Neutral Citation Number: [2020] EWCA Civ 387 Case No: A3/2019/1370

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
PROPERTY TRUSTS AND PROBATE LIST (Ch)
HHJ RUSSEN QC (sitting as a Judge of the High Court)
[2019] EWHC 869 (Ch)

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 17/03/2020

Before :

LORD JUSTICE FLOYD
LORD JUSTICE NEWEY
and
LORD JUSTICE ARNOLD

- -

Between :

(1) DAVID GEORGE GUEST **(2) JOSEPHINE GUEST**	**Appellants**
- and -	
ANDREW CHARLES GUEST	**Respondent**

- -

Guy Adams (instructed by **Twomlows**) for the **Appellants**
Philip Jenkins (instructed by **Clarke Willmott LLP**) for the **Respondent**

Hearing date: 11 February 2020

- -

Approved Judgment

Lord Justice Floyd:

Introduction

1. Tump Farm ("the Farm") is a working dairy farm in Sedbury, near Chepstow in Monmouthshire. It has been farmed by members of the Guest family for three generations. Initially it was leased to the parents of the first appellant, David Guest, but when his father died in 1964 David and his mother bought it and farmed it in partnership until 1992. David married the second appellant, Josephine, in 1964, and by 1992 Josephine was also a member of the farming partnership.

2. David and Josephine have three children. The respondent, Andrew, is the eldest, born in 1966. Andrew's sister, Jan, was born in 1968 and his younger brother, Ross, in 1977.

3. Andrew left school in 1982 at the age of 16 and worked full time at the Farm until 2015, a period of some 33 years. From 1989 he and his wife Tracey lived in Granary Cottage, which is situated on Tump Farm, and is located in close proximity to the main farmhouse occupied by his parents.

4. Relations between Andrew and his parents deteriorated. In 2015 David and Josephine offered Andrew terms for carrying on farming Tump Farm under a Farming Business Tenancy ("FBT"), but Andrew felt unable to accept those terms on the grounds of affordability. He accordingly left Granary Cottage and his work on the Farm in that year. He now lives with his family near Tewkesbury, and at the time of the trial was employed as a salaried herdsman.

5. In 2017 Andrew brought these proceedings against David and Josephine, seeking a declaration of entitlement under the principles of proprietary estoppel to a beneficial interest in Tump Farm, together with a declaration of entitlement to reside in Granary Cottage. After a trial spreading over some 6 court days in November and December 2018, HHJ Russen QC (sitting as a High Court Judge) ("the judge") gave judgment in favour of Andrew and ordered David and Josephine to make a lump sum payment to Andrew composed of 50% after tax of the market value of the farming business, and 40% after tax of the market value of Tump Farm (subject to a life interest in favour of David and Josephine in the farmhouse). It was the almost inevitable consequence of the judge's order that Tump Farm would have to be sold in order to realise the lump sum payable to Andrew.

6. David and Josephine sought permission to appeal both in respect of the judge's conclusion that an equity arose in favour of Andrew, and in respect of the remedy which the judge devised to give effect to it. Males LJ refused permission to appeal in respect of the existence of the equity, so the case comes before us solely on the question of remedy.

7. Mr Guy Adams appeared on behalf of David and Josephine; Mr Philip Jenkins on behalf of Andrew.

The facts in more detail

8. The judge carefully chronicled the largely uncontroversial background to the dispute in paragraphs 19 to 104 of his judgment. He dealt in a separate section of his judgment with his findings in relation to the components of Andrew's case on proprietary estoppel. The summary which follows seeks to combine these two sections, but is heavily, and gratefully, based on each of them.

9. Tump Farm has been farmed by the Guests since 1938. The Farm comprises three dwelling houses (Tump Farmhouse, Granary Cottage and Stone Cottage), farm buildings, pasture land of around 150 acres, separated into two enclosures by a solar park of 32 acres which is leased to a commercial operator, and woodland of around 45 acres. There are now two telecoms masts on the Farm which are also leased to commercial operators.

10. Because the trial was intended to deal with both the existence of the equity, and, if established, the remedy to give effect to it, the judge had before him two joint valuation reports in respect of Tump Farm. Mr McLaughlin of Carter Jonas valued the freehold of all the buildings and land (including the woodland and rental income from the solar park and telecoms masts) at £2,855,000 as at August 2018. Ms Dooley of Hazlewoods valued the Farm as an agricultural business at around £3.35m (the dairy farm business being attributed a value of just under £500,000).

11. In October 1981, David and Josephine each made wills, designed in essence to ensure that Andrew and Ross would inherit Tump Farm and its business in equal shares (contingent upon each reaching the age of 25) but on terms that they would have to raise monies to pay a pecuniary legacy to Jan equal to one fifth of the value of the residuary estate. Each testator expressed the wish that Andrew and Ross should ultimately own the agricultural land and premises at Tump Farm "and any other agricultural premises owned wholly or in part by me at my death" and have the opportunity to continue the farming business. The terms of this will were not communicated to Andrew at any time prior to the present proceedings.

12. Andrew was paid a basic wage when he started to work full time in 1982. He paid his mother for board and lodging out of his wages. Andrew attended agricultural college for one day a week and spent the rest of it at the Farm. After the summer of 1982, Andrew quickly took over sole responsibility for calf rearing, using the practical and management skills he was learning at college. In 1984 he took a course in artificial insemination of cattle. Thereafter he took responsibility for the artificial insemination of cows and the selection of bulls and breeding cows. After 1985 he undertook two further part-time courses of one year in farm enterprise management and whole farm management, and as a result took on more responsibility for the paperwork on the Farm, starting with straightforward cash analysis but progressing to greater financial management and administration, including managing farm subsidies and business planning. He attended any meetings which his father had with the partnership accountant or bank manager at which finances and business matters were discussed.

13. In June 1989 Andrew and Tracey married and, in November, they moved into Granary Cottage. Andrew and Tracey did not pay any rent for their occupation but did pay for maintenance and repairs in relation to the property. The parents' partnership paid other outgoings in respect of the property, such as utility bills.

14. Andrew continued to take on responsibilities well beyond that of an agricultural worker on a basic wage. In 1991, when the Integrated Administration and Control Scheme ("IACS") was introduced, he attended a workshop organised by the local branch of the National Farmers Union ("NFU") and took responsibility for the IACS submissions. In due course, he became responsible for processing the claims under the Single Payment Scheme and then the Basic Payment Scheme which replaced IACS.

15. David's mother died in 1992 and the farming business was thereafter carried on by David and Josephine in partnership under the name DG Guest.

