their clear agreement as to how their assets should be dealt with on their deaths. However, on 2 June 2016, following the emergence of the family dispute, Nora executed a new will by which her entire estate was left to Lisa.

When the case came to trial, there was a large number of competing claims before the court, reflecting the bedlam that had engulfed the family. Only John and his wife's claim is relevant for this article.

John and his wife's claim was that they held a beneficial interest in Wood House and the 25 acres. It was said in support that in 1983 or 1984, Charles and Nora orally agreed with, or represented to, John and his wife that Wood House and the 25 acres were theirs. In reliance on that agreement, John and his wife acted to their detriment in moving their child out of the property they then occupied and into a caravan at Edlington Wood, allowed Charles and Nora to live in the property they had moved out of rent free and undertook the renovation and maintenance of Wood House at John's expense. It was said that when the first phase of work on Wood House was completed, they acquired beneficial ownership of Wood House pursuant to a common intention constructive trust. Alternatively, if the court were to take the view that the understanding was that John and his wife were to acquire beneficial ownership of Wood House and the 25 acres upon the death of Charles and Nora, a proprietary estoppel-based interest had arisen such that it would be unconscionable for Nora's estate to resile from that understanding.

The existence of the alleged agreement in respect of the land was contested by Lisa in response to the claim. It was contended that there was no document recording the alleged agreement, that John and his wife's case was unparticularised as to words used to form the agreement, and its existence was only asserted, after the event, in 2017. There was no plausible explanation for the failure to document the agreement.

To those familiar with proprietary estoppel cases these contentions may appear a little unfair. It is a theme of such cases that the alleged agreement is not recorded in writing, and very often there is a lack of precision regarding recollections of the key conversations, resulting perhaps from the passage of time between the date of the conversation and the date of the court hearing. Indeed, the court noted that

> "… it is in the nature of constructive trust and proprietary estoppel cases that they are often founded upon 'imperfectly remembered' recollections of oral agreements expressed in 'imprecise' terms[35] and formulated in a family or social context where such promises are often subject to 'unspoken and ill-defined qualifications' and require careful consideration of the context and surrounding circumstances, as noted in *Thorner v Major*[36] by Lord Walker … cautioning against an overly rigorous approach to assessing the terms of promises and assurances".[37]

[35] *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107, 132 F-G per Lord Bridge.
[36] *Thorner* [2009] UKHL 18.
[37] *Pickering* [2021] EWHC 1672 (Ch) at [76].

That said, the court took a very strict approach. Accepting Lisa's arguments on the existence of an agreement, it held that no agreement had been made relating to the beneficial ownership of Wood House and the 25 acres. As there was no agreement, there could be no successful claim in proprietary estoppel. In reaching that finding, it noted that a failure to document the agreement was surprising. It was said that given the significance of the agreement, which affected the most substantial asset owned by Nora and Charles, "… it was to be expected that there would be a record of it, albeit an informal one".[38]

This is perhaps a harsh criticism and feels out of place with the tenor of the principal case law in this area. However, the court held that, while it was common in such cases for agreements not to be put to writing, "… the inferences to be drawn from a failure to record or assert an oral agreement obviously depend on the particular factual context".[39] In this case, the court was not dealing with two cohabiting partners, who might never think to seek legal advice regarding the property they occupy, but was dealing with business people who dealt frequently with properties. And, when considering the issue of detriment, the court found that the fact that John and his wife were prepared to suffer the detriment as pleaded and yet failed to ensure the alleged agreement was put down in writing, reinforced the conclusion that no agreement had been made. The court therefore held that no agreement had been made relating to the beneficial ownership of Wood House and the 25 acres. As there was no agreement, there could be no successful claim in proprietary estoppel.

While this may appear at first sight to be a potentially harsh result, this context-specific approach marches in step with the approach endorsed in the authorities such as *Jennings v Rice*. The court found that, on the facts, this was more akin to a commercial transaction between businesspeople, albeit that they were members of the same family.

Nazir v Jagota

While *Pickering v Hughes* is a fairly typical proprietary estoppel case in terms of its context and subject matter, the same cannot be said for *Nazir v Jagota*,[40] which was essentially a commercial dispute. But that does not mean that this case is out of the ordinary for proprietary estoppel lawyers—on the contrary, it appears to be increasingly common that in commercial disputes a claim based on proprietary estoppel is thrown into the mix.

The claimant was Mr Parwaiz Nazir (PN). He brought a claim against his brother Javaid Nazir (JN) and JN's wife Seema Jagota (SJ) and two companies owned or majority-owned by them (the relevant one being referred to as TPL). JN and SJ were the owners, via the above companies and others, of a substantial property-owning business, comprising rental and student accommodation.

