Neutral Citation Number: [2008] EWCA Civ 732

Case No: A3 2007/2767

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JOHN RANDALL QC SITTING AS A DEPUTY HIGH COURT JUDGE

[2007] EWHC 2422 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

2 July 2008

B e f o r e :

LORD JUSTICE WARD
LORD JUSTICE LLOYD
and
LORD JUSTICE RIMER

Between:

DAVID THORNER	**Claimant Respondent**
- and -	
(1) ENA JOYCE MAJOR **(2) WINIFRED CURTIS** **(3) LESLEY DAWN HEUSEN**	**Defendants Appellants**

Miss Penelope Reed (instructed by Gould & Swayne) for the Appellants
John McDonnell QC and Michael Jefferis
(instructed by Stephen Gisby & Co) for the Respondent
Hearing dates: 21 May 2008

Lord Justice Lloyd:

Introduction

1. These proceedings would not have been necessary but for the decision of the late Mr Jesse Peter Thorner (always known as Peter) to revoke the will which he had made in 1997, and his failure to make another will. Under that will David Thorner, the Claimant, whom I will call David, would have inherited the residue of Peter's estate, subject to some legacies, and thereby would have acquired Steart Farm, Cheddar, which Peter had farmed with a great deal of unpaid help from David over the best part of 30 years. Peter's revocation of his will is not fully explained, but it seems to have been motivated by his desire to exclude from benefit one of the legatees. As it is, Peter died intestate, and his next-of-kin were his siblings, and their issue by substitution, of

whom the Defendants and Appellants are three (two sisters and a niece), being his personal representatives under a grant of letters of administration.

2. David claims that, Peter having died intestate, his estate is bound by conscience, as Peter was during his life, to give him Steart Farm, and he asserts a claim to that by way of proprietary estoppel. The claim came to trial before Mr John Randall Q.C. sitting as a judge of the Chancery Division in Bristol, who held that he was so entitled: [2007] EWHC 2422 (Ch). The Defendants challenge that conclusion by this appeal.

3. The judge was satisfied that Peter intended David to have Steart Farm, notwithstanding the revocation of his will, but intention, though necessary, is not sufficient by itself to create a will, and David can only succeed if he can prove a proprietary estoppel, which is independent of Peter's ultimate intentions.

The facts

4. David's father was Jimmy Thorner, who was a first cousin of Peter. They were both farmers in Somerset. Jimmy had four children, all sons, of whom David was the second, whereas Peter had no children. Peter, who was born in 1927, married Sarah Evans, who inherited Steart Farm from her parents. She died in 1976. Peter was devastated by her loss. He engaged a housekeeper after her death, Veronica, whom he married in 1978. This marriage was not happy; they separated within 18 months, and were divorced in 1986.

5. Peter kept dairy and beef cattle, as well as sheep, and cared for the cattle above all. His agent Mr Hares said Peter had never taken a holiday in the last 30 years of his life. He suffered a ruptured hernia twice, first in the early 1980's and then again in the early 1990's. This prevented him from carrying out heavy physical work on the farm, and increased his need for help, though it did not affect his strong and proud personality. While not always easy to get on with, he was a popular member of the farming community, well-regarded for his skills in relation to livestock, and he was supported by unpaid help on the farm from a number of people, including above all David. In the course of describing Peter on the basis of the evidence he had heard, the judge said this at paragraphs 31 and 32:

"31. Peter was described in evidence as "a man of few words". There are perhaps two relevant aspects to that. First, Peter was a relatively private man who generally kept his thoughts about his business and financial affairs to himself. Second, he had literacy problems, not finding reading easy, and finding writing particularly difficult. He never took to paperwork, and regarded the increasing amount required as an unwelcome imposition, although that may well have been as much a generational matter as a reflection of his literacy problems. There is however also some evidence that once 'cattle passports', movement records and the like became mandatory, he was concerned that the paperwork from his farm should be right. I detect no necessary inconsistency between these various features of the evidence.

32. There is evidence from a number of witnesses (including David, Richard Adams and Graham Livings), which I accept, that Peter was not given to direct talking. The simplest example (though it went a good deal further than this) is that when Peter said "What are you doing tomorrow?" he generally meant "Would you come and help me tomorrow?" Indeed Mr Selby, a long serving police officer in the Avon & Somerset Constabulary, observed that lack of directness in conversation is a common feature he has encountered more generally when speaking to farmers in the area. I will not speculate as to whether it is confined to farmers in this area of Somerset. In assessing whether there is any significance to be attached to the somewhat indirect manner in

which a number of Peter's statements now relied by David on were expressed or communicated, this is a factor to borne in mind."

6. Peter was not particularly close to his siblings, but there were family loyalties, shown in particular when Jimmy and David stepped in to help after Sarah's death in 1976.

7. Steart Farm is on the edge of the village of Cheddar. In 1976 it comprised about 350 acres. Peter acquired some more land later, between 1987 and 1992. In 1987 he had 187 cattle and 45 sheep, but in 1988 he sold his dairy herd, leased out his milk quota and concentrated thereafter on beef and sheep. In 1992 he farmed 583 acres, some of it rented, and had 285 cattle and 164 sheep. By the end of 1998 he sold his sheep, and after that farmed only about 160 acres himself, primarily for beef and grass. In 1999 he granted some 3 year farm business tenancies of part of the land. In 2004 he further reduced his stock, from almost 250 head down to just less than 100. In 2005 he moved from the traditional farmhouse to a newly converted adjacent barn, and lived there until his death in November 2005.

8. David was born in 1949, left school at 15 and joined his father on the family farm, between Wells and Glastonbury. In 1976 when Sarah Thorner died, Jimmy and David went over to help Peter. That was the start of David's help at Steart Farm, which continued so that, by the time in the later 1970's when Peter's second marriage was failing, David used to go over to help on his own, though sometimes his father came as well. He found Peter's paperwork in a considerable mess, to the extent that cheques had been received but not paid in, and available grants not pursued. The judge described the general nature and extent of the help that David gave in paragraphs 62 and 64 of his judgment:

"62. David undertook a wide range of work for Peter on Steart Farm, including helping with the animals, mending fences and gates, taking cattle to and from market (preparation for the former, including the paperwork, would take up much of the previous day – Sunday before Monday market), working on the farm buildings, vehicles and equipment, bringing in the hay. He also undertook a great deal of Steart Farm's paperwork and administration. This included writing out cheques for signature and dealing with the completion of grant applications, the special payment scheme, the Rural Payments Agency, rights of way issues, cattle identification reports, cattle movement books, and cattle passports. It may well be that a Mr Richard Binning (as to whose qualities witnesses' views varied widely) also gave Peter some assistance with regard to some aspects of paperwork and administration, but I am quite satisfied that David made the principal contribution. Peter and David together made plans for both BSE (in the early 1990s) and then later Foot & Mouth Disease, although in the event Steart Farm was spared both. Calving took place over most of the year, due to Peter's particular methods. When David was helping with calving, sleep could easily be no more than an hour's dozing at a time in the seat of a Land Rover.

