Neutral Citation Number: [2016] EWCA Civ 463

Case No: A3/2015/0741

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
CARDIFF DISTRICT REGISTRY
HIS HONOUR JUDGE JARMAN QC
2HV00182

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2016

Before:

LORD JUSTICE PATTEN
LORD JUSTICE LEWISON
and
LORD JUSTICE UNDERHILL

- -

Between:

EVAN JOHN TEGWYN DAVIES (1) **MARY EILEEN DAVIES (2)**	**Appellants**
- and -	
ELIZABETH EIRIAN DAVIES	**Respondent**

- -
- -

Timothy Fancourt QC and Elizabeth Fitzgerald (instructed by **Michelmores LLP**) for the **Appellants**
Leslie Blohm QC and Adam Boyle (instructed by **Hugh James Solicitors**) for the **Respondent**

Hearing dates: 26 and 27 April 2016

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Approved Judgment

Lord Justice Lewison:

1. The issue on this appeal is how to satisfy the equity raised by Eirian Davies ("Eirian") against her parents by virtue of the principles of proprietary estoppel. The dispute between them has been a bitter one. Procedurally it was divided into two parts: the first to decide whether Eirian had raised an equity and the second to decide how that equity should be satisfied. Both parts of the dispute were tried by HHJ Jarman QC, sitting as a judge of the Chancery Division. His judgment on the first part of the dispute is at [2013] EWHC 2623 (Ch); and an unsuccessful appeal to this court against that part of his decision is at [2014] EWCA Civ 568, [2014] Fam Law 1252. The Court of Appeal said that they were concerned "only with the threshold question" whether Eirian was entitled to "some equitable relief"; and held that the judge was entitled to conclude that she was. The court made it clear that the second hearing would determine how the equity should be satisfied "whether by a monetary payment, a licence to stay in the farmhouse, or in some other way." The judge's judgment on the second part of the dispute, against which this appeal is brought is at [2015] EWHC 015 (Ch). I refer to the judge's first judgment as "J1" and to the second as "J2".

2. Mr and Mrs Davies are now in their seventies. They have been farmers for over fifty years. Their farming began at Caeremlyn in 1961, and they have added land to their holding over the years. In 1972 they bought another farm called Henllan consisting of a farmhouse, some other buildings and 182 acres. The two holdings were farmed together as one farm. It is principally a dairy farm. At the beginning of the story they farmed in partnership but in 2002 they formed a company to take over the farming business. The company does not own any of the land which is the subject of this dispute. That remains owned by Mr and Mrs Davies personally. The extent of the land that they own, and its agreed value at the time of trial, is set out in the table which I have reproduced from the skeleton argument of Mr Gaunt QC and Ms Fitzgerald, then instructed on behalf of Mr and Mrs Davies. Mr Fancourt QC now appears in place of Mr Gaunt. Mr Blohm QC appeared for Eirian together with Mr Adam Boyle.

Land	**Purchased**	**Value 2014**
55 acres being part of Caeremlyn Farm	3 August 1965	£390,000
Henllan Land: c.179 acres and dairy unit	12 Dec 1972	£1,100,000
Henllan Farmhouse		£300,000
Blaenos, 24 acres	18 Jan 1982	£150,000
68 acres at Glascoed	12 March 1991	£430,000
Llwynderw Farm, 147 acres	Purchased early 1997	£940,000
Land at Castell Draenog, 74 acres.	3 Sept 2008	£540,000

3. The judge structured his first judgment by setting out a general narrative, followed by separate consideration of questions of representations or assurances, reliance and

detriment. However, I think that it helps more to deal with the whole chronological picture in an integrated way.

4. Eirian was born in 1968, the second of three sisters; Enfys, herself, and Eleri. She and her elder sister both worked on the farm until her elder sister left to get married in 1988. By then Eirian was 20 years old. A few years earlier in about 1985, when Eirian was 17, it had become clear that she was the only one of the three sisters who was interested in taking over the farm. This would fulfil Mr and Mrs Davies' wish, which was important to them, that the farm would be kept in the family. Although they said nothing to Eirian which they regarded as a clear and binding promise the judge found that Mr Davies said to her that she would have the farming business; and that this was reinforced by Mrs Davies' telling her not to kill the goose that lays the golden eggs: J1 at [35]. It is unlikely that anyone distinguished at that time between the business and the land, although the judge made no finding that the land was explicitly mentioned. The extent of the land at that time did not include Glascoed, Llwynderw or Castell Draenog, the addition of which have subsequently doubled the size of the farm. However, Eirian understood that she would have to work on the farm in return: J1 at [57]. During that time she was paid no wages, but she had board and lodging at home, money for clothes and leisure and a scooter. She also had the use of a car. Those benefits, in aggregate, were substantial, but less than full recompense for the work that she did: J1 at [64].

