



Concentrate Questions and Answers Equity and Trusts: Law Q&A Revision and Study Guide (3rd edn)

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p. 158 11. Equitable Estoppel

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Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans, suggested answers, and author commentary. This book offers advice on what to expect in exams and how best to prepare. This chapter covers questions on equitable estoppel.

Keywords: estoppel, proprietary estoppel, representation, reliance, detriment, proprietary interest, land law

Are You Ready?

In order to attempt the questions in this chapter you will need to have covered the following topics:

- Doctrine of proprietary estoppel
- Remedies
- Basic material on constructive trusts

Key Debates

Debate: the role of unconscionability in proprietary estoppel and its remedies.

Proprietary estoppel remains a contested area with two House of Lords' decisions, *Yeoman's Row Management v Cobbe* [2008] UKHL 55 and *Thorner v Major* [2009] UKHL 18 following on from the innovative application of estoppel to limit a person's testamentary freedom by the Court of Appeal in *Gillett v Holt* [2001] Ch 210. All of these cases have generated an extensive discussion about the criteria and application of proprietary estoppel in academic circles.

The Law Commission Report, which led to the passing of the **Law of Property (Miscellaneous Provisions) Act 1989**, abolished the equitable doctrine of part performance. It was envisaged that the doctrine of estoppel would take its place, and there have now been two or three cases where this doctrine has been applied to prevent a contract or deed from being declared void for failure to comply with statutory formalities. However, each case needs to be carefully examined on its facts as the House of Lords made clear in *Yeoman's Row*. This is a topical and fast-moving area as estoppel seems to be the claim of choice currently where families are fighting over property.

Debate: how to satisfy the equity?

Estoppel cases are necessarily very varied in their results, but there is a helpful judgment of Walker LJ in *Jennings v Rice* [2003] (referred to in the questions) suggesting guidelines for the courts as to how they should satisfy an estoppel.

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☞ Because estoppel can give rise to a proprietary interest, it is of considerable importance in land law where it may be necessary to determine whether a third party will be bound or not by an estoppel interest. This chapter has not considered this aspect of the subject as this is usually dealt with in Land Law. Question 4 of Chapter 15 also includes an estoppel interest.

Question 1

... once the elements of proprietary estoppel are established an equity arises. The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment.

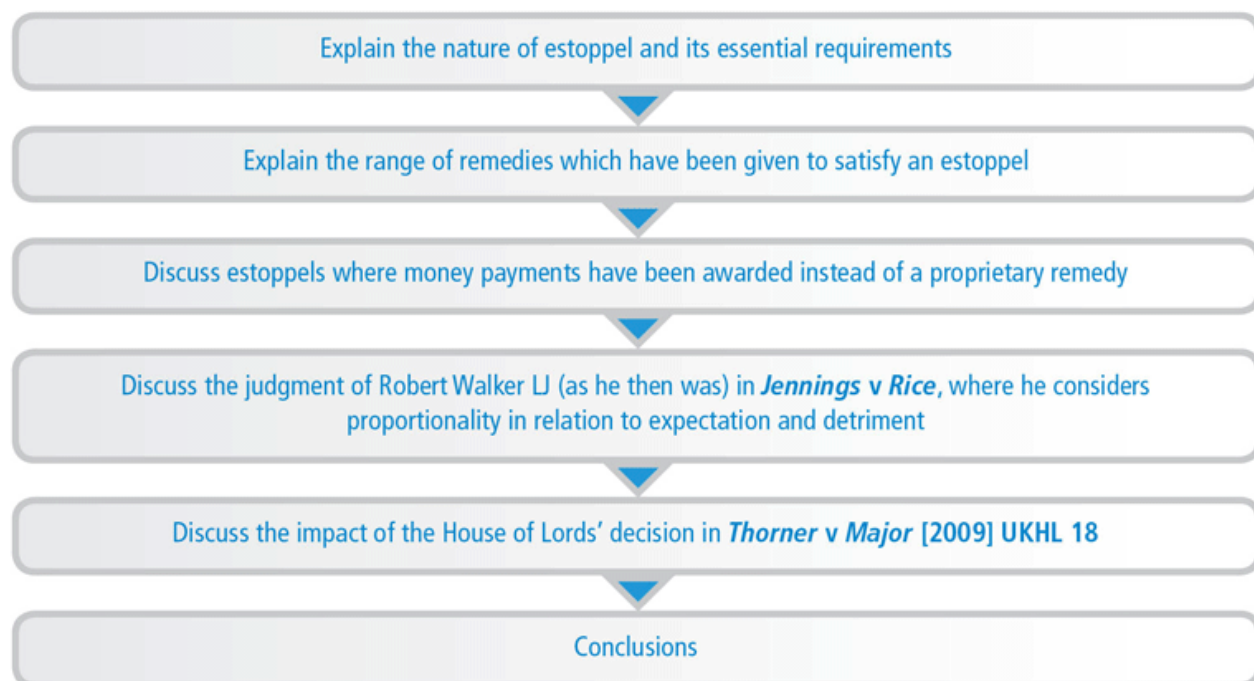
(Aldous LJ in *Jennings v Rice* [2003] 1 P & CR 8)