In his claim, PN sought to establish an interest in that property business. His claim was primarily based on the proposition that JN and JS entered into a partnership with him. In the alternative, he made his claim "based on the doctrine of proprietary estoppel".

His claims were based on the following evidence:

(1) In late 2011 SJ identified a business opportunity in the form of a property that was coming to auction. The parties then held discussions about developing that property together, and PN was asked to join JN and SJ as an equal partner in the venture.

(2) The terms were that each would be equal partners with an equal share in the property and the income generated by it.

[38] *Pickering* [2021] EWHC 1672 (Ch) at [83].
[39] *Pickering* [2021] EWHC 1672 (Ch) at [85].
[40] *Nazir* [2021] EWHC 2291 (Ch).

(3) PN would project manage the development and carry out some of the physical work. He would not be asked to contribute any funds to the project. JN and SJ would arrange for financing and sourcing of materials.

As for JN and SJ, they denied there was any conversation in which PN was offered a partnership. Instead, PN had been taken on as a self-employed contractor, and was paid on a per job basis.

PN's claim that a partnership existed, and that he was a partner with JN and SJ was dismissed by the court. The relevant evidence demonstrating the existence of a partnership was simply not there, whether written or oral.

As to his proprietary estoppel claim, PN relied upon the same evidence which he had adduced in respect of his partnership claim. This included assertions that:

(1) JN and SJ had promised PN an "equal share" in the business, in exchange for PN carrying out certain "physical work"; and
(2) JN and SJ had promised PN a "share in the profits" of "what was coming in", or "25% of whatever we [i.e., JN and SJ] were taking".

It is fair to say that the evidence in support of his claim on this ground was weak. And in fact, the court suggested that the proprietary estoppel claim had been "something of an afterthought".[41] It had been added by way of a late amendment to the particulars of claim.

PN's claim in proprietary estoppel also failed. It is relevant for the purposes of this article to understand why.

PN's claim, in short, was that in reliance on the representations allegedly made to him as to his interests as a partner, he had undertaken works at the property. He asserted that the defendants were therefore estopped from denying that he was entitled to a one-quarter share in the property, and a one-third share in other properties and/or rent and/or profits derived from those properties.

Unfortunately, PN's claim fell at the first hurdle. The court simply did not accept that a representation had been made to PN as to his having an interest in the property or business. Disputed evidence that SJ had told a third party that PN and the defendants were partners was said to not be "particularly reliable or useful".[42] And as to the suggestion that PN had been promised 25 per cent of the profits, the court queried what this might mean. Did it refer to the profits of one of the ventures, or all future ventures? Were capital gains taxes to be included? In conclusion, the court preferred the defendants' evidence and found that it was difficult to credit the defendants with the representations that PN alleged them to have made. It was found to be more likely that PN had misunderstood what had been offered to him and had misinterpreted suggestions that he work with the defendants, as offers of partnership or interests in the property.

A further difficulty for PN was that, for "there to be a proprietary estoppel" the representation, promise or acquiescence needs to relate to specific property.[43] This will generally be a property that belongs to (or is about to be acquired by) the person who has made the representation. In this case, PN had not established that any representation related to any particular property. His pleadings simply did not identify the relevant property. The court noted that the interest that PN alleged to have, could be in the partnership, the various property assets or in the shares in TPL. However, there were difficulties with each of these possibilities, as the court had already found that there was no partnership, the properties in question were not owned by the defendants, but by companies controlled by them (such as TPL) and PN had claimed that he had not been aware of the existence of TPL at the relevant time, so he could not say that the representation was that he would have an interest in that company.

[41] *Nazir* [2021] EWHC 2291 at [174].
[42] *Nazir* [2021] EWHC 2291 at [185].
[43] *Nazir* [2021] EWHC 2291 at [202].

While the case in representation failed, the court noted that a case based on acquiescence might be a possibility. Could it be that JN and SJ had understood that PN believed that he had a partnership or ownership right, and failed to correct that misunderstanding? However, there was no evidence at all that JN and SJ had failed to assert their rights over the relevant properties or shares in the companies at the relevant times.