…

64. By 1985, shortly before his parents moved [in 1986, on his father's retirement from farming], David was working 18 hours a day, 7 days per week, split between his father's farm and Peter's farm, the latter taking up more than half of his total time. He had very little by way of any social life, but was a remarkably hard worker, as several witnesses observed. This continued to be the pattern after David had moved to Barton House with his parents. There is clear evidence, supporting David's own, that he continued to work very long hours after the move, splitting his time between the 'homestead' at Barton House and Steart Farm, from Fred Cremin and Simon Selby. Both were genuinely concerned for David's own health. If the former rang him, he was

hardly ever at home, and would often ring back at midnight, saying that he had just got in. There were very few days when David did not go to Steart Farm at least once."

9. Peter's land agent, Mr Hares, gave evidence that Peter always wanted to discuss any proposed transaction with Jimmy and David before taking a decision. He confirmed that David had given Peter a huge amount of help over 30 years, and had been essential to the running of the farm, to the extent that, had he not done it, the farm would have ceased to trade profitably. David was a vital part of the management team, along with Peter's professional advisers, and dealt with all the administration on the farm as well as much of the physical work.

10. Peter never paid David anything for any of the work that he did at the farm over almost 30 years. David lived with his parents until they died (his mother in 1992 and his father just before Peter, in 2005), and lived off pocket money given to him by his parents. He did have a number of opportunities to develop a different career, one in particular (prompted by his interest in horses) being the development of a technique for treating soft tissue injuries to horses' legs, which he might have pursued in the late 1980's, but which would have involved moving away from Somerset, and from his parents and also from Peter. He was also invited by a Mr Cremin to work for him which would also have required him to move. There is no evidence that Peter was aware of any of these alternative opportunities which may have been open to David but which he did not pursue.

11. Peter had the help of several others at Steart Farm as well as that of David. He had one full time employee, Colin Wall, from 1974 to 1998. Roger Durston worked part time for a while in the early 1970's and was paid for that work. After that he helped out at various times, which he regarded as helping out a mate, and for which he got help in return by way of, for example, the loan of farm equipment. Richard Adams helped as a boy, and was given something in return from time to time, and helped also as an adult, for which he was paid. James Selway (known as Sam) started working at Steart Farm as a full time employee under the Youth Opportunities Scheme. Later he took employment elsewhere locally, but helped out over weekends and as holiday cover, until 1998. It is not clear what, if anything, he was paid after the end of the YOS employment. Martin Taylor started to help out at 14 as a relief milker, and continued until the dairy herd was sold in 1988; he was supposed to be paid per session, but he said he was only rarely paid in fact. Brian Young helped with haymaking from the late 1970's, did quite a lot of work at the farm in about 1982, when he was between other jobs, and after that helped out at evenings and weekends, and as a mechanic when called upon; he was not paid properly, but got loans of a Land Rover or a tractor or the like from time to time.

12. Richard Adams gave evidence, describing among other things Peter's attitude to his various helpers. The judge dealt with this at paragraph 82:

"Richard Adams observed that whilst both of them, and others too, helped Peter at this difficult time, Peter's attitude to David was somewhat different to his attitude to all the others – David "was family". David was the only one to whom Peter turned for help with the paperwork, and David was the only one who knew how Steart Farm was doing financially. Richard Adams observed that (in contrast to the others, like himself, who worked there) Peter considered himself *entitled* to David's help, and *expected* David to do whatever he asked. Peter was more demanding of David than of anyone else. The witness Graham Livings made a similar point another way, when he observed that David, whom he described as an extraordinary, indefatigable personality of the utmost integrity, was "*at Peter's beck and call*". The witness Andrew Barratt, speaking of a later period (1998 onwards) said the same."

13. In 1984-5 Peter's divorce from Veronica reached a bitter stage, in relation to ancillary relief. At one stage Peter considered granting a protected tenancy of Steart Farm at well below an open market rent, in order to depreciate the apparent value of the asset. He did not proceed with it, though solicitors prepared a draft tenancy agreement. Peter found this period very stressful, and suffered psychiatric problems, for which he spent some time as an in-patient. David visited him at Steart Farm, sometimes with his father but more often on his own, bringing him an evening meal at least every other evening, staying for several hours on each occasion.

14. The judge said, at paragraph 86:

> "During the 1980s David came to hope that he might inherit Steart Farm. As he put it in evidence, from 1985 Peter "made various noises that made me think that I might well inherit, but nothing very definite." Significantly, the evidence of Richard Adams, who saw quite a lot of Peter in the first half of the 1980s, is that "by the mid 80's I had no doubt that Peter intended David to have the farm. I cannot point to any specific statements from that period, it was more a question of the nature of their relationship."

15. By then, Peter was separated from his second wife, and in the process of divorce, he had no children, he did not have particularly close links with his siblings, the farm was his primary, if not sole, interest, and David was not only his principal helper in relation to the farm, but was the only family member (apart from his father Jimmy) who had anything to do with the farm. It must have been a fairly obvious possibility that, if and when Peter decided to make a will, he would choose David as the appropriate person to be given the farm.

16. The first, and the most important, event on which David's claim is based occurred in 1990. The judge described and discussed it at paragraph 94, as follows:

> "One day in 1990, when Peter was still only in his early sixties, he handed David a Prudential Bonus Notice, relating to 2 policies on Peter's life which appear then to have had a value of about £20,000 between them, and said "that's for my death duties". David duly retained the document, the original of which was disclosed to the defendants' former solicitors, and (after it was eventually retrieved from a file, during the course of the trial) a copy of which is now exhibited. One can only speculate as to whether the timing was coincidental, or whether Peter had heard from a mutual contact that David was considering other career avenues at about that time, and felt that he should say something to encourage David to continue helping him at Steart Farm (David makes an observation to similar effect in his witness statement). This simple action and short accompanying comment by Peter marked something of a watershed, in that it was the first direct reference made by Peter to David with regard to matters concerning his estate and passing, and marked the point at which David's hope of inheriting (born of the various hints referred to in para (86) above) became an expectation. Given the clear picture which has emerged from the evidence of Peter as a man of few words, who generally maintained his privacy about his personal financial affairs (even David only learned after his death of the extent of his monetary resources), and who hardly ever spoke in direct terms, I am satisfied that in making such a remark, and handing such a document to David to keep, Peter was intending to indicate to David that he would be Peter's successor to Steart Farm, upon his death, and that David's understanding to that effect was correct. I find that this remark and conduct on Peter's part strongly encouraged David, or was a powerful factor in causing David, to decide to stay at Barton House and continue his very considerable unpaid help to Peter at Steart Farm, rather than to move away to pursue one of the other opportunities which were then available to him, and which he had been mulling over. I reject the suggestion that David would definitely have stayed in any event, with or

without Peter's said remark and conduct, in order to look after first his mother and then his father. Had David left Barton House between January 1987 and August 1991, Kevin and his family would have stayed there. Kevin had the opportunity to go back into the financial services industry in that region, rather than Devon, had he wished to do so. The company he went to work for in 1991 had an office in Taunton as well as Exeter. Both their other brothers lived within an hour of Barton House, and would have offered back-up as necessary. They are a close-knit family."

