Expectation, Reliance and Detriment. What is it the essential aim of the remedy of proprietary estoppel?

Elizabeth Fitzgerald discusses this controversial topic in the wake of the recent decision of the Court of Appeal in Davies v Davies [2016] EWCA Civ 463.

Introduction

1. The ingredients necessary to raise an equity are well established. They are: (1) a sufficiently clear assurance; (2) reliance by the claimant on the assurance; (3) detriment to the claimant in consequence of his reasonable reliance. (See e.g. Thorner v Major [2009] UKHL 18 at [29]).

2. Once it has been established that an equity has arisen by proprietary estoppel, a more difficult issue then arises. How should the question of relief be approached?

3. In contract or tort the aim of an award of damages is generally to put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong. What are we trying to do when determining the extent of an equity created by proprietary estoppel?

4. Unless we know what we are aiming to achieve, it is difficult to know how to go about assessing the level of the award necessary to satisfy an equity arising by proprietary estoppel.

The Approach of the Court
5. There have been two competing views as to the general approach: (1) the court is trying to give a remedy which is consistent with the belief or expectation generated by the relevant assurance; or (2) the remedy focuses on the detriment and alleviating the harm.

6. The two approaches can be seen from the judgments of Roch L.J. and Hobhouse L.J. in *Sledmore v Dalby* (1996) 72 P&CR 196.

- Roch L.J. Said, at p.203:
  
  "...The extent of the equity is to have made good, so far as may fairly be done between the parties, the expectations of A which O has encouraged. A’s expectation or belief is the maximum extent of the equity..."

- Hobhouse L.J., at p. 208, looked more to detriment, citing the High Court of Australia (Mason C.J.) in *Commonwealth of Australia v. Verwayen* (1990 ) 170 C.L.R 394:

  "In conformity with the fundamental purpose of all estoppels to afford protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted, ..."

7. Historically it seems that the court had concerned itself more with the claimant’s expectations. However, in *Jennings v Rice* [2002] EWCA Civ 159 [2003] 1 P&CR 196 the Court of Appeal expressly rejected an argument to the effect that the basic rule was that an equity should be satisfied by making good the expectation.¹ The starting point now is probably Robert Walker L.J.'s judgment:

  "[45] Sometimes the assurances, and the claimant's reliance on them, have a consensual character falling not far short of an enforceable contract ... In a case of that sort both the claimant's expectations and the element of detriment to the claimant will have been defined with reasonable clarity. ..."

¹ See [2002] EWCA Civ 159 at [16]
[50] ... In such a case the court’s natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant’s equity should be satisfied in another (and generally more limited) way.

[51] But that does not mean that the court should in such a case abandon expectations completely, and look to the detriment suffered by the claimant as defining the appropriate measure of relief. Indeed in many cases the detriment may be even more difficult to quantify, in financial terms, than the claimant’s expectations. Detriment can be quantified with reasonable precision if it consists solely of expenditure on improvements to another person's house, and in some cases of that sort an equitable charge for the expenditure may be sufficient to satisfy the equity .... But the detriment of an ever-increasing burden of care for an elderly person, and of having to be subservient to his or her moods and wishes, is very difficult to quantify in money terms. Moreover the claimant may not be motivated solely by reliance on the benefactor's assurances, and may receive some countervailing benefits (such as free bed and board). In such circumstances the court has to exercise a wide judgmental discretion. ...

[56] However, I respectfully agree with the view expressed by Hobhouse L.J. in Sledmore v Dalby (1996) 72 P. & C.R. 196, that the principle of proportionality (between remedy and detriment), emphasised by Mason C.J. in Verwayen , is relevant in England also. As Hobhouse L.J. observed at p.209, to recognise the need for proportionality: “... is to say little more than that the end result must be a just one having regard to the assumption made by the party asserting the estoppel and the detriment which he has experienced.”

8. The basis of the reasoning in Jennings v Rice came from what Mason C.J. had said in Commonwealth of Australia v Verwayen:

“...A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist
9. The focus on ‘proportionality’ puts reliance and detriment, rather than expectation, more in centre stage.

10. In Davies v Davies [2016] EWCA Civ 463, Lewison L.J. succinctly summarised relevant legal principles relating to proprietary estoppel and noted:

“viii) Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application: Henry v Henry at [65]. In particular there must be a proportionality between the remedy and the detriment which is its purpose to avoid: Jennings v Rice at [28] (citing from earlier cases) and [56]. 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: Jennings v Rice at [50] and [51].

