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Family law update: current issues in proprietary estoppel - Part 2

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## The appeal court's decision

The Court of Appeal unanimously allowed the appeal. It drastically reduced the award to £500,000. The court considered that the judge at first instance had 'applied far too broad a brush and failed to analyse the facts that he found with sufficient rigour' in deciding to award the claimant £1.3m (para 42 per Lewison LJ).

The Court of Appeal stressed that proportionality 'lies at the heart of the doctrine' (para 38). In particular, there must be proportionality between the remedy and the detriment. This is not, the judgment noted, to suggest that the court abandons expectation only to compensate detrimental reliance, but rather to accept that if the expectation is disproportionate to the detriment, then the equity may be satisfied in a more limited manner.

Some of the controversies in balancing expectations and detriment in exercising the broad discretion of the court to satisfy the equity were set out by Lewison LJ in an interesting and informative summary. He began with an area of academic debate (see in particular para 39).

Lewison LJ went on to consider that in cases in which the assurance and the element of detriment is defined with some clarity (akin to a contract), per Jennings v Rice and others [2002] EWCA Civ 159, the court is likely to vindicate the claimant's expectations. However, while not expressly stated in Jennings, Lewison LJ stated that it was implicit that in such a case the person claiming must have performed their part of the quasi-bargain.

Where the expectation was uncertain, Jennings establishes that specific vindication cannot be the appropriate test. The case is also authority for expectations sometimes being out of line with what could be justified by the assurances. In such cases, the expectation could still be used, but only as the starting point. Lewison LJ noted that Jennings does not explain what to do with the expectation if it is only the starting point, but suggested that some sort of 'sliding scale' is a helpful working hypothesis (para 41). The clearer the expectation, the greater the detriment and the longer the expectation is held, the greater the weight to be given to the expectation (paras 41–42).

Despite accepting the relevance of the expectation in the case at hand, the Court of Appeal, in criticising the trial judge's approach, noted that he had not explained which (of the many) expectations he had taken as the starting point or given enough weight to any expectations being conditional on Eirian Davies continuing to work at the farm. This was a series of different, and sometimes 'mutually incompatible' expectations (para 48). This was not a contract-like situation in which the respondent had performed her end of the quasi-bargain, and this should be clearly reflected in the award (paras 41–42).

The detrimental reliance was also an important factor: the Court of Appeal agreed with the trial judge that this was not a case where the respondent had 'positioned her whole life' on the basis of the assurances (paras 41–42 and para 49). Eirian Davies had been underpaid, and it was considered that she had sacrificed the opportunity to work shorter hours in alternative employment, away from the somewhat strained relationship she had with her parents.

The Court of Appeal reasoned that of the award given, close to £1m must have come from non-financial aspects of the detrimental reliance, with a very large value ascribed to the disappointment relating the respondent's expectation of inheriting the land. Yet, that expectation had not been held for long, and at some points the expectation Eirian Davies held was not reasonably derivable from what she was told (particularly in the light of the changing nature of her parents' wills). Giving up the shorter working hours to work with her parents was a detriment, but this had not been consistent as she had worked elsewhere and was now free to retrieve that situation. There was no evidence that Eirian Davies had made life-changing choices based on her expectations. While non-financial aspects are difficult to assess, the court clearly determined that the amount awarded had been excessive and stated that the award under this head should be relatively modest.

The Court of Appeal ultimately gave Eirian Davies an award totalling £500,000, made up of an accommodation element, a commercial element and a non-financial element.

## Comments and observations

The Court of Appeal applied Jennings above regarding unclear expectations, and considered that one means of approaching the position of expectation in a case such as this would be to adopt 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' (para 41).

Overall, *Davies and Linden v Burton* [2016] EWCA Civ 275; (2016) November CILExJ p26 can be seen to demonstrate the use of proprietary estoppel as a remedy in family cases, both for cohabiting couples and for other family relationships. Proprietary estoppel offers judges wide discretion in the remedy that can be awarded, but these cases show the difficulty of interpreting the reasonable meaning to be attributed to often informal discussions, agreements and actions occurring over long periods of time. Davies and Linden do, however, help to somewhat clarify the discretion left to judges in satisfying the equity.

* See also 'Family law update: current issues in proprietary estoppel – Part 1', (2016) November CILExJ pp26–27.