17. As I see it, this appeal turns on whether Peter's act in handing over the Bonus Notice is sufficient to amount to a promise, representation or assurance which can be the basis of a proprietary estoppel claim. Before that time, David hoped that he would inherit the farm, but he could not (and does not) say that he had any expectation that he would, nor any right to expect it. From that time, he says that he did have that expectation, as a result of Peter's act and comment. The appeal challenges the conclusion that so neutral and oblique a remark could amount to a representation or assurance sufficient to found David's claim that Peter's conscience was thereafter affected so that he was bound to leave the farm to David.

18. We saw the bonus notice, as the judge did. It is addressed to Peter and refers to "policies on the life of" Peter, giving two policy numbers. Each had a sum assured of £1,000, with a record of previous bonus additions, and a bonus addition for 1989. The total including terminal bonus was also stated, which, between the two policies, amounted to just under £20,000. One of the incidental puzzles in the case is that, on Peter's death, the Prudential could find no record of either policy.

19. The judge referred to later incidents which he considered amounted to Peter reinforcing the expectation which he had encouraged in 1990. At paragraph 98 he said:

"From time to time, Peter made remarks to David in conversation which, though not saying so directly, carried with them the implication that David was to have continuing long-term involvement with Steart Farm. Peter would point out to him little things about the farm which would only be of relevance to someone with such an involvement (as they were of no immediate relevance at the time they were made), and which it was only necessary to communicate to someone who would be there after Peter had gone, and the undocumented knowledge in his head was no longer available. …"

20. Examples of these remarks were pointing out a cattle trough with the comment that it never froze in winter, telling David "not to touch" a farm building which had been put up by Sarah Thorner's father, when there was no plan or discussion which might have meant altering it, and four comments about matters of farm management or assets, as well as the comment "you look after the farm and it will look after you", and telling David in 1999 that he had granted business tenancies over parts of the farm in order to reduce inheritance tax on his estate. In 2002 Peter told David that "we" wanted all his deeds in one place (whereas some had been held by one firm of solicitors, and others by another) and that it would be better for him (i.e. for David). The judge said of this comment, at paragraph 114:

"I am satisfied that this was said and done by Peter, and understood by David to have been said and done, in the context of the unspoken mutual understanding which by then existed between them that David was to inherit Steart Farm and/or Peter's estate, and had the intended effect of encouraging that understanding on David's part. … This is another example of a conversation between them which proceeded on the implicit but unspoken premiss that David was to inherit Steart Farm and/or Peter's entire estate."

21. The judge also found that Peter said things to other people which indicated that he expected David to have the farm after his death. These may corroborate the findings as to what he said to David directly, but as I see it they are not themselves relevant to David's claim, there being no suggestion that they were said in order to be passed on to David.

22. In 1997 Peter made the will which I mentioned, giving a number of pecuniary legacies, including one of £50,000 to Sam Selway, and the residue, which would have included the farm, to David. He appointed David as his executor, but did not tell David about the will. In 1998, however, he fell out with Sam Selway, for reasons which do not matter, and he obtained his original will from his solicitors and revoked it by destruction. Despite his referring to an intention to make another will in future, and the solicitors pointing out the consequences of intestacy and suggesting that he make a new will, he did not do so. The judge rejected any idea that there had been a falling out between Peter and David at that stage, and held that the cause of the revocation was that he wished to revoke his generous legacy to Sam Selway. He said at paragraph 105:

> "I infer that Peter either forgot the warning that a new will needed to be made, never properly read the letter which contained it, or never got round to acting on it. The (inferred) destruction, and the non-replacement, of the 1997 will does not cause me to doubt the existence of a continuing shared assumption between Peter and David that the latter would inherit Steart Farm on the death of the former."

The judge's decision

23. The judge described David's state of mind as proceeding from hope, between 1985 and 1990, to expectation following the incident in 1990, to an unspoken mutual understanding by 1999. The judge was unsure whether the expectation related to Peter's entire estate or only to the farm, and he found it unnecessary to decide that point.

24. He held that what Peter said and did in 1990 did amount to an assurance to David that he would inherit, and that this was encouraged by manifestations of the mutual understanding, including explaining his reasons for granting the tenancies in 1999, the comment about the deeds in 2002, and the other minor comments about the farm, most of which I have referred to above. The judge also said that Peter did in fact intend that David should inherit the farm (though it is plain that he was not to have the entire estate) because that was the effect of the will which he made in 1997, and was supported by evidence of consistent comments to others.

25. In turn, the judge held that the event in 1990 contributed significantly to David's decision to stay where he was, and to continue his very considerable unpaid help to Peter, rather than to move away and pursue one of the other opportunities that were open to him. The judge regarded the unpaid help given before 1990 as relevant by way of background, and his later unpaid work, which was far in excess of that done by anyone else, as being sufficient by way of detrimental reliance on David's part on the assurance given by Peter in 1990.

26. Looking at the matter in the round, he held that Peter's words and conduct gave rise to an estoppel in David's favour, being sufficient to affect Peter's conscience, David having from 1990 held, and reasonably so, the expectation that he would inherit at least the farm; he passed up other attractive opportunities and continued to devote an extraordinary amount of time and effort into both Steart Farm and looking after Peter himself for the following 15 years, without any remuneration.

27. He then decided that the appropriate way to satisfy the equity was to give David the farm land and other agricultural assets, including some £24,000 in the farm business account, but not any other part of the estate, and on the basis that the farm would bear the appropriate proportion referable to it of the overall inheritance tax, with the benefit of its share of the nil rate band. (Part of that decision was made after further argument following the handing down of the principal judgment.) We were told that the effect of that, in broad terms, would be that David would inherit assets with a net value of some £2.1 million, and that there would be about £730,000 net to be distributed among those entitled on intestacy.

The appeal

28. The appeal, brought with permission granted by Mummery LJ, is based on four grounds:

i) The judge was wrong to find that a proprietary estoppel case in relation to property to be left by will can be based on conduct or standing by, or anything less than a clear promise or assurance that the claimant will inherit;

ii) The judge was wrong to hold that the event in 1990 was sufficient to affect the conscience of the deceased and to found an estoppel;

iii) The judge placed undue weight on the expectation and detriment on the part of the Claimant rather than having regard to the nature and quality of the assurances or conduct which gave rise to that expectation;

iv) The judge's award did not correctly satisfy the estoppel because it gave the Claimant more than the minimum necessary for the purpose; the award of the whole farm was disproportionate in the light of the fact that the Claimant had not farmed the land, but had only helped the deceased to do so.

