Is the Doctrine of Estoppel Sound in Theory and Practice?

by

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STUDENT DECLARATION

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I, Synther Chitolie declare that while registered as a candidate for the research degree, I have not been a registered candidate or enrolled student for another award of the University or other academic or professional institution. I declare that no material contained in the thesis has been used in any other submission for an academic award and is solely my own work.

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ABSTRACT

This thesis aims to assess whether proprietary estoppel, as a deep-rooted tenet in English law, is sound in theory and practice and will demonstrate why the recent proliferation of cases[1] on proprietary estoppel renders inquiry into the origins, nature, operation, application and significance of this doctrine so timely.

Underpinned by its pivotal rationale of curtailing unconscionable behaviour, this equitable concept has increasingly been deployed since its inception in circumstances where a legal owner of land seeks to renege upon an express or implied assurance upon which a promisee has relied to his or her detriment. The doctrine thus appears to defy statute[2] to compel compliance by a landowner with representations previously made to a promisee, capable of engendering a legitimate expectation of the acquisition of an interest in land and upon which assurances the claimant has placed detrimental reliance.

Since the genesis of proprietary estoppel, the doctrine has continued to evolve in the face of manifold challenges and controversies, recent decisions of the House of Lords (now the Supreme Court)[3] having attempted to balance consistency and uniformity of approach when upholding the inherent purpose of the doctrine, against the perceived need for flexibility of factual interpretation in relation to the criteria for estoppel to operate.

The thesis embarks on the unprecedented task of ascertaining whether proprietary estoppel is sound in theory and practice against the benchmark of the extent to which the courts have achieved correlation between the intrinsic purpose for which proprietary estoppel was conceived – the curtailment or prevention of unconscionable behaviour where a landowner has reneged on an assurance upon which the claimant has placed detrimental reliance – and the unwavering affirmation and fulfilment of that purpose. This is accomplished by tracing and reconstructing the historical origins and subsequent evolution of the concept of proprietary estoppel, whilst also conducting detailed analysis of judicial interpretation of the doctrine, with particular emphasis on the significance and impact of recent case law. A comparison is drawn between the concepts of proprietary estoppel and other equitable devices such as the constructive trust and the principle of unjust enrichment by reference to the English and United States legal systems to demonstrate the significance and esoteric qualities of proprietary estoppel. Ultimately unveiled is a uniquely formulated perspective of the doctrine.

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[1] *See Thorner v Major* [2009] UKHL 18*; Henry v Henry* [2010] UKPC 3; *Lothian v Dixon* [2014] Ch D; *Moore v Moore* [2016] EWHC 2202 (Ch); *Bradbury v Taylor* [2012] EWCA Civ 1208; *Suggitt v Suggitt* [2012] EWCA Civ 1140; *Southwell v Blackburn* [2014] EWCA Civ 1347; *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 782; *Davies v Davies* [2016] EWCA Civ 463; *Burton v Liden* [2016] EWCA Civ 275; *James v James* [2018] EWHC 43 (Ch); *Haberfield v Haberfield* [2018] EWHC 317 (Ch); *Thompson v Thompson* [2018] EWHC 1338 (Ch); *Gee v Gee* (2018) EWHC 1393 (Ch)

[2] *See* Law of Property (Miscellaneous Provisions) Act, s 2 *which provides that a contract for the sale or disposition of an interest in land can only be made in writing, and signed by the parties with all the terms expressly agreed upon.*

[3] *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55; *Thorner v Major* [2009] UKHL 18

Against the previously articulated benchmark, this thesis contends that proprietary estoppel is essentially sound in theory and practice. It acknowledges the inevitability of challenges posed by unpredictability of outcome due to the unavoidable judicial interpretation of facts giving rise to a finding of estoppel, but asserts that these do not detract from its fundamental 'soundness'. Novel recommendations, including a 'proprietary estoppel model', are then advanced to maximise the practical efficacy of the doctrine.

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PRELUDE

Proprietary estoppel is a judicial doctrine which puts "legal clothing on the adage that you should not lead people up the garden path"[4].

[4] Per Lord Neuberger of Abbotsbury, 'Thoughts on the Law of Equitable Estoppel' [2010] 84 Australian LJ 225, 238, cited by Jonathan Morgan, *Contract Law* (2nd edn, Palgrave 2015) 57

INTRODUCTION

This thesis embarks on a rigorous exploration and analysis of the doctrine of proprietary estoppel via case law, with the aspiration of proposing innovative recommendations to reform the operation of the concept where appropriate, and to facilitate its application by the courts.

According to Lord Hope in ***Fisher v Brooker***[5], "there is no concept in our law that is more absolute than a right in property". Proprietary estoppel is now a fairly longstanding doctrine within English jurisprudence, capable of creating a proprietary interest in land (and, on occasions, intellectual property)[6]. It invokes scrutiny of the question of whether a landowner who promises an interest in his or her land to another party who relies on such promise to his or her detriment, should be permitted to resile from the expectation thereby created.

For example, a situation may arise in which a farmer, as landowner, makes an assurance to a family member that in return for working on the farm for little or no pay, a bequest of the farm will immediately follow. When coupled with the subsequent detrimental reliance of the family member, perhaps in the form of giving up education and forfeiting other employment opportunities, the farmer is estopped from reneging on the promise made.

[5] [2009] 1 WLR 764 [HL] [8]
[6] *Motivate Publishing FZ LCC v Hello Ltd* [2015] EWHC 1554 Ch

Proprietary estoppel is an important concept that enables the creation, acquisition and enforcement of rights on the basis of informal promises, assurances or representations. It is not a carte blanche for every failed promise. The doctrine permeates transactions in land by addressing the "unconscionable conduct" of a landowner. To this extent and for this purpose, proprietary estoppel operates flexibly by considering and evaluating the circumstances of a particular case to determine whether a party has acted "unconscionably" against another. It was and is promulgated by the Courts of equity, rather than being a product of statute. It is best broadly defined as "one of the most flexible and useful in the armoury of the law"[7] as it will not allow persons to go back on their promises or representations where it is inequitable or unconscionable to do so.

This thesis critically analyses the equitable doctrine of proprietary estoppel to determine whether it is sound in theory and in practice. Whether it is 'sound' is assessed in relation to the immanent purpose of the doctrine, and more specifically whether proprietary estoppel continues to achieve the purpose envisaged by the original architects of the concept as explored and explicated in this thesis, and whether its purpose is preserved, honoured and reflected in the decisions of the court. The underlying purpose of proprietary estoppel was discernible as early as the ***Earl of Oxford's Case***[8] where Lord Ellesmere affirmed that it would be 'unconscionable' for the lessor to obtain the houses, gardens and orchards of the lessee which he neither built nor planted, and which added more value to the land than before. The court resolved thereafter "to correct men's consciences for frauds, breach of trust, wrongs

[7] *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1984] QB 84 (Denning LJ)
[8] [1615] 21 ER 485 (Ch) 486 (Lord Ellesmere LC)

and oppressions of what nature soever they be and to soften and mollify the extremity of the law"[9]. This principle of unconscionability was approved in ***Dillwyn v Llewelyn***[10] to create a proprietary interest in land where a father (F) had executed a memorandum leaving his farm to his son (S) and F encouraged S to build a house on F's land. In reliance on F's memorandum and with F's knowledge and approval, S had expended considerable monies in building on the land. F died without transferring the legal estate to S. The Lord Chancellor Lord Westbury ordered the defendant to convey the freehold to the plaintiff. Thus, in the context of proprietary estoppel, the prevention of unconscionable behaviour is represented by the intervention of the courts via its equitable jurisdiction, to insist that a legal owner of land cannot renege upon representations where the claimant has suffered a detrimental reliance thereon. This purpose has never materially wavered from its original genesis to the present day.

By way of example, in ***Crab v Arun District Council***[11], Lord Denning clearly articulated that the purpose of proprietary estoppel is to prevent a person from insisting on his strict legal rights where it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. Thereby, proprietary estoppel estops a party from enforcing his or her strict legal rights based on the prior dealings of the parties. This rationale was amplified in ***Taylor Fashions Ltd v Liverpool Victoria Trustees Ltd***[12] where Oliver J asserted that the purpose of proprietary estoppel is to ascertain "whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment". Thus, the underlying

[9] *Earl of Oxford's Case* [1615] 21 ER 485 (Ch) 486 (Lord Ellesmere LC)
[10] [1862] 45 ER 1285
[11] [1976] Ch 179 (CA) 187-188 (Lord Denning)
[12] [1982] QB 133 (HC) 593 (Oliver J)

purpose of proprietary estoppel is to prevent unconscionable conduct in the dealings of parties. Unconscionability invokes equity to act against the conscience of the promisor to fulfill what he or she had promised. The purpose of proprietary estoppel permeates its every application by the courts and the soundness of estoppel is assessible by scrutinising and evaluating the aforementioned purpose and the court's consistent fulfilment of it. This pivotal adherence by the courts to the fundamental objective of proprietary estoppel produces a bedrock of certainty in the sense of an unwavering insistence on the prevention of unconscionable behaviour when facts potentially giving rise to a finding of proprietary estoppel are pleaded. It is the court's consistent realization and affirmation of its purpose in every case that evidences the soundness of the doctrine.

The issue of 'sound' is also examined by an objective assessment via case law of any clear or latent defects, any controversy or challenges, internal contradictions, vague or uncertain foundations, or ambiguous implications and the strengths, weaknesses, benefits and limitations of proprietary estoppel to determine whether these deter the purpose of the doctrine. This critical analysis unfolds in the context of its historical and contemporary development, its application and operation by the courts, and also by comparison to similar equitable doctrines. The thesis is structured in the following three parts to impart clarity and insight into the discourse on proprietary estoppel comprised within it.

Part 1 deals with the historical and contemporary development of proprietary estoppel. It focuses on concepts such as the nature of the doctrine, the influence of social change in the development of common law and equity, the evolution of

proprietary estoppel and theoretical perspectives underpinning proprietary estoppel. Scrutiny of the nature and essence of proprietary estoppel enables examination of the purpose, benefits and limitations of the doctrine, whereas explanation of the socio-historical context sheds light on the impact of extralegal factors upon the evolution of equity and with it, the concept of proprietary estoppel. Attendant upon this, is exposition of the principles of estoppel that depend upon the exercise of judicial discretion and signify the subjugation of common law positivism, with its insistence on observance of strict technical rules, to the natural law-based approach of equity based upon principles of fairness and good conscience. The chapters contained in Part 1 provide a broad understanding of how and why equity developed, its interrelationship with the common law, and the reasons which impelled the evolution of the doctrine of proprietary estoppel.

Part 1 adopts a number of investigative approaches to formulate a conclusion of its objective. The black letter approach provides a descriptive analysis of the nature and purpose of the doctrine, how it evolved, and its theoretical underpinnings. The socio-legal approach is also applied to illustrate how social changes influenced the development of equity and its offspring, proprietary estoppel.

Part 2 examines the application and operation of the doctrine by the courts. It focuses on issues such as the transition of proprietary estoppel from a traditional to a modern doctrine, and the scope and application of proprietary estoppel in the key decisions of ***Yeoman's Row Management Co. Ltd v Cobbe***[13], and ***Thorner v Major***[14], before

[13] [2008] UKHL 55
[14] [2009] UKHL 18

providing critical review of subsequent case law, with the concomitant challenges to the doctrine and then presenting a holistic evaluation of proprietary estoppel from the past to the modern day.

Critical scrutiny takes place of the drawbacks and limitations of proprietary estoppel in the context of its application within case law. As will emerge, the evaluation conducted in Part 2 provides a rich tapestry of the case by case development of the doctrine, and the manner in which it climaxed in the landmark decision in ***Thorner***[15], heralding an arguably more principled approach to the determination of an estoppel. Despite its drawbacks, there are about thirteen new cases decided in proprietary estoppel following ***Thorner***[16], which illustrate that the application and operation of the doctrine is more settled than before.

This Part also adopts a number of investigative approaches to determine whether or not the doctrine has any latent defects, internal contradictions, ambiguous implications, and challenges and controversies in its application and operation by the courts. The black letter approach is adopted to explicate and provide descriptive analysis of the traditional and modern approach of the courts, the House of Lords decisions in ***Yeoman's Row***[17] and ***Thorner***[18], the subsequent cases following ***Thorner***[19], and also in tendering a holistic assessment of proprietary estoppel from the past to the present.

[15] [2009] UKHL 18
[16] [2009] UKHL 18
[17] [2008] UKHL 55
[18] [2009] UKHL 18
[19] [2009] UKHL 18

A similar approach is applied to assess whether and to what extent, the decisions of their Lordships' in ***Yeoman's Row***[20] and ***Thorner***[21], and the cases following ***Thorner***[22], have influenced the direction of the doctrine, and the courts perception of it in moving forward to the future. This analytical assessment enables evaluation of the judicial decision-making process in relation to the incremental evolution and refinement of aspects of proprietary estoppel on the premise previously articulated.

Part 3 undertakes a comparison between the concepts of proprietary estoppel and the constructive trust, and conducts a broad review of estoppel and its interrelationship, if any, with the doctrine of unjust enrichment, as conceptualized within the United States and English legal systems. Emerging from this analysis is the notion of proprietary estoppel as a distinct and independent doctrine.

The comparison between proprietary estoppel and constructive trusts establishes the circumstances whereby each doctrine is applied by the courts, accentuates the similarities and differences between the two doctrines, and considers the extent to which the constructive trust can be pleaded in the alternative to proprietary estoppel. The objective is to assess whether or not proprietary estoppel comprises any internal contradictions, ambiguity, latent defects, strengths and weaknesses or benefits and limitations, vis-a-vis the constructive trust. A combination of investigative approaches is applied to distinguish the two equitable doctrines. The black letter approach is adopted to provide a descriptive analysis of the two doctrines applied by the courts, as well as the court's approach in dealing with either doctrine. The socio-legal approach is

[20] [2008] UKHL 55
[21] [2009] UKHL 18
[22] [2009] UKHL 18

adopted in considering the positive and negative aspects of the doctrines in terms of their respective impact on those who seek to rely on them, and the comparative approach is applied to illustrate their similarities and differences, strengths and weakness, and the flexibility and predictability of the two doctrines. Careful analysis of case law helps to ascertain whether proprietary estoppel is sound by reference to the similar equitable remedy of the constructive trust.

Comparison is undertaken between the concepts of proprietary estoppel and unjust enrichment, from which it appears that proprietary estoppel and unjust enrichment are two distinct and independent doctrines. By highlighting the nature of the two doctrines, their application by the courts, and their similarities and differences, the objective is to determine whether proprietary estoppel comprises any latent defects, ambiguity or internal contradictions, or strengths and weaknesses in comparison to unjust enrichment. A combination of approaches is adopted to delineate the two doctrines similar to those detailed above in relation to estoppel versus the constructive trust.

The doctrine of proprietary estoppel, and its gradual evolution, is complex and profound. Distinct research methodologies are applied to present clear arguments and perspectives on proprietary estoppel. For example, a critical literature review in each chapter identifies deficits within the existing state of knowledge; the historical reconstruction of proprietary estoppel captures the evolution, development and progression of the doctrine through the courts; the survey of the case law highlights the principles developed by the courts, and a doctrinal analysis assesses the

application of the doctrine before and following the House of Lords (now Supreme Court) decision in ***Thorner v Major***[23].

Additional research methods are adopted to provide clarity and insight on the evolution of the doctrine and its application by the courts, to identify the issues arising from the operation of the doctrine, and also to draw comparison between the doctrine and similar equitable remedies.

For example, the black letter approach is beneficial in providing in-depth details and exposition of the doctrine in theory. It is defined as a doctrinal analysis of legal rules and principles that are disconnected from contextual explanation and analysis.[24] It clarifies the law on proprietary estoppel by a descriptive analysis of statutes, court judgments and other authoritative texts to explain the law.[25] This approach utilizes legal reasoning to assess and interpret legal rules and to suggest recommendations for further development of the law.[26] It examines the doctrine of proprietary estoppel and deal with such issues as its theoretical framework; its equitable nature; the evolution of proprietary estoppel; the requirements of the doctrine; its remedies granted by the courts and its effect on statute. This approach provides in-depth details and exposition of the development of the doctrine as a topic in its own right, and its application by the courts.

[23] [2009] UKHL 18
[24] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013)
[25] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press Ltd 2007)
[26] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013)

The comparative approach is beneficial to present a broader picture of the relative similarities and differences of estoppel in law and practice. It is defined as the act of comparing two or more concepts to provide an explanation about the extent of the relationship between them.[27] The research adopts the descriptive comparison method to draw the relative peculiarities, similarities and differences in the case law principles of proprietary estoppel.[28] It provides the framework whereby conflicts and differences between legal concepts can be explained and solutions identified.[29] It is utilized to compare proprietary estoppel with the constructive trust and unjust enrichment to determine its efficacy over the similar equitable remedy. The approach is beneficial to illustrate the significance of proprietary estoppel and its advantage over the similar equitable doctrine of the constructive trust and unjust enrichment, and will also demonstrate the flexibility of the doctrine and how the courts have developed the test of proprietary estoppel over the years. It will also help to identify any need for reform and further development in the law of proprietary estoppel.

The socio-legal approach is defined as the study of how laws are implemented and enforced in society.[30] This approach addresses issues that can only be identified when we consider the operation of this law in action, and its practical implications for different parties, as opposed to mere description of the law in books. It is beneficial

[27] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press Ltd 2007)
[28] TJ Scott, 'The Comparative Method of Legal Research'< http://italeem.iium.edu.my/2014/pluginfile.php/155226/mod_resource/content/0/J%20Scott%20-%20Comparative%20research%20perspectives%20_Private%20law_.pdf> accessed 13 February 2016
[29] TJ Scott, 'The Comparative Method of Legal Research'< http://italeem.iium.edu.my/2014/pluginfile.php/155226/mod_resource/content/0/J%20Scott%20-%20Comparative%20research%20perspectives%20_Private%20law_.pdf> accessed 13 February 2016
[30] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013)

because it identifies the challenges arising in the application of the doctrine to help develop recommendations and solutions to eliminate such in future case law.

Critical analysis of proprietary estoppel is utilized to assess the challenges in the operation of proprietary estoppel such as the lengthy and costly litigation involved to establish the estoppel, and the lack of definition for proprietary estoppel and its requirements. This will help illustrate the controversies arising from case law so as to develop recommendations and solutions to enhance its efficacy in law.

Pertinently, while doctrinal research can yield the potential for critical analysis, this is limited to technical questions on how clear, precise and determinate a particular formulation of legal rules is an embodiment of principles. It does not necessarily expose discrepancies between what the law claims to be about, and the impact of how it is actually operating in practice, and the impact of this on affected parties.

The thesis also adopts a critical socio-economic historical review to demonstrate the evolution and significance of proprietary estoppel against the background of the common law, which deficiencies led to the development of equity and its progeny, proprietary estoppel. For example, the current application of proprietary estoppel in cases like ***Thorner***[31] ***or Suggitt v Suggitt***[32] is not consistent with the approach which may have been adopted on similar facts within the socio-economic climate of the early 17th century. Evidence in the case law scrutinized and analyzed shows that the judiciary who decided these cases, and incrementally made the estoppel into a more

[31] [2009] UKHL 18
[32] [2012] EWCA Civ 1140

principled and accessible doctrine, are influenced by the socio-economic context, and other economic or political factors prevailing at the date of those decisions. Further, proprietary estoppel in its modern form could not have readily emerged earlier in history, as it evolved together with the changing socio-economic tide in society. Both economic and socio-economic factors in the late 19th and 20th centuries have acted as a catalyst for the development of proprietary estoppel in its modern incarnation.

The thesis presents a holistic assessment of proprietary estoppel throughout the entirety of its development, accompanied by incisive case law analysis and review. It augments existing literature on proprietary estoppel, by demonstrating the significance of the socio-historical and contemporary background against which it has evolved and their impact upon the nature, operation and application of estoppel.

Many of the textbooks[33] and articles[34] on the doctrine possess an inherent tendency to deal with the descriptive nature and character of the doctrine and seldom consider its

[33]Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009); Alastair Hudson, *Understanding Equity & Trusts* (6th edn, Routledge 2017); Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Landlaw Text, Cases and Materials* (3rd edn, OUP 2012); Martin Dixon, *Modern Land Law* (10th edn, Routledge 2016); Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986); E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000); Gary Watt, *Trusts & Equity* (7th edn, OUP 2016); R. B. Mowat, *A New History of Great Britain* (OUP 1992); Ralph V. Turner, *Magna Carta: Through the Ages* (Routledge 2014); Rod Green, *Magna Carta and All That* (Andre Deutsch Ltd 2015); Alastair Hudson, *Understanding Equity & Trusts* (3rd edn, Routledge 2008); Richard Edwards and Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013); Mohamed Ramjohn, *Unlocking Equity and Trusts* (5th edn, Routledge 2015); Raymond Wacks, *Understanding Jurisprudence* (4th edn, OUP 2015); Stephen Pope, 'Reason and Natural Law', The Oxford Handbook of Theological Ethics (OUP 2007); Brian Bix, *Jurisprudence: Theory and Context* (7th edn, Carolina Academic Press 2015); H.L.A. Hart, *The Concept of Law (*2nd edn, OUP 1994); Theodore M. Benditt, *Law as Rule and Principle : Problems of Legal Philosophy* (Stanford University Press, 1978); Edmund Heward, *Lord Denning: A Biography* (George Weidenfeld & Nicolson Ltd 1991)

[34] John Cartwright, 'Protecting Legitimate Expectations and Estoppel in English Law' [2006] Electronic Journal of Comparative Law Vol. 10(3) <https://www.ejcl.org/103/art103-6.pdf> accessed 10 January 2015; John Mee, 'Proprietary estoppel and inheritance: enough is enough?' [2013] Conv. 280; Kenneth Jupp, 'European Feudalism from its Emergence through its Decline' (v2003) AJES 27 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1536-7150.00084> accessed 15 August 2015; Ronald M. Glassman, *The Middle Class and Democracy in Socio-Historical Perspective* (E.J. Brill 1995); Dennis Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate

theoretical framework and effect in legal practice. For example, the question of how far or to what extent has the theoretical foundation of proprietary estoppel influenced its application and the decisions of the courts have not been thoroughly dealt with by these scholars. The thesis deals with these novel issues that have not been examined to the same extent and depth by other legal scholars.

Each chapter of the thesis introduces a new and fresh perspective of the doctrine beginning with its inception and development as a judicial benchmark of legal rights by the courts. The exclusive approach of expansive case law analysis adopted in assessing its evolution, development and application by the courts, is unprecedented in light of existing literature that places more focus on a primarily descriptive analysis of the developing case law.

The substantive content of the thesis is also distinct as it fills the gaps in the existing literature on the historical evolution of the doctrine. For example, it addresses the question of why did the courts find it necessary to develop the doctrine? Why do the courts deliberate on the doctrine? Why is it being pleaded in the courts? Why do the courts enforce the doctrine? What are the implications of estoppel for legal practice? What is the theoretical basis of estoppel, and how is estoppel justifiable both in theory and in practice? These are some of the glaring gaps in the existing literature of estoppel that need to be addressed to lend greater clarity and insight into the

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Publishing Group 2010), W.S. Holdsworth, 'The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor' (1916) Yale Law Journal, Vol. XXVI(1); Mike Macnair, 'Equity and Conscience' [2007] OJLS 27(4), Wendel, W. Bradley, 'Jurisprudence and Judicial Ethics' [2007] Cornell Law Faculty Publications, Paper 96 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1095&context=lsrp_papers> accessed 12 October 2015; David Reidy, *On the Philosophy of Law* (Wadsworth Cengage Learning 2007)

doctrine, and which this thesis has sought to redress. Legal scholars[35] have largely investigated the holistic nature of the doctrine such as the different forms of proprietary estoppel; its development and how it is applied by the courts; discussed the decided cases and the future of the doctrine. They have not considered the theoretical and practical efficacy of the doctrine by meticulous scrutiny of the decided cases from its genesis in the ***Earl of Oxford's Case***[36] to the most recent case in ***Gee v Gee***[37]. Every chapter of the thesis presents a unique perspective of the doctrine that has not been explored in the existing literature.

The thesis is a unique presentation of proprietary estoppel to suggest possible avenues for reform to assist in the future clarification of aspects of the doctrine. For example, issues such as lengthy and costly litigation, or unpredictability of outcome in terms of interpretation of facts to determine whether the components of estoppel are factually present are just some of the pervasive challenges that befall the doctrine. The thesis augments the existing literature by providing the gateway for estoppel to be reformed and revolutionized to be more efficacious in legal practice.

The recommendations presented towards the end of the thesis are original, unprecedented and significant as they propose a unique proprietary estoppel model by which both parties to a claim in proprietary estoppel can be winners.

[35] Elizabeth Cooke, *The Modern Law of Estoppel* (OUP, Oxford 2002); Mark P. Thompson*, Modern Land Law* (5th edn, OUP 2012); Judith-Anne Mackenzie and Mary Phillips, *Textbook on Land Law* (15th edn, OUP 2014); Martin Dixon, *Modern Land Law (*10th edn, Routledge 2017); Charles Harpum, Stuart Bridge and Martin Dixon, Megarry and Wade: *The Law of Real Property* (8th edn, Sweet & Maxwell 2012); Judith Bray, *Unlocking Land Law* (5th edn, Routledge 2016); Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009); Alastair Hudson*, Understanding Equity & Trusts* (6th edn, Routledge 2017)

[36] [1615] 21 ER 485 (Ch)

[37] [2018] EWHC 1393 (Ch)

Proprietary estoppel has exerted its influence in English law since 1615 in the ***Earl of Oxford's Case***[38], and will likely be of greater influence if appropriate measures are adopted to secure its enhanced efficacy for the benefit of claimants who rely on it and the judiciary who seek to apply it.

The novelty and relevance of the thesis, compounded with the challenges it seeks to elucidate, render it a distinct and significant contribution to legal knowledge. Also, in unravelling what has been left unknown and undiscovered about estoppel, the thesis will emerge as uniquely relevant, interesting and engaging throughout.

[38] [1615] 21 ER 485 (Ch)

PART 1: THE HISTORICAL AND CONTEMPORARY DEVELOPMENT OF PROPRIETARY ESTOPPEL

Chapter One: The Nature of Proprietary Estoppel

1.1 Introduction

This chapter elucidates the nature and purpose of proprietary estoppel. It aims to provide insight into the function of the doctrine to discern why it is, and has been deployed as an equitable concept and remedy since its inception. The chapter is a prelude to the ensuing assessment of the development of proprietary estoppel, the theoretical perspectives which influenced and underpinned it, the limitations of the doctrine and its judicial application. Via the detailed analysis of case law contained in this thesis, the essence of and significance of proprietary estoppel will emerge to an extent not previously explored in established literature[39].

1.2 Definition of Proprietary Estoppel

According to Lord Denning, "The word "estoppel" only means stopped"[40]. This connotes varying ideas of restraint, restriction and control. It prevents a party from adducing evidence to contradict their previous assertions.

Despite its considerable influence over the past centuries in creating an interest in land, proprietary estoppel has not been defined by the courts.

[39]Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2002); Mark P. Thompson*, Modern Land Law* (5th edn, OUP 2012); Judith-Anne Mackenzie and Mary Phillips, *Textbook on Land Law* (15th edn, OUP 2014); Martin Dixon, *Modern Land Law (*10th edn, Routledge 2017); Charles Harpum, *Megarry and Wade: The Law of Real Property* (6th edn, Sweet & Maxwell 2000); Judith Bray, *Unlocking Land Law* (5th edn, Routledge 2016); Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009); Alastair Hudson*, Understanding Equity & Trusts* (6th edn, Routledge 2017)

[40]*McILKenny v Chief Constable of the West Midlands* [1980] 283 (QB) [316]-[317] (Lord Denning) as cited by John Cartwright, 'Protecting Legitimate Expectations and Estoppel in English Law' (2006) Electronic Journal of Comparative Law Vol. 10(3) 1, 2 <https://www.ejcl.org/103/art103-6.pdf > accessed 10 January 2015

In the significant House of Lords decision in ***Thorner v Major***[41], Lord Walker remarked that there is no definition of proprietary estoppel:

> An academic authority (Gardner: An Introduction to Land Law (2007) p.101) has recently commented: 'There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither).[42]

Nor is prior case law any more definitive, as proprietary estoppel is more often described but not defined.

In ***Crab v Arun District Council***[43], Lord Denning construed proprietary estoppel as a fundamental principle preventing a party from insisting on their strict legal rights whether arising under a contract, a title deed or by statute when it would be inequitable to do so having regard to the prior dealings between the parties.

Similarly, Scott L.J. asserted in ***Layton v Martin***[44] that proprietary estoppel is concerned with the question of whether a landowner can insist on his or her strict legal rights to defeat an expectation of an interest in land that was created, and was acted upon to the other party's detriment.

Thus, proprietary estoppel is described as a doctrine of equity, and not of common law, concerning the disposition of property based on the dealings of parties. It prohibits a party from averring a different state of affairs by words or conduct where another has been led to believe in a prior state of fact.

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[41][2009] UKHL 18
[42]*Thorner v Major* [2009] UKHL 18 [29] (Walker LJ)
[43] [1976] Ch 179 (CA)
[44] [1986] 2 FLR 227 (Ch) 238

Academic commentators have likewise described proprietary estoppel as a doctrine devised by the courts to address unconscionable conduct in the transactions of parties.

For example, ***Gray and Gray***[45] epitomizes the doctrine of proprietary estoppel as a fortress against unconscionable dealings in land in the following terms:

> …[T]he doctrine of proprietary estoppel gives expression to a general judicial distaste for any attempt by a legal owner unconscientiously to resile from assumptions which were previously understood, and acted upon, as the basis for relevant dealings in respect of his land.[46]

Here, proprietary estoppel is described as a doctrine of equity and not of law, that concerns the disposition of property based on the understanding of parties.

John Mee[47] also states that proprietary estoppel is a judicial doctrine which creates a proprietary interest in land, and which precludes the necessity of a deed, registered disposition or written contract for the creation or transfer of an interest in land.

Likewise, ***John Cartwright***[48] articulated that proprietary estoppel operates to restrain a party from promising, assuring or representing that which they know is false, and also to preclude a party from denying that which they had affirmed.

Ben McFarlane, Nicholas Hopkins and Sarah Nield[49] also interpreted the doctrine of proprietary estoppel as "a means by which a party (B) can gain some protection

[45] Kevin Gray and Susan Gray, *Elements of Land Law* (6th edn, OUP 2009)
[46] Per Kevin Gray and Susan Gray, *Elements of Land Law* (6th edn, OUP 2009) 1197; also referred to by Sukhninder Panesar, 'Enforcing oral agreements to develop land in English law' [2009] International Company and Commercial Law Review Volume 20(5) 165
[47] John Mee, 'Proprietary estoppel and inheritance: enough is enough?' [2013] Conv. 280
[48] John Cartwright, 'Protecting Legitimate Expectations and Estoppel in English Law' (2006) Vol. 10(3) 1, 7 < https://www.ejcl.org/103/art103-6.pdf > accessed 10 January 2015

against an owner of land (A), even if he or she has no contract with A and even if A has not formally given B a property right in relation to A's land"[50].

The various descriptions of proprietary estoppel demonstrate that it is a judicial doctrine capable of creating an informal interest in land which would otherwise be unenforceable by law. As an equitable doctrine that is driven by conscience and unconscionability, it considers the dealings of the parties rather than the strict legal rights of the parties. The broad application of the doctrine to enforce informal dealings holds a landowner conscientiously liable to satisfy his or her promise for an interest in land.

The soundness of the doctrine, as described, is determined by the consistency of approach adopted by the courts whereby a party is held to be bound in varying circumstances whether it be a contract, a promise or by words or conduct to prevent unconscionable behaviour. It prevents reliance on strict legal rights, and also prevents a party from resiling from a promise asserted where another has relied thereon to their detriment. Also, it enforces the informal dealings or arrangements between parties, and is not restrained or constrained by formality.[51] Further, proprietary estoppel limits or extinguishes the legal right to land in the face of equity for the unconscionable or inequitable dealings between parties. Any difficulty in foreseeing the precise outcome on the particular facts of a case is attributable to the

[49] Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Landlaw Text, Cases and Materials* (3rd edn, OUP 2012)

[50] Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Landlaw Text, Cases and Materials* (3rd edn, OUP 2012) 307

[51] *Proprietary estoppel is only applicable to land and intellectual property (see Motivate Publishing FZ LLC v Hello Ltd* [2015] EWHC 1554 (Ch))*, and does not apply to any other area of law such as contract or tort.*

interpretation by the courts when determining whether each of the requisite components of estoppel are satisfied. However, this potential unpredictability in outcome is an inevitable by-product of the litigation process and does not impinge upon the consistent adherence by the courts to the quintessential purpose of proprietary estoppel, that of preventing unconscionable behavior by a legal owner of land who seeks to deny the claimant's "rights" founded upon detrimental reliance on a representation by the landowner for an interest in land.

1.3 What is the Crux of Proprietary Estoppel?

In ***Cave v Mills***[52]***,*** Wilde B described estoppel as a mechanism that prevents a party from affirming and denying their actions as follows:

> A man shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called "estoppel", or by any other name, it is one which Courts of law have in modern times most usefully adopted.[53]

Thus, proprietary estoppel is a principle of common sense and common justice that prevents a party from asserting and denying his or her representations, where another has acted thereon to their disadvantage.

Lord Denning also described estoppel as a device of equity that prohibits unconscionable conduct as follows:

> …is a principle of justice and of equity. It comes to this when a man, by his words or conduct, has led another to believe that he may safely act on the faith of them – and the other does act on them – he will not be allowed to

[52] *Cave v Mills* [1862] 158 ER 740 (CEEC)
[53] *Cave v Mills* [1862] 158 ER 740 (CEEC) 747 (Wilde B)

> go back on what he has said or done when it would be unjust or inequitable for him to do so.[54]

Here, estoppel prohibits a party from denying what they have affirmed when another has relied on it to his or her detriment. The intervention of equity mitigates the rigour of the common law by seeking to address unconscionable behavior on the part of a legal owner of land who attempts to renege upon a prior representation to the claimant.

Thus, proprietary estoppel may arise in varying circumstances such as: where A has led B to believe that A will bequeath his farm to B at death and B works on the farm without pay in the expectation of inheriting the farm; but A dies leaving a will for the estate to A's children instead, then proprietary estoppel will intervene to enforce A's promise to B. Similarly, where X moves in with Y on Y's promise that X will inherit Y's house at death, and X expends money repairing the home but Y dies intestate, then proprietary estoppel will intervene to enforce Y's promise to X.

The role and operation of proprietary estoppel was summarized by ***Stephen Moriarty*** as follows:

> The role of proprietary estoppel seems self-evident: it provides for the informal creation of interests in land whenever a person has acted detrimentally in reliance upon an oral assurance that he has such an interest. Oral grants of interests by themselves, therefore are insufficient;

[54]Alfred Denning, *The Discipline of Law* (Butterworths 1979) 223; also cited by Lord Denning *in Moorgate Mercantile v Twitchings* [1975] 3 WLR 286 (CA); See also Lord Denning in *Amalgamated Investment & Property Co. Ltd. (In Liquidation) v Texas Commerce International Bank Ltd*. [1982] 1 QB 84 (CA) 122 that "The doctrine of estoppel is one of the most flexible and useful in the armoury of the law."

> but act in reliance upon some such assurance, and proprietary estoppel will validate what the law of property says has no effect.[55]

Hence, proprietary estoppel arises where a party suffers a detrimental reliance on an assurance of an interest in land, and the landowner has acted unconscionably to enforce his or her strict legal rights in denial of the assurance made. Equity acts against the conscience of a landowner to enforce the promise made.

Dixon[56], also asserts that proprietary estoppel is a method of creating informal rights in land. The estoppel in its own right is not binding, but it engenders a proprietary right, and this right is binding on the promisor. Proprietary estoppel relies on the intervention of equity to alleviate the consequences of the lack of formality requirements of the common law or statute such as contracts for the sale of land created by Section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989[57], or by deeds required to convey land under Section 52(1) of the Law of Property Act 1925 which must comply with the formalities contained in Section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. Hence, proprietary estoppel is the exception that sidesteps the formality requisites for the creation of estates and interests in land. Thus, the propensity of proprietary estoppel to bypass the formality requisites in creating an interest in land is largely amplified by the courts in case law.

[55] Stephen Moriarty, 'Licenses and Land Law (1984) 100 LQR 376, 381; also cited by Nicola Jackson, John Stevens and Robert Pearce*, Land Law* (4th edn, Sweet & Maxwell 2008) 639; Robert Pearce, John Stevens & Warren Barr, *The Law of Trusts and Equitable Obligations* (5th edn, OUP 2010) 340

[56] Martin Dixon, *Modern Land Law* (10th edn, Routledge 2016)

[57] *Though estoppel, unlike constructive trust does not fall within the exception contained in s.2(5) LP (MP)A 1989.*

In ***Crab v Arun District Council***[58], Lord Denning M.R. articulated that the consequence of estoppel for the true owner of land may be the loss of title as follows:

> …his own title to the property, be it land or goods had been held to be limited or extinguished, and new rights and interests have been created therein and this operates by reason of his conduct – what he has led the other to believe – even though he never intended it.[59]

This illustrates that proprietary estoppel gives rise to a new equitable interest that is enforceable against the promisor or representor. The interest created will manifest the promise or representation made, the detrimental reliance thereon or the expectation created or encouraged.

For example, in ***Greasley v Cooke***[60] the plaintiff had assured the defendant that she could live in the house for as long as she wished. The defendant remained in the house caring for the family without payment. The claimant brought possession proceedings. The court held that an equity in the defendant's favour was raised, and she was entitled to occupy the house rent free as long as she wished.

Similarly, in ***Re Basham***[61] the claimant had worked many years caring for her mother and stepfather in reliance of the promise that she would inherit the stepfather's house at death. The stepfather died without leaving a will, but the court granted the claimant a proprietary estoppel on the basis that her stepfather had encouraged her expectation and reliance on his assurances of inheriting the house.

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[58] [1976] Ch 179 (CA)
[59] *Crab v Arun District Council* [1976] Ch 179 (CA)187 (Lord Denning MR)
[60] [1980] 3 All ER 710 (CA); *Cf. Griffiths v Williams* [1977] 248 EG 947 (CA) *where assurances were made to the claimant that she could live in the house for life and the claimant expended monies for improvements. A proprietary estoppel was established and the court granted a non-assignable lease at a nominal rent that was determinable at the claimant's death.*
[61] [1986] 1 WLR 1498 (Ch)

The above authorities reflect the principle of proprietary estoppel as established by Lord Denning in ***Crab v Arun***[62] that a landowner is held bound by his or her promise for an interest in land where the other party has acted on that promise to his or her detriment. Hence, proprietary estoppel not only binds a landowner to his or her promise, but also requires the landowner to surrender the interest promised.

Proprietary estoppel is thus a restraint or bar against the words or conduct of a party which leads another to alter their previous position. The operation of estoppel as a bar to prevent inequitable or unconscionable conduct ensures that parties are not prejudiced or suffer loss or damage by the words or conduct of others. However, since human nature is so unpredictable, it raises the question of how can a party know that he or she may be held liable for their words or conduct. For example, words may be said in jest or carelessly or recklessly but may still be binding against a party unbeknown to that party. Hence, estoppel binds a party irrespective of whether their actions were intended.

1.4 Benefits of Proprietary Estoppel

Case law illustrates the immense benefits of proprietary estoppel, and its flexibility to be applied in a wide range of circumstances:

First, proprietary estoppel prevents reliance on strict legal rights where it is inequitable or unconscionable to do so. The underlying principle of the doctrine prevents a landowner from denying his or her assertions or from resiling from the promise made for an interest in land.

[62] [1976] Ch 179 (CA)

For example, in ***Lothian v Dixon***[63] the claimants had moved from their home in Scotland to support and care for a family member on the promise of her entire estate upon death. The deceased's will instead bequeathed the estate in half share to the claimants and another cousin. The claimants brought a claim in proprietary estoppel, and the court ruled that in spite of the deceased's will, the claimants were entitled to the entire estate on the grounds of proprietary estoppel. The promises of the deceased were clear, certain and continued until her death, and the claimants had suffered a detriment that was substantial in reliance and expectation of those promises. This case illustrates the precedence of proprietary estoppel over a testamentary disposition contained in a will in circumstances where the promise had created an equity in the property. The claimants' equity in the property was given priority over the testamentary disposition of the deceased, and hence the second defendant could not enforce her entitlement or strict legal rights to a half share under the testamentary disposition. The basis of equity in proprietary estoppel enables transactions to be judged on the basis of unconscionability, rather than strict law so as to broaden the scope of remedies in a particular case.

Second, proprietary estoppel considers all the facts and circumstances of a case to determine whether a party has acted inequitably or unconscionably toward another. For example, in ***Southwell v Blackburn***[64] an unmarried couple had moved in together in a house selected by the respondent. The house was bought in the claimant's sole name. The relationship broke down and the appellant changed the locks to the property. The respondent applied to the court for an equal share in the property. The

[63] [2014] 1 WLUK 851 (Ch)
[64] [2014] EWCA Civ 1347

Court of Appeal held that the respondent had an equitable interest arising from proprietary estoppel in the home as the appellant had assured the respondent of a secure home to which the respondent had given up her accommodation in reliance of that promise. The court articulated that although the parties moving in together was not specific as to the ownership of the home that they were moving into, it was specific as to the nature and commitment of the appellant to provide secure accommodation for the respondent. The court also held that it would be unconscionable for the appellant to retract from his promise and not return the respondent to the position she was in before she gave up her house to move in with him. This remedy takes into consideration all the circumstances of the case and the conduct of the parties to produce a fair and just outcome.

Third, proprietary estoppel applies where a person has induced another to believe in a certain state of affairs, and that person has acted in reliance thereon to their detriment. The expectation arises from that person's reliance on a promise or representation made and has thereby altered their position. For example, in the case of ***Bradbury v Taylor***[65] a young couple moved from their home to that of their elderly relative in reliance on a promise that he would leave them his house and land in return for their care of him. The defendants argued that no detriment had been suffered, as the claimants lived rent free in the premises. The Court of Appeal held that the move itself amounted to detrimental reliance even though there were substantial benefits for the family arising from the move. The promise was a specific bargain and the claimants had kept their side of the bargain. Hence, the court will seek to enforce the expectation created where a detriment has been suffered.

[65] [2012] EWCA Civ 1208

Fourth, it enforces informal promises or oral arrangements between parties. Proprietary estoppel is a remedy against informality in circumstances where the defendant relies on formality. It applies principles of conscience and not strict law. For example, in ***Thorner v Major***[66] David (D) worked on Peter's (P) farm for thirty years being unpaid and working long hours. P had assured D that D would inherit his estate at death but had changed his will and disinherited D. The House of Lords (now Supreme Court) held that although there was no legally binding agreement, it would be unconscionable if the promise or assurance was not kept. An oral assurance or representation will bind another party who has acted unconscionably in their transaction.

Likewise, in the case of ***Lester & Hardy v Woodgate & Woodgate***[67] a neighbour, Lester & Hardy (LH) had in 1980 granted another neighbour, Woodgate & Woodgate (WW) an easement over a pathway on land owned by (LH). Nineteen years later, LH developed the land as a car park without any objections from WW who had the benefit of the easement. Both properties were sold and the new owners of WW's land sought an injunction to enforce the easement against the car park. The court held that since the previous owners (WW) had taken no action against the owner of the land (LH) for breach of the easement, then the easement was no longer enforceable despite being recorded by deed. Further, the easement had lapsed as WW had stood by and permitted LH to undertake the car park to prevent the use of the easement. It was therefore held unconscionable for the new owner to seek to enforce a right that their

[66] [2009] UKHL 18
[67] [2010] EWCA Civ 199

predecessors had given up. Equitable estoppel will not permit the formality requirements of common law or statute to override unconscionable conduct.

Fifth, proprietary estoppel creates substantive rights in property. In such cases, the equity of estoppel can only be satisfied by the promised entitlement to be transferred or granted to the claimant. For example, in ***Pascoe v Turner***[68] the defendant had assured the plaintiff, with whom he formerly cohabited, that the house in which they lived was hers and the plaintiff had expended her limited resources in repairs and improvements to the house. The defendant filed action for possession. The Court of Appeal held that defendant's promise and encouragement to the plaintiff to improve the house in the belief that the house was hers had created a proprietary estoppel. The court also held that the defendant's ruthless conduct in seeking to evict the plaintiff was a ground for ordering the defendant to convey the fee simple to the plaintiff.

Likewise, in ***Dillwyn v Llewelyn***[69] a father had promised property to his son. The son took possession of the lands and expended monies to build a house and to make improvements to the property. The father died and had not bequeathed the lands to his son. The court ordered the trustees to convey the land to the son. Thus, the court translated the son's expectation of rights into a proprietary entitlement.

[68] [1979] 1 WLR 431 (CA)
[69] [1862] 4 De GF & J 517 (EWHC)

Alternatively, to a proprietary right, the court may grant a right to occupy or monetary compensation.[70] For example, in ***Greasley v Cooke***[71], the defendant was granted a life interest in the home; and in ***Inwards v Baker***[72], the son was granted a licence to remain in the bungalow built on his father's land. In ***Gillett v Holt***[73], the claimant was awarded compensation in the sum of £100,000, in addition to the freehold of the farmhouse being excluded from the defendant's farm and farming business, and in ***Campbell v Griffin***[74]***,*** the claimant was awarded the sum of £35,000 rather than a life interest in the property. In ***Powell v Benney***[75], a couple was awarded the sum of £20,000 for their detrimental reliance on a promise to inherit two properties in a will. In some circumstances, the court has also granted right of way as in ***ER Ives Investment Ltd v High***[76]***,*** and ***Sommer v Sweet***[77] and an easement in ***Crab v Arun District Council***[78]. The cases illustrate that the courts have adopted a wide range of interests to appropriately satisfy the estoppel equity. As their Lordships expressed in ***Plimmer v City of Wellington Corporation***[79]***,*** in granting a remedy "the court must look at the circumstances in each case to decide in what way the equity can be satisfied."

Sixth, proprietary estoppel grants a remedy that is proportionate to the detriment suffered in a particular case. According to ***Mason CJ in Commonwealth of Australia v Verwayen***[80] "a central element of estoppel doctrine is that there must be a

[70] See Nicola Jackson, John Stevens & Robert Pearce, *Land Law* (4th edn, Sweet & Maxwell 2008) 660-661
[71] [1980] 1 WLR 1306 (CA)
[72] [1965] 2 QB 29 (CA)
[73] [2000] 2 All ER 289 (CA)
[74] [2001] EWCA Civ. 990
[75] [2007] EWCA Civ 1283
[76] [1967] 2 QB 379 (CA)
[77] [2005] EWCA Civ. 227
[78] [1976] Ch 179 (CA)
[79] [1884] 9 App. Cas.669 (PC) 714
[80] [1990] 170 CLR 394 (HCA) 413; also cited by Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) 1246

proportionality between the remedy and the detriment which is its purpose to avoid"[81]. Proportionality applies where an equity has arisen on the facts of the case and the court will grant the minimum equity to do justice[82].

For example, in ***Jennings v Rice***[83], J worked as a gardener for R (a childless widow) for many years. J and his wife took care of R without payment on R's promise that R 'would be alright' and that her house (worth over £400,000) would be his 'one day'. R died intestate and J made a claim in proprietary estoppel. The Court of Appeal held there was a proprietary estoppel on the facts and upheld the award of £200,000 for the costs of care. The court asserted that any larger award would be disproportionate to what J might have charged for his services. ***Robert LJ*** expressed that "The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result, and a disproportionate remedy cannot be the right way of going about that"[84]**.**

Likewise, in the case of ***Henry v Henry***[85] the promise was that the whole of the promisor's share of land would be the promisee's if he cultivated it and cared for the promisor. The promisee's reliance on the promise to his detriment gave rise to a proprietary estoppel but the equity was satisfied by an award of one half of the

[81] Mason CJ asserted that it would be 'wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption'. Also, Deane J stated that it was clear that 'a doctrine based on good conscience' should not be converted by excessively zealous application into 'an instrument of injustice or oppression' in *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 (HCA) 413, 442 as cited in Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) 1246

[82] Per Scarman LJ in *Crab v Arun District Council* [1976] Ch 179 (CA)

[83] [2002] EWCA Civ 159; See also *Campbell v Griffin* [2001] WTLR 981 (CA) [34]-[36] where the promise for a home for life was satisfied by an award of charge in the sum of £35,000; in *Powell v Benny* [2007] EWCA Civ 1283 [34] per Sir Peter Gibson where a promise to leave properties by will was satisfied by an award of £20,000.

[84] *Jennings v Rice* [2002] EWCA Civ 159 [56] (Walker LJ)

[85] [2010] UKPC 3

promisor's share in the land. The award had been reduced below the promise specified to the promisor, as the promisee had not only suffered a detriment but had also derived benefits from the land being in occupation rent free and being allowed to keep some of the fruits of the land, or to sell any surplus and keep the proceeds. Their Lordships pronounced that "Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application". Hence, the courts award a remedy in proprietary estoppel that is proportionate to the detriment suffered or the expectation created or encouraged.

Seventh, that the court exercises a principled discretion in determining a remedy in proprietary estoppel to ensure that the defendant is not adversely affected by its decision. Robert Walker LJ in ***Jennings v Rice***[86], explained the principled discretion in proprietary estoppel as follows:

> …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. [..] It cannot be doubted that in this, as in every other area of law, the court must take a principled approach, and cannot exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case.[87]

Thus, the court does not exercise an unfettered discretion in awarding a remedy in proprietary estoppel, but adopts a principled approach to do justice between the detriment suffered and the expectation created or encouraged.

[86] [2002] EWCA Civ 159; See also *Campbell v Griffin* [2001] WTLR 981 (CA) [34]-[36] where the promise for a home for life was satisfied by an award of charge in the sum of £35,000; in *Powell v Benny* [2007] EWCA Civ 1283 [34] where a promise to leave properties by will was satisfied by an award of £20,000.
[87] *Jennings v Rice* [2002] EWCA Civ 159 [36], [43] (Walker LJ)

For example, in ***Thorner v Major***[88] the promise made by Peter (P) to David (D) was that D would inherit P's farm upon P's death. Upon P's promise, D's proprietary estoppel claim had extended to the whole of P's net estate. However, since P had revoked his will leaving the whole of his residuary estate to D, the House of Lords held that D was only entitled to the farm and certain related assets. Since D had not known about P revoking the will in D's favour, the estoppel did not extend to parts of the estate that were unconnected with the farm. D was therefore granted the extent of the promise by P.