5. But Eirian did not remain on the farm. She left four years later in 1989 after an argument with her father which, the judge found, must have appeared to have dashed her parents' hopes: J1 at [7] and [36]. In the following year she married Paul Rogers; and shortly before her wedding she and her parents were reconciled; and she came back to work (but not to live) on the farm "a couple of years" after she had left: J1 at [36]. Later in 1990 Mr and Mrs Davies bought another farm, called Glascoed, which consisted of a farmhouse and 89 acres. They sold the farmhouse and 22 acres to Eirian and her husband. Eirian and her husband lived in the farmhouse. Although Eirian claimed that her parents had told her that the remaining 67 acres would be hers one day, the judge rejected her evidence to that effect: J1 at [36].

6. The work that Eirian carried out on the farm was primarily milking, for which she was paid the going rate: J2 at [10]; J 1 at [8]. The other work she did consisted of veterinary work, foot trimming, insemination and general farming work: J2 at [10]. The judge did not make clear findings about the extent of that additional work at that time. Eirian was not paid for that additional work: J 1 at [65].

7. In 1997 Mr and Mrs Davies bought another 175 acres of land at Llwynderw which is adjacent to Henllan. In 1998 they had discussions about taking Eirian into the farming partnership which resulted in the drawing up of a draft partnership agreement. Under that agreement they were to transfer Henllan and Llwynderw into the joint names of themselves and Eirian, together with the stock and implements to be held in equal shares as partnership assets. However, this agreement did not contemplate the transfer of either Caeremlyn or the milk quota (J1 at [10]), both of which were assets of the partnership between Mr and Mrs Davies themselves. Although Eirian signed the agreement in the expectation that her parents would sign, in fact they did not. Any expectation of an immediate interest created by the draft partnership agreement could not, of course, have extended either to Caeremlyn or the milk quota because neither were encompassed in the agreement. Nor, on the basis of the judge's findings, could it

have included the 67 acres at Glascoed retained by Mr and Mrs Davies; or the land at Castell Draenog which had not then been acquired.

8. The judge appears to have accepted Eirian's evidence that at the time she signed the draft partnership agreement she thought that she had become a partner and that she was also told that the farm would be left to her: J1 at [37], [41] and [61].

9. In October or December 1998 Eirian and her husband sold Glascoed and moved into Henllan, which they occupied rent free: J1 at [12]. (October is stated at J1 [39] and December at J1 [42]). They also made improvements to Henllan for which they were partially reimbursed, but their expenditure was about £3,000 more than the reimbursement: J1 at [76]. At the time of her move Eirian was still under the impression that she was a partner; but no further representation was made to her at that time: J1 at [42] and [46]. In addition to the provision of the farmhouse at Henllan, Eirian was paid £3,000 per annum. She also worked in the belief that she would be entitled to an equal share in the profits of the business: J1 at [68].

10. In 2001 Eirian was pregnant with her second daughter, when she was kicked by a cow. There was another argument with her father during the course of which she discovered that she was not a partner as she had thought: J1 at [42]. She and her husband left Henllan and moved into a house at Ludchurch which they acquired with the aid of a mortgage. She accepted in the course of her cross-examination that at that time she had to an extent "given up on Henllan"; and she readily accepted that her expectation of the farm and the business was "dependent on her continuing to work in the business": J2 at [33]. When she left she had "no expectations regarding the farm": J2 at [35]. She loved the herd but she was prepared to give it up because she was pregnant and she had had enough: J2 at [39].

11. In the autumn of that year, in conversation with their solicitor Mr Bissmire, Mr and Mrs Davies told him that there was no possibility of Eirian coming back to work on the farm: J1 at [13]. They also told Mr Bissmire that although they wanted Eirian to take over the farm in due course, they did not want her to have it outright while she was still married to Paul.