Proprietary estoppel claims to inheritance

29. Mr MacDonnell Q.C., for the Respondent, identified as the clearest support for his submissions the observations of Lord Kingsdown (dissenting) in the decision of the House of Lords in *Ramsden v Dyson* (1865) LR 1 HL 129, at 170-1.

"The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* 18 Ves. 328, and, as I conceive, is open to no doubt."

30. That statement is part of the source of the principles of proprietary estoppel as they have been developed over the years. It is a long way from the present type of case, but Mr MacDonnell relies on it in support of the judge's decision. He submitted that David had an expectation that he would have a certain interest in land, namely that he would inherit Steart Farm on Peter's death, and that this expectation was created or encouraged by Peter. For the other ingredients of the estoppel he relied on later and wider statements of the principle, above all that of Oliver J in *Taylors Fashions v Liverpool Victoria Trustee Co* [1982] QB 133. Although the present facts are different

from the sort of facts which were being considered in *Ramsden v Dyson* or *Taylors Fashions*, he submitted that they were not altogether different in kind. In the latter case, at p.151-2, Oliver J said this:

"Furthermore the more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson*, LR 1 HL 129 principle – whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial – requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

31. It is only in the last 20 years or so that proprietary estoppel has been used as the basis for a claim to the effect that a landowner is obliged to leave property to another person on his death. The principle would have provided an altogether different outcome to *Maddison v Alderson* (1883) 8 App Cas 467, but at that time no-one had thought of applying Lord Kingsdown's observations to such a situation, so as to dispense with the need to prove a contract.

32. In 1971 conduct very similar to that relevant in some of the cases that have since been presented by way of proprietary estoppel had to be considered by the Privy Council in *Schaefer v Schuman* [1972] AC 572, where the promise to leave the property had been performed, and the issue was as to the relevance, if any, and the effect of the prior promise when the value of the devise was sought to be reduced by an order by way of financial provision under the equivalent in New South Wales of the then Inheritance (Family Provision) Act 1938. The rights of the devisee were held by the trial judge, and by the majority of the Privy Council (Lord Simon of Glaisdale dissenting on this as on the major point in the case), to be properly founded in contract, and, that being so, to be immune from the effect of an order under the family provision legislation. (The English legislation now deals with the substantive point by section 11 of the Inheritance (Provision for Family and Dependants) Act 1975.) Still at that time the finding of a contract was seen as essential to the plaintiff's success.

33. In the third edition of Spencer Bower's Estoppel by Representation, published in 1977, the editor stated that conduct which related only to the recognition of future rights or interests could not provide the basis for proprietary estoppel (see page 295) but the fourth edition (2003) accepts that this is no longer the law: see paragraph XII.5.1.

34. The first reported case in which the principle was applied to such facts seems to be *Re Basham deceased* [1986] 1 WLR 1498, a decision of Mr Edward Nugee Q.C; it is the earliest case on this point mentioned in the fourth edition of Spencer Bower. Since then, there have been successful claims in cases including *Wayling v Jones* (1993) 69 P&CR 170, *Gillett v Holt* [2001] Ch 210, *Campbell v Griffin* [2001] EWCA Civ 990, *Jennings v Rice* [2003] 1 P&CR 100, *Grundy v Ottey* [2003] EWCA Civ 1176 and the present case, and an unsuccessful claim in *Uglow v Uglow* [2004] WTLR 1183, where arrangements made during the life of the landowner were held to be sufficient in the circumstances. A claim was unsuccessful in *Taylor v Dickens* [1998] 1 FLR 806, but that decision has since been disapproved, and I need not mention it further.

35. Cases are decided on their own facts, and not on the facts of other different cases. Nevertheless, I find it instructive to consider the essential facts of some of the previous cases to see what it was that led the court to consider that the estoppel was established. Where the question arises from facts closer to those of which Lord Kingsdown spoke in

Ramsden v Dyson, it is easy enough to see why the landowner should be held to be acting against conscience if he refuses to give effect to an expectation which he has created or encouraged, even by standing by silently while the other party, to his knowledge, incurs expenditure on his land. Such situations arose in cases such as *Inwards v Baker* [1965] 2 QB 29 and *Crabb v Arun District Council* [1976] Ch 179. Where the question concerns the landowner's intentions as regards the disposition of his property upon his death, a more subtle distinction needs to be drawn between, on the one hand, a statement as to the landowner's current testamentary intentions and, on the other, a promise or assurance by him to the other party as to what he will do by his will. The latter could be intended to be relied on by the other party, and to influence his or her course of action; the former might be no more than a matter of information, not intended to be relied on, and which the other party could not reasonably be expected to take as so intended.

36. Mr MacDonnell submitted that it is not necessary that a statement by the landowner should be intended to be relied on. However, in *Crabb v Arun District Council* [1976] Ch 179 Lord Denning MR said at 188C:

"Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights – knowing or intending that the other will act on that belief – and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied."

37. Similarly, in *JT Development Ltd v Quinn* [1991] 2 EGLR 257 at 261, Ralph Gibson LJ said:

"The law requires that a representation, if it is to provide the basis of an estoppel, be clear and unequivocal and that it be intended to be relied upon."

38. That is consistent with statements of the law on estoppel by representation generally, such as that of Lord Denning MR in *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529 at 540-1:

"But in order to work as an estoppel, the representation must be clear and unequivocal, it must be intended to be acted on, and in fact acted on. And when I say it must be "intended to be acted upon," I would add that a man must be taken to intend what a reasonable person would understand him to intend. In short, the representation must be made in such circumstances as to convey an invitation to act on it."

39. Spencer Bower, Estoppel by Representation, 4th ed, (2003) at paragraph V.3.2, notes that the requirement of intended reliance "is often not expressed in formulations of the doctrine of proprietary estoppel", but it was expressed in *Uglow v Uglow*, quoted below, and it seems to me that it is an essential ingredient of these cases, even if one which is sometimes taken for granted, or not mentioned because it is obvious on the facts.

40. Mr MacDonnell also submitted that the landowner need not know that the assurance is being relied on. (I ignore for the present purpose cases where there has not been a specific assurance and the estoppel is founded on the landowner standing by, knowing that the other party is acting on a given assumption, which is not correct but of which the landowner does not disabuse him.) As regards cases of express assurance, I would accept that, if the representation is made in circumstances in which it can be shown, or presumed, to have been intended to be relied on, it may not be necessary to show that

the landowner knew that it was in fact relied on. However, it does not seem to me that this point is of any real relevance on the facts of the present case.

41. The starting point for a review of the cases about representation in relation to prospective inheritance is *Re Basham deceased*. The plaintiff lived with her mother and stepfather until her marriage at the age of 20, and continued to help them thereafter to run their business, without pay, but on the understanding that she would inherit her stepfather's property when he died. After her marriage she proposed getting a regular job so as to supplement her husband's income but her stepfather wanted her to continue working for him, without pay, and said to her that she did not have to worry about money, she would be all right. There were other later representations to similar effect, or relating to the stepfather's property specifically. The judge said, at [1986] 1 W.L.R. 1504 and 1505:

"In the present case it is in my judgment clearly established by the evidence, first, that the plaintiff had a belief at all material times that she was going to receive both Rosslyn and the remainder of the deceased's property on his death, and secondly, that this belief was encouraged by the deceased. …

I am satisfied that the deceased encouraged the plaintiff in the belief that all the property he possessed at the date of his death would pass to her."

