Chapter 10

Question 1: In *Thorner v Major*, why was Peter Thorner under a duty to transfer Steart Farm to David Thorner?

As noted in the extract from the decision in section 10.1.1, Peter was under that duty because David satisfied the three elements necessary to establish a proprietary estoppel. Those three elements are an assurance by A, reasonable reliance by B, and the prospect of detriment to B.

The supposed assurance by Peter was not an explicit promise by Peter to David, but was established by Peter's conduct over 15 years. For example in 1990, Peter gave David a bonus notice relating to two assurance policies on Peter's life, saying 'That's for my death duties'. The House of Lords concluded that, overall, there was a sufficient assurance, as it was reasonable for someone in David's position to understand Peter as having made a serious assurance which was capable of being relied on. David relied on this assurance by working on Peter's farm for 30 years without pay. As a result, if Peter was entitled to resile from his assurance, David would suffer detriment in that he had given up the chance of paid work for many years. Therefore Peter was under a duty to transfer Steart Farm to David Thorner.

Question 2: Is our understanding of how a proprietary estoppel claim differs from a contractual claim aided by Lord Hoffmann's metaphor, in his discussion of proprietary estoppel in *Thorner v Major*, that 'the owl of Minerva spreads its wings only with the falling of the dusk'?

The aphorism 'the owl of Minerva spreads its wings only with the falling of the dusk' means that, in some contexts at least, the truth is only known after the event. It seeks to draw a distinction between a contractual claim and a proprietary estoppel claim. With a contractual claim, A's promise imposes an immediate duty on A to perform that promise. In contrast, proprietary estoppel does not impose such an immediate duty. Instead, it involves a 'retrospective exercise' (*per* Lewison LJ in *Davies v Davies*): the court asks whether, in light not only of A's assurance, but also of subsequent events (such as B's reliance), A came under some form of duty to B. And, if a duty arises, it need not be a duty to honour A's assurance (see section 10.7).

Two points are worth noting. First, given this difference, the degree of certainty required of A's assurance is lower in a proprietary estoppel claim than a contractual claim (see section 10.3.2). With contractual claims, given that the promise imposes an immediate duty to perform the promise, the terms of the promise must be clear from the outset. In contrast, with proprietary estoppel, it was stated by Lord Walker in *Thorner v Major* that '[w]hat amounts to sufficient clarity, in a case of this sort, depends hugely on context', and that context includes events occurring after the moment of any initial assurance of A. *Thorner v Major* itself illustrates how, in practice, in a proprietary estoppel claim, the assurance need not be clear and unequivocal. Peter Thorner was a man of very few words and never directly stated that David Thorner would inherit the farm. Nevertheless, the House of Lords decided that there was a sufficiently certain assurance. Lord Neuberger did attempt to insist that a clear and unequivocal assurance is required, but also noted three qualifications which undermine that supposed requirement.

Secondly, Lord Hoffmann's metaphor illustrates that, in a proprietary estoppel claim, the *extent* of A's duty is fixed not when the assurance is made, but at a later date when B could suffer detriment if A's promise was resiled from. For example, in *Jennings v Rice* Mrs Royal promised Mr Jennings that he would receive the entire of her estate (valued at £1.285m) or at least her house and furniture (valued at £435,000). However, the potential detriment to Mr Jennings by the time he brought the claim was much lower. As a result, the Court of Appeal awarded him £200,000. If Mr Jennings had a contractual right against Mrs Royal, it would be fixed at £1.285m when Mrs Royal made the assurance, and subsequent events would not have affected this figure.

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Question 3: In *Cobbe v Yeoman's Row Management Limited*, should Mr Cobbe have been entitled to at least some of the increase in value of YRML's land, given that his work was crucial in obtaining the planning permission that led to that increase?