Similarly, in ***Gee v Gee***[89] the promise made to the claimant by his father was that he would inherit the lion's share of the farm. The father instead transferred all his shares in the farm to another son to disinherit the claimant. The claimant had devoted his whole life to the farm, and working for low wages and long hours in the expectation of inheriting the farm. The claimant was awarded the lion's share in the farm in proprietary estoppel. The court granted the claimant 52% shares in the company and 46% in the land with the remainder of shares to his parents. Hence, the claimant was granted the lion's share of the farm as promised. The principled discretion of proprietary estoppel grants a remedy commensurate with the promise given and the detrimental reliance thereby.

On analysis, the decided cases declare that the benefits of the doctrine are conferred by its application both as a cause of action and a defence. It can operate as a cause of action where a party has relied on an assurance by a landowner of a right or interest in

[88] [2009] UKHL 18
[89] [2018] EWHC 1393 (Ch)

land and has suffered a detriment in reliance of the assurance. Proprietary estoppel can also operate as a defence against a landowner who seeks to enforce his or her strict legal rights against another to whom a right or interest in the land was promised. Hence, the broad application of the doctrine as a cause of action and a defence illustrates its benefit and efficacy in creating an interest in land. Moreover, ***Cooke***[90] articulated that "Estoppel can prevent and accomplish so many things that it defies systematic description.."[91], thereby asserting that its practical application is beyond description.

1.5 Conclusion

Proprietary estoppel is a doctrine of equity that infuses morality and conscience into land transactions. It enables interests in land to arise without legal formalities where equity intervenes to preclude unconscionable conduct on the part of a legal owner of land. A judgment relying on proprietary estoppel is a judgment of conscience based on all the facts and circumstances of a case. The courts have deployed the conscience-based jurisdiction of equity to arrive at morally well-founded decisions.

Proprietary estoppel has the capacity to hold parties bound by their words or conduct, irrespective of whether such outcome was ever contemplated, and confers a remedy where none would otherwise be available. For example, where a landowner assures a neighbour for a right of way over property but later renege on that promise, then the landowner will be held liable; or where a father promises his farm to his son at death in return for working on the farm for no wages, but dies without leaving a will to the

[90]Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2002)
[91]Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2002) 170

son, then the son's equity in working the farm creates an equitable interest that entitle him to the farm. Hence, proprietary estoppel enforces a right or entitlement that would otherwise be unenforceable by law.

The decided cases show the doctrine is capable of application to a wide range of facts, where a landowner has led another to change his or her position in reliance on the landowner's promise or assurance. Mr. Justice Danckwerts in ***Inwards v Baker***[92] articulated that with such change of position, equity protects the party so that an injustice is not perpetrated by the landowner. The benefit of proprietary estoppel is also demonstrated by its propensity to limit or extinguish rights in land based on words or conduct. The interposition of equity creates substantive rights in land. Lord Denning M.R. in ***Crab v Arun District Council***[93], advocated that the core of the doctrine is the intervention of equity so that whatever was assured, promised or represented and was acted upon is already done in equity. Thus, proprietary estoppel is an equitable doctrine that is designed to redress the insistence of the common law on formality in the context of dealings with land.

The next chapter will focus on the influence of historical and social changes on the development of common law and equity.

[92] [1965] 2 QB 29 (CA)
[93] [1976] Ch 179 (CA)

Chapter Two: The Influence of Social Change on the Development of Equity against the backdrop of the Common Law

2.1 Introduction

This chapter illustrates how social change has influenced the respective development of common law and equity, the corollary being the extent to which common law and equity have impacted upon the social order. As will emerge, events such as the Black Death (1348-51) and the Industrial or Economic Revolution (1760-1840) indirectly accelerated the development of equitable concepts. The consequential analysis produces a rich tapestry involving the relationship and interplay between common law and equity, demonstrating how social and historic events appear to have influenced the development of these two bodies of law.

The ensuing elucidation in the specific context of the interrelationship between social and legal change, and the development of common law and equity in response to the changing social order, is arguably distinct from the typical methods applied by legal scholars[94]. Existing academic commentary[95] tends to provide a discursive account of the topics under scrutiny rather than formulating debate about the co-relationship between historical events and the development of legal and equitable concepts and

[94] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986); E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000); Gary Watt, *Trusts & Equity* (7th edn, OUP 2016); R. B. Mowat, *A New History of Great Britain* (OUP, 1992); Ralph V. Turner, *Magna Carta: Through the Ages* (Routledge, 2014); Rod Green, *Magna Carta and All That* (Andre Deutsch, 2015); Alastair Hudson, *Understanding Equity & Trusts* (3rdedn, Routledge 2008); Richard Edwards and Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013); Mohamed Ramjohn, *Unlocking Equity and Trusts* (5th edn, Routledge 2015)

[95] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986); E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000); Gary Watt, *Trusts & Equity* (7th edn, OUP 2016); R. B. Mowat, *A New History of Great Britain* (OUP, 1992); Ralph V. Turner, *Magna Carta: Through the Ages* (Routledge, 2014); Rod Green, *Magna Carta and All That* (Andre Deutsch, 2015); Alastair Hudson, *Understanding Equity & Trusts* (3rd edn, Routledge 2008); Richard Edwards and Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013); Mohamed Ramjohn, *Unlocking Equity and Trusts* (5th edn, Routledge 2015)

principles. This chapter seeks to present a comprehensive compilation of prior scholarly exposition of the evolution of common law and equity and the influence of social change on the development of these two bodies of law. In contrast, most legal scholars[96] tend not to identify precisely how, why and which specific social events transformed common law and equity.

Also considered here is the doctrine of estoppel in light of, and against the backdrop of its historical foundation and subsequent evolution to determine whether or not, the concept has ameliorated the strictures of the common law. Established literature[97] tends to provide a descriptive account of the doctrine, rather than assessing the link between historical changes in society and their influence on the synthesis of the components underpinning estoppel and the increasing prevalence of litigation founded on it.

The emergence of equity as a response to the deficiencies of the common law was crucial to the development of the doctrine of equitable estoppel which, in turn, led to the modern concept of proprietary estoppel, this being the focus of the thesis. This chapter explains how estoppel is closely interwoven within the overall evolution of

[96] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986); E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000); Gary Watt, *Trusts & Equity* (7th edn, OUP 2016); R. B. Mowat, *A New History of Great Britain* (OUP, 1992); Ralph V. Turner, *Magna Carta: Through the Ages* (Routledge, 2014); Rod Green, *Magna Carta and All That* (Andre Deutsch, 2015); Alastair Hudson, *Understanding Equity & Trusts* (3rd edn, Routledge 2008); Richard Edwards and Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013); Mohamed Ramjohn, *Unlocking Equity and Trusts* (5th edn, Routledge 2015)

[97] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986); E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000); Gary Watt, *Trusts & Equity* (7th edn, OUP 2016); R. B. Mowat, *A New History of Great Britain* (OUP, 1992); Ralph V. Turner, *Magna Carta: Through the Ages* (Routledge, 2014); Rod Green, *Magna Carta and All That* (Andre Deutsch, 2015); Alastair Hudson, *Understanding Equity & Trusts* (3rd edn, Routledge 2008); Richard Edwards and Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013); Mohamed Ramjohn, *Unlocking Equity and Trusts* (5th edn, Routledge 2015)

equitable concepts. It also seeks to illustrate how the development of estoppel is arguably the by-product of the changing needs of society and the requisite legal response to the consequential challenges thereby presented. It is artificial, therefore, to scrutinize the doctrine of estoppel in isolation from the complex social and historical backdrop against which it evolved.

2.2 Historical Change in England

The period in England spanning the 11th to 19th centuries witnessed momentous political, social and economic upheaval sufficient to create the impetus for the development firstly of the common law and, secondly, of equity as a corrective, supplementary and ameliorative body of law. According to ***Hogue***[98], law reflects the character of the social order, such that societal changes precipitate a commensurate response from those responsible for making and applying the law.[99] Hence the events that transpired in the 11th-19th centuries influenced the evolution of the prevailing and developing legal and regulatory framework and jurisdiction. For example, the Norman Conquest (1066) led to the rise of feudalism and the inauguration of common law, whilst the deficiencies in the common law in turn led to the emergence of equity. Likewise, the decline of feudalism precipitated by events such as the Black Death (1348-51) and the Hundred Years' War (1337-1453) created a society and economy founded on trade and commerce. Historical events, leading to the decline and eventual abolition of feudalism, together with other political and legal reforms created a new social order: the "socio-economic evolution of society". Further, the deficiencies inherent in the common law acted as a catalyst for the development of equity and its

[98] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[99] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) 3

paradigm concept, the trust. Both the socio-economic evolution of society and the rise of equity illustrate the symbiotic relationship between the social order and the legal system which co-exists with it.

2.3 Socio-economic Evolution of Society

The gradual transition of English society, precipitated by key events such as the Norman Conquest (1066), the Hundred Years' War (1337-1453), the Black Death (1348-51) and the Industrial Revolution (1760-1840), witnessed the birth of the common law, the genesis of equity and the subsequent development of both bodies of law.

2.3.1 Feudalism

Social change in England began with the Norman Conquest (1066) and the introduction of feudalism. It created a localized system of governance, justice and security. According to ***Jupp***[100], the feudal system was imposed in England following the Norman Conquest as follows:

> In England, following the Norman Conquest in the eleventh century, the continental feudal system was super-imposed on the existing Saxon tenure of land, which had already developed some of its characteristics.[101]

Thus, the Norman Conquest heralded the imposition of the feudal system in English society. Feudalism comprised a system of exchange of land for military service introduced by William the Conqueror (William I) to reward his supporters for their

[100] Kenneth Jupp, 'European Feudalism from its Emergence through its Decline' (2003) AJES 27 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1536-7150.00084> accessed 15 August 2015
[101] Kenneth Jupp, 'European Feudalism from its Emergence through its Decline' (2003) AJES 27, 27 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1536-7150.00084> accessed 15 August 2015

support in the conquest of England.[102] The monarch held all land and estates, and the land was granted to the lords or nobles who in turn sub-divided the land to peasants (tenants).[103] It created a pyramid or hierarchy of tenure whereby the medieval nobles or lords provided trained soldiers to fight for the king and clothes and weapons for the soldiers.[104] Medieval peasants worked the lords' lands and paid dues in exchange for the use of the land.[105] The dues were in the form of labour on the lord's land.[106] The lords or barons governed the estates, administered justice and levied taxes on the peasants.[107] The medieval feudal system created a land-based economy with production for subsistence and with no land rights for the peasants.

It gave rise to a socio-economic relationship and interdependence whereby land was the exclusive union between the nobles and tenants. According to ***Burn***[108], "feudalism implied a reciprocity of rights and duties. The lord gained in dignity and entitled to personal services, while the tenant obtained security."[109] The land-holding relationship was binding in providing security and obligations. He described the relationship thus:

> A state of society in which the main social bond is the relation between lord and man, relation implying on the lord's part protection and defence; on the man's part protection, service and reverence, the service including service in arms. This personal relation is inseparably involved in a proprietary relation, the tenure of land – the man holds of the lord, the man's service is a burden on the land, the lord had important rights in the land.[110]

[102] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[103] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[104] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[105] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[106] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[107] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[108] E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000) 9
[109] E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000) 10
[110] E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000) 9

Thus, the feudal system involved an asymmetric relationship whereby the lord held the rights to the land, and the bondsman was tied to the land in exchange for protection.

Burn[111] also asserts that one of the effects of feudalization was the system of land tenure it created whereby land became the exclusive bond in society as follows:

> When the country settled down after the upheaval of the Norman conquest, the social bond which both on the public and on private side of life united men together in a political whole was the land. Broadly speaking, land constituted the sole form of wealth, and it was through its agency that the everyday needs of governing and the governed classes were satisfied.[112]

Thus, feudalism propounded a system of personal and proprietary subordination founded on the land which maintained the social order and mutual sustenance.

In commenting on the feudal system of land tenure, ***Jupp***[113] similarly states that:

> Land everywhere was held in return for payment in service – military, civil or personal – or in money. [.....] The basis of contribution to the revenue of the Crown was the land which provided the subject with the means with which to pay.[114]

Hence, land was the most significant form of revenue and of wealth in feudal society. ***Jupp***[115] explains that the major effect of the Norman Conquest was the creation of the system of Crown ownership of all lands which characterizes English land ownership. He describes the influence of the Norman Conquest on English land law as follows:

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[111] E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000)
[112] E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000) 4
[113] Kenneth Jupp, 'European Feudalism from its Emergence through its Decline' (2003) AJES 27 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1536-7150.00084> accessed 15 August 2015
[114] Kenneth Jupp, 'European Feudalism from its Emergence through its Decline' (2003) AJES 27, 37 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1536-7150.00084> accessed 15 August 2015
[115] Kenneth Jupp, 'European Feudalism from its Emergence through its Decline' (2003) AJES 27 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1536-7150.00084> accessed 15 August 2015

> William regarded the whole of England as his by conquest, whence the doctrine of present day English law that all land is owned by the Crown and that the highest estate a man may have is a tenancy in fee simple.[116]

Thus, the Norman Conquest established a system of land ownership within the absolute dominion of the Crown. The concept of Norman kingship permanently influenced English property law by its recognition of the sovereign as the supreme landlord of the realm.[117] "Socage tenure"[118] survived into the twentieth century and, since 1925, became predominant in England.[119]

The decline and eventual abolition of the feudal system by the Tenures Abolition Act 1660, was promulgated by a catalogue of haphazard events that occurred between the period 1337 to 1660, including the Black Death (1348-51), the Hundred Years' War (1337-1453) and a series of political and legal reforms (1215-1660).

2.3.2 The Hundred Years' War

The ravages caused by the Hundred Years' War (1337-1453) shifted the power from the feudal lords to the common people.[120] It involved a series of wars for the control of lands in France led by the English kings: Edward III (1327-1377), Richard II (1377-1399), Henry IV (1399-1413), Henry V (1413-1422) and Henry VI (1422-1461).[121] The English had claimed lands in France as their fiefs, but the French disputed the claim, and when

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[116] Kenneth Jupp, 'European Feudalism from its Emergence through its Decline' (2003) 27, 36 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1536-7150.00084> accessed 15 August 2015

[117] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) 104

[118] *Refers to the freehold tenure of land, in medieval times it involved the tenure of land in exchange for husbandry rather than military service.*

[119] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) 105; see also the modern legislation in the Law of Property Act 1925, the Settled Land Act 1925 and the Land Registration Act 1925 as cited by Hogue, 1986.

[120] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)

[121] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)

King Phillip VI of France declared that the French fiefs of England were part of the realm of France, war broke out.[122] During the conflicts, the King no longer relied on the nobles to supply knights for the armies, but instead collected taxes and raised armies from the common folk.[123] The impact of nobles and knights on the battlefield was eliminated, as the peasants were directly engaged on behalf of the sovereign.[124] The Hundred Years' War marked the 'turning point' or 'watershed' that established nationalism and nationalist concepts in both England and France.[125]

Postan[126] discusses how the impact of the Hundred Years' War on the feudal system led to the demise of feudal tenure. He asserted thus:

> It began with a break in prices in the opening decades of the fourteenth century, and was accentuated by shortage of labour and of tenants in the second half of the century. The falling profits of cultivation led to the leasing out of demesne lands and of customary holdings, and this produced a fall in land values ...[127]

Thus, the labour shortage, falling profits and loss of revenue from the land led to the decline of feudalism and the dependency on land as the source of wealth.

Significantly, the Hundred Years' War also influenced the development of the common law in that, following the Norman Conquest, French was the primary language of the

[122] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[123] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[124] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[125] M. M. Postan, 'Some Social Consequences of the Hundred Years' War' (1942) EHR Vol. 12:1 <https://www.jstor.org/stable/pdf/2590387.pdf?refreqid=excelsior%3A3e219176be8d5f6ebf0e92451efac4bf> accessed 12 July 2015
[126] M. M. Postan,'Some Social Consequences of the Hundred Years' War' (1942) EHR Vol. 12:1 <https://www.jstor.org/stable/pdf/2590387.pdf?refreqid=excelsior%3A3e219176be8d5f6ebf0e92451efac4bf> accessed 12 July 2015
[127] M. M. Postan,'Some Social Consequences of the Hundred Years' War' (1942) EHR Vol. 12:1, 1, 11 <https://www.jstor.org/stable/pdf/2590387.pdf?refreqid=excelsior%3A3e219176be8d5f6ebf0e92451efac4bf> accessed 12 July 2015

English courts whilst by the end of the Hundred Years' War, this had changed to English.[128] England was defeated in this War, and because the French language was considered that of the enemy, it had to be discarded.[129]

2.3.3 The Black Death

The Black Death (1348-1351) caused by the bubonic plague, infested many towns and villages causing widespread death.[130] There were insufficient people to work the fields and the peasants who survived demanded more wages and rights for their labour, thereby reducing the landowners' profits[131]. This weakened the feudal system by reducing the power of feudal lords. Hence, the Black Death shifted the power from the feudal lords to the common people, who controlled the labour supply. The effect of the Black Death on the feudal holdings is described as follows:

> So terrible was the visitation that in the rural districts it may be estimated from the evidence that not less than one-third perhaps a full half of the population was swept away. The fields were left untilled and there was a terrible scarcity of food. The demand for labour greatly exceeded the supply while the price of provisions rose. The labourer demanded higher wages. High wages and high cost of living reacted on each other; the men would not work except at prices which from the landowners' point of view were extortionate.[132]

Thus, the Black Death decimated the peasant population and created a labour shortage with demands for higher wages to work the land.

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[128] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[129] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present (*T.C & C. Jack 1912)
[130] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[131] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[132] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912) 174

According to ***Robbins***[133], the Black Death also led to the peasants' abandonment of the manors[134] to the neighbouring towns to escape serfdom:

> The English villien lured by the prospect of high wages in neighbouring towns must sooner or later have deserted his manor. The plague and the attendant disorder furnished him an excuse. And in so far as it furnished him an excuse for desertion, it played its part in the breakdown of the old manorial system.[135]

Hence, the Black Death not only caused a severe labour shortage, but also occasioned the commutation to the towns and cities in lure of high wages in industry, and greater opportunities for deriving a livelihood.

Following the Black Death and the labour shortage that ensued, the lords considered the higher wages demanded by the peasants as insubordination.[136] In response, King Edward II passed the Ordinance of Labourers 1349 followed by the Statute of Labourers 1351, which returned the wages of the peasants to those of the pre-plague era and ordained that food be sold at prices established before the Black Death.[137] The peasants were also being heavily taxed on their low wages, and were precluded in practical terms from migrating from their locality to seek higher wages elsewhere.[138]

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[133] Helen Robbins, 'A Comparison of the Effects of the Black Death on the Economic Organization of France and England' (1928) JPE Vol. 36:4 <https://www.jstor.org/stable/pdf/1822539.pdf?refreqid=excelsior%3Afdebd212a3d7917baf41e3761ac14f97> accessed 12 July 2015

[134] *Manor and manorial system refer to the lord of the manor who was supported economically from his land, and from the contributions of peasant population under his authority. It differs from feudalism which represent the relationship between the king and his nobles, whereas manorialism describe the relationship between the nobles and the peasants in medieval Europe.*

[135] Helen Robbins, 'A Comparison of the Effects of the Black Death on the Economic Organization of France and England' (1928) JPE Vol. 36:4 447, 479 <https://www.jstor.org/stable/pdf/1822539.pdf?refreqid=excelsior%3Afdebd212a3d7917baf41e3761ac14f97> 12 July 2015

[136] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)

[137] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)

[138] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)

The imposition of these rigid laws, following the Black Death, caused grievance amongst the peasants.[139]

Notwithstanding the hardship which the Black Death and its aftermath engendered, this post Black Death era was an effective catalyst for the development of equity. According to ***Watt***[140], the high volume of litigation caused by the Black Death led to the evolution of equity as an independent body of law as follows:

> By the end of the fourteenth century, the Chancellor was dispensing justice on his own authority from his base at Westminster Hall (in the middle of that century, litigation caused by the Black Death had caused the common law courts to be overwhelmed). As petitions to the Chancellor grew in number throughout the fifteenth and sixteenth centuries, the Court of Chancery expanded and records of the Chancellor's decisions gradually acquired the status of a separate body of legal authority distinct from the common law.[141]

Hence, the volume of litigation spawned by legislative measures enacted after the Black Death, inadvertently contributed to the burgeoning role of the Lord Chancellor in the dispensation of a new body of law called 'equity'.

2.3.4 The Peasants' Revolt

Apart from the Black Death, adding further to the grievance of the peasants was the poll (head) tax introduced in 1380 by King Richard II to support the wars. The poll tax required the population over the age of fifteen to pay one shilling in cash and not farm produce, which appeared to be an intolerable and unjust burden affecting the poor than the rich nobles.[142]

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[139] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[140] Gary Watt, *Trusts & Equity* (6th edn, OUP 2016)
[141] Gary Watt, *Trusts & Equity* (6th edn, OUP 2016) 5
[142] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)

In Kent, a peasant, Wat Tyler clashed with a tax collector who insulted his daughter.[143] Other peasants converged together in support of their comrade which resulted in a revolt in Kent, that followed to other counties in north-east London.[144] Peasants from Kent on the South, and from Norfolk, Suffolk, Essex and Hertfordshire on the North had marched to London where revolt and violence ensued in 1381.[145] The outbreak was in protest against serfdom, the poll tax and the right to occupy land at a reasonable rent.[146] Richard II agreed to the demands of the peasants, specifically to abolish serfdom.[147] However, serfdom was not immediately abolished as King Richard failed to honour the concessions made to the peasants, and Parliament equally favoured the repudiation of the promises made to the peasants. Parliament ruled the promises made to the peasants were invalid and illegal until confirmed by legislation, which it refused to enact.

Although the Peasants Revolt did not abolish serfdom, it created an awareness amongst the nobles of the peasants' opposition to it. ***Mowat***[148] argues that this gradually led to a new system of land tenure that contributed to the decline of serfdom as follows:

> In spite of its apparent failure, the peasants' revolt in the long run contributed greatly to put an end to villeinage. To avoid the continual friction caused by trying to keep his villeins to their labour services, the lord began again to accept quit-rents. This meant that the labour services of a villein were 'commuted' for a fixed annual payment, for instance, seven pence an acre. The agreement was recorded in the rolls of the manor, and a copy of it was given to the villein, who thenceforth held his land by 'copy'. So long as he held his copy, and paid his dues, the

[143] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[144] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[145] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[146] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[147] A.D. Innes, *A History of the British Nations from the Earliest Times to the Present* (T.C & C. Jack 1912)
[148] R. B. Mowat, *A New History of Great Britain* (OUP, 1922)

> copyholder was in a secure position, and almost as good as a freeholder.[149]

Thus, the Peasants Revolt inadvertently contributed to the decline of serfdom and also led to a new system of land tenure characterized by a landlord-tenant relationship instead of lord and villein.

2.3.5 The Agricultural Revolution

Hogue[150] asserts that the decline of feudalism was evident as early as the twelfth and thirteenth centuries, as "… agriculture flourished in an epoch of good markets and rising prices"[151]. There was growing prosperity in trade and commerce as the economy was being transformed by the industrialization process.

Hogue[152] describes the technological advances in agriculture as follows:

> …a revolution in agricultural techniques producing crop yields unknown to medieval cultivators. Innovators enclosed blocks of land, removing them from open fields; they added legumes and root crops to old rotation schemes; new horse drawn implements replaced hand hoeing; selective breeding improved cattle, sheep, horses, and swine which benefited from a new abundance of forage.[153]

Thus, the agricultural revolution eliminated the reliance on feudal labour as new technology and techniques created more profits.

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[149] R. B. Mowat, *A New History of Great Britain* (OUP, 1922) 141, 142
[150] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[151] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) 4
[152] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[153] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) 247-248

Postan[154] also asserts that the decline of feudalism was caused in part by the agricultural revolution as follows:

> The closing hundred and fifty years of the Middle Ages were marked by a profound transformation of agriculture. The manorial system was breaking up all over the country. […] By the end of the fifteenth century, labour services, villeinage and cultivation by landlords or estate bailiffs were nearly everywhere replaced by copyholds, leaseholds and rent-collecting land ownership.[155]

Hence, the agricultural revolution considerably contributed to the decline of feudalism, as more revenue was being derived from the land by increased crop production and the collection of rents for farming from land ownerships.

2.3.6 The Abolition of Feudalism

Royal intervention finally heralded the demise of feudalism. King Edward I (1239) introduced legislation, which altered land rights, such as the Statute of Westminster II (1285) which regulated estates or interest in land and the Statute of Westminster III (1290) which created the alienation or sale of a tenure and prohibited sub-infeudation of land.

The Statute of Westminster II created various estates in land such as the fee simple and fee tail for the succession of property, and also created two property interests namely: tenure by statute merchant and tenure by elegit for the protection of land and

[154] M. M. Postan,'Some Social Consequences of the Hundred Years' War' (1942) The Economic History Review Vol. 12:1 <https://www.jstor.org/stable/pdf/2590387.pdf?refreqid=excelsior%3A3e219176be8d5f6ebf0e92451efac4bf> accessed 12 July 2015

[155] M. M. Postan,'Some Social Consequences of the Hundred Years' War' (1942) The Economic History Review Vol. 12:1 1, 10 <https://www.jstor.org/stable/pdf/2590387.pdf?refreqid=excelsior%3A3e219176be8d5f6ebf0e92451efac4bf> accessed 12 July 2015

chattels of debtors. On the other hand, the Statue of Westminster III regulated the buying and selling of estates or tenures, protected feudal property interest and eliminated the addition of new links to the types of tenure by subinfeudation.

The reign of Charles II (1660) introduced the Tenures Abolition Act (1660), which finally ended all vestiges of feudalism in England. Tenures were converted from feudal holdings to free and common socage involving taxation on the general public to provide an income for the monarch as a monetary replacement for the abolition of feudal tenures.

2.3.7 Political and Legal Reform

Political developments also led to the creation of parliamentary supremacy rather than monarchial rule. King John, in 1215, had signed the Magna Carta whereby the king was subject to the common law, as were his subjects. The barons rebelled against the high taxes imposed to support the French war[156], and the invention of new writs by the king for new causes of action reduced the fees, fines and amercements obtained from the administration of justice.[157] The king's council created new writs or new remedies for new and difficult cases for which there was no existing writ, and as litigants sought the king's justice, the business from the medieval royal courts administered by the nobles was curtailed. The rebellion by the barons led to the Magna Carta which protected their privileges, reduced taxes and provided that no new taxes could be imposed without the barons' consent.

[156] Chris Berg and John Roskan, *Magna Carta: The Tax Revolt That Gave Us Liberty* (Institute of Public Affairs, 2015)
[157] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)

King Edward I (1239) had also established a Model Parliament in 1291, which included commoners, low ranking clergy, church officials and nobles. This gave the common people an equal voice in government on par with the nobles. King Henry VII (1485) passed laws terminating the military power of the lords to raise armies to support their side. The English Civil War (1642-46), in part due to the King's absolutist rule by Royal Prerogative led to the subsequent overthrow of King Charles 1. The King purported to use the discretion vested in him by equity/natural law principles to undermine the authority of the legislature (Parliament). Freeman[158] articulates that the civil war led to a constitutional monarchy as parliament had overturned the absolutist power and right of the King. Power was vested both in the executive branch (monarchy) and the legislative branch (parliament) under the governance of a constitution.

Following the Glorious Revolution (1688), William of Orange established a new legislature by allowing Parliament to pass the Bill of Rights which guaranteed Parliamentary sovereignty and supremacy over the King. Thus, a new Parliament signalled the development of new legislation for land ownership in England which, was ultimately manifested in statutes such as the Law of Property Act 1925, the Settled Land Act 1925, the Land Charges Act 1972 and the Land Registration Act 2002. These are very diverse pieces of legislation with differing objectives for property rights and interests.

Legal reform by royal intervention in England also led to the establishment of the common law. King Henry II (1154) established the system of common law as the law of England. A writ system was established to create rights in property and rights against a

[158] Robert Freeman, *The English Civil War* (Kendall Lane Publishers, 2014)

person. He created the court of King's Bench to hear all matters of his subjects throughout the country. The principles of the common law emanated from these courts, and judge-made common law was the primary source of law applied throughout the country. Thus, the nobles no longer controlled the administration of justice in feudal strongholds as the royal courts took charge.

According to ***Turner***[159], King Henry II transformed England's law from customary norms to the common law which greatly undermined the feudal order as follows:

> Henry's legal innovations transformed England's law from customary norms into a legal system, a common law for the kingdom. They threatened magnates' traditional control over their vassals or tenants, for knights and other free landholders could purchase royal writs transferring their lawsuits from their lords' courts to the king's court. The shire courts became temporary royal tribunals when justices from the king's court arrived on their circuits about the counties. Wider access to royal justice began to undermine freeholders' dependent relationship with their lords and to change their relationship into a reciprocal one of landlords' and tenants' rights.[160]

Hence, the evolution of the common law also weakened the feudal system, and led to its decline and eventual abolition by the Tenures Abolition Act 1660. The wider access to the royal courts for justice undermined the dependency on the lord's courts, and a reciprocal relationship of landlord and tenant evolved. Thus, the common law not only transformed the legal system, but also altered the social relationship between the nobles and peasants.

2.3.8 The Industrial Revolution

An Industrial Revolution (1760-1840) that created wealth by trade and commerce rather than the production of goods and services represented a radical departure from

[159] Ralph V. Turner, *Magna Carta: Through the Ages* (Routledge, 2014)
[160] Ralph V. Turner, *Magna Carta: Through the Ages* (Routledge, 2014) 14

the feudal system. It altered the system of wealth-holding from land, to wealth in money derived from trade and commerce. According to ***Burn***[161], the feudalistic society that satisfied the needs of a society based on the land had evolved into a commercial society based on money. He articulates that English society had progressively evolved from land to money, or land to trade.

Hogue[162] describes how commerce flourished with manufacturing and trade as follows:

> …in the eighteenth century, English sea power protected a volume of commerce with the Orient and America yielding profits unknown to medieval merchants. Inventors designed steam engines to pump water from coal mines and to supply power for machinery in factories where English workers turned out an incredible flow of goods for a world market.[163]

Thus, trade and commerce yielded more profits than the land could have produced. Trade created a system of production for market in exchange for money, whereas feudalism was a system of production for use.[164] Trade transformed wealth from land to the exchange of goods and services. The growth of trade gave rise to a money system which in turn created a middle class. ***Rod Green***[165] described the economic revolution and the rise of the middle class as follows:

> London was by far and away the largest and most important city in England, but there were new cities blossoming all over the country as trade within the country and with foreign territories expanded at a rate never before known. Merchants, tradesmen and professionals began to form a new, growing tier of society – the middle class …..[166]

[161] E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000)
[162] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[163] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) 248
[164] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[165] Rod Green, *Magna Carta and All That* (Andre Deutsch, 2015)
[166] Rod Green, *Magna Carta and All That* (Andre Deutsch, 2015) 13

Hence, as trade and commerce expanded in England, the engaging merchants, traders and professionals emanated as a middle class. This middle class were paying taxes to the king and in return were provided with banking services, were offered protection and expanded territory for trade. The newly emerged middle class also helped the king to diminish the power of the nobles. The businessmen and traders provided the king with money to raise independent armies which eliminated the need for the king to rely on the nobles to provide military support. Also, new discoveries for weapons of war such as gun powder and the cannon reduced the King's subjection and dependence on the nobles.

Glassman[167] describes the relationship between the king and middle class as follows:

> The kings gained money revenue from the city merchants and used this capital to fund huge palaces and a vast staff of bureaucrats, professional soldiers and war equipment. In return the king granted the city merchants land for commercial development and eventually the titles that went with such land-holdings.[168]

Thus, a symbiotic relationship developed between the king and the middle class whereby the merchants obtained commercial holdings and title in exchange for revenue.

With the growth of trade and commerce, and the conversion of the land from feudal to commercial use, new cities and towns grew which provided fresh employment opportunities. However, ***Glassman***[169] asserts that the Industrial Revolution did not

[167] Ronald M. Glassman, *The Middle Class and Democracy in Socio-Historical Perspective* (E.J. Brill, 1995)
[168] Ronald M. Glassman, *The Middle Class and Democracy in Socio-Historical Perspective* (E.J. Brill, 1995) 91
[169] Ronald M. Glassman, *The Middle Class and Democracy in Socio-Historical Perspective* (E.J. Brill, 1995)

provide economic opportunity for all peasants, as those who could not find employment in the towns lived in poor conditions as follows:

> The poor peasants displaced relentlessly from their lands were absorbed in small numbers into the flourishing artisan trade of the free cities. However, the majority of them could not find work in the cities or the countryside. In Britain, France, Germany and other commercializing areas of Europe, these ex-peasants accumulated as vagrants and vagabonds living in squalor in both urban and rural settings.[170]

Hence, the Industrial Revolution did not create prosperity for all the peasants, as some could not be gainfully employed to reap the benefits of the money economy.

However, despite the hardship it created for many, the Industrial Revolution was instrumental in the development of equity, as the common law could not adequately deal with the commercial transactions of the industrial era. For example, the common law did not provide for the specific performance of a contract, but only provided for damages in breach. ***Hogue***[171], articulates that "… the common law of the twelfth and thirteenth centuries is in large part the law of land and tenures, the law of property rights and services together with rules for procedure for the administration of justice."[172] He elaborates on the common law thus:

> Medieval common law was principally land law. Rules of land law first enforced in the reign of Henry II were later elaborated especially in the time of Edward I who provided for the alienation of freehold and for the creation of long term family property arrangements by means of conditional gifts. Land was the principal source of wealth in the middle ages and so continued until the commercial and industrial revolutions created alternative sources of personal property which in their turn fell under common law rules.[173]

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[170] Ronald M. Glassman, *The Middle Class and Democracy in Socio-Historical Perspective* (E.J. Brill, 1995) 91-92
[171] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[172] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) 112
[173] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) 246-247

Hence, the industrial revolution created challenges with which the legal system had to cope and adapt, not least in the formulation of appropriate rules to regulate commercial transactions.

Hudson[174], argues that the Industrial Revolution acted as a catalyst for the development of specific aspects of the common law, arising in the context of these commercial transactions, accompanied by the emergence of new equitable devices:

> ….the common law developed to regulate commercial transactions and so forth. At the same time, equity was required to develop to provide a means of resolving disputes which arose out of that commercial activity but which the common law was not able to manage.[175]

Thus, the common law was unable to deal adequately with the commercial disputes arising in the industrialized economy.

Dobbs[176] also stresses that the common law was inadequate to cope with an industrial economy:

> As England moved from an agrarian to a commercial economy, the pace of economic development overtook the legal system's ability to provide new writs together with new remedies to meet new situations.[177]

Hence, the industrialized society had moved ahead of the common law, creating the need for a new system of law to provide remedies for new transactions and disputes arising in a commercial economy.

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[174] Alastair Hudson, *Understanding Equity & Trusts* (4th edn, Cavendish Publishing Ltd 2005)
[175] Alastair Hudson, *Understanding Equity & Trusts* (4th edn, Cavendish Publishing Ltd 2005) 23
[176] I. Dan B. Dobbs, *Law of Remedies* (2nd edn, West Publishing Co. 1993) 58 cited by Kevin C. Kennedy, 'Equitable Remedies and Principled Discretion: The Michigan Experience' (1997) UDLR Vol. 74:4 <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1045&context=facpubs> accessed 12 July 2015
[177] I. Dan B. Dobbs, *Law of Remedies* (2nd edn, West Publishing Co. 1993) 58 cited by Kevin C. Kennedy, 'Equitable Remedies and Principled Discretion: The Michigan Experience' (1997) UDLR Vol. 74:4 609, 611 <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1045&context=facpubs> accessed 12 July 2015

Hogue[178] asserts that the industrial economy created the impetus for the evolution of equity as follows:

> These changes in agriculture, commerce and manufacturing all demanded the organization of capital in new patterns. As new technology created wealth largely in the form of personal property, feudal land law obviously required additions.[179]

Hence, the development of equity was significant in dealing with the challenges of the industrial era as social change required the concretization of equitable principles to facilitate trade and protect often newly-acquired family wealth.[180]

Hudson[181] also argues that the Industrial Revolution influenced the development of the trust as follows:

> …the trust became a more rigid institution in the 19th century as it was used by commercial people to develop the means of holding property and conducting trade during the social and industrial advances in Great Britain.[182]

Thus, as the industrialized society advanced, it contributed to the utilization of the trust in relation to the creation of new initiatives to preserve wealth and property for future generations.

Viewed retrospectively, the type of static socio-economic system, epitomized by the feudal system, propagated a related legal order conducive to the interests of the privileged classes. There was a rigorous class system whereby the nobles controlled all the land, whilst the peasants worked the land. Also, the feudal system provided armies

[178] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[179] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986), 248
[180] Alastair Hudson, *Understanding Equity & Trusts* (2nd edn, Cavendish Publishing Ltd 2004) 5
[181] Alastair Hudson, *Understanding Equity & Trusts* (3rd edn, Routledge 2008)
[182] Alastair Hudson, *Understanding Equity & Trusts* (3rd edn, Routledge 2008)

for war, meaning that the king was not bound to establish an independent army. However, the gradual decline and abolition of feudalism created a new system of land tenure such as leaseholds and copyholds, and a free market for the buying and selling of land. Further, the industrial economy changed the source of wealth from land to money, and to trade and commerce. Thus, society progressed from a feudal to an industrialized society, in parallel with the evolution of the common law and the development of equity to deal with the defects of the common law.

2.4 The Rise of Equity

Legal change in English society cannot be attributed to a single event, as it was the amalgam of the historic events including the Norman Conquest, the Hundred Years' War, the Black Death, the Industrial Revolution and political reform which bestirred the modernization of England, and witnessed legal change via the evolution of common law and equity. The transformation of English law and society reflects that the progression of law is mobilized by a changing society and vice versa. As society evolved from feudalism to industrialization, the common law was inadequate to meet the changing needs of the society. Hence, the ongoing deficiencies of the common law influenced the evolution of equity.

2.4.1 The Problems of the Common Law

Following the Norman Conquest (1066), the common law became instilled as the law of England. ***Milsom***[183] describes the evolution of the common law as follows:

> The common law is the by-product of an administrative triumph, the way in which the government of England came to be centralised and specialised during the centuries after the Conquest.[184]

[183] S.F.C. Milsom, *Historical Foundations of the Common Law* (Butterworths, 1969)

The use of writs was the machinery of the justice system of the common law.[185] A writ created the concise formula for every private right or interest that was recognized by the royal courts.[186] It was made at the instance of the complainant or plaintiff who alleged that a legal right had been infringed, and ordered the defendant to appear in the royal courts or other inferior court for justice, for the court to make a determination of the parties' rights.[187]

Over time, the common law operated repressively. It was dominated by procedure and formality that created oppression in the law.[188] For example, the writ system became formal and technical as claims would be allowed only if they could fit into an existing writ. If there was no writ to match the circumstances of a particular case, then there was no remedy. Also, the failure to select the proper form of action or writ resulted in the dismissal of the suit. Even where a writ was obtained, the judges examined the validity of the writ rather than the merits of the claim. The plaintiff was also forced to select a remedy in advance, and could not later amend the pleadings to conform to the evidence presented.

There was also a stultification of the writ system as the English feudal barons restrained the legal inventiveness of the King's Council to create new writs or to recognize the propriety of a new cause of action.[189] The creation of new writs by the king meant the baronial and local courts were in danger of losing the fees and fines obtained from the sale of writs in the administration of justice. In 1258, the Provisions

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[184] S.F.C. Milsom, *Historical Foundations of the Common Law*(Butterworths, 1969) 1
[185] Arthur Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[186] Arthur Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[187] Arthur Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[188] Richard Edwards and Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013)
[189] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc., 1986)

of Oxford restricted the King's power to issue new writs without the consent of the King's Council. The feudal barons considered that the power to make new writs and forms of action was also the power to make new law and therefore limited the King's power to invent new remedies by writ. If a cause of action did not fit within an existing writ, then a plaintiff had no remedy at the common law courts, so that the common law became rigid and the new laws operated unjustly. Further, in the Magna Carta of 1215, King John was forced to promise that a writ would not be issued in such a way that a feudal lord would lose jurisdiction.

Hogue (1986)[190] describes the hardship created by the writ system of the common law as follows:

> During the twelfth and thirteenth centuries the tendency was in England to create an appropriate writ for the protection of every private right or interest recognized by the royal courts. Then, at the end of the thirteenth century the lush growth slowed and the time soon came when the plaintiff whose case could not be brought within the scope of one of the common law writs might be compelled to seek a remedy elsewhere than in a common law court, perhaps by means of a petition to the king's council, perhaps by a petition to the chancellor. For the writ system hardened and set forth in the fourteenth century. Thereafter a plaintiff might brood on the maxim, "No writ, no remedy."[191]

Hence, the hardening of the writ system created grievance and oppression that led to petitions to the king in council for a remedy not provided by the common law.

[190] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[191] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) 14

Watt[192] similarly asserts that by the early fourteenth century, the writ system and common law had become rigid and inflexible, as claims were allowed only if they could fit within an existing writ.

The abolition of the Eyre[193] also reinforced the strictness of the common law. The Eyre was a circuit court consisting of four itinerant judges appointed by the king to centralize control over local courts. The judges in Eyre had administered an equitable jurisdiction that ensured justice to the parties who had a good ground of complaint. The General Eyre was replaced by itinerant judges who tried cases according to the strict procedure of the common law.

Also, damages were the only remedy at common law and were often inadequate.[194] For example[195], where A had a contract with B and B had acted in breach of the contract, A was only entitled to damages at the common law courts. A could not obtain an order such as specific performance to compel B to perform the contract as such remedy was not available at common law. Similarly, where C had trespassed on D's land, the only remedy available was damages caused by C. D could not obtain an order such as an injunction to restrain the unlawful entry on D's land as such remedy was not available at common law.[196]

[192] Gary Watt, *Trusts & Equity* (6th edn, OUP 2014)
[193] Dennis Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate Publishing Group 2010)
[194] Mohamed Ramjohn, *Unlocking Equity and Trusts* (5th edn, Routledge 2015)
[195] Mohamed Ramjohn, *Unlocking Equity and Trusts* (5th edn, Routledge 2015)
[196] Mohamed Ramjohn, *Unlocking Equity and Trusts* (5th edn, Routledge 2015)

Further, the petitioner seldom obtained relief because of the power or influence of the defendant;[197] or the plaintiff was the victim of the corrupt jury which heard the case.[198] Also, the common law did not recognize oral agreements or informal relations in the dealings of parties. For example, where two parties had entered into an oral contract, which was required at common law to be in writing, then the common law would not recognize the contract nor grant any remedies on it.

Such defects of the common law led to the development of a new body of law called "equity" to overcome the harshness of the common law. Arguably, the common law initially met the needs of feudal society, but as society evolved with the socio-economic and demographic impact of the Black Death, the Hundred Years' War, the Peasants' Revolts, the Agricultural Revolution, political and legal reform and the abolition of feudalism, the common law became too rigid and inflexible to meet the changing needs of the society. The early quest for justice also influenced the development of equity as persons sought to petition the king against the hardship caused by the common law.

According to ***Bryson***[199], litigants who were prejudiced by the common law system sought justice from the king as follows:

> It was a period during which the rich and the powerful of the county could manipulate or intimidate juries and thus pervert the course of justice. Frequently, weak and poor litigants had to resort to the court of

[197] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[198] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[199] W. Hamilton Bryson,' Equity and Equitable Remedies' (1987) EAJS Scribner <https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 12 July 2015

> the Lord Chancellor, the most powerful political figure in the country, to obtain justice against their strong neighbours.[200]

Hence, the petitions made to the Chancellor led to the evolution of equity as the common law could not provide a remedy, or the remedy provided was inadequate to address the perils of social injustice.

Hogue[201] emphasizes that the "medieval society in which the common law took form was feudal and agricultural, and was rapidly changing"[202] as society evolved. As social changes occurred, the law was adapted by judicial interpretation to meet new conditions.[203] For example, petitions were made to the King where the common law was thought to be unjust or unfair. The king was considered the fountain of justice and hence invoked the power of the Lord Chancellor to whom the king delegated his discretion and who determined claims by conscience. Hence, the deficiencies of the common law created the gateway for the law to adapt to the changing needs of society and the social order.

2.4.2 The Development of Equity

According to ***Edwards and Stockwell***[204], ***"***the origins of equity lie in the deficiencies in the common law".[205] Where the common law did not provide a remedy, a plaintiff petitioned the King in Council for justice and a remedy to his or her case. These

[200] W. Hamilton Bryson, 'Equity and Equitable Remedies' (1987) Encyclopedia of American Judicial System 545, 547 <https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 12 July 2015
[201] Arthur Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)
[202] Arthur Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) xiv (preface)
[203] Arthur Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) 3
[204]Richard Edwards & Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013)
[205] Richard Edwards & Nigel Stockwell, *Trusts and Equity* (8th edn, Pearson Education Ltd 2007) 2

petitions pleaded for the king's conscience or mercy, and were heard by the King's Council of which the Chancellor was a member[206]. It was the deficits of the common law and the changing social order that created the rationale for the development of equity.

Watt[207] likewise advocates that equity emerged due to the royal prerogative of the English king to do justice between his subjects, as he was accountable to God for his laws as follows:

> …the King was accountable to God for the righteousness of his laws and the Chancellor as 'keeper of the king's conscience' would act in particular cases to admit 'merciful exceptions' to the king's general laws to ensure that the king's conscience was right before God.[208]

Thus, where the common law had not provided justice, petitions were made to the King's Council. The Lord Chancellor was the keeper of the king's conscience, and sought to do justice to the king's subjects in good faith to God.

Hogue[209] similarly advocates that equity emerged from the ad hoc intervention of the Lord Chancellor, as the keeper of the king's conscience, into a body of precedent administered by the court of Chancery as follows:

> In the thirteenth century, the English king and his council, including his judges and great officers, were able to exercise the royal duty and right to develop new remedies for new wrongs. Thus, new forms of action, new writs such as Trespass and new royal courts such as Common Pleas and King's Bench were all 'equitable' in the thirteenth century. The emergence of the Chancery as a court of 'equity' in the fourteenth century is worth noting because its procedures ultimately led to a

[206] Richard Edwards & Nigel Stockwell, Trusts and Equity (11th edn, Pearson Education Ltd 2013)
[207] Gary Watt, *Trusts & Equity* (6th edn, OUP 2014)
[208] Gary Watt, *Trusts & Equity* (6th edn, OUP 2014) 5
[209] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986)

> widening distinction between what were later called the common-law courts and the equity courts.[210]

Accordingly, the Chancellor developed new forms of actions and new remedies that were not available at common law. These actions and remedies were designed to meet the changing needs of society and the people within it.

Edwards and Stockwell[211] describes how the equitable jurisdiction of the Lord Chancellor arose as follows:

> It was considered that a residuum of justice resided in the king, and petitions were directed at tapping in to this as a last resort if the common law had not provided justice. If a subject believed that the common law would not provide an appropriate solution to his case, he could petition the king and the Council asking that justice be done and that a remedy should be ordered. These petitions were referred to the Lord Chancellor and eventually the Chancellor was petitioned directly. Cases brought before the Chancellor were called suits. The Chancellor was making decrees by the end of the fifteenth century.[212]

Hence, equity provided the flexibility for the Lord Chancellor to mete out appropriate justice where the common law proved too rigid to achieve what equity would have regarded as a "fair" outcome.

Edwards and Stockwell[213] further articulate that the petitions to the Lord Chancellor appealed to the king's mercy or conscience, and were heard by the King's Council of which the Chancellor was a member. The Chancellor was usually a clergyman, the king's confessor, and the keeper of the king's conscience.[214] As an ecclesiastic, he was learned in civil law and well versed in moral and canon (church) law, and resolved

[210] Arthur R. Hogue, *Origins of the Common Law* (Liberty Fund Inc. 1986) 176
[211] Richard Edwards & Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013)
[212] Richard Edwards & Nigel Stockwell, *Trusts and Equity* (8th edn, Pearson Education Ltd 2007) 2
[213] Richard Edwards & Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013)
[214] Richard Edwards & Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013)

disputes based on his ideas, belief and conscience, and not by law.[215] The resolution of disputes by conscience developed into a system of law known as equity.[216]

Watt[217] asserts that by the late thirteenth and early fourteenth centuries, petitions to the Chancellor became routine as a means of escaping the harshness of the writ system and the judgments of the common law courts. The Chancellor was able to issue subpoenas to compel defendants to attend before him to answer the complaint of the petitioner. Non-attendance could be punished by imprisonment.

The Chancellor's power to resolve disputes by the prohibition of unconscionable conduct gained popularity, and his deliberations gradually evolved as an independent body of law called equity.

According to ***Thompson***[218]:

> Such a system which gave a seemingly unfettered discretion to the Chancellor could not be tolerated as a rational system of law and so the principles upon which the Chancellor would intervene became established and developed into a coherent body of law known as equity.[219]

Later reliance on a body of substantive precedent and fixed principles addressed this type of criticism that "equity varied with the length of the Chancellor's foot", as John Seldon has also claimed.[220]

[215]Richard Edwards & Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013)
[216]Richard Edwards & Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013)
[217] Gary Watt, *Trusts & Equity* (6th edn, OUP 2014)
[218] Mark P. Thompson, *Modern Land Law* (5th edn, OUP 2012)
[219] Mark P. Thompson, *Modern Land Law* (5th edn, OUP 2012) 37
[220] *See John Seldon's criticism of equity at page 70-71*

In the case of ***Dudley v Dudley***[221], Lord Cowper articulates a most explicit summary of the nature and purpose of equity thus:

> Equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigor, hardness and edge of the law, and is a universal truth. It does also assist the law, where it is defective and weak in the constitution (which is the life of the law), and defends the law from crafty evasions, delusions and mere subtleties, invented and contrived to evade and elude the common law, whereby such as have undoubted right are made remediless. And thus is the office of equity to protect and support the common law from shifts and contrivances against the justice of the law. Equity, therefore, does not destroy the law, nor create it, but assists it.[222]

Thus, equity intervened not only to redress the defects of the common law, but also to enforce obligations based on conscience and morality. It created a new form of justice based on the dealings and the conduct of the parties, rather than the strict and formal legality of a case. Hence, the limitations of the common law to provide for the changing social order was manifested in the growth of equity to ensure that the legal system, as a whole, was meeting the evolving needs of society.