42. That was a case in which the stepfather's first representation was made in circumstances in which the plaintiff might otherwise have taken a choice which would have affected her ability to work for her stepfather, and the representation was made in order to persuade her not to take that course of action. Plainly, it was intended by the stepfather to be relied on by the plaintiff. The same was true of some of the later representations.

43. *Wayling v Jones* (1993) 69 P&CR 170 arose from a homosexual relationship between Mr Jones, an older man, and Mr Wayling who was much younger. The plaintiff worked in Mr Jones' businesses, receiving no remuneration but only pocket money, living and clothing expenses and an express promise that the business would be left to him. Mr Jones did make a will leaving one property to Mr Wayling, but he then sold it, bought another, but did not (despite saying that he would) make a new will leaving the newly acquired property to him. The judge found that Mr Jones held out to Mr Wayling the prospect of inheriting property on his death, that these promises were made repeatedly, and sometimes in the presence of others, and were sincerely meant. The evidence included reference to one occasion on which Mr Wayling had complained about his earnings (which is perhaps to be understood as about his lack of earnings), to which Mr Jones had said "You'll get everything after I'm gone". So this too was a case in which there were express representations, characterised by the court as promises, made, on at least one occasion, in circumstances in which it was intended to meet a complaint by the plaintiff as to how he was being treated at the time, and therefore intended to be relied on, in the sense of being taken as a sufficient response to the complaint.

44. In *Gillett v Holt* [2001] Ch 210, again the plaintiff was a younger man, who spent his working life as a farm manager for the defendant, working for what was said to be a low rate of remuneration, and where the defendant made repeated promises and assurances over many years, some on special family occasions, that the plaintiff would succeed to his farming business including the farmhouse in which the plaintiff and his family had lived for a long time. One of the novel features of the case is that Mr Holt had changed his mind about Mr Gillett during his lifetime, and Mr Gillett therefore sought to enforce the equity before Mr Holt's death. Mr Gillett had got to know Mr Holt while he was a teenager. When he was 15 Mr Holt proposed to his parents that Mr

Gillett should leave school and work full time for him; this was agreed and happened, Mr Gillett starting on the farm in 1957. In 1964 Mr Gillett for the first time was left in charge of the farm at harvest time. He coped successfully with the harvest and Mr Holt then withdrew from daily involvement with the farm. Soon after this Mr Holt made the first of a series of specific assurances, the series extending over a period from 1964 to 1989, to the effect that Mr Gillett would inherit the farm business. One of the series, known as the Beeches incident, was a statement, in response to a request by Mr Gillett for something in writing to confirm that the farm would be his: "that was not necessary as it was all going to be ours anyway". Again, that was a statement which must be taken to have been intended to be relied on by Mr Gillett.

45. In *Jennings v Rice*, Mrs Royle, widowed in 1969 and without children, had the benefit of work and help from Mr Jennings, initially as a gardener, later undertaking a wider variety of tasks, and from the mid 1990's staying overnight to give her security after a burglary. In the 1980's she stopped paying him, but gave him £2,000 towards the purchase of his property. Later in the 1980's he took up with her the fact that he was not being paid. She told him that he need not worry about that, he would be alright and she would see to it. At various times she expressed it differently, but used words to the effect of "this will all be yours one day". Mr Jennings believed that he would inherit all or part of her property on her death, but she died intestate. The judge held that he had the benefit of a proprietary estoppel, which should be satisfied not by giving him the whole estate or even the whole value of the house (some £420,000), but by an award of £200,000. The Court of Appeal dismissed his appeal. In that case too at least one of Mrs Royle's representations was made in response to Mr Jennings taking up with her the fact that he was working for her unpaid. Evidently what she said was intended to satisfy him, and in that sense at least intended to be relied on.

46. In *Campbell v Griffin* Mr Campbell moved in to live as a lodger with Mr and Mrs Ascough in 1978, he being then 30 and they in their 70's. They had no children and the relationship developed to the extent that they treated him as their child. He came to be much more than a lodger, and as they became more frail and, in the case of Mrs Ascough, mentally incapable, he became their principal (and, at night, their only) carer, coping with Mr Ascough's blackouts and falls, Mrs Ascough's frailty and deafness, and latterly incontinence. From 1987 onwards they frequently told him, sometimes in the presence of others, that whatever happened he would have a home for life. Robert Walker LJ said at paragraph 27:

"By 1990 at latest there was a much closer, family-type relationship, with assurances of a home for life being given from about 1987. By 1990 Mr Campbell was doing much more for the Ascoughs than could be ascribed to even the most friendly lodger. He had become part of the family, and there was a strong presumption that the assurances given to him (to treat him, in effect, as a member of the family with moral claims on the Ascoughs) were influencing his conduct."

47. The court concluded that Mr Campbell's claim to an equity, having regard to the principles of proprietary estoppel, had been established. The representation in that case was not only about what would happen on the death of Mr and Mrs Ascough, but also as regards Mr Campbell's position in the meantime. His ability to stay in the house could have been, and at one stage was, at risk before they died. The ground on which his claim had failed at trial was that the detrimental conduct was not in reliance on the assurances, rather as in *Wayling v Jones* at first instance; as in that case the Court of Appeal held that this was too narrow a view of the evidence. But the equity was to be satisfied by the award of a lump sum, since the right to live in the particular house for life would have been disproportionate. In that case there were clear assurances, but unlike some of the other cases in this category, they do not seem to have been made on

occasions when the person making the representation sought to influence the acts of the recipient of the representation.

48. The same could be said of *Grundy v Ottey*, where the relationship of the parties, which lasted for about 3½ years, was as of husband and wife, and Miss Ottey was much younger than Mr Andreae. He was an alcoholic and the judge found that she performed the tasks of a carer and "made extraordinary efforts to try to assist him with his alcohol problem", far beyond what would be part and parcel of an ordinary relationship. After about a year Mr Andreae promised that Miss Ottey would inherit a flat which he owned in Kingston Jamaica, and this was later confirmed by a draft letter addressed to his solicitor (whether or not sent to him) and given to her. The judge held that the requirement of a promise or assurance was established on these facts "with unusual ease". As for reliance, he held that, rather as in *Wayling v Jones*, the promise having been made, if it had then been revoked Miss Ottey might well have left Mr Andreae. On that footing, the assurance was given, intended to be relied on, and was in fact relied on.