16. Ross, who was 12 years Andrew's junior, left school in 1993 and went to Hartpury College to study for a first diploma in Agricultural Engineering and, in 1996, started to work for an agricultural engineering company. He stayed in that employment until 1999 when the quad bike business (mentioned below) was able to support him full time. Throughout the period between 1993 and 1999 Ross helped out on the Farm at weekends in return for pocket money.

17. Following the abolition of the Milk Marketing Board in 1993, Andrew organised some local farmers into an informal group so that milk processing companies, offering direct supply contracts, might make presentations to the group. In 1994, he was nominated as a Vice Chairman of the district branch of the Northern Milk Partnership. Andrew dealt with a local consultant of the Milk Marketing Board who visited Tump Farm on a monthly basis, and was responsible for providing him with the input and output data which was then processed and translated into a performance indicator report for the benefit of the business. The reports indicated that the Farm's performance was average, at best. Andrew succeeded in securing an additional 10% milk quota allocation (a further 65,000 litres). Through the development of a business plan the business was lifted from its rating of "average" into the top 20%. This was in part the result of changes in feeding regime and in the feeds themselves, and of the cows being housed in a new building. Andrew also addressed the Farm's underperformance due to low stocking rates by deciding to breed more replacements.

18. In the course of the 15 years during which Andrew worked on the Farm up to 1997, David would shut down disagreements with Andrew over farming decisions by saying "*It's my farm, when you take over you can do what you want*", or words to similar effect. Over the years, as the judge accepted, there were a number of these occasions when David said things which implied that Andrew's time would come. It was not in David's nature, however, to discuss details of the proposed succession. Andrew rebutted the suggestion made to him in cross-examination that his position was based on his own assumption rather than any parental assurance. His father made no secret of his intention to leave the Farm to the next generation. As to whether Ross was included in those intended to inherit the Farm, Andrew responded that his expectation of inheriting the whole Farm changed when Ross started to show an interest in farming. He accepted that "*[Ross] would be there along with me*".

19. By 1997, Andrew was responsible for compiling the business' accounting information and its VAT returns. Andrew also kept the herd's medicine books up to date and was responsible for the cows "heat records" as well as arranging the passports for movements and records for deaths in the BSE crisis in 2000. He did the paperwork to secure the Farm's accreditation with the Red Tractor quality assurance scheme, and completed the necessary paperwork for cattle movement when there was a spread of bovine tuberculosis in Gloucestershire in 2003.

20. In July 1997, Andrew and Ross launched their partnership business of the Chepstow Quad Trekking Centre ("CQTC") later changed to Chepstow Outdoor Activity Centre ("COAC") when it started offering paintball as well. The parents' partnership funded the capital start-up costs of around £10,000. David wanted to encourage his sons to work together. Once he had left his employment, Ross took the leading role at CQTC while Andrew's primary focus remained on farming. Tracey did the bookkeeping for CQTC, and later for COAC. The co-operation between Andrew and Ross did not, however, endure.

21. In 1999, David had an accident at the Farm and ruptured his spleen. This led to David being advised to take things easier, and to discuss the succession to the Farm with legal and accountancy advisers. The advice involved bringing Andrew and Ross into the partnership (so that they each had a 40% share to their parents' 10% interests), transferring the land and buildings into the names of the parents as tenants in common in equal shares and granting a Farm Business Tenancy (excluding the farmhouse) to the partnership at a market rent. Later advice involved placing the land into a fourway partnership involving both sons and the parents.

22. No steps were taken at that time to implement that advice as David was concerned that his sons might encounter matrimonial difficulties which might result in a wife making an adverse claim upon the land.

23. During the period 2002 to 2005 Andrew served as Regional Vice Chairman for the South West England Area of the Express Milk Partnership (as the Northern Milk Partnership became), involving his (remunerated) attendance at six board meetings a year as well as attendance at shows and farming events.

24. Ross had started to work on the Farm in 2002. In addition to the work required by CQTC, Andrew directed his efforts to the livestock and Ross to field work. In February 2004 Ross and his girlfriend Sarah left for Australia, returning in 2005. Ross and Sarah moved into a flat on the top two floors of Tump Farmhouse and married about a year later.

25. Not long after Ross's return in 2005, Andrew bought him out of his share of COAC for £15,000. Andrew then carried on the COAC business (through the limited company) until around 2013 when increasing insurance costs and wear and tear on the quad bikes made it financially unviable.

26. In October 2006, Andrew was awarded a postgraduate diploma in Agricultural Business Management.

27. In 2007 the parents' partnership took the FBT of a neighbouring farm, Dayhouse Farm, and farming operations there were integrated with those on Tump Farm.

28. Until 1996 Andrew's wages kept track with the base rate set by the Agricultural Wages Board ("AWB"). Andrew's weekly wage had been £190 between February 2004 and April 2008. His annual earnings for his work on the Farm were: £9,100 in 2000 rising to £11,050 by 2008.

29. The DG Guest Partnership paid for certain of Andrew's living expenses. These and other "benefits" (including an entitlement to sick pay which he never called upon and the ability to "attend meetings for private business and farm business") were enumerated in a letter dated 26 March 2009 from Francis & Co, on behalf of David, which put the value of these further benefits at around £8,000-10,000 per annum. The letter also referred to the parents' understanding that COAC was then capable of producing a profit of £10,000-11,000 per annum. Andrew's position was that all these figures were exaggerated.

30. Andrew wrote to the AWB in October 2008 because of his concern that, despite having two children to support, his wages had not significantly increased since 1996. In a letter dated 7 November 2008, prepared for him by Francis & Co, David said that he was "*somewhat saddened that you wish to be regarded as an ordinary employee rather than a valued member of the family*". David said he had been unaware of the Agricultural Wages Order but would ensure that he adhered to the regulations. The other benefits received by Andrew were quantified at £306 per week and David suggested that, as "*it is not essential for your employment that you live on the farm*", there should be factored in a notional rent of £75 per week. A warning shot was also sent about COAC's use of farmland and the letter concluded by saying employment contracts would be prepared for all employees and that "*I do not require you to work more than 39 hours a week so that no overtime will accrue*."

31. The wages dispute was pursued to the Agricultural Wages Team within DEFRA. In the end, Andrew agreed to an additional £25 to be added to his pay per week backdated to 1 April 2008, a bonus of £1,800 and the receipt of £500 from shooting rights over the Farm.

32. On 17 February 2010, Andrew wrote to Mr Wildin (the partnership's accountant) saying that he had been reading about succession planning in a farming journal. The letter referred to the fact that David was then aged 69, that he had "*always assumed that I would take over the farm from my father, maybe in partnership with my brother*" but that he was unaware whether any arrangements were in place and, if they were, "*whether they are acceptable to all concerned*". He told Mr Wildin it was a difficult subject to discuss with his father, but wanted to be reassured that everything was in hand.