As to reliance, PN asserted that he did rely on the representations made to him and suffered detriment as a result. But what was the detriment? The classic case of proprietary estoppel is one which involves a person working for no, or very low, wages. In this case, PN made "extravagant claims as to the hours he worked", which were disputed by the defendants.[44] The key fact to be determined by the court, however, was not the number of hours worked but the benefits received by PN in respect of those hours. PN's evidence was that he was paid £46,000 between 2011 and 2019—the defendants asserted that he was paid around £101,500. The court preferred the defendants' figures and noted that a contractor working for £7.50 an hour (above minimum wage at the time), for six hours a day, five days a week, 48 weeks a year, would have charged £75,600 over the seven-year period. Even if he had worked eight hours a day, his pay would have come in just below the figure given by the defendants. PN also failed to provide evidence as to what other job he would have done had he not worked with JN and SJ. In short, there was simply no evidence of detriment, substantial or otherwise.

So, no representation, and no detriment. It is hard to understand why, on the basis of the evidence available to the claimant (assuming all evidence was put before the court), a claim in proprietary estoppel was therefore pursued. And yet in the writers' experience, the addition of a proprietary estoppel pleading to a claim which bears no resemblance to the usual proprietary estoppel claims, and which lacks any real substance in respect of the key elements, is becoming more and more common.

It might be argued that adding such a pleading cannot hurt. But there are two reasons why it can. First, it dilutes the force of the argument put before the court. If JN was an equal partner with the defendants, why would the defendants have promised him some separate interest in the properties themselves? The additional claim undermined the narrative that might have been put clearly before the court. And secondly, adding a pleading in proprietary estoppel necessitates a large amount of work—proving who said what and when is not a quick task. Work results in costs. Indeed, in this case it has been reported that JN was ordered to pay—on account—a six-figure sum to the defendants. It can be safely assumed that a not insignificant part of those costs will have resulted from the defence of the proprietary estoppel claim.[45]

Sangha v Sangha

Finally, we come to *Sangha v Sangha*.[46] This case concerned the estate of Hartar Singh Sangha, who owned substantial assets in India and the UK.

A variety of claims were made in relation to his estate. The relevant claim for our purposes was the claim by his son, Sundeep. He had worked for or with Hartar at SBM from the age of 10. The court accepted that in order to persuade Sundeep to come into the business Hartar had promised Sundeep that he would succeed to it and own the business for his own benefit and that of his mother and sister.[47]

These promises were "at the heart" of Sundeep's claim, "by the application of principles of proprietary estoppel" to the beneficial ownership of half a dozen properties either owned by Hartar or jointly owned by Hartar and his (alleged) wife Jaswinder.[48]

[44] *Nazir* [2021] EWHC 2291 at [260].
[45] Trinity Chambers, "Leeds High Court Success for Trinity Business & Property Barrister" (18 August 2021), *trinitychambers.co.uk*, *https://www.trinitychambers.co.uk/news-insights/leeds-high-court-success-for-trinity-business-property-barrister/* (Accessed 8 December 2021).
[46] *Sangha* [2021] EWHC 1599 (Ch).
[47] *Sangha* [2021] EWHC 1599 (Ch) at [12].
[48] *Sangha* [2021] EWHC 1599 (Ch) at [13].

The claim is interesting for our purposes for two reasons. First, the court took a very strict approach on the question of reliance. Secondly, the court embarked on an analysis of whether it is possible that an equity arising from the operation of proprietary estoppel can be the subject of a tracing claim.

Dealing with reliance first, the court found that there was no doubt that the promises had been made, in various forms over many years[49] and that they were intended to be relied upon, and that reliance on them would have been reasonable.[50] The question the court posed, however, was whether Hartar's promises were ever in fact relied upon "to a material extent":

> "Put another way, has Sundeep's life been shaped … by his reliance upon his father's promises, or, quite a different thing, has it been shaped by his willingness to conform to his father's wishes."[51]

Unfortunately for Sundeep, what was lacking from his evidence was any significant assertion that his conduct in respect of his father, or his career and business life, had been built upon his father's promises. That was a curious omission. The court held that it might simply have been love (or fear) of his father that had motivated his behaviour. Sundeep's own written evidence stated that

> "[the] weight of pressure that I felt that my father was putting me under to work for the business was enormous. He made me feel that if I did not do what he wanted I would be letting him down and wondered what he might do if I didn't agree to his demands".

The result of this analysis was that the court found that the only detrimental reliance that Sundeep could point to was that found "in the short span of time when Sundeep, as a very young man, was first working in SBM … at very little pay".[52] And, in any event, the detriment suffered by Sundeep did not result from Hartar resiling on his promises, but on the failure of SBM. There was nothing unconscionable in Hartar's conduct therefore which might give rise to a remedy. Instead, the court found that when SBM failed, Hartar set Sundeep up in a new business of his own. When that was brought into account, Sundeep could not be found to have suffered any detriment, substantial or otherwise, rising from his work at SBM.