Explain how the courts have sought to do justice in satisfying an estoppel.

Caution!

- Read the question carefully and take care to write about remedies to satisfy an estoppel rather than spending too much time on the doctrine itself.
- A good knowledge of *Jennings v Rice* as the leading authority on how an estoppel should be satisfied is required.
- Aim for a PEA approach throughout although bear in mind that you will have several points to make (which correspond with the headings) so the PEA will take place under each heading.

Diagram Answer Plan



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Suggested Answer

Estoppel is a doctrine of equity¹ which has been applied to a variety of informal dealings in order to do justice. The essential requirements have been that a statement is made by one person as to their intention on which another person acts to their detriment in such a way that it would be unjust to allow the person who has made the statement to renege upon it (*Taylor's Fashions Ltd v Liverpool Victoria Trustees Co. Ltd* [1982] QB 133).

¹ This introduction to the topic lays out the basics of estoppel. It is a brief introduction into the main topic.

Remedies

The doctrine is wide and has been applied to a variety of situations.² The interests granted to satisfy an estoppel are usually (although not always) proprietary. They have included³ a right in the nature of an easement (*E. R. Ives Investment Ltd v High* [1967] 2 QB 379), a licence (*Inwards v Baker* [1965] 2 QB 29, *Matharu v Matharu* (1994) 68 P & CR 93), the full fee simple (*Pascoe v Turner* [1979] 1 WLR 431), a long lease (*Griffiths v Williams* (1978) 248 EG 947), and where it was applied prospectively to limit a person's testamentary freedom (*Gillett v Holt* [2001] Ch 210). However, in *Powell v Benny* [2008] P & CR D31, a sum of money was awarded. In *Crabb v Arun DC* [1976] Ch 179, Scarman LJ sought, as a remedy for estoppel, 'the minimum equity to do justice'. Estoppel was given proprietary recognition in the **Land Registration Act 2002, s. 116**.

² Having briefly established the doctrine this is the *key point*.

³ The point is followed in this paragraph by *evidence* and then *analysis*.

Proprietary estoppel, unlike promissory estoppel,⁴ may be used to found an action and is not confined to setting up a defence. It is not, like promissory estoppel, limited by the terms of a contract, and the courts have jealously guarded their wide discretion in applying it, taking into account any unconscionability and the circumstances of the parties. The statement giving rise to the estoppel may be vague as to what was actually intended and the detriment may be conduct over a number of years; these factors mean that the courts often have difficulty in finding a just solution. In some cases, it has been impossible to award an interest which exactly achieves what was required to reflect the estoppel, and the courts have awarded an interest which most nearly approximates to it. Thus, in *Ungurian v Lesnoff* [1990] Ch 206⁵ a life tenancy under the **Settled Land Act 1925** was awarded to a cohabitee, although it gave her the very wide powers of disposition under the Act, and in *Griffiths v Williams* a lease at a nominal rent for life. In other cases, the courts have exercised their discretion to err on the side of generosity because of the possibly difficult behaviour of one of the parties (as in *Pascoe v Turner*, where, on expenditure of less than £700 on a house, a cohabitee was awarded the fee simple), or have refused to make any award where the circumstances of the parties had changed ↵ so that this would have caused hardship to the party who had made the statement (*Sledmore v Dalby* (1996) 72 P & CR 196—where ten years' rent-free occupation had satisfied the estoppel).

