Davies v Davies

or

The story of the Cowshed Cinderella

'Cowshed Cinderella' wins £1.3m from her parents after being made to milk cows while her sisters partied

Once Upon a Time . . .

in a far away country known as Carmarthenshire, there lived a young couple called Mary and Tegwyn. Mary and Tegwyn were not wealthy but they were hard working farmers. On the day of their wedding they were given a prize heifer and some magic seeds. In the years' that followed they laboured hard and together they built a successful, prize winning pedigree milking herd.

Mary and Tegwyn had three daughters, Enfys, Eirian and Eleri. All three daughters worked hard and helped their parents on the family farm. When Eirian was little she was very happy working on the family farm but as she got older, she quarrelled with her parents and her two sisters, whom she thought to be better treated by her parents. She claimed that her sisters were given clothes and presents and allowed to go out to Young Farmers parties, while she had to stay behind mucking out the cows.

As time passed, and the children grew up, Enfys and Eleri married and moved away. But Eirian's wish was to stay at home and carry on farming.

Eirian and her parents carried on farming, and quarrelling, until one day, something nasty happened in the woodshed. (Actually, it happened in the milking parlour.)

They did not live happily ever after …

Davies v Davies

[2014] EWCA Civ 568; [2016] EWCA Civ 463

1. *Davies v Davies* is all about cows and proprietary estoppel. It has been to the Court of Appeal twice and is now the subject of a petition to the Supreme Court. There have been two appeals because of the unfortunate procedural decision, taken by a district judge in Cardiff, to divide the claim into two parts: the first to decide whether an equity by estoppel arose; the second to determine how the equity should be satisfied.

2. The first lesson we can learn from *Davies v Davies* is that split trials for estoppel claims are generally a bad idea. As Floyd L.J said in round 1 in the Court of Appeal, at [58]:

   "I would finally observe that, whilst the case management of this case was not something with which we were directly concerned on this appeal, I have doubts about whether the list of essentially factual preliminary issues, coupled with a split trial procedure, would normally be appropriate in a claim for equitable relief based on proprietary estoppel. As Walker LJ's observations in Gillett v Holt (above) make clear, such claims require a holistic approach which the procedure adopted here did not facilitate."

   HHJ Jarman QC (in round 2) also said:

   "*As foreshadowed by an observation of Floyd LJ, the split trial procedure has not proved to be ideally suited to this sort of claim*."

3. Round 1 of *Davies v Davies* was concerned with the threshold question of whether Eirian was entitled to some kind of equitable relief. The Court of Appeal, upholding the decision of the judge below, found that she was. Round 2 determined how the equity should be satisfied. It is this aspect of the claim which is the focus of this article. But as with any estoppel claim, it is necessary to

understand the facts which give rise to the equity in order to understand how the court approached the question of relief.

The facts

4. The claim actually started as a possession claim brought by Mary and Tegwyn Davies. They sought to evict Eirian from Henllan Farmhouse, having terminated her contract and her licence to occupy the farmhouse. The possession proceedings were met with Eirian's defence and counterclaim asserting a beneficial interest in the farm under the doctrine of proprietary estoppel.

5. The farmland, save for one small parcel, was owned by Mary and Tegwyn Davies but the dairy farm business was run through a company which was wholly owned by Mary and Tegwyn and run as a quasi-partnership. Prior to the formation of the company there had been a farming partnership.

6. Mary and Tegwyn were in their mid-70s. Had they not been farmers, they would have retired years ago. Eirian was one of three daughters. When she was younger she helped on the farm, as did her sisters, but when she was 16, she left school with the intention of pursuing a career as a dairy farmer. She worked on the family farm. She was not paid a formal salary, but she was given pocket money and money for clothes, holidays etc. Her parents paid for her to go to College, after which she carried on living and working at home. When she was 21, following an argument with her parents, she moved out to live with her boyfriend. She later married him and there was a reconciliation. With her parents' help she bought a small area of farmland near to the family farm, Glascoed Farm, in order to run a small farming business together with her husband. This did not work out and in 1998, Glascoed was sold. Eirian then moved into Henllan Farmhouse, where she lived free of charge. From this time Eirian worked more for her parents.

7. The Judge found that Eirian received "substantial but something less than full recompense for her working on the farm".

8. Eirian was the only one of the three daughters who was really interested in farming and who wanted to work at the family farm. Her parents wanted the farm to pass to the next generation, but Eirian's relationship with her parents was not an easy one and her parents were reluctant to let Eirian take over.