Edwards and Stockwell[223] affirms that equity operated in tandem with the common law thus:

> Equity might well provide a remedy where the common law provided none or provide a more suitable remedy than the common law. Equity might also intervene to ensure that the available common law remedy was actually enforceable. In other words, equity worked alongside the common law and provided different solutions to problems.[224]

Hence, equity eventually operated harmoniously with the common law to provide a remedy, or more suitable remedy than the common law.

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[221] [1705] Prec. Ch 241
[222] [1705] Prec. Ch 241, 244
[223] Richard Edwards & Nigel Stockwell, *Trusts and Equity* (11th edn, Pearson Education Ltd 2013)
[224] Richard Edwards & Nigel Stockwell, *Trusts and Equity* (8th edn, Pearson Education Ltd 2007) 2

Sometimes in conflict with equity's own maxim that "equity follows the law", it sought to complement the common law by application of notions of fairness and good conscience. It provided a remedy where the common law would not, or it granted a more suitable remedy than the common law, exemplified by the maxim that "equity will not suffer a wrong without a remedy". As seen, the transition from a society which depended on land as the sole or primary source of wealth, to a money economy based on trade and commerce attracted new types of legal claim which could not be substantively or procedurally remedied by the common law, but only in equity.

According to ***Bryson***[225], the equitable jurisdiction of the Lord Chancellor remedied defects in the procedural operation of the common law courts. For example, the common law rule of evidence that a party could not testify in court as a witness meant that a person could not testify against himself and neither for himself.[226] The court of equity provided a remedy whereby a party with a common law grievance could sue in equity to force the defendant to respond under oath so as to discover the truth, and to use the sworn statement as a binding admission in the common law court.[227]

Another example identified by ***Bryson***[228], is the trial by jury in common law courts. Civil juries were seldom sufficiently educated or experienced to determine a party's liability

[225] W. Hamilton Bryson, 'Equity and Equitable Remedies' (1987) Encyclopedia of American Judicial System <https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 14 July 2015

[226] W. Hamilton Bryson, 'Equity and Equitable Remedies' (1987) Encyclopedia of American Judicial System <https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 14 July 2015

[227] W. Hamilton Bryson, 'Equity and Equitable Remedies' (1987) Encyclopedia of American Judicial System<https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 14 July 2015

[228] W. Hamilton Bryson, 'Equity and Equitable Remedies' (1987) Encyclopedia of American Judicial System <https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 14 July 2015

in damages.[229] In the case of multiple plaintiffs or defendants, the common law jury was inadequate to decide on complex issues relating to financial liability such as the proportion of damages to be paid to each defendant.[230] Conversely, in the courts of Chancery, the judges heard all the issues of the case and were capable of determining them in an informed manner, drawing upon their experience and training.[231]

Hudson[232] describes the operation of equity as mitigating the strictness of the common law to prevent injustice in individual cases. He states that:

> An expression which has been commonly used to describe the way in which equity functions is that equity 'mitigates the rigour of the common law' so that the letter of the law is not applied in so strict a way that it may cause injustice in individual cases. English equity does this by measuring the behavior of the individual defendant against the standards which the law requires in a process which is described as 'correcting men's consciences.[233]

Hence, the goal of equity is to apply conscience to prevent unconscionable dealings between parties, so as to ensure an equitable outcome of a case.

Hudson[234] also describe how the courts arrive at a decision in equity as follows:

> Conscience is the key concept at the heart of equity. Equity then is that part of English civil law which seeks either to prevent any benefit accruing to a defendant as a result of some unconscionable conduct, or to compensate any loss suffered by a claimant which results from some unconscionable conduct, and which seeks to ensure that the common law and statutory rules are not manipulated unconscionably. At its

[229] W. Hamilton Bryson, 'Equity and Equitable Remedies' (1987) Encyclopedia of American Judicial System <https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 14 July 2015
[230] W. Hamilton Bryson, 'Equity and Equitable Remedies' (1987) Encyclopedia of American Judicial System <https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 14 July 2015
[231] W. Hamilton Bryson, 'Equity and Equitable Remedies' (1987) Encyclopedia of American Judicial System <https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 14 July 2015
[232] Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2017)
[233] Alastair Hudson, *Equity and Trusts* (4th edn, Cavendish Publishing Ltd 2005) 3
[234] Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2017)

> broadest, equity appears to imbue the courts with a general discretion to disapply statutory or common law rules whenever good conscience requires it.[235]

Thus, conscience is the heart of equity whereby the court always has a discretion to produce an equitable outcome even where it involves non-compliance with statutory or common law rules, sometimes in violation of equity's own maxim that "equity follows the law".

However, despite equity's intervention to remedy the common law, its operation by the courts was not without confusion and uncertainty. ***Watt***[236] articulates that:

> ….it was a frequent criticism of Chancery in the sixteenth and seventeenth centuries that the Chancellor's discretion to dispense justice ad hoc on the ground of 'conscience' produced justice that varied markedly in quality from one Lord Chancellor to the next.[237]

Since equity is based on conscience, then words or conduct that may be adjudged unconscionable by one Chancellor may not have been similarly viewed by another, thereby causing inconsistency and unpredictability for litigants.

John Selden, a 17th-century jurist, also criticized equity for its lack of fixed rules and unfettered discretion.[238] Seldon made the observation of conflicting judgments being made by the Lord Chancellors in every case. He stated that:

> Equity is a Roguish thing: for Law wee have a measure, know what to trust too; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the Standard for the measure wee call A foot, to be the

[235] Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2017) 96
[236] Gary Watt, *Trusts & Equity* (6th edn, OUP 2014)
[237] Gary Watt, *Trusts & Equity* (6th edn, OUP 2014) 6
[238] H. Jefferson Powell, ' "Cardozo's Foot":The Chancellor's Conscience and Constructive Trust' (1993) Law and Contemporary Problems Vol. 56:3 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=4192&context=lcp> accessed 22 September 2015

> Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another A short foot, a third an indifferent foot: 'tis the same thing in the Chancellor's Conscience.[239]

John Seldon's critique deals tellingly with the confusion that was engendered by decisions of the Lord Chancellor determined on an ad hoc basis with little recourse to established precedent. Conversely, however, it illustrates the unfettered discretion of the Lord Chancellor to have referred to the particular facts and circumstances of each case, rather than being constrained by prior authority decided on similar facts. This highlights the historical flexibility of equity and its attendant capacity to produce new doctrines such as proprietary estoppel (which is the theme of this thesis).

Holdsworth[240] highlights the difference between the type of equity administered by the common law courts, and the equity administered by the Lord Chancellor as follows:

> The equity administered through the common law courts was administered on the broad basis that justice must so far as possible be done to parties who had a good ground of complaint. The equity administered by the chancellor, on the other hand, rested on the more restricted idea of the canon lawyers that the court ought to compel each individual litigant to fulfill the duties dictated by reason and conscience. It followed that the examination of the litigant was absolutely essential to the administration of equity. Obviously, the judge could not ascertain what course of action conscience would dictate in any given case unless by this examination he elicited all the facts.[241]

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[239] H. Jefferson Powell, ' "Cardozo's Foot":The Chancellor's Conscience and Constructive Trust' (1993) Law and Contemporary Problems Vol. 56:3 7, 7 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=4192&context=lcp > accessed 22 September 2015

[240] W.S. Holdsworth, 'The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor' (1916) YLJ Vol. XXVI:1 <https://www.jstor.org/stable/pdf/787320.pdf?refreqid=excelsior%3Ad5696cf696378fdc86160a02b5cacf92> accessed 24 September 2015

[241] W.S. Holdsworth, 'The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor' (1916) YLJ Vol. XXVI:1 1, 14-15 1 <https://www.jstor.org/stable/pdf/787320.pdf?refreqid=excelsior%3Ad5696cf696378fdc86160a02b5cacf92> accessed 24 September 2015

What is clear however, is that in spite of any inherent shortcomings in terms of unpredictability, the Lord Chancellor did seek to enforce obligations between parties on grounds of good conscience, mindful of all the facts and circumstances of the case.

Holdsworth[242] articulates that "… the whole system of equity was to a large extent governed by a rival system of the common law"[243], whereby successive Lord Chancellors supplemented and complemented the common law. Hence, the purpose of equity was not to subvert, but to mitigate the harshness of the common law.

Bryan and Vann[244] assert that the early distinction between common law and equity was procedural rather than substantive:

> The real differences between the common law and equity in its formative stage concerned not substantive law but the procedures applied by chancellors to obtain evidence. The action was begun not by writ but by a simple summons to appear before the Chancellor. Failure to comply with the summons would render the defendant liable for contempt of court. Evidence was taken by interrogatories (questionnaires) or written dispositions. The Chancellor did not work with a jury. In practice he collected evidence until he had obtained enough to justify taking action.[245]

Thus, equity originally varied from the common law in terms of evidence-gathering mechanisms and the Chancellor's power to secure the defendant's attendance before him on threat of imprisonment. The legacy of this still endures in the modern day subpoena which if disregarded, constitutes contempt of court.

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[242] W.S. Holdsworth, "The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor" (1916) YLJ Vol. XXVI, No. 1 1 <https://www.jstor.org/stable/pdf/787320.pdf?refreqid=excelsior%3Ad5696cf696378fdc86160a02b5cacf92> accessed 24 September 2015

[243] W.S. Holdsworth, "The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor" (1916) YLJ Vol. XXVI, No. 1., 15 1 <https://www.jstor.org/stable/pdf/787320.pdf?refreqid=excelsior%3Ad5696cf696378fdc86160a02b5cacf92> accessed 24 September 2015

[244] M.W. Bryan and V.J. Vann, *Equity and Trusts in Australia* (Cambridge University Press, 2012)

[245] M.W. Bryan and V.J. Vann, *Equity and Trusts in Australia* (Cambridge University Press, 2012) 6

Historically, therefore, the role of equity was to redress the procedural frailties of the common law, rather than seeking to alter its substance. However, equity came to adopt a more substantive position. In this regard, ***Watt***[246] emphasizes that the distinction between equity and the common law is aptly described by the legal historian, ***J.H. Baker*** who observed that:

> If, for reasons of history, equity had become the law peculiar to the Court of Chancery, nevertheless in broad theory equity was an approach to justice which gave more weight than did the law to particular circumstances and hard cases.[247]

Hudson[248] similarly states that the "conscience" underpinning equity created the divergence between equity and the common law as follows:

> Whereas the common law was concerned with the application of legal rules and principles to individual set of facts, equity as administered through the Courts of Chancery was concerned to consider the conscience of the individual defendant.[249]

Hence, one incontrovertible distinction between common law and equity is the application of legal rules or precedent by the common law versus the conscience-based and discretionary approach of equity.

The function of equity was to deal with hard cases that could not be resolved by the common law, and to intervene to provide a remedy where the common law would not. Hence, equity departed from the common law on grounds of fairness and good conscience, and it is on this basis of preventing unconscionability that remedies in equity were conceived and granted.

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[246] Gary Watt, *Trusts & Equity* (6th edn, OUP 2014) 13
[247] Gary Watt, *Trusts & Equity* (6th edn, OUP 2014)
[248] Alastair Hudson*, Equity and Trusts* (6th edn, Routledge 2017)
[249] Alastair Hudson, *Understanding Equity & Trusts* (6th edn, Routledge 2017), 2

The role of good conscience is enshrined in the equitable maxim that equity acts 'in personam' in contrast to the 'in rem' jurisdiction of the common law.[250] This was explained by Lord Ellesmere in the ***Earl of Oxford's Case,***[251] whereby "equity corrects men's consciences for fraud, breaches of trust, and wrongs and oppression of all nature they may be, and mollifies the extremity of the law".

In essence, therefore, political and social change led to the evolution firstly of common law and secondly of equity. As English society progressed from an agricultural to an industrial economy, equity provided a wellspring of justice predicated on notions of good conscience. Equity emerged as a crucial response to the deficiencies of the common law, having its origins in petitions for "justice" to the king. The flexibility of equity, affording a remedy where the common law could not, enhanced the utility and impact of equitable principles. Whereas the common law was steeped in formality and rigid procedure, equity was able to devise a range of new remedies for new causes of action, including its capacity to deal with disputes arising from informal dealings between parties. For example, in the absence of a formal agreement between parties, equity considers that there is an agreement based on the prior dealings of the parties.

With the changing socio-economic structure, equity was called on to administer mercantile dealings including mortgages, bankruptcy, partnerships, the chartering and ownership of ships, and the relations between merchants and factors, principals and sureties.[252] It provided remedies non-existent to the common law such as specific performance of contracts, relief from fraud, relief from mistake and injunctive relief

[250] Alastair Hudson, *Equity and Trusts* (6th edn, Routledge 2017)
[251] [1615] 21 ER 485 (Ch)
[252] Theodore F.T. Plucknett, *A Concise History of the Common Law* (5th edn, The Lawbook Exchange Ltd 2001) 690-691

from nuisances.[253] Hence, as society evolved, so did equity develop to satisfy the needs of the changing social order.

According to ***Burn***[254], "law will wither unless it expands to keep pace with the progressive ideas of an advancing community."[255] Hence, the emergence of equity to complement the common law was necessary and instrumental to maintain the continuing function of the law to provide remedy and relief from wrongs. For example, whereas the common law developed to regulate commercial transactions, equity was required at the same time to resolve disputes that arose from commercial activities that the common law could not manage.[256] ***Megarry & Wade***[257] also maintain that equity provided "the means needed in every legal system of adapting general rules to particular cases,"[258] to facilitate the changing social order. Thus, equity acted as a gloss on the common law to meet the challenges posed by increasingly complex socio-economic conditions.

In commenting on the historical evolution of the law, ***Tarchila***[259] remarked that law adapts to the changing social order as follows:

> It has been set that law is a social phenomenon incidental to human society; thus, Romans have expressed this statement through the phrase: "ubi societas, ibi jus", namely law occurs along with the society. Law, like society is not a static, immutable entity issued once and for all; they are under constant development and social-historical evolution. As social

[253] Howard L. Oleck, 'Historical Nature of Equity Jurisprudence' 20 Fordham Law Review 23 (1951), 37-38 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1378&context=flr> accessed 25 September 2015
[254] E.H. Burn, *Modern Law of Real Property* (16th edn, Butterworths 2000)
[255] E.H. Burn, *Modern Law of Real Property* (16th edn, Butterworths 2000) 4
[256] Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2017), 23
[257] Charles Harpum, *Megarry & Wade:The Law of Real Property* (6th edn, Sweet & Maxwell Ltd 2000)
[258] Charles Harpum, *Megarry & Wade:The Law of Real Property* (6th edn, Sweet & Maxwell Ltd 2000) 97
[259] Petru Tarchila, Historical Evolution of the Law (2015) AGORA International J. Juridical Sciences 54 <https://heinonline.org/HOL/LuceneSearch?terms=evolution+of+law+and+society&collection=all&searchtype=advanced&typea=text&tabfrom=&submit=Go&all=true> accessed on 28 September 2018

> phenomenon, social law experiences a constant historical evolution, bearing the mark of historical periods and cultural, spiritual and religious features of nations.[260]

This reflects the symbiotic interrelationship between law and society, as illustrated by the development of equitable concepts and principles, including the modern doctrine of proprietary estoppel.

2.4.3 The Development of the Trust

According to ***Hudson,***[261] "one of the most sophisticated instruments in equity's armoury is the trust …".[262] In effect, equity created the trust to facilitate the changing needs of society and the inadequacy of the common law to provide an appropriate remedy.

Thompson[263] also emphasizes that the development of the trust was the hallmark of equity as follows:

> The original basis on which equity intervened was to enforce obligations of conscience and to redress defects in the common law. What also emerged from the intervention of equity was its most important and practical development: the trust.[264]

A trust arises when assets are transferred by a settlor to one party to hold on behalf of another. For example, A may be required to hold property on trust for B, A being the trustee and B the beneficiary. The trustee holds the property for the benefit of the beneficiary. Equity does not permit the trustee to deny the trust, that is, to hold the

[260] Petru Tarchila, Historical Evolution of the Law (2015) AGORA International J. Juridical Sciences 54-55 <https://heinonline.org/HOL/LuceneSearch?terms=evolution+of+law+and+society&collection=all&searchtype=advanced&typea=text&tabfrom=&submit=Go&all=true> accessed on 28 September 2018
[261] Alastair Hudson*, Equity and Trusts* (4th edn, Cavendish Publishing Ltd 2005)
[262] Alastair Hudson, *Equity and Trusts* (4th edn, Cavendish Publishing Ltd 2005) 9
[263] Mark P. Thompson, *Modern Land Law* (5th edn, OUP 2012)
[264] Mark P. Thompson, *Modern Land Law* (5th edn, OUP 2012) 41

property for his or her personal benefit, as it imposes on the trustee a fiduciary duty of the utmost good faith and confidence towards the beneficiary.

Historically, the common law did not recognize this division between the ownership of property and the enjoyment of it. Therefore, the common law would not provide a remedy to the beneficiary where the trustee had used trust property for personal benefit or had used the proceeds thereof for personal gain.

Thompson[265] asserts that the inadequacy of the common law created the trust as follows:

> From the early days, the practice developed of land being conveyed to a person, T for the use of another person, B. At common law, T was the legal owner of the land, and the obligation accepted on behalf of B was disregarded by the common law. However, in equity, since T had accepted the undertaking to hold the land to the use of B, it was considered unconscionable for T to renege on that obligation. T's conscience was affected and equity compelled T to comply with the use, so B could enjoy the benefit of the land.[266]

Hence, the trust accorded the beneficiary a right to equitable relief against the trustee for breach of trust, enforceable by a proprietary remedy (specific performance) or a personal action against the trustee's own resources.

Similarly, ***Bryson***[267] affirms that the absence of a common law writ to enforce the trust had led to its enforcement by the Lord Chancellor as follows:

> A trust or use was a type of contract usually in reference to land, which was invented after the common law writs (which controlled the

[265] Mark P. Thompson, *Modern Land Law* (5th edn, OUP 2012)
[266] Mark P. Thompson, *Modern Land Law* (5th edn, OUP 2012) 42
[267] William H. Bryson, 'Equity and Equitable Remedies' (1987) Encyclopedia of American Judicial System 545, 547 <https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 26 September 2015

> jurisdiction and procedures of the common law courts) had become fixed and unchangeable. Since there was no common law writ available to enforce a trust, and since the chancery clerks and the common law judges could not change the law by inventing a new one without unconstitutionally usurping the legislative power of Parliament, the Chancellor enforced them.[268]

The development of the trust in equity protected the beneficiary's right to the property. The trust of a legal estate in land involves two owners namely, the trustee who holds the legal estate and the beneficiary who holds the equitable interest. The common law, on the other hand, requires both the legal and equitable interest to be vested in the same party to constitute absolute ownership of the legal estate. Thus, the common law could not provide a remedy in trust.

Bryan and Vann[269] articulate that the trust evolved from the interrogatories held by the Lord Chancellor in discovering the informal agreement by which the trustee held the land for the beneficiary.

> The fifteenth century, when these procedures were developed, was the period in which uses (or trusts) of land were enforced by chancellors. Disputes typically arose when the feoffee (trustee) of land who was bound to hold the land for the benefit of the cest que trust (beneficiary) claimed the land for himself. The common law courts could do little to prevent the trustee from obtaining a personal advantage from the trust because its methods for obtaining evidence were not suited to discovering the terms on which the trustee had agreed to hold the land. They could be ascertained however, as a result of interrogatories administered by the Chancellor.[270]

[268] William H. Bryson, 'Equity and Equitable Remedies' (1987) Encyclopedia of American Judicial System 545, 547 <https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 26 September 2015

[269] William H. Bryson, 'Equity and Equitable Remedies' (1987) Encyclopedia of American Judicial System 545, 547 <https://pdfs.semanticscholar.org/024f/9e8c06d40b47a09d64ebdc64408f7894d4e9.pdf> accessed 26 September 2015

[270] M.W. Bryan and V.J. Vann, *Equity and Trusts in Australia* (Cambridge University Press, 2012 6

Hence, the trust provided a safety net when the trustee was holding the legal title but refused to honour his equitable obligation to hold it for the beneficiary. The Lord Chancellor utilized the trust to establish the true owner in equity and by conscience. The trust maintains that the use or benefit of the property does not necessarily belong to the holder of legal title, thus drawing a distinction between the legal and equitable owner of land.

Bryan and Vann[271] continue that the Lord Chancellor's method of collecting evidence by testimony determined the trust as follows:

> Upon proof of the terms of the trust, the Chancellor made orders to protect the beneficiary's interest in the land. The basic features of the law of trusts therefore emerged from the orders made by the chancellors to protect the interest of beneficiaries.[272]

Thus, where land was held by a trustee for the benefit of another, the Chancellor recognized the beneficiary as the true owner in equity.

Hudson[273] describes the development of the trust from the use as follows:

> So the trust grew out of this system of equity as a means of recognizing that in some circumstances it would not be just if the common law owner of property were able to deny that other people ought to be recognized as also having rights in that property. For example, if two people bought property together it would be wrong if one person sought to deny that the other person also had rights in that property.[274]

Hence, the essential characteristic of the trust was the separation of the title to property, from the right to use and enjoy it. Equity devised the trust to safeguard

[271] M.W. Bryan and V.J. Vann, *Equity and Trusts in Australia* (Cambridge University Press, 2012)
[272] M.W. Bryan and V.J. Vann, *Equity and Trusts in Australia* (Cambridge University Press, 2012) 6
[273] Alastair Hudson, Understanding Equity & Trusts (2nd edn, Cavendish Publishing Ltd 2004)
[274] Alastair Hudson, *Understanding Equity & Trusts (*2nd edn, Cavendish Publishing Ltd 2004) 5

the beneficiary's interest, being an interest which manifested itself as an equitable proprietary interest in the asset concerned.

Thomas and Hudson[275] describe the importance of the trust as follows:

> The essence of a trust is the imposition of an equitable obligation on a person who is the legal owner of property (a trustee) which requires that person to act in good conscience when dealing with that property in favour of any person (the beneficiary) who has a beneficial interest recognised by equity in the property. The trustee is said to "hold the property on trust" for the beneficiary. There are four significant elements to the trust: that it is equitable, that it provides the beneficiary with rights in property, that it also imposes obligations on the trustee, and that those obligations are fiduciary in nature.[276]

Thus, equity acts upon the conscience of the trustee to perform the duties imposed by the settlor, or to deal with the consequences of unconscionable conduct. Further, the trust not only preserves the beneficiary's rights in property, but also compels the trustee to act in good faith. The utilization of the trust enabled new forms of personal property such as stocks and shares to be brought into settlements.[277]

2.4.4 The Development of Equitable Estoppel

Equitable estoppel is derived from the ethos of equity to redress unconscionable behaviour.[278] It precludes enforcement of strict legal rights where it is inequitable or unconscionable to do so.[279] In ***Crab v Arun District Council***[280], Lord Denning described

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[275] Geraint Thomas and Alastair Hudson, *The Law of Trusts* (2nd edn, OUP 2010)
[276] Geraint Thomas and Alastair Hudson, *The Law of Trusts* (2nd edn, OUP 2010) 11-12
[277] Theodore F.T. Plucknett, A Concise History of the Common Law (5th edn, The Lawbook Exchange Ltd 2001) 691
[278] T. Leigh Anenson, "The Triumph of Equity: Equitable Estoppel in Modern Litigation" (2008) The Review of Litigation 27(3) <https://heinonline.org/HOL/Page?public=true&handle=hein.journals/rol27&div=23&start_page=377&collection=journals&set_as_cursor=0&men_tab=srchresults> accessed 13 October 2015
[279] T. Leigh Anenson, "The Triumph of Equity: Equitable Estoppel in Modern Litigation" (2008) The Review of Litigation 27(3)

equitable estoppel as a judicial doctrine that is designed to protect a party from the detriment which arises from a party's change of position, in circumstances where the assumption or expectation that it created were proved to be inequitable. Likewise, in ***Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd***[281], Oliver J explicated that an estoppel arises where Y has by words or conduct led Z to believe that a state of facts exists, and Z has acted upon that belief to Z's detriment, then Y will not be permitted to aver that a different state of facts existed at the time. Thus, equitable estoppel precludes the inequitable enforcement or assertion of rights that may otherwise have existed at law[282].

Equitable estoppel encompasses the two distinct forms of estoppel that exist in equity, namely promissory and proprietary estoppel. The principal difference between the two forms of estoppel depends on the function of equity that each performs. In promissory estoppel, the equity binds the holder of the legal right who has induced another party to believe that a right will not be enforced against that other party. In contrast, with proprietary estoppel the equity binds the owner of property who has induced another to expect an interest in land. Hence, estoppel is a mechanism devised by equity which applies conscience to prohibit inequitable or unconscionable conduct in the dealings of parties.

<https://heinonline.org/HOL/Page?public=true&handle=hein.journals/rol27&div=23&start_page=377&collection=journals&set_as_cursor=0&men_tab=srchresults> accessed 13 October 2015

[280] [1976] Ch 179

[281] [1982] QB 133 Ch

[282] Mike Macnair, "Equity and Conscience" (2007) OJLS 27(4) <https://doi.org/10.1093/ojls/gqm015> accessed 28 October 2015

Proprietary estoppel is the embodiment of equity which developed as a necessary adjunct to the common law system with its strict adherence to formality. It is the inherent flexibility and discretion of equity which enabled it to be applied to create property rights based on the prior dealings of the parties. Property rights are determined according to the conscience of the parties, rather than the enforcement of strict legal rights. This determination to prevent unconscionable behavior enables the court to grant the most appropriate remedy to the claimant. For example, if the claimant establishes an assurance supported by a detrimental reliance, then the estoppel generated may be satisfied by awarding a fee simple to the claimant as in ***Dillwyn v Llewelyn***[283] and ***Pascoe v Turner***[284]; the grant of an easement as in ***Crab v Arun District Council***[285] and a right of way in ***Ives v High***[286]; a licence to use the property as in ***Inwards v Baker***[287], or the payment of a cash sum as in ***Campbell v Griffin***[288]. Thus, the equitable doctrine of proprietary estoppel is able to provide a remedy based on the informal dealings of parties, where a landowner has informally promised an interest in land to another party, who has suffered a detrimental reliance on that promise. The capacity for equity to be applied in diverse circumstances thereby created the latitude to give rise to the equitable doctrine of proprietary estoppel, providing a remedy where the common law would not.

Because equity does not suffer a wrong without a remedy, it acts against the conscience of the landowner to bind him or her to fulfil his or her promise. The rationale of proprietary estoppel is that equity and conscience will not permit a party

[283] [1862] 45 ER 1284 (Ch)
[284] [1979] 1 WLR 431 (CA)
[285] [1976] Ch 179 (CA)
[286] [1967] 2 QB 379 (CA)
[287] [1965] 2 WLR 212 (CA)
[288] [2001] EWCA Civ. 990

to be deprived of his or her home, livelihood or a promised interest in land based on the informal dealings of the parties. Equity and the need to act in good conscience do not consider social class or wealth, but are intent on prohibiting unconscionable conduct.

Arguably, when land represented the sole or primary source of human existence, as in feudal England, estoppel was less likely to have been embraced by equity because estoppel possessed the capacity to strip a legal landowner of his livelihood. However, as the commodity of land became subordinate to greater industrialization and urbanization, the judiciary was, perhaps, more inclined to apply and develop proprietary estoppel since they were no longer depriving a landowner of his only source of income. This implicitly changing judicial perception possibly opened the opportunity for the doctrine of proprietary estoppel to evolve and develop, as the continuing chapters of this thesis will illustrate.

Interestingly, the courts are now using proprietary estoppel to vest land in a claimant who relies on that land for his or her livelihood, as in ***Thorner v Major***[289]. Whilst the judiciary may have been resistant to accepting so radical a doctrine as estoppel prior to the modern era, the current application of estoppel perhaps echoes the rationale underpinning the original development of the trust from the 13th century onwards. Integral to the trust was equity's desire to protect the interests of beneficiaries notwithstanding the deprivation of a purported landowner of the legal title to land. The inception, evolution and modernization of the doctrine of proprietary estoppel resonates throughout this thesis, and it is the extent to which the courts ensure that

[289] [2009] UKHL 18

estoppel achieves its inherent purpose of preventing unconscionable behaviour that enables the soundness of the doctrine to be assessed.

2.4.5 The Conflict between Common Law and Equity

According to ***Bryan and Vann***[290], the jurisdictional conflict between the common law and equity culminated in the ***Earl of Oxford's Case***[291]:

> The period from the sixteenth century to the early seventeenth century in England was one of jurisdictional conflict and jealously between the common law courts and chancery. The Chancellor's court was caught up in the great constitutional struggles of that age. Chancery jurisdiction rested on the sovereign's prerogative power to administer justice which was challenged by a parliament increasingly inclined to test the limits of the prerogative. The resolution of the dispute between the chancellor and the common lawyers established the basis of the relationship between the common law and equity which still exists today.[292]

Chief Justice Coke thus challenged the jurisdiction of the Lord Chancellor, Lord Ellesmere, to grant common injunctions. This case was referred to King James 1 in 1616 to rule on the competing jurisdiction of equity and the common law. The king, in preserving the status of the throne as the arbiter of justice, exercised the Royal Prerogative by decreeing equity's primary status in English Law whereby when equity and law conflict, equity shall prevail. Equity's primacy in English Law was later enshrined in the Judicature Acts of 1873 and 1875, which served to fuse the courts of equity and the common law via the jurisdiction of the High Court to enforce legal and equitable claims, defences, rights and remedies.

Clearly, equity continues to alleviate the shortcomings within the common law and, by dint of its primacy over the common law, enables its unique concepts, devices and

[290] M.W. Bryan and V.J. Vann, *Equity and Trusts in Australia* (Cambridge University Press, 2012)
[291] [1615] 21 ER 485 (Ch)
[292] M.W. Bryan and V.J. Vann, *Equity and Trusts in Australia* (Cambridge University Press, 2012) 6-7

remedies, including the trust and proprietary estoppel to be deployed to prevent inequitable conduct in the dealings between parties. The development of equitable principles signifies the law's response to the changing needs of society, a key aspect of which is the determination of disputes by conscience-based doctrines, such as estoppel rather than by strict adherence to the formalities of the common law.

Conversely, one possible criticism of equity is that, at least until the development of a body of precedent by the Chancery Court from the late 1400's onwards, equity lacked settled principles and was overly dependent on the ad hoc exercise of discretion by the Lord Chancellor. Though equity remains a discretion-based body of law, its unpredictability has now been largely mitigated by the entrenchment of enduring principles, albeit still characterized by innovative remedies and concepts, such as proprietary estoppel itself.

2.5 Conclusion

Historical events not only transformed socio-economic conditions within England, but also led to the evolution of common law and equity, and the genesis of English land law as it now exists. As ***Dixon***[293] articulates:

> Land law is a subject steeped in history. It has its origins in the feudal reforms imposed on England by William the Conqueror after 1066, and many of the most fundamental concepts and principles of land law spring from the economic and social changes that began then.[294]

Thus, land law is the product of the changing social order, as the law develops in response to social and economic pressures. Specifically, equity evolved in response to

[293] Martin Dixon, *Modern Land Law* (8th edn, Routledge 2014)
[294] Martin Dixon, *Modern Land Law* (8th edn, Routledge 2014) 2

the deficits within the common law, and the trust evolved in response to the failure of the common law to protect the beneficiary's interests. Therefore, as society evolves, so does the law and both co-exist in an interdependent, symbiotic relationship.

The essence of equity is aptly reflected by concepts such as the trust and equitable estoppel, the latter of which ultimately metamorphosed into promissory and proprietary estoppel. Further, equity introduced a natural law-based concept of conscience that not only tempered the strictness of the common law but held parties bound by their previous assertions and conduct in informal relations.

The complex interrelationship between law and socio-economic change is succinctly expressed by ***Burn***[295]***,*** who asserts that real property law falls into three categories in order of its historical development. First, is the "purely common law which was designed to meet the needs of a feudal society"[296]. Second, is the "equitable system which gradually evolved in certain directions with a view to adapting the common law rules to a society moved by different ideals and possessing a more commercial outlook on life"[297]. Third, are the "various legislative enactments by which judge-made law of the land was rendered more adequate to meet the needs of society"[298]. In essence, real property rights are derivative of the historical development of the common law, equity and legislation. Therefore, the English legal system continues to reflect and embody the gradual evolution of common law and equity, and the bodies of law they respectively comprise, which together with legislation, strive to meet the changing needs of modern day society.

[295] E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000)
[296] E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000) 8
[297] E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000) 8
[298] E.H. Burn, *Cheshire and Burn's Modern Law of Real Property* (16th edn, Butterworths 2000) 8

The next chapter will focus on the evolution of proprietary estoppel as an equitable doctrine.

Chapter Three: The Evolution of Proprietary Estoppel

3.1 Introduction

This chapter presents a critical analysis of how equitable estoppel originated in the Courts. Equitable estoppel is founded in equity and embraces the precept of prohibiting unconscionable or inequitable conduct in the dealings between parties. The chapter focuses on how the principle of equitable estoppel evolved in land disputes in the ***Earl of Oxford's Case***[299] until being gradually eclipsed by the doctrine of proprietary estoppel in ***Dillwyn v Llewelyn***[300]. It traces the development from equitable estoppel into proprietary estoppel – by prohibiting the enforcement of strict legal rights to land, to the capacity to create an interest in land. For example, where a party expends monies in building on land without any objection from the landowner, then equitable estoppel precludes the enforcement of the landowner's strict legal rights against that party, as the land owner had acquiesced in the party's expenditure and mistaken belief of title.[301]

Similarly, where a land owner encourages a party to build on land and that party expends money on the land with the knowledge of the landowner, and without any objection from him or her in the expectation of obtaining a right or title in the land,

[299] [1615] 21 ER 485 (Ch)
[300] [1862] 45 ER 1284 (Ch)
[301] *See the Earl of Oxford's Case* [1615] 21 ER 485 (Ch); *also Ramsden v Dyson* [1866] L.R. 1 H.L. 129 *per Lord Cranworth: If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake to which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain willfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.*

then the landowner may be bound by proprietary estoppel to convey title to that party.[302]

The discussion and analysis of the evolution of equitable estoppel via case law as described in this chapter, is distinctive, as unlike existing academic literature[303], it uses decided cases to describe and trace how an equitable estoppel in land arises. It delves into the early case law to discover how equitable estoppel has evolved to a point where it is capable of creating a proprietary interest in land. For example, it considers how the concept of equitable estoppel emerged over four hundred years ago in the ***Earl of Oxford's Case***[304] and which principle was followed in successive cases in relation to dealings with land.

It also traces how the Courts transitioned from the general principle of equitable estoppel to prevent the reliance on strict legal rights by the landowner, to the more specialized doctrine of proprietary estoppel for the creation of an interest in land. For example, it demonstrates that the early cases were not focused on the expressed determination of an estoppel, but rather sought to prevent the enforcement of a landowner's strict legal rights where it was unconscionable to do so. Proprietary estoppel, on the other hand, emanated as an offspring of equitable estoppel to create a proprietary interest in land where the representee had suffered a detriment in

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[302] *See Dillwyn v Llewelyn* [1862] 45 ER 1284 (Ch); *also Ramsden v Dyson* [1866] L.R. 1 H.L. 129 *per Lord Kingsdown: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.*

[303] Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2003); Holker Meggison, *A Treatise of the Administration of Assets in Equity* (Saunders and Benning 1832); Mark P. Thompson, *Modern Land Law* (OUP 2009); Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2016)

[304] [1615] 21 ER 485 (Ch)

reliance on the landowner's representations, that the claimant should acquire an interest in the land.

The chapter also explicates the courts' approach to an estoppel in land in the early case law that is distinctive to other academic literature[305] which focus on the developing case law, and it tends not to investigate how the decisions of the past have influenced the decisions of today. It illustrates that the courts tended to focus on the detriment suffered by the claimant in reliance on the defendant's representations, and the application of estoppel to prevent the landowner's enforcement of strict legal rights. It also demonstrates how proprietary estoppel emerged from the landowner's promise for an interest in land based on the prior dealings of the parties. It was the evolution and development of equitable estoppel that evolved into the doctrine of proprietary estoppel in later cases.

This chapter also addresses the question of whether the doctrine of proprietary estoppel is sound in terms of the evolutionary principles developed by the courts. For example, have the courts consistently upheld the quintessential purpose of estoppel in redressing unconscionable behaviour on the part of a landowner who would otherwise be free to deny the claimant's entitlement arising from detrimental reliance on the landowner's representations? Other legal scholars[306] have not engaged in discussion on its evolution via case law, but focus instead on the developing case law.

[305] Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2003); Holker Meggison, *A Treatise of the Administration of Assets in Equity* (Saunders and Benning 1832); Mark P. Thompson, *Modern Land Law* (OUP 2009); Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2016)
[306] Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2003); Holker Meggison, *A Treatise of the Administration of Assets in Equity* (Saunders and Benning 1832); Mark P. Thompson, *Modern Land Law* (OUP 2009); Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2016)

The chapter explicates the evolution of proprietary estoppel to clarify its genesis in English law, which then flows into the further chapters of the thesis dealing with its development and progression in the courts.

3.2 Case Law Development in the 16th-17th Centuries

Proprietary estoppel is a form of equitable estoppel devised by the courts for the creation of informal rights to land based on the prior dealings of parties, indicative of the underlying purpose of estoppel. The case law of the 16th to 17th centuries illustrates the evolution of equitable estoppel to prevent the reliance on strict legal rights where it was inequitable or unconscionable to do so. It was this principle of equitable estoppel that was in later centuries developed by the Courts as giving rise to a proprietary interest in land by the doctrine of proprietary estoppel.

The genesis of equitable estoppel can be traced back more than four hundred years to the ***Earl of Oxford's Case***[307] which laid the foundation of equity in English law. The Lord Chancellor, Lord Ellesmere, had to determine the equity of the plaintiff in the land against the Defendant's legal title. It concerned a lease which was void as the conveyance of the land was prohibited by statute. The lessee had occupied the land for many years and expended monies in improvements believing that he had title to possession. The lessor sought to void the lease to recover the land. The lessee desired the value of the building and planting since the conveyance, with the option for purchase.

[307] [1615] 21 ER 485 (Ch)

The Lord Chancellor defended the equitable jurisdiction of the Court against the strictness of the common law for the enforcement of title. He established that the expenditure in the land was an equity against the lessor and the enforcement of the lessor's legal title without relief was adverse to the law of God, and to both equity and law as follows:

> The law of God speaks for the plaintiff (Deut. 28); and equity and good conscience speak wholly for him; nor does the law of the land speak against him, but that equity ought to join hand in hand in moderating and restraining all extremities and hardships. By the law of God he that builds a house ought to dwell in it; and he that plants a vineyard ought to gather the grapes thereof (Deut. 28. V. 30). And yet here in this case, such is the conscience of the Defendant that he would have the houses, gardens and orchards which he neither built nor planted: But the Chancellors have always corrected such corrupt consciences and caused them to render quid pro quo; for the common law itself will admit no contract to be good without quid pro quo or land to pass without a valuable consideration and therefore equity must see that a proportionable satisfaction be made in this case. […] and equity speaks as the law of God speaks ... for conscience and equity is always ready to render to everyone their due.[308]

The Lord Chancellor's arguments rest on the basis that neither equity nor the law would permit the lessor to obtain possession without recompense. The arguments prayed for equity against the conscience of the lessor who sought to obtain the lessee's gardens and its profits which had added more value to the land than before, and pleaded for the Lord Chancellor to correct such corrupt conscience. The Lord Chancellor maintained that equity does not seek to overrule the common law but prevented a party from enforcing a common law right where it was unconscionable to do so, and that equity does not act against the law but against the conscience of the defendant, that is 'in personam'.

[308] *Earl of Oxford's Case* [1615] 21 ER 485 (Ch) 486 (Lord Ellesmere LC)

The plaintiff's expenditure in the land had created an equity therein which manifested as an equitable estoppel against the defendant. The Court held that the void lease did not prevent the lessee from obtaining equitable relief, as to allow the lessor to enforce his title for possession would also allow him to unjustly profit from the investment of the lessee which was contrary to conscience. Equity was applied as an estoppel against the lessor who was made to compensate the lessee.

The decision of the Lord Chancellor speaks to the nature and purpose of equity to correct mens' consciences and the harshness of the law. He stated thus:

> ….as a right in law cannot die, no more can equity in Chancery die ….the cause why there is a Chancery is for that mens' actions are so divers and infinite that it is impossible to make any general law which may aptly meet with every particular Act and not fail in some circumstance; the office of the Chancellor is to correct mens' consciences for frauds, breach of trust, wrongs and oppressions of what nature soever they be and to soften and mollify the extremity of the law.[309]

This case was referred to King James 1 in 1616 to rule on the competing jurisdiction of equity and the common law. The King, in preserving the status of the throne as the arbiter of justice, exercised the Royal Prerogative by decreeing equity's primary status in English Law, whereby when equity and law conflict, equity shall prevail. Equity's primacy in English Law was later enshrined in the Judicature Acts of 1873 and 1875 which also served to fuse the courts of equity and the common law with the jurisdiction of the High Court to enforce legal and equitable claims, defences, rights and remedies.

[309] *Earl of Oxford's Case* [1615] 21 ER 485 (Ch) 486 (Lord Ellesmere LC)

The application of equity as an estoppel to prevent the reliance on strict legal rights in land was therefore, first enunciated by the Court of Chancery in the ***Earl of Oxford's Case***[310]. This case affirmatively established a landowner's liability for acquiescence in another's mistaken belief of title; also the primacy of equity over the common law in land disputes between parties, and to prevent a landowner from enforcing his or her strict legal rights where it is unconscionable to do so, or where the landowner had acquiesced in another party's expenditure in the land. The case embodies the court's willingness to consider all the circumstances of the case and to intervene by deploying equity and conscience against a landowner's unconscionable conduct, or acquiescence in another party's conduct. Whether and to what extent this pivotal rationale of redressing unconscionability has been subsequently upheld by the courts is crucial in assessing the inherent soundness of the doctrine of estoppel.

The principle of equity in the ***Earl of Oxford's Case***[311] was followed in ***Hunt v Carew***[312], where the Lord Commissioners held that the purchaser was entitled to possession based on his reliance of a valid title from the vendor. This case involved a father who held land as a tenant for life with remainder in tail for his son. The plaintiff, believing the father had owned the inheritance, had sought the assistance of the son to acquire a lease from his father. The son helped the plaintiff and was paid for his assistance by the plaintiff. The plaintiff later discovered the father was only a tenant for life and the lease was void. The plaintiff filed suit for the lease to be confirmed by the father and son. The court held that since the plaintiff was unaware that the father had exceeded his power, but relied on the son's affirmation and reassurance of the validity of the

[310] [1615] 21 ER 485 (Ch)
[311] [1615] 21 ER 485 (Ch)
[312] [1649] Nelson 46 (Ch)

lease together with the money received, that both the father and son should confirm the lease to the plaintiff.

This case affirms the principle in the ***Earl of Oxford's Case***[313] that where a landowner has acquiesced in another party's mistaken belief of title, then equity is applied as an estoppel against the landowner. The son's encouragement and assistance in obtaining the lease had created an estoppel against him. Equity intervened to prevent the enforcement of the strict legal rights of the father and son, as both had acted unconscionably toward the plaintiff in their acquiescence and encouragement of the transaction.

Similarly, in ***Hobbs v Norton***[314] the Court of Chancery held that the purchaser was entitled to the annuity purchased by the encouragement of the true owner. In that case, the defendant's young brother had an annuity on land from his father's will. The claimant was desirous of purchasing the annuity and sought confirmation on the validity of title from the defendant. The defendant encouraged the claimant to purchase the land. The annuity turned out to be void as the father was not the true owner of the land, and the defendant's brother did not have good title. The father had sold the land before death. The defendant later acquired the land and sought to have the annuity made void. The claimant filed suit to have his annuity decreed. The court ruled for the payment of the annuity by the defendant to the claimant based on the defendant's encouragement to the claimant to undertake the purchase, and failing to disclose his ownership upon the claimant's enquiry of him.

[313][1615] 21 ER 485 (Ch)
[314][1682]1 Vern. 136 (Ch)

This case exemplifies the principle in the ***Earl of Oxford's Case***[315] whereby equity was applied as an estoppel against the defendant who acquiesced in the claimant's purchase of the annuity and was estopped from claiming its invalidity. The Defendant's encouragement and non-disclosure of ownership upon enquiry had created the estoppel against him. Equity intervened to prevent the defendant's reliance on his strict legal rights where he acted unconscionably towards the claimant in actively encouraging the purchase of the annuity and non-disclosure of his ownership thereof.

Further, in ***Huning v Ferrers***[316] the claimant had accepted the lease of some mills from a tenant for life. The life tenant's son knew about the lease but failed to warn the claimant. Upon the death of the life tenant, the son (defendant) became entitled to the property and sought to evict the claimant. The claimant obtained an order for the quiet possession of the mills as the defendant had failed to warn of his interest in the property.

This case follows the principle of the ***Earl of Oxford's Case***[317] as equity was applied as an estoppel against the defendant who acquiesced in the claimant's ownership of the mills, and was estopped from claiming ownership upon the death of the life tenant. The defendant had failed to disclose his ownership of the mills to the claimant, which created an estoppel against him. Equity intervened to prevent the defendant enforcing his strict legal rights, as he acted unconscionably towards the claimant in his acquiescence of the purchase of the mills.

[315][1615] 21 ER 485 (Ch)
[316][1711] Gilb. Ch 85 (Ch)
[317][1615] 21 ER 485 (Ch)

On further analysis, although the above cases per ***Hunt v Carew***[318], ***Hobbs v Norton***[319] and ***Huning v Ferrers***[320] do not expressly state an estoppel was raised against the defendant, they nonetheless illustrate the principle of equitable estoppel to prohibit inequitable or unconscionable conduct to dealings in land. These cases also illustrate the intervention of equity as an estoppel to prevent the enforcement of the strict legal rights of the landowner, where the landowner acquiesced in the other party's mistaken belief of title, or led another to believe in a state of affairs that turned out to be false.

The cases also illustrate the application of equity as an estoppel in varying circumstances. For example, equity was applied as a defence where a party had acted in reliance of the assurance or encouragement of the landowner as in ***Huning v Ferrers***[321], and also as a cause of action where a party had suffered a detriment in reliance of the assurance made as in ***Hunt v Carew***[322]***.*** These cases focus on the detriment that arises from the landowner's acquiescence of a party's expenditure on land, or misapprehension of title as the basis of the estoppel.

Although the doctrine of estoppel was not specifically dealt with by the Courts in either of these cases, they nonetheless demonstrate the requisite elements of proprietary estoppel, including the representations or assurances of the landowner and the detrimental reliance by the plaintiff on these representations for the establishment of an estoppel. They also demonstrate the Court's intervention with

[318] [1649] Nelson 46 (Ch)
[319] [1682]1 Vern. 136 (Ch)
[320] [1711] Gilb. Ch 85 (Ch)
[321] [1711] Gilb. Ch 85 (Ch)
[322] [1649] Nelson 46 (Ch)

equity to prevent the enforcement of the landowner's strict legal rights based on the prior dealings of the parties.

The benefit of the above cases per ***Hunt v Carew***[323], ***Hobbs v Norton***[324] and ***Huning v Ferrers***[325] is that they augment the principle of equity established in the ***Earl of Oxford's Case***[326]. They demonstrate that an equity arises against a landowner who acquiesces in another party's mistaken belief of title or expenditure on land; or where the landowner has by his or her words or conduct induced a party to believe in a state of affairs, and that party has suffered in detrimental reliance thereon. The cases also illustrate that equity intervenes to prevent the landowner from enforcing his or her strict legal rights to land on the basis of unconscionability in regard to the dealings of the parties.

The limitation of these cases is that they do not specifically mention the term 'equity' or an 'estoppel' arising against the landowner. An estoppel can only be inferred from the courts' decisions and the principle of equity established in the ***Earl of Oxford's Case***[327]. Also, another limitation is that these Courts merely applied the principle in the ***Earl of Oxford's Case***[328] rather than adopt a fully-argued rationale for enforcing an estoppel or equity against the landowner. These cases are very short and relate the facts and decision of the Court without argument on how and why the Court arrived at their decision. For example, the cases do not explain why the Courts decided to deprive the landowner of their legal title in the land. Was it because the landowner

[323] [1649] Nelson 46 (Ch)
[324] [1682]1 Vern. 136 (Ch)
[325] [1711] Gilb. Ch 85 (Ch)
[326] [1615] 21 ER 485 (Ch)
[327] [1615] 21 ER 485 (Ch)
[328] [1615] 21 ER 485 (Ch)

had falsely represented the truth, or acted unconscionably or inequitably towards the other party? Exactly what motivated the Courts to arrive at their decision by estoppel or by equity remains uncertain, and is left to be inferred from the facts of the case.

3.3 Case Law Development in the 19th Century

Following the above litany of cases in equity, the courts continued to apply the principle of the ***Earl of Oxford's Case***[329] whereby an equity arises against a landowner who has acquiesced in a party's expenditure in the land. Equity was applied as an estoppel against the landowner. It was this principle of equitable estoppel that was, in later centuries, developed by the Courts as giving rise to a proprietary interest in land by the doctrine of proprietary estoppel.

The principle of the ***Earl of Oxford's Case***[330] was cited in ***Dann v Spurrier***[331], a decision of the Lord Chancellor's Court. The plaintiff (tenant in possession) filed claim for the specific performance of an agreement for the lease of a dwelling-house for seven, fourteen or twenty-one years, and to compel the defendant (lessor) to execute a lease for twenty-one years. The plaintiff also sought an injunction against the defendant for proceedings of ejectment following the first seven years, and also compensation for monies expended in improvements undertaken whilst the defendant stood by without objection. The defendant insisted on the right to determine the lease at the end of the seven years, and stated he had no knowledge of the repairs until August and, in September, notice was given to the plaintiff to prevent further expense. The Court ruled that it was not satisfied that the defendant knew of the repairs and, therefore,

[329] [1615] 21 ER 485 (Ch)
[330] [1615] 21 ER 485 (Ch)
[331] [1802] 7 Ves. Jr. 231 (Ch)

his conscience was not affected by that knowledge to allow the Court's intervention by equity.