11. We know that there must be ‘proportionality’ in any award, but this is does not answer the question “what are we trying to do when determining the extent of an equity created by proprietary estoppel?” Proportionality is not what we are trying to compensate.

12. In Davies v Davies Lewison L.J. noted:

“39 There is a lively controversy about the essential aim of the exercise of this broad judgmental discretion. One line of authority takes the view that the essential aim of the discretion is to give effect to the claimant’s expectation unless it would be disproportionate to do so. The other takes the view that essential aim of the discretion is to ensure that the claimant’s reliance interest is protected, so that she is compensated for such detriment as she has suffered. The two approaches, in their starkest form, are fundamentally different: see Cobbe v Yeoman’s Row Management Ltd [2006] EWCA Civ 1139, [2006] 1 WLR 2964 at
[120] (reversed on a different point [2008] UKHL 55; [2008] 1 WLR 1752). Much scholarly opinion favours the second approach: see Snell’s Equity (33rd ed) para 12-048; Wilken and Ghaly Waiver Variation and Estoppel (3rd ed) para 11.94; McFarlane The Law of Proprietary Estoppel para 7.37; McFarlane and Sales: Promises, detriment, and liability: lessons from proprietary estoppel (2015) LQR 610. Others argue that the outcome will reflect both the expectation and the reliance interest and that it will normally be somewhere between the two: Gardner: The remedial discretion in proprietary estoppel – again [2006] LQR 492. Logically, there is much to be said for the second approach. Since the essence of proprietary estoppel is the combination of expectation and detriment, if either is absent the claim must fail. If, therefore, the detriment can be fairly quantified and a claimant receives full compensation for that detriment, that compensation ought, in principle, to remove the foundation of the claim: Robertson: The reliance basis of proprietary estoppel remedies [2008] Conv 295. Fortunately, I do not think that we are required to resolve this controversy on this appeal.”

**What Role does Expectation Play?**

13. The role of court is not to enforce promises or give effect to expectations and here is no basic rule that an equity should be satisfied by making good the expectation. So how does expectation fit into the equation?

14. Some have suggested that Robert Walker L.J. has made two categories of cases: the ‘bargain’ and the ‘non-bargain’ case. The former yields expectation relief and in the latter, some form of wider discretion is involved. It is not clear the extent to which this analysis has really been followed through in subsequent cases and in truth, Robert Walker L.J. might not be setting out two different basis of relief.

15. Expectation relief is likely to be the appropriate relief in a “bargain” case because, as Robert Walker L.J. explained\(^2\), the parties:

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\(^2\) EWCA Civ 159 at [45]
“...probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate.”

16. In this sort of case, the court is still concerned with detriment it is just that detriment is equivalent to expectation and this is why the expectation measure is awarded.

17. In *Davies v Davies* Lewison L.J. referred to Robert Walker L.J.’s first sort of case: 
“...in which the assurances and reliance had a consensual character not far short of a contract. In such a case “both the claimant’s expectations and the element of detriment will have been defined with reasonable clarity.” In that kind of case the court is likely to vindicate the claimant’s expectations. Although Robert Walker L.J does not say so in terms, it is implicit that in such a case the claimant will have performed his part of the quasi-bargain.”

18. The reference to the claimant having performed his side of the bargain, although perhaps obvious, is nevertheless important. At [43] Lewison L.J. referred the fact that in some cases of proprietary estoppel there is a quasi-bargain between the parties which the claimant has fulfilled but the defendant (or often his personal representatives) seek to repudiate. That is quite different from a case in which the claimant did not perform his or her side of the quasi-bargain.

19. Moving on to Robert Walker L.J.’s second type of case, where the court:
“may still take the claimant's expectations (or the upper end of any range of expectations) as a starting point, but unless constrained by authority I would regard it as no more than a starting point.” Lewison L.J. said:

“What is not entirely clear from this passage is what the court is to do with the expectation even if it is only a starting point. Mr Blohm suggested that there might be a sliding scale by which the clearer the expectation, the greater the detriment and the longer the passage of time during which the expectation was
reasonably held, the greater would be the weight that should be given to the expectation. I agree that this is a useful working hypothesis.

20. This is, at least some guidance as to how to deal with expectation.

**How did expectation feature in Davies v Davies?**

21. The facts in *Davies v Davies* were unusual in that the equity had arisen as a result of a number of different representations made to the claimant over a long period of time, some of which were incompatible.