12. All Eirian's work on the farm ceased until 2006, apart from a few occasions when she attended to a sick cow at her father's request: J2 at [11].

13. During the period when Eirian thought she was a partner, the actual partnership between Mr and Mrs Davies made a profit of £21,419 (in 1997) and a loss of £9,609 (in 1999). Figures for the other years covered by that period are not available. Those figures would also have taken into account the ability to sell such quantities of milk as were covered by the milk quota (which was not to have been transferred to the intended partnership between all three parties).

14. During the period when Eirian was away from the farm, in 2002, Mr and Mrs Davies made new wills leaving one third of their estate each to their daughters Enfys and Eleri and one third on trust for Eirian's daughters: J1 at [13]. Eirian became aware of the new will some years later. It was also at this time that the company was incorporated and took over the main farming business (but not the land which remained owned by Mr and Mrs Davies personally).

15. In February 2004 Mr and Mrs Davies bought a further 74 acres of land at Castell Draenog.

16. Eirian's marriage broke down in June 2006. In the course of the ancillary financial proceedings she filed a Form E statement in October 2006 in which she said:

> *"During our 16 year marriage we were meant to inherit one of my parents' farms but due to the Respondent's actions 7 years ago we were taken out of their Will completely and moved away from my parents' farm. I have since made contact with my parents although the relationship is very strained, and now they will not forgive me for leaving. Therefore I have no future inheritance as I gave it up for my loyalty towards my husband and our marriage."*

17. Seven years before that statement was 1999, so Eirian appears to have been referring to the second occasion on which she had left the farm in 2001. On the breakdown of Eirian's marriage she returned to work part time at Henllan, although she continued to live at Ludchurch. That did not last long, because in early 2007 she had another argument with her father about her new partner, which led to her leaving the farm and taking a job in October with an employer called Genus: a specialist in livestock reproduction services.

18. In 2007, while she was still working for Genus, Eirian would supervise the start of the milking in the mornings and then work on the farm during the afternoons and on her days off, attending to calving, insemination and veterinary work: J2 at [11] and [20].

19. On Boxing Day 2007, following requests from her father, Eirian returned to live at Henllan although she continued to work for Genus. Mr Davies told her at the time that Henllan would be her home for life: J1 at [49]. She kept her property at Ludchurch, which she rented out. Although Mr Davies had told Eirian that Henllan would be her home for life, he made no further representations about the farm or the business: J2 at [35]. As she put it in her cross-examination:

> *"… no he had not promised me the business again. I moved back because the house was going to be my home for the rest of my life…"*

20. In July 2008 Mr and Mrs Davies and Eirian met a solicitor and an accountant to discuss the issue of shares in the company to Eirian and to appoint her as a director. Mr and Mrs Davies said that they were thinking of issuing 49 per cent of the shares to Eirian. Although salaries were discussed, and figures of between £1,000 and £1,880 per month were mentioned nothing was agreed: J1 at [17]. The pattern of work described in relation to 2007 continued while Eirian continued to work for Genus: J2 at [11] and [20]. In August Eirian left her employment at Genus and went back to work on the farm at an agreed salary of £1,500 per month plus payment of the rates and the electricity bill for the farmhouse. She raised the question of a pension with her mother, to which her mother replied "your house is your pension": J1 at [50]. The company did not, of course, own any of the land relevant to this dispute. The judge found that she left her job at Genus because of the promises made at the meeting in July 2008 about a share in the company. That led to a period of about four years

during which Eirian worked long hours for £1,500 per month; probably as many as 100 hours per week: J2 at [11], [20], and [41]. Her monthly payment was increased to £1,700 in mid-2011 and to £2,000 in mid-2012; J1 at [66]. The quality of her work was high. In 1997 she had won an award as Young Farmer of the Year: J2 [13]. She had a passion for the herd, and maintained high standards of care: J2 [20]. She had excellent stockman skills.