9. In 1998 Mary and Tegwyn agreed to consider letting Eirian into the farming partnership. Lawyers and accountants were instructed and a draft agreement drawn up, which was signed by Eirian but ultimately not by her parents. The judge found that Eirian did not find out that her parents had not signed the partnership agreement until 2001 and that from March 1998 until April 2001 Eirian believed that she was a partner. This led to another argument between Eirian and her parents. Eirian left the Farm and purchased a house in nearby Castle Croft, Ludchurch. Eirian severed virtually all ties with her parents for a period of 4 or 5 years.

10. By the end of 2005/early 2006, there was another reconciliation between the family and Eirian started to do some relief milking work on the Farm. In June 2006 Eirian and her husband separated. Eirian's parents helped her at this time.

11. In October 2007 Eirian obtained full time employment with a company called Genus and on Boxing Day 2007, she moved back to Henllan Farmhouse. At this time Tegwyn made a representation to Eirian to the effect that Henllan would be her home, rent free, for life.

12. By July 2008, Mary and Tegwyn were thinking of issuing shares in the Company to Eirian and were considering making her a director of the Company. It was agreed that Eirian would be employed by the Company as a herdswoman and everyone agreed that she would be paid a monthly salary, which started at £1500, later rose to £1700, and by 2011 was £2,000 per month. Eirian terminated her employment with Genus in September 2008.

13. Mary and Tegwyn also discussed with Eirian what would happen to their property after they died, and it seems that Eirian was shown a draft will. But in

about December 2008/early January 2009, there was another row between Eirian and her parents and things became very difficult between them. Mary and Tegwyn changed their minds about bringing Eirian into the Company and reconsidered the position with their wills. They wanted the Farm and the shares to be held in a trust after their deaths to protect it from claims of third parties. Eirian was told about this, resulting in a further breakdown in the relationship with her parents.

14. In 2010, Tegwyn decided to issue Eirian with some of his shares in the Company but Eirian refused to sign any relevant documentation and walked away from the offer.

15. Eirian's relationship with her parents further deteriorated, culminating in a physical altercation in the milk parlour. Eirian claimed to have been attacked by her parents and said that a bucket of milk was thrown over her. Eirian bit her father on the leg. When giving her evidence she said "*I bit so hard I thought I was going to bite a chunk out of him.*" This was the trigger for the proceedings. The relationship between parents and daughter had irreconcilably broken down.

Chapter I: The Equity

16. The Judge found that Eirian was entitled to an equity. In summary, the court made the following findings.

17. In relation to representations:

    (1) The Judge found that when Eirian was 17 and living with her parents, representations were made to the effect that the farming business would be hers one day. It was unlikely that anything was said at this time which was regarded as a clear and binding promise and these hopes must have appeared dashed when Eirian left the farm in 1989.

(1) In 1998, when Eirian signed, but Mary and Tegwyn did not sign, the partnership agreement, a representation was made that she would have a long term future at the farm.

(2) When she moved into Henllan Farmhouse in 1998 she thought she was a partner. She discovered that she was not a partner and walked out on the farm in Spring 2001.

(3) In late 2007 a representation was made by her father that Henllan farmhouse would be her rent-free home for life.

(4) In 2008 a representation was impliedly made by Mary and Tegwyn that Eirian was or would be a shareholder in the business.

(5) In 2009 an indication of her parents' then intention to the effect that the farm would be left to her was given in a draft will seen by her, and at events on the farm.

18. In relation to reliance, the Judge essentially found that Eirian relied on the representations by working on the farm at various times; by moving to live at Henllan farmhouse at the end of 1998; and by moving back into Henllan farmhouse after she had left.

19. In relation to detriment, the Judge held that until Eirian left home in 1989 she received "substantial but something less than full recompense for her working on the farm". From 1991 until 1998 Eirian did extra work on the farm for no extra pay. Eirian had expended various sums on Henllan farmhouse but these sums had been repaid.

Chapter II: The Award

20. *Davies v Davies* was an unusual case in that the equity had arisen as a result of a number of different representations made to the claimant over a long period of

time, some of which were incompatible. Lewison L.J., at [48] characterised the representations as follows:

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

21. It is because the case was not a *Thorner v Major*/*Gillet v Holt* sort of case (i.e. where one representation, such as "one day my boy this will all be yours", is made repeatedly) that it is an interesting case to consider the principles which apply when determining the extent of an equity created by proprietary estoppel.