33. In 2011 each of the parents broke their hips, in separate incidents, and Andrew took on sole responsibility for milking the cows.

34. In 2012 the FBT of Dayhouse Farm came up for renewal. By that stage, for various reasons, it was clear that the idea of Andrew and Ross continuing to farm together was not a workable one. The renewal of the Dayhouse tenancy also carried with it the

new opportunity to rent the farmhouse, and not just the land, at Dayhouse Farm. It therefore meant that Ross, his wife and young children could move there from Tump Farmhouse.

35. For these reasons, in 2012 it was decided to split what by then had become the business of the DG Guest Partnership into two parts and into two new partnerships: the Ladysmith Farming Partnership between Andrew and the parents, running Tump Farm, and the Dayhouse Farming Partnership between Ross and the parents, running Dayhouse Farm. Each son was to be the principal farmer of "his" farm. The new partnerships were established on the basis that each son would have a 50% share of profits with the other half being split equally between the parents.

36. Prior to the partnership arrangements conceived in 2012 Andrew's understanding was that "… *we were building up the farm for my brother and I to inherit*". His father "*would not talk about the details but it was always his intention that his sons would follow him in the farm*". As to the 2012 partnerships, he did not think that his hard work and dedication to the Farm had been fully reflected in the arrangements put into place, but he was prepared to accept them as "*the way it was going to be*".

37. The judge accepted Andrew's case and evidence that a key term of the 2012 succession arrangements was that he and Ross would inherit Tump Farm and its assets (and also the farming assets used on Dayhouse Farm) in equal shares, it being his intention that he would buy out Ross's interest in Tump Farm. An express promise of equal inheritance was made at that time. Dayhouse farming assets would go to Ross, and Ladysmith farming assets would go to Andrew. The land at Tump Farm would then be split between the two brothers, between those farming businesses.

38. The Ladysmith Farming Partnership did not work out as had been envisaged because of a breakdown in relations between Andrew and David. The judge explained these disagreements in some detail at [75], but the details no longer matter. From Andrew's perspective the upshot of these disagreements was that he felt that he needed control of the business of Tump Farm if he was going to make it work. He emphasised that this meant control over business decisions rather than immediate ownership of the Farm and its assets. He said: "*The issue was control of the business in order to raise finance to invest in the business and make a success of it."* Andrew felt he needed such control and had expected it in circumstances where he understood the arrangements of 2012 were part of the succession planning that he had touched upon when concluding the wages issues in 2009 and reflected his father's desire to take a step back from the business. He thought that his parents' continuing interest in the Ladysmith Farming Partnership was as much about securing succession relief against Inheritance Tax as anything else.

39. The family relationships deteriorated. In the course of 2014 David, Josephine and Ross began to make secret recordings of conversations with Andrew. Andrew was unaware of the fact that these recordings were being made until they were produced very shortly before the date originally fixed for trial. The recordings demonstrate Andrew using phrases such as:

> *"if [Ross] is going to own half of the house that I live in that I paid then he should pay half isn't that fair?"*
>
> *"When we had the agreement it was that I was going to be able to borrow against my half of the farm."*
>
> *"Because you are going to be leaving the farm to each of us as you know. If you are going to have half the assets, we ought to share the bills equally. Now I don't see why, you know, you have to ply all the negatives on to me and then let Ross have a share of the farm equally."*

40. The judge found that these recordings supported the view that Andrew understood he would inherit half of the Farm, not least because it was notable that the statements by Andrew about the business being his to run, and the assumption that he and Ross were to come into equal ownership of Tump Farm, were not met with objection by his parents. Indeed, there was implicit concurrence. To the last observation David's response was:

> *"Because this business is the most profitable business you got the milk. You are the most profitable part of the business in the first place."*

41. In early 2014 David indicated that he would dissolve the Ladysmith Farming Partnership. By May 2014 a draft Notice of Dissolution of the Ladysmith partnership had been prepared on behalf of David and Josephine. On 21 May 2014, David and Josephine made new wills which operated to exclude any entitlement for Andrew beyond his right to occupy Granary Cottage for as long as he wished, subject to him meeting the outgoings.

42. At around that time David engaged the services of Mr Iwan Price, a business consultant, to attempt to sort out the disagreement with Andrew. The negotiations continued over some time but foundered on the rental payable for the land. Although David was prepared to discount the rent, it remained Andrew's view that this rent was unfairly high (particularly having regard to the rent that Ross was paying) and uneconomical.

43. The solar energy park came to be constructed on Tump Farm after planning permission for it was granted in May 2015. Before then, David's plans for such a park were publicised in the local press, in articles in the Chepstow Beacon and South Wales Argus in December 2014. In the latter, there was reference to the length of time that the Guest family had been farming at Tump Farm, and to the family's plans that Andrew's son Richard might, as the next generation, take the span to 100 years; and, in the former, David was pictured and quoted as saying: "*Lots of farmers are having to diversify these days and a solar park could help guarantee the future of our farm into the next generation after my sons retire.*" At that stage, there was still a prospect that David and Andrew might agree the terms of a FBT for Tump Farm.

44. Andrew's dialogue with Mr Pullin over the terms of any such tenancy continued after October and into 2015. By a letter dated 24 February 2015, Mr Pullin made a revised offer which excluded 35 acres that might be earmarked for the solar panels and any entitlement to subsidy under the Single Farm Payment Scheme. The proposed rental

figure was £28,500 for a 5-year term. The letter contemplated that there might be part payment through the transfer of calves to Dayhouse Farm. Andrew responded by saying the suggested terms were neither acceptable nor formed the basis for negotiation. He said it would not be possible to operate a dairy business on the proposed 115 acres that would produce a turnover large enough to carry the current level of staff. His letter to Mr Pullin of 3 March 2015 concluded with his looking forward to "receiving a more realistic proposal in due course". Mr Pullin reported back to David, by a letter dated 2 April, saying that Andrew appeared unwilling to discuss a rental until the partnership issues were resolved.

45. The Ladysmith Farming Partnership was dissolved on 14 April 2015. Andrew's solicitors, Clarke Willmott, wrote a letter of claim to Francis & Co on 20 June 2016

setting out Andrew's case based on proprietary estoppel. The letter of response was sent by Francis & Co on 15 September 2016. Andrew issued the present claim on 25 August 2017.

46. On 5 January 2018, David made his latest will and signed a letter of wishes which operated to remove Andrew entirely from its terms, so that his right to occupy Granary Cottage was removed.