21. In March 2009 Eirian's former husband was pursuing her for child support payments. The parties had a meeting with the accountant; and it was agreed that the shares would not be allotted and that Eirian would not be appointed as a director; but that Mr and Mrs Davies would sign draft wills and show them to Eirian: J1 [20]. At some point in 2009 Mr and Mrs Davies showed Eirian draft wills under which she was to be left the land and buildings and a share in the company. The judge found that there was no understanding that Mr and Mrs Davies had actually executed wills in that form, but that the draft wills were an indication to Eirian of her parents' intentions at that time: J1 at [52].

22. Also in 2009 Mr and Mrs Davies installed a new milking parlour; and at its opening Mrs Davies made remarks to the effect that the investment was for Eirian's benefit and that she hoped that Eirian would be as happy on the farm as she and her husband had been for fifty years: J1 at [53].

23. In December 2009 Mr and Mrs Davies, with the advice of Mr Young, were contemplating new testamentary arrangements, under which the farm and the shares in the company would go into a discretionary trust, with the residue to be split between their three daughters in equal shares. Eirian found out about these proposals which led to further arguments with her parents: J1 [20] and [21]. She also corresponded directly with Mr Young. In an e-mail of 13 March 2010 she said that she was unhappy with the situation and that the only way it would work for her would be if her parents "went back to [their] promise and to carry on with the original Will that Mr Bissmire wrote out for them only last year." This was the draft will that she had been shown in 2009. Mr Young responded on 22 March. In his e-mail he said that Mr and Mrs Davies "want … to enable you to continue to live at Henllan and to work the whole farm for the benefit of you and your family after they are gone." He added:

> *"Nothing I have talked to them about is intended to prevent you from continuing to live at Henllan and to ultimately take over the running of the farm when your parents are both dead."*

24. In the summer of 2010 Mr Davies made a new will, which was shown to Eirian about a month later, in which he left his shares to her: J1 at [24]. She reacted to that in angry terms, telling her father (according to her evidence in cross-examination) that he could "stick it where the sun doesn't shine".

25. Mr Davies' shareholding would have been 50 per cent; and Eirian accepted in evidence that she only expected to receive the 49 per cent after incremental increases: J2 at [36].

26. The relationship between the parties deteriorated after that. Matters were brought to a head by a physical altercation in August 2012 following which Eirian left the farm for the last time.

27. Had Eirian not worked on the farm she would have pursued a career of the sort that she had with Genus. That would have given her shorter working hours and a better working environment, as well as more money: J2 at [40]. However, she did not wish to go back to Genus; and at the time of the trial she was working as a trainee foodstuffs specialist: a job that she enjoyed; and she was also doing some relief milking. The judge considered that it was likely that she would be successful in that career with "some fulfilment, better hours and better pay": J2 at [43]. She would, however, be capable of managing the farm: J2 at [49].

28. The judge also found that Eirian had received countervailing benefits, of which the most obvious was free accommodation and, in the early years, free board and other benefits. The value of accommodation at Henllan since 2007 was agreed at £525 per month (£6,300 per annum). Because she was living at Henllan she was able to let out her house at Ludchurch for £600 to £700 per month (£7,200 to £8,400 per annum), of which the profit (before paying the mortgage) was likely to have been of the order of £4,750 to £5,600 per annum. However, her lifestyle at Ludchurch was more attractive, and there was a benefit to the business in her living on the farm: J2 at [44] and [45].

29. Mr and Mrs Davies, although in their mid-seventies, intend to carry on farming. But their main income now comes from solar panels at Llanlliwe (on land that belongs to the company) and amounts to some £42,000 per annum: J2 at [46] and [47]. They live in the farmhouse at Caeremlyn with their daughter Eleri and her family, which is a substantial asset. It is likely that they are in a secure financial position apart from the farm and the business: J2 at [48].

30. As mentioned, in his first judgment the judge held that, in principle, Eirian was entitled to some form of equitable relief and his decision to that effect was upheld by this court. In his second judgment the judge was called upon to decide the nature of the remedy.

31. In addition to the land, which I have described above, there were also other assets in play. The herd of about 750 cows was valued as at 1 August 2014 at £1,738,675. The Company's agricultural machinery and fixed equipment was valued as at 1 August 2014 at £472,310. The net worth of the whole farming enterprise (before taxation) regardless of ownership of assets, as at 1 August 2014 was approximately £4.4 million and, net of CGT (at 28% on the land), at £3.15 million. The Company itself was worth £141,000. Most of the value thus lay in the land.