22. At stage two of the trial Eirian's case remained that she was entitled to the whole of the farm. Her parents sought to argue that she was entitled to a sum of money, and put forward the sum of £350,000 as an appropriate amount.

23. It was common ground that if Eirian was not going to get the farm a monetary award would have to be made. Relations between the parties had deteriorated to such an extent that the one thing everyone did agree on was that no award could be made which required the parties' ongoing cooperation. Notwithstanding this, however, Eirian did not put forward any alternative claim as to what sum of money would be appropriate.

24. The Judge awarded £1.3m. The Court of Appeal reduced this to £500,000.

How should the question of relief be approached?

25. We all know that quantification of damages can be complicated (both factually and jurisprudentially). However, in contract or tort we broadly know what we are trying to achieve: the aim of an award of damages is generally to put the party who has been injured, or who has suffered, in the same position as he

would have been in if he had not sustained the wrong. But what are we trying to do when determining the extent of an equity created by proprietary estoppel?

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

27. In *Davies v Davies* Lewison L.J. noted:

"39 There is a lively controversy about the essential aim of the exercise of this broad judgmental discretion. One line of authority takes the view that the essential aim of the discretion is to give effect to the claimant's expectation unless it would be disproportionate to do so. The other takes the view that essential aim of the discretion is to ensure that the claimant's reliance interest is protected, so that she is compensated for such detriment as she has suffered. The two approaches, in their starkest form, are fundamentally different: see *Cobbe v Yeoman's Row Management Ltd* [2006] EWCA Civ 1139, [2006] 1 WLR 2964 at [120] (reversed on a different point [2008] UKHL 55; [2008] 1 WLR 1752). Much scholarly opinion favours the second approach: see Snell's Equity (33rd ed) para 12-048; Wilken and Ghaly, Waiver Variation and Estoppel (3rd ed) para 11.94; McFarlane, The Law of Proprietary Estoppel para 7.37; McFarlane and Sales: Promises, detriment, and liability: lessons from proprietary estoppel (2015) LQR 610. Others argue that the outcome will reflect both the expectation and the reliance interest and that it will normally be somewhere between the two: Gardner: The remedial discretion in proprietary estoppel – again [2006] LQR 492. Logically, there is much to be said for the second approach. Since the essence of proprietary estoppel is the combination of expectation and detriment, if either is absent the claim must fail. If, therefore, the detriment can be fairly quantified and a claimant receives full compensation for that detriment, that compensation ought, in principle, to remove the foundation of the claim: Robertson: The reliance basis of proprietary estoppel remedies [2008] Conv 295.

Fortunately, I do not think that we are required to resolve this controversy on this appeal."

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

- Roch L.J. said, at p. 203:

  "…The extent of the equity is to have made good, so far as may fairly be done between the parties, the expectations of A which O has encouraged. A's expectation or belief is the maximum extent of the equity…"

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

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

29. Historically it seems that the court has concerned itself more with the claimant's expectations. However, in *Jennings v Rice* [2002] EWCA Civ 159 [2003] 1 P&CR 196 the Court of Appeal expressly rejected an argument to the effect that the basic rule was that an equity should be satisfied by making good the expectation.[1]

30. The starting point when considering this question of relief is now Robert Walker L.J.'s judgment:

  "[45] Sometimes the assurances, and the claimant's reliance on them, have a consensual character falling not far short of an enforceable contract … In a case

[1] See [2002] EWCA Civ 159 at [16]

of that sort both the claimant's expectations and the element of detriment to the claimant will have been defined with reasonable clarity. …

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

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

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

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

> *"...A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption."*

32. The focus on 'proportionality' puts reliance and detriment, rather than expectation, more in centre stage. In *Davies v Davies* [2016] EWCA Civ 463, Lewison L.J. noted:

> "*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]*.

33. We know that there must be 'proportionality' in any award, but this is does not answer the question "what are we trying to do when determining the extent of an equity created by proprietary estoppel?" Proportionality is what we are trying to achieve, not what we are looking to compensate or give effect to.

What Role does Expectation Play?

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

35. Some have suggested that Robert Walker L.J. has made two categories of cases: the 'bargain' and the 'non-bargain' case. The former yields expectation relief and in the latter, some form of wider discretion is involved. It is not clear, however,

the extent to which this analysis has really been followed through in subsequent cases and in truth, Robert Walker L.J. might not be setting out two different bases of relief.

36. Expectation relief is likely to be the appropriate relief in a "bargain" case because, as Robert Walker L.J. explained[2], the parties:

"…*probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate*."