The issue of the construction of the lease agreement was remitted to the Court of Common Pleas. As to the plaintiff's expenditure for improvements to the land, Lord Eldon LC asserted that equity acts against the conscience of a landowner who had acquiesced in a party's expenditure on land under a mistaken belief of title. He stated that:

> …this court will not permit a man knowingly, though but passively to encourage another to lay out money under an erroneous opinion of title, and the circumstance of looking on is in many cases as strong as using terms of encouragement.[332]

Lord Eldon LC thus reaffirmed the principle of the ***Earl of Oxford's Case***[333] that the expenditure on land creates an equity in the land, and that the Court will not permit a landowner to enforce his or her strict legal rights where the landowner had acquiesced in the other party's expenditure in the land.

In ***Rochdale Canal Company v King***[334]***,*** cited with approbation in ***Yeoman's Row Management Limited and Another v Cobbe***[335]***,*** Sir John Romilly MR reiterated the principle in ***Earl of Oxford's Case***[336] and ***Dann v Spurrier***[337]:

> The principle on which the Defendants rely is one often recognized by this Court, namely, that if one man stand by and encourage another, though but passively, to lay out money, under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the Court will not permit any

[332] *Dann v Spurrier* [1802] 7 Ves. Jr, 231 (Ch) 118 (Lord Eldon LC)
[333] [1615] 21 ER 485 (Ch)
[334] (1853) 16 Beav. 630 (Ch) 633-637
[335] [2008] UKHL 55
[336] [1615] 21 ER 485 (Ch)
[337] [1802] 7 Ves. Jr. 231 (Ch)

> subsequent interference with it, by him who formally promoted and encouraged those acts of which he now either complains or seeks to take advantage. This is the rule laid down in **Dann v Spurrier**[338], **Powell v Thomas**[339], and many other cases, to which it is unnecessary to refer, because the principle is clear.[340]

Thus, where a landowner acquiesces in, or encourages another to expend monies on land under a mistaken belief of title, an equity will be raised against the landowner.

The Court elucidated the clear principle of equity exemplified in the ***Earl of Oxford's Case***[341] and ***Dann v Spurrier***[342] arising from the expenditure on land either by the mistaken belief of title or by the encouragement of the landowner. It predicates the Court's intervention with equity, where a party had altered his or her position on the faith of the dealings with the landowner, or the acquiescence of the landowner in the party's expenditure on the land. Moreover, this statement by Sir John Romilly MR affirms and approves the principle of an 'equity' arising from the expenditure on land as established in the ***Earl of Oxford's Case***[343] and ***Dann v Spurrier***[344].

The principle in ***Earl of Oxford's Case***[345] and ***Dann v Spurrier***[346], was applied in ***Dillwyn v Llewelyn***[347] by Lord Chancellor, Lord Westbury. A father had placed his younger son in possession of land and issued a memorandum in conveyance of the land to his son. The son expended his monies in building his house on the land with the knowledge

[338] [1802] 7 Ves. Jr. 231 (Ch)
[339] [1848] 6 Hare 300 (Ch)
[340] *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55 [51] (Lord Walker)
[341] [1615] 21 ER 485 (Ch)
[342] [1802] 7 Ves. Jr, 231 (Ch)
[343] [1615] 21 ER 485 (Ch)
[344] [1802] 7 Ves. Jr. 231 (Ch)
[345] [1615] 21 ER 485 (Ch)
[346] [1802] 7 Ves. Jr. 231 (Ch)
[347] [1862] 45 ER 1285 (QB)

and encouragement of his father. Upon his father's death the elder brother sought his eviction from the land.

The plaintiff contended that the intention was to give the whole fee simple, whereas the Respondent contended that the terms of the memorandum give an equitable estate for life.

The court decided that the plaintiff was entitled to an equitable interest in the property, and the freehold conveyance was ordered to the plaintiff. Thus, the plaintiff's expenditure on the land, with the father's encouragement, created an equity in the land that gave rise to an equitable interest which in turn was manifested as a proprietary interest whereby the plaintiff was the absolute owner of the estate comprised in the memorandum. The Court considered that the original intention of the father, per the memorandum, when added to the son's expenditure on the land with the approval of the father, had created an equity in the son's favor and the Court ordered the father's estate to convey the land to the son.

Here, equity was applied via estoppel to compel the conveyance of the fee simple to the plaintiff.

Lord Westbury LC stated that:

> …the subsequent expenditure of the son with the approbation of the father supplied a valuable consideration originally wanting the memorandum signed by the father and son must be regarded as an agreement for the soil extending to the fee-simple of the land. […] the son's expenditure on the faith of the memorandum had supplied a valuable consideration and created a binding obligation. On this I have no doubt, and it, therefore follows that the intention to give the fee simple

> must be performed, and that the decree ought to declare the son the absolute owner of the estate comprised in the memorandum.[348]

This case, as in the ***Earl of Oxford's Case***[349], shows that an equity arises against the landowner where a party has expended monies on land on the mistaken belief of title, and where the landowner has acquiesced in that party's expenditure. However, this case goes further by establishing that the equity in the land may give rise to a proprietary interest against the landowner based on the prior dealings of the parties. It reflects the proprietary character of proprietary estoppel against the landowner.

In ***Dillwyn***[350], the Court had advanced a number of principles that form the basis of proprietary estoppel such as the expenditure on land created an equity in the land; the priority of an equity in land over the legal title of the landowner; the primacy of equity in land against statute (Wills Act 1837) as the father had not bequeathed the land to the son; that the informal dealings of parties can give rise to a proprietary interest in land, and also that the lack of formality in land transactions will not defeat a proprietary interest in land.

On further analysis, the case of ***Dillwyn***[351] advances the principle that where a party has acted in detrimental reliance on the assurances of a landowner, then the Court will intervene via equity to enforce the state of affairs which the landowner had knowingly created or encouraged. It establishes the underlying principle of proprietary estoppel that holds a landowner bound by his words or conduct for a proprietary interest in

[348] Dillwyn v Llewelyn [1862] 45 ER 1285 (QB) 388-389 (Lord Westbury LC)
[349] [1615] 21 ER 485 (Ch)
[350] [1862] 45 ER 1285 (QB)
[351] [1862] 45 ER 1285 (QB)

land. Further, it illustrates that an equity arises by a party's expenditure in land, where the landowner's encouragement created an expectation of title to the defendant.

The case also illustrates that the Court will intervene via equity to enforce the state of affairs which the parties had informally agreed to and acted upon, and that equity prevails over the formality requirements of the common law in land transactions. For example, the concept of proprietary estoppel overcomes the strict formality of the common law for the creation and transfer of land in Section 52 (1) of the Law of Property Act 1925 that states all conveyances of land or of any interest in land are void for the purpose of conveying, or creating a legal estate unless made by deed; also Section 53(1)(a) which relates that no interest in land can be created or disposed of except in writing and signed by the person creating or conveying the same;[352] and further in Section 2 Law of Property (MP) Act (1989) that require contracts for the sale or of other disposition of an interest in land to be in writing, and signed by the parties with all the terms upon which they have expressly agreed. Hence, equity 'tempers' the rigidity of the common law in land transactions. Thompson[353], asserts that equity recognizes the position of the common law, but intervenes to modify its effect in the exercise of its jurisdiction.

As in the prior cases on equity such as the ***Earl of Oxford's Case***[354], the case of ***Dillwyn v Llewelyn***[355] deals with the equity created in the land giving rise to an equitable

[352] *See also* Law of Property Act 1925, s 53(1)(b) *which relates that a new trust of land is not enforceable until proved in writing and signed by the settlor; also* Law of Property Act 1925, section 53 (1)(c) *which states that the disposal of a subsisting equitable interest in any property including land must be in writing and signed by the person disposing the same.*
[353] Mark Thompson, *Modern Land Law* (5th edn, OUP 2012) 38
[354] [1615] 21 ER 485 (Ch)
[355] [1862] 45 ER 1285 (QB)

interest in the land, which in turn creates an estoppel against the landowner. It is therefore uncertain why the Courts, including the Court of Appeal, Privy Council and House of Lords (Supreme Court), have cited and continue to cite the case of ***Dillwyn v Llewelyn***[356] as a case of proprietary estoppel but have not also relied on the ***Earl of Oxford's Case***[357]***.*** Moreover, the term 'proprietary estoppel' or 'estoppel' is neither expressly stated by the Court in ***Dillwyn***[358], nor in the previous cases in equity.

However, the Court's reference to ***Dillwyn***[359] as a case of proprietary estoppel may be because it demonstrates the requisites of proprietary estoppel including the assurance made by the father, the reliance on the assurance by the son in expending monies in building the house, and the detriment suffered in being evicted off the land. The detrimental reliance of the son on the assurances of the father had created an equity in the land that gave rise to a proprietary interest in the land. Also, the case presents another requisite element of proprietary estoppel, that is a statement of future intention for an interest in land. The encouragement of the father and the memorandum to the son, constituted a statement of future intention to grant the estate to the son. This statement of future intention give rise to a proprietary estoppel where an equity arises in the land.

Another reason for the reference to ***Dillwyn***[360] as a case of proprietary estoppel, rather than the ***Earl of Oxford's Case***[361], may be that the ***Earl of Oxford's Case***[362]

[356] [1862] 45 ER 1285 (QB)
[357] [1615] 21 ER 485 (Ch)
[358] [1862] 45 ER 1285 (QB)
[359] [1862] 45 ER 1285 (QB)
[360] [1862] 45 ER 1285 (QB)
[361] [1615] 21 ER 485 (Ch)
[362] [1615] 21 ER 485 (Ch)

significantly predated the Judicature Acts of 1873-1875. It was only following the ***Earl of Oxford's Case***[363] that a more liberal approach to an equity in land was applied in ***Dillwyn***[364]. For example, the ***Earl of Oxford's Case***[365] established a number of principles that were reflected in ***Dillwyn***[366] such as the expenditure on land created an equity in the land; the priority of an equity in land over the legal title of the landowner; the primacy of equity in land against statute (as the equitable interest in the land arose despite the lease being void by statute), and also that the landowner's acquiescence of a party's expenditure on land creates an equity in the land.

The decision of the ***Earl of Oxford's Case***[367] can be also be distinguished from ***Dillwyn***[368] by the fact that the equity created in the land had given rise to an equity that was ordered to be compensated by the defendant, instead of a proprietary interest in the land. Arguably, the ***Earl of Oxford's Case***[369] describes a proprietary estoppel by acquiescence whereby the plaintiff had expended monies in the mistaken belief of title, and the defendant had acquiesced in the plaintiff's expenditure on the land. It represents the turning point for equity in land giving rise to a proprietary estoppel.

In ***Dillwyn v Llewelyn***[370] the Court had granted the conveyance of the fee simple to the son, based on the son's detrimental reliance on the assurances of the father. This was equated to a proprietary estoppel in land by the Privy Council in ***Plimmer v Mayor of***

[363] [1615] 21 ER 485 (Ch)
[364] [1862] 45 ER 1285 (QB)
[365] [1615] 21 ER 485 (Ch)
[366] [1862] 45 ER 1285 (QB)
[367] [1615] 21 ER 485 (Ch)
[368] [1862] 45 ER 1285 (QB)
[369] [1615] 21 ER 485 (Ch)
[370] [1862] 45 ER 1285 (QB)

Wellington[371]***;*** by the High Court in ***Re Basham***[372]; by the Court of Appeal in ***Inwards v Baker***[373] and ***Pascoe v Turner***[374], and by the House of Lords (Supreme Court) in ***Thorner v Major***[375].

Thus, ***Dillwyn***[376] is considered to be the first and leading case on proprietary estoppel that is cited in all cases involving an equitable estoppel in land such as ***Plimmer v Mayor of Wellington***[377], and ***Inwards v Baker***[378]***.*** It is also cited by the House of Lords (Supreme Court) as authority for proprietary estoppel in ***Thorner v Major***[379].

The significance of the ***Earl of Oxford's Case***[380] and ***Dillwyn v Llewelyn***[381] is that they established the principle that expenditure following a representation by the landowner can create an equity in the land, capable of yielding an equitable or proprietary interest enforceable against third parties. For example, although in the ***Earl of Oxford's Case***[382], the equity created in the land was compensated for, in ***Dillwyn***[383] the equity gave rise to a proprietary interest in the land itself. Also, the decisions in the above cases reflect that an equity in land arises in various circumstances such as where a landowner is bound by his words or conduct because the landowner has created or encouraged an expectation for an interest in the land, or where the landowner has

[371] [1884] 9 App Cas 699 (PC)
[372] [1987] 1 All ER 405 (Ch)
[373] [1965] 2 WLR 212 (CA)
[374] [1979] 2 All ER 945 (CA)
[375] [2009] UKHL 18
[376] [1862] 45 ER 1285 (QB)
[377] [1884] 9 App. Cas. 699 (PC)
[378] [1965] 2 WLR 212 (CA)
[379] [2009] UKHL 18
[380] [1615] 21 ER 485 (Ch)
[381] [1862] 45 ER 1285 (QB)
[382] [1615] 21 ER 485 (Ch)
[383] [1862] 45 ER 1285 (QB)

acquiesced in a party's expenditure on the land, and where a party has expended monies on land in a mistaken belief of title.

The limitation of the ***Earl of Oxford's Case***[384] and ***Dillwyn v Llewelyn***[385], is that neither mentions the terms 'estoppel' or 'equitable estoppel' or 'proprietary estoppel'. They only establish an equity that manifested as an estoppel in the ***Earl of Oxford's Case***[386], and as a proprietary interest in ***Dillwyn***[387]. Also, although the decisions of the Courts in both the ***Earl of Oxford's Case***[388] and ***Dillwyn***[389] illustrate that an estoppel had arisen against the landowners by the equity created in the land, the Courts had still not established any principles for dealing with the extent of the equity created in the land or how that equity ought to be satisfied.

Following ***Dillwyn***[390]***,*** was the case of ***Walsh v Lonsdale***[391] that was determined after the Judicature Acts 1873-1875. This case affirmed and applied the supremacy of equity contained in Section 25(11) of the Judicature Act 1873 (now reaffirmed in Section 49 Senior Courts Act 1981), and demonstrates the equitable basis of proprietary estoppel that 'equity regards as done that which ought to be done'.

In ***Walsh***[392]***,*** the defendant (landlord) had agreed in writing to grant the plaintiff (tenant) a seven years' lease with a condition that the landlord could demand one

[384] [1615] 21 ER 485 (Ch)
[385] [1862] 45 ER 1285 (QB)
[386] [1615] 21 ER 485 (Ch)
[387] [1862] 45 ER 1285 (QB)
[388] [1615] 21 ER 485 (Ch)
[389] [1862] 45 ER 1285 (QB)
[390] [1862] 45 ER 1285 (QB)
[391] (1882) 21 Ch D 9 (CA)
[392] [1882] 21 Ch D 9 (CA)

year's rent in advance. A deed had not been executed but the plaintiff took possession and paid rent quarterly in arrears. The defendant, as per the agreement, demanded a year's rent in advance, and when the plaintiff refused sought to seize the plaintiff's goods to the value of the rent that was owed. The plaintiff disputed the defendant's actions and sued for trespass.

Competing arguments were made in law and equity. At law, there was no deed and consequently there could not be a seven years' lease. Also, the requirement to pay a year's rent in advance was inconsistent with the tenant's ability to terminate the lease by six months' notice to quit. In equity, on the other hand, there was no need for the formality of a lease and, consequently, there was a valid seven years' lease.

The court held that in so far as law and equity differed as to how the transaction was viewed, equity prevailed. A seven years' lease existed and what the defendant had done was lawful. ***Sir George Jessel M.R.*** stated that, "There is only one court and the equity rules prevail in it."[393]

Thompson[394] asserted that equity intervenes to ensure specific performance in land transactions "because equity takes the view that what ought to be done should be regarded as already having been done"[395].

The basis of this case is that equity awarded specific performance of the lease. Pending the creation of the formal lease, equity considered the lease to have been created by

[393] *Walsh v Lonsdale* (1882) 21 Ch D 9 (CA) 14-15
[394] Mark P. Thompson, *Modern Land Law* (5th edn, OUP 2012)
[395] Mark P. Thompson, *Modern Land Law* (5th edn, OUP 2012) 41

the agreement for a lease and the plaintiff taking possession of the land. The agreement must now comply with Section 2 Law of Property (Miscellaneous Provisions) Act 1989[396] as must any contract concerning land, and also Section 2(5) of the same Act provides exception in case of constructive trusts or resulting or implied trust, but there is no express exception for estoppel which makes the incidence and growth of estoppel even more significant. An estoppel in contrast can be entirely raised without a contract for the sale of land. In addition, equity had created an estoppel against the plaintiff who had acted on the informal agreement and was thus estopped from denying the informal lease. This would have operated even in the absence of any written agreement.

3.4 Conclusion

In the ***Earl of Oxford's Case***[397], equitable estoppel originated as a general principle to prevent the reliance or enforcement of strict legal rights where it was inequitable or unconscionable to do so. Gradually, the principle of equitable estoppel was extended by the Courts to dealings in land such as in ***Hunt v Carew***[398] and ***Hunning v Ferrers***[399]. Whilst the Courts did not expressly determine that an estoppel had arisen in either of these cases, the decisions nonetheless imply that equitable estoppel was applied to prevent the detriment that the claimant suffered in reliance on the assurances of the landowner, and to prevent the landowner from enforcing his or her strict legal rights based on the prior dealings of the parties.

[396] Law of Property (MP) Act, s 2 *provides that contracts for the sale of land, or other disposition of an interest in land can only be made in writing, and incorporate all the terms agreed upon by the parties.*
[397] [1615] 21 ER 485 (Ch)
[398] [1649] Nelson 46 (Ch)
[399] [1711] Gilb. Ch 85 (Ch)

Despite the establishment of the principle of equity as an estoppel in the ***Earl of Oxford's Case***[400]***,*** successive cases reflect that the Courts were not inclined to expressly state that an estoppel had arisen against the defendant, but rather that the defendant was estopped from exercising inequitable or unconscionable conduct. Therefore, following the ***Earl of Oxford's Case***[401] the principle of estoppel remained unused and undeveloped by the Courts until the later case of ***Dillwyn v Llewelyn***[402] where the Court intervened via equity and, more specifically, by the creation of an equity in land as an estoppel against the landowner.

In both the ***Earl of Oxford's Case***[403] and ***Dillwyn v Llewelyn***[404], the Courts did not expressly state that an estoppel had arisen against the defendant, but the decisions illustrate that expenditure on land had created an equity in the land that was manifested as an equity against the defendant in the ***Earl of Oxford's Case***[405]***,*** and as a proprietary interest in the land in ***Dillwyn v Llewelyn***[406].

The early cases, involving dealings in land, such as ***Hunt v Carew***[407] and ***Hunning v Ferrers***[408], demonstrate that the Courts adopted a restrictive approach to the development of estoppel and were more conservative in prohibiting the detriment arising from the representations made and relied on in the dealings between the parties. However, in the ***Earl of Oxford's Case***[409] and ***Dillwyn v Llewelyn***[410], it appears

[400] [1615] 21 ER 485 (Ch)
[401] [1615] 21 ER 485 (Ch)
[402] [1862] 45 ER 1285 (QB)
[403] [1615] 21 ER 485 (Ch)
[404] [1862] 45 ER 1285 (QB)
[405] [1615] 21 ER 485 (Ch)
[406] [1862] 45 ER 1285 (QB)
[407] [1649] Nelson 46 (Ch)
[408] [1711] Gilb. Ch 85 (Ch)
[409] [1615] 21 ER 485 (Ch)

that the Courts adopted a more liberal approach to the creation of an equity by the expenditure on land and the landowner's acquiescence or encouragement thereon.

The ***Earl of Oxford's Case***[411] and ***Dillwyn v Llewelyn***[412] affirmatively laid the foundation for equity creating an estoppel against a landowner. These cases also highlight the circumstances whereby an equity in land may arise, namely expenditure on land in the mistaken belief of title, or by the words or conduct of a landowner in creating or encouraging an expectation for an interest in land, or by the acquiescence of a landowner in a party's expenditure on land. It was the creation of an equity in land, giving rise to a proprietary interest as established in ***Dillwyn v Llewelyn***[413], that the courts later evolved into a proprietary estoppel.

The Judicature Acts of 1873-1875 recognized the primacy of equity over the common law where the two jurisdictions clashed, enshrining the principle laid down in the ***Earl of Oxford's Case***[414]***.*** In situations of conflict between common law and equity, the Courts were, therefore, able to apply equitable doctrines and concepts. The Judicature Acts thus affirmed the role of equity and arguably furnished an impetus for the application of proprietary estoppel, characterized by the significance of conscience-based equitable principles. This is exemplified in ***Walsh v Lonsdale***[415] where the court was prepared to enforce the informal dealings between parties in land, and embraced the equitable principle that equity regards as done those arrangements between parties which fell short of the strict formalities, required by the common law.

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[410] [1862] 45 ER 1285 (QB)
[411] [1615] 21 ER 485 (Ch)
[412] [1862] 45 ER 1285 (QB)
[413] [1862] 45 ER 1285 (QB)
[414] [1615] 21 ER 485 (Ch)
[415] [1882] 21 Ch D 9 (CA)

Both the ***Earl of Oxford's Case***[416] and ***Dillwyn***[417] established the foundation for the development of proprietary estoppel as an equitable doctrine in land law, and by which equity prevails in land transactions. They also amplify the function of equity as an estoppel against the strict common law, and by which equity rules as an estoppel in land transactions by proprietary estoppel.

The next chapter will focus on the theoretical perspective of proprietary estoppel as a doctrine.

[416] [1615] 21 ER 485 (Ch)
[417] [1862] 45 ER 1285 (QB)

Chapter Four: The Theoretical Perspective of Proprietary Estoppel

4.1 Introduction

This chapter explores the theoretical perspectives or philosophy of law such as legal positivism and natural law theory. It aims to critically examine the theoretical underpinnings of proprietary estoppel to ascertain the underlying basis of a decision in proprietary estoppel. For example, it considers why judges apply morality and conscience in proprietary estoppel, rather than simply following strict legal rules[418], in apparent contradiction of the equitable maxim that "equity follows the law". It illustrates why the courts have been persuaded to redress inequitable or unconscionable conduct on the part of a legal owner of land on which the claimant has relied to his or her detriment.

The scrutiny of differing theoretical perspectives of law in the context of proprietary estoppel will shed light on the rationale deployed by the courts in developing and crystallizing the doctrine of estoppel, and the role played by conscience and morality during this process.

The approach and discussion adopted in this chapter is distinctive from that of other legal scholars[419] who have dealt with the topic. These scholars focus on the various

[418] See Law of Property Act 1925, s 52 (1) *that states all conveyances of land or of any interest in land are void for the purpose of conveying, or creating a legal estate unless made by deed*; Law of Property Act 1925, s 53 (1)(a) *states no interest in land can be created or disposed of except in writing signed by the person creating or conveying the same, or by his agent lawfully authorized in writing or by will or by operation of law*; Law of Property (MP) Act (1989), s 2 *require contracts for the sale or of other disposition of an interest in land to be in writing, and to incorporate all the terms upon which the parties have expressly agreed.*

[419] Brian Bix, *Jurisprudence: Theory and Context* (7th edn, Carolina Academic Press 2015); E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (1st edn, Cambridge University Press 2008); Alastair Hudson*, Equity and Trusts* (9th edn, Routledge 2017); Richard Edwards & Nigel Stockwell, *Trust and Equity* (11th edn, Pearson Education Ltd 2013); Gary Minda, *Postmodern Legal*

theories of law including positivism and natural law, with extensive discussion of what they entail, relate the proponents of those theories and the perspectives they advance. However, they have not particularly explored the theoretical perspectives underpinning proprietary estoppel itself.

Further, this chapter inquires into the question of whether the doctrine is sound in terms of its theoretical basis and the extent to which this forms the basis of the principles and decisions of the Courts. For example, to what extent have the courts drawn upon the natural law precept of "good conscience" when developing and applying the doctrine of proprietary estoppel to ensure that its inherent rationale – the prevention of unconscionable behaviour on the part of a legal owner of land – is fulfilled?

The chapter evaluates the reasoning behind the courts' decisions in the decided cases discussed throughout the thesis, to determine whether they have been true to this fundamental purpose at the heart of the doctrine of proprietary estoppel.

4.2 Theoretical Perspectives of Law

The theories of law provide a philosophical analysis about the nature of law. It incorporates legal positivism, natural law theory and critical legal studies that present theoretical underpinnings for the creation, application and enforcement of the law and legal rules. It also draws the relationship between law and social order; law and

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Movements: Law and Jurisprudence At Century's End (New York University Press 1995); Theodore M. Benditt, *Law as Rule and Principle: Problems of Legal Philosophy* (Stanford University Press 1978); Jules Coleman & Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002); Robert Hayman, Nancy Levit & Richard Delgado, *Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism* (2nd edn, West Academic Publishing 2002)

morality and the schema of judicial decision making. Thus, the differing perspectives of law explicate the operation of law and legal systems.

4.2.1 Natural Law Theory

Many scholars have contributed to the development and application of natural law theory. According to Drury[420], natural law encompasses a moral theory of law whereby universal moral standards are inherent in all persons and form the basis of a just society.

According to Pope[421], Thomas Aquinas, a 13th century monk and a proponent of the natural theory, articulated that natural law considers basic moral principles as being objective, because they are not derived from custom or man-made institutions. Pope[422] asserted that, to Aquinas, the natural law encompasses a moral realism that is based on practical reasoning of moral principles applied to specific facts. This process of moral reasoning invokes conscience to produce a moral judgment. Pope[423] maintains that according to Aquinas, moral reasoning may go astray either in ignorance of the particulars of a case or by ignorance of the general moral principles relevant to it. These moral principles are interpreted by reference to the particular nuances of cases, and are not applied rigidly or mechanistically.

[420] S. B. Drury, 'H.L.A. Hart's Minimum Content Theory of Natural Law' (1981) SP Vol.9(4) 533 <https://journals.sagepub.com/doi/pdf/10.1177/009059178100900404> accessed October 10 2015
[421] Stephen Pope, 'Reason and Natural Law', The Oxford Handbook of Theological Ethics (OUP 2007)
[422] Stephen Pope, 'Reason and Natural Law', The Oxford Handbook of Theological Ethics (OUP 2007)
[423] Stephen Pope, 'Reason and Natural Law', The Oxford Handbook of Theological Ethics (OUP 2007)

Wacks[424] highlights one example of natural law theory as where certain acts were deemed to constitute "crimes against humanity" because they were morally reprehensible irrespective of the fact that they did not contravene specific provisions of law. In this context, he referred to the Nuremberg War Trials[425] where the Tribunal did not explicitly appeal to natural law theory, although their judgments represented an important recognition of morality, and the principle that the law[426] is not necessarily the sole determinant of what is right.

Other examples identified by Wacks[427] where morality was applied as a yardstick in the formulation of intentional legislation include the post-war recognition of human rights and their expression in declarations such as the Charter of the United Nations[428], the Universal Declaration of Human Rights[429] and the European Convention on Human Rights[430]. Also, the development of constitutional safeguards for human or civil rigths in various jurisdictions, such as the American Bill of Rights[431] illustrate the influence of morality in the law.

[424] Raymond Wacks, *Understanding Jurisprudence* (4th edn, OUP 2015)
[425] *This comprised a series of trials held in Nuremberg, Germany between (1845-46) in which former Nazi leaders were prosecuted for war crimes by the International Military Tribunal.*
[426] *The Nuremberg Trials were conducted by the allied powers of France, Britain, the Soviet Union and the U.S.; who had to establish laws and procedures for the trials by the London Charter of the International Military Tribunal. This Charter described the categories of crimes including crimes against peace, war crimes and crimes against humanity by which the former Nazi would be tried. There was no defined legislation for the trials and the allied powers had to develop the categories of crimes based on the mass murder and violence during Nazi Germany.*
[427] Raymond Wacks, *Understanding Jurisprudence* (4th edn, OUP 2015)
[428] *The Charter relates a commitment to uphold human rights of citizens, and universal respect and observance of human rights and freedoms for all irrespective of race, sex, language or religion.*
[429] *The Declaration provide a comprehensive list of universal human rights, and is adopted by countries of the United Nations.*
[430] *An International Treaty to protect human rights and political freedoms in Europe.*
[431] *Comprise amendments to the U.S. Constitution that guarantees individual freedoms, and limitations on federal and state governments.*

According to Benditt[432], natural law theory maintains that there are laws not created by human beings but which are binding on them. These laws are of divine origin and are immutable and eternal.

Bix[433] argues that natural law theory requires the courts to apply ethical judgment in their interpretive latitude of the law. Judges exercise a broad discretion in decision-making that encompasses their moral or ethical beliefs to impart a sense of substantive or procedural justice in particular cases. Natural law takes priority in any conflict between natural law and positive law, and that all law is morally justified for its legitimacy as "law".

Bradley[434] expresses the view that natural law is based on intuition of what is self-evident, and that knowledge of what is self-evident comes from experience and willingness to engage in reason and reflection or practical reasonableness.

These scholars adduce that natural law is the epitome of morality which leads judges to exercise conscience and practical reasoning in their interpretation of the law. Also, that natural law enables judges to bypass legislation and apply their moral convictions to a particular case so as to arrive at a moral judgment rather than a legal one.

For instance, the equitable maxim that 'equity will not allow a statute to be used as an instrument of fraud' provides that equity prevents a party from relying on legal

[432] Theodore M. Benditt, *Law as Rule and Principle: Problems of Legal Philosophy* (Stanford University Press, 1978)
[433] Brian Bix, *Jurisprudence: Theory and Context* (7th edn, Carolina Academic Press 2015)
[434] Wendel, W. Bradley, 'Jurisprudence and Judicial Ethics' (2007) Cornell Law Faculty Publications, Paper 96 <http://scholarship.law.cornell.edu/lsrp_papers/96> accessed 12 October 2015

formality where it is unconscionable to do so. For example, in ***Bannister v Bannister***[435], the lack of legal formality did not defeat a trust. In this case, Y had orally agreed to permit X to live in the house that X conveyed to Y. Y later sought to evict X because their agreement was not in writing. The Appeal Court held that A was a tenant for life, as the agreement was binding despite the lack of formality.

A further example[436] is a secret trust which arises where a party executing a will creates a trust but fails to state that intention or the precise terms of the trust in the will.[437] Although, the Wills Act 1837 stipulates that a will contains all the directives for the distribution of a deceased's estate, the secret trust creates the exception. Where the deceased had informed his successors of the secret trust, and they seek to circumvent it in reliance of the strict application of the Wills Act, then equity intervenes with the secret trust to prevent the deceased's successors from defrauding the intended beneficiary of the property. Thus, equity intercedes to provide a moral judgment rather than a legal one in the circumstances of a trust.

However, the differing views presented by the scholars above beg the question of the yardstick for ascertaining whether a moral judgment is just, fair and right. Is it in the subjective assessment of the judge, or is it based on objective notions of conscience as accepted within society as universally applicable. These are pervasive issues that raise uncertainty to the notions of natural law, and that have not been addressed by these scholars.

[435] [1948] 2 All ER 133 (CA)
[436] Alastair Hudson, *Equity and Trusts* (8th edn, Routledge 2015) 34
[437] See *Blackwell v Blackwell* [1929] AC 318 (UKHL); *Ottaway v Norman* [1972] 2WLR 50 (Ch) as cited in Alastair Hudson, *Equity and Trusts* (8th edn, Routledge 2015) 34 at fn. 159

As below, natural law theorists have also presented many distinct and disparate views of the nature of the law, and the consequential manner in which judicial decisions are made. The common thread advanced between the different theories is that morality is the basis of law and that this creates a moral duty to obey the law and do what is required by the law.

Lon Fuller[438], a proponent of the natural law theory argues against the separation of law from morality. According to Ten[439], Fuller maintains that morality influences the administration of law, as a legal system must embrace the citizen's need for co-operation and reciprocal obligations. The notion of fidelity to law introducd by Fuller involves a procedural version of natural law operating with an inner morality of eight requirements that constitute a "valid legal system".

According to Asomah[440], Fuller's conception of the inner morality of law contends that a valid legal system must: "(1) have rules which are known; (2) be clear; (3) not be retrospective; (4) not contain contradictions; (5) not place impossible demands on its subjects; (6) not be revised on a temporal basis that prevents citizens from knowing the state of the law; (7) administer justice in accordance with legislation, and (8) achieve congruence between official action and declared rule."[441] When the eight requirements are satisfied, they provide order and coherence to the system of law they engender, and prevent law from being overly authoritative and unsustainable.

[438] Legal philosopher (1902-78), who advanced a procedural form of natural law.
[439] C. L. Ten, 'The Soundest Theory of Law' (1979) OUP, Vol. 88(52) <http://www.jstor.org/stable/2253451> accessed 29 January 2016
[440] Joseph Asomah, 'The Importance of Social Activism to a Fuller Concept of Law' (2015) Western Journal of Legal Studies 6(1) <http://ir.lib. uwo.ca/uwojls/vol6/iss1/6> accessed 29 January 2016
[441] Joseph Asomah, 'The Importance of Social Activism to a Fuller Concept of Law' (2015) Western Journal of Legal Studies 6(1) 1, 2 <http://ir.lib. uwo.ca/uwojls/vol6/iss1/6> accessed 29 January 2016

The principles of Fuller's inner morality are also necessary to bring about a framework of reciprocity by which law acquires a moral dimension rather than instituted norms and rules by a supreme power. Asomah[442] states that Fuller's view of a valid legal system creates a moral duty to obey its laws, and a moral duty to do what is right.

Minda[443] states that for Fuller, decision-making according to rules requires judges to consider the purpose of the rule they seek to enforce. Judicial inquiry of purpose entails much more than simply deciding according to rules, and that judges adopt a functional or purposive approach to legal decision making.

Reidy[444] refers to another natural law propronent, John Finnis[445], who argues that citizens internally accept and comply wth legal rules because of moral reasons. He also states that Finnis argues from the internal point of view of persons subject to law, meaning that the paradigm case law or a legal system is one where citizens have internally accepted most of the legal rules for good moral reasons. Finnis states that those legal rules that are not backed by moral reasons must be judged defective or considered as nonparadigm instances.

Ronald Dworkin[446], a natural law theorist, advances that law consists of both formal rules and legal principles, and argues for a constructive interpretation of the law by

[442] Joseph Asomah, 'The Importance of Social Activism to a Fuller Concept of Law' (2015) Western Journal of Legal Studies 6(1) <http://ir.lib. uwo.ca/uwojls/vol6/iss1/6>
[443] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence At Century's End* (New York University Press 1995)
[444] David Reidy, *On the Philosophy of Law* (Wadsworth Cengage Learning 2007)
[445] Legal philosopher, jurist and scholar of jurisprudence (1940 to present), advocate of natural law theory
[446] Philosopher, advocate of natural law

judges. According to Mackie[447], Dworkin states that a judge's decision must harmonize with precedent established in similar cases so that unity in the law exists. Legal judgments must be coherent with legislation and previous judicial decisions.[448] Further, the exercise of judicial discretion does not create new laws, but ensures consistency with existing laws and judicial precedent.[449]

By analysis, the natural law theorists concede that the natural law theory is founded on morality, but advance different propositions of how morality influences the decisions of judges. For example, Finnis articulates a functional or purposive approach to legal decision making, whereas Dworkin favors a constructive interpretative approach towards judicial discretion. Both approaches produce a similar conclusion to the effect that moral factors are sufficiently significant to permit judges, in limited circumstances to override legislation. Further, the natural law theorists posit that natural law embodies legal rules and concepts of moral principles reliant on reason and good conscience. They regard the law as creating moral obligations, and that obedience to the law leads to justice.

Although these natural law theorists present varied but interconnected perceptions on what natural law theory represents, there appears to be no single definition of natural law or of the concepts of morality to which they allude. Another drawback to the natural law theory propounded is the imposition of possible unpredictability in the

[447] John Mackie, 'The Third Theory of Law' (1977) Wiley Philosophy & Public Affairs Vol.7(1) < http://www.jstor.org/stable/2265121>acessed 29 January 2016
[448] John Mackie, 'The Third Theory of Law' (1977) Wiley Philosophy & Public Affairs Vol.7(1) <http://www.jstor.org/stable/2265121> accessed 29 January 2016
[449] John Mackie, 'The Third Theory of Law' (1977) Wiley Philosophy & Public Affairs Vol.7(1) <http://www.jstor.org/stable/2265121> accessed 29 January 2016

application and the enforcement of the law. Since judges are guided by notions of good conscience when exercising judicial decision making in the sphere of equity jurisdiction, the outcome rests within the discretion of the presiding judge. Also, different judges will potentially reach conflicting decisions even when dealing with similar issues. The pivotal role accorded to discretion within the decision-making process, is liable to create unpredictability in terms of the likely success of legal proceedings and the availability and nature of the remedy which flows from them.

4.2.2 Legal Positivism

In contrast to natural law theory, there is legal positivism based on legislation and judicial precedent. According to Reidy[450], positivism maintains that "law is law", and has binding authority regardless of its moral merits. Thomas[451] articulates that with legal positivism, the role of a judge is highly formalistic as judges seek to apply a strict doctrine of precedent rather than judicial reasoning, and will try to fit established facts into an existing rule so that the facts fit the law rather than the law fitting the facts. This process seek to inhibit or curtail judicial discretion by rules and established precedent. In other words, the judge tends to adopt a declaratory theory of law by the application of rational or predictable rules based on precedent.

Minda[452] asserts that positivism reflects a transcendent wisdom built by the judges of yesteryear. Judges adhere to that wisdom without question and perceive the exisitng law to be the same as natural law.

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[450] David Reidy, *On the Philosophy of Law* (Wadsworth Cengage Learning 2007)
[451] E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (1st edn, Cambridge University Press 2008)
[452] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence At Century's End* (New York University Press 1995)

H.L.A Hart[453], a leading proponent of positivist theory maintains that the crux of legal positivism is the "separation thesis". According to Hart[454], the positivist theory encapsulates the notion that legal rights are determined by laws established in society to perform or undertake an action, and does not involve any moral right. Hart[455] rejects natural law theory, and holds that the law is whatever is enacted, as such, by the legislature in a procedurally correct manner and is not necessarily identified with morality. Hart[456] also argues that every legal system is a union of primary rules (obligation imposing) and secondary rules (power conferring) social rules. Secondary rules authorize primary rules, and enable the court's interpretation and application of primary rules. Hart[457] maintains that judges are obligated to apply settled principles of law in decision-making, and should not be influenced by personal preferences or ideology.

Another proponent of legal positivism, is Joseph Raz[458] who, according to Bix[459], argues that the law is what is posited by the legislature, and provides a system of guidance and adjudication that is of supreme authority in society. Raz argues that legal rules do not impose moral obligations, as the purpose of a legal system is to provide a framework for social interaction with no agreement about moral principles.

[453] British legal philosopher, advocate of legal positivism
[454] H.L.A. Hart, *The Concept of Law (*2nd edn, OUP 1994)
[455] H.L.A. Hart, *The Concept of Law (*2nd edn, OUP 1994)
[456] H.L.A. Hart, *The Concept of Law (*2nd edn, OUP 1994)
[457] H.L.A. Hart, *The Concept of Law (*2nd edn, OUP 1994)
[458] Philosopher, advocate of legal positivism
[459] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence At Century's End* (New York University Press 1995)

Hans Kelsen[460], a proponent of the positivist theory articulates that law and morality are independent concepts, as the legitimacy of law does not depend on its moral validation. Kelsen[461] argues for a pure theory of law whereby the law comprises a basic form and basic norm. The form of every law is a conditional order that is directed at the courts so as to apply sanctions for delict behavior.[462] The law moderates the social order by guiding officials on the appropriate action to be taken in the event of disobedience to the law.

Therefore, the theorists who advocate legal positivism all concede that the law is exactly what is posited by the legislature and the courts by precedent. Judges are bound to abide by the written law without any moral compass or judicial reasoning. The literal or strict application of the law by judges demands strict compliance by society, because its disobedience leads to the controls imposed by the law.

The major drawback to the theory of legal positivism is the formalistic application of the law and precedent, potentially culminating in an unfair outcome. The judge is merely trying to place a given set of facts and circumstances within the straightjacket of pre-existing precedent in order to arrive at a decision. The judge has no discretion to decide a case on its own facts unless it is supported by existing precedent. This inhibits the development of the law because judges are said to remain bound by the wisdom of the past, instead of exercising their moral intuition in the decision-making process. The literal application of the law may thus impede the possibility of innovation within the legal system. Judges are bound to decide as the legislature

[460] Hans Kelsen, *Pure Theory of Law* (OUP 2007)
[461] Hans Kelsen, *Pure Theory of Law* (OUP 2007)
[462] Hans Kelsen, *Pure Theory of Law* (OUP 2007)

ordains, rather than to do what they perceive to be the underlying purpose of law. Further, because it is unlikely that legislation will envisage and cover every single act or event that may occur within society, it is uncertain how judges can assess the just outcome of a case where positive law fails to provide for a specific eventuality.

In contradistinction to the natural law and positivist theories of law, is the theory of critical legal studies which incorporate legal realism that is the prevailing legal philosophy in the United States. According to Benditt[463], realism maintains that judicial decision making is creative and intuitive, rather than a mechanical activity. Different judges employ their own reasoning processes, which leads to divergent outcomes in similar cases. There are no binding legal rules in judicial reasoning and judges have the last word on the interpretation of statutes.

The theories of natural law and legal positivism illustrate opposing views on the role of morality, legislation and judicial precedent in the law. Legal realism on the other hand opposes both views and considers the judge as the ultimate decision maker. However, no particular theory is self-evidently convincing as to the nature of law and its empirical operation. Generally, as legal systems and society become increasingly sophisticated, more than one theory of law underpins the judicial process of decision-making. Therefore, these conflicting theories serve as crucial interpretive filters through which judicial discretion can be objectively examined and assessed.

[463] Theodore M. Benditt, *Law as Rule and Principle: Problems of Legal Philosophy* (Stanford University Press 1978)

4.3 Natural Law and Equity

According to Edwards and Stockwell[464], the evolution of equity can be traced back to the Lord Chancellor who was a clergyman, the King's confessor, and the keeper of the King's conscience. As an ecclesiastic, he was learned in civil law and well versed in moral and canon law which was the essence of equity.[465] The Lord Chancellor resolved disputes based on his ideas, beliefs and conscience, and not by strict legal doctrine.[466] It was this resolution of disputes by conscience which developed into a system of law known as equity.[467] Thus, equity emerged on a foundation of religious principles rather than from formalistic legal precedent and procedural processes.[468] Hence, the foundation of equity on moral and religious principles is reflective of natural law theory which maintains that laws are valid only when they conform to a constant notion of morality.

Lord Denning also asserts that equity is founded on natural law principles of morality and conscience, describing equity as follows:

> Equity is not a static system of law established for all time but can be adapted to any situation. It has developed from the cannon law in the nineteenth century which relied on reason and conscience. It is the application to particular circumstances of the standard of what seems naturally just and right. The basis of equity is that the judge must have a discretion to do justice in individual cases as laws cannot be framed to cover all eventualities. Equity is concerned with the reality of the situation and not with the formalities. It is concerned with the substance, not the form and with the intention of the parties. If the intention of the parties is vitiated by fraud, duress or mistake the transaction can be rectified and set aside. It will provide for specific performance of a contract where the remedy of damages is not enough. In exercising his discretion, the judge takes into consideration all

[464] Richard Edwards & Nigel Stockwell, *Trust and Equity* (11th edn, Pearson Education Ltd 2013)
[465] Richard Edwards & Nigel Stockwell, *Trust and Equity* (11th edn, Pearson Education Ltd 2013)
[466] Richard Edwards & Nigel Stockwell, *Trust and Equity* (11th edn, Pearson Education Ltd 2013)
[467] Richard Edwards & Nigel Stockwell, *Trust and Equity* (11th edn, Pearson Education Ltd 2013)
[468] Richard Edwards & Nigel Stockwell, *Trust and Equity* (11th edn, Pearson Education Ltd 2013)

> relevant matters relating to the justice or injustice of granting the relief sought, delay or hardship or unfairness.[469]

Lord Denning thus epitomizes equity as a moral code of conduct for doing what is naturally just and right. For example, in ***Central London Property Trust Ltd v High Trees House Ltd***[470], his Lordship stated that "the law said that the contract must be observed, but equity said that the landlord had promised to reduce the rent and he should keep his promise".[471] The court held that the landlord was bound by his promise in equity. It was unconscionable for the landlord to revert to the increased rent when the tenants had acted on the promise of the reduced rent to their detriment. Here, morality and conscience had prevailed over the law to enforce the promise of the reduced rent.

Lord Denning also asserted that "without religion there can be no morality, and without morality there can be no law"[472]; and that "many of the Christian precepts have given origin to the precepts of law".[473] Thus, according to Lord Denning, many of the fundamental principles of law were derived from the Christian religion. He articulated that the law proceeds on Christian principles whereby if you love your neighbour, you will take care not to injure him; and if perchance you should do him damage by negligence then you will compensate him.[474] For example, this "Christian" principle was applied in the case of ***Donoghue v Stevenson***[475] where Lord Atkin established the principle of negligence that:

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[469] See Edmund Heward, *Lord Denning: A Biography* (George Weidenfeld & Nicolson Ltd 1991) 214
[470] [1947] KB 130 (HC)
[471]See Edmund Heward, *Lord Denning: A Biography* (George Weidenfeld & Nicolson Ltd 1991) 214
[472] See Edmund Heward, *Lord Denning: A Biography* (George Weidenfeld & Nicolson Ltd 1991) 83
[473] See Edmund Heward, *Lord Denning: A Biography* (George Weidenfeld & Nicolson Ltd 1991) 83
[474] See Edmund Heward, *Lord Denning: A Biography* (George Weidenfeld & Nicolson Ltd 1991) 83
[475] [1932] UKHL 100

> The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question " Who is my neighbor? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[476]

Thus, the traditional Christian principles that infuse the law impute a moral duty to do right to another and to make recompense for acts or omissions that may cause loss or damage. Similarly, the maxims of equity, which are general principles that govern equity and equitable conduct, are also founded on Christian principles of morality, conscience and reciprocity. For example, the maxim 'equity acts in personam' means that equity acts "on the person" and not against property. Orders are enforced against the defendant such as an injunction, specific performance of a contract or to observe a trust. Likewise, the maxim 'equity will not suffer a wrong to be without a remedy' demonstrates that equity will not allow a claim to be defeated by the formality requirements of common law. For example, the use of specific performance can enforce contracts that are otherwise unenforceable at law and the use of injunctions can restrain threatened actions or protect a plaintiff's interests before trial.

Thus, equity is founded upon Christian principles that mirror natural law principles of morality and conscience to ascertain the truth of a transaction to prevent unconscionable conduct between parties.

[476] *Donoghue v Stevenson* [1932] UKHL 100, 580 (Lord Atkin)

Another example of the pervasiveness of morality in the law is the dissenting speech of Lord Goff in ***Tinsley v Milligan***[477], which stated that the claimant could not acquire any equitable rights in the property which she had purchased, because she had committed a criminal offence.[478] The claimant's conduct invoked equity against her, as equity does not provide a remedy where a party has acted unconscionably.[479] Here, the morality of the law took precedence over legislation which recognized the claimant as the legal owner of the land by purchase.

In his criticism of legal positivism, Lord Denning states that:

> If lawyers hold to their precedents too closely, forgetful of the principles of truth and justice which they should serve, they may find the whole edifice comes tumbling down about them. They will be lost in "the codeless myriad of precedent. That wilderness of single instances. The common law will cease to grow. Like a coral reef it will become a structure of fossils.[480]

Lord Denning argues that the strict application of precedent without morality in the law causes stagnation, because the application of legal principles impedes the constructive development of the law and impacts on fairness and justice. This, in turn, leads to a wilderness of single instances which prevent the development of the law and the loss of truth and justice.

Hence, natural law underpins the moral basis of equity, with its attendant reliance on notions of fairness and good conscience. A decision in equity is a decision of morality and conscience, both reflective of natural law.

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[477] [1993] UKHL 3
[478] Alastair Hudson*, Equity and Trusts* (9th edn, Routledge 2017)
[479] Alastair Hudson*, Equity and Trusts* (9th edn, Routledge 2017)
[480] See Edmund Heward, *Lord Denning: A Biography* (George Weidenfeld & Nicolson Ltd 1991) 91

4.4 Natural Law and Proprietary Estoppel

Proprietary estoppel is a doctrine founded in equity and therefore reflects and encompasses the moral character of equity described above. Like the natural law principles of equity elucidated by Lord Denning, proprietary estoppel encapsulates the wide discretion of judges to examine all the facts and circumstances of a case to arrive at a decision by logical reasoning and deduction. It also imputes the necessity of conscience in judicial decision making to prevent the reliance on formality and the enforcement of strict legal rights. For example, why do the courts apply the test of unconscionability in proprietary estoppel? The natural law theory holds that it arises from an innate sense of morality to do right from wrong and that the doctrine is based on a moral realism that adopts practical reasoning by the courts.

The function of proprietary estoppel as a natural law doctrine is exemplified by Lord Denning who articulates that a decision in equity is premised on doing what is naturally just and right, and by reasoning and conscience.[481] Lord Denning also emphasized the natural law principle that judges must have a discretion to do justice in individual cases, as laws cannot be framed to cover all eventualities, and the courts must be mindful of the reality of a situation rather than with strict formalities.[482]

For example, Lord Denning applied a natural law analysis in ***Eves v Eves***[483] where the defendant had failed to put the claimant's name on the legal title to their home. The parties were unmarried and the claimant had borne two children to the defendant. Although the claimant had not directly contributed to the purchase price of the home,

[481] See Edmund Heward, *Lord Denning: A Biography* (George Weidenfeld & Nicolson Ltd, 1991)
[482] See Edmund Heward, *Lord Denning: A Biography* (George Weidenfeld & Nicolson Ltd 1991)
[483] [1975] 1 WLR 1338 (CA)

she had undertaken substantial work in its rehabilitation. The plans for marriage did not materialize and the defendant left the claimant for another woman. Lord Denning asserted that the contribution of the claimant was such that had she been a wife in a divorce, she would have obtained a share in the home. Lord Denning held it would be inequitable for the defendant to deny the claimant any share in the house, and held that the claimant was entitled to a fair quarter share in the home based on all she had done and was doing for the defendant and the children, and would thereafter do. This case illustrates that conscience and morality was applied to recognize the Claimant's equity in the home against the Defendant's legal title. Hence, morality and conscience prevailed over pre-existing precedent to enable her to establish an equitable interest in the family home.