32. The judge said at J2 [33] that this was not a case in which the expected benefit and the expected detriment were equivalent or not disproportionate for three main reasons. First, a number of different representations were made over the relevant period. Second, in 2001, when Eirian left the farm for the second time she had to an extent "given up on Henllan". At [35] he went further and accepted the submission that when she left in 2001 she "had no expectations regarding the farm". Third, her expectation of the farm and the business was dependent on her continuing to work in the business, but that did not happen. The judge also held at J2 [34] that this was not a case in which Eirian "positioned her whole life" on the basis of her parents' assurances.

33. Nevertheless at J2 [35] he took "expectation" as an "appropriate starting point". Having summarised some of the facts that he had found he pointed out at J2 [38] that

from 2007 to 2012 the position with regard to expectation was changing and somewhat uncertain. But he said that "the essence of the expectation was that in reality Eirian was the only person who could fulfil her parents' wishes of keeping the business in the family after their days."

34. The case presented on Eirian's behalf was that she should be awarded what was promised to her; namely the land and the business: J2 at [51]. The opposing case was that Eirian should be given a sufficient sum for accommodation and for a share in the farm and the business. The former could be achieved by paying of her mortgage on the Ludchurch property; and the latter by awarding her the share of the partnership profits that she would have had if she had been a partner as she had thought, and by a share in the profits of the company. The aggregate of these sums amounted to £350,000: J2 at [54].

35. The judge rejected both sides' case. He held that the accommodation element did not sufficiently accommodate the expectation and detriment which he had found, and in particular those elements on which it was difficult to place a financial value. Nor did the accommodation element reflect what Eirian was promised in 2007, which was that she could live in the farmhouse for life. The calculations about profit etc. did not sufficiently recognise that for substantial periods up to 2001 and from 2009 to 2012 the expectation was that Eirian would succeed to the farming business and the herd that she loved. Nor did it take into account her parents' significant role in bringing that expectation to an end in 2012.

36. The judge thus concluded that justice was likely to lie somewhere between the polarised positions that the parties had adopted. He acknowledged that it was not an easy exercise; and that his conclusion might mean that part of the farm would have to be sold. He continued at J2 [56]:

> *"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 dependent on the impact of CGT which in turn depends [on] how much is sold. It is, in my judgment, a fair reflection of the expectation and detriment and other factors set out above."*

37. There was no further explanation of how he reached his ultimate conclusion. As Mr Gaunt pointed out in his skeleton argument the judge's award of £1.3 million is equivalent to £65,000 after tax for every year Eirian worked on the farm. I will return to these paragraphs of the judge's judgment in due course.

38. Inevitably any case based on proprietary estoppel is fact sensitive; but before I come to a discussion of the facts, let me set out a few legal propositions:

    i) Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part: *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [57] and [101].

ii) The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance: *Thorner v Major* at [29].

iii) However, no claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined, and whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood: *Gillett v Holt* [2001] Ch 210 at 225; *Henry v Henry* [2010] UKPC 3; [2010] 1 All ER 988 at [37].

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

v) There must be a sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability: *Gillett v Holt* at 232.

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

vii) In deciding how to satisfy any equity the court must weigh the detriment suffered by the claimant in reliance on the defendant's assurances against any countervailing benefits he enjoyed in consequence of that reliance: *Henry v Henry* at [51] and [53].

viii) Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application: *Henry v Henry* at [65]. In particular there must be a proportionality between the remedy and the detriment which is its purpose to avoid: *Jennings v Rice* at [28] (citing from earlier cases) and [56]. This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way: *Jennings v Rice* at [50] and [51].

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

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.

40. In *Jennings v Rice* at [45] Robert Walker LJ referred to a class 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. At [47] he referred to another class of case in which:

> *"... the claimant's expectations are uncertain (as will be the case with many honest claimants) then their specific vindication cannot be the appropriate test. A similar problem arises if the court, although satisfied that the claimant has a genuine claim, is not satisfied that the high level of the claimant's expectations is fairly derived from his deceased patron's assurances, which may have justified only a lower level of expectation. In such cases the court 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. 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. Nevertheless in my judgment the judge in this case applied far too broad a brush and failed to analyse the facts that he found with sufficient rigour. Nor, to my mind, did he explain why he reached the conclusion that he did. Although he said that he took

"expectation" as an appropriate starting point, he did not explain which expectation out of the many he found he regarded as the starting point.