Legal principles

47. The principles applicable to a claim in proprietary estoppel of this kind were recently summarised by Lewison LJ in *Davies v Davies* [2016] EWCA Civ 463 at [38]:

> "Inevitably any case based on proprietary estoppel is fact sensitive; but before I come to a discussion of the facts, let me set out a few legal propositions:
>
> i) 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 which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part: *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [57] and [101].
>
> ii) 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: *Thorner v Major* at [29].
>
> iii) However, 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, and whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood: *Gillett v*

Holt [2001] Ch 210 at 225; *Henry v Henry* [2010] UKPC 3; [2010] 1 All ER 988 at [37].

iv) Detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances: *Gillett v Holt* at 232; *Henry v Henry* at [38].

v) 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: *Gillett v Holt* at 232.

vi) Thus the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result: *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P & CR 8 at [56].

vii) 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: *Henry v Henry* at [51] and [53].

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].

ix) In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion: *Jennings v Rice* at [51]. However the discretion is not unfettered. It must be exercised on a principled basis, and does not entail what HH Judge Weekes QC memorably called a "portable palm tree": *Taylor v Dickens* [1998] 1 FLR 806 (a decision criticised for other reasons in *Gillett v Holt*)."

48. Lewison LJ went on to discuss, without finally resolving, what he described as the

"lively controversy" about the aim of the "broad judgmental discretion". Is it to give effect to the claimant's expectations unless it would be disproportionate to do so? Or is it to ensure that the claimant's reliance interest is protected, so that he or she is compensated for detriment suffered only? That controversy is much ventilated in academic writings of great scholarship, but the courts have shown a marked reluctance to answer a question posed in such stark terms. The courts have preferred to identify its aim or task as the fashioning of a remedy that is appropriate in all the circumstances of the case to satisfy the equity that has arisen, and so to avoid an unconscionable result.

49. In *Jennings v Rice* Mr Jennings had worked for many years on a part-time basis for a widow, Mrs Royle, at first for reward and later unpaid. Mr Jennings was initially Mrs Royle's gardener, but later took on more extensive caring responsibilities. The judge found that Mr Jennings expected, in return, to receive "all or part of Mrs Royle's property on her death". The judge awarded him £200,000, which was very much less than the value of Mrs Royle's estate, and was estimated by reference to the value of

full time nursing care for Mrs Royle. Mr Jennings appealed, arguing that the court ought, once an equity is established under the doctrine of proprietary estoppel, to make an award which satisfied the expectation.

50. Aldous LJ, who gave the first judgment, rejected the contention that the court should always satisfy the expectation. Having extensively reviewed the authorities, he said at [36]:

> "There is a clear line of authority from at least *Crabb* to the present day which establishes that once the elements of proprietary estoppel are established an equity arises. The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation [*semble* the remedy] and the detriment."

51. Robert Walker LJ expressly recognised the lively academic controversy about the aim of relief in proprietary estoppel cases: see [42]. At [44] he noted the wide range of variation in the main elements of the doctrine: that is, the quality of the assurances which give rise to the claimant's expectations and the extent of the claimant's detrimental reliance on those assurances. He went on to distinguish between those cases where "both the claimant's expectations and the element of detriment will have been defined with reasonable clarity", and those where "the claimant's expectations are uncertain" or "the court … is not satisfied that the high level of the claimant's expectations is fairly derived from his deceased patron's assurances, which may have justified only a lower level of expectation". In the former class of case the court was likely to vindicate the claimant's expectation, because there is something approaching a bargain and the claimant will have performed his side of it. In the latter class of case the court might still take the expectation as a starting point, but no more than that. At [50] to [52] he said:

"50. To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. 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 (see *Snell's Equity* 30th ed para 39-21 and the authorities mentioned in that paragraph). 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.

52. It would be unwise to attempt any comprehensive enumeration of the factors relevant to the exercise of the court's discretion, or to suggest any hierarchy of factors. In my view they include, but are not limited to, the factors mentioned in Dr Gardner's third hypothesis (misconduct of the claimant as in *J Willis & Sons v Willis* [1979] Ch 261 or particularly oppressive conduct on the part of the defendant, as in *Crabb v Arun District Council* or *Pascoe v Turner* [1979] 1 WLR 431). To these can safely be added the court's recognition that it cannot compel people who have fallen out to live peaceably together, so that there may be a need for a clean break; alterations in the benefactor's assets and circumstances, especially where the benefactor's assurances have been given, and the claimant's detriment has been suffered, over a long period of years; the likely effect of taxation; and (to a limited degree) the other claims (legal or moral) on the benefactor or his or her estate.

> No doubt there are many other factors which it may be right for the court to take into account in particular factual situations."

52. Lewison LJ suggested in *Davies*, that "a useful working hypothesis" was to apply "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 respectfully agree with this analysis, although I would not regard this list of scaling factors as more than important examples of the considerations which come into play.

53. Lewison LJ returned to the topic of proportionality in *Habberfield v Habberfield* [2019] EWCA Civ 890. At [68] to [69] he approved (subject to the appropriate degree of flexibility) the approach of the trial judge in that case (Birss J) which he summarised as:

> "Looking back from the moment when assurances are repudiated, the nearer the overall outcome comes to the expected reciprocal performance of requested acts in return for the assurance, the stronger will be the case for an award based on or approximating to the expectation interest created by the assurance. That does no more than to recognise party autonomy to decide for themselves what a proportionate award would be."

The judgment of HHJ Russen QC

54. The judge commenced the conclusory section of his judgment by explaining the nature of the relationship between Andrew and his parents, and in particular the relationship Andrew had with his father. Both were strong-willed characters. They had widely differing approaches, David's being traditional and cautious, Andrew's less risk averse. Through his training Andrew felt that it was necessary to make substantial capital commitments funded by borrowing. David's attitude to risk could be seen from his reluctance to advance succession arrangements for fear of some unforeseen marital strife involving either of his sons. David and his father had a communication problem. This accounted in large part for the breakdown of relations, but was also very significant when it came to assessing whether or not there was a "clear enough" assurance that Andrew would inherit the Farm or some interest in it. The judge no doubt had in mind his earlier discussion of *Thorner v Major* and *Gillett v Holt*. He said at [137]:

> "Looking at the matter "in the round", as the courts have been required to do since *Gillett v Holt*, whether or not an assurance is of sufficient clarity is to be judged objectively. This necessarily involves consideration of the context and reflection upon how the person to whom the assurance was made (the claimant) might have been expected to interpret it and act upon it: see the speeches [in *Thorner*] of Lord Rodger (at [26]), Lord Walker at [56]-[57]) and Lord Neuberger (at [80]). An

> objective assessment of the parties' position and the drawing of permissible inferences may mean that a proprietary estoppel claim is sustained by a statement or series of statements which to an outsider, lacking knowledge of the relationship between "representor" and "representee", could appear more Delphic than clear and unequivocal."