22. Eirian Davies was claiming an interest in her parents’ farm. Broadly speaking the representations were to the effect that the family farming business would be hers one day; that she would have a future at the farm and be a partner/shareholder in the farming business; that she would have a rent free house for life; that the farm would be left to her by her parents in their wills. The court found that Eirian had relied on the representations by working on the farm and moving into a farmhouse on the farm, and this had been to her detriment. She had received something less than full recompense for her working on the farm and had also worked at times for no pay.

23. Lewison L.J. characterised the representations as follows:

“What we have, then, is a series of different (and sometimes mutually incompatible) expectations, some of which were repudiated by Eirian herself, others of which were superseded by later expectations. This is far removed from a case like *Gillett v Holt* where the same unambiguous testamentary assurance was repeated many times publicly over a long period of years; or a case like *Thorner v Major* which followed the same pattern.”

24. The fact that *Davies v Davies* was far removed from the *Gillett v Holt*/ *Thorner* types cases is what makes it an interesting case in which to consider the question of the aim of remedy in proprietary estoppel.

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3 [48]
25. At first instance, the Claimant was seeking the transfer of her parents’ farm. If this wasn't going to happen it was common ground that a monetary award would have to be made (relations between the parties had deteriorated to the extent that no award could be made which required the parties ongoing cooperation). The Defendants had put forward a sum which sought to compensate the claimant for the loss of her expectation of having lifetime accommodation; the profits which she would have received had she been made a partner/received a shareholding in the farming business; and a sum to reflect her underpayment for work she had carried out. The Judge at first instance criticised this sum as not sufficiently accommodating the expectation and detriment which he had found. In particular, he said that failed to take into account detriment which was difficult to place a financial value on.

26. The Court of Appeal, however, were critical of the judge’s failure to sufficiently analyse the offer put forward, in particular, his failure to appreciate the extent to which the offer contained much that went towards satisfying the claimant’s expectations.

27. The offer had been £350,000. The Judge awarded £1.3m. At paragraph [63] Lewison L.J. said:

“How, then did the judge bridge the gap between the offer of £350,000 and his award of £1.3 million? The only explanation, based on the judge’s own reasoning at [55] is that he attributed a value of close to £1 million to the non-financial aspects of the detrimental reliance, and/or that (although not expressly mentioned) he ascribed a very large value to the disappointment of Eirian’s expectation of inheriting the land (as opposed to the business and the herd).”

“[66] In some cases it may well be that the impossibility of evaluating the extent of imponderable and speculative non-financial detriment (for example life-
changing choices) may lead the court to decide that relief in specie should be given. But that is not this case, not least because the judge rejected the claim for the transfer of assets in specie.

[67] Neither of these factors is capable of precise valuation, but since it is now common ground that the ultimate award will be a purely monetary one, we must do the best that we can. In different situations the court is often called upon to award compensation for non-pecuniary losses, and the difficulty of assessment is no bar to an award.”

28. The Court of Appeal reduced the sum to £500,000.

   The award was struck a balance between the claimant’s expectations and the detriment she had suffered.

   This wasn’t a case where the assurances and reliance on them overlapped (Walker L.J. first category case). This argument had not succeeded at first instance and was not pursued on appeal. Lewison notes that this was not a quasi bargain case and noted C had not performed her side of the bargain.

29. Although Lewison L.J. declined to resolve the controversy about the essential aim of the discretion. He admitted the logical attraction of an approach which sought to protect the claimant’s reliance interest in order to compensate for detriment suffered. He referred to an article written by Andrew Robertson: The reliance basis of proprietary estoppel remedies [2008] Conv 295. At p. 302 Robertson said:

   “...both expectation loss and reliance loss are essential elements of the equity, and, once either the expectation is fulfilled or reliance loss is prevented, the relying party has no claim in estoppel. ...If either the expectation loss or the reliance loss is on one way or another avoided or taken away, the reason for the court’s intervention comes to an end.”

30. Thus Lewison L.J. said: “Since the essence of proprietary estoppel is the combination of expectation and detriment, if either is absent the claim must fail. If, therefore, the detriment can be fairly quantified and a claimant receives full
compensation for that detriment, that compensation ought, in principle, to remove the foundation of the claim”

31. The award in Davies v Davies did, in part compensate for the lost expectation (e.g. the loss of a home for life) but in relation to other aspects of the claim the focus was more of compensating for the detriment suffered.

32. The role of court is not to enforce promises or give effect to expectations. But we cannot ignore them completely. Lewison LJ’s ‘sliding scale’ is, perhaps, the most helpful guidance we have been given to date.