Lord Denning also applied natural law analysis in ***Tanner v Tanner***[484] where the parties had agreed to purchase a house for the defendant and the children. The claimant had paid for the house and the defendant left her rented house to live with the claimant. The claimant later asked the defendant to leave and filed for possession. Lord Denning asserted that the provision of a place to live was in return for the defendant and the children to live there. Lord Denning ruled that the claimant had a duty to the children, and in the circumstances the duration of the licence to leave in the home lasted until the children were of school leaving age to enable the defendant to afford them a better upbringing that was anticipated in the home. This case demonstrates that although the Defendant had not established an equity in the home, the Claimant's promise of a secure home for the defendant and children was binding by morality,

[484] [1975] 1 WLR 1346 (CA)

conscience and reciprocity of the promise. Hence, morality and conscience prevailed over the law to achieve an equitable outcome.

Lord Denning was cognizant of the intentions of the parties rather than the form of arrangement, and exercised a broad discretion to do what was naturally just and right in the circumstances rather than enforce the law or strict legal rights of the parties. Proprietary estoppel is therefore a moral precept of equity, and a decision in proprietary estoppel is a decision embedded in the conscience and morality of natural law, rather than the positivistic insistence on adherence to strict legal rules.

4.5 Conclusion

The philosophies of positivism and natural law have attempted to define the nature of the law and the duty of those bound by it to comply with the rules and procedures which it prescribes. These conflicting theories impinge upon the judicial decision-making function and the manner in which it ought properly to be exercised. In turn, they illuminate the relationship between the positivist approach enshrined within the common law, and the natural law-based precepts of equity and equitable jurisdiction. They also portray the progression of the law from the common law positivist approach of precedent to embracing the natural law of equity. As the law and society evolve, legal systems are rarely confined to just one philosophy, but encompass an amalgam of the theories of positivism and natural law.

Proprietary estoppel, as an equitable doctrine, is grounded in natural law theory. Equity embraces transcendent precepts derived from ideas of morality and good conscience echoed in the doctrine of proprietary estoppel. Proprietary estoppel,

therefore, reflects the religious, moral and equitable principles of equity, all pervasively governed by adherence to good conscience. When a Court considers whether a proprietary estoppel arises in the facts and circumstances of a case, it is not minded to think whether or not the transaction of the parties is permitted by legislation, but instead considers the morality of the transaction. Specifically, it addresses whether a landowner should be permitted to renege on the representations made to another party who has suffered a detriment in reliance on the landowner's representations. The Court, in effect, determines whether the landowner has acted unconscionably towards the other party, and therefore, holds the landowner bound by his or her words or conduct.

Pertinently, the law is not self-applying and a law cannot by itself indicate exactly which factual circumstances are covered by it and which are not.[485] Hence, judges are charged with the judicial task of interpreting and ascertaining the law, and the above theories provide the mechanism to best understand the process and impact of judicial decision making. Because proprietary estoppel is an equitable doctrine originating in natural law theory, each case where it is applied emanates from the intuitiveness of judges to achieve an equitable result based upon notions of fairness and good conscience. The extent to which this is achieved evidences the soundness of the doctrine of proprietary estoppel.

The next chapter will focus on the transition of proprietary estoppel from a traditional approach to a modern approach in the Courts.

[485] Theodore M. Benditt, *Law as Rule and Principle: Problems of Legal Philosophy* (Stanford University Press 1978)

PART 2: THE APPLICATION AND OPERATION OF PROPRIETARY ESTOPPEL BY THE COURTS

Chapter Five: The Transition of Proprietary Estoppel from a Traditional Approach to a Modern Approach in the Courts

5.1 Introduction

This chapter involves a methodical examination of the case law to trace the origins of proprietary estoppel and the approaches applied by the Courts in the development of proprietary estoppel over the years. It explains how and why the doctrine transitioned from a traditional approach into a modern approach as an established legal doctrine from its early inception in ***Ramsden v Dyson***[486] to the most recent Supreme Court decision of ***Thorner v Major***[487].

The approach and analysis presented in this chapter is exclusive, as other legal scholars[488] have not adopted the same view, and neither investigated the development of the doctrine via case law to the same extent or depth as discussed. These scholars[489] have, to a large extent, dealt with proprietary estoppel as a doctrine in land law and focused on such topics as the elements of the doctrine, the types of proprietary estoppel and decided cases, and compare the doctrine with constructive trust.

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[486] [1866] LR 1 HL 129

[487] [2009] UKHL 18

[488] Martin Dixon, *Modern Land Law* (10th edn, Routledge 2016); Ben McFarlane, *The Law of Proprietary Estoppel* (OUP 2014); Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2003); Mark Davys, *Land Law* (10th edn, Palgrave 2017); Judith Bray, *Unlocking Land Law* (4th edn, Routledge 2014); Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2016); Diane Chappelle, *Land Law* (8th edn, Pearson Education 2007); Nigel Stockwell, *Trusts and Equity* (Pearson Education 2009); Roger J. Smith, *Property Law: Cases and Materials* (5th edn, Pearson Education 2012); Nicola Jackson, *Gateway to Land Law* (1st edn, Sweet & Maxwell 2012)

[489] Martin Dixon, *Modern Land Law* (10th edn, Routledge 2016); Ben McFarlane, *The Law of Proprietary Estoppel* (OUP 2014); Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2003); Mark Davys, *Land Law* (10th edn, Palgrave 2017); Judith Bray, *Unlocking Land Law* (4th edn, Routledge 2014); Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2016); Diane Chappelle, *Land Law* (8th edn, Pearson Education 2007); Nigel Stockwell, *Trusts and Equity* (Pearson Education 2009); Roger J. Smith, *Property Law: Cases and Materials* (5th edn, Pearson Education 2012); Nicola Jackson, *Gateway to Land Law* (1st edn, Sweet & Maxwell 2012)

Further, this chapter inquires into the question of whether the doctrine is sound in terms of the courts' transition from a traditional approach to a modern approach for the determination of an estoppel. Although the approach towards aspects of the doctrine may have developed with the passage of time, it will emerge that the courts' determination to redress unconscionability in the specific contexts in which a claim based on proprietary estoppel arises, has been an enduring and consistently applied theme. This facet of the doctrine has not been explored by other legal scholars[490].

The chapter aims to present a critical analysis of the development of proprietary estoppel in preventing the legal owner of land from denying an equitable estoppel interest in favour of a claimant who would otherwise suffer from the legal owner's unconscionable behavior. It reflects on the underlying impetus and rationale for the doctrine and the criteria necessary to give rise to the remedy of proprietary estoppel. Through scrutiny of relevant case law, the nature and character of the doctrine of estoppel will emerge, as will its novelty in creating a proprietary interest in land in favour of a claimant who previously had no such interest.

This chapter traces the case by case law development of the doctrine in the courts, which flows to its progression to the House of Lords in further chapters.

[490] Martin Dixon, *Modern Land Law* (10th edn, Routledge 2016); Ben McFarlane, *The Law of Proprietary Estoppel* (OUP 2014); Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2003); Mark Davys, *Land Law* (10th edn, Palgrave 2017); Judith Bray, *Unlocking Land Law* (4th edn, Routledge 2014); Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2016); Diane Chappelle, *Land Law* (8th edn, Pearson Education 2007); Nigel Stockwell, *Trusts and Equity* (Pearson Education 2009); Roger J. Smith, *Property Law: Cases and Materials* (5th edn, Pearson Education 2012); Nicola Jackson, *Gateway to Land Law* (1st edn, Sweet & Maxwell 2012)

5.2 The Development of Proprietary Estoppel by the Courts

The doctrine of proprietary estoppel has a long historical pedigree originating in the House of Lords decision in ***Ramsden v Dyson***[491], and which one hundred and forty-two years later was approved by the House of Lords (Supreme Court) in ***Thorner v Major***[492]. During the intervening period, both the High Court and the Court of Appeal participated in the development of the doctrine in various cases, including ***Taylor Fashions Ltd v Liverpool Victoria Trustees Co. Ltd***[493], ***Re Basham***[494], ***Crab v Arun District Council***[495] ***and Gillett v Holt***[496]***.*** Finally, ***Thorner v Major***[497] gave the House of Lords the opportunity of reviewing and affirming the operation of proprietary estoppel, crystallizing its significance for potential litigants.

Proprietary estoppel had its roots in the doctrine of equitable estoppel, explored in ***Ramsden v Dyson***[498] after which it slowly emerged as a fully-fledged doctrine through a gradual process of judicial creativity.

Judicial reasoning was impelled by the application of equitable principles to address unconscionable behavior on the part of the legal owner of land. In ***Crab v Arun District Council***[499] and ***Gillett v Holt***[500], the landowner was prevented from exercising his strict legal rights where it was inequitable to do so, by invoking the Court's intervention to satisfy the equity that had been inchoately created in the land. It will emerge that each

[491] [1866] LR 1 HL 129
[492] [2009] UKHL 18
[493] [1982] QB 133 (Ch)
[494] [1986] 1 WLR 1498 (Ch)
[495] [1976] Ch 179 (CA)
[496] [2000] EWCA Civ 66
[497] [2009] UKHL 18
[498] [1865] 1 H.L. 129
[499] [1976] Ch 179 (CA)
[500] [2000] EWCA Civ 66

decided case demonstrates that 'a Court of Equity' will not permit inequitable conduct on the part of the landowner. The decisions in ***Plimmer v Mayor of Wellington***[501] and ***Ives v High***[502] can be described as groundbreaking and revolutionary in nature in that the Courts applied the traditional doctrine of equitable estoppel to create an equitable proprietary interest in land, and were also prepared to extend the doctrine to new circumstances. ***Crab v Arun District Council***[503] and ***Thorner v Major***[504] can be described as progressive and reformative in their affirmation and extension of the previously established principles underlying the doctrine of estoppel.

5.2.1 The Traditional Approach of Proprietary Estoppel

The traditional approach appears to have originated in the House of Lords (Supreme Court) in the judgment of Lord Kingsdown in ***Ramsden v Dyson***[505]***.*** In ***Crab v Arun District Council***[506], Lord Scarman stated that "***Ramsden v Dyson***[507] may properly be considered as the modern starting point of the law of equitable estoppel."

Ramsden v Dyson[508] was an appeal from the Queen's Bench to the House of Lords against the decision of the Vice Chancellor that two tenants were entitled to long leases from the estate holder based on their building on the land on the faith of the assurances of the landowner's agent that they would never be disturbed. The Vice Chancellor's decision was overturned and there was a difference of opinion by the

[501] [1884] 9App Cas 699 (PC)
[502] [1967] 2 QB 379 (CA)
[503] [1976] Ch 179 (CA)
[504] [2009] UKHL 18
[505] [1866] LR 1 HL 129
[506] [1976] Ch 179 (CA)
[507] [1866] LR 1 HL 129
[508] [1866] LR 1 HL 129

House of Lords on an issue of fact on what was said by the agent to cause the two tenants to be paying lower rents than the other tenants of the landowner.

The appeal to the House of Lords was determined by four Lordships including Lord Cranworth, Lord Wensleydale, Lord Kingsdown and Lord Westbury. The majority of their Lordships namely: Lord Cranworth, Lord Wensleydale and Lord Westbury, decided that the appeal could not be substantiated in law or in equity and it was dismissed without costs. Lord Kingsdown, in the minority dissented, because in his view the Respondents were entitled to some kind of equitable relief.

Lord Cranworth, Lord Wensleydale and Lord Westbury concurred that at law, there was no contract, express or implied, by the landlord to grant a long-term lease.

Specifically, Lord Cranworth stated that equity could only intervene in circumstances where a stranger was building on the land believing it was his or her own, and the landowner had acquiesced in his or her acts. He stated thus:

> If a stranger begins to build on my land supposing it to be his own and I, perceiving his mistake, abstain from setting him right and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own.[509]

Lord Cranworth asserted that equity could not assist the Respondents who had built on the lands knowing it belonged to the landlord. He stated thus:

> For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive making it inequitable in me to assert my legal rights.[510]

[509] *Ramsden v Dyson* [1866] LR 1 HL 129 (HL) 140-141 (Lord Cranworth)
[510] *Ramsden v Dyson* [1866] LR 1 HL 129 (HL) 141 (Lord Cranworth)

Lord Cranworth further explained his decision against the interposition of equity thus:

> …if my tenant builds on land which he holds under me, he does not thereby in the absence of special circumstances acquire any right to prevent me from taking possession of the land and buildings when the tenancy is determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would, or might soon, come to an end.[511]

Lord Westbury concurred with Lord Cranworth, whilst Lord Wensleydale reiterated Lord Cranworth's interpretation of the extent and scope of equitable relief:

> If a stranger builds on my land, supposing it to be his own and I knowing it to be mine do not interfere but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it. If a tenant of mine does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.[512]

The reasoning behind the decision of the majority of their Lordships was that the Respondents were not strangers building on the land believing it to be their own or in the mistaken belief of title. Instead they were tenants who knew the land was owned by the landlord and had expended monies on the land knowing they had no title. Therefore, their Lordships concurred that equity could not assist in the folly of the Respondents.

In contrast, Lord Kingsdown, in his dissenting judgment, articulated that the Respondent had "made out a case for relief of some kind in a Court of Equity". His reasoning was that the tenants had acted on the assurance that leases were not

[511] *Ramsden v Dyson* [1866] LR 1 HL 129 (HL) 141 (Lord Cranworth)
[512] *Ramsden v Dyson* [1866] LR 1 HL 129 (HL) 168 (Lord Wensleydale)

required and they would not be disturbed in their possession without full compensation.

Lord Kingsdown stated that:

> …what I understand that law to be upon the subject and the effect generally which the evidence has produced on my mind. The rule of law applicable to the case appears to me to be this: If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing under an expectation created or encouraged by the landlord that he shall have a certain interest takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in ***Gregory v Mighell (1811)*** and as I conceive is open to no doubt.[513]

Lord Kingsdown's approach in equity was based on the assurances of the landlord and the expectations created for a long-term lease that led the Respondents to expend monies in building on the land. His Lordship also asserted a limitation on his judgment for equitable relief, that equity would not intervene in circumstances where the landlord had not encouraged the expenditure or created the expectation of the extended lease. He stated thus:

> If, on the other hand, a tenant being in possession of land and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of law or equity can enforce. This was the principle of the decision in ***Pilling v Armitage***[514]

[513] *Ramsden v Dyson* [1866] LR 1 HL 129 (HL) 170-171 (Lord Kingsdown)

[514] [1805] 12 Ves. Jr. 78 (Ch) *cited by the Respondents' solicitors in Ramsden v Dyson* [1866] LR 1 HL 129. *In Pilling v Armitage* [1805] 12 Ves. Jr. 78 (Ch) *there was no acquiescence as the Respondents had taken possession of the land by contract, had paid rent and expended monies under a general belief that was never contradicted.*

> and like the decision in ***Gregory v Mighell***[515] seems founded on plain rules of reason and justice.[516]

On the facts, however, the landlord had encouraged the tenant's expenditure on the land and created the expectation of an extended lease and, therefore, a Court of equity would in Lord Kingsdown's view enforce the interest that was created or encouraged.

Lord Scarman, in ***Crab v Arun District Council***[517] stated that "the law has developed so that today it is to be considered as correctly stated by Lord Kingsdown in his dissenting speech in ***Ramsden v Dyson***"[518]. His Lordship also asserted that although the statement of the law was expressed in the context of landlord and tenant, it had nonetheless been accepted as being of general application.

It is clear that, Lord Kingsdown established a very broad approach to equitable estoppel based on the informal dealings of parties, the words or conduct of the landowner, the expectations created or encouraged by the landowner, and also the expenditure on land which created an equity that was capable of giving rise to a proprietary interest in land. His Lordship's statement of the law was underpinned by equity, whereby it will not allow a landowner to profit from a party's expenditure on land where he or she had acquiesced in that party's expenditure or had created or encouraged an expectation for an interest in land. Lord Kingsdown's statement of the

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[515] [1811] 18 Ves. Jr. 328 (Ch) *cited by the Respondents' solicitors in Ramsden v Dyson* [1866] LR 1 HL 129*. In Gregory v Mighell* [1811] 18 Ves. Jr. 328 (Ch) *there had been an agreement for lease by which possession was taken with expenditure made on the land to which specific performance was enforced. It states the expenditure of money had made the property more valuable than before, and like the Earl of Oxford's case the expenditure was sufficient to the protection of the Court of Chancery.*

[516] *Ramsden v Dyson* [1866] LR 1 HL 129 (HL) 171 (Lord Kingsdown)

[517] [1976] Ch 179 (CA)

[518] [1866] LR 1 HL 129

law, therefore, established the proprietary character of estoppel in relation to land. It is predicated on the basis that equity is not bound by the landowner's title to land or by the usual formalities required to create a legal interest in land.[519]

Following ***Ramsden v Dyson***[520] was the High Court case of ***Willmott v Barber***[521] which had curtailed the principle of equitable estoppel established in ***Ramsden v Dyson***[522].

In ***Willmott***[523] a lessee had agreed to let one acre of land to the plaintiff and to sell the remainder of his interest to him despite a covenant in the lessee's lease not to assign without a license. The plaintiff was not aware of the covenant and took possession of the one acre and expended money on it. The plaintiff later gave notice to the lessee of his intention to exercise his option to purchase his interest as agreed in their lease. The lessee declined to sell to the plaintiff on the ground that the lessor had refused to give a license to an assignment. The plaintiff instituted claim against the lessee and lessor for specific performance of the agreement by the lessee, and to compel the lessor to grant a license by his acquiescence in the plaintiff's expenditure and mistaken belief that the lessee would assign the property to him. The lessor was not aware of the lessee's covenant not to assign without a license at the time of the plaintiff's expenditure, but later became aware of the lease agreement. It was held that the lessee could not be compelled to perform the agreement as it would be in breach of his prior covenant not to assign without a license.

[519] See for example, Law of Property Act 1925, s 2(1); Law of Property Act 1925, s 3(1)(6); Law of Property (Miscellaneous Provisions) Act 1989, s 1 & 2
[520] [1866] LR 1 HL 129
[521] [1880] 15 Ch D 96 (Ch)
[522] [1866] LR 1 HL 129
[523] [1880] 15 Ch D 96 (Ch)

Fry J ruled against equitable estoppel because legal title could not be defeated except by fraud. He stated that: "It requires very strong evidence to induce the Court to deprive a man of his legal right when he has expressly stipulated that he shall be bound only by a written document."[524] To Fry J, it was fraud alone, and not equity that could deprive a man of his legal rights to land.

Fry J held that estoppel could not deprive a landowner of his strict legal rights unless he or she had acted in such a way to make it fraudulent to set up those rights. He established the five probanda as the pre-requisites for a claim in estoppel as follows:

> The plaintiff must have made a mistake as to his legal rights; the plaintiff must have expended money or done some act on the faith of his mistaken belief; the defendant, the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; the defendant, the possessor of the legal right must know of the plaintiff's mistaken belief of his rights; and the defendant, the possessor of the legal right must have encouraged the plaintiff in his expenditure of money or other acts done either directly or by abstaining from asserting his legal right." Where all the elements exist, then there is fraud of such a nature that will entitle the Court to restrain the possessor of the legal right from exercising it.[525]

These probanda formed the strict preconditions for the operation of estoppel, as opposed to the more expansive principles by ***Ramsden v Dyson***[526]. Contrary to Lord Kingsdown's judgment, Fry J established that equitable estoppel without more, could not deprive a man of his or her legal title. This begged the question of whether or not Lord Kingsdown's judgment was an accurate statement of the law. Was equitable estoppel capable of depriving the legal owner of land of his collateral "right" to enjoy that land? Was the dissenting judgment of Lord Kingsdown a false claimer for the

[524] *Willmott v Barber* [1880] 15 Ch D 96 (Ch) 105 (Fry J)
[525] *Willmott v Barber* [1880] 15 Ch D 96 (Ch) 105-106 (Fry J)
[526] [1866] LR 1 HL 129

doctrine of estoppel? Should legal ownership of land be impregnable, regardless of the unconscionability of the landowner?

Fry J's formulation was highly criticized by scholars[527], the High Court[528] and Court of Appeal[529]. In ***Crab v Arun District Council***[530], Lord Scarman stated that:

> Fraud was a word often in the mouths of those robust Judges who adorned the bench in the 19th century. It is less often in the mouths of the more wary judicial spirits today who sit upon the bench. But it is clear that whether one uses the word fraud or not, the plaintiff has to establish as a fact that the defendant by setting up his right is taking advantage of him in a way which is unconscionable, inequitable or unjust.[531]

Lord Scarman further expressed that the "fraud in these cases is not to be found in the transaction itself but in the subsequent attempt to go back on the basic assumptions which underlay it."[532]

Oliver J, in ***Taylor Fashions v Liverpool Victoria Trustees Ltd***[533], also asserted that "…there is no room for the literal application of the probanda in ***Ramsden v Dyson***[534]"[535]. Oliver J postulated that the circumstances in ***Ramsden***[536] ***"…***do not presuppose a mistake on anybody's part, but merely fostered an expectation in the minds of both parties at the time which, once it had been acted on, would be unconscionable to permit the landlord to depart."[537]

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[527] See Nicola Jackson, John Stevens & Robert Pearce, *Land Law* (4th edn, Sweet & Maxwell 2008); Kevin Gray & Susan Gray, *Elements of Land Law* (5th edn, OUP 2009)
[528] *Taylor Fashions v Liverpool Victoria Trustees Ltd* [1982] QB 133 (Ch) (Oliver J)
[529] *Crab v Arun District Council* [1976] Ch 179 (CA) (Lord Scarman)
[530] [1976] Ch 179 (CA)
[531] *Crab v Arun District Council* [1976] Ch 179 (CA) 195 (Lord Scarman)
[532] *Taylor Fashions v Liverpool Victoria Trustees Ltd* [1982] QB 133 (Ch) 147 (Oliver J)
[533] [1982] QB 133 (Ch)
[534] [1866] LR 1 HL 129
[535] *Taylor Fashions v Liverpool Victoria Trustees Ltd* [1982] QB 133 (Ch) 147 (Oliver J)
[536][1866] LR 1 HL 129
[537] *Taylor Fashions v Liverpool Victoria Trustees Ltd* [1982] QB 133 (Ch) 147 (Oliver J)

Jackson et al (2008)[538] also stated that in ***Ramsden v Dyson***[539] Lord Kingsdown had

> …articulated a more generalized jurisdiction for establishing an equity rooted in the concept of expectations induced by the landowner, rather than the mistake of the claimant ..[540].

Kevin Gray and Susan Gray[541] suggest that the probanda had restricted the application, development and availability of estoppel as a remedy thus:

> The probanda came to be applied indiscriminately to all forms of estoppel claims thereby dramatically curtailing the availability of estoppel-based remedies. In particular, the estoppel doctrine was rendered virtually inapplicable to cases of common expectation in which mistaken assumptions of entitlement, if there are any, are usually bilateral and wholly innocent. The requirement that the estoppel claimant be positively mistaken as to his existing rights operated harshly where the claimant was in no doubt as to the absence of any strict entitlement on his own part, but had been led to expect that he would somehow or at some stage acquire rights by relying upon the representation made by the landowner. Dogmatic insistence on the five probanda caused special difficulty in the context of informal family arrangements where full awareness of non-entitlement in strict law is often wholly incompatible with an ill-defined expectation of future entitlement.[542]

The probanda was short lived, as four years later, in ***Plimmer v Mayor of Wellington***[543] the Privy Council affirmed and approved Lord Kingsdown's judgment as the basis for establishing equitable estoppel.

In ***Plimmer***[544], the Appellants had occupied Government land by a revocable licence and established a jetty and harbor thereon with the Government's permission. The

[538] Nicola Jackson, John Stevens & Robert Pearce, *Land Law* (4th edn, Sweet & Maxwell 2008)
[539] [1866] LR 1 HL 129
[540] Per Nicola Jackson, John Stevens & Robert Pearce, *Land Law* (4th edn, Sweet & Maxwell 2008) 644
[541] Kevin Gray & Susan Gray, *Elements of Land Law* (5th edn, OUP 2009)
[542] Per Kevin Gray & Susan Gray, *Elements of Land Law* (5th edn, OUP 2009) 1207
[543] [1884] 9 App. Cas. 699 (PC)
[544] [1884] 9 App. Cas. 699 (PC)

Government later encouraged the appellants to extend the jetty and establish a warehouse on the land. The Appellant expended monies for that purpose in the expectation that his occupation would not be disturbed. The Government later sought possession of the land. Their Lordships held that the Appellants had an 'equity arising from their expenditure on the land' and the Government was estopped from asserting that the licence was revocable, as it constituted an estate or interest in the land.

Their Lordships granted an equitable estoppel for the Appellant because the licence given by the Government to the Appellant had become irrevocable by the request for the extension of the jetty and the construction of a warehouse. The request had sufficiently created a reasonable expectation in the Appellant's mind that his occupation would not be disturbed.

Their Lordships stated that: "the law relating to cases of this kind may be taken as stated by Lord Kingsdown in ***Ramsden v Dyson***[545]**"**.[546]

Their Lordships held that:

> This case falls within the principle stated by Lord Kingsdown as to expectations created or encouraged by the landlord, with the addition that in this case the landlord did more than encourage the expenditure, for he took initiative in requesting it. [….] that the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated. [….] In fact, the court must look at the circumstances in each case to decide in what way the equity can be satisfied.[547]

The Privy Council effectively re-instated Lord Kingsdown's judgment as the criteria for reliance on equitable estoppel. It re-established the capacity of

[545] [1866] LR 1 HL 129
[546] Per *Plimmer v Mayor of Wellington* [1884] 9 App. Cas. 699, 1324 (PC)
[547] Per *Plimmer v Mayor of Wellington* [1884] 9 App. Cas. 699 (PC) 1324-1325

equitable estoppel to create a proprietary interest in land, and emphasized the discretionary basis of estoppel. The Privy Council broadly construed and extended Lord Kingsdown's principle removing it from the confines of the landlord tenant situation to the broader context of an irrevocable license in land. This demonstrated the flexibility of the doctrine to evolve and relate to circumstances beyond its original remit.

The ratio of ***Plimmer***[548] was applied by the Court of Appeal in ***Inwards v Baker***[549] which also established an equitable estoppel in land. A father (F) had persuaded his son (S) to build a house on F's land with the assurance that the house would remain there indefinitely as long as S wished to use the property as his home. S expended his monies in constructing the home and lived there for thirty years. Upon the father's death, the successors of his estate sought to evict the son off the land. The Court refused to order possession against S and held S could remain there so long as he desired to use it as his home.

The Court granted the remedy of equitable estoppel to the son because the licensee had, at the request and encouragement of the landlord, expended monies in the expectation of being allowed to live on the land. The Court did not allow the expectation of the licensee to be defeated as it was inequitable to do so.

[548] [1884] 9 App. Cas. 699 (PC)
[549] [1965] 2 WLR 212 (CA)

Lord Denning MR stated that: "It is an equity well recognized in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that as a result of that expenditure he will be allowed to remain there."[550]

Danckwerts L.J. also stated that:

> …it seems to me that this is one of the cases of an equity created by estoppel or equitable estoppel as it is sometimes called by which a person who has made the expenditure is induced by the expectation of obtaining protection and equity protects him so that an injustice may not be perpetrated.[551]

The Court of Appeal in ***Inwards v Baker***[552] affirmed the concept of equitable estoppel established in ***Ramsden v Dyson***[553] and ***Plimmer v Wellington***[554], and extended the principle to the creation of a licence to remain on land. The court established that the equity arising from the expenditure on land does not fail, as it creates an equitable estoppel against the landowner.

Following ***Inwards v Baker***[555] the Court of Appeal in ***ER Ives Ltd v High***[556] also affirmed the principle of Lord Kingsdown in ***Ramsden v Dyson***[557] ***and Plimmer v Wellington***[558]. In that case, the defendant owned lands on which he was building his house. A block of flats was being built on the adjoining land and the defendant realized that the foundation of the flats had trespassed onto his land. The defendant met with the adjoining owner and the parties agreed that the defendant would permit the trespass in return for the adjoining owner granting the defendant a right of way across his land.

[550] *Inwards v Baker* [1965] 2 WLR 212 (CA) 217
[551] *Inwards v Baker* [1965] 2 WLR 212 (CA) 512 (Danckwerts L.J.)
[552] [1965] 2 WLR 212 (CA)
[553] [1866] LR 1 HL 129
[554] [1884] 9 App. Cas. 699 (PC)
[555] [1965] 2 WLR 212 (CA)
[556] [1967] 2 QB 379 (CA)
[557] [1866] LR 1 HL 129
[558] [1884] 9 App. Cas. 699 (PC)

The defendant built his house with the only access being via the right of way on the adjoining land. The block of flats was later sold but there was no mention of the right of way and it was not registered as a land charge. The new owners of the flats permitted the defendant to use the right of way for fourteen years without objection, and the defendant built a garage on his land in reliance that the right of way was valid. However, the flats were again sold at an auction to the plaintiff, and the auction had stated the flats were subject to a right of way and the conveyance had mentioned the right of way. The plaintiff nonetheless sought an injunction against the defendant for the right of way on the ground that it was not registered as a land charge and was void.

The Court granted an equitable estoppel to the defendant because of equity's insistence on redressing unconscionable behavior. The right arose from the defendant's expenditure in building the garage, and the plaintiff's predecessor had stood by and acquiesced in it knowing that the defendant believed that he had a right of way. The plaintiff's predecessor had created a reasonable expectation in the defendant's mind that his access over the yard would not be disturbed.

Lord Denning stated that the defendant's expectation that he would not be disturbed gave rise to an "…equity arising out of acquiescence"[559] available against the plaintiff's predecessors and their successors in title. Lord Denning expressed that "The court will not allow that expectation to be defeated when it would be inequitable to do so."[560]

[559] *Ives v High* [1967] 2 QB 379 (CA) 508 (Lord Denning)
[560] *Ives v High* [1967] 2 QB 379 (CA) 508 (Lord Denning)

In ***Ives v High***[561], **Danckwerts L.J.** accepted the validity of the term 'proprietary estoppel' to explain that estoppel was capable of establishing an equitable proprietary interest in land.

Danckwerts L.J. stated as follows:

> There is another equitable ground on which Mr. High's rights may be protected, which has nothing whatever to do with the Land Charges Act. It is discussed in Snell's Equity, 26th ed. (1966), pp. 629-633, under the name "proprietary estoppel," and the comment is made (p. 633) that "the doctrine thus displays equity at its most flexible.[562]

Danckwerks L.J. then proceeded to illustrate the circumstances that gave rise to the proprietary estoppel of the defendants thus:

> There are two aspects in which equitable estoppel applies in the present case. First, the defendant in reliance of the arrangement made with Mr. Westgate allowed the encroaching foundations to remain on his land and built his house without proper access except over the yard, and finally built his garage in such a way that it was useless unless access to it could be had over the yard. Mr. Westgate acquiesced in the use of the yard for access, and the Wrights stood by and indeed encouraged the defendant to build his garage in these conditions and for these purposes. Could anything be more monstrous and inequitable afterwards to deprive the defendant of the benefit of what he has done?[563]

Danckwerks L.J. continued to assert the circumstances of the defendant's entitlement to a proprietary estoppel that:

> Secondly, the Wrights continued to enjoy the benefit of the encroaching foundations on the defendant's land. It would no doubt be quite an expensive job to remove the encroaching foundations and provide other support for the building. Equity does not allow a person who takes advantage of such a situation to deny to the other party the corresponding benefits which were the consideration for allowing the foundation to remain. The plaintiffs bought the property subject to the defendant's equitable rights and the property was so conveyed to them. […] The principle stated here is not new. It goes back at least as far as the observations of Lord Kingsdown in ***Ramsden v Dyson (1866)***[564]

[561] [1967] 2 QB 379 (CA)
[562] *Ives v High* [1967] 2 QB 379 (CA) 511 (Danckwerts L.J)
[563] *Ives v High* [1967] 2 QB 379 (CA) 511-512 (Danckwerts L.J)
[564] [1866] LR 1 HL 129

> which were approved by the Privy Council in ***Plimmer v Wellington Corporation (1884)***[565].[566]

Danckwerts L.J. held a proprietary estoppel was established because an equity had arisen from the expense incurred by the claimant in building the garage with the former owners' acquiescence in standing by, knowing that the defendant had believed he had a right of way. The defendant's equity was binding on the claimant's successor in title, who had express actual notice of the right of way and where it was inequitable to deny its existence. The court did not focus on the agreement or representation of the parties, but ruled that the equity had been created with the other party's 'implied' consent.

This was the process by which the term 'proprietary estoppel' was inscribed by the Court and given judicial status as proprietary estoppel. The principle of proprietary estoppel, established in ***Ramsden v Dyson***[567] had evolved during the intervening period as 'equitable estoppel', until ***Ives v High***[568] adopted the term 'proprietary estoppel' to describe the doctrine which the court was applying. The umbrella term captured and re-interpreted the previous case law in which estoppel had been applied to establish a proprietary interest in land.

The strength of the traditional approach is that it laid the foundational principles for proprietary estoppel and also gave rise to the term by which it came to be known. In the early stages, the Courts had widened the application of equitable estoppel from

[565] [1884] 9 App. Cas. 699 (PC)
[566] *Ives v High* [1967] 2 QB 379 (CA) 511-512 (Danckwerts L.J)
[567] [1866] LR 1 HL 129
[568] [1967] 2 QB 379 (CA)

the landlord tenant situation in ***Ramsden v Dyson***[569], to include an irrevocable licence in ***Plimmer v Mayor of Wellington***[570], a right of way in ***Ives v High***[571] and also a licence to remain on land in ***Inwards v Baker***[572]. The weakness exemplified by the traditional approach is that the early cases had not yet established the particular requirements for the doctrine and its remedy. Nonetheless, the traditional approach had set the scene for the development of the doctrine by the later Courts.

5.2.2 The Modern Approach of Proprietary Estoppel

The modern approach of proprietary estoppel involves the cases whereby the doctrine was pleaded as a defence or cause of action in the Courts. These cases led the Courts to establish the apparatus for the application and operation of proprietary estoppel, and to re-define the law on proprietary estoppel.

In ***Crab v Arun District Council***[573], the claimant was assured that the defendant would build a right of way to his land so that a portion could be sold off without leaving the remainder landlocked. The defendant had also built a fence with a gap to confirm the right of way. The claimant sold a portion of his land in reliance of the defendant's assurance of a right of way that left his land landlocked. Relations between the parties broke down, and the defendant filled the gap and demanded monies to construct a right of way. The Appellant pleaded a right of way by equitable estoppel, promissory or proprietary. The Court of Appeal held that it was inequitable for the Respondent to

[569] [1866] LR 1 HL 129
[570] [1884] 9 App. Cas. 699 (PC)
[571] [1967] 2 QB 379 (CA)
[572] [1965] 2 WLR 212 (CA)
[573] [1976] Ch 179 (CA)

insist on its strict legal rights, as the Appellant had established his equity in the land and was granted an easement without payment.

The Court established a proprietary interest in land, by estoppel, in favour of the Appellant. The Appellant was led to believe that he would be granted a right of access over the Respondent's land, and the Respondents had erected their gates at considerable expense in such a way to cause the Appellant to believe that the right of access would be granted. Also, the Respondent had known of the Appellant's intention to sell his land and did nothing to dissuade him but had confirmed it by erecting their gates. The Respondent had acquiesced in the Appellant's conduct and further, the Respondent's conduct had caused the Appellant to act as he did, which raised an equity in the Appellant's favour against the Respondent.

Crab v Arun[574] is significant as Lord Denning and Lord Scarman set out the most explicit framework yet for proprietary estoppel and its characterization for a proprietary interest in land. Lord Denning established a comprehensive clarification of proprietary estoppel. He described the nature and purpose of proprietary estoppel, identified the circumstances where the estoppel may arise, and also elucidated the effect of proprietary estoppel.

Lord Denning MR described the nature and purpose of proprietary estoppel thus:

"The basis of this proprietary estoppel – as indeed of promissory estoppel is the interposition of equity. Equity comes in true to form to mitigate the rigours of the common law. The early cases did not speak of it as 'estoppel'. They spoke of

[574] [1976] Ch 179 (CA)

it as "raising an equity". If I may expand that, Lord Cairns said: "it is the first principle upon which all Courts of Equity proceed", that it will prevent a person from insisting on his strict legal rights - whether arising under a contact, or on his title deeds or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties ***(Hughes v Metropolitan Railway (1877)***[575].[576]

Thus, proprietary estoppel prevents a party from enforcing his or her strict legal rights where it would be unconscionable to do so in light of the prior dealings of the parties, and this is evident in the case law under scrutiny.

Lord Denning MR also described the circumstances whereby proprietary estoppel may arise as follows:

> What then are the dealings which will preclude him from insisting on his strict legal rights? – If he makes a binding contract that he will not insist on the strict legal position, a Court of Equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist upon his strict legal rights – that even though that promise may be unenforceable in point of law for want of consideration or want of writing – then if he makes the promise knowing or intending that the other will act upon it, and he does act upon it, then again a Court of Equity will not allow him to go back on that promise […]
>
> Short of an actual promise, if he by his words or conduct so behaves as to lead another to believe that he will not insist on his strict legal rights – knowing or intending that the other will act on that belief – and he does so act that again will raise an equity in favour of the other: and it is for a Court of Equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct.[577]

[575] [1877] 2 App. Cas. 439 (UKHL)
[576] *Crab v Arun District Council* [1976] Ch 179 (CA) 188-189 (Lord Denning MR)
[577] *Crab v Arun District Council* [1976] Ch 179 (CA) 189 (Lord Denning MR)

Here, proprietary estoppel arises where party A by his words or conduct assures party B that party A will not enforce his or her strict legal rights, and party B relies on party A's assurance to his or her detriment. Equity intervenes to enforce party A's promise to party B.

Lord Denning MR also articulated that the effect of estoppel on the true owner may be that:

> His own title to the property, be it land or goods had been held to be limited or extinguished, and new rights and interests have been created therein and this operates by reason of his conduct – what he has led the other to believe – even though he never intended it.[578]

Thus, proprietary estoppel limits or extinguishes legal rights to property in favour of the new rights created by the words or conduct of a promisor.

As to remedy in proprietary estoppel, Scarman LJ stated that where an equity is raised by the claimant, the court will apply the minimum equity to do justice in a particular case. Lord Scarman set out the criteria for the court to establish the estoppel being: Whether an equity is established? What is the extent of the equity? And what is the relief appropriate to satisfy the equity? The three-fold test illustrates the equitable and discretionary character of the doctrine, and also the broad jurisdiction of the Court to determine the estoppel and the remedy. Lord Scarman also stated that in proprietary estoppel, the Court must analyze and assess the conduct and relationship of the parties to determine the equity.

[578] *Crab v Arun District Council* [1976] Ch 179 (CA) 188 (Lord Denning MR)

The rationale deployed in ***Crab v Arun***[579] highlighted the scope of proprietary estoppel and the principles governing the determination of the remedy it could afford. It provided a comprehensive description of the application and operation of the doctrine and sought to eliminate confusion and uncertainty regarding the utilization of estoppel in the future.

Crab v Arun[580] was followed by the High Court in ***Taylor Fashions Ltd v Liverpool Victoria Trustees Co. Ltd***[581] which re-stated the principle of proprietary estoppel and its requirements extracted from Lord Kingsdown's judgment in ***Ramsden v Dyson***[582].

In ***Taylor Fashions***[583]***,*** two leases contained an option to renew that was not registered under the Land Charges Act 1925. The tenants had undertaken substantial improvements to the properties believing they had the benefit of the lease and the option to renew. The leases and the reversions were assigned to the defendant who argued the option to renew was void for non-registration. The claimants relied on proprietary estoppel that the defendants knew of the improvements being undertaken and had acquiescence in the claimant's mistake. One of the tenants (Taylor Fashions) was able to show proprietary estoppel but the other tenant failed because he was acting on his own mistaken belief, rather than as a result of anything that the landlord did or allowed.

[579] [1976] Ch 179 (CA)
[580] [1976] Ch 179 (CA)
[581] [1982] QB 133 (Ch)
[582] [1866] LR 1 HL 129
[583] [1982] QB 133 (Ch)

The Court granted a remedy arising from the doctrine of proprietary estoppel to ***Taylor Fashions***[584] based upon equitable principles. The Court emphasized that Taylor Fashion's had expended monies on the improvements in the expectation that it was a necessary prerequisite to the extension of the lease; that Taylor Fashion's expectation was known to the defendants; that the improvements undertaken were known to and acquiesced by the defendants who co-operated to the extent of installing the elevator; that at the time of the discussion and the completion of the works the Respondents did not challenge the validity of the option, and that if the Appellant had known the Respondent would challenge the option, they would have taken a different course of action. Hence, an equity was raised against the Respondents as they had acquiesced in the Appellant's expenditure for the lease and created the expectation for the extension.

Oliver J stated that the fundamental principle that equity prevents unconscionable conduct permeates all the elements of the doctrine of estoppel.[585] Oliver J established that the application of the ***Ramsden v. Dyson***[586] principle, whether it be called proprietary estoppel by acquiescence or estoppel by encouragement, is immaterial, as it required a broader approach to ascertaining whether in the circumstances it would be unconscionable for a party to deny that which he or she has knowingly or unknowingly allowed or encouraged another to assume to his or her detriment, rather than inquiring into whether the circumstances can be fitted into a preconceived formula as a yardstick for every form of unconscionable behavior.[587]

He stated the principle of proprietary estoppel thus:

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[584] [1982] QB 133 (Ch)
[585] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co. Ltd* [1982] QB 133 (Ch) 144 (Oliver J)
[586] [1866] LR 1 HL 129
[587] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co. Ltd* [1982] QB 133 (Ch) 151-152 (Oliver J)

> If A under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter on the faith of such expectation and with B's knowledge and without objection by B acts to his detriment in connection with such land, a Court of equity will compel B to give effect to such expectation.[588]

Hence, the principle of proprietary estoppel, articulated by Lord Kingsdown in ***Ramsden v Dyson***[589] and by Lord Denning in ***Crab v Arun District Council***[590], was simplified for the purpose of establishing a proprietary interest in land. Although these prior cases embraced the same principle of proprietary estoppel, the re-statement of the law created a new criterion for the creation of proprietary estoppel. Oliver J. had not modified the law, as previously stated in ***Crab v Arun***[591], but sought to add more clarity and certainty to the establishment of proprietary estoppel.

Oliver J also established that three interrelated elements must be satisfied to establish an estoppel equity: the claimant must show that there was an assurance by the landowner that gave rise to an expectation that he or she was entitled to an interest in land; that he or she had relied on the assurance made, and that he or she had acted to his or her detriment in consequence of the assurance.

The satisfaction of the requirements of assurance, reliance and detriment created the equity for the operation of proprietary estoppel. Oliver J thus simplified the law on proprietary estoppel by eliminating the requirement of 'creating or encouraging an expectation for an interest in land', as evident in the previous case law, to a more universal formula of assurance, reliance and detriment. It provided a more realistic

[588] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co. Ltd* [1982] QB 133 (Ch) 144 (Oliver J)
[589] [1866] LR 1 HL 129
[590] [1976] Ch 179 (CA)
[591] [1976] Ch 179 (CA)

model for the Courts to determine the estoppel, rather than inquiring into the landowner's mind to ascertain what, if any, expectation was created or encouraged.

Taylor Fashions[592] was followed by the Court of Appeal in ***Gillett v Holt***[593]. In ***Gillett***[594] G left school to work full-time on H's farm for over forty years on the repeated promises and assurances by H to G that G would inherit the farm upon H's death. Relations between G and H subsequently broke down. H altered his will to disinherit G and G was dismissed from the farm. G filed a claim for proprietary estoppel, but it was dismissed by the High Court on the basis that the representations relied on by G could not reasonably be construed as an irrevocable promise that G would inherit H's estate regardless of any change in circumstances. However, on appeal the Court held that a proprietary estoppel had arisen as G had acted in reliance on H's promise to his detriment. The judgment was given by Robert Walker LJ to which Beldam LJ and Waller LJ agreed.

The Court of Appeal unanimously granted a proprietary estoppel to G. H's assurances for bequeathing the farm to G were repeated over a long period on special family occasions, and some of the assurances made such as 'it was all going to be ours anyway' were held to be completely unambiguous. H had intended that his assurances be relied on by G to remain on the farm in the expectation of inheriting the estate upon H's death.

[592] [1982] QB 133 (Ch)
[593] [2000] EWCA Civ 66 (CA)
[594] [2000] EWCA Civ 66 (CA)

In reliance on H's assurances, G had suffered a substantial detriment in leaving school before sixteen to work on H's farm for low wages; G had not taken any examinations which might otherwise might have given him academic qualifications; G went to work for and live with H against the advice of his headmaster and against his parents' doubts about H; H's influence had extended over G's social and private life which revolved around the farm, and H had promised to arrange for G to attend agricultural college but did not make the arrangement. G also stated that he continued in H's employment for over forty years without seeking or accepting offers of employment elsewhere; had not started a business on his own account; had undertaken tasks and worked long hours beyond an employee's duty; had not taken steps to secure his future wealth upon retirement, and had expended monies for improvements of one of the farmhouses that was uninhabitable upon acquisition. G had suffered a detriment in reliance on H's assurances, which created an equity in H's estate and gave rise to a proprietary estoppel.

The Court of Appeal established that H's promises were revocable by their own nature, but it was G's detrimental reliance which made them irrevocable. The Court ruled that once a promisee has acted upon the promise to his detriment, it is binding in equity, and the minimum equity was for H to transfer the freehold in one of his houses to G with compensation for loss of the farming business.

Robert Walker LJ stated thus:

> …it is important to note at the outset that the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments. […] that the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined and that whether there is a distinct need for a mutual understanding may depend on how the other elements are formulated and understood. Moreover, the fundamental principle that equity is

> concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end, the Court must look at the matter in the round.[595]

Robert Walker LJ articulated the necessity and interconnection of assurance, reliance and detriment to give rise to proprietary estoppel in land. He advanced that proprietary estoppel could not be established by the satisfaction of one of those elements but rather by the combined effect of the three elements. Robert Walker LJ asserted that it was immaterial whether there was a mutual understanding between the parties, as the estoppel depended on the interplay of the three elements of assurance, reliance and detriment. He also affirmed that the interposition of equity was to prevent unconscionable conduct which required the Court to consider all the facts and circumstances as a whole and to determine whether the promisor had acted unconscionably towards the promisee.

In establishing the estoppel, Robert Walker LJ stated thus:

> There must be 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. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded – that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved.[596]

Here, Walker LJ asserted that proprietary estoppel is proved by the causal link between the assurance made and the detrimental reliance thereon. The detriment arises where the promisor seeks to resile from his or her promise, and where the detriment is substantial, the Court will consider whether the promisor had acted unconscionably towards the promisee.

[595] *Gillett v Holt* [2000] EWCA Civ 66 (CA) 225 (Walker LJ)
[596] *Gillett v Holt* [2000] EWCA Civ 66 (CA) 232 (Walker LJ)

As to the nature and the extent of the detriment suffered, Walker LJ stated that detriment is:

> …not a narrow or technical concept. The 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.[597]

He further asserted that: …"it is the other party's detrimental reliance on the promise which makes it irrevocable."[598]

Here, Robert Walker LJ established the importance of detriment in establishing proprietary estoppel. He asserted that the detriment suffered need not be quantifiable or based on expenditure on land, so long as the detriment was substantial. The detriment suffered makes the promise irrevocable, and also invokes the test of unconscionability on whether the promisor should be permitted to renege on his or her promise.

The Court of Appeal in ***Gillett v Holt***[599] re-affirmed and approved the tripartite test of assurance, reliance and detriment for proprietary estoppel as established by Oliver J in ***Taylor Fashions***[600]. The Court of Appeal also emphasized the test of unconscionability as established in ***Taylor Fashions***[601] as the determinant factor in establishing the estoppel, and reiterated that the Court must consider all the facts and circumstances as a whole to determine the estoppel. However, the Court of Appeal moved a step

[597] *Gillett v Holt* [2000] EWCA Civ 66 (CA) 232 (Walker LJ)
[598] *Gillett v Holt* [2000] EWCA Civ 66 (CA) 229 (Walker LJ)
[599] [2000] EWCA Civ 66 (CA)
[600] [1982] QB 133 (Ch)
[601] [1982] QB 133 (Ch)

further than ***Taylor Fashions***[602] in categorically defining the role of detriment for proprietary estoppel. For example, Walker LJ in ***Gillett***[603] had explained what comprised the element of detriment and how it determined the proprietary estoppel. Walker LJ established that the detriment suffered made the promise irrevocable, and determined whether it was unconscionable for the promisor to renege on his or her promise. The Court of Appeal in ***Gillett***[604] adopted the rationalized test for proprietary estoppel as adopted in ***Taylor Fashions***[605], following the comprehensive treatment of proprietary estoppel in ***Crab v Arun***[606].

Gillett v Holt[607] was followed by the House of Lords in ***Thorner v Major***[608]***.*** In ***Thorner***[609] T worked on his father's cousin's (P) farm for thirty years without pay. P had indicated on several occasions that T would inherit the farm one day. P had handed him a bonus notice on two life insurances policies and said "that's for my death duties". P had also made a will leaving his residuary estate to T but it was subsequently revoked. P died intestate and his farm was inherited by his personal representatives. T brought a claim against P's estate that he had the benefit of a proprietary estoppel. The House of Lords held that T had established a proprietary interest in the farm as P's pattern of conduct had amounted to an assurance for the estate.