55. The judge then dealt with the first element that Andrew needed to establish, that of "representation/assurance". He first dealt with what he described as "Andrew's shifting expectations over time", by which he meant the fact that Andrew at one stage expected to inherit the whole Farm, but later came to recognise that he would share it with his much younger brother. He recognised that this *might* (his emphasis) be an indication that no assurance of sufficient clarity had been given. He concluded that, in principle, if an initial assurance subsists over a period of time and gives rise to substantial detriment, it is no answer to a claim based on proprietary estoppel if at some later stage the claimant's expectation is scaled down. He concluded at [241] to [242]:

> "I am satisfied on the evidence that, until the falling out in 2014, David consistently over time led Andrew to believe that he would succeed to the farming business, even though by the late nineties Andrew had been made aware that this would be alongside Ross. … David's statements were clear enough to amount to an assurance that Andrew would inherit a sufficient stake in Tump Farm as to enable him to carry on farming after his parents' deaths. Mr Jenkins referred, by reference to the facts of *Thorner v Major*, to "the private language" of the family and I accept that, taken together, the matters upon which Andrew relies support the conclusion that his expectation was built upon parental assurance rather than a misplaced assumption on his part."

56. The judge found at [245] that David's intentions could be seen from the terms of his 1981 will, and to the extent that these might be seen as inconsistent with Andrew's expectation, reconciled the two by reference to Andrew's cross examination where he answered: "*I think there is a difference between ownership and control here. I thought as the elder son I would be in control of it [the farm] but I've never expected my brother and sister to be left with nothing*" and "*I expected to take over the farm and run the business*".

57. The judge stated his conclusion at [260] to [262]:

> "260. In all the circumstances, on my assessment of the evidence, Andrew has proved that a clear enough assurance was made by his father, during conversations over a number of years and with the tacit support of his mother later made clear by her entry into the Ladysmith Farming Partnership, that he would inherit a substantial share of Tump Farm. Mr Adams' submission in his skeleton argument was that his clients "*did*

> *not know of Andrew's belief, if he had one*." The evidence shows otherwise.
>
> 261. However, Andrew's own evidence supports the conclusion that statements made to him by his father to the effect that "*one day this will all be yours*" were neither meant as or understood by Andrew to be an assurance that the ownership of Tump Farm would pass to him, exclusively, without any provision being made out of it for Ross or Jan. Although the assurances were specific enough in identifying the farm, and until the late 1990's Andrew alone was assumed within the family to be the successor to the business, the extent of Andrew's promised inheritance was left open. Nevertheless, it was to be a significant share in the farm, as is evident from the family's expectation (after 1997) that Andrew and Ross would farm side-by-side.
>
> 262. Accordingly, although I accept that David did not tell Andrew about the detail of his 1981 Will, I reject David's position that he never had cause to correct Andrew's (suggested) misunderstanding because he had no reason to believe that Andrew held it. In my judgment, David clearly encouraged Andrew to believe he would benefit substantially from Tump Farm. On the basis of what I have said in paragraph 143 above, that is sufficient for a potential estoppel to be raised."

58. Next the judge turned to consider reliance and detriment. He treated this in a straightforward, broad-brush way, not applying mathematical precision. He concluded that it was obvious that Andrew reasonably relied on David's assurance. This could be seen from the fact that Andrew worked hard on the Farm for many years for little financial reward, even taking into account the provision of accommodation at Granary Cottage and the payment of certain living expenses. He would not have done so if David had not encouraged the idea of an inheritance. There were limits, however, to the extent to which one could explore the counter-factual position premised on an assumption that Andrew had gone to work elsewhere. The judge expressed himself as satisfied that Andrew was "a hard-working, accomplished and forward-thinking farmer". His current position as a herdsman, starting afresh in his fifties, provided no real indication of what he could have achieved starting in his 20s, 30s and 40s.

59. The judge then turned to the issue of unconscionability. He addressed this by asking the question "whether it was unconscionable, or inequitable, for them to have done so in the circumstances prevailing by May 2014 when the parents made their new wills which (allowing for his right to reside in Granary Cottage, on terms) Andrew was cut out of his inheritance."

60. The judge warned himself that a conclusion of unconscionability did not automatically follow from his conclusion on assurance and detriment. A significant part of the cross-examination of Andrew had been taken up with the suggestion that the breakdown in relations was Andrew's fault. The judge rejected the suggestion that those matters had an adverse impact on the claim. The partnership came very late in the chronology, and the judge felt unable to say that Andrew's position was wrong. The same applied to the suggestion that Andrew should not have rejected the offer of a FBT at a discounted rent. This did not address Andrew's "proprietary expectation".

61. Against this background the judge came to the question of remedy. He had earlier directed himself on the law in the following terms, at [165]:

> "In my judgment, therefore, the court should approach the question of remedy by looking first at the claimant's expectation based upon the nature of the assurance made to him. Before contemplating the grant of a remedy which would satisfy that expectation it should first check that doing so would not produce one out of proper proportion to the value of the detriment suffered by the claimant. That is the eighth proposition in Davies. But identifying the true measure of "the equity" to be satisfied may not stop there. The ninth proposition refers to the principled exercise of "the broad judgmental discretion" and it is clear from what Robert Walker LJ said in *Jennings v Rice*, at [49], that satisfying the equity may well not involve satisfying the claimant's expectation for other reasons that might support the conclusion that, in the circumstances, it is too extravagant. Together with the fifth one, that last proposition encompasses the notion that the court must also do justice to the defendant. That may involve taking account of the defendant's continuing interest in the property (particularly when the claimant's expectation was to inherit only after his death) and the interests of others, aside from the claimant, whose occupation may derive from that interest or who may have their own claims or expectations in relation to it."

62. At [282] the judge described his task as either exercising the "broad judgmental discretion" (referred to by Robert Walker LJ in *Jennings v Rice*) "in an endeavour to do what is necessary to avoid an unconscionable result" or alternatively "to identify the minimum equity to do justice".