You should refer to section 10.3.3. In *Cobbe*, Etherton J, at first instance, ordered that Yeoman's Row should pay Mr Cobbe a sum equal to half the increase in the value of the company's land caused by the grant of planning permission: Mr Cobbe was therefore set to receive around £2m. The Court of Appeal (albeit somewhat reluctantly) upheld that decision. This view can perhaps be defended on the grounds that Mr Cobbe's endeavours were crucial in the company's receipt of planning permission. It could also be said that, given Mr Cobbe had fully performed his side of his informal deal with the company, the company should fully perform its part of that deal and so give Mr Cobbe some of the benefit of the increased value of the land.

The House of Lords allowed Yeoman's Row's appeal and so took a different view from that of Etherton J and the Court of Appeal. It is interesting to note that, even if you agree with the House of Lords' view that Mr Cobbe should have no proprietary estoppel claim, it may still be possible to argue that he should have received some of the benefit of the increased value of the land. The House of Lords did find that the company should pay Mr Cobbe something for the services he had rendered. Such payments are generally set at the going rate for the service, plus expenses. It may well be that the usual agreement, in such a situation, is that if the developer's efforts lead to a grant of planning permission, the developer will share in the financial benefits of that grant. After all, as Mr Cobbe agreed to be paid nothing if planning permission was not obtained, it might be reasonable for him to expect a bonus (beyond a mere hourly rate payment) if planning permission was granted.

Question 4: Can proprietary estoppel apply even if A (the party against whom proprietary estoppel is used) has acted perfectly innocently? How does the decision in *Taylors Fashions v Liverpool Victoria Trustees* affect your answer?

In *Taylors Fashions*, two separate proprietary estoppel claims were made: one by Taylors, the other by Olds. Each party had a lease from Liverpool Victoria, and acted in reliance on a belief that it had a right to renew that lease. At the time of that reliance, Liverpool Victoria had also shared the parties' belief and therefore could not be said to have deceived either party. When it turned out that, in fact, neither Taylors nor Olds had a right to renew its lease, each party argued that Liverpool Victoria was estopped from relying on this point. Taylors' claim failed, because Oliver J held that Liverpool Victoria had not encouraged it to believe that it had a right to renew the lease, and it was not clear that Taylors had acted in reliance on its belief that it could renew the lease. In contrast, Olds' claim succeeded, because Liverpool Victoria had encouraged it to believe it had a right to renew, and Olds had spent large sums improving the land in reliance on that belief.

The wider significance of the decision in *Taylor Fashions* depends, in part, on Oliver J's use of the concept of unconscionability. His Lordship used the concept to emphasize that the doctrine of proprietary estoppel should not be constrained by overly technical rules. The particular rule on which Liverpool Victoria had attempted to rely was that, before B could acquire a right through proprietary estoppel, A had to know that B's belief was, in fact, mistaken. If such a rule existed, it would have prevented both the claim of Taylors and of Olds. However, by taking a more flexible approach based on unconscionability, Oliver J rejected that rule. This shows that proprietary estoppel may be available even if A, an owner of land, has acted perfectly innocently. It is thus somewhat ironic that an emphasis on unconscionability, which we tend to associate with bad conduct on part of A, resulted in B acquiring a right against A even though A had not acted badly.

Question 5: What role, if any, should unconscionability play in a proprietary estoppel claim?

This question is discussed in section 10.6. To answer it, you should consider both the use that particular judges have made of unconscionability in deciding proprietary estoppel cases, and what use you think should be made of that concept. Useful cases to discuss include *Taylors Fashions*, where the concept of unconscionability was used as a means to relax the requirements of proprietary estoppel, and thus make it somewhat easier for B to make a successful claim, as well as *Jennings v Rice*, where the concept was used to limit the remedy available to B, as it was part of the court's rejection of the idea that proprietary estoppel necessarily leads to the

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enforcement of a promise made by A to B. Similarly, you could also consider the role unconscionability plays in restricting B's remedy where there has been a 'relevant change of circumstances' on the facts – such as in *Habberfield v Habberfield*, where such a change of circumstances, occurring after A's promise and B's reliance, meant it was no longer unconscionable for A to give B a more limited right, rather than honouring A's promise to B (in that case, control, and eventual ownership of a farm with a working dairy unit). You might compare this approach to unconscionability, for instance, with the view of Samet, who argues that unconsconability can – and should – play a more positive, direct role in allowing a court to intervene; or in increasing B's remedy.