⁴ You will have covered promissory estoppel in contract.

⁵ *Evidence* continues here with a good range of cases showing different remedies in different circumstances.

Payments⁶

⁶ Monetary payments are unusual (although becoming less so with the flow of cases) given the proprietary nature of the doctrine so worth a separate paragraph.

In some cases, the courts have taken the view that a monetary payment is the best way of satisfying the estoppel (*Guest v Guest* [2019] EWHC 869 (Ch); *Habberfield v Habberfield* [2019] EWCA Civ 890; *Davies v Davies* [2016] EWCA Civ 463). In *Wayling v Jones* (1995) 69 P & CR 170 the promised property had already been sold, so that the only possibility of compensation was by a money payment from the estate. In *Baker v Baker* [1993] 2 FLR 247, the relationship had broken down, so that the only practicable way of satisfying the estoppel was by a money payment. In *Dodsworth v Dodsworth* (1973) 228 EG 1115, where the promisees had spent £700 improving a house where they were told they could live for as long as they liked, they were allowed to remain there until the expenditure had been reimbursed. Money awards were also deemed appropriate in *Campbell v Griffin* [2001] EWCA Civ 990 and *Jennings v Rice* [2003] 1 P & CR 8 where the value of the equity resulting from the estoppel was found to be less than half the value of the house which the plaintiff claimed to have been promised.

*Jennings v Rice*⁷

⁷ Good to link clearly to the quotation in the question.

Given the wide discretion which the courts have applied in the cases,⁸ it is hardly surprising that Weeks J remarked in *Taylor v Dickens* [1998] 1 FLR 806 at first instance that one might as well 'issue every civil judge with a portable palm tree', and that equity was in danger again of becoming as long as the Chancellor's foot. Whilst a discretion is desirable to do justice in a particular case, it creates problems for lawyers who have to advise their clients.

⁸ This paragraph starts with the *point*.

For this reason,⁹ the judgment of Walker LJ in *Jennings v Rice* is to be welcomed as an attempt to lay down some guidelines.¹⁰ Walker LJ said that the courts cannot exercise a totally unfettered discretion, which might anyway vary from one judge to another. He considered that any strict rules for the application of a discretion would be inappropriate, but that nevertheless, 'The need to search for the right principles cannot be avoided'. He conceded that the search would be difficult because of the unlimited variety of factual situations which could give rise to an estoppel.

⁹ This is part of the *analysis*.

¹⁰ Set these out clearly—here your reading of the case will pay off.

Walker LJ observed that in these contractual cases where the promise and the detriment are fairly clearly defined and the arrangement between the parties does not fall far short of a contract, there is not much difficulty as the estoppel can be satisfied by the implementation of the agreement. An extreme example of such a case would be *Yaxley v Gotts* [2000] Ch 162, where there was an agreement but it was void as it failed to comply with the **Law of Property (Miscellaneous Provisions) Act 1989, s. 2**.

Where, however, the promisee's expectations far exceed what he might have expected as a result of the detriment, then the court should limit the expectations to make them more proportionate. The equity from an estoppel arises from the expectations and detriment and the unconscionable behaviour of the promisor, but the expectations and the detriment must be proportionate in the remedy granted.

Impact of *Thorner*¹¹

¹¹ A new heading here is useful to separate out these cases concerning future property rights (typically where a promise to leave property in a will is made).

On the other hand, distinct from cases where the interest is immediate, in other cases the assurance may relate to a future property right¹² (*Thorner v Major* [2009] UKHL 18; *Gillett v Holt* [2001] Ch 210). These cases present much more difficulty in satisfying the estoppel particularly where the expectation is to receive property on the death of the promisor.

¹² This is more *evidence* and *analysis*.

In *Thorner*, the House of Lords acknowledged that an assurance as to an inheritance might well involve a change in the extent of the property between the date of the assurance and the death and that would then be relevant to the relief that the claimant was awarded. However, provided that there was still an identifiable property at the death then the court would be willing to grant the relief.