63. The judge rejected the suggestion that the equity was based on an assurance of a quasi-contractual nature because the promised extent of the Andrew's inheritance was too uncertain for that. Next, he reminded himself that the assurance was as to an inheritance after the second death of David and Josephine "who might expect to live for many years yet, in their home at Tump Farm". Even though Andrew expected to take on the farming business (and thought he effectively had in 2012) he did not expect to acquire any interest in the land and buildings before his father's death. The determination that the judge was required to perform had to be performed now, during

the parents' lifetime, but that involved an acceleration of his entitlement. Next, the judge concluded at [286]:

> "[T]he sad fact that Andrew and the other members of his family have fallen out badly means, in my judgment, that it is appropriate to identify relief which will achieve a clean break between them. The family is not functioning as it ought, so far as Andrew's place within it is concerned, and the secret recording of his conversations reveals the level of mistrust. It is not realistic to think that Andrew might continue farming at Tump Farm alongside his father or brother, taking up again with Tracey the home at Granary Cottage."

64. The need for a clean break meant that it seemed almost inevitable that the mitigation of tax which would occur if the Farm was passed on would not be achieved, as it would probably be necessary to sell the Farm. Although Andrew was not to blame for the failure of the succession arrangements, it was fair that he should take his share of the taxes (actual or notional) that were the price of satisfying the equity. At [288] he set out the terms of the order he was proposing to make:

> "288. In my judgment, the appropriate remedy to satisfy Andrew's equity is a lump sum payment to him which reflects the following components:
>
> i) 50% after tax (see paragraph (iii) below) of the market value of the dairy farming business identified in the Supplementary Report of Ms Dooley dated 25 October 2018 or 50% (after tax) of any actual value realised by, or apportioned to, the sale of that business in consequence of this judgment;
>
> ii) 40% after tax (see paragraph (iii) below) of the market value of the freehold land and buildings at Tump Farm identified in the Reports of Mr McLaughlin dated 8 August and 8 October
> 2018 or 40% (after tax) of any actual value realised by the sale
>
> of that property in consequence of this judgment. If the percentage share is determined by reference to the valuation then the tenure is as stated at paragraph 22 of the first Report save that Tump Farmhouse shall be treated as being subject to a "life interest" in favour of the parents and the survivor of them (on terms that they are responsible for its upkeep for so long as they live there) and Granary Cottage is to be valued on the basis of MR1 and not MV1 or MV2. In the event of the percentage being determined by reference to actual proceeds of sale, the parents shall first be credited with the notional value of the life interest. In the absence of agreement between the

> parties, that life interest shall be the subject of further independent valuation; and
>
> iii) the percentage share payable to Andrew shall be net of any taxes that either are payable by the parents in respect of their realisation of sale proceeds or would properly have been payable on a sale of the dairy business (per (i) above) and/or Tump Farm (per (ii) above)."

The appeal

65. David and Josephine have three surviving grounds of appeal, numbered 4-6:

i) Ground 4 is that the judge was wrong to hold that the appropriate approach to relief was to base the remedy on Andrew's subjective expectation. He ought to have gone no further when granting relief than was necessary to avoid an unconscionable result and/or considered what David and Josephine must, in the all the circumstances, be taken to have intended in order to avoid an unconscionable result.

ii) Ground 5 is that the relief granted went beyond what was necessary to avoid an unconscionable result, or, in so far as different, the minimum equity to do justice. Any "*current equity*" arising from the claimant's detrimental reliance upon such unequivocal promises as had in fact been made by David and Josephine, when viewed objectively and taken at their minimum, could be satisfied by a charge on the farming business or Tump Farm for: (i) a sum representing the extent to which the business had been enhanced by Andrew's contribution over and above what was required by his employment; and/or (ii) to compensate Andrew for the loss of opportunity to save money for the purchase of a house; and/or (iii) such other sum as the court judges necessary to avoid an unconscionable result.

iii) Ground 6 is that, insofar as any equity is "*anticipatory*", such that in the current circumstances it would be unconscionable for David and Josephine not to make provision for Andrew by way of inheritance, such equity can be satisfied by the making of a declaration or by the grant of injunctive relief, anticipating that the issue of whether or not to grant further relief and the extent of any such relief should be considered in the light of all the circumstances at the date of death.

66. Mr Jenkins takes a preliminary point that these grounds should not be open to David and Josephine as they fought the case before the judge exclusively on the question of whether an equity arose. They advanced no case at all before the judge on remedy and developed no submissions on this topic. This, of course, does not prevent this court interfering if the judge had nevertheless gone plainly wrong, but David and Josephine should not be allowed to advance new suggested bases for a remedy, such as those contemplated in grounds 5 and 6, when these had not been ventilated at the trial at all. By way of contrast, Andrew had set out his case on relief in his skeleton argument for trial and in opening the case before the judge.

67. Although there is obvious force in these submissions, I do not think it would be right for us to shut out these grounds of appeal altogether on the basis that the points were not argued below. The grounds raise questions of principle as to the correct way in which to fashion a remedy for the equity that has been established on the facts. Mr Jenkins did not suggest that he was in any way prejudiced in responding to the grounds on that basis. If the judge has not gone wrong in principle, however, Mr Adams faces the obvious difficulty that we have no way of knowing what the judge's assessment would have been of any other remedy which it is suggested would, on the facts, meet the justice of the case.

68. Basing himself on the decision in *Crabb v Arun District Council* [1976] 1 Ch 179, Mr Adams submitted that the judge had wrongly conflated two stages of the relevant enquiry. In that case, at page 192H, Scarman LJ said:

> "In such a case I think it is now settled law that the court, having analysed and assessed the conduct and relationship of the parties has to answer three questions. First, is there an equity established? Secondly, what is the extent of the equity if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?"

69. Mr Adams submits that the judge conflated the second and third steps in Scarman LJ's analysis. In particular, the judge did not ask himself the second question, namely what the extent of the equity was. That question, Mr Adams submitted, was to be answered by an objective bystander test which asks what arrangement the owner must be taken to have intended in order to avoid an unconscionable result. It was only at the third stage that the judicial discretion as to how to satisfy the equity arose.

70. Mr Adams continued that if the judge had asked himself what the extent of the equity was in the present case he ought to have noticed that there had been no clear promise or commitment to grant or pass on any particular interest in Tump Farm to Andrew. The bystander would not therefore expect David and Josephine to have intended an arrangement in which they were committed to passing on to Andrew any such interest. In such circumstances, the court will regard the extent of the equity as limited to undoing what has taken place. This might take the form of depriving the owner of the benefit that he has derived from the other party's reliance on such assurance as he has made, or awarding compensation for the detriment the other party has suffered. It was, however, wrong in principle for the judge to have started from Andrew's subjective expectation when it was not founded on any sufficiently definite promise.