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

38. In *Davies v Davies* Lewison L.J. referred to Robert Walker L.J.'s first sort of case:

"…*in which the assurances and reliance had a consensual character not far short of a contract. In such a case "both the claimant's expectations and the element of detriment will have been defined with reasonable clarity." In that kind of case the court is likely to vindicate the claimant's expectations. Although Robert Walker LJ does not say so in terms, it is implicit that in such a case the claimant will have performed his part of the quasi-bargain*."

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

40. Moving on to Robert Walker L.J.'s second type of case, where the court:

[2] EWCA Civ 159 at [45]

"*may still take the claimant's expectations (or the upper end of any range of expectations) as a starting point, but unless constrained by authority I would regard it as no more than a starting point.*"

41. Even Lewison L.J. was slightly baffled by this. He said:

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

42. This is, at least some guidance as to how to deal with expectations.

How did expectation feature in Davies v Davies?

43. The sum of £350,000 had been put forward as an appropriate award which sought to compensate the claimant for the loss of her expectation of having lifetime accommodation; the profits which she would have received had she been made a partner/received a shareholding in the farming business; and a sum to reflect her underpayment for work she had carried out.

44. HHJ Jarman QC criticised this sum as not sufficiently accommodating the expectation and detriment which he had found. In particular, he said that it failed to take into account detriment which was difficult to place a financial value on.

"In my judgment that approach does not sufficiently accommodate the expectation and detriment which I have found and in particular those elements upon which it is difficult to place a financial value. The accommodation element of Mr Gaunt's submission does not reflect what Eirian was promised in 2007, which was that she could live in the farmhouse for life. There is no suggestion that this promise was conditional in any way upon her selling her property, and she has since let that out. Mr Gaunt's calculation of a share of the profit during

the periods from 1999 to 2001 and 2008 to 2012 does not in my judgment sufficiently recognise that for substantial periods up until 2001 and from 2009 to 2012 the expectation was that Eirian would succeed to the farming business and to the herd which she loved. It does not take sufficiently into account the detriment which I have found, which goes well beyond what her parents recognise, despite the countervailing benefits. It does not take into account her parents' significant role of bringing that expectation to an end in 2012.

In my judgment it is clear that weighing all the above circumstances involves more than just arithmetical calculation, and justice is likely to lie somewhere between the polarised positions which the parties now adopt. It is not an easy exercise to determine the precise point where it does lie. That approach may well mean that the farm and business or a substantial part of it will have to be sold. Neither side is likely to welcome that, but in view of their poor relationship the options are very limited. In my judgment the proportionate remedy is to award Eirian a lump sum in the amount of £1.3 million. That is just over or under one third of the net value of the farm and farming business depending on the impact of CGT which in turn depends how much is sold. It is, in my judgment a fair reflection of the expectation and detriment and other factors set out above."

45. The Court of Appeal, however, was critical of the judge's failure to sufficiently analyse the offer put forward, in particular, his failure to appreciate the extent to which the offer contained much that went towards satisfying the claimant's expectations. At Lewison L.J., paragraph [63], said:

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

46. The criticism levelled at the judgment was essentially that the Judge ascribed a very large value to the loss of 'expectation'. Lewison L.J. went on to say:

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

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

47. Although Lewison L.J. declined to resolve the controversy about the essential aim of the court's discretion when giving effect to an equity, he admitted the logical attraction of an approach which sought to protect the claimant's reliance interest in order to compensate for detriment suffered. Lewison L.J. referred to an article written by Andrew Robertson: The reliance basis of proprietary estoppel remedies [2008] Conv 295, where Robertson said, at p. 302:

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

48. This formed the basis of Lewison L.J.'s reasoning:

"*Since the essence of proprietary estoppel is the combination of expectation and detriment, if either is absent the claim must fail. If, therefore, the detriment can be*

fairly quantified and a claimant receives full compensation for that detriment, that compensation ought, in principle, to remove the foundation of the claim"

Summary

49. *Davies v Davies* was not a case where the assurances and the reliance on them overlapped (Walker L.J.'s first category case). This argument had not succeeded at first instance and was not pursued on appeal. This was not a *quasi*-bargain case and as Lewison L.J. noted, Eirian had not performed her side of the bargain.

50. Ultimately, Eirian's award struck a balance between her expectations and the detriment she had suffered. The award did, in part, compensate for the lost expectation (e.g. the loss of a home for life) but in relation to other aspects of the claim, particularly where Eirian had not performed her 'side of the bargain' the focus was more on compensating for detriment suffered.

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