[602] [1982] QB 133 (Ch)
[603] [2000] EWCA Civ 66 (CA)
[604] [2000] EWCA Civ 66 (CA)
[605] [1982] QB 133 (Ch)
[606] [1976] Ch 179 (CA)
[607] [2000] EWCA Civ 66 (CA)
[608] [2009] UKHL 18
[609] [2009] UKHL 18

The Court granted the remedy of proprietary estoppel to T. P's remarks and conduct towards T over thirty years were intended to indicate to T that T would be the successor to P's farm at P's death. T had continued in rendering unpaid help to P and had forgone other opportunities that were available by P's encouragement, which created an expectation by T of inheriting the farm upon P's death.

Lord Walker approved and affirmed the test for proprietary estoppel thus:

> …identified the three main elements requisite for a claim based on proprietary estoppel as first, a representation made or assurance given to the claimant; second, reliance by the claimant on the representation or assurance; and third, some detriment incurred by the claimant as a consequence of that reliance.[610]

Thus, Lord Walker had approved the tripartite test of assurance, reliance and detriment for a proprietary estoppel.

As to the nature of the assurance made, Lord Scott asserted an implied intention could create a proprietary interest in land thus:

> ..to confine proprietary estoppel to cases where the representation, whether express or implied on which the claimant has acted is unconditional….[611]

Here, Lord Walker asserts that an assurance can be expressed or implied for a proprietary estoppel.

Lord Walker also advanced that the assurance must be determined from the contextual circumstances in which it was made. He stated thus:

[610] *Thorner v Major* [2009] UKHL 18 [15] (Lord Walker)
[611] *Thorner v Major* [2009] UKHL 18 [20] (Lord Scott)

> I would prefer to say that to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity is hugely dependent on context.[612]

Lord Neuberger also concurred and stated that:

> Perhaps more importantly, the meaning to be ascribed to words passing between parties will depend often very much on their factual context.[613]

Hence, Lord Walker and Lord Neuberger adduced that an assurance must be determined in the particular context in which it was made, and Lord Walker further affirmed that the assurance must be clear enough to give rise to a proprietary estoppel.

Thorner v Major[614], the first case of proprietary estoppel to be determined by the House of Lords (Supreme Court), gave efficacy and affirmation to the doctrine of proprietary estoppel developed by the lower Courts. It affirmed the threefold criteria of assurance, reliance and detriment established by Oliver J in ***Taylor Fashions***[615] and by Walker LJ in ***Gillett v Holt***[616], but with greater emphasis on the assurance made by the legal owner of land. It affirmed the court's willingness to grant a proprietary estoppel where a party had undertaken a course of conduct in reliance on the promise made by a landowner, and had suffered a detriment in consequence of that promise. This case also broadened the parameters of the doctrine to include an implied intention for the claimant to acquire an interest in land and the contextual relation or circumstances in which the promise was made. It sought to eliminate the problems encountered by the lower Courts in deciding whether proprietary estoppel should

[612] *Thorner v Major* [2009] UKHL 18 [56] (Lord Walker)
[613] *Thorner v Major* [2009] UKHL 18 [80] (Lord Neuberger)
[614] 2009] UKHL 18
[615] [1982] QB 133 (Ch)
[616] [2000] EWCA Civ 66 (CA)

operate on the facts before them. The decision in ***Thorner***[617] also effectively continued and approved the stance adopted by the lower courts towards the formulation and embrace of the doctrine of proprietary estoppel.

The strength of the modern approach is that the Courts have developed proprietary estoppel as a doctrine in its own right and have affirmatively established how and why it arises to create an equitable interest in land. The weakness of the modern approach is that the Supreme Court has prescribed the criteria for the establishment of a remedy based on proprietary estoppel arising from the nature of the assurance, contextual circumstances and implied intention of the parties which the lower courts will need to interpret. Following ***Thorner v Major***[618], no other case on proprietary estoppel has been taken to the Supreme Court, and until this occurs it remains unclear whether the doctrine will be applied in the manner envisioned by the Supreme Court.

5.3 What factors motivated the development of Proprietary Estoppel?

During the course of over a century, the courts have conceived, moulded and refined the now thriving doctrine of proprietary estoppel.

The decided cases illustrate that one possible catalyst for the development of proprietary estoppel has been the moral conviction of diverse members of the judiciary, who have been influenced by a desire to apply equitable principles to achieve a fair and conscionable outcome on the facts of the case. For example,

[617] [2009] UKHL 18
[618] [2009] UKHL 18

Heward[619] states that "Lord Denning was a moral conservative who believed in established rules of conduct. Lord Denning thought if the law was divorced from morality it would lose the respect of the people."[620]

Heward[621] also articulates that Lord Denning described a judge's role as follows:

> My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all that he legitimately can to avoid the rule, even to change it, so as to do justice in the instant case before him. He need not wait for legislation to intervene because that can never be of help in the instant case.[622]

It is arguably the moral conviction of Lord Denning MR and Danckwerts LJ. in ***Ives v High***[623] which established a right of way by estoppel as a proprietary interest in the land, and also created a proprietary interest in the land for the bungalow built thereon in ***Inwards v Baker***[624]. Similarly, it was the moral conviction of Lord Kingsdown in his dissenting judgment in ***Ramsden v Dyson***[625], which established an equitable estoppel by the words or conduct of a landowner for an interest in land or the creation of an equity for the expenditure on land. Each case of a proprietary interest in land is premised on equity, because equity will not permit a landowner to enforce his or her strict legal rights where it is unconscionable or inequitable to do so. The moral stance of members of the judiciary thus paved the way for the development of proprietary estoppel.

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[619] Edmund Heward, *Lord Denning: A Biography* (Weidenfeld and Nicolson 1990)
[620] Per Edmund Heward, *Lord Denning: A Biography* (Weidenfeld and Nicolson 1990) 219
[621] Edmund Heward, *Lord Denning: A Biography* (Weidenfeld and Nicolson 1990)
[622] Per Edmund Heward, *Lord Denning: A Biography* (Weidenfeld and Nicolson 1990) 161
[623] [1967] 2 QB 379 (CA)
[624] [1965] 2 WLR 212 (CA)
[625] [1866] LR 1 HL 129

It is also apparent that there were progressive judges who sought to develop the law. For example, Lord Denning in ***Central London Property Trust Ltd v High Trees House Ltd***[626] states that:

> At this time of day however, when the law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect.[627]

Similarly, Lord Denning in ***Crab v Arun District Council***[628] finally established a comprehensive model for proprietary estoppel regarding its nature, purpose, and the circumstances where it can arise, together with the effect of proprietary estoppel on a landowner's right. Also, Lord Scarman defined the criteria for ascertaining the existence of a proprietary estoppel by considering whether an equity had arisen, the extent of the equity and the satisfaction of the equity.

Likewise, it was the progressive judges of the Privy Council in ***Plimmer v Mayor of Wellington***[629] who affirmed and approved Lord Kingsdown's statement of the law on equitable estoppel and established the criteria for the creation of a new proprietary interest in land based on that judgment. This set a precedent for other courts to follow in cases such as ***Inwards v Baker***[630], ***Ives v High***[631], ***Crab v Arun District Council***[632] and ***Taylor Fashions v Liverpool Victoria Trustees Co. Ltd***[633]. These progressive judges sought to develop and extend the bounds of proprietary estoppel in response to the

[626] [1947] KB 130 (HC)
[627] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (HC) 135 (Lord Denning)
[628] [1976] Ch 179 (CA)
[629] [1884] 9 App. Cas. 699 (PC)
[630] [1965] 2 WLR 212 (CA)
[631] [1967] 2 QB 379 (CA)
[632] [1976] Ch 179 (CA)
[633] [1982] QB 133 (Ch)

circumstances before them, rather than force the circumstances into the legal straightjacket of earlier decisions.

Another major influence in the development of proprietary estoppel has been the judicial activism of the Courts. Judicial activism is described by ***Heward***[634] thus:

> It is a positive approach to the law with a readiness to stretch the law to a certain degree so that justice can be done in the particular case. It requires judicial courage as judges like to keep in step with their brother judges. Judicial activism includes a desire to meet the needs of the times. What is laid down in the nineteenth century is not necessarily what is wanted in the twentieth century and the law has to be adjusted to meet the different circumstances.[635]

Lord Denning was described as a judicial activist and this is reflected in his comprehensive description of proprietary estoppel in ***Crab v Arun District Council***[636]. According to ***Heward***[637], Lord Denning:

> …was bold and innovative, wished to restate the law in accordance with the established principles and hated the restrictions imposed by precedent. He was astute enough to circumvent awkward precedent so that justice could be done in the individual case before him; he did not wait for Parliament to amend the law.[638]

Judicial activism also appears to have been the driving force in ***Plimmer v Wellington***[639] to affirm the principle of equitable estoppel by Lord Kingsdown in ***Ramsden v Dyson***[640], and to create a proprietary interest in land in the face of a statute such as Section 2 of the Law of Property (Miscellaneous Provisions) Act

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[634] Per Edmund Heward, *Lord Denning: A Biography* (Weidenfeld and Nicolson 1990)
[635] Per Edmund Heward, *Lord Denning: A Biography* (Weidenfeld and Nicolson 1990) 219
[636] [1976] Ch 179 (CA)
[637] Per Edmund Heward, *Lord Denning: A Biography* (Weidenfeld and Nicolson 1990)
[638] Per Edmund Heward, *Lord Denning: A Biography* (Weidenfeld and Nicolson 1990) at the preface (ix)
[639] [1884] 9 App. Cas. 699 (PC)
[640] [1866] LR 1 HL 129

1989[641]. Likewise, it was judicial activism that re-stated the law on proprietary estoppel and re-defined its requirements in ***Taylor Fashions v Liverpool Victoria Trustees Ltd***[642], and it was judicial activism that led the House of Lords (Supreme Court) to give efficacy and affirmation to proprietary estoppel and to establish its requirements for an interest in land in ***Thorner v Major***[643]. Throughout the development of proprietary estoppel, the Courts have not been constrained by the strict formalities of the common law, but rather driven by equity to consider all the circumstances of the case to arrive at a decision based on equitable principles of good conscience. Judicial activism has caused the Courts to move with the times and the circumstances of the case before them, rather than adhere to the constraints of previously established principles. However, at no stage have the courts failed to uphold the intrinsic purpose underlying proprietary estoppel.

With the traditional approach of proprietary estoppel, the parties did not plead the intervention of estoppel but the Courts, nonetheless, invoked equity based on the words or conduct of the parties. Conversely, with the modern approach of proprietary estoppel, the parties did plead proprietary estoppel which, in turn, led the Courts to establish the protocol for its application and operation. Judicial activism in proprietary estoppel shows that the Courts were not concerned with what the law was, but what it ought to be.

The above combination of the moral conservatism of judges, the progressiveness of judges and the judicial activism of judges had spearheaded the development of

[641] *This section provides for a contract for the sale of land or other disposition of an interest in land can only be made in writing, and incorporate all the terms expressly agreed upon by the parties*.
[642] [1982] QB 133 (Ch)
[643] [2009] UKHL 18

proprietary estoppel and brought about the transition of facets of the doctrine from a traditional approach to the modern approach in law. This has, however, occurred against the pivotal backdrop of the courts' abiding insistence on preventing or curtailing unconscionable behaviour in accordance with equitable principles and the intrinsic purpose for which proprietary estoppel was conceived.

5.4 Conclusion

To summarize, the transition from the traditional to the modern approach of proprietary estoppel was a gradual process that evolved over a century. It did not arise spontaneously but developed on a case by case basis as the Courts determined the particular cases before them. It began as the doctrine of equitable estoppel and finally appropriated the label of "proprietary estoppel" because it was capable of creating a proprietary interest in land. Although the equitable doctrine was stifled in its early development by ***Willmott***[644], it gained new vigour following the Privy Council case of ***Plimmer***[645] and from then proceeded along a clear path to its affirmation as a doctrine of equitable land ownership by the House of Lords (Supreme Court) in ***Thorner v Major***[646]. It arose in response to, and in consequence of, the particular facts and circumstances in land disputes that were dealt with by the Courts through the interposition of equity. According to Lord Justice Cotton in ***Birmingham & District Land Co. v. The London & North Western Railway***[647] ***cited with approbation by Lord Denning in Crab v Arun District Council***[648], "…what passed (between the parties (my emphasis)) did not make a new agreement but what took place …. raised an equity

[644] [1880] 15 Ch D 96 (Ch)
[645] [1884] 9 App. Cas. 699 (PC)
[646] [2009] UKHL 18
[647] [1888] 40 Ch. D (CA)
[648] [1976] Ch 179 (CA)

against him"[649]. Likewise, Danckwerks L.J. asserted in ***Inwards v Baker***[650] that "… equity protects him so that an injustice is not perpetrated."[651] Hence, each decided case of proprietary estoppel is a decision in equity.

What is significant about the traditional approach is that it has established the framework of proprietary estoppel. It laid the foundation for proprietary estoppel, the proprietary character of proprietary estoppel and the flexibility of the doctrine to be applied in varying circumstances. With the modern approach, the Courts have affirmatively created new perspectives on proprietary estoppel for the acquisition of an interest in land. The Courts have established an all-inclusive paradigm on the application and operation of proprietary estoppel and have later re-defined and simplified the doctrine to be of universal application. The common thread between the traditional and modern doctrine is equity and the prevention of unconscionable behaviour, whereby a Court of Equity will hold a landowner bound by his or her words or conduct for an interest in land where a party has acted in detrimental reliance thereon.

Also, with both the traditional and modern approaches of proprietary estoppel, the burning question as to why the courts developed the doctrine and what motivated the judiciary is answered by five words in every case – 'equity speaks for the plaintiff'! The Courts have established that where an equity arises in land, it will not be allowed to fail, and where an equity is raised, the landowner is precluded from enforcing his or her strict legal rights. As Lord Denning emphatically stated in ***Crab v Arun District***

[649] *Crab v Arun District Council* [1976] Ch 179 (CA) 188 (Lord Denning), also *Birmingham & District Land Co. v. The London & North Western Railway* [1888] 40 Ch. D (CA) 622
[650] [1965] 2 WLR 212 (CA)
[651] *Inwards v Baker* [1965] 2 WLR 212 (CA) 218 (Danckwerts L.J)

Council[652], "Equity comes in true to form to mitigate the rigours of strict law."[653] Thus, equity has created a pillar of conscience by which judges are persuaded to rule against strict legal rights in relation to proprietary interests in land.

The next chapter will focus on proprietary estoppel in the House of Lords decision of ***Yeoman's Row Management Ltd v Cobbe***[654].

[652] [1976] Ch 179 (CA)
[653] *Crab v Arun District Council* [1976] Ch 179 (CA) 187
[654] [2008] UKHL 55

Chapter Six: Proprietary Estoppel in Yeoman's Row[655]

6.1 Introduction

This chapter examines the House of Lords decision in ***Yeoman's Row Management Ltd v Cobbe***[656] on the doctrine of proprietary estoppel. ***Yeoman's Row***[657] is one of the two cases thus far considered by the House of Lords on the status of the doctrine. The other case is ***Thorner v Major***[658] which will be dealt with in the following chapter. Although ***Yeoman's Row***[659] was primarily based on a "subject to contract" agreement rather than proprietary estoppel, their Lordships nonetheless considered the application of the doctrine to the facts in ***Yeoman's Row***[660] and adduced some principles for the finding of the estoppel. For example, their Lordships determined that proprietary estoppel is a principled doctrine that applies only to land, and not to commercial pre-contractual agreements relating to land. Lord Walker pointed out that in commercial cases, the claimant often only expects to acquire a contract (leading to a purchase of land) whereas the proper basis for estoppel (as exists in family cases) is an expectation of the claimant to obtain an interest in land.

The chapter demonstrates the House of Lords' approval of the doctrine and its elements, and assesses the impact of the principles introduced. It explores whether the principles are novel, whether they are consistent with those of the decided cases and whether they simplify the finding of an estoppel. The discussion presented is

[655][2008] UKHL 55
[656][2008] UKHL 55
[657][2008] UKHL 55
[658][2009] UKHL18
[659][2008] UKHL 55
[660][2008] UKHL 55

distinct from the existing literature[661] that has not thoroughly undertaken an investigation of the principles of proprietary estoppel established in ***Yeoman's Row***[662], and neither has it considered the extent to which those principles influence the development of the doctrine. The principles introduced by their Lordships help define the foundation and future of proprietary estoppel, and help put perspective on its operation by the courts, specifically the extent to which their interpretation and application of the doctrine upheld its purpose of redressing unconscionable behaviour in the contexts where proprietary estoppel arises.

This chapter leads to the discussion in further chapters of the thesis on whether or not ***Yeoman's Row***[663] has imported clarity and simplicity in the application of the doctrine by the courts.

6.2 The Decision of the House of Lords in Yeoman's Row Management Ltd v Cobbe[664]

In ***Yeoman's Row***[665], the Appellant (Y) was the owner of land for residential development and entered negotiations with the Respondent (C) for the sale of the land to C. The parties had arrived at an oral agreement on some terms but no written or draft contract was produced. The agreement required C at his own expense to make the application for residential development, and if planning permission was obtained, then Y would sell the land to C or a company nominated by C at an agreed price. Also,

[661] Richard Ridyard, 'Five Wheels on the Coach?' [2012] UKLSR Vol.1(1) 54; John Mee, 'Proprietary Estoppel and Inheritance: Enough is Enough?' [2013] Conv 280; Martin Dixon, 'Proprietary estoppel: a return to principle' [2009] 73 Conv 3; Ben McFarlane and Andrew Robertson, 'Apocalypse Averted: Proprietary Estoppel in the House of Lords' [2008] LQR 535; Sir Terrence Etherton, 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle' [2009] 73 Conv 104; Brian Sloan, 'Estoppel and the importance of straight talking' [2009] Conv. 2, 154
[662] [2008] UKHL 55
[663] [2008] UKHL 55
[664] [2008] UKHL 55
[665] [2008] UKHL 55

at his own expense C had to develop the land in accordance with the planning permission, sell off the residential units, and pay 50% of the amount where the gross proceeds exceeded £24 million.

In accordance with the agreement, C expended considerable monies and time in obtaining planning permission. Upon C obtaining planning permission, Y sought to re-negotiate the financial terms of sale for a substantial increase in the gross proceeds of sale as originally agreed. C disagreed on the new financial terms and Y refused to proceed on the originally agreed financial terms, so C commenced legal proceedings. Both the High Court and the Court of Appeal had granted relief in proprietary estoppel but the House of Lords disagreed.

Notably, an oral contract for the sale or purchase of land is normally void without writing which complies with section 2 Law of Property (Miscellaneous Provisions) Act 1989. The contention in ***Yeoman's Row***[666] was that the mere oral agreement did not meet the statutory requirements. Hence, the reliance on equity via proprietary estoppel as a defence.

Lord Scott stated that the remedy to which Mr. Cobbe was entitled was neither based on estoppel nor was it estoppel in character. The question to be determined by their Lordships was what relief should C be granted in the circumstances of the case. The House of Lords unanimously agreed that C was entitled to a quantum meruit payment for his services in obtaining the planning permission as he did not intend to provide his services gratuitously nor did Y understand the contrary. Their Lordships held that both

[666] [2008] UKHL 55

parties knew that their oral agreement was subject to further negotiations and was not legally binding.

Lord Walker cited Lord Cranworth from ***Ramsden v Dyson***[667] that agreements made in honour were not binding and were excluded both by the courts of equity and of law:

> If anyone makes an assurance to another, with or without consideration, that he will do or will abstain from doing a particular act but he refuses to bind himself and says that for the performance of what he has promised the person to whom the promise has been made must rely on the honour of the person who has made it, this excludes the jurisdiction of courts of equity no less than of courts of law.[668]

Lord Walker also referred to similar comments made by Lord Wensleydale that an arrangement which was expressly and deliberately acknowledged to be a "gentleman's agreement" may not be capable of giving rise to an estoppel.[669] Lord Walker maintained that the parties knew the agreement was binding in honour only and was not legally binding. He stated that both parties were experienced in property matters and knew the position between themselves. Lord Scott also emphasized that there was no certainty in relation to the expectation created or encouraged by Y to create a proprietary estoppel, nor that an interest in land would be acquired.

6.3 The Approach to Proprietary Estoppel in Yeoman's Row[670]

The House of Lords embraced the test formulated by Oliver J in ***Taylor Fashions***[671] as the modern test of proprietary estoppel, and dismissed the five probanda in ***Willmott v Barber***[672].

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[667] [1866] LR 1 HL 129
[668] *Yeoman's Row* [2008] UKHL 18 [53] (Lord Walker)
[669] *Yeoman's Row* [2008] UKHL 18 [53] (Lord Walker)
[670] [2008] UKHL 55

Lord Walker remarked that the five probanda propounded by Fry J had over the years proven to be an impediment to the development of equitable estoppel until the position was finally clarified by Oliver J in ***Taylor Fashions***[673]. However, his Lordship did comment that these five probanda had never been intended to be indispensable prerequisites to the operation of proprietary estoppel, Fry J had indicated that he was not seeking to stipulate a generic and all-embracing test. On this point, Lord Walker highlighted that the judgment in ***Willmott***[674] was based on the facts before the court:

> I think it is very questionable whether after what Bowyer has done he could interfere with the plaintiff's possession of the one acre. But that point is not raised in this action, and my decision will in no way affect it.[675]

Hence, Lord Walker explained that the context in which Fry J formulated the five probanda was based on the particular facts of the case that were being dealt with by the court, rather than comprising a formulation for the universal application of proprietary estoppel.

Lord Walker stated that Oliver J had in ***Taylor Fashions***[676] "…analyzed the authorities in a masterly way and put this aspect of the law back on the right track". He related the requirements of proprietary estoppel established by Oliver J thus:

> If A under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a Court of Equity will compel B to give effect to such expectation.[677]

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[671] [1982] QB 133 (Ch); *See facts of Taylor Fashions* [1982] QB 133 (Ch) *and the description of the test by Oliver J in Chapter 5 of this thesis.*
[672] [1880] 15 Ch D 96 (Ch)
[673] [1982] QB 133 (Ch)
[674] [1880] 15 Ch D 96 (Ch)
[675] *Yeoman's Row* [2008] UKHL 18 [57] (Lord Walker)
[676] [1982] QB 133 (Ch)
[677] *Taylor Fashions* [1982] QB 133 (Ch) 910 (Oliver J)

Here, Lord Walker approved the requirements of assurance, reliance, detriment and unconscionability established by Oliver J for a finding of proprietary estoppel. Lord Scott also approved and affirmed these pre-requisite criteria described by Oliver J. However, their Lordships did express reservations about the overriding influence of unconscionability advanced by Oliver J in the determination of the estoppel.

Accordingly, Lord Walker and Lord Scott in ***Yeoman's Row***[678] affirmed the essential components of the established doctrine of proprietary estoppel, by ascertaining the requirements of the doctrine and endorsing its application to land in conformity with ***Taylor Fashions***[679]. This arguably accorded a measure of consistency in the application and operation of the doctrine by the lower courts.

6.4 The Principles of Proprietary Estoppel in Yeoman's Row[680]

Lord Scott and Lord Walker established a number of key principles for the application and operation of proprietary estoppel as follows:

First, proprietary estoppel is a principled doctrine that is not subject to the whims and fancies of the courts.

Lord Scott stated that proprietary estoppel is a principled doctrine that is not subjective, but is objectively ascertained upon established principles. He cited Deane J in ***Muschinski v Dodds***[681] in a judgment concurred by Mason J where he elaborated on the nature and function of constructive trust, that Lord Walker considered was equally

[678] [2008] UKHL 55
[679] [1982] QB 133 (Ch)
[680] [2008] UKHL 55
[681] [1985] 160 CLR 583 (HC)

applicable to proprietary estoppel. He described the nature of proprietary estoppel in the following terms:

> …as an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, starting from the conceptual foundations of such principles ….[682]

Lord Scott continued on the principled nature of proprietary estoppel that:

> Under the law of this country – as I venture to think under the present law of England … proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party 'ought to win' … and the 'formless void' of individual moral opinion…[683]

Here, Lord Scott affirmed the objective character of proprietary estoppel and the operation of the doctrine on established equitable principles and sound legal reasoning. He articulated that the court embraces a legitimate process of analogy, induction and deduction, rather than subjective views and individual moral opinion.

Lord Walker also asserted the principled nature of proprietary estoppel in the following terms:

> Equitable estoppel is a flexible doctrine which the court can use in appropriate circumstances to prevent injustice caused by the vagaries and inconsistency of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions.[684]

[682] *Yeoman's Row* [2008] UKHL 55 [17] (Lord Scott)
[683] *Yeoman's Row* [2008] UKHL 55 [17] (Lord Scott)
[684] *Yeoman's Row* [2008] UKHL 55 [46] (Lord Walker)

Hence, Lord Walker ascertained that proprietary estoppel is based on established principles of law, and is not founded on ungrounded judicial discretion or subjective criteria or opinion.

Their Lordships thus concluded that the objective nature of proprietary estoppel had been alluded to in previously decided cases without being explicitly explained. For example, in ***Crab v Arun***[685] and ***Taylor Fashions***[686] the courts asserted the circumstances whereby a proprietary estoppel may arise, but did not specifically focus on, or elaborate upon the objective nature of the doctrine. If it is possible to apply a consistently objective approach, as articulated in ***Yeoman's Row***[687], this may arguably lend more clarity to the operation and application of the doctrine of proprietary estoppel.

Second, proprietary estoppel requires the expectation of a certain interest in land.

Lord Scott referred to ***Ramsden v Dyson***[688] and ***Taylor Fashions***[689] that established the requirement for a claim in proprietary estoppel to relate to a certain interest in land. His Lordship remarked that in ***Ramsden v Dyson***[690], Lord Kingsdown emphasized that an informal agreement for an interest in land was the core of the doctrine thus:

> If a man under a verbal agreement with a landlord for certain interest in land, or what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest takes possession of such land ….[691]

[685] [1976] Ch 179 (CA)
[686] [1982] QB 133 (Ch)
[687] [2008] UKHL 55
[688] [1866] LR 1 HL 129
[689] [1982] QB 133 (Ch)
[690] [1866] LR 1 HL 129
[691] *Yeoman's Row* [2008] UKHL 55 [19] (Lord Scott)

Lord Scott stated that the requirement of "a certain interest in land" is the basis for a claim in proprietary estoppel, and provide clarity on the object of the parties' dealings or arrangements. He emphasized that there was not a certain interest in land in ***Yeoman's Row***[692]***,*** and no certainty for the expectation created or encouraged by the Appellant to invoke proprietary estoppel.

Lord Scott also referred to the case of ***Taylor Fashions Ltd v Liverpool Victoria Trustees Co. Ltd***[693] where Oliver J stated the requirement of 'a certain interest in land' for a proprietary estoppel as follows:

> …if A under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a Court of Equity will compel B to give effect to such expectation.[694]

Hence, unless there was an expectation created or encouraged for the acquisition of an interest in land, then the doctrine of proprietary estoppel could not be invoked by the claimant.

In ***Yeoman's Row***[695], the expectation of Cobbe was merely for further negotiations leading to a formal contract. Hence, any expectation of a certain interest in land was contingent on further contractual negotiations and the conclusion of a formal written contract.[696] Lord Scott asserted that an expectation dependent upon the conclusion of a successful negotiation is not an expectation of an interest having comparable certainty to the certainty envisaged in the test required to invoke proprietary estoppel

[692] [2008] UKHL 55
[693] [1982] QB 133 (Ch)
[694] *Yeoman's Row* [2008] UKHL 55 [18] (Lord Scott)
[695] [2008] UKHL 55
[696] *Yeoman's Row* [2008] UKHL 55 [21] (Lord Scott)

in ***Taylor Fashions***[697].[698] Hence, no proprietary estoppel could have arisen at minimum, without an oral agreement for an interest in land.

This same principle has resonated throughout the period from the inception of the doctrine by Lord Kingsdown in ***Ramsden v Dyson***[699] and the succession of cases following including ***Inwards v Baker***[700], ***Plimmer v Wellington***[701] and ***Ives v High***[702].

Third, unconscionability is not the overriding factor or requirement in the determination of a proprietary estoppel.

Their Lordships maintained that unconscionability, though highly relevant, does not supersede the importance of the other criteria of assurance, reliance and detriment. Rather, it is used in combination with them in the determination of the estoppel. Lord Scott illustrated the status of unconscionability in the following terms:

> My Lords, unconscionability of conduct may well lead to a remedy but in my opinion proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present. These ingredients should include in principle a proprietary claim made by a claimant and an answer to that claim based on some fact, or some point of mixed fact and law that the person against whom the claim is made can be estopped from asserting.[703]

Lord Scott continued to comment on the requirements of the doctrine thus:

> To treat a "proprietary estoppel equity" as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behavior is in my respectful opinion, a recipe for confusion.[704]

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[697] [1982] QB 133 (Ch)
[698] *Yeoman's Row* [2008] UKHL 55 [18] (Lord Scott)
[699] [1866] LR 1 HL 129
[700] [1965] 2 QB 29 (CA)
[701] [1884] 9 App Cas 699 (PC)
[702] [1967] 2 QB 379 (CA)
[703] *Yeoman's Row* [2008] UKHL 55 [16] (Lord Scott)
[704] *Yeoman's Row* [2008] UKHL 55 [16] (Lord Scott)

Here, Lord Scott established that proprietary estoppel is a doctrine that assimilates the prescribed formula of assurance, reliance, detriment and unconscionability. He asserted that neither criteria is more relevant than another, nor does any carry more weight. It is the combined effect of these interconnected ingredients that determine the estoppel.

Lord Walker also asserted the relevance of unconscionability in the determination of proprietary estoppel as follows:

> …it should always be used as an objective value judgment on behavior (regardless of the state of mind of the individual in question). As such it does in my opinion play a very important part in the doctrine of equitable estoppel, in unifying and confirming as it were the other elements. If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again.[705]

Here, Lord Walker stressed the unifying characteristic of unconscionability to underpin the other elements of the estoppel, so as to invoke equity against the conscience of the defendant. Unconscionability is the causal link and catalyst for the equitable estoppel to arise.

The above is consistent with the principle in ***Taylor Fashions***[706] and ***Gillett v Holt***[707] whereby unconscionability appears to be the pre-requisite for proprietary estoppel to operate. Although their Lordships agreed that the importance of unconscionability should not be overstated, they were nonetheless united in their view that unconscionable behavior was an indispensable factor in the invocation of equity to invoke estoppel against the conscience of the promisor.

[705] *Yeoman's Row* [2008] UKHL 55 [92] (Lord Walker)
[706] [1982] QB 133 (Ch)
[707] [2000] ECWA Civ 66 (CA)

Their Lordships favoured a holistic assessment of assurance, reliance, detriment and unconscionability, without promoting the importance of one criterion over another. Nonetheless, the existence of unconscionability is pivotal to the operation of proprietary estoppel.

Fourth, proprietary estoppel does not apply in a commercial context involving similar facts as Yeoman's Row[708].

Lord Walker established that proprietary estoppel typically arises in a domestic or family context. Estoppel did not operate in the particular commercial context of ***Yeoman's Row,***[709] but there are numerous cases such as ***Ives v High***[710], ***Yaxley v Gotts***[711] and ***Taylor Fashions***[712] where estoppel operated in a commercial context. His Lordship illustrated the difference between a commercial context and a domestic or family context as follows:

> In the commercial context, the claimant is typically a business person with access to legal advice and what he or she is expecting to get is a contract. In the domestic or family context, the typical claimant is not a business person and is not receiving legal advice. What he or she wants and expects to get is an interest in immovable property, often for long-term occupation as a home. The focus is not on intangible legal rights but on the tangible property which he or she expects to get.[713]

In other words, proprietary estoppel in the family or domestic context deals with the expectation of an interest in land, rather than simply the negotiation as a prelude to a formal contract of rights in land.

[708] [2008] UKHL 55
[709] [2008] UKHL 55
[710] [1967] 2 QB 379 (CA)
[711] [2000] Ch 162 (CA)
[712] [1982] QB 133 (Ch)
[713] *Yeoman's Row* [2008] UKHL 55 [68] (Lord Walker)

Lord Walker further stated that in relation to commercial transactions, proprietary estoppel in a commercial context would introduce considerable uncertainty into commercial negotiations, and that although "equity has some important functions in regulating commercial life, those functions must be kept within proper bounds"[714]. Hence, the negotiations involved in commercial transactions import uncertainty as to the dealings of the parties that preclude the application of proprietary estoppel.

This principle elucidates that proprietary estoppel does not apply in a commercial context on similar facts as ***Yeoman's Row***[715], as it imports uncertainty in commercial transactions. The doctrine exerts a broad influence on domestic and family arrangements. The limitation of proprietary estoppel in the commercial context as in ***Yeoman's Row***[716], is a new development in the operation of the doctrine and provides guidance for future cases in proprietary estoppel.

Fifth, 'subject to contracts' do not create a proprietary interest in land.

Lord Scott explained that the reason why a proprietary estoppel cannot arise in a 'subject to contract case' is that "the would-be purchaser's expectation of acquiring an interest in the property"[717] is entirely speculative. He asserted thus:

> The reason why in a "subject to contract case", a proprietary estoppel cannot ordinarily arise is that the would-be purchaser's expectation of acquiring an interest in the property in question is subject to a contingency that is entirely under the control of the other party to the negotiations …[718]

[714] *Yeoman's Row* [2008] UKHL 55 [85] (Lord Walker)
[715] [2008] UKHL 55
[716] [2008] UKHL 55
[717] *Yeoman's Row* [2008] UKHL 55 [25] (Lord Scott)
[718] *Yeoman's Row* [2008] UKHL 55 [25] (Lord Scott)

Hence, in a subject to contract case, a would-be purchaser's expectation in acquiring an interest in land could be withdrawn, whether expressly or by inference from conduct, and therefore could not establish an arguable case for proprietary estoppel.

For example, in the case of ***Yeoman's Row***[719], negotiations had been made subject to contract, and in the end no contract was formed, and therefore no remedy could be granted in proprietary estoppel. Lord Scott maintained that the representations of intention on which Cobbe acted could not in principle entitle him to a remedy that intended to give him the value of his expectations engendered by the representations.

This principle qualifies the type of arrangements that give rise to a proprietary estoppel and its limitation in the context of negotiable contracts. Their Lordships in ***Yeoman's Row***[720] therefore affirmed the nature and character of proprietary estoppel as an objective and principled doctrine. The pre-conditions required for proprietary estoppel to arise, such as a "certain interest in land" alerts the legal practitioner as to whether a litigant has a viable action lying in proprietary estoppel, and enables advice to be given on whether or not to proceed with a claim.

Their Lordships also established the limits to a potential claim in proprietary estoppel such as the exclusion of 'subject to contract' agreements, and confined the circumstances in which proprietary estoppel can arise – in a domestic and family context and not a commercial context as in ***Yeoman's Row***[721]. Thus, their Lordships

[719] [2008] UKHL 55
[720] [2008] UKHL 55
[721] [2008] UKHL 55

developed a new perspective towards the judicial application and operation of the doctrine.

The strength of their Lordships' decision in ***Yeoman's Row***[722] is that it imports clarity and consistency with the decided cases in proprietary estoppel such as ***Gillett v Holt***[723], ***Crab v Arun District Council***[724], ***Ives v High***[725] and ***Taylor Fashions***[726]. The House of Lords gave credence to the doctrine, and approved its rationale for a proprietary interest in land. The weakness of ***Yeoman's Row***[727] is that the court did not fully examine the doctrine of proprietary estoppel as a whole, as their decision was limited by the pertinent issues to be decided. Also, their Lordships did not define the role of unconscionability in proprietary estoppel, but only emphasized its significance. Their Lordships decision did not seek to re-invent a new doctrine of proprietary estoppel, or to transform the doctrine of the lower courts, but merely to implant clarity and provide guidance on the application of the doctrine. Although, the case of ***Yeoman's Row***[728] was not primarily based on proprietary estoppel, the court had nonetheless articulated instructive principles for the future operation and scope of the doctrine.

6.5 Conclusion

Their Lordships did not seek to re-define the doctrine of proprietary estoppel and neither to re-state the law established by the lower courts. To a large extent, they

[722] [2008] UKHL 55
[723] [2001] 2 All ER 289 (CA)
[724] [1976] Ch 179 (CA)
[725] [1967] 2 QB 379 (CA)
[726] [1982] QB 133 (Ch)
[727] [2008] UKHL 55
[728][2008] UKHL 55

ratified the existing decisions and affirmed the traditional course of the doctrine. However, the House of Lords also dealt with the constraints on the application of the doctrine within the context of commercial transactions involving negotiable contracts. This provided some guidance on the operation and scope of the doctrine, and gave an indication to the legal practitioner and litigant on the type of cases to which proprietary estoppel might apply. Even had the later case of ***Thorner***[729] not proceeded to the House of Lords, the doctrine would have been preserved and accorded judicial status at the highest level by their Lordships in ***Yeoman's Row***[730].

The next chapter will focus on proprietary estoppel in the House of Lords decision of ***Thorner v Major***[731].

[729] [2009] UKHL 18
[730] [2008] UKHL 55
[731] [2009] UKHL 18

Chapter Seven: Proprietary Estoppel in Thorner v Major[732]

7.1 Introduction

This chapter provides an in-depth examination of the House of Lords decision in ***Thorner v Major***[733] on the doctrine of proprietary estoppel. Since ***Yeoman's Row***[734], ***Thorner***[735] is the only case in which the House of Lords has made a determination in proprietary estoppel. Not only did their Lordships revisit the lower courts' decisions on the doctrine, but assiduously considered its application and devised new principles and practices that the courts should adopt in determining the estoppel.

The chapter illustrates the House of Lords approval of the doctrine and its elements, the principles affirmed for its application, and the extent to which ***Thorner***[736] represents a restatement of the stance taken by the Court of Appeal or a divergence from the lower court. It also assesses whether the principles advanced by their Lordships had developed the law beyond what was applied by the lower courts, whether the principles propounded were novel or consistent with the decided cases, or whether they simplified the law of proprietary estoppel.

The discussion adopted in this chapter is distinct from the existing literature[737] that has not undertaken an in-depth investigation of the principles developed in ***Thorner***[738] but

[732] [2009] UKHL 18
[733] [2009] UKHL 18
[734][2008] UKHL 55
[735][2009] UKHL 18
[736][2009] UKHL 18
[737] G. Griffith, 'Proprietary Estoppel-the Pendulum Swings Again?' [2009] 73 Conv 141; K.R. Handley, 'Unconscionability in Estoppel by Conduct: Triable Issue or Underlying Principle?' [2008] 72 Conv 382; Brian Sloan, 'Estop Me If You Think You've Heard It' [2009] CLJ 518; Lord Neuberger of Abbotsbury, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' [2009] CLJ 68, 537; Judith Bray,

presented a holistic perspective of the House of Lords decision. Although some legal scholars[739] have considered the impact of ***Thorner***[740] on the future of proprietary estoppel, they have not analyzed and compared its implications on the previous cases before ***Thorner***[741]***.*** The chapter illustrates the modern approach of the House of Lords for the future application of the doctrine.

This chapter further explores the question of whether the underlying purpose of estoppel in redressing unconscionable behaviour was upheld by their Lordships, whether or not the principles adduced are consistent with those of the decided cases, and whether the principles advocated have created clarity in the application of the doctrine by the courts. This aspect of the doctrine has not been investigated by legal scholars[742] who have discussed some of the principles advanced by their Lordships, but not to the extent and depth presented in this chapter.

The chapter leads to the discussion in further chapters of the thesis on whether or not, and to what extent ***Thorner***[743] has influenced any future decisions of the courts in proprietary estoppel.

'Proprietary Estoppel: A New Chapter Dawns?' [2010] DLJ Vol.22(175); John Mee, 'The Limits of Proprietary Estoppel: Thorner v Major' [2009] CFLQ Vol.21(3)

[738] [2009] UKHL 18

[739] Judith Bray, 'Proprietary Estoppel: A New Chapter Dawns?' [2010] DLJ Vol.22(175); John Mee, 'The Limits of Proprietary Estoppel: Thorner v Major' [2009] CFLQ Vol.21(3)

[740] [2009] UKHL 18

[741] [2009] UKHL 18

[742] G. Griffith, 'Proprietary Estoppel-the Pendulum Swings Again?' [2009] 73 Conv 141; K.R. Handley, 'Unconscionability in Estoppel by Conduct: Triable Issue or Underlying Principle?' [2008] 72 Conv 382; Brian Sloan, 'Estop Me If You Think You've Heard It' [2009] CLJ 518; Lord Neuberger of Abbotsbury, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' [2009] CLJ 68, 537; Judith Bray, 'Proprietary Estoppel: A New Chapter Dawns?' [2010] DLJ Vol.22(175); John Mee, 'The Limits of Proprietary Estoppel: Thorner v Major' [2009] CFLQ Vol.21(3)

[743] [2009] UKHL 18

7.2 Thorner v Major[744] in the House of Lords

In ***Thorner***[745], T (also referred to as D) had worked for his cousin P for almost thirty years without pay on P's promise that D would inherit P's farm upon P's death. Over the years P's words and conduct such as handing D the bonus notice to P's two insurance policies for the payment of P's death duties, and making a will leaving the farm to D had led D to believe that P would keep his promise. However, P had destroyed the will and had not made another before his death, and the farm passed to P's personal representatives upon P's death. D made a claim for proprietary estoppel.

The High Court held there was a proprietary estoppel. The Court held that by P handing over the bonus notice and saying that it was for his death duties, P indicated to D that D would be P's successor to P's farm upon P's death. P's conduct encouraged the expectation which D had formed that D would be P's successor and encouraged D to continue working without pay for P. The Court also held that it was reasonable for D to understand and rely on P's words and conduct to inherit P's farm. D was granted a proprietary estoppel to P's farm and received the land, buildings, live and dead stock and other assets of P's farming business, and had to indemnify the personal representatives in respect of the inheritance tax payable on P's farm.

An appeal was made against the High Court's decision. The Court of Appeal held there was no clear and unequivocal assurance for the farm from P to D, and therefore no proprietary estoppel could be granted to D. D appealed to the House of Lords.

[744] [2009] UKHL 18
[745] [2009] UKHL 18

The House of Lords (now Supreme Court) allowed the appeal and restored the decision of the High Court. Their Lordships held that a proprietary estoppel was established, as P's assurances, objectively assessed, was intended for D to inherit P's farm at P's death.

7.3 The Approach to Proprietary Estoppel in Thorner v Major[746]

Thorner[747] was the first case founded in proprietary estoppel to reach the House of Lords (now Supreme Court) since the evolution of the doctrine by Lord Kingsdown in ***Ramsden v Dyson***. The court approved the judicial principle of proprietary estoppel by which an interest in land could be acquired.

Their Lordships also affirmed the same elements required for a proprietary estoppel as previously established in ***Taylor Fashions Ltd V Liverpool Victoria Trustees Co. Ltd***[748]. Lord Walker stated that the three major elements requisite for a claim in proprietary estoppel includes a representation made or an assurance given to the claimant; reliance by the claimant on the representation or assurance, and some detriment incurred by the claimant as a consequence of that reliance.[749] The approval of these requirements by their Lordships illustrate their necessity for a successful claim in proprietary estoppel, and also impute certainty in the law and pleadings of a case founded on proprietary estoppel.

[746] [2009] UKHL 18
[747] [2009] UKHL 18
[748] [1982] QB 133 (Ch)
[749] *Thorner v Major* [2009] UKHL 18 [29] (Lord Walker)

Their Lordships proceeded further to broaden the scope of the assurance required for a proprietary estoppel. More emphasis was placed on the role of an assurance in creating the estoppel. In other words, unless the assurance was proved, then the other elements could not be invoked to do so. Their Lordships established a very broad test for proving the assurance, including the nature of the assurance made; the context in which it was made; whether the assurance was expressed or implied; whether the subject matter of the assurance was identifiable, and also that the assurance was a finding of fact by the trial judge. This test gave the promisee a wide latitude for proving estoppel by direct or indirect statements made, by the context in which it was made, or the contextual relationship of the parties. Hence, the task of proving the assurance was made easier or less onerous for the promisee.

In ***Thorner***[750], their Lordships[751] also rejected the 'clear and equivocal' test for an assurance that was established by the Court of Appeal**.** Their Lordships determined that it was sufficient if the assurance was 'clear enough'. The clear and equivocal test was more restrictive, and constituted an imperative intention by the landowner to give an interest in land. On the other hand, the 'clear enough' test had narrowed the assurance to being apparent or discernible rather than certain and unquestionable. Hence, the intricacies of how and whether an assurance was binding depended on the lesser standard of being just clear enough to understand that it was intended to be

[750] [2009] UKHL 18

[751] *Lord Hoffman, Lord Scott, Lord Roger and Lord Walker had rejected the clear and equivocal test but Lord Neuberger did not. Lord Neuberger emphasized that he is not seeking to cast doubt on the proposition that there must be some sort of assurance which is "clear and equivocal" but asserted that the proposition is subject to three qualifications namely: the effect of words or actions must be assessed in their context; that the court should not search for ambiguity or uncertainty, but should assess the question of clarity and certainty practically and sensibly, as well as contextually; and where an assurance gives rise to more than one meaning, the ambiguity should not deprive a person who reasonably relied on the assurance of all relief but should be accorded relief on the basis of the interpretation that is least beneficial to him. Thorner v Major* [2009] UKHL 18 [84]-[86] (Lord Neuberger)

binding. Thus, in ***Thorner***[752] their Lordships amplified the nature and purpose of the assurance, the circumstances in which it could arise, and how it could be proved.

The House of Lords in ***Thorner***[753] also re-stated the correct test for determining whether an estoppel could arise on the facts of a case. The Court of Appeal had established the "subjective test" of whether the landowner had intended the promisee to rely on the representation made, or to have foreseen that the promisee would have done so. This was a departure from the traditional approach adopted in the decided cases whereby the court focused on the detrimental reliance suffered by a promisee on the assurances of a landowner, rather than the landowner's subjective intentions.

Their Lordships in ***Thorner***[754] affirmed the test applied in previous cases to be whether the promisee had understood and interpreted the words or conduct of the landowner to create an expectation for an interest in land.[755] Hence, the burden of proof for the estoppel was reversed and imposed on the landowner to disprove the assurance made to the promisee and the expectation created for that interest in land. Thus, their Lordships had established an objective test of whether it was reasonable for the promisee to rely on the assurance made, rather than looking at the subjective intentions of the landowner in making the promise or representation.

Thorner[756] thus introduced more clarity in the law of proprietary estoppel. It affirmed the longstanding doctrine, devised and developed by the lower courts, and established

[752] [2009] UKHL 18
[753] [2009] UKHL 18
[754] [2009] UKHL 18
[755] Lord Hoffman [5], Lord Scott [17], Lord Roger [24], [26]-[27], Lord Walker [60], Lord Neuberger [77]
[756] [2009] UKHL 18

new criteria for its operation and application by the courts. Not only had their Lordships further developed the law to be applied by the courts, but had shifted the focus to the assurance made.

7.4 The Principles of Proprietary Estoppel in Thorner v Major[757]

Thorner[758] is the leading case in proprietary estoppel to be decided by the House of Lords, and is the authoritative precedent and historical pinnacle in the law of proprietary estoppel. Their Lordships pronounced cardinal principles for the future application and operation of the doctrine as follows:

First, the affirmation of the pre-conditions necessary for a proprietary estoppel. Their Lordships approved and affirmed the requirements of assurance, reliance, detriment and unconscionability for establishing proprietary estoppel.

Lord Scott and Lord Walker asserted that the elements required to prove a proprietary estoppel are a representation made or assurance given to the claimant, reliance by the claimant on the representation or assurance given, and some detriment incurred by the claimant in consequence of this reliance.[759]

Lord Walker also emphasized the importance of unconscionability for a proprietary estoppel based on the retrospective nature of the doctrine. He expressed that proprietary estoppel is backward looking from the moment of the promise to the events which have transpired to determine whether it would be unconscionable for

[757] [2009] UKHL 18
[758] [2009] UKHL 18
[759] *Thorner v Major* [2009] UKHL 18 [15], [29] (Lord Scott and Lord Walker)

the promise not to be kept. Conversely, the remedy awarded in proprietary estoppel is prospective by nature. For example, estoppel creates an interest in land (if that is what the court decides) from the moment the decision is made. Unlike the constructive trust which operates retrospectively and always gives the claimant an equitable interest in land, estoppel operates prospectively and an interest in land created by estoppel thus only binds third parties dealing with the land from the date the court declares that interest (if any) exists.

Their Lordships approved and confirmed the pre-conditions of proprietary estoppel established in ***Taylor Fashions***[760] ***and Gillett v Holt***[761]. In ratifying the requirements of the estoppel, the House of Lords defined the precise elements that create the estoppel, and confirmed its capacity to give rise to a proprietary interest.

Second, an assurance can be made by indirect statements, mere inferences and implied statements.

Their Lordships determined that a promise or representation may be inferred by the words or conduct of the landowner, or by the landowner's implied intention or indirect statements relating to an interest in land. For example, Lord Hoffman asserted that the representations made to David (Appellant) were never made expressly but were a "matter of implication and inference from indirect statements and conduct"[762]. It consisted of Peter (deceased, whose estate was represented by the Respondents) handing over to David an insurance policy bonus notice to pay Peter's death duties and other oblique remarks which indicated that Peter intended David to inherit the farm.

[760] [1982] QB 133 (Ch)
[761] [2000] ECWA Civ 66 (CA)
[762] *Thorner v Major* [2009] UKHL 18 [2] (Lord Hoffman)

Likewise, the trial judge found as a fact that Peter's words and acts were reasonably understood by David as an assurance that David would inherit the farm, and Peter intended his acts to be so understood.[763] Thus, an assurance can be created by indirect statements, mere inferences or implied statements relating to the landowner's land so long as it is reasonably construed and interpreted as an assurance by the promisee.

Lord Roger also adduced that oblique or vague statements, or mere inferences for an interest in land, were capable of creating an assurance for that interest if interpreted or understood to do so. His Lordship maintained that David had years of experience in interpreting what Peter said and did, so as to form a reasonable view that Peter was giving him the assurance that he was to inherit the farm and David relied on Peter's assurance.[764]

This approach is innovative, as none of the decided cases had established that the indirect statements, inferences or implied intention of the promisor constituted an assurance. Their Lordships had broadened the scope of an assurance for proprietary estoppel beyond the oral arrangements or promises of a landowner to incorporate the landowner's implied intention, inferences or indirect statements for an interest in land. Irrespective of a landowner's oblique remarks or intentions, an assurance depended on how it was reasonably interpreted and understood by the promisee. Although the decided cases demonstrated that the courts apply the narrow test for an assurance as whether or not the words or conduct of the promisor sufficiently amounted to an assurance, their Lordships introduced a new test of how the

[763] *Thorner v Major* [2009] UKHL 18 [2] (Lord Hoffman)
[764] *Thorner v Major* [2009] UKHL 18 [26] (Lord Rodger)

landowner's words or actions were reasonably construed by the promisee to lead to the promisee's detrimental reliance thereon. Hence their Lordships extended the ambit of an "assurance" to encompass implied as well as expressed representations.