49. In *Uglow v Uglow*, between 1969 and 1976 the testator tried to persuade his nephew Richard to come and work at Treludick, a valuable freehold farm, on the footing that he would inherit it on the testator's death. On 5 April 1976 Richard left TR Uglow & Sons and went to work at Treludick which the testator, as the eldest son in his family, had inherited on his own father's death. The Testator and Richard began to farm in partnership, but they did not get on, and in 1984 the partnership was brought to an end, and different arrangements were made, under which each of them farmed different parts of the farm separately. The testator left the farm to a great-nephew, giving Richard more modest benefits under his will. The court held that any equity arising from the testator's assurance had been satisfied by the arrangements made when the partnership came to an end. In this case, the assurance was made in order to persuade Richard to act in a particular way, and he relied on it as the testator had hoped. If the partnership had not come to an end, with different arrangements being made, and if the farm had not been left to Richard, it seems plain that latter would have had a good claim, other things being equal, to be entitled to the farm.

50. At paragraph 9 Mummery LJ summarised the relevant principles in a way which Miss Reed, in her submissions to us for the Appellants, argued was a valuable, though not exhaustive, guide:

> "9. The general principles expounded in those cases [*Gillett v Holt* and *Jennings v Rice*] are relevant to the instant case in the following respects.
>
> (1) The overriding concern of equity to prevent unconscionable conduct permeates all the different elements of the doctrine of proprietary estoppel: assurance, reliance, detriment and satisfaction are all intertwined.
>
> (2) The broad inquiry in a case such as this is whether, in all the circumstances, it is unconscionable for a testator to make a will giving specific property to one person, if by his conduct he has previously created the expectation in a different person that he will inherit it.
>
> (3) The expectation may be created by (a) an assurance to the other person by the testator and intended by him to be relied upon that he will leave specific property to him; (b) consequent reliance on the assurance; and (c) real detriment (not necessarily financial) consequent on the reliance.

(4) The nature and quality of the assurance must be established in order to see what expectation it creates and whether it is unconscionable for the testator to repudiate his assurance by leaving the property to someone else.

(5) It is necessary to stand back and look at the claim in the round in order to decide whether the conduct of the testator had given rise to an estoppel and, if so, what is the minimum equity necessary to do justice to the claimant and to avoid an unconscionable or disproportionate result.

(6) The testator's assurance that he will leave specific property to a person by will may thus become irrevocable as a result of the other's detrimental reliance on the assurance, even though the testator's power of testamentary disposition to which the assurance is linked is inherently revocable."

51. Miss Reed fastened particularly on the words "an assurance to the other person by the testator and intended by him to be relied upon that he will leave specific property to him". Mr MacDonnell responded that this was only an example: "the expectation *may* be created" in that way.

52. In all of these cases, therefore, the representation, assurance or promise was made expressly. In all but two of them it was, on some occasions at least, evidently made in order that it should be relied on by the person to whom it was addressed, either by agreeing to do something which the representor wished, or by refraining from taking some step which the representor did not wish to be taken, or at least being taken as a sufficient answer to a request, question or complaint. In *Campbell v Griffin* and *Grundy v Ottey* the assurances appear to have been given unprompted, but nevertheless were express, clear and sincere. The representation was sometimes in rather general terms, in other cases more specific. In each case the court concluded that the representor intended the representation to be taken seriously, and therefore it was fair to say that, if the representation was acted on, the representor should be regarded as committed to the representation and not entitled, in conscience, to go back on it.

53. None of the cases would have satisfied the requirement of a contract, though in some cases a primary claim in contract was put forward. A contract to leave property by will is not perhaps commonly encountered, other than in the special case of mutual wills, but it is perfectly possible, though if the gift is to be of an estate or interest in land, section 2 of the Law of Property (Miscellaneous) Provisions Act 1989 would have to be satisfied. As discussed in *Schaefer v Schuman*, mentioned above, such a contract would, or could, have effect during the life of the landowner so as to inhibit his powers of disposition of the land, just as proprietary estoppel can affect the relevant land during the owner's life, as in *Gillett v Holt*.

54. Accordingly, while there is no special rule as to the form or nature of the promise, representation or assurance which is capable of providing the basis of a proprietary estoppel case as regards a claim against a deceased's estate, it seems to me that the general requirements that there must be a clear and unequivocal representation, and that it must be intended to be relied on, or at the very least that it must be reasonably taken as intended to be relied on, are of no less importance in this type of case than in others, and they must be applied with care, given that statements may be made about testamentary intentions which are not necessarily intended to be taken as promises. The proposition which is the basis of the first ground of appeal is partly justified. It is argued that a proprietary estoppel claim of this kind cannot be based on conduct or standing by, or anything less than a clear promise or assurance that the claimant will inherit. I agree that there must be a representation which can be categorised as a promise or assurance. In principle, that representation could be made by conduct, or

partly by conduct, as well as by words. In whatever way it is made, however, it must be clear and unequivocal, and it must be intended to be relied on.

Discussion

55. Among the striking features of the present case is the fact that Peter never said anything to David which in terms amounted to a statement, still less a promise, that David would inherit the farm. At its highest, David's claim is that Peter said things which implied that David was to become the owner of the farm on Peter's death. That is true not only of what was said and done in 1990 but of all the other matters of conduct or statement relied on, as described above. In the situation in which not only was David the only obvious member of the next generation to take over the farm, but he had already been proving his worth by providing voluntary unpaid help since Sarah's death, it is not surprising that Peter should regard David as the most suitable inheritor of the farm, nor that he should say or do things consistent with his holding that opinion.

56. Another notable aspect of the case is that the acts done by David and relied on by him in support of his proprietary estoppel claim are the continuation of what he had been doing before the first relevant representation, namely his extensive and valuable voluntary help to Peter on the farm and in his life generally. There is no evidence that Peter was aware of any of the other opportunities which the judge held were open to David, and which he might have pursued in other circumstances. It could not be suggested that whatever Peter said was motivated by a wish to persuade David to continue working on the farm rather than take up some other opportunity. The judge said in his paragraph 94: "One can only speculate as to whether the timing was coincidental, or whether Peter had heard from a mutual contact that David was considering other career avenues at about that time, and felt that he should say something to encourage David to continue helping him at Steart Farm". As he says, that would be speculation. There was no evidence on the point. The case has to proceed on the basis that he was not prompted by anything of that kind, and that he was unaware of any other opportunities that David had and might have pursued.

57. Mr MacDonnell submitted that the case could be regarded as one in which David had worked to improve the farm, in reliance on an assurance that it would be his in the end. But the case was never pleaded on the basis that what he did was to improve the land by his own efforts, nor was there evidence that this was the result of what he did. At the highest Mr MacDonnell could say that David provided invaluable help with the husbandry of the farm, and that a farm which is not the subject of proper husbandry will deteriorate in condition and therefore in value. It seems to me that it is not open to David to put a case made in this alternative way, if his primary case does not succeed.