71. I do not accept these submissions for a variety of reasons. In *Crabb*, the defendants had encouraged the plaintiff, their neighbour, to believe that the plaintiff would have access from his land onto the defendants' land to reach the highway though a particular access point on their common boundary. In reliance on that encouragement, the plaintiff then sold part of his land without reserving to himself an alternative route across that part to the highway. The defendants then fenced off the access point, leaving the plaintiff's retained land without any access at all. Lord

Denning MR, giving the first judgment, considered whether an equity arose, and then proceeded to ask "in what way now should the equity be satisfied". Under this head he considered that "equity is displayed at its most flexible", and decided that the equity should be satisfied by the grant of an easement, without payment. Lawton LJ approached the matter on the same basis. Neither judge adopted an intermediate stage of asking what the extent of the equity was. Lord Denning and Lawton LJ agreed that the court should declare that the plaintiff was entitled to an easement, without payment. Scarman LJ agreed that the appeal should be allowed but gave his own reasons. Having decided that an equity arose he went on to "the other two questions – the extent of the equity and the relief necessary to satisfy it". It appears from page 198 at G-H that he considered that the second question, the extent of the equity, was concerned with finding "the minimum equity to do justice to the plaintiff". This he held to be "an easement or a licence upon terms to be agreed". Under the third question, what was necessary to satisfy the equity, he considered whether it was necessary for the plaintiff to pay for the easement or licence. He held that in all the circumstances it was not necessary for there to be payment.

72. The difference in judicial approach in *Crabb* rather suggests that whether one approaches the matter in two stages or three is unlikely to be of significance, given the very broad and flexible discretion which it is common ground applies at the final stage. Indeed, it is far from clear to me on what basis the right to the easement or licence and the payment terms were assigned to their respective stages by Scarman LJ. One could instead have asked a single question: what is necessary to avoid an unconscionable result? The answer would be that provided by all members of the court, namely an assured, payment-free right of access across the defendants' land.

73. Mr Adams also drew our attention to *Griffiths and another v Williams* [1978] 2 EGLR 121 where Goff LJ (with whom Megaw and Orr LJJ agreed) cited and applied Scarman LJ's three stage test. That was a case in which the representation relied upon was that Mrs Williams should be entitled to live in a house rent-free for the rest of her life. So, Goff LJ posed and answered the second of Lord Scarman's questions as follows:

> "What is the equity? That must be an equity to have made good, so far as may fairly be done between the parties, the representation that Mrs Williams should be entitled to live rentfree for the rest of her life."

74. It is, again, difficult to see what is added by asking this intermediate question given the existence of the broad judgmental discretion at the final stage to award what is necessary to avoid an unconscionable result.

75. It is perhaps for reasons such as this that, in more recent cases dealing with proprietary estoppel based on assurances, the courts have asked, in a first stage, whether an equity arises, and then, in a second stage, how the equity is to be satisfied in order to do justice. There is no intermediate stage in which one seeks to define or quantify the precise extent of the equity which arises. In *Stack v Dowden* Lord Walker explained the nature of the claim in proprietary estoppel, in contrast to a claim to establish a common intention constructive trust, in this way at [37]:

> "Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the "true owner". The claim is a "mere equity". It is to be satisfied by the minimum award necessary to do justice (*Crabb v Arun District Council* [1976] 179, 198), which may sometimes lead to no more than a monetary award. A "common intention" constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests."

76. In my judgement, the judge in the present case did not go wrong in principle by approaching the matter in two stages rather than three. His self-direction at [165], which I have quoted above, shows that he was seeking to identify "the true measure of "the equity" to be satisfied", by the application of proportionality, and scaling down by reference to a variety of factors.

77. I take next the suggested objective bystander test. Mr Adams submits that the extent of the remedy is what an objective bystander would say is the arrangement that the owner must be taken to have intended in order to avoid an unconscionable result. I think this injects an unnecessary layer of complication into the established approach. The objective of the remedy is certainly to avoid a result which is unconscionable. An unconscionable result would normally appear to be so to an objective bystander, at least if he or she is a reasonable one. To that extent, the courts have sometimes used a normative legal fiction in order to determine what is and what is not unconscionable (see e.g. *Uglow v Uglow* [2004] EWCA Civ 987 at [30] per Mummery LJ). The bystander, however, takes into account all the circumstances, including the expectations of and detriment to the claimant. He does not look at the matter solely through the eyes of the owner. Mr Adams' test, which asks what the bystander would have thought the owner to have intended to avoid an unconscionable result risks skewing the exercise in a manner not supported by authority.

78. I also reject Mr Adams' submission that, had the judge adopted his proposed tests, he would have been bound to relegate Andrew to a remedy based on the increased value of the Farm, and should not have fashioned a remedy based on Andrew's expectation interest. That was essentially because no clear enough assurance had been given to Andrew. The objective bystander would not therefore have thought it unconscionable if David and Josephine had, by way of example, sold the Farm and gone on a world cruise and spending spree, and left whatever remained of the estate to the children in equal shares. If that was so, the minimum award necessary to do justice fell well short of what the judge had awarded here.

79. The difficulty with this submission is that it cuts right across the judge's findings in relation to the components of the proprietary estoppel. The judge found that a sufficiently clear assurance had been given to Andrew that he would inherit a sufficient interest in Tump Farm to enable him to farm there. That assurance had been intended to be, and was, acted upon. As a result, Andrew had given up the possibility of being able to pursue a successful career elsewhere. The assurances had been relied upon, in one form or another, for over 30 years, the best years of Andrew's life. Andrew had received little financial return. Finally, the judge held

that, by repudiating that assurance and effectively disinheriting Andrew, David and Josephine had acted unconscionably. In those circumstances I am unable to accept the premise of Mr Adams' argument, that to sell the Farm and dissipate the assets is something that the objective bystander would not regard as unconscionable. If it was unconscionable to repudiate the promise, it would equally be so to place oneself in the position where the promise becomes impossible to perform.

80. It is nevertheless relevant to ask whether the alternative remedies proposed by David and Josephine are adequate to avoid an unconscionable result. I take first the suggestion that Andrew should be compensated by a sum representing the extent to which the value of the Farm has increased as a result of Andrew's contribution. Mr Adams submitted that this would be a fair way of compensating Andrew, given that his "real complaint" was that his efforts on the Farm had not been properly appreciated or rewarded.