Moving on to the second issue, the court began by agreeing that it is well established that an equity can bind third parties, whether the transfer of the relevant property fixed with the equity takes place at a time when the equity is inchoate and has not been the subject of an order crystallising, or satisfying the equity, or whether the transfer is effected after the equity has crystalised.[53] One limitation was that in respect of registered land, an equity would not bind a bona fide purchaser for value unless it took effect as an overriding interest.[54]

It then noted the argument of Sundeep's counsel, being that where, in respect of particular property, an equity arises under the doctrine of proprietary estoppel, and where that property is, therefore, held by the promisor subject to that equity, on a sale of that property the proceeds of that sale are themselves subjected to the equity which existed in respect of that property, such that any substituted property is itself impressed with that equity.

The court noted that there was no authority or case law where an equity under proprietary estoppel has been held to have been traced. But *Snell's Equity*, it was noted, did suggest that there were circumstances where a mere equity might be enforced against the traceable proceeds of the original asset bound by the equity.[55] The court found that there was no principled reason why the proposition set out in *Snell* might not be applicable where the equity in question is one arising out of proprietary estoppel.

[49] *Sangha* [2021] EWHC 1599 (Ch) at [355].
[50] *Sangha* [2021] EWHC 1599 (Ch) at [359].
[51] *Sangha* [2021] EWHC 1599 (Ch) at [362].
[52] *Sangha* [2021] EWHC 1599 (Ch) at [387].
[53] *Sangha* [2021] EWHC 1599 (Ch) at [309].
[54] *Sangha* [2021] EWHC 1599 (Ch) at [310].
[55] McGhee and Elliot, *Snell's Equity*, 34th edn (2020), para.2–007.

The problem, however, was that the essence of equitable tracing is that the tracing party is asserting a proprietary right in property on the footing that they have proprietary rights in the asset or property whose proceeds of sale can be traced into that new property.

But an equity arising from proprietary estoppel was not in itself a property right, albeit that it might be satisfied by the grant by the court of a property right. Prior to satisfaction, a person asserting and entitled to "a proprietary estoppel" has "no defined right of property, merely an inchoate right which may crystallise into, or be satisfied by the grant of a right of property".[56]

One answer postulated by the court was that where the court has determined that the satisfaction of the equity warrants the grant of a property right, the court could treat that interest as arising as at the date of the equity and, in consequence, construe that interest as an interest capable of being enforced by equitable tracing as against any property purchased with the proceeds of the property subject to the equity in question.

There is real force in the court's suggestion in this regard. Assuming that the court has given judgment on the relief that is appropriate to satisfy the equity, assuming that that relief is a property right, and noting that equity arises when the conditions for the creation of the equity are met,[57] then the equity will have existed in the relevant property before it was sold and may well be capable of being traced.

Ultimately, the court did not come to a final answer, noting that the issues were not dealt with in argument at trial.

Analysis

So, what are these three cases trying to tell us? The obvious observation is that they were all, without exception, unsuccessful. Proprietary estoppel claims are clearly not to be embarked on lightly. They are heavily reliant on the quality of the evidence (see *Sangha v Sangha*), on the perception by the court regarding the relevant context and the nature of the relations between the parties (*Pickering v Hughes*), and are not the clever shortcut to the acquisition of property rights as they might at first appear. They also illustrate what can happen when a proprietary estoppel claim is attempted in circumstances that simply do not warrant it (*Nazir v Jagota*). An intimation of a proprietary estoppel claim might provide some leverage pre-action, but caution should be urged before a claim is issued, or a pleading added: these are costly claims.

The scope for judicial discretion, the fact that unconscionability can be a particularly subjective concept, and the willingness of the courts to accept that representations have been made in circumstances where they were never committed to writing, can, it appears, sometimes encourage claimants to embark upon proprietary estoppel claims in circumstances where not only is there significant doubt that the three core tests can be met, but where it is not at all clear that—even if an equity is recognised as arising—the court will grant anything close to what it is the claimant wants. This presents very real dangers for solicitors, who should be mindful of the importance of warning clients of foolish and expensive errands. It is possible that these cases indicate a trend toward a stricter interpretation of the three core requirements of a successful claim. Time will tell.

Tax and proprietary estoppel

Before concluding, it is worth briefly flagging one further complexity and uncertainty associated with these claims, often left as an afterthought: tax.

Not only are the identifying fiscal consequences of a successful proprietary claim a vital element of weighing up its risks and rewards, but it is well established in the jurisprudence that these are themselves a factor in the determination of a claim because they are relevant to the exercise of the court's discretion.