58. It seems to me that there is much force in the argument on the appeal that elements necessary to a proprietary estoppel claim have not been made out on the judge's findings of fact. Miss Reed submitted that there was no representation, and certainly no clear representation, amounting to a promise or assurance to David, that he would inherit the farm. It may be that it amounts to part of the same point to say that there is also not shown to have been any intention on the part of Peter that whatever he did say, or imply, about his testamentary intentions was to be relied on by David, or, to put it differently, anything about the implicit statements on Peter's part which could make it reasonable for David, without further enquiry, to rely on them as implicit promises that he would inherit the farm, come what might.

59. The fact that Peter did intend that David should inherit the farm, as the judge found to be the case, is not sufficient. The estoppel has to be made out sufficiently clearly and reliably to prevail even if the landowner has changed his mind, for good or bad reason,

about his intentions. His conduct must have been such that it is unconscionable for him to go back on his previous representations, they having been relied on, as intended, by the person to whom the representation is made.

60. What is there in the present case which entitles David to oblige Peter, and his estate, to give him the farm? It is not a case in which anything that Peter said or did occurred on an occasion when he could be thought to have been seeking to influence David's conduct or choices, unlike many of the previous cases cited above. Of course, *Campbell v Griffin* and *Grundy v Ottey* show that this is not an essential element in itself. It is no more than a feature which helps in the resolution of the question whether what was said or done amounts to a representation, assurance or promise intended to be relied on.

61. Nor was there any express representation. As the judge recognised, even at the later stage there was at most an "unspoken mutual understanding", and what passed in 1990, as recorded at paragraph 94 of the judge's judgment (see paragraph [16] above), was indirect, giving rise at most to implication and inference. The judge held that, on the part of Peter, as a man not given to speaking his mind directly, it amounted to a statement to David that he would be Peter's successor to Steart Farm, upon his death, and that it was rightly understood in that sense. Miss Reed's first ground of appeal, discussed at paragraph [54] above, relates to this argument. As noted there, the representation must be clear and unequivocal. That is not inconsistent, in cases of this kind, with a degree of uncertainty as to the scope of the prospect held out, for example as to what will be left to the person to whom the statement is made, but it must leave no doubt that a prospect of inheriting something is being held out, and is being put forward so as to be relied on, or in circumstances in which it may reasonably be taken as intended to be relied on.

62. In many of the cases which I have quoted it is clear from the content and the context that this was so. Mr Holt's reported statement, "that was not necessary as it was all going to be ours anyway", in the circumstances of the Beeches incident, referred to at paragraph [44] above, is a good example of this. In *Campbell v Griffin* and *Grundy v Ottey* the statement was clear enough (very clear in the latter, less so in the former case), and although there was not the same sort of specific feature in the context from which it was plain that the statement was made in order to be relied on, nevertheless the terms of the statement, in the context of the relationship of the parties generally, were plain enough for it to be reasonable to assume that it was intended to be relied on. In the present case there is neither the same context nor any express representation which can be construed to decide whether it was intended to be relied on, or could reasonably be so taken.

63. It is noteworthy, also, that in both those cases, and also in *Wayling v Jones*, the primary difficulty encountered by the Claimant was not in proving the representation, but in proving reliance, because the relationship between the parties was such that it could plausibly be argued that the recipient of the statement would have done just the same whether or not the statement had been made. As in the present case, in *Wayling v Jones* and in *Campbell v Griffin* there was no suggestion that the intentions of the person making the representation had in fact changed before death. In *Campbell v Griffin* it was Mrs Ascough's mental illness (and her surviving her husband) which prevented fulfilment of the representation; in *Wayling v Jones* it was Mr Jones' failure to make a new will after selling one business and buying another, the former having been left to Mr Wayling by a specific gift which was adeemed by the sale. In both those cases, and in *Grundy v Ottey*, the court regarded the critical question as being, not what would have happened if the statement had not been made, but what would have happened if the statement, having been made, had been expressly withdrawn.

64. The present case has a number of features in common with some of these three cases. David had for years provided invaluable help to Peter on the farm out of the goodness of his heart and out of family loyalty. David was not only of the family, but he was serious about farming, and the only one of the next generation who was. The reliance he is said to have placed on Peter's implicit representations is that of going on doing what he had been doing before, i.e. working on Peter's farm, and helping Peter generally, for no remuneration. It is clear that, in this, he devoted long hours altogether selflessly to Peter. I do not intend to disparage in any way the effort and commitment that David devoted to Peter and to Steart Farm by saying that, after 1990, he went on as before, rather than changing his course of conduct in any respect. The three cases which I have discussed above show that continuing as before can be a sufficient reliance, if the Claimant would not have so continued either, first, had the representation not been made or, alternatively, if a representation which had been made was later expressly withdrawn.

65. The distinctive feature of this case is that the representation was not made expressly but was a matter of implication and inference from indirect statements and conduct. It seems to me that the one crucial part of the history is what was said and done in 1990, and recounted in the judge's paragraph 94, set out at paragraph [16] above. The later matters relied on were much later on in time, so that, if anything depended on them, David's reliance on them was much less, since he continued for a much shorter time after them. They supported the view that Peter did intend David to inherit the farm, and therefore the judge's interpretation, and that of David, of the events of 1990, but that is inadequate, and irrelevant, in itself.

66. The judge explained in paragraph 94 how he came to the view that, by what he said and did in 1990, Peter was indicating to David, in his own oblique way, that David would inherit the farm on his death. He relies on it having been "the first direct reference made by Peter to David with regard to matters concerning his estate and passing", and on Peter "as a man of few words, who generally maintained his privacy about his personal financial affairs …, and who hardly ever spoke in direct terms". The finding as to what was said and done is one of primary fact, which is not open to challenge, nor it is sought to be challenged. The finding as to what Peter meant by what he said and did is one of inference, but the judge's ability to draw the inference was based on other evidence, above all as to what Peter was like, which he had and we do not. It is therefore also, in effect, immune from challenge. I proceed on the footing of the judge's finding that Peter did intend to indicate to David that the latter would inherit the farm. It is, nevertheless, not a case of an express statement whose meaning and effect can be examined in the way that the court could in all the previous cases of proprietary estoppel in relation to testamentary expectations which I have reviewed.

67. The difficulty that appears to me to arise from the judge's conclusion that this was a sufficient basis for the proprietary estoppel claim is that the same might be said of any indication by a person to another as to his or her intended or actual testamentary dispositions in favour of the addressee. Wills and testamentary intentions are well known to be subjects on which different people have very different feelings, some being very reluctant even to consider making a will (even if they have clear intentions as to the disposal of their estate), and even more so to talk about it, and others being very ready to speak of the provision which they have made, intend to make or might make. Wills and succession are also subjects on which many misconceptions are common. Statements by a particular person on this subject may need to be considered with particular care in order to be able to assess their significance.