81. I do not think that a remedy fashioned in this way would avoid an unconscionable result in this case, as it leaves out of account altogether what Andrew has lost as a result of the unconscionable failure to honour the assurances he was given, and in at least two respects. First, it pays no regard to the nature of the assurance which he was given. This was not that his efforts and dedication would be generously rewarded in the event that they bore fruit, by reference to any increase in the value of the land. Rather it was that he would inherit a sufficient interest in the Farm to enable him to farm himself. The remedy must be fashioned paying proper regard to the nature of the assurances given. Secondly, the proposed remedy focuses attention entirely on what David and Josephine have gained as a result of promising something to Andrew which they did not subsequently deliver. That seems to me to be a remedy which is completely out of kilter with the nature of the cause of action. The remedy proposed would be more appropriate to an action in unjust enrichment, which this is not. Quite apart from these objections, the proposed remedy would require a factual enquiry which was not undertaken at the trial (because it had not been suggested). There is no way for us to know what the proposed method of calculating compensation would be or what it would yield. In those circumstances it is not possible to decide whether it would avoid an unconscionable result.

82. Similarly, I would reject an approach to compensation based on Andrew's loss of opportunity to work elsewhere. The loss or detriment suffered by a claimant who is persuaded to take a poorly remunerated position on the strength of a promise of some interest in land is not limited to the quantifiable difference in wages. There is a large but unquantifiable element attributable to loss of opportunity which will, in many cases, make it just to award sums far greater than any sum based on the wage differential. In a case where the claimant has largely performed his side of the bargain, it is fair to take what the claimant was promised as a rough proxy for what he has lost. The judge was certainly entitled to take the view that this was such a case.

83. Mr Adams recognised that his submissions were not consistent with the approach of Robert Walker LJ in *Jennings v Rice*, where he held that the claimant's expectation remained relevant to be taken into account even in cases where the relevant assurances were not clear. He submitted that these passages now had to be read in the

light of the speech of Lord Neuberger in *Thorner v Major* at [84] to [86]. In that case the principal issue was whether the assurances were sufficiently clear to give rise to an estoppel at all. At [86], however, Lord Neuberger said:

> "… 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."

84. I do not accept that this passage is inconsistent with the approach of Robert Walker LJ in *Jennings*. That approach expressly contemplates the scaling down of the award based on the clarity of the assurances. In a case where an assurance was reasonably capable of being understood in a number of ways, some more restricted than others, the appropriate course may well be to base the award on the more restricted meaning.

85. In the present case, although the assurances were given in broad, descriptive terms, there was no uncertainty of a kind which would assist David and Josephine on this appeal. Their case is not that the judge has overestimated what was a sufficient share in the Farm and its assets to enable Andrew to farm on his own account, and that a lesser proportion would do. Rather their case is that the nature of the assurances was so uncertain that a bystander would not regard it as unconscionable if the parents were simply to give Andrew the increase in value of the land, or compensate him for his detriment. I have already explained why I do not consider that these solutions avoid an unconscionable result on the facts as found by the judge.

86. I do not think the judge fell into any error in the present case in any of the ways suggested in fashioning a remedy giving important weight to Andrew's expectation. The judge was able to reach a finding that a clear enough assurance had been made, and that it had been relied upon by Andrew to his detriment. When he came to remedy, he directed himself by reference to the authorities I have mentioned. Whilst it was not a case where the parties had made a quasi-contractual arrangement at the outset, it was a case where, looking back from the moment when the assurance was repudiated, the overall outcome came close to the expected reciprocal performance of the acts requested in return for the assurance. The judge was therefore entitled to take Andrew's expectation as a strong factor in deciding how to satisfy the equity. He was not bound to abandon expectation in favour of some more limited form of remedy.

87. Mr Adams also submitted that the judge ought not to have accelerated Andrew's expectation, because it was only ever an expectation that he would inherit upon the deaths of David and Josephine. Any "current equity" could be satisfied by a declaration, and any "anticipatory equity" should be dealt with at the time of such deaths.

88. I am not able to accept these submissions either. First, while such a course is no doubt a possibility, Mr Adams did not submit that it is not open in principle for a judge to accelerate the claimant's entitlement in a proprietary estoppel case based on assurance of inheritance. It is therefore necessary for him to show that the judge exceeded the wide bounds of his discretion by adopting the course of settling Andrew's entitlement now. Secondly, the judge had to balance a number of factors in deciding what course to take. This was a case where there was no prospect of the parties continuing to work and live together in close proximity. Deferral would perpetuate the situation in which Andrew was required to take up salaried employment away from the Farm, for an indefinite period. Andrew had expected to take over running the Farm on his father's retirement, yet did not expect to inherit anything until his parents' deaths. An immediate sale would prejudice David and Josephine in some ways, although it would release capital to fund their retirements. That was the background against which the judge decided to accelerate Andrew's entitlement, whilst at the same time making allowance for a life interest in the farmhouse for the parents and mitigating the tax impact of paying Andrew's entitlement now. I am unable to accept that in those circumstances the judge exceeded the bounds of his discretion.

89. Mr Adams also submitted that the overall outcome of the case, with the near inevitability of a sale of the Farm, was an inappropriate result as it was something which David and Josephine could never themselves have contemplated. Their consistent wish, through the 1981 wills and the 2012 partnership arrangements was that Andrew and Ross would continue to farm Tump Farm. I do not accept this. First, the submission is based, at least to some extent, on the earlier contention that the award necessary to avoid an unconscionable result is to be arrived at by enquiring what the owners must have intended. I have rejected that contention. Secondly, if decisive weight is given to the fact that farmers would not wish to sell a farm, a cleanbreak solution would hardly ever be possible. Yet it is clear from the cases (e.g. *Jennings v Rice* at [52]) that a clean-break solution is indeed possible, and has been found necessary in a number of farm cases (e.g. *Moore v Moore* [2018] EWCA Civ. 2669). The judge did not go wrong in principle by devising a clean break solution in the present case. He was well aware that the need for a sale was a sad consequence of the breakdown in relations, and was part of what was, in all the circumstances, necessary to avoid an unconscionable result.

90. Finally, Mr Adams sought to persuade us that the judge had been wrong not to limit Andrew's relief to the grant of a FBT. He took us to some of the documents relating to the FBT offered to Andrew, demonstrating that the FBT was offered at a discount to commercial rates. In my judgment a FBT came nowhere near satisfying the equity in the present case. There is no reason whatever to believe that Andrew would have remained on the Farm, or dedicated his life to it if, instead of giving the assurances which he did, David had merely promised Andrew that he would one day become a tenant farmer at a discounted rent. Insofar as the point relates to Andrew's conduct, in that he ought reasonably to have accepted the FBT that he was offered, that contention is hopeless. As Arnold LJ pointed out in the course of argument, the FBT offered was for a fixed term, and with no guarantee of renewal. Against the background of the assurances that he had been given, he was right not to accept it.

91. For the reasons I have given, I would dismiss this appeal.

Lord Justice Newey:

92. I agree.

Lord Justice Arnold:

93. I also agree.