[56] *Sangha* [2021] EWHC 1599 (Ch) at [322].
[57] *Brake v Swift* [2020] EWHC 1810 (Ch); [2020] 4 W.L.R. 113 at [148].

Indeed, in the case of *Moore v Moore* Henderson LJ criticised in strong terms the parties' failure to have put relevant evidence on the issue of tax before the trial judge:

> "The impact of IHT, capital gains tax ('CGT') and income tax all needed careful consideration, with the benefit of expert evidence, or at least submissions from counsel well versed in the relevant areas of tax law. Despite the vast amounts of money spent on this litigation, the judge was unfortunately left with next to no assistance on this important subject. Counsel on both sides had no relevant expertise, there was no expert evidence, and although the partnership accountant, Mr Butler, gave evidence in the form of a lengthy and discursive agreed witness statement, he was called as a witness of fact, his statements about the impact of taxation were of a generalised nature, and neither he nor anybody else was asked to advise on the taxation consequences of the immediate transfer of assets ordered by the judge. In my view, this should be as unacceptable in a substantial proprietary estoppel case as it would be in a big money divorce case."[58]

In short, this is crucial evidence to put before the court.

The difficulty, however, is that the tax analysis applicable to these cases is largely unresolved. Little assistance is to be found in the law reports, and it is the subject of considerable debate in the commentaries.[59]

The paragraphs which follow are not intended to be exhaustive. Rather, they intend to highlight a few of the major issues, particularly as regards inheritance tax (IHT), which affect this area of analysis.

One key question is whether an asset that is subject to an estoppel is included within the promisor's estate for IHT purposes. If so, then it will not be part of the chargeable transfer on death (under s.4 of the Inheritance Tax Act (IHTA) 1984).

The prevailing view appears to be that an asset subject to an estoppel will be included within the promisor's estate, not least given the inchoate nature of the equity to which the necessary ingredients give rise, as well as the flexibility which the court enjoys in granting a remedy. It would be odd if an estoppel in respect of a house resulted in it falling out of the promisor's estate in circumstances where the equity is not yet satisfied, and the court may well stop short of outright ownership.

What effect, if any, does the existence of a mere equity in respect of an asset have on the IHT analysis? The most convincing analysis is that an estoppel gives rise to a liability to be deducted in the assessment of the promisor's estate under s.5 of the IHTA 1984.

However this is of course subject to the following limitations at s.5(5) of the IHTA 1984:

> "Except in the case of a liability imposed by law, a liability incurred by a transferor shall be taken into account only to the extent that it was incurred for a consideration in money or money's worth."

There are two limitations in play in the above. To be taken into account, liability must have been (i) imposed by operation of law; and (ii) incurred for consideration. How these limitations apply to the circumstances giving rise to an estoppel gives rise to various interesting and difficult questions.

Does a promise-based estoppel claim arise "by operation of law", or does it arise as a result of the positive conduct of the promisor? What about the more passive strand of acquiescence-based estoppel? Is there consideration incurred in return for the liability—namely, the promisee's detriment? Is that detriment capable of being characterised as consideration in money or money's worth? These are all acutely fact-sensitive questions, so will depend on the precise circumstances in which the estoppel has arisen.

[58] *Moore v Moore* [2018] EWCA Civ 2669; [2019] W.T.L.R. 233 at [96].

[59] For the most complete analysis of the subject, see B. Macfarlane, *The Law of Proprietary Estoppel*, 2nd edn (Oxford: Oxford University Press, 2020), Ch.10.

For similar reasons to those expressed above (namely the inchoate nature of the equity), it seems likely that, for CGT, any disposal will occur either on the testator's death (in a testamentary case) or on the making of a court order (in a lifetime case), and not when the estoppel arises.

In conclusion, the applicable tax analysis is another uncertainty affecting claims of this nature, and one that should not be left as an afterthought. Resolution of the issues which currently bedevil this area of are much needed.

The above paragraphs have highlighted some of the main trends and difficulties associated with these claims. On 2 December 2021 the Supreme Court heard the appeal in *Guest v Guest*.[60] This is predominantly focused on the debate regarding the fundamental objective underlying the Court's remedial discretion, specifically whether doing justice involves remedying detriment, fulfilling expectations, or something else. It is hoped that the Court's decision will provide at least some long-needed clarity in this vexed area of jurisprudence.

[60] *Guest v Guest* [2020] EWCA Civ 387; [2020]1 W.L.R. 3480.