In *Thorner*, the claimant was granted the beneficial ownership in the whole of the farm and the business although the extent of the farm had changed since the first assurances. But the court was prepared to make an award since the approach is to look back at the time at which the promise should have been carried out and ask whether it would be unconscionable not to give effect to it. As Lord Hoffmann stated in *Thorner*, 'The owl of Minerva spreads its wings at dusk';¹³ in other words, the assessment of the equity is retrospective.

¹³ See article by Lord Neuberger in 'Taking Things Further'.

The majority in *Thorner* based their view of the claimant's entitlement on the doctrine of proprietary estoppel whereas Lord Scott considered¹⁴ that the nature of the expectation made a claim based on estoppel difficult, preferring the constructive trust as the better mechanism for realising the claimant's expectation. His view, first set out in *Yeoman's Row Management* where equitable relief was denied, was that cases where the expectation which had been disappointed was for a future property right were more appropriately dealt with using the constructive trust. In *Thorner*, albeit the basis for his decision was different from the majority, his view as to the way in which the equity should be satisfied (i.e. the transfer of the farm and the business to the claimant) was the same.

¹⁴ This point showing the debate between the majority and minority is worth extra marks.

↵ *Gillett* concerns a future property right where the expectation was to receive property on death and the effect of the equity was to limit testamentary freedom. The Court of Appeal deemed that the promisor was estopped from denying the promise during his lifetime and undertook an inquiry into the extent of the estate making an award which was consistent with the reasonable expectation the

claimant had been led to hold. The satisfaction of the equity there was to make an evaluation of what it was reasonable for the claimant to receive in the light of the promise which had been made and his detrimental reliance.

Conclusion¹⁵

¹⁵ The conclusion is relatively brief as much of the analysis above incorporates concluding viewpoints.

So, it is clear that although there are some judicial guidelines as to the manner of satisfying the equity, nevertheless there remains much flexibility in the scope available to the courts in providing a particular remedy. The scope of an estoppel appears to be as unlimited as the factual circumstances which may arise.

Looking For Extra Marks?

- Thoroughly analyse Walker's guidelines in *Jennings*.
- Cover the minority judgment in *Thorner* and analyse the points.
- Explain how proprietary estoppel differs from promissory estoppel.
- Use the full range of cases as evidence of each point.

Question 2

Luke is the owner of a large agricultural barn which he is using for his pottery business. Two years ago, Luke was approached by Eddy, an old friend from their school days, who had inherited a large amount of money from his father which had been made mainly from buying former agricultural buildings and developing them into high-quality housing. Eddy proposed that they should convert the barn into two large houses. As Luke had no money to invest in this venture, they agreed that Eddy would bear all the costs involved in acquiring planning permission; he would then buy the barn from Luke for £650,000 and undertake the development, and when the work was completed he would recoup his costs out of the sale of the housing and they would share the profits equally.

At some considerable expense, the planning permission was successfully obtained last year. However, Luke has now received an offer from AristoBuild plc to sell the barn to them, with the benefit of the planning permission, for £850,000. He is now refusing to go ahead with the original agreement with Eddy.