68. It is possible for a person to acquire a particular asset on another person's death by way of inheritance in a number of different situations. (I ignore irrelevant rarities such as donatio mortis causa.)

i) Under the Wills Act, if A wishes to leave property to B, there is a simple way of doing so, albeit that the Act's requirements have to be followed strictly, namely to execute a will to the desired effect. If A has done so, the disposition is inherently revocable, by an act of revocation or by other events including subsequent marriage. If B knows of the will, he may have an expectation of inheriting, but it is precarious.

ii) Alternatively, B's position may be stronger because A may agree with B to leave him the relevant property or, if he has already made the will, not to revoke it. If this agreement is for consideration, then *Schaefer v Schuman* shows that B will be entitled to inherit the property even if A has not made, or has revoked, the appropriate will, and that if he does take under the will, his rights are stronger by virtue of the contract. In the case of a specific gift, B may be entitled to intervene if A acts during his lifetime to prevent B receiving the property on his death. Whether there is a contract will depend on ordinary principles of the law of contract. It cannot have come into being without conduct on the part of A which makes it clear that, judged objectively, he intended to commit himself by contract so that B would acquire the property on his death, and B must provide consideration for the promise.

iii) As a further alternative, by way of a proprietary estoppel claim, B may be entitled to prove that, even without a contract, he is in almost as good a position as if he had made a contract with A under which he would acquire the property on A's death. Such a claim has to be based on A having made a representation to B, intended to be relied on by B, and B having acted to his detriment in reliance on the representation. If the proprietary estoppel is made out, there are issues as to how the court should give effect to it, and the position is less clear cut than it would be if B could prove a contract, but ordinarily B would have a claim to have the representation made good by the transfer to him of the property which he was assured he would receive.

iv) Whether or not A has left a will, B may be able to assert a claim under the Inheritance (Provision for Family and Dependants) Act 1975, if he is within the class of applicants defined by the Act. That is irrelevant to the present case and would rarely extend to a particular asset, except in the case of a surviving spouse.

69. In the case of contract or of proprietary estoppel, B's position is stronger than if he is no more than an actual (or, all the more so, only an intended) beneficiary under A's will. There is no conceptual difficulty with the position of B under a contract, nor, as the law has now developed, if B's claim is by way of proprietary estoppel. However, given the potential and inevitable fluidity and flexibility of proprietary estoppel, as a doctrine of equity based on conscience, it seems to me that there are dangers unless the established requirements of proprietary estoppel are applied with a certain degree of rigour of analysis. Otherwise not only the strict requirements of the Wills Act as to how to give effect to testamentary intentions, but also the basic proposition of freedom of testamentary disposition, might be subverted, so that A could be found much too readily to be subject to an obligation to dispose of particular property in a particular way, giving B a claim which would take effect not merely to give B the expected legacy or devise, but also to give B a stronger right to it than if he or she had merely been made a beneficiary under a duly executed will but with no relevant promise or representation.

70. In Spencer Bower, Estoppel by Representation, 4th ed, at XII.6.4, footnote 3, the authors venture to criticise what Robert Walker LJ said in *Gillett v Holt* at [2001] Ch 227-230 as being

> "unsatisfactory, for it provides no assistance in distinguishing between the kind of informal assurances which can be revoked, and those which cannot. This is of importance in the case in which a representation is made as to a testamentary gift, because a will is revocable. The mere fact that the assurances were intended to be relied on, and were in fact relied on is a necessary condition for an estoppel, but cannot be sufficient".

71. In *Gillett v Holt* the Court of Appeal regarded the representations or assurances as clear and unequivocal, and the circumstances in which they were made showed that they were intended to be relied upon. It was not necessary for the Court of Appeal to give guidance as to how formal or informal an assurance must or could be to provide the basis for a proprietary estoppel claim. The various cases referred to above give a variety of examples of degrees of formality and otherwise, but in all of them the representation or assurance was express. It seems to me that it is difficult to lay down a rule other than that which already exists, namely that the representation must be clear and unequivocal, and that it must be intended to be relied on, or at least reasonably taken to be so intended. If the statement is clearly so intended, then it will not be difficult to conclude that, if it has been acted on in a way such that, if it were not given effect, the person to whom the statement was made would suffer detriment, then the person making it should not be allowed to go back on it, and it therefore ceases to be revocable. If it is not so intended, while it may be a statement of existing intention, it cannot be taken as a promise as to what is to happen, come what may, on the death of the person making the statement.

72. In the present case, the judge did not in terms consider whether the implicit statement which he found to have been made in 1990, to the effect that Peter intended David to succeed to the farm on his death, was intended to be relied on. Since he was unable to find that the implicit statement was made for the purpose of persuading David not to pursue some other opportunity, it seems to me that there was no material on the basis of which the judge could have found, if he had asked the question, that the implicit statement was intended to be relied on or, in other words, was intended as a promise rather than, at most, a statement of present intention, which might well be maintained in fact (as it was, although not in the event carried through), but as to which there was no commitment.

73. It may be that the judge was too much influenced by the fact that Peter did intend that David should inherit the farm, remained of that view, put it into effect by his 1997 will, and did not change his intention despite the revocation of that will. The proprietary estoppel claim has to be tested against a different hypothesis, namely that, for whatever reason, Peter had changed his mind, and had decided to leave the farm to someone else, so that it would not appear to be reinforced by his continuing favourable intention, nor would it have the effect, if allowed, of making good an intention which Peter did not take the trouble to put into effect by the proper means.

74. In my judgment, viewed in that way, and in the light of what I have said above about proprietary estoppel claims of this kind, David's claim in the present case does not satisfy the tests for such a claim, because the statement made implicitly in 1990, as recorded by the judge, did not amount to a clear and unequivocal representation, intended to be relied on by David, or which it was reasonable for him to take as intended to be relied on by him. The various later matters relied on do not, it seems to me, add to the strength of David's case. None of them is different in nature from what

was said and done in 1990; none is express, so that they are either weaker than the earlier implicit statement, or at best no stronger.

75. For those reasons I would allow this appeal. In the circumstances I need say nothing about the separate ground of appeal as to whether it was proportionate and appropriate to award David the farm, with the live and dead stock and the content of the farm account. As it is, this is another case where what appear to have been a man's testamentary intentions have failed because, for whatever reason, he did not take the proper steps to put them into effect. It may be thought that David had a strong moral claim to inherit Peter's farm, after the unstinting help he gave to Peter, both on the farm and in personal support to him in his life, over almost 30 years. Unfortunately, because Peter revoked his 1997 will and did not make another, David's claim depends on making good a proprietary estoppel entitlement. He must therefore make good the ingredients of the estoppel. I can well understand why the judge should have wanted to achieve the result that he did, and thereby to give effect to that which he had found to be Peter's unimplemented intentions as regards the succession to his farm. However, it seems to me that in so doing he failed to give proper effect to the requirement that the representation be clear and unequivocal and intended to be relied on. If what Peter said and did in 1990 were sufficient to satisfy that test, the ingredients of proprietary estoppel in such cases would have been diluted in such a way as to create a dangerous precedent. In my judgment the judge was wrong in law to find the necessary representation, assurance or promise, and David's claim should not have been upheld.

Lord Justice Rimer

76. I agree.

Lord Justice Ward

77. I also agree.