43. Take first the expectation that the judge found to have been created by the assurance given in 1985. That expectation was that Eirian would inherit the farm. Whether that meant the business or the business and the land was itself uncertain. But as the judge found Eirian knew that that expectation was conditional upon her remaining on the farm and working in return. At that point given that Mr and Mrs Davies were in their forties and Eirian was only 17, the expectation must have been conditional upon several decades of work. When she left only four years later, dashing her parents' hopes, it does not seem to me to be equitable to hold them to that assurance at least to its full extent. 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. Had this been a contract (which of course it was not) Eirian's decision to leave the farm after only four years would surely have been regarded as a repudiatory breach. This idea, although not of course expressed in legal terms, seems to me to have underlain Eirian's statement in her Form E. As McFarlane and Sales put it in the article cited:

> *"The relief afforded to B under the promise-detriment principle is protection in respect of B's detrimental reliance, unless and until any performance he or she has rendered under a reciprocal arrangement with A of which A's promise forms part amounts to substantial performance by B of the return A wished to secure by making that promise."*

44. Take next the expectation created by Eirian's belief between 1998 and 2001 that she was a partner with her parents on the basis of the draft partnership agreement. This was a quite different expectation to an expectation of inheritance. It was an expectation of participation in profits (and exposure to losses) during the subsistence of the partnership. Indeed in one year covered by the period in which Eirian thought she was a partner the partnership did make a loss. It is, however, fair to say that during the time that she thought she was a partner she also expected to inherit the farm. Again, whether that meant the business or the business and the land is uncertain. But her expectation was falsified in 2001 and it was that which caused her to leave the farm once again.

45. When she left the farm for the second time in 2001 (and remained off the farm for five years) she had no expectation as regards the farm; and was prepared to give up the herd because she was pregnant and had had enough. As she herself explained to the court in the matrimonial proceedings, her parents had not forgiven her for leaving the farm; and she had put her marriage first. Unless something was said or done to rekindle that expectation, there was no subsisting expectation at the time when Mr and Mrs Davies attempted to assert their strict legal rights which equity would intervene to protect. On the judge's findings nothing was said to Eirian about inheriting the farm when she came back to live at Henllan at the end of 2007. What was said to her was that she would be able to live rent free at Henllan for her life.

46. Take next the expectation created by the discussions about a shareholding in the company in and after 2008. The first point to make is that, as Eirian knew, the

company did not own the land which is the subject of the dispute. Second, any expectation created by discussions about shareholdings must have superseded any expectation of partnership. Third, Eirian accepted that although she thought that she would become a 49 per cent shareholder in the company, she would acquire the shares in tranches over a period of five years.

47. The judge placed some weight on the fact that in 2009 Mr and Mrs Davies showed Eirian the will in which the farm would be left to her. But in evaluating that representation it is pertinent to note (a) that it was a draft rather than an executed will which was only "an indication" of their intention "at that time" (b) that their executed wills at that time left their estate to their other two daughters and to Eirian's children in equal shares; (c) that Eirian knew of the existence of that executed will, as her form E shows; and (d) that the draft will was superseded by another testamentary proposal in that same year, also known to Eirian, in which the farm was to be left to a discretionary trust. Moreover, the falsification within a short time of Eirian's expectations aroused by the draft will did not cause her to leave the farm, although it did lead to an argument.

48. 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. The judge recognised that the expectations were changing and uncertain but said (J2 at [38]) that the uncertainty related to Mr and Mrs Davies' "proposals as to how to formalise Eirian's position in documentation at particular times. The essence of the expectation was that in reality Eirian was the only person who could fulfil her parents' wishes of keeping the business in the family after their days." This conclusion, as it seems to me, does not take into account the judge's findings about the changing nature of Mr and Mrs Davies' wills, which left their estate to all three sisters and then to a discretionary trust. Nor does it reflect his finding that everyone knew that the company did not own the land.