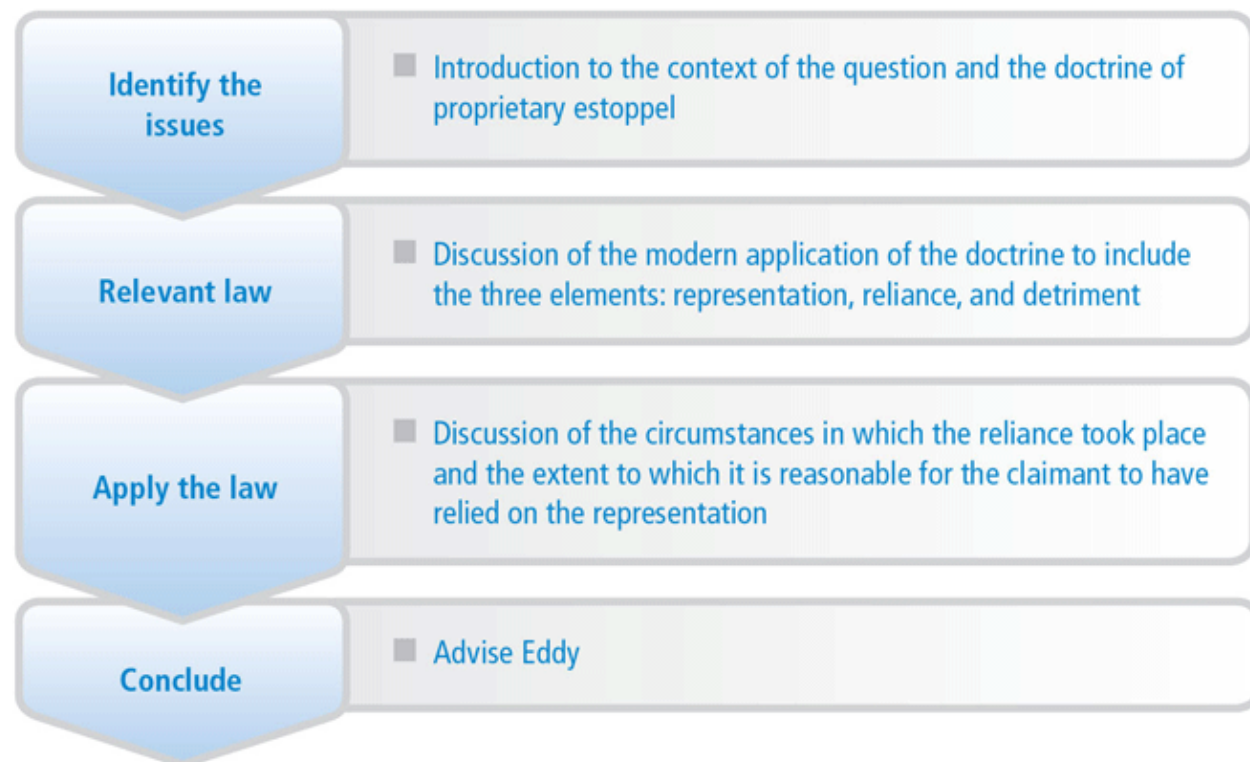
Advise Eddy.

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Caution

- You need to know the cases on proprietary estoppel thoroughly.
- If coursework is set in this area then good knowledge of the journal articles is helpful.
- Watch out for a recent and topical case—this may well trigger a question in this area.

Diagram Answer Plan



Suggested Answer

Introduction¹

¹ The introduction covers the issues and outline of the law.

If the agreement between Luke and Eddy is in respect of an interest in land, the absence of any formalities as required by s. 2(1) of the **Law of Property (Miscellaneous Provisions) Act 1989** means that no action can be brought for specific performance of a contract. The question then remains as to what rights and remedies might be available to Eddy given that he has expended money in obtaining planning permission for the conversion of Luke's barn. Proprietary estoppel and the remedial constructive trust need to be considered. If these fail then Eddy may have to rely on personal claims for damages at common law such as unjust enrichment or *quantum meruit*.

Modern Application²

² This section and the next outline the development of the law and its modern iteration.

The essentials are threefold: representation, reliance, and detriment. There must be a clear and unequivocal representation whether by words or conduct made by the legal owner on which the claimant reasonably relies (and therefore changes his position) and on which the claimant acts to his detriment or is unconscionably disadvantaged (*Liden v Burton [2016] EWCA Civ 275*). Cases relying on the doctrine of proprietary estoppel can rest either on a common expectation, an imperfect gift, or a unilateral mistake (*Yeoman's Row* at para. 47 citing Gray and Gray, *Land Law*, 4th edn at 10.189). The problem posed in the question is one where there is an expectation held in common by both parties that the agreement will be carried through; that is, that Eddy will undertake the acquisition of the planning permission and will then buy the unconverted barn from Luke.

Belief Agreement Binding³

³ This is one of the detailed issues followed by the *rule*.