Third, an assurance must be assessed on the context in which it was made.

Lord Roger articulated that the context in which an assurance is made provides insight on the unusual situation and circumstances in which the promise was made. For example, His Lordship stated since David worked on the farm without pay for almost thirty years, and his only income was pocket money from his father, then that unusual situation provided 'the context in which the remarks which lie at the heart of the case of proprietary estoppel fall to be interpreted'[765].

Likewise, Lord Scott stated that the relationship between Peter and David was a familial one and the conduct of the parties in the years leading up to Peter's death had to be assessed in the context of that familial relationship.[766] For example, Lord Scott asserted that David's many years of unpaid labour on the farm and assistance with the management of Peter's farming business took place in the context of that relationship.[767] Similarly, David's expectation of inheriting Peter's farm was driven by years of unpaid labour and his understanding of Peter's remarks and intentions. Hence the contextual relationship of the parties provide insight on the assurance of the promisor and the detrimental reliance of the promisee.

[765] *Thorner v Major* [2009] UKHL 18 [23] (Lord Rodger)
[766] *Thorner v Major* [2009] UKHL 18 [12] (Lord Scott)
[767] *Thorner v Major* [2009] UKHL 18 [12] (Lord Scott)

Lord Hoffmann also indicated that the context in which the words or conduct of the representor was made impacted upon the future conduct of the promisee. His Lordship stated thus:

> Past events provide context and background for the interpretation of subsequent events and subsequent events throw retrospective light upon the meaning of past events.[768]

Hence, the incident of Peter handing over the insurance policy to David to pay his death duties led David to rely on Peter's assurances of inheriting the farm that was affirmed by later words and conduct from Peter. Moreover, Peter's remarks and conduct encouraged David to continue with his unpaid help to Peter in the expectation of being Peter's successor.

Lord Neuberger also adduced that "… the effect of words or actions must be assessed in their context."[769] His Lordship remarked that this was particularly true "where a very taciturn farmer, given to indirect statements, made remarks obliquely referring to his intention with regard to his farm after his death."[770] Hence, whether an assurance is intended to be binding on the promisee depends on the context in which it was made, and relied on to the detriment of the promisee. Context provides insight of the conduct and relationship of the parties in the determination of the estoppel.

Previously decided cases did not place emphasis on the context in which the assurance was made. This contextualization of the assurance requires consideration of the background and circumstances in which the promise was made. For example, context provides insight and understanding of a landowner's inferences, implied intention or

[768] *Thorner v Major* [2009] UKHL 18 [8] (Lord Hoffman)
[769] *Thorner v Major* [2009] UKHL 18 [84] (Lord Neuberger)
[770] *Thorner v Major* [2009] UKHL 18 [80] (Lord Neuberger)

indirect statements for an interest in land. It eliminates any speculation about the parties' conduct and relationship. Further, context provides clarity on 'how' and 'why' a promise was made and helps understand the rationale or reasoning for the detrimental reliance on the promise. Hence their Lordships sought to import a broader approach and greater latitude in ascertaining an assurance for the estoppel. It is arguable that this broad approach may introduce a level of uncertainty in trying to determine the context in which the assurance was made. However, this does not impact upon the soundness of the estoppel in that although the outcome is fact-dependent it does not detract from the court's unwavering adherence to the essential purpose of proprietary estoppel, that of preventing unconscionable behavior on the part of a legal owner of land who seeks to renege upon representations on which the claimant has relied to his or her detriment.

Fourth, an assurance is a finding of fact by the trial judge.

Their Lordships established that the existence of an assurance is determined by the factual evidence presented before the trial judge, who has the benefit of first-hand evidence from the claimant.

Lord Walker described why an assurance is a matter of fact as follows:

> The commercial, social or family background against which a document or spoken words have to be interpreted depends on findings of fact. When a judge sitting alone hears a case of this sort, his conclusion as to the meaning of spoken words will be inextricably entangled with his factual findings about the surrounding circumstances …[771]

Here, the trial judge is privy to all the evidence of the character, demeanour, relationship and conduct of the parties and is better able to draw inferences from the

[771] *Thorner v Major* [2009] UKHL [58] (Lord Walker)

direct evidence which another court cannot. The evidence heard by the trial judge includes primary facts not heard by the higher courts.

Lord Roger stated that the trial judge who heard and tried the case, had the advantage of first-hand evidence of the parties' relationship, and there was no reason to doubt the trial judge was right.

Lord Walker declared that the facts found out by the deputy judge were unquestionable, as the judge had the advantage of seeing and hearing the witnesses who gave evidence before him.

Lord Neuberger also affirmed that the Appellate tribunal only had the benefit of transcripts of evidence. The trial judge was far better able to assess not only how the statements would have been intended by Peter and understood by David, but also whether any such understanding and any subsequent reliance by David was reasonable.[772]

The above approach re-affirmed the deep-rooted precept of previous cases that a proprietary estoppel is fundamentally based on the findings of fact by the trial judge. Whether an assurance was made, relied on and detriment suffered is a question of fact to be determined by the trial judge. The trial judge has the advantage and seeing and hearing the witnesses first-hand and is able to determine whether the witness was truthful or not, or whether the promisee had reasonably relied on the promise, or whether the promisee had suffered a detrimental reliance on a promise. Hence an

[772] *Thorner v Major* [2009] UKHL 18 [80] (Lord Neuberger)

estoppel is based on the factual matrix of the promise made and the trial judge has the benefit of hearing the witnesses in the determination of the estoppel.

Fifth, their Lordships established a clear enough test for a proprietary estoppel.

Their Lordships adduced that an assurance need not be certain, unequivocal or ambiguous as long as it was clear enough to the promisee. Lord Walker asserted the 'clear enough' test as follows:

> I would prefer to say … that to establish a proprietary estoppel the relevant assurance must be clear enough."[773]

Lord Roger also confirmed that the 'clear enough' test determined the subjective view of the party to whom the assurance was made as follows:

> …I would hold that it is sufficient if what Peter said was "clear enough". To whom? Perhaps not to an outsider. What matters however, is that what Peter said should have been clear enough for David whom he was addressing and who had years of experience in interpreting what he said and did to form a reasonable view that Peter was giving him an assurance that he was to inherit the farm and that he could rely on it.[774]

Here, the 'clear enough' test is better suited to the invocation of estoppel as it examines the assurance through the lens of how it was understood and interpreted by the promisee, and relied on to his or her detriment. It eliminates the landowner's subjective intentions or contemplations in making the promise. It is arguable that the test may introduce a level of uncertainty in trying to determine whether the assurance was "clear enough" to the promisee.

[773] *Thorner v Major* [2009] UKHL [56] (Lord Walker)
[774] *Thorner v Major* [2009] UKHL [26] (Lord Rodger)

The above test is novel as it is not applied in the decided cases. It simplifies the test for an assurance, and broadens the scope of an assurance for proprietary estoppel. Whereas the decided cases show the assurance is narrowly construed as being precise, certain, unequivocal or absolute, the "clear enough" test requires the assurance to be judged on what was said and how it was reasonably understood or interpreted by the promisee. Hence, the clear enough test focuses on the subjective interpretation of the promise by the promisee, rather than the subjective intention of the landowner. This test is a new development in the law of proprietary estoppel as the assurance whether it be made orally, or by inference or indirect statement or implied intention, need only be clear enough to be considered for a proprietary estoppel. This approach makes the assurance less onerous to prove and, perhaps, more easily to establish an estoppel.

The House of Lords in ***Thorner***[775] thus articulated a new paradigm for the determination of proprietary estoppel with more focus on the assurance made by the landowner. The House not only approved the doctrine and confirmed its requirements, but also developed new principles to assist the court in the finding of the estoppel. Their Lordships have set forth a very broad test for the assurance in proprietary estoppel with greater scope in the determination of the assurance for the estoppel.

The strength of ***Thorner***[776] is that the House of Lords had finally heard and determined a case based purely on proprietary estoppel following the genesis of the doctrine over four hundred years earlier. Their Lordships elevated the status of the judicial principle of proprietary estoppel, and also supported the efficacy of the doctrine. The principles

[775] [2009] UKHL 18
[776] [2009] UKHL 18

adduced by their Lordships amplify the criteria for the future application and operation of the doctrine by the courts.

The limitation of ***Thorner***[777], is that the House of Lords' decision was confined to the issue to be determined: that is whether the representations made by Peter had created, or was capable of creating an assurance for an interest in land. Hence, their Lordships' decision narrowly focused on this issue with less emphasis or consideration on the other requirements of the estoppel such as reliance and detriment. Unless and until another case is heard and determined by the House of Lords to develop and establish new principles for the lower courts to follow, then the law on proprietary estoppel is guided by their Lordships' decision in ***Thorner.***[778] The Supreme Court (as it now is) has not dealt with any subsequent cases based on proprietary estoppel.

7.5 Securing an Inheritance with Proprietary Estoppel

Definitively, without the benefit of the defence of proprietary estoppel, the claimant would have lost the inheritance without a will from the testator. Section 3 of the Wills Act says that all property may be disposed of by will, and the original will in favour of the claimant was destroyed by the testator. The testator died intestate and the property devolved by law (section 3 of the Wills Act 1837 as amended) to his successors. The Claimant's only defence was in proprietary estoppel based on the representations made by the deceased, and his detrimental reliance thereon that made it unconscionable for the deceased to renege on the assurances made.

[777] [2009] UKHL 18
[778] [2009] UKHL 18

In sharp contrast to ***Thorner***[779], is the case of ***Lothian v Dixon***[780] where the deceased had left a will for her property. The deceased had promised to leave her entire estate to the claimant in return for taking full-time care of her and to manage her hotel until her death. The deceased left no will to the claimant. Upon her death, there was an original will which bequeathed the property in equal shares between the claimant and defendant. The claimant made a claim in proprietary estoppel for the deceased's entire estate, and the court awarded the deceased's estate to the claimant on the basis of proprietary estoppel, thereby overriding the will of the deceased.

Here, equity is effectively enabling claimants to sidestep the testator's intentions as expressed in a valid will made in conformity with section 9 of the Wills Act 1837 as amended. Equity is thereby disregarding its own maxim that "equity follows the law" to provide a remedy in terms of the maxim that "equity will not suffer a wrong to be without a remedy". Further, as per the ***Earl of Oxford's Case***[781], equity prevails over the law; and in ***Crab v Arun District Council***[782], Lord Denning stated that equity comes to mitigate the rigours of strict law. The flexibility of equity permits a promise made in a deceased's lifetime to be enforced after death, based on the detriment suffered by the promisee in reliance of the assurances of the deceased. In both ***Thorner***[783] and ***Lothian***[784]***,*** the court considered the 'substantial' detriment which the claimants had suffered, and held that it would be unconscionable if they could not inherit what they had been promised. Thus, equity by nature presents a balancing scale in bypassing statute to prohibit inequitable or unconscionable conduct.

[779] [2009] UKHL 18
[780] [2014] 11 WLUK 851
[781] [1615] 21 ER 485 (Ch)
[782] [1976] Ch 179 (CA)
[783] [2009] UKHL 18
[784] [2014] 11 WLUK 851

7.6 Conclusion

The influence of ***Thorner***[785] as the leading authority by the House of Lords in proprietary estoppel, and its potential to enforce informal rights to land gives infinite credence to the doctrine since its evolution over a century ago.

Their Lordships did not seek to re-define the doctrine of proprietary estoppel or to re-state the law established by the lower courts. Their Lordships ratified the existing decisions and affirmed the traditional course of the doctrine. For example, whereas the Court of Appeal in ***Thorner***[786] held that proprietary estoppel was determined by the subjective intentions of the landowner, the House of Lords intervened and established that proprietary estoppel is an objective assessment of the assurance made to the promisee. Also, whereas the Court of Appeal in ***Thorner***[787] held that a proprietary estoppel is not based on the inferences drawn by the promisee, the House of Lords intervened and established that mere inferences, indirect statements, or an implied assurance can give rise to a proprietary estoppel. Hence, ***Thorner***[788] was significant in that it restored the direction of the law back to its traditional roots, whilst enunciating new criteria for the establishment of the requisite elements on which the estoppel was founded. The House of Lords thereby instilled a measure of consistency to assist in the future application of the doctrine of the lower courts.

Pertinently, both decisions of the House of Lords in ***Yeoman's Row***[789] and ***Thorner***[790] amplify the essence of the doctrine and its implications for the creation of an interest

[785] [2009] UKHL 18
[786] [2009] UKHL 18
[787] [2009] UKHL 18
[788] [2009] UKHL 18
[789][2008] UKHL 55

in land. For example, both decisions describe the same pre-requisites for the estoppel, being an assurance, reliance, detriment and unconscionability. Further, both cases demonstrate that a proprietary estoppel may arise in a family or domestic context, and must concern an interest in land. Moreover, the unifying principle between the two cases is that they both assert an objective approach in the determination of the estoppel. Hence, although the two decisions vary in outcome, the House of Lords broadly considered the doctrine of proprietary estoppel, and its capacity to create an interest in land. The most illuminating difference between the two cases is that ***Yeoman's Row***[791] highlights the limitations or exceptions to a claim in proprietary estoppel, whereas ***Thorner***[792] embraces the finding of a proprietary estoppel in the type of context within which the case arose.

Thus, the House of Lords decisions in ***Yeoman's Row***[793] and ***Thorner***[794] heralded a new chapter in the development and progression of proprietary estoppel. The new principles devised by their Lordships substantially influence the finding of a proprietary estoppel, and the court's approach to the doctrine. Whether or not these principles have simplified or complicated the finding of the estoppel is to be determined by the future case law on proprietary estoppel. Also, how far the lower courts embrace those new principles will be determined by the future case law to the extent discussed above. The House of Lords has set the doctrine on a new path, and the onus is on the lower courts to implement the principles it articulated.

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[790] [2009] UKHL 18
[791] [2008] UKHL 55
[792] [2009] UKHL 18
[793] [2008] UKHL 55
[794] [2009] UKHL 18

The next chapter will focus on a critical review of the case law following ***Thorner v Major***[795].

[795][2009] UKHL 18

Chapter Eight: Critical Review of the Case Law following Thorner v Major[796]

8.1 Introduction

This chapter critically examines the recent case law on proprietary estoppel following the House of Lords decision in ***Thorner***[797]. It seeks to assess whether the courts are applying the principles; how far are the principles being applied; whether the cases are dominated by the principles that prevailed before the House of Lords decisions; whether the courts have adopted a progressive or conservative approach to the evolution of proprietary estoppel, and whether the courts have developed new principles of proprietary estoppel following ***Thorner***[798].

The discourse in this chapter is exclusive as it goes beyond the mere vagaries of the principles applied by the courts to assess what changes, if any, that ***Thorner***[799] has created in the application and operation of the doctrine by the courts. Other legal scholars[800] tend to discuss the ratio of the court's decision, but neither seek to compare each new case decided with the previous cases, nor consider the influence of ***Thorner***[801] in arriving at a decision in proprietary estoppel. The cases demonstrate the direction of proprietary estoppel following ***Thorner***[802].

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[796] [2009] UKHL 18
[797] [2009] UKHL 18
[798] [2009] UKHL 18
[799] [2009] UKHL 18
[800] Mischa Balen and Christopher Knowles, 'Failure to estop: rationalising proprietary estoppel using failure of basis' [2011] Conv. 3, 176; M. P. Thompson, 'The Flexibility of Estoppel' [2003] Conv. May/June 225; Martin Dixon, 'Estoppel and Testamentary Freedom' [2008] Conv. 1, 65; Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme' [2008] Conv. 5, 401; M. P. Thompson, 'Estoppel and Proportionality' [2004] Conv. Mar/April 137; Martin Dixon, 'Estoppel: a panacea for all wills? [1999] Jan/Feb 46; M. P. Thompson, 'Estoppel: a return to principle' [2001] Conv. Jan/Feb 78; M. P. Thompson, 'Emasculating Estoppel' [1998] Conv. May/Jun 210
[801] [2009] UKHL 18
[802] [2009] UKHL 18

This chapter further considers the question of whether the doctrine is sound in terms of the extent to which the courts continue to prevent unconscionable behaviour on the part of a legal owner of land and further to this, whether or not, and how far the courts are applying the principles adduced by their Lordships in ***Thorner***[803]. This sphere of the doctrine has not been investigated by other legal scholars[804], and neither have they considered the case by case development of the law following ***Thorner***[805].

The chapter leads to the discussion in further chapters of the thesis on whether or not, and to what extent ***Thorner***[806] has created a positive impact in the development of the doctrine.

8.2 Recent Case Law

There are many High Court cases on proprietary estoppel following ***Thorner***[807], most of which proceeded to appeal. In most cases, the appeal turned on the facts rather than the law, and the appeal courts upheld the decision of the trial judge appearing to apply settled principles of proprietary estoppel elicited from previously decided cases.

Below is an account of the key decisions which demonstrate the judicial attitude towards the doctrine.

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[803] [2009] UKHL 18

[804] Mischa Balen and Christopher Knowles, 'Failure to estop: rationalising proprietary estoppel using failure of basis' [2011] Conv. 3, 176; M. P. Thompson, 'The Flexibility of Estoppel' [2003] Conv. May/June 225; Martin Dixon, 'Estoppel and Testamentary Freedom' [2008] Conv. 1, 65; Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme' [2008] Conv. 5, 401; M. P. Thompson, 'Estoppel and Proportionality' [2004] Conv. Mar/April 137; Martin Dixon, 'Estoppel: a panacea for all wills? [1999] Jan/Feb 46; M. P. Thompson, 'Estoppel: a return to principle' [2001] Conv. Jan/Feb 78; M. P. Thompson, 'Emasculating Estoppel' [1998] Conv. May/Jun 210

[805] [2009] UKHL 18

[806][2009] UKHL 18

[807] [2009] UKHL 18

8.2.1 Henry v Henry[808]

In that case, Geraldine Pierre had permitted the Respondent's grandmother to build a house on her plot of land and to live there. The Respondent's grandmother was a relative of Geraldine Pierre. The Respondent testified that he was born in that house and lived with his grandmother until her death. He continued to live in the grandmother's house and was later joined by his girlfriend with whom he had four children. The Respondent stated that Geraldine Pierre had frequently visited the property until five years before her death as she became too old and infirm to do so. He said that he called Geraldine Pierre "Mama" and that she treated him like a son. The Respondent testified that Mama promised him her share of the plot of land upon her death because he lived on the land, cultivated it and cared for her.[809] The Respondent said he cultivated the plot of land to provide food for himself and family, as well as for Mama to whom he took food and sold any leftovers.

In 1998, Geraldine Pierre had made a will appointing the Respondent as her executor and leaving her half share in the plot of land to him. In September 1999, Geraldine Pierre made a further will in which she left her half share in her plot of land to the first Appellant who was later registered as owner upon the death of Geraldine Pierre in October 1999. The first Appellant gave notice to the Respondent to vacate the plot. The Respondent instituted proceedings for proprietary estoppel.

The trial judge found that Mama had made a clear representation to the Respondent but that the Respondent had not acted to his detriment. The Respondent had instead

[808] [2010] UKPC 3
[809] See *Henry v Henry* [2010] UKPC 3 [21]

benefited from the land, as he had lived on the land rent free for decades, it had been his source of livelihood and had reaped the benefits of the land. On appeal, the court held that the Respondent had acted to his detriment and was awarded the plot of land by proprietary estoppel.

On further appeal to the Privy Council, the Board held that the issue was whether the Respondent had acted to his detriment, and the process of deciding whether there had been sufficient detriment was to weigh up the advantages and disadvantages suffered by the Respondent in reliance of Mama's promises.[810] The Board followed the approach in ***Gillett v Holt***[811] that detriment was to be viewed in the round and ruled that the Respondent had established his detriment and equity in choosing a hard life to work the land to care for Mama and to provide food for her and had deprived himself of a better life elsewhere. The Respondent was awarded a half share in Mama's property by proprietary estoppel.

This case applied the settled principles of the decided cases for proprietary estoppel and did not change its application. Although the Board did not refer to the House of Lords decision in ***Thorner***[812], it affirmed the principles applied in previous cases. The Privy Council did not endeavor to examine the doctrine of proprietary estoppel as a whole, or to express a view on its principles or operation by the courts, but applied the established principles to determine the estoppel.

[810] See *Henry v Henry* [2010] UKPC 3 [51]
[811] [2000] EWCA Civ 66
[812] [2009] UKHL 18

8.2.2 Bradbury v Taylor[813]

In this case, the claimant was awarded a proprietary estoppel based on a promise to inherit the property. In ***Bradbury***[814] a couple (B) had left their home and moved to care for an elderly relative (T) on the promise that they would inherit T's home at death. B expended monies for improvements to the property. T brought proceedings that B had no beneficial interest in the property and to deny their access to the property. T died before the trial and the proceedings were continued by T's executors. B counterclaimed that they were entitled to the property by proprietary estoppel.

The Court held an equity had arisen by proprietary estoppel as the couple had relied on T's representations to their detriment. It ruled that B had moved, based on the promise to inherit the property, and the move itself constituted a detrimental reliance as the couple were away from their family providing care for T and making improvements at their own expense to the property.

The law of proprietary estoppel was not in dispute in the appeal. Rather, the facts were in dispute and also how the trial judge had directed himself. The appeal court upheld the trial judge's decision and established the role of the court in deciding the remedy of proprietary estoppel. Lloyd LJ stated thus:

> So long as the judge has the facts clearly in mind, with the material elements of advantage or disadvantage to those concerned … and has understood the law correctly … it is inherently difficult to show that the judge has misdirected himself in coming to a conclusion as to the appropriate remedy.[815]

[813] [2012] EWCA Civ 1208
[814] [2012] EWCA Civ 1208
[815] *Bradbury v Taylor* [2012] EWCA 1208 (CA) 52 (Lloyd LJ)

Here the court established that a trial judge's decision will not be challenged where the law and facts have been considered in a balanced way. It illustrates that the Court of Appeal will more readily uphold a trial judge's decision in proprietary estoppel where the finding of facts and law have been decided. Hence, this case affirms the principle established in ***Thorner***[816] that an appeal court should be wary not to disturb the findings of a trial judge for a proprietary estoppel. The trial judge receives first-hand evidence from the parties whereas an appeal court only has reference to the documented evidence and findings of the case.

Lloyd LJ articulated that a case in proprietary estoppel generally turns on its own facts, and it is not helpful for a legal practitioner to argue about the facts of one case by comparison with those of another. Hence, a case in proprietary estoppel is determined on its own particular facts, and not in light of the previous cases. The findings of fact determine whether the requisite elements exist for the estoppel.

This case provides clarity and guidance in the application of the doctrine to legal practitioners who seek to rely on previous case law to draw a co-relation for a proprietary estoppel in another case. Unless the material facts of a case are pleaded and proved for estoppel, then the courts will not be impressed by previously decided facts or circumstances of a case. Whereas ***Thorner***[817] established that each case of proprietary estoppel is determined on its own facts, this case has clarified this principle further to establish that the facts of previous cases will not influence future decisions in proprietary estoppel. Legal practitioners are guided to prove the facts and principles

[816] [2009] UKHL 18
[817] [2009] UKHL 18

for a proprietary estoppel in every case rather than rely on co-relations or similarities of decided cases.

8.2.3 *Suggitt v Suggitt*[818]

In ***Suggitt***[819]***,*** a son (J) had worked for many years on his father's (F) farm for no wages on the promise that the farm would be his one day. J left home after F decided that J was unfit to run the farm. J returned to the farm briefly to work but left to undertake his own business with F's support. F died leaving the farm to J's sister. J claimed the farm by proprietary estoppel.

The High Court ruled that F had made an unconditional promise or assurance of the farm to J and a place for J to stay upon F's death and it was unconscionable to go back on the assurance that had resulted in detrimental reliance to J. The court determined that the promise by F was unconditional as it was made by F knowing and believing that J was not fit to ran the farm. Also, J had worked on the farm for no wages in the expectation and reliance that the farm lands would be his one day. The court held that J had positioned his whole life on the basis of the assurances given to him and were reasonably believed by him and was granted the farm land and farmhouse to live by means of proprietary estoppel.

On appeal the decision of the trial judge was upheld. It was undisputed that unconditional promises were made by F to J for the farmlands and the appeal turned on the aspects of reliance and detriment.

[818][2012] EWCA Civ 1140
[819][2012] EWCA Civ 1140

Arden LJ sought to clarify the uncertainty of an assurance for an interest in land by stating that it was necessary to consider the strength of the evidence of reliance and detriment on the promise. She stated thus:

> Where doubt is raised as to whether assurances have been given then the court may wish to look for confirmation to the strength of the evidence about reliance and detriment. The requirements of proprietary estoppel are not watertight requirements and it is a matter of substance whether they have been fulfilled.[820]

Arden LJ continued that reliance and detriment are connected matters as follows:

> They are clearly connected matters; reliance is what a person does on the faith of some matter and detriment is usually the result: they are very closely connected. Clearly the same factual matters may show both reliance and detriment. That is why Walker LJ held in ***Gillett v Holt***[821] that the concepts were "often intertwined".[822]

Arden LJ also stated that unconscionability is unconscionable conduct in failing to give effect to the assurances made, and the court was bound in equity to give effect to the assurance made.

The court thus adopted a holistic approach to the determination of the estoppel per the decided cases of ***Thorner***[823], ***Taylor Fashions***[824] and ***Gillett v Holt***[825]. The court considered the interconnection of the requirements of assurance, reliance, detriment and unconscionability for a proprietary estoppel. Neither of the requirements were isolated or held more weight than the other. Hence, the court is to be guided by the settled principles of the decided cases for a proprietary estoppel.

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[820] *Suggitt v Suggitt* [2012] EWCA Civ 1140 (CA) [30] (Arden LJ)
[821] [2000] EWCA Civ 66
[822] *Suggitt v Suggitt* [2012] EWCA Civ 1140 (CA) [35] (Arden LJ)
[823] [2009] UKHL 18
[824] [1982] QB 133
[825] [2000] EWCA Civ 66

On the question of appeals, Arden LJ stated that the appeal court could only interfere with the trial judge's judgment if it was "perverse or clearly wrong", as the judge had heard a substantial amount of oral evidence and that his decision was based on evaluation of all the evidence.[826] Here, Arden LJ had introduced a new development in the operation of the doctrine by establishing the circumstances whereby a trial judge's decision could be overturned on appeal. In ***Thorner***[827], their Lordships had stated their reasoning that the trial judge had the benefit of hearing the evidence and seeing the witnesses, but in ***Suggitt***[828] Arden LJ had extended the reasoning beyond the evidence to whether the decision was perversely or clearly wrong. Hence, the court had added a further ground against reversing a trial court's decision in proprietary estoppel, thus making it difficult for cases to succeed on appeal.

This case also set new ground in the application of the doctrine by establishing that a party's absence from the land will not break the assurance made for the estoppel where the promisee had already suffered a detrimental reliance thereon. The assurance was already irrevocable upon the detrimental reliance suffered by the promisee despite the promisee's absence from the land or provision by the promisor. In ***Suggitt***[829] J had moved off the farm to York for nine months and later returned. Despite the Appellant's argument that J could not have relied on F's promise for the whole farm as J had gone off to York for nine months, Arden LJ established that leaving the farm did not alter J's reliance on F's promise as follows:

> For my own part, I do not consider that simply going off to York shows that John did not intend to rely on his father's promise. He was a very young man when he went, 21 or 22. There was no evidence that, when he went

[826] *Suggitt v Suggitt* [2012] EWCA Civ 1140 [37] (Arden LJ)
[827] [2009] UKHL 18
[828] [2012] EWCA Civ 1140
[829] [2012] EWCA Civ 1140

> to York, he did so with a view of never coming back; there is no reason why he should not have gone off to York for a period of time, then returning to the farm to work there until it became his own.[830]

Here, Arden LJ reiterated the principle established in ***Thorner***[831] that an assurance is irrevocable where a party has suffered a detrimental reliance thereby. In ***Suggitt***[832], J had already relied on F's promise in working for no wages in the expectation of inheriting the farm and a place to live. It was irrelevant that J had moved off the farm or that F provided for J upon his return, as the promise made by F was unconditional and J had fashioned his life in expectation on F's promise. This case also reiterates that a proprietary estoppel will override a testamentary disposition to land as equity holds a landowner bound by their promise for an interest in land. The case adds more clarity in the law and also extends its application beyond ***Thorner***[833].

8.2.4 Southwell v Blackburn[834]

In ***Southwell***[835], the couple (S & B) lived together for ten years in a house purchased by S. B was assured by S that she would be secure in their new home and B had left her secure tenancy to move in with S. The relationship broke down and S gave B notice to quit the property. B made a claim for proprietary estoppel. The Court held that a proprietary estoppel had been established. A proprietary interest was not granted in the home as there was no clear promise that B would become an equal owner of the property. B had relied on S's assurances for a secure home and had given up her

[830] *Suggitt v Suggitt* [2012] EWCA Civ 1140 (CA) [33] (Arden LJ)
[831] [2009] UKHL 18
[832] [2012] EWCA Civ 1140
[833] [2009] UKHL 18
[834] [2014] EWCA Civ 1347
[835] [2014] EWCA Civ 1347

secure home on S's promise and S was compensated to put her back in the position she was in before she had moved in with S.

This case appears to deviate in an important respect from one of the principles in ***Thorner***[836] and ***Yeoman's Row***[837] whereby proprietary estoppel relates to an interest in a parcel of identifiable land. Although B was promised a secure home, there was no promise of ownership specifically in S's house; in short the promise of a secure home did not identify which property. However, the court established that the promise of a secure home for life nonetheless gave rise to a proprietary estoppel as B had incurred losses and given up her secure home in reliance on S's promise. The court held that unconscionability permeated all the elements of proprietary estoppel rather than being a discrete feature of it and it was unconscionable for S not to return B to the same position as she would have been before they moved in together. The detrimental reliance made the promise irrevocable and the repudiation of the assurance was unconscionable.

The court had adopted a broad approach towards the determination of the estoppel and although the promise of a secure home was vague, the elements of assurance, reliance and detriment were still satisfied for the estoppel. The court ascertained that the assurance was clear enough per ***Thorner***[838] and need not relate to a specific right or interest, and it was unconscionable for S to deny what he had knowingly allowed or encouraged B to believe to her detriment per ***Taylor Fashions***[839] and ***Thorner***[840].

[836] [2009] UKHL 18
[837] [2008] UKHL 55
[838] [2009] UKHL 18
[839] [1982] QB 133 (Ch)
[840] [2009] UKHL 18

Hence, the 'clear enough' test from ***Thorner***[841] had enabled the court to arrive at a proprietary estoppel in satisfaction of the requirements of the estoppel. However, the case illustrates the unpredictability in the law as to how the court will view a vague promise for an estoppel. Whether a promise amounts to an assurance is entirely to be determined by the court.

8.2.5 Lothian v Dixon[842]

In this case, the court found a proprietary estoppel operated in the claimant's favour despite the deceased's will. In ***Lothian***[843] L was a cousin of the deceased who had had left her home and business to care for the deceased and manage her hotel on the promise that L would inherit her entire estate at death. Despite the deceased's instructions for a will in L's favour, it was not executed before her death. L instead inherited a half share in the estate based on a previous will of the deceased. L made a claim on the basis of proprietary estoppel. The Court held that in spite of the deceased's will, L was entitled to the entire estate on the grounds of proprietary estoppel. The promises of the deceased were clear, certain and continued until her death, and L had suffered a substantial detriment in reliance and expectation on those promises.

The court did not establish any new development in the operation of proprietary estoppel, as the established principles from ***Thorner***[844] and the previous case law were applied. For example, the court decided that a proprietary estoppel was founded on the elements of assurance, reliance and detriment, as established in ***Taylor***

[841] [2009] UKHL 18
[842] [2014] 11 WLUK 851
[843] [2014] 11 WLUK 851
[844] [2009] UKHL 18

Fashions[845], and upheld by the House of Lords in ***Thorner***[846]. The test applied from ***Thorner***[847] was whether in the circumstances that transpired it would be unconscionable for the promise or assurance not to be kept when there was no legally binding agreement in favour of the claimant. The court held the promises or assurances made by the deceased were relied upon to the last moment of her death and in applying the principle in ***Gillett v Holt***[848] that detriment had to be judged in the round, it would be unconscionable to deny the promise, due to the detriment suffered.

Like ***Thorner***[849], the court established that detriment should not be judged by the countervailing benefits of free rent or other tangible or intangible benefits such as provision for care and sustenance. The issue of detriment was whether the promisee had suffered detriment and, if so, how could the equity created in the promisee's favour be satisfied. The case is consistent with the decided cases on the doctrine.

8.2.6 Hoyl Group Ltd v Cromer Town Council[850]

In ***Hoyl***[851], the Council **(C)** owned a house that comprised a basement, ground floor and upper floors. The council occupied the ground floor and ***Hoyl***[852] **(H)** took tenancies for the upper floors and basement. H intended to convert the basement into a residential apartment and the layout and conversion plans were approved by C. The plan provided for the removal of the internal door to the basement via the ground floor and for its replacement by an external door over garden land owned by C. C

[845] [1982] QB 133 (Ch)
[846] [2009] UKHL 18
[847] [2009] UKHL 18
[848] [2000] EWCA Civ 66
[849] [2009] UKHL 18
[850] [2015] EWCA Civ 782
[851] [2015] EWCA Civ 782
[852] [2015] EWCA Civ 782

stood by without objections whilst the conversion works were being completed but later sought to deny the right of way over the garden land.

The trial judge held that H was entitled to a right of way over the garden by proprietary estoppel as C had led H to believe they had or would have had a right of way following the conversion of the basement. In reliance on that belief, H had acted to their detriment in undertaking the conversion works, and it was unconscionable for C to deny the existence of the right of way. The appeal court upheld the decision of the trial judge.

On appeal, the court applied the test in ***Taylor Fashions***[853] and ***Thorner***[854] as to whether it was unconscionable for the council to be permitted to deny what it had knowingly or unknowingly allowed or encouraged. The holistic approach of assurance, reliance, detriment and unconscionability were applied to the facts of the case to arrive at the estoppel.

The case applied the settled principles of proprietary estoppel and did not develop its principles of application following ***Thorner***[855]. The court favoured the broad analysis of the core principles of assurance, reliance, detriment and unconscionability for the estoppel in coherence with the decided cases.

[853][1982] QB 133 (Ch)
[854][2009] UKHL 18
[855][2009] UKHL 18

8.2.7 Burton v Liden[856]

In Burton[857]*,* the parties lived together in a home registered in B's sole name. L paid B £500 per month towards the mortgage payments of the house in L's belief that she would obtain an interest in the property. The relationship broke down and L claimed she had an equity by proprietary estoppel. The Court of Appeal held that L's monthly payments were made in reliance on her belief that she was paying towards the ownership of the house; that B had induced, encouraged and allowed L in her belief and it was unconscionable to deny L a proprietary interest in the property. L was compensated for her interest in the home.

The Appeal Court followed the settled principles in ***Thorner***[858] in relation to proprietary estoppel. The court considered the context in which the assurance was made, and held that L's assurance of making payments "towards the house" was clearly meant "towards the ownership of the house". Hamblen LJ stated that:

> Context is "hugely important" as to whether an assurance is sufficiently clear, and the judge was best placed to evaluate that issue, having had the advantage of seeing and hearing the witnesses.[859]

Hence, the context in which the statements were made by L constituted a sufficiently clear assurance for a proprietary estoppel. The court considered that the assurance was based on the promisee's interpretation and not on the promisor's intention.

This case also reiterates the principles established by ***Thorner***[860], ***Gillett v Holt***[861] and ***Crab v Arun***[862] and ***Taylor Fashions***[863] that the elements of the assurance, reliance and

[856] [2016] EWCA Civ 275
[857] [2016] EWCA Civ 275
[858] [2009] UKHL 18
[859] *Burton v Liden* [2016] EWCA Civ 275 (CA) [24] (Hamblen LJ)

detriment must be considered as a whole rather than as disparate entities. It also upholds the principle in ***Thorner***[864] and ***Suggitt***[865] that an appellate court will be reluctant to overturn the conclusions of a trial judge on factual issues which have been decided on correct legal principles. The case does not seek to challenge the established principles of proprietary estoppel, thereby contributing a greater measure of consistency in judicial approach.

8.2.8 Davies v Davies[866]

In ***Davies***[867], the claimant worked on her family's farm for long hours and low wages in reliance on her parent's assurances that the farm would be hers one day. These assurances were repeatedly made to the claimant by her parents over many years. The claimant's relationship with her parents broke down and the parents sought to evict the claimant off the farm. The claimant counterclaimed on the basis of proprietary estoppel for an interest in the farm, land and business. The Court held that the claimant had established an equity in the farm and farming business. The claimant had relied on the parents' representations and forfeited a different career and lifestyle to work on the farm for long hours and without wages. The detriment that she suffered in expectation of the promises made gave rise to proprietary estoppel to which a substantial monetary award of £1.3 million was awarded to the claimant.

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[860] [2009] UKHL 18
[861] [2000] EWCA Civ 66
[862] [1976] Ch 179 (CA)
[863] [1982] QB 133 (Ch)
[864] [2009] UKHL 18
[865] [2012] EWCA Civ 1140
[866] [2016] EWCA Civ 463
[867] [2016] EWCA Civ 463

On appeal, the court reduced the monetary award to £500,000 on the basis that the trial judge had not provided a reasoned assessment for the award. The court determined that different expectations had been generated at different times and the Respondent had not positioned her whole life on her parents' assurances. The court held that the monetary award should be based on the financial and non-financial aspects of the detriment that the Respondent suffered and the expectations that had been generated. ***Davies***[868] show that it is difficult to apply law to the facts of family life with the inconsistency and contrary nature of the parties' evidence spanning decades.

Davies[869] was arguably inconsistent with aspects of the previously established principles of estoppel. Whereas ***Thorner***[870] and ***Suggitt***[871] established that an assurance is irrevocable where the promisee had acted to his or her detriment, the appeal court in ***Davies***[872] failed to consider that the assurance of the farm to the Respondent was irrevocable by the Appellants. The Respondent had already suffered a detriment in working for low wages (that was considered as maintenance provision) and long hours upon the expectation of inheriting the farm.

The assurance of the farm was also unconditional as the Appellants made the promise knowing and accepting that the Respondent was the only child to continue the farm upon their death as their other two daughters had no interest in the farm. Moreover, the decision is contrary to ***Thorner***[873] which established that an assurance is not based on the landowner's intentions as to how his or her assurance was likely to be

[868] [2016] EWCA Civ 463
[869] [2016] EWCA Civ 463
[870] [2009] UKHL 18
[871] [2012] EWCA Civ 1140
[872] [2016] EWCA Civ 463
[873] [2009] UKHL 18

perceived by the promisee, but on its objectively accessible interpretation by the promisee. The Appellant's subjectively-held intentions when making the "promise" were given primacy over the Respondent's detrimental reliance on the promise in her favour that she would one day become entitled to the farm.

Further, the decision is contrary to the principle in ***Suggitt***[874] that the promisee's absence from the land and provision by the promisor does not break the assurance made for the estoppel where the promisee has already suffered detrimental reliance thereon. Also, in ***Gillett v Holt***[875], Lord Walker established that rent-free occupation does not extinguish a party's equity. The assurance of the farm was already irrevocable upon the detrimental reliance suffered by the Respondent working for low wages, long hours and the lost opportunity of working in a different environment. The assurance was also irrevocable despite the Respondent's absence from the land or provision to the Respondent by the Appellants upon her return to the farm.

Whereas in ***Suggitt***[876], the Appeal Court held that the trial judge's decision could not be overturned unless it was perverse or clearly wrong, the Appeal Court in ***Davies***[877], instead, overturned the award of the trial judge due to his giving no explanation of the award. Although, the trial judge asserted that the award was based on all the facts and evidence, and the Respondent's expectation and detriment suffered, the appeal court failed to adhere to the decision of the trial judge who had heard first-hand evidence of the witnesses and was in a better position to make a determination on the facts as per

[874] [2012] EWCA Civ 1140
[875] [2000] EWCA Civ 66
[876] [2012] EWCA Civ 1140
[877] [2016] EWCA Civ 643

Thorner[878]. Moreover, the Appeal Court failed to emphasize the role of unconscionability of the Appellants in reneging on their promise several times to the Respondent in its assessment of detriment.

This decision also undermines the doctrinal basis of proprietary estoppel. It makes clear that a landowner can make an assurance for an interest in land, and later renege on that promise despite the detrimental reliance suffered by the promisee, and the court would not hold the actions of the landowner to be unconscionable. The trial judge's award of one third of the farming business to the Respondent was based on the irrevocable assurance of the farm to the Respondent but the appeal court had failed to consider the irrevocable assurance and unconscionability of the Appellants in denying their promise.

Despite the fact that the Appellants had promised the farm to the Respondent, they had changed their minds and later misled the Respondent about a proposed partnership and testamentary disposition. The Appellants made repeated promises to keep the Respondent working on the farm and their retraction led to the difficult and strained relations with the Respondent.

As per ***Thorner***[879], proprietary estoppel looks backward from the moment when the promise falls due to be performed and asks whether it would be unconscionable for a promise not to be kept in whole or in part. Hence, the promise of the farming business to the Respondent was irrevocable and it was unconscionable for the Appellants to

[878][2009] UKHL 18
[879][2009] UKHL 18

deny the promise as the Respondent had suffered a detrimental reliance by working for low wages and long hours in a difficult environment. As per ***Gillett v Holt***[880], the issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. Hence, the issue of detriment had to be judged from the moment the Appellants had reneged on their promise for the farming business to the Respondent and not on the successive promises made. Per ***Gillett v Holt***[881] and ***Taylor Fashions***[882], unconscionability permeates all the elements of proprietary estoppel and the unconscionability of the Appellants in their repeated broken promises to the Respondents was not dealt with by the appeal court in their assessment of detriment. The case illustrates the confusion and uncertainty that in some respects pervade the law of proprietary estoppel.

8.2.9 Moore v Moore[883]

In this case, the claimant was awarded the defendant's interest in the farm by the doctrine of proprietary estoppel. The farm was originally owned by the defendant and the claimant's uncle. The claimant worked on the farm at a young age and was promised the farm on numerous occasions by the defendant. When the claimant's uncle left the farming partnership with the defendant, the claimant replaced the uncle and worked in partnership with the defendant on the farm. Later the defendant became incapacitated by Alzheimer's disease and the claimant took over the operation of the farm. The claimant's mother had encouraged the defendant to alter his will and to leave only a share of the farm to the claimant to allow the claimant's sister to

[880] [2000] EWCA Civ 66
[881] [2000] EWCA Civ 66
[882] [1982] QB 133 (Ch)
[883] [2016] EWHC 2202 (Ch)

inherit a share. The claimant instituted proceedings for full ownership of the farm on the basis of proprietary estoppel.

The court decided in favour of the claimant and awarded him the entire farm by proprietary estoppel. The defendant's promises to the claimant that he would inherit the farming business were unconditional, and the claimant had devoted his whole life to the farm in the expectation of inheriting it. The claimant had acted to his detriment in not seeking alternative employment in the expectation and belief of inheriting the farm and it was unconscionable to allow the defendant to renege on his promise.

On analysis, the case did not establish any new principles of proprietary estoppel, but utilized the approach applied in practice. The court relied on the three elements of assurance, reliance and detriment for a proprietary estoppel as established in ***Taylor Fashions***[884] and upheld in ***Thorner***[885]. It also applied the test of a reasonable man as predicated in ***Thorner***[886] – whether the words and actions of the defendant had reasonably conveyed the assurance to the claimant that he would inherit the farm. Mr. S Monty QC (sitting as a Deputy Judge) articulated that proprietary estoppel should not be narrowly construed as expressed in ***Thorner***[887]***.*** He emphasized that "… the equitable doctrine should be as flexible as the circumstances allow in order to give effect to the equity …"[888]. The case is therefore consistent with the decided cases concerning the doctrine.

[884] [1982] QB 133 (Ch)
[885] [2009] UKHL 18
[886] [2009] UKHL 18
[887] [2009] UKHL 18
[888] *Moore v Moore* [2016] EWHC 2202 (Ch) 174 (Monty QC)

8.2.10 James v James[889]

In that case, the claimant was not successful in the claim for proprietary estoppel. The claimant (Raymond James (R) was the son of a farmer (Charles James (C). C left a will in favour of his wife and two daughters. R made a claim in proprietary estoppel against the successors of the deceased being his mother and two sisters (defendants). R claimed that C had told him he would will the farmland to R but it was instead bequeathed to the defendants. C had made a will to that effect but it was never signed. R also stated that twice before buying further land (including the land bequeathed to the defendants) C would ask R whether he should buy it as R would be farming it one day. A witness, Andrew Mills (A) also testified that C had told him that R would "run the farm" that was being claimed by R.

The court held that R was unable to give evidence of any particular promise or act creating an expectation to inherit the farmland, and there was no promise intended to be relied on to satisfy the element of an assurance for a proprietary estoppel. Also, R could not prove that he had suffered a detriment as he was being paid by C for his services, lived rent free on the farm and was given cars or bonuses. HHJ Paul Matthews ruled that the draft will was merely ambulatory and was a statement of current intention which could be changed at any time. Justice Matthews also held that C asking R whether or not to buy further land did not amount to a promise or assurance to leave the property to R as the intention to do a thing is not the same as promising it. Further, Justice Matthews held that the witness evidence that R would "run the farm" indicated C's current intention but did not amount to a promise intended to be acted upon. The court determined that R's eagerness to inherit the farmland from C had

[889] [2018] EWHC 43 (Ch)

caused R to persuade himself that he was being promised something when he was not. Also, that C did not intend his words in that way, and did not intend them to be relied upon by R, as it is not consistent with C's image who kept everything in his own hands and did not confide in others. Moreover, the court held that a reasonable person would not have misinterpreted C's words and actions in that way. Thus, the claim in proprietary estoppel failed as R could not prove the requirements for the estoppel.

The court applied the decision in ***Thorner v Major***[890] in relation to the requirements of the estoppel, the totality of the evidence and the "clear enough test" for establishing the estoppel. The components of proprietary estoppel were not challenged, but the facts and circumstances establishing the estoppel were in dispute. The case reinforced the principles of ***Thorner***[891] and demonstrated that the court was more inclined to follow the established principles of proprietary estoppel rather than seeking to expound or develop the law any further than ***Thorner***[892]. The principles in ***Thorner***[893] were applied as the leading authority in proprietary estoppel.

On further analysis, the court's decision is confusing by its application of the principles in ***Thorner***[894]. The court seemed to focus on the testator's intentions of how his words and conduct would be perceived by the claimant. This was the test laid down by the Court of Appeal in ***Thorner***[895] and was overruled by the House of Lords. Thus, the court seemed to have strayed from the House of Lords decision in this regard. For example, the court considered that the draft will was a statement

[890] [2009] UKHL 18
[891] [2009] UKHL 18
[892] [2009] UKHL 18
[893] [2009] UKHL 18
[894] [2009] UKHL 18
[895] [2009] UKHL 18

of current intention by the testator and failed to consider how it was interpreted by the claimant. In ***Thorner***[896], the House of Lords ruled that an intention may be implied, or be made by mere inferences or be made indirectly. This begs the question of whether the words "would be farming it one day" was an implied intention, or an indirect statement, or mere inference that constituted a promise. Thus, although the court considered that the context in which the statements were made did not constitute a promise, there was no consideration on whether or not the testator could have made an indirect promise based on his nature to hold on to his property.

Further, the court's approach towards the issue of detriment was arguably confusing. The court determined that there was no detriment suffered by the claimant but gave little consideration to the fact that the testator would not buy more farmland without the claimant's approval and assurance that he would farm the land upon his death. No consideration was given to whether the claimant would have persuaded the testator not to purchase further farmland if the claimant knew he was not to inherit it, or whether the claimant would have sought other opportunities elsewhere if he knew he was not to inherit the farmland. Further, the defendants would not have inherited the farmland if the claimant had not persuaded the testator to purchase it in the expectation of owning it one day.

The court instead focused on the wages paid to the claimant, the bonuses given and the rent-free accommodation, which were held in ***Suggitt v Suggitt***[897] to be such

[896] [2009] UKHL 18
[897] [2012] EWCA Civ 1140

benefits that would not defeat a promise made and expectation created. The wages and bonuses by the testator may have reflected the hard work produced by the claimant to ensure the success of the farm, as there was no mention of the testator's love and affection to the claimant. The court maintained that the claimant's statements were inconsistent and contradictory, but also expressed that the claimant was poor at reading. Thus, the claimant may not have been able to clearly express himself and the circumstances that evolved to influence the court's decision.

Since the matter did not proceed to the appeal court, it remains uncertain whether the same view would be expressed, or whether the court would find a proprietary estoppel. The judgment nonetheless illustrates the court's strict application of the requirements of proprietary estoppel. There was no promise or act that amounted to an assurance or to create an expectation to be relied upon. Further, no detriment was suffered as there was no assurance to be relied upon. This illustrates that no estoppel can arise unless all the requirements of the doctrine is proved.

Further, the court decided that testamentary intentions were current intentions, and do not equate to a promise of that conduct or to be acted upon. Hence, a draft will is considered ambulatory and is not a promise of ownership to property. Evidentially, this ascertains that a party cannot rely on a draft will to be considered as a promise for an interest in land, or a proprietary estoppel. This case provides practical guidelines to both legal practitioners and litigants on the strict requirements for a successful claim in proprietary estoppel, and also the courts will not rule in proprietary estoppel without strict proof of a promise to trigger the other elements of the doctrine.