49. I turn next to the question of detrimental reliance. As the judge rightly said (J2 at [34]) this was not a case in which Eirian "positioned her whole life on the basis of her parents' assurances". The first time that she left the farm in 1989 was nothing to do with any promises or their falsification. She left because her parents disapproved of her choice of Paul Rogers, and she put her marriage first. Up to that time she had received board and lodging and money for clothes and leisure, but did not receive wages as such. I cannot see that up to her first departure the detrimental reliance was more than the extent of her underpayment.

50. When she returned to the farm in 1991 or thereabouts she was paid for milking at the going rate, but not for the other work that she did. She stayed for ten years. Although the judge made no express finding that her return was a response to any further representation made by Mr or Mrs Davies, the Court of Appeal on the first appeal took the view that this was implicit and referred to parts of Eirian's evidence which would have supported such a finding. I will assume that to be the case. It would have been helpful if in his second judgment the judge had confirmed that he intended to make a finding to that effect and had identified the relevant representation or assurance, but he did not do so.

51. However, there was a clear break in 2001 when Eirian left the farm for the second time. The mutually agreed position during that time was that Eirian had no expectation of inheritance in part because her parents had not forgiven her for leaving the farm. When she came back in 2006 she did not stay for long because of the argument with her father in 2007. Nor did the judge find that the reason for her return in 2006 was attributable to anything other than the breakdown of her marriage.

52. The promise of rent free accommodation at Henllan farm house for life does not appear to have been accompanied by any *detrimental* reliance. As the judge pointed out the promise was not conditional on Eirian's giving up her property in Ludchurch; and she did not do so.

53. The judge identified two broad strands in the detriment that Eirian suffered (J2 at [10]):

    i) Working for long hours on the farm without full payment and

    ii) Had she not worked on the farm she would have been able to work shorter hours in a working environment of her choosing and she would have been free of the difficult working relationship she had with her parents.

54. As I have said the judge rejected the claim that the farm should be transferred to Eirian in specie. He also rejected a claim that some lesser part of the farm should be transferred in specie. He thus decided that Eirian's equity should be satisfied by means of a monetary award. There is no cross-appeal against that decision in principle. It follows that the only question is: how much? That necessarily means placing a money value on both financial and non-financial aspects of the detriment that Eirian suffered, as well as on the expectations that were aroused.

55. Before the judge Mr and Mrs Davies argued that the equity would be satisfied by a payment of £350,000. That sum consisted of the following components:

    i) An accommodation element of £180,000. This would enable her to pay off the mortgage on her other property at Ludchurch, with the consequence that she would have had free accommodation for her lifetime, and also a capital asset.

    ii) A partnership element of £22,000. This represented the profits to which she would have been entitled between 1998 and 2001 if she had been made a partner as she had expected.

    iii) A company element of £120,000. This represented a one half share of the profits made by the company from mid-2008 to mid-2012.

    iv) The balance of £28,000 represented underpayment for the work Eirian had carried out on the farm in the early years.

56. It is necessary to quote the judge's reasons (J2 at [55]) for rejecting the case for Mr and Mrs Davies:

> *"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 … does not reflect what Eirian was promised in 2007, which is 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 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."*

57. I do not consider that in this paragraph the judge properly analysed the offer that Mr and Mrs Davies had made; and in particular he failed to appreciate that the offer itself already contained much that went towards satisfying Eirian's expectations.

58. Let me take first the accommodation element. This component attempted to provide Eirian with the equivalent in money of what she had been promised in relation to the farm house at Henllan. Since the agreed value of the freehold of Henllan was £300,000 the accommodation element could not have exceeded that figure, and would almost certainly have to be scaled down to some extent to reflect the difference between a personal entitlement to a home for life and a freehold capital asset. It is true that the promise was not conditional, but by the same token the promise did not include a promise to pay off the mortgage on the Ludchurch property. Although that property was let out, the judge made no finding that the rental income exceeded keeping down the mortgage.

59. The judge phrased the expectation which caused him to reject the partnership element and the company element as the expectation that Eirian would succeed "to the farming business and to the herd": not to the land. As he said at J2 [38]:

> *"Whilst the expectation was focussed on the herd, there was no suggestion of the business being carried on from land other than the farm."*

60. However, the lack of suggestion that the business might be carried on elsewhere does not lead to the conclusion that there was any promise that Eirian would have the unencumbered freehold. Eirian had two other sisters, for whom her parents might have wanted to make some provision (as they indeed did in the wills that they executed in 2002); and had they retired from farming it would not have been in the least unconscionable for them to have granted Eirian a tenancy of the farm to enable her to continue farming the herd and to give them an income in retirement.