One issue which arises, therefore, is the extent to which the parties, and the claimant in particular, believed that the agreement was binding or knew that it was not. In *Ramsden v Dyson (1866) LR 1 HL 129*, Lord Kingsdown relied on the fact that the claimant mistakenly believed that the agreement was binding whereas in *A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd [1987] AC 114*, there

was no question but that the claimant (the Government of Hong Kong) knew that the agreement was binding in honour only. In *Plimmer v Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App Cas 699, when a businessman engaged in an arrangement to provide landing places with the provincial government, it was held wholly inequitable that the government should be allowed to renege on this agreement. In *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co. Ltd* (1979) [1982] QB 133, Oliver J delivered an important analysis of proprietary estoppel when he stated that '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 ...' (at pp. 151–152).

Commercial or Family Context?⁴

⁴ This is the next *issue* followed by the *rule*.

These cases indicate a different approach between commercial and domestic contexts. Cases such as *Inwards v Baker* [1965] 2 QB 29; *Pascoe v Turner* [1979] 1 WLR 431; *Windeler v Whitehall* [1990] 2 FLR 505; *Gillett v Holt* [2001] Ch 210; *Grundy v Ottey* [2003] WTLR 1253; *Jennings v Rice* [2003] 1 P & CR 8; *Lissimore v Downing* [2002] 2 FLR 308, where there is a domestic context, tend to show a greater readiness on the part of the courts to apply the doctrine.

Where a claimant has a mistaken belief, on which they rely to their detriment, that they have a proprietary interest, the courts are more ready to accord them the right under the doctrine than in those cases of a commercial context where the parties are deemed to have been aware of the lack of their formal rights. In *Yeoman's Row*,⁵ the House of Lords held that the claimant, a businessman, knew that the agreement was binding in honour only. His claim for enforcement of the agreement based on proprietary estoppel was therefore not upheld. He was only able to claim damages for the expenditure he had committed to the abortive project. The limitations of proprietary estoppel in commercial cases where there is no element of unconscionability was also considered in *Crossco No. 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 and *Herbert v Doyle* [2010] EWCA Civ 1095. In *Thorner v Major* [2009] UKHL 18, a case of a familial context, the House of Lords came to an opposite conclusion. Their Lordships held that a representation had been made by the deceased that his cousin would inherit and that it had been reasonable for the claimant to rely on it and conduct himself in a way that was detrimental if the promise was not fulfilled.

⁵ This case and *Thorner v Major* are highly dependent on their facts so it is worth setting them out in more detail than usual.

Where Estoppel is Conditional⁶

⁶ Next issue and rule.

Difficulties have been raised about the applicability of proprietary estoppel to cases where the estoppel is conditional. For instance, in cases where the promise will only be implemented on death through inheritance as in *Gillett* then there is an argument that the promise which is conditional on death is uncertain. The property which is left at death may be different from the property which is in existence when the representation is originally made. Lord Scott⁷ in *Thorner* at para. 20, argues that the remedial constructive trust is a better route to find a remedy in such cases than estoppel, 'For my part I would prefer to keep proprietary estoppel and constructive trust as distinct and separate remedies'. Lord Hoffmann at para. 8, however, in the same case, found no difficulty in applying estoppel to such cases arguing that certainty is available when the promise is realised and is achieved by ascertaining the form of the relief which equity can grant. The agreement between Eddy and Luke⁸ is for a future agreement to convey land to take place. Had the planning permission not been obtained then the question apparently remains open: would the whole agreement have fallen? It would seem unlikely in the circumstances that Eddy would have wanted to go ahead with the agreement had the potential for redevelopment not been attained. In such a case, Lord Scott in *Thorner* expresses the view that the better remedy would be the remedial constructive trust. A constructive trust based on the decision in *Pallant v Morgan* [1952] Ch 43 would not be effective because the land was not purchased following an agreement relating to the joint venture (*Banner Homes Group plc v Luff Developments* [2000] EWCA Civ 18, [2000] EWCA Civ 3016).

⁷ This is the minority judgment—worth extra marks.

⁸ Application of rule to problem here.