8.2.11 Haberfield v Haberfield[898]

This was a successful claim in proprietary estoppel. The claimant Lucy (L) was the daughter of a farmer who left school at aged 16 and gave up further education to devote her life to the farm upon her father's (deceased) assurance that L would eventually take over the farm when he could not do farming anymore. The defendant Jane (J) was the claimant's mother who denied that the deceased had made such a promise, and could not have made it knowing J was an equal owner of the farm. By a partnership proposal prepared in 2008 by their solicitor, the deceased and defendant had stated their desire that L inherit the farming house and farming stock, but the exact terms of the proposal were not communicated to L. Later in 2013, L left the farm following an altercation with her sister in the milking parlour. L instituted claim for a proprietary estoppel following the death of her father, claiming that although the deceased did not refer to her ownership of the farm but only to the running of it, her ownership of the farm was impliedly stated in encouraging her to work on the farm.

The court found that L's interest in the dairy farm and her willingness to work on it led the deceased to restart a dairy farm. The deceased had taught L about dairy farming and both shared a close personal bond. The deceased had also assured L at least eight times over an extended number of years that L would inherit the farming business when he could no longer farm. The court determined that although the various representations used different words and were not always explicit, when put together they amounted to a coherent promise to L that she would inherit the dairy farm. L's detriment comprised the low wages paid, long hours with few holidays and her continued commitment to the farm. L had forgone a farming tenancy elsewhere or

[898] [2018] EWHC 317 (Ch)

seeking other employment and positioned her working life based on the assurances given. The court ruled that a proprietary estoppel had been established because an equity had arisen. L was awarded a cash payment of the value of the farmland and farm buildings. Compensation was awarded instead of a transfer of title to prevent the farmhouse from being split from the rest of the holding, and also not to force the defendant out of her home.

The court relied on the principles in ***Thorner***[899] and the pre-existing case law principles seen in ***Gillett v Holt***[900] and ***Davis v Davies***[901]. The doctrine of proprietary estoppel was not in dispute, nor were the components with it. Instead, the focus was whether the facts and circumstances had given rise to a proprietary estoppel. No new principles had been applied beyond the existing case law on proprietary estoppel. The principles of proprietary estoppel in ***Haberfield***[902] were also applied more flexibly as envisaged by their Lordships in ***Thorner***[903]. For example, an assurance for an ownership in the farm was held to have been made based on the meaning of different words and phrases that were not explicit or coherent, but which when put together amounted to a representation of ownership. Hence, the indirect statements reiterated over time created an implied ownership of the farm to the claimant. The issue of detriment was also considered to be the same in ***Thorner***[904], as the claimant had positioned her whole life to working on the farm in the expectation of inheriting it and had forgone other opportunities of higher education or employment. Pertinently, the case presents

[899] [2009] UKHL 18
[900] [2000] EWCA Civ 66
[901] [2016] EWCA Civ 463
[902] [2018] EWHC 317 (Ch)
[903] [2009] UKHL 18
[904] [2009] UKHL 18

a very flexible approach towards the establishment of an assurance in proprietary estoppel following ***Thorner***[905].

8.2.12 Thompson v Thompson[906]

In ***Thompson***[907], the claimant was promised the farm and bungalow upon the death of his parents. The claimant and his parents operated under a partnership agreement whereby the claimant would inherit both his parents' shares upon their death. He had been farming with his father since leaving school at aged 15, and worked for long hours and low pay. When the claimant's father died, the partnership deed was varied and his one third share was assigned to his mother. Subsequently, the claimant's relationship with his mother broke down, and she executed a will that disinherited the claimant of his share in the farm upon her death. The will was a departure from his mother's original will that bequeathed her estate to the claimant. The claimant filed a claim in proprietary estoppel for the mother's share in the farm.

The claimant claimed that throughout his working life, his parents had made promises to him that upon their death the farm and bungalow would be his. In reliance on that promise he had worked for low wages, and forsook alternative employment or other life outside the farm. On that basis, it would be unconscionable for his mother to dispose of her interest that was already promised to him. The court granted the claimant the farm and bungalow in proprietary estoppel.

[905] [2009] UKHL 18
[906] [2018] EWHC 1338 (Ch)
[907] [2018] EWHC 1338 (Ch)

The court affirmed the established principles of assurance, reliance and detriment per ***Thorner v Major***[908] for a proprietary estoppel. For example, the court decided that the claimant had relied on his parents' promises or assurances to his detriment. He dedicated his whole life to the farm which had affected his lifestyle "in terms of working hours, financial independence and ability to buy his own house"[909]. Thus, the court determined it would be unconscionable if the claimant was denied the farm upon his mother's death.

As in ***Thorner***[910], the court adopted a flexible approach in finding the requisite assurance. HH Davies-White held that although it was not possible to pinpoint a specific occasion where the promise or assurance was given, it was nonetheless a very longstanding promise or assurance that was repeated within the family, to the claimant and to others on numerous occasions as a young child and while working fulltime on the farm.[911] Thus, the court considered that the promises or assurances made by both parents were consistent over time, and that they were sufficiently clear and definite to have created the expectation of inheriting the farm.

In terms of detriment, the court emphasized the principles established in ***Suggitt v Suggitt***[912]. For example, the court held that the claimant's abandonment of the farm when the relationship broke down with the mother, did not affect the promise to inherit the farm. The claimant's equity had crystallized before the breakdown, and the events that transpired thereafter could not affect the promise to inherit the farm.

[908] [2009] UKHL 18
[909] *Thompson v Thompson* [2018] EWHC 1338 (Ch) 157 (HH Davis-White)
[910] [2009] UKHL 18
[911] *Thompson v Thompson* [2018] EWHC 1338 (Ch) 149 (HH Davis-White)
[912] [2012] EWCA Civ 1140

Further, the court declared that detriment was to be measured by what the claimant had given up, and not by the means of the maker of the promise. Also, the court maintained that any benefit given by the promisor to the promisee represented the beginning of the fulfilment of the promises made, and could not defeat the equity that had arisen. Thus, this case serves to clarity the application of the principles in ***Thorner***[913] and ***Suggitt***[914] for a proprietary estoppel, and illustrates the flexible approach adopted by the courts following ***Thorner***[915] in determining the assurance for the estoppel.

8.2.13 Gee v Gee[916]

In ***Gee***[917]***,*** the claimant worked on the farm for over twenty years, upon the assurances of his father that he would inherit the lion's share of the farm and farming business. He relied on these assurances and devoted his whole working life to the farm, working long hours for low wages. His father instead transferred all his shareholdings in the farming company, and land to the claimant's brother. The claimant's mother testified that it was always the family's intention that the claimant would receive the company and the farm. The claimant instituted a claim in proprietary estoppel for the whole farm and shares in the company. The court granted the farm to the claimant in proprietary estoppel. The court satisfied the claimant's equity by awarding 52% shares in the company and 46% of the land. The remainder was left to the father and mother to dispose of as they saw fit. The court maintained this approach ensured the continuity of the farm and the farming business.

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[913] [2009] UKHL 18
[914] [2012] EWCA Civ 1140
[915] [2009] UKHL 18
[916] [2018] EWHC 1393 (Ch)
[917] [2018] EWHC 1393 (Ch)

Again, here, the court applied the principles of assurance, reliance and detriment in ***Thorner***[918] for a proprietary estoppel. The court decided that over a twenty-year period, the claimant's father had made several representations to the claimant to inherit the whole farm and company as farmer and owner, as he was the only one farming the land, and the only successor to his father's role as a farmer. The court also held that the remedy was based on the claimant's expectation, and not on the financial value of the measurable parts of the detriment. Thus, the court asserted that emphasis should not be placed on the financial value of the assets that were promised, but instead on the expectation of the claimant. Since the claimant had understood that his father's shareholding and land would be his, then detriment and expectation should be apportioned accordingly. Following ***Thorner***[919], ***Gee***[920] is consistent with the flexible approach increasingly adopted by the courts when finding that an assurance had been made.

8.3 Conclusion

The doctrine of proprietary estoppel has not significantly evolved since ***Thorner***[921] as the courts continue to apply settled principles from decided cases. For example, most of the appeals following ***Thorner***[922] turn on the facts rather than the constituent elements of proprietary estoppel. Hence, the courts have elected to adopt a more conservative approach to the doctrine, rather than seeking to deviate from established principles.

[918] [2009] UKHL 18
[919] [2009] UKHL 18
[920] [2018] EWHC 1393 (Ch)
[921] [2009] UKHL 18
[922] [2009] UKHL 18

In compliance with ***Thorner***[923] the courts have adopted a broader approach to the determination of the assurance to found the estoppel. An increasing number of cases have appeared before the courts, since ***Thorner***[924], and successfully argued on the basis of proprietary estoppel. For example, where the elements of proprietary estoppel have been proved to the satisfaction of the trial judge, the Appeal Courts have always been reluctant to overturn the decision. The principles established in ***Thorner***[925] have provided more flexibility in the application of proprietary estoppel, such that the courts have been able to adopt a more open-minded approach to the doctrine. For example, since ***Thorner***[926] asserted that the components of proprietary estoppel are subject to a finding of fact by the trial judge, the majority of cases heard at first instance illustrate that the finding of fact and consequent conclusions are very clear, explicit, thorough and meticulous and more legally precise than before ***Thorner***[927] – so much so that the Appeal Courts have frequently dismissed appeals against the trial judge's decision.

The majority of cases on appeal turn on the facts, as following ***Thorner***[928] the doctrinal aspects of proprietary estoppel are more settled. In fact, the Appeal Courts have upheld the trial judge's decision of proprietary estoppel, in almost every case, following ***Thorner***[929] in view of their Lordships' perspective in ***Thorner***[930]***,*** that the trial judge has the benefit of hearing the evidence and seeing the witnesses first-hand to

[923] [2009] UKHL 18
[924] [2009] UKHL 18
[925] [2009] UKHL 18
[926] [2009] UKHL 18
[927] [2009] UKHL 18
[928] [2009] UKHL 18
[929] [2009] UKHL 18
[930] [2009] UKHL 18

make a determination on the facts. The trial judge is considered as the chief arbiter of the facts to establish whether the criteria for proprietary estoppel, are satisfied.

Some practical guidelines have evolved from the case law following ***Thorner***[931]. In ***Bradbury***[932], the Appeal Court declared that proprietary estoppel is not determined by the same or similar facts of previous cases, and in ***Suggitt***[933], the Appeal Court asserted that a trial judge's decision will be overturned only if it was clearly wrong or perverse, and that a party's absence from the land will not extinguish the assurance made for an interest in the land where that party has suffered a detrimental reliance on the assurance. These guidelines are not only instructive to legal practitioners in proceeding with a case in proprietary estoppel, but also provide guidance for the process of appeals.

The case of ***Davies***[934] is most at variance with the decided cases, but this, unfortunately, did not proceed to the House of Lords to re-consider the Appeal Court's decision. ***Davies***[935] illustrates the costs constraints in proceeding to further appeals in such cases, as the potential reduction in the trial judge's award may have deterred further litigation. Likewise, the focus of the court in ***James v James***[936] on the testator's intentions, rather than objectively considering how the promisee had perceived and interpreted the testator's words or conduct is arguably confusing, but the case did not proceed to appeal and it remains uncertain whether the Appeal Court would have

[931] [2009] UKHL 18
[932] [2012] EWCA Civ 1208
[933] [2012] EWCA Civ 1140
[934] [2016] EWCA Civ 643
[935] [2016] EWCA Civ 643
[936] [2018] EWHC 43 (Ch)

decided differently. The case of ***Suggitt***[937] more closely embraces the established doctrinal principles of proprietary estoppel by adhering to the approach adopted in ***Thorner***[938]***.***

Following ***Thorner***[939], no case in proprietary estoppel has proceeded to the House of Lords, so that ***Thorner***[940] currently represents a plateau in the development of the law on proprietary estoppel. Their Lordships have arguably contributed a greater measure of clarity in the law of proprietary estoppel and the lower courts are demonstrating a readiness to uphold and apply the doctrine. Moreover, the decisions of the lower courts are now being presented in a fully reasoned manner citing the appropriate case law and applicable principles. However, unless and until other cases in proprietary estoppel proceed to the House of Lords, it is unlikely that there will be further significant developments in the law as the lower courts will be required to adhere to the principles affirmed in ***Thorner***[941]***.***

The next chapter will focus on the challenges to the doctrine of proprietary estoppel.

[937] [2012] EWCA Civ 1140
[938] [2009] UKHL 18
[939] [2009] UKHL 18
[940] [2009] UKHL 18
[941] [2009] UKHL 18

Chapter Nine: The Challenges to Proprietary Estoppel

9.1 Introduction

This chapter considers the controversies that befall the doctrine of proprietary estoppel. It begins with a critical examination of the principles from the House of Lords decisions in ***Yeoman's Row***[942] and ***Thorner***[943] and continues with further investigation into the limitations of the application and operation of the doctrine.

The disquisition and analysis presented in this chapter are exclusive as they present a thorough investigation of the drawbacks to the doctrine through the lens of case law developed over the years. The existing literature[944] has not adopted the same approach when reviewing the case law, and in presenting a holistic assessment of the operation of the doctrine. It provides insight and knowledge of the dilemmas that continue to beset the doctrine despite its overview by every court including the High Court to the House of Lords (now Supreme Court).

The chapter identifies the problems arising from the case law discussed in the chapters of the thesis, to determine whether or not, or how far those challenges hinder the future development of the doctrine.

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[942] [2008] UKHL 55

[943] [2009] UKHL 18

[944] Hilary Delany, 'Is there a future for proprietary estoppel as we know it? [2009] DLJ 31, 440; Martin Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability' [2010] 30 LS 408; John Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' [2011] Modern Studies in Property Law Vol. 6(182); Andrew Robertson, 'Unconscionability and proprietary estoppel remedies', Exploring Private Law [2010] 1(402); Rosalyn Wells, 'The Element of Detriment in Proprietary Estoppel' [2001] Jan/Feb 13; Mark Pawlowski, 'New limits on proprietary estoppel' [1998] LQR 351; Martin Dixon, 'No palm tree justice' [1998] SLR 24 (Sum) 56; M. P. Thompson, 'Estoppel: reliance, remedy and priority' [2003] Conv. Mar/Apr 157

9.2 The Quandaries of Proprietary Estoppel

The quandaries that persist in the doctrine of proprietary estoppel are as follows:

First, the description of proprietary estoppel, as a principled doctrine, was not expounded by the court.

In ***Yeoman's Row***[945], Lord Walker and Lord Scott highlighted the objective nature of proprietary estoppel as a principled doctrine exercised by the courts. However, their Lordships merely provided a generalized idea of the conceptual nature of the doctrine 'without more'. Their Lordships did not clarify what they meant by the doctrine being 'principled''. No examples are provided by the court, whether by previously decided cases or circumstances to illustrate how it might operate in a 'principled' fashion.

Likewise, in ***Thorner***[946], their Lordships held that the objective nature of the doctrine is measured by the test of a reasonable man, being the conduct of a promisee or the interpretation of a statement by a promisee, equated to a reasonable person in the same circumstances. No case examples were cited by their Lordships to illustrate what is and what constitutes 'reasonableness'. Critically, a legal practitioner may consider a potential client's conduct or interpretation of a statement as 'reasonable' in instituting a claim for a proprietary estoppel, but the court may decide otherwise. Thus, a client may expend monies in instituting a claim for a proprietary estoppel on the premise that a reasonable person may have acted in the way that he or she did, or interpreted a statement in the same manner that he or she had, but may not succeed in his or her claim. For example, in ***James v James***[947], the court held that the statement relied on by the claimant that he would be 'farming the land one day' did not amount to a promise,

[945] [2008] UKHL 55
[946] [2009] UKHL 18
[947] [2018] EWHC 43 (Ch)

because no reasonable person would interpret the words as a promise. Hence, the 'reasonableness' nature of the doctrine provides no certainty or clarity of what their Lordships alluded to in ***Thorner***[948]. Much is left to the imagination or speculation of the legal practitioner and potential client, and have the potential to lead to costly litigation and unsuccessful claims.

Second, the elements of proprietary estoppel are undefined.

A successful claim in proprietary estoppel requires the satisfaction of the criteria of assurance, reliance and detriment. However, these three elements are undefined by the courts in the sense of exactly what each means, represents or constitutes. Much is left to be speculated or deduced from the case law on what would fulfil each element and what specifically the courts require for each element. For example, in ***Pascoe v Turner***[949] it was held that the words, "the house is yours and everything in it", constituted an assurance; in ***Wayling v Jones***[950]***,*** it was held that the words, "it'll all be yours someday", constituted an assurance, and in ***Williams v Staite***[951], it was held that the words, "live here as long as you want", constituted an assurance on which a claim for proprietary estoppel could be founded.

However, in ***Layton v Martin***[952]***,*** the court held there was no assurance where a man had given a woman who moved in with him a general assurance that he would provide for her financially. Similarly, in ***Jones v Thomas***[953], the Court of Appeal held that assurances by the defendant that his cohabitee would be 'provided for' when he died

[948] [2009] UKHL 18
[949] [1979] 1 WLR 431 (CA)
[950] [1993] 69 P&CR 170 (CA)
[951] [1979] Ch 291 (CA)
[952] [1986] 2 FLR 227 (Ch)
[953] [2007] ECWA Civ 1212

and that improvements to the property that the claimant were working on would 'benefit' them, were not specific enough to amount to an assurance. Exactly what type of words or conduct qualifies as an assurance is therefore left to the determination of the individual judge.

Likewise, the requirements of reliance and detriment are left undefined by the courts. In ***Teng Huan v Ang See Chuan***[954], the Privy Council held that reliance can be inferred from the facts of the case. The parties had jointly purchased a portion of land, and subsequently executed another agreement in which the plaintiff accepted monetary compensation for his half share from the defendant. The plaintiff was compensated before the defendant commenced construction of his house on the land, but later claimed his half share in the property. The defendant counterclaimed that he was the sole beneficial owner of the land, and in reliance of their agreement, and compensation to the plaintiff had continued construction. The Privy Council decided that the parties had intended the land to belong solely to the defendant, and the defendant had acted in reliance of that agreement to begin construction. It was also held unconscionable to allow the plaintiff to deny the defendant's title having received compensation for his half share. Hence, it is left for the courts to determine what reliance is, and whether it arises on the facts of a case.

As to detriment, in ***Coombes v Smith***[955] it was held there was no detriment where the claimant had left her husband to live with the defendant, bore the defendant's child, cared for the child and re-decorated the defendant's house. Similarly, in ***Watts v***

[954] [1982] 1 WLR 113 (PC)
[955] [1986] 1 WLR 808 (Ch)

Storey[956], it was held there was no detriment where a grandson had given up his protected tenancy in Leeds to move into his grandmother's home in Nottinghamshire giving up any prospects of employment in Leeds. On the other hand, in ***Yaxley v Gotts***[957], the plaintiff acted to his detriment in refurbishing the house owned by the defendant; and in ***Gillett v Holt***[958] the plaintiff acted to his detriment in improving the defendant's farmhouse that was uninhabitable. The difference between these cases of non-detriment and detriment is that in ***Coombes***[959] and ***Watts***[960], the claimant had not acted in reliance of a promise but had, of their own free will and volition, lend themselves to change their position. Conversely, in ***Yaxley***[961] and ***Gillett***[962], the claimants had acted in reliance of the promise of the defendant and thus suffered a detriment.

Thus, it is left for the courts to determine what detriment is, and whether it arises on the facts of a case. Hence, both the legal practitioner and litigant are bound to examine the decided cases to infer what circumstances the court deems adequate to constitute assurance, reliance and detriment. Hence, this leaves scope for unpredictability of outcome in a claim founded on proprietary estoppel as the legal practitioner and litigant may consider that an estoppel has arisen in their case, but the court may decide otherwise. This dilemma may even prevent potential cases on proprietary estoppel being commenced at all where a legal practitioner may consider the statement made was too vague to comprise an assurance or representation, or the

[956] [1984] 134 NLJ 631 (CA)
[957] [2000] 1 All ER 711 (CA)
[958] [2000] EWCA Civ 66
[959] [1986] 1 WLR 808 (Ch)
[960] [1984] 134 NLJ 631 (CA)
[961] [2000] 1 All ER 711 (CA)
[962] [2000] EWCA Civ 66

litigant believes that the words spoken did not amount to a promise capable of supporting a claim based on proprietary estoppel. Prior understanding and knowledge of what amounts to each of the elements of the estoppel may, therefore, potentially render the outcome of litigation unpredictable, though this is arguably always the by-product of the exercise of all equitable principles and the attendant discretion of the court.

Third, the focus on the 'nature' of the assurance to determine the estoppel is undefined.

Since there is no judicial definition of an assurance, how can a legal practitioner accurately assess the 'nature' of the assurance required for the estoppel? What exactly does the court require by the 'nature' of the assurance, or what qualities constitute the "nature' of the assurance? Does the 'nature' of the assurance refer to the type of words or conduct; or does it refer to the interest promised, or the repeated promises made over long years? Alternatively, does it relate to the landowner inducing, encouraging, permitting or allowing a party to believe that he or she will acquire a right or interest in land? Exactly what the court considers by the 'nature' of the assurance, and the capacity of a legal practitioner to know what 'nature' is required for the estoppel is undefined, potentially giving rise to inability to forecast the exact outcome on any particular combination of facts.

Fourth, an assurance may be implied or made by mere inference or indirect statements is confusing.

Their Lordships failed to define, describe and give examples of an implied assurance for a proprietary estoppel. Exactly what is or what constitutes or amounts to an

implied assurance is open to speculation. For example, what types of words or conduct constitute an implied assurance, or a mere inference or indirect statement for an interest in land? How does a legal practitioner know or determine what words or conduct give rise to an implied assurance or an inference for an interest in land? And how does the court determine what words or conduct equates to an implied assurance or implied intention? What type of words or conduct would be considered 'vague' or 'unclear' for an implied assurance, inference or indirect statement? How can a legal practitioner accurately advise his or her client on whether the landowner's words or conduct is an implied assurance or an inference or indirect statement for an interest in land? What is the test for an implied assurance, inference or indirect statement for an interest in land? Does the implied assurance, inference or indirect statement have to be repeated several times over the course of several years?

In ***Thorner***[963], the Court of Appeal held there was no assurance based on the subjective intentions of the landowner as to how his words would be interpreted by the promisee, but the House of Lords held that the indirect statements, inferences and implied intentions of the land owner by words and conduct over several years had created an assurance and a detrimental reliance thereon. Hence, what type of words or conduct qualify as an implied assurance, implied intention, mere inference or indirect statement for a proprietary estoppel is not fully defined by the courts.

Fifth, an assurance must be assessed against the context in which it was made.

The question of whether there was an assurance depends on the context in which it was made, and unless the trial judge determines contextually that there was an

[963] [2009] UKHL 18

assurance, then there is no proprietary estoppel. Their Lordships failed to define what is meant by 'context' for an assurance but referred to the family or domestic relationships and surrounding circumstances that influence an assurance for the estoppel. Exactly what the 'context' encapsulates or constitutes for the estoppel is left for the court to determine on the facts. Thus, how can a legal practitioner advise his or her client that an assurance was made based on the 'context' in which it was made? Or how can the legal practitioner assess whether the circumstances described by the litigant provide the appropriate 'context' for an assurance in proprietary estoppel?

For example, if a landowner promises a friend that if he or she works the farm for no wages and that friend will inherit the farm upon the landowner's death, how does a legal practitioner decide the 'context' in which that promise was made? What is the test for the 'context' of an assurance? Does it relate to why the landowner made the promise? What influenced the landowner's promise? What is the relationship of the parties? Whether the landowner has any family? Whether the landowner was a man of few words and kept his or her property until death? Or why the landowner chose the friend to whom to make the promise? In ***Thorner***[964], their Lordships considered the handing over of a life insurance policy to pay the landowner's death duties provided the context for an assurance to inherit the landowner's estate. Thus, exactly what factors the court considers for the 'context' of an assurance remain unpredictable, and much is left to the imagination of and speculation by, the legal practitioner and litigant.

[964] [2009] UKHL 18

Sixth, a finding of fact by the trial judge for an estoppel creates considerable unpredictability.

Unless the trial judge makes a finding of fact for an assurance, then there is no proprietary estoppel. This begs the question of whether every trial judge would view the evidence and witnesses in the same way. Although the trial judge has the exclusive advantage of first-hand evidence from the claimant, this also begs the question of whether every judge will perceive the facts in the same way, and arrive at the same finding or conclusion. For example, a trial judge may declare there was no assurance on the facts, but on appeal the court may decide there was assurance. Exactly how does a trial judge arrive at a finding of fact that there was an assurance is unknown, or what factors may persuade or prove a finding of fact for an assurance is uncertain. Would a finding of fact be influenced by a credible witness, or the demeanour of the witness, or the manner in which the evidence is given, or the amount of evidence given by a witness, or the number of witnesses who testify. In ***Thorner***[965], the Appeal Court ruled there was no clear and unequivocal promise made to the claimant to inherit the farm and made no finding of a proprietary estoppel. The House of Lords overruled the Court of Appeal's decision and held there was a proprietary estoppel based on the facts and circumstances of the case. Thus, there are no hard and fast rules for the finding of fact for an assurance by a trial judge. This process may reduce, limit or even preclude a successful claim in proprietary estoppel, as only the trial judge decides if there is an estoppel on the facts of the case. Hence, whether a finding of proprietary estoppel is determined by the trial judge remains unpredictable.

[965] [2009] UKHL 18

Seventh, the 'clear enough' test for a proprietary estoppel is undefined and apt to cause confusion.

This test begs the question of what is meant by the terms 'clear enough' and what exactly is required for an assurance to be judged 'clear enough' for a proprietary estoppel. Also, who determines whether the representation or promise made was 'clear enough' for a proprietary estoppel? Is it the trial judge who decides on the facts, or is it the claimant's interpretation of the promise made and relied thereon to his or her detriment? How does a trial judge determine if the assurance was 'clear enough' for a proprietary estoppel? Likewise, how does a legal practitioner determine if the assurance was 'clear enough' for a proprietary estoppel? And how does a litigant adjudge a promise as being 'clear enough' to rely thereon for an interest in land? Exactly what qualifies, justifies or constitutes an assurance as being 'clear enough' for an estoppel is unable to be predicted in advance.

Eighth, the standard of reasonableness applied for a proprietary estoppel is unclear.

This begs the question of whether it was reasonable for the claimant to perceive that an assurance was made; whether it was reasonable for the claimant to have relied on the promise, and whether it was reasonable for the claimant to have suffered a detriment in the circumstances. How is the test of 'reasonableness' judged? Is it whether another person would have interpreted the assurance in the same way, or whether another person would have embarked on the same course of conduct? Is the court's perception of 'reasonableness' the same for every person, or judge? Is it reasonable to expect the court to arrive at the same finding of 'reasonableness' as a legal practitioner? It may be that what is considered reasonable for one judge, may not be reasonable for another. Likewise, it may be that what is considered reasonable

by a legal practitioner may not be the same for another. And how does the litigant decide if he or she had acted reasonably in his or her interpretation of an assurance. Exactly what words or conduct qualify as being reasonable for an assurance, reliance or detriment is difficult to predict as a precursor to litigation.[966]

Ninth, the doctrine of proprietary estoppel is complicated by the different types of estoppel.

It can be confusing and difficult to distinguish between the different forms of proprietary estoppel such as "acquiescence estoppel, promise estoppel and representation estoppel"[967]. Unless a legal practitioner has sound knowledge of the circumstances whereby a particular estoppel may arise, then it might be misapplied to a given set of facts. For example, how can the legal practitioner determine whether an assurance constitutes a promise estoppel or a representation estoppel? In ***Huning v Ferrers***[968] the claimant was awarded the quiet possession of the mills where the defendant had failed to warn of his interest in the property; in ***Suggitt v Suggitt***[969], the court awarded a proprietary estoppel where the claimant's father had promised the claimant the farm where the claimant worked for no wages and long hours as a young child in the expectation of inheriting the farm; and in ***Thorner v Major***[970], the House of Lords awarded a proprietary estoppel based on the representations made to the claimant by words and conduct over a period of thirty years. Thus, it requires sound

[966] *It is arguable that the objective test of 'reasonableness' besets many other areas of the judicial function as well though, especially when equity is being applied to enable the discretion of the court to be exercised.*
[967] Per Ben McFarlane in *The Law of Proprietary Estoppel* (OUP 2014)
[968] [1711] Gilb. Ch 85 (Ch)
[969] [2012] EWCA Civ 1140
[970] [2009] UKHL 18

knowledge of the different forms of estoppel to know when and how to use them appropriately to obtain a remedy in proprietary estoppel.[971]

Tenth, the scope and operation of proprietary estoppel is not always certain in terms of the predictability in outcome of litigation.

Proprietary estoppel has been applied to a wide range of circumstances, and there is no precise rule to define in what circumstances that proprietary estoppel may arise or is likely to succeed. Reference has to be made to case law for guidance on its applicability to certain facts or circumstances. For example, in ***Crab v Arun District Council***[972] proprietary estoppel was applied to an easement; in ***Ives v High***[973] it was applied to a right of way; in ***Griffiths v Williams***[974] it was applied to a long lease; in ***Inwards v Baker***[975] it was applied to a licence to land; in ***Greasley v Cooke***[976] it was applied to possession of property; in ***Gillett v Holt***[977] it was applied to an expectation of an inheritance, and in ***Pascoe v Turner***[978] it was applied to co-habitees.

The scope and operation of proprietary estoppel is left to be deduced from the conflicting circumstances that arise in the case law. This begs the question of how can a legal practitioner or litigant confidently predict in advance that a proprietary estoppel can be found on the particular circumstances of his or her case, and a successful outcome will be achieved? It lends a legal practitioner or litigant to draw

[971] *Although presumably a client would expect his lawyer to research the differences to acquire a thorough grasp of the law.*
[972] [1976] Ch 179 (CA)
[973] [1967] 2 QB 379 (CA)
[974] [1977] 248 EG 947 (CA)
[975] [1965] 2 QB 29 (CA)
[976] [1990] 1 WLR 1306 (CA)
[977] [2000] EWCA Civ 66
[978] [1979] 1 WLR 431 (CA)

inferences and conclusions from similar case law which may be inconsistent and confusing.[979]

Eleventh, there is no formal acceptance of proprietary estoppel in law.

The equitable doctrine is not enacted by legislation, as it is a judicial doctrine that is applied by the courts. In the case of ***Muschinski v Dodds***[980] Mr. Justice Deane stated that under the law of the land, proprietary rights fall to be governed by principles of law and not by a mix of judicial discretion and subjective views of which party ought to win.[981] Proprietary estoppel arguably flies in the face of such judicial dicta.

Further, the provisions of the Land Registration Act, 2002 do not expressly create rights by proprietary estoppel. Section 116 of the Act relates that for the avoidance of doubt and in relation to registered land, an equity by estoppel and a mere equity has effect from the time the equity arises as an interest capable of binding successors in title.[982] Whereas the title of Section 116 is stated to be "Proprietary estoppel and mere equities", subsections (a and b) do not expressly state the term proprietary estoppel but only relates to an equity by estoppel and a mere equity. The section does not define what is meant by "an equity by estoppel" which tends to create mere inferences and implied observations that it is intended to relate to proprietary estoppel.

[979] *Though the variety of circumstances in which estoppel may be available is surely to the benefit of a claimant.*
[980] [1985] 160 CLR 583 (HC)
[981] *Muschinski v Dodds* [1985] 160 CLR 583, 615-616 (Justice Deane)
[982] Land Registration Act 2002, s 116

Moreover, the Act does not define the term "mere equities", nor does it define what is meant by "for the avoidance of doubt". Further, the section does not define proprietary estoppel; does not state what constitutes proprietary estoppel; does not state what circumstances give rise to proprietary estoppel, and does not state what remedies are available in proprietary estoppel. The section begs the question of how can a party know whether the express provisions of Section 116 relate to proprietary estoppel at all?

Twelfth, proprietary estoppel bypasses statutory legislation.

Prorietary estoppel may override a testamentary disposition or deed ordinarily required to transfer or create an interest in land. Where a proprietary estoppel is proved, it is capable of giving rise to an equitable interest in land, which supersedes or binds the legal interest of the landowner. For example, where A promises B that A will bequeath A's estate to B if B cares for A until death, then the court will grant a proprietary estoppel of A's estate to B where A has failed to leave a will in B's favour. In ***Pascoe v Turner***[983], the Court of Appeal held that where the defendant had promised the plaintiff that the house was hers and everything in it, the representation was sufficient to establish a proprietary estoppel against the defendant. Similarly, in ***Griffiths v Williams***[984], the Court of Appeal held there was a proprietary estoppel where a mother had assured her daughter who moved in with her to provide full-time care for her that she would be entitled to live in the house for the rest of her life. In

[983] [1979] 1 WLR 431 (CA)
[984] [1977] 248 EG 947 (CA)

Lothian v Dixon[985], the claimant was awarded the entire estate of the deceased by proprietary estoppel despite the deceased's will for a half share.

The informal nature of the doctrine contravenes Sections 1(2) and 52 of the Law of Property Act 1925 which states that informal arrangements cannot create an interest in land. These sections state that all conveyances of land or any interest therein can only be conveyed or created by deed. Further, the equitable doctrine of proprietary estoppel also contravenes Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 as it precludes the necessity for a written agreement when the criteria for proprietary estoppel are made out. Proprietary estoppel is the exception to these statutory provisions, as it operates on the basis of judicial discretion whereby the court grants a remedy when the estoppel is proved on the facts of a case. In ***Western Fish Products Ltd v Penwith District Council***[986] ***Megaw LJ expressed the same view as Harman LJ in Campbell Discount Co. Ltd v Bridge***[987] that the creation of new rights and remedies is a matter for parliament, and not the judges. However, the courts have consistently applied the doctrine of proprietary estoppel which they and their predecessors have developed, whilst ensuring that they do not deviate from the intrinsic purpose of the concept.

Thirteenth, the status of proprietary estoppel in English law remains undetermined.

Proprietary estoppel is judge-made law, developed and applied by the courts. This invites scrutiny into whether the courts are usurping the function of parliament, and

[985] [2014] 11 WLUK 851
[986] [1981] 2 All ER 204 (CA)
[987] [1961] 1 QB 445 (HL)

whether proprietary estoppel is legitimately in violation of the maxim that "equity follows the law".

Parliament makes law and enacts legislation for the court to interpret. In ***Western Fish Products Ltd v Penwith District Council***[988] ***Megaw LJ expressed the same view as Harman LJ in Campbell Discount Co. Ltd v Bridge***[989] that the creation of new rights and remedies is a matter for parliament, and not the judges. Likewise, in ***Actionstrength Ltd v International Glass Engineering SpA***[990], the House of Lords held that an estoppel is based on no more than an oral guarantee and could not displace the Statute of Frauds, where such guarantees are unenforceable. Although the Judicature Acts of 1873 and 1875 bestowed a harmonized court system with the jurisdiction to give effect to both legal and equitable rights, claims, defences and remedies, this begs the question of whether it granted the courts the power to develop the equitable right of proprietary estoppel with the power to bypass legislation. The doctrine has been in operation by the courts for over a century, and yet no laws have been enacted by parliament for its legal status in law. However, the survival and flourishing role played by proprietary estoppel is testament to the courts' consistent determination to prevent unconscionable behaviour, even in the absence of legislative assistance.

Fourteenth, the judicial discretion within proprietary estoppel may create inconsistency and unpredictability.

A remedy in proprietary estoppel is exclusively based on the judicial discretion of the court. Whilst the court is expected to apply the principles of equity in its discretion to

[988] [1981] 2 All ER 204 (CA)
[989] [1961] 1 QB 445 (HL)
[990] [2003] 2 AC 541 (HL)

arrive at a decision, the decisions of judges can often be conflicting and inconsistent. For example, in ***Sledmore v Dalby***[991] where a proprietary estoppel had been established, the court held that its value was already satisfied by the free accommodation provided and no remedy was granted. By contrast, in ***Taylor v Dickens***[992], the court held there was no proprietary estoppel where an elderly lady who promised her estate to her gardener had changed her mind without telling him after he stopped charging her for his services. The court determined that the assurance did not give rise to an estoppel equity, because the elderly lady had not created or encouraged a belief that she would not exercise her right to change her will. This decision was widely criticized by academics[993] and, the Court of Appeal ***in Gillett v Holt***[994]***,*** reiterated that the criticisms were well-founded.

In ***Gillett***[995]***,*** Robert Walker LJ held that the inherent irrevocability of a will was irrelevant to the assurance made by the defendant to the plaintiff. This begs the question of whether the discretionary justice administered by the courts in proprietary estoppel is principled or is exercised arbitrarily. Different judges arrive at different decisions on the same facts leading to inconsistency and confusion in the law of proprietary estoppel. For example, in ***Thorner***[996], the Court of Appeal held there was no assurance for a proprietary estoppel, whereas the House of Lords overruled this decision and held that the representations made did amount to an assurance for a proprietary estoppel. Hence, whether a claim succeeds in proprietary estoppel

[991] [1996] 72 P&CR 196 (CA)
[992] [1998] 3 FCR 455 (Ch)
[993] M.P. Thompson, 'Emasculating Estoppel' [1998] Conv. 210; William Swadling [1998] RLR cited in *Gillett v Holt* [2000] EWCA 66, 227 (Robert Walker LJ)
[994] [2000] EWCA Civ 66
[995] [2000] EWCA Civ 66
[996] [2009] UKHL 18

depends on the trial judge or court making the decision, and their particular interpretation of the facts and law can lead to much unpredictability in terms of the outcome reached.

Further, although the criteria for establishing estoppel are bound by precedent, the court is nonetheless not bound by previous decisions, as each case turns on its own facts. This presents a category of cases which produce a level of unpredictability as to how the courts determine the nature and application of this equitable doctrine. It also begs the question of what factors will influence a court when considering how to exercise its discretion. Will the discretion be exercised arbitrarily or capriciously depending on the particular mood or spirit of the judge and how the judge perceives the case at hand? Or will it be shrouded by the judge's particular values or beliefs and a subjective view of what is perceived as moral or ethical? It may arguably breed uncertainty, confusion, guesswork and risk-taking as to whether a judge will possibly find an estoppel in a particular case. If such discretion is to be exercised in a principled fashion, then the court ought to provide guidelines on what that means, and how it operates.

In ***Cowcher v Cowcher***[997] Bagnall J stated that in the determination of rights, the only justice that could be attained by mortals who are fallible and not omniscient is the justice established by law. This begs the question of why is estoppel not enacted by statute but left only to the discretion of the court? Why are there no settled principles for the exercise of the court's discretion in proprietary estoppel? Unless the court decides at its discretion in favour of proprietary estoppel, there will be no estoppel,

[997] [1972] 1 WLR 425 (Family Division)

leaving the claimant to appeal the court's decision and perhaps never succeed in the ensuing litigation. Although, however, the courts necessarily have to interpret the facts giving rise to estoppel, this does not derogate from the soundness of the doctrine in terms of the courts' determination to maintain correlation between its key purpose of redressing unconscionability and judicial enforcement of it.

Fifteenth, litigation in proprietary estoppel is affected by unpredictability.

A party may believe that he or she has a claim in proprietary estoppel, but that is left to be determined by the court. Only the court can determine if a proprietary estoppel arise on the facts pleaded, and it is often uncertain and unpredictable as to whether a party will succeed in a case. For example, in the case of ***Suggitt v Suggitt***[998], the testator had promised the claimant the farm upon his death, but instead left it to the defendant (claimant's sister). Despite the will, the court awarded the farm to the claimant having suffered a detrimental reliance on the promise of the testator in working for low wages as a young child for many years in the expectation of inheriting the farm. Thus, although it could not be predicted in advance that the farm would be awarded to the claimant, the litigation proved successful. Similarly, in ***Thorner v Major***[999], the testator had promised his estate to the claimant but died intestate, and his estate devolved by law. The claimant had relied on the testator's representations for over thirty years and suffered a detriment in working long hours for no wages, and giving up alternative employment in the expectation of inheriting the farm. Although the outcome of the claim to the House of Lords following its rejection by the Court of Appeal, was unforeseeable, the litigation was successful. These decisions create

[998] [2012] EWCA Civ 1140
[999] [2009] UKHL 18

unpredictability in the outcome of litigation for a proprietary estoppel, as there is no litmus test to ascertain whether or not the litigation will be successful.

A party who believes they are entitled to proprietary estoppel relief takes a risk when deciding to initiate proceedings. Further, there is no strict formula for a successful claim in proprietary estoppel, except submitting a claim before the court to decide whether an estoppel has arisen in the particular facts. Unpredictability as to whether an estoppel is made out prevails until the determination of the court, and will continue at each stage of appeal thereafter in quest of a finding of proprietary estoppel. Very few cases will provide a remedy at first instance, and the majority continues to an appeal court. This begs the question of why proprietary estoppel is often dependent on a multiplicity of proceedings.

Sixteenth, a remedy in proprietary estoppel lends to prolonged and costly litigation.

Proprietary estoppel can only be established by the court. Therefore, proceedings have to be instituted for a claim in proprietary estoppel, and where the estoppel is not founded by the court of first instance, the matter may lead to further appeals. For example, in the case of ***Thorner v Major***[1000] the trial judge held that there was sufficient assurance given to find a proprietary estoppel. On appeal, the Court of Appeal overturned the decision on the ground that the assurance was not intended to be relied on and there was no material evidence on which the trial judge could have made a finding of proprietary estoppel. On further appeal to the House of Lords, the Court of Appeal's decision was overturned and the decision of the trial judge was upheld. Estoppel often causes lengthy and costly litigation. A party may not have the

[1000] [2009] UKHL 18

financial resources to undertake such a claim even where that party believes that a claim can be established. This begs the question of whether the remedy is available to only those who can afford the costs of litigation, and why estoppel is discoverable only by virtue of lengthy and costly litigation.[1001]

9.3 Conclusion

The challenges and controversies in the law of proprietary estoppel illustrate the problems in the operation of the doctrine by the courts, and the obstacles to its progress and future development. It is determined at the exclusive prerogative of the courts, and legal practitioners and litigants are at the mercy of the court for a favourable outcome. Hence, the propensity of the court to grant an estoppel in a particular case is left much to speculation as to whether the courts will be moved by the facts, and how the facts are interpreted. The case law is marred by unpredictability of outcome and litigation cannot be relied on for an automatic guarantee of the remedy sought by the claimant. Whilst the catalogue of jurisprudence developed by the courts proves that the doctrine is capable of producing an equitable or even legal interest in land, it is always left to the discretion and conscience of a particular judge to produce a finding of proprietary estoppel on the particular facts before the court.

Although, the House of Lords in ***Thorner v Major***[1002] attempted to simplify the basis of proprietary estoppel, there is arguably still a great deal of residual and unnecessary complexity, confusion, and unpredictability in the court's interpretation of any given set of facts. This lends a legal practitioner to draw inferences and conclusions about

[1001] *This is not unique to estoppel as other causes of action are similarly left to the vagaries and discretion of the court especially where equity is involved.*
[1002] [2009] UKHL 18

proprietary estoppel from the case law established by the courts. Consequently, it begs the question of how a legal practitioner or litigant can be confident in drawing the correct inference or conclusion for his or her case from the numerous case law developed by the courts. Does a legal practitioner or litigant have to engage in a proprietary estoppel guessing-game to discover if the facts of his or her case will match a previously decided case by the court? How can a legal practitioner or litigant accurately predict that their circumstances will merit a claim in proprietary estoppel from the decided cases? Although each case is to be determined by its own facts, how likely is it that the court will interpret the facts in the same way as a legal practitioner and litigant?

As cases of proprietary estoppel arise, the courts will continue to encounter the type of challenges and controversies detailed above. The same challenges of the past are likely to proliferate in the future. Arguably, some of the principles developed by the House of Lords in ***Thorner***[1003] such as an assurance constituting an implied intention, and a mere inference or indirect statement, have added more complexity and controversy in the law, as well as their Lordships approving the elements of the estoppel but failing to define what each means. However, the challenges articulated in this chapter serve only to highlight the vagaries of judicial discretion in interpreting the facts giving rise to a finding of estoppel but do not impinge on the courts' determination to curtail unconscionable behaviour on the landowner's part, consistent with the intrinsic purpose of the doctrine of proprietary estoppel.

[1003] [2009] UKHL 18

The next chapter will present a holistic evaluation of proprietary estoppel from the past to the present.

Chapter Ten: A Holistic Evaluation of Proprietary Estoppel from the Past to the Present

10.1 Introduction

This chapter provides a holistic evaluation of proprietary estoppel from its formative years to the present day. It considers the metamorphosis of proprietary estoppel via case law before and following ***Thorner v Major***[1004]**.** Drawing upon the historical review conducted in Chapter 2 of the thesis, it focuses on pervasive aspects such as the socio-economic context against which it developed, and the extent to which it has influenced judicial attitudes towards the evolution and operation of the doctrine and its application.

The discussion presented in this chapter is exclusive, as it considers the application and operation of the doctrine in a holistic fashion, and the extent to which non-legal factors have moulded the concept of proprietary estoppel and refined the doctrine to produce the current incarnation of the criteria applied today. Legal scholars[1005] tend to consider the strictly legal aspects of the doctrine and its requirements, with less focus on historical and socio-economic factors.

This chapter will draw upon the historical background of proprietary estoppel, judicial approaches and application, the remedies awarded by the court, the progression of the doctrine and the modern day cases in proprietary estoppel. Other legal scholars[1006]

[1004] [2009] UKHL 18

[1005] Martin Dixon, *Modern Land Law* (10th edn, Routledge 2017), Mark P. Thompson, *Modern Land Law* (5th edn, OUP 2012), Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996), Judith Bray, *Unlocking Land Law* (4th edn, Routledge 2014)

[1006] Martin Dixon, *Modern Land Law* (10th edn, Routledge 2017), Mark P. Thompson, *Modern Land Law* (5th edn, OUP 2012), Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996); Judith Bray, *Unlocking Land Law* (4th edn, Routledge 2014)

have not critically examined the doctrine from the past to the present to formulate conclusions or perspectives on the same issues. There is more descriptive discourse about the case law rather than extensive review of its progression from the past to the modern day.

The chapter links to the other chapters of the thesis to provide an overall perspective on how far the doctrine has developed and progressed from the past to the present.

10.2 The Historical Background of Proprietary Estoppel

Proprietary estoppel evolved from the historical incidents of society that created the impetus for the development of equity to overcome the rigours of the common law. For example, changes in society arising from the Black Death (1348-51), Peasants Revolt (1381), the Hundred Years' War (1337-1453), and the industrialization of society (1760-1840) created a vital catalyst for the evolution of sophisticated equitable remedies. These in turn created the momentum for the development of remedies unique to equity, including proprietary estoppel.

Equity introduced notions of fairness and good conscience into the law, as the conduct of parties was judged by the yardstick of unconscionability. Via these natural law principles, manifested through the operation of equity, proprietary estoppel, as the offspring of equity, engages natural law principles to achieve the objective of equity – to prevent inequitable conduct between parties.

10.3 Judicial Approach and Application

Estoppel is applied in diverse circumstances such as: estoppel prevented reliance on strict legal rights where the claimant relied on a defendant's assurance that turned out to be false[1007]; as an estoppel against the defendant where the claimant expended monies in the land with the knowledge and acquiescence of the landowner[1008]; as an equitable estoppel where a landowner encouraged or created an expectation for an interest in land, and the claimant had expended monies in furtherance of that expectation[1009]; and as a proprietary estoppel against a landowner where the claimant relied on the assurances of a landowner for an interest in land and thereby suffered a detriment[1010]. Judicial readiness to utilize the concept of proprietary estoppel to create a proprietary interest in land emanated from equity's intervention in the common law from the ***Earl of Oxford's Case***[1011] onwards.

The varying circumstances, in which equity is applied via estoppel, also illustrates the court's flexible approach to protect the claimant from the unconscionable conduct of the defendant. The approach underlies the basis of equity to mitigate the rigours of strict law and to prohibit unconscionable conduct. Further, the flexible approach is reflected from the wide range of cases in which the courts have determined a proprietary estoppel including: a freehold interest in land[1012]; a licence to remain on land[1013]; an easement[1014] or right of way on land[1015]; or a proprietary interest in the

[1007] *Hunt v Carew* [1649] Nelson 46, *Hobbs v Norton* [1682] 1 Vern. 136 (Ch)
[1008] *Dillwyn v Llewelyn* [1862] 45 ER 1285 (QB)
[1009] *Inwards v Baker* [1965] 2 WLR 212 (CA), *Plimmer v Wellington* [1884] 9 App. Cas. 699 (PC)
[1010] *Crab v Arun District Council* [1976] Ch 179 (CA), *Ives v High* [1967] 2 QB 379 (CA)
[1011] [1615] 21 ER 485 (Ch)
[1012] *Dillwyn v Llewelyn* [1862] 45 ER 1285 (QB)
[1013] *Inwards v Baker* [1965] 2 WLR 212 (CA)
[1014] *Crab v Arun District Council* [1976] Ch 179 (CA)
[1015] *Ives v High* [1967] 2 QB 379 (CA)
[1015] [1615] 21 ER 485 (Ch)

land[1016]. This flexible approach promotes the availability of estoppel, as every case is judged on its particular facts and circumstances.

10.4 The Socio-economic Context of the Case Law

The early cases[1017] in estoppel developed around family and domestic situations, commercial, and local authority disputes. They focused on the encouragement by the landowner for an interest in land[1018], the expenditure on land with the encouragement and acquiescence of the landowner[1019], or relying on a landowner's promise for an interest in land and suffering a detriment thereby[1020]. In all these cases, the courts applied equity to prevent unconscionable conduct. The courts were more inclined to protect the rights of the claimant where the claimant had expended monies on land, or suffered a detriment in reliance of a promise for an interest in land. For example, in ***Crab v Arun District Council***[1021] had the court not granted the easement to the claimant against the local authority, then the claimant's land would have remained landlocked. Similarly, in ***Ives v High***[1022], if the court had not granted a right of way, then the claimant would have no access to his garage. Therefore, estoppel was applied to remedy the detriment suffered by the claimant, and the expectation created or encouraged for an interest in land.

[1016] *Thorner v Major* [2009] UKHL 18, *Suggitt v Suggitt* [2012] EWCA Civ 1140
[1017] *(1615-1982) beginning from the Earl of Oxford Case* [1615] 21 ER 485 (Ch) *to Gillett v Holt [2000] EWCA Civ 66 in Chapters 3 & 5 of the thesis.*
[1018] *Inwards v Baker