61. On one view the profit share between 1999 and 2001 reflected more than what Eirian's expectation was as regards that business. The sum of £22,000 during the period of the partnership gave full effect to her expectation in monetary terms. The company element did not take account of the countervailing benefits that she had

enjoyed during that time, namely (a) her salary of £20,000 per annum and (b) the provision of free accommodation. It was also far in excess of any amount that had actually been paid by the company by way of dividend between 2008 and 2012. In the years between 2008 and 2012 the company in fact paid a total in dividends of £60,000, of which half would have been £30,000. The agreed value of the company itself was £141,000 of which half would have been £70,000 in round terms. So the company element of the overall sum was equivalent to 85% of the value of the company, and more than the combination of half the dividends and half the value of the company. In my judgment this part of the offer reflects the value of Eirian's expectations as regards succeeding to the business and the herd.

62. So far as Mr and Mrs Davies' "significant role of bringing that expectation to an end" is concerned, it is inherent in almost every claim based on proprietary estoppel that the representor or promisor has resiled from the representation or promise that he has made. It is, therefore, always the representor or promisor who has a significant role in bringing the expectation to an end. But there is no warrant (and no authority that we were shown) for increasing a monetary award on that account. In the course of his first judgment the judge was studiously careful to avoid attributing blame for the breakdown in the relationship; and he does not explain at [55] whether (and if so why) he changed his mind. As Gardner says in the article cited: analysing relationship breakdowns in terms of fault is at best a tasteless, and generally an inept, undertaking.

63. 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).

64. Let me take the last element first. It is clear from Eirian's own evidence that she had no expectation of inheriting the land between 2001 and 2006. She came back to the farm in 2007 and stopped working for Genus in 2008 without anything further having been said about inheritance. I agree with Mr Fancourt that the only clear representation after that time that she would inherit the land was the draft will shown to her in 2009. At best the expectation created by that draft will lasted for three years or so, until the final rupture in 2012. But even within that period Eirian knew that the testamentary proposal had been superseded twice by contemplated dispositions less favourable to her. As her e-mail correspondence with Mr Young shows, she knew by March 2010 that the "promise" made to her in 2009 would not be kept. Mr Blohm argued that her expectation about the land was not limited to inheritance but extended also to lifetime succession in the event that her parents decided to retire; but there is no clear representation to that effect. Accepting that she had an expectation of inheritance, it was in my judgment an expectation which was at a high level and could not fairly be derived from what she was told between 2009 and 2012: see *Jennings v Rice* at [47]. It cannot carry much weight in an overall assessment. I am prepared to accept that some award must be made under this head, but in my judgment it will be a relatively modest one.

65. The non-financial detrimental reliance that the judge identified was that Eirian gave up the ability to work shorter hours in a working environment of her choice and freedom from the difficult working relationship she had with her parents. All that is

true, but the effect of the rupture is that she is now free to do all that which the judge said that she had given up. He made no finding that any of what she gave up was irretrievable. To the contrary, he found expressly that this was not a case in which Eirian's whole life was positioned on the representations. Eirian moved out of her home in Ludchurch in December 2007 and ceased to work for Genus in August of the following year. The period covered by this head is therefore 4 to 5 years at most. Again I accept that some award must be made under this head, but in my judgment it will be a relatively modest one.

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.

68. Finally, as Underhill LJ pointed out in argument, to the extent that the offer includes compensation for past expectations (in particular the partnership element, the company element and the underpayment element) some additional sum must be allowed to reflect delay in payment and the changes in the value of money since those expectations were created. On the other hand, in so far as a monetary award covers future expectations it must be discounted for early payment.

69. Taking all these factors into account I would increase Mr and Mrs Davies' offer by a further £150,000 making a total award of £500,000. I would thus allow the appeal and reduce the judge's award from £1.3 million to £500,000.

Lord Justice Underhill:

70. I agree.

Lord Justice Patten:

71. I also agree.