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↪ Lord Scott in *Yeoman's Row* (at para. 15) also indicated that a flaw in the claimant's argument in that case was that he was not claiming an interest in land as appeared to have been required by Oliver J in *Taylor's Fashions* and Lord Kingsdown in *Ramsden*. Lord Walker at para. 61 in *Thorner*, indicates that the necessary requirement for proprietary estoppel to apply is for the assurance to relate to an identified piece of land owned by the defendant (*Crabb v Arun District Council* [1976] Ch 179). This is the case in the current problem—Luke is the owner of the barn. However, the point made by Lord Scott in *Yeoman's Row* is that the agreement was speculative. An 'expectation dependent upon the

conclusion of a successful negotiation is not an expectation of an interest having [sufficient] certainty' (Lord Scott at para. 18). In this context, the interest to be granted lacked certainty and both parties knew that the agreement was not legally binding.

Application⁹

⁹ These final paragraphs cover the final application of the law to the facts and incorporate the conclusions.

So, could Luke and Eddy's agreement be distinguishable from that in *Yeoman's Row*? There seem to be two possible grounds of distinction: the agreement is clear (the land will be transferred and the net profits split 50:50); and the parties are arguably not operating on a commercial basis (they are old friends and Eddy may not be running a business). The first point is problematic in that the agreement is presumably conditional on obtaining planning permission. That favours an outcome as in *Yeoman's Row*, i.e. estoppel is not available because there is no certainty as to the interest to be obtained. However, the judgment in *Thorne* clearly suggests that estoppel is retrospective—it bites not at the time of the assurance but at the point when the expectation is not realised. Once Eddy has obtained planning permission—as he has—then arguably the estoppel should be realised since there is a clear and unequivocal assurance as to the terms of the agreement.

The second point relating to the argument that the agreement was on a familial rather than a commercial basis where both parties might be considered to have clearly understood the lack of enforceability in their transactions, would rely on further evidence surrounding the capacity of the two parties. In both *Yeoman's Row* and *Thorne* much was made of the evidence surrounding the understanding of the parties. It is likely that that would be relevant again here to determine the context in which Luke and Eddy were operating. Finally, even if proprietary estoppel was not available there remains the possibility of an argument that Luke holds his land on a constructive trust for himself and Eddy to take account of his unconscionable conduct. In any event, the element of unconscionability—not specifically dwelt upon in *Thorne* although clearly acknowledged (albeit unsuccessfully in *Yeoman's Row*)—is plainly in evidence here.

↪ Failing all else,¹⁰ Eddy would have a personal remedy for compensatory damages on a *quantum meruit* basis at common law for the expenditure he committed in obtaining planning permission.

¹⁰ Extra marks here for comprehensive analysis including the common law outcome to the problem.

Looking For Extra Marks?

- Including the ‘five *probanda*’ is worth extra points to show your knowledge of the development of this doctrine. But it does make for a longer answer than you would normally be expected to produce so you might want to bear it in mind if this topic crops up as coursework.
- Dig a little deeper into the cases—discuss the differences between Lords Scott and Hoffmann in *Thorne v Major*. (Again, as before this makes this suggested answer quite long—so don’t feel it is necessary to include this—you will still get a reasonable mark.)
- Be comprehensive in your use of case law—don’t just limit yourself to the leading cases but give other examples in brackets (but don’t go into depth on them unless it is coursework).

Taking Things Further

- Dixon, M., ‘Proprietary estoppel: the law of farms and families’ [2019] Conv 89–92.

This editorial provides some interesting commentary on estoppel in farming families—a common context for this area of law.

- Dixon, M., ‘Confining and defining proprietary estoppel: the role of unconscionability’ (2010) 30 LS 408.

*An article considering the role of unconscionability after the decisions in **Thorne v Major** and **Yeoman’s Row Management v Cobbe**.*

- Gardner, S., ‘The remedial discretion in proprietary estoppel’ (1999) 115 LQR 438.

This article considers four different hypotheses upon which the remedy for estoppel could be based.

- Malcolm, R., ‘A rural family at war’, *Estates Gazette*, No. 0108, 24 February 2001, pp. 162–163.

*An article considering the decision in **Gillett v Holt**.*

- Lord Neuberger, ‘The stuffing of Minerva’s owl? Taxonomy and taxidermy in equity’ (2009) 68 CLJ 537.

This article considers the remedy for satisfying an estoppel and its timing.

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