Question 6: Do you agree with the result reached by the Court of Appeal in *Jennings v Rice* and in *Habberfield v Habberfield*?

At a general level, the decision in *Jennings v Rice* can be compared to that in *Thorner v Major*: even in the absence of a contract with A, B acquired a right against A due to reliance on a belief, encouraged by A, that B would acquire a right in relation to A's land.

Like *Thorner*, *Jennings v Rice* can be seen as a 'domestic' case. This may be important in considering the impact of *Yeoman's Row*. In that case, a proprietary estoppel claim was denied in a commercial context where B acted before entering a contract with A. In contrast, in *Jennings v Rice*, we can perhaps be more sympathetic to the estoppel claimant, who was not acting in a commercial context and so can perhaps be more readily excused for acting in the absence of a concluded contract with A. As Lord Neuberger suggested, '[t]he notion that a claimant takes his chance, where he knows that he has no legally enforceable right, is easier to accept in the context of a commercial and arm's length relationship than in a domestic or familial context.'

There is also the question of the right acquired by Mr Jennings. One might argue that the he should have been awarded his expectation, and thus receive more than £200,000. The arguments made by Bright and McFarlane and Robertson can, however, be used to support the result in the case.

In *Habberfield v Habberfield*, apparently by contrast, B was effectively awarded her expectation engendered by A's assurance (subject to a 'relevant change of circumstances' on the facts: see Question 5). Yet, on closer inspection, *Habberfield* arguably shows how a detriment-focussed approach to satisfying B's equity by estoppel can still be consistent, in appropriate cases, with an award protecting B's expectation. In particular, Lewison LJ, adopting Robert Walker LJ's dictum in *Jennings* – see the judgment extracted in section 10.7.3 – placed *Habberfield* in 'a class of case in which the assurances and reliance had a consensual character not far short of a contract,' or 'quasi-bargain'. As such, the detriment that B suffered consisted in the 'expected reciprocal performance of requested acts in return for the assurance, [making a strong] case for an award based on or approximating to the expectation interest created by the assurance.'

Question 7: Does s 116(a) of the Land Registration Act 2002 impose a potentially unfair burden on a third party acquiring land subject to a proprietary estoppel claim?

S 116(a) of the Land Registration Act 2002 was designed by the Law Commission to confirm the conventional understanding of how B's proprietary estoppel claim, arising initially as a result of A's conduct, may affect C. On that view, before any court order is made in B's favour, B has an 'equity by estoppel'. S 116(a) then makes clear that this right is capable of binding C, if C acquires his right before any court order in B's favour.

The potential problem for C occurs in a case where C acquires his right before any court order in B's favour, and a court would ultimately have ordered A simply to pay money to B, or to allow B to occupy A's land as a licensee. In such a case, if C had acquired his right *after* such a court order, it would be clear that C could not be bound by B's pre-existing proprietary estoppel claim: after all, if A is under a duty simply to pay money to B, or not to revoke a licence, then B has only a personal right against A. It therefore seems strange, and potentially unfair to C, that C should be bound by B's claim simply because C acquired his right *before* any court order in B's favour.

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Of course, it should be noted that s 116(a) does not mean that B's 'equity by estoppel' will always bind C: for example, C may be able to use the lack of registration defence against B's right. However, in a case where B is in actual occupation of A's land before C acquires his right, C will not be able to rely on that defence, as any 'equity by estoppel' of B will count as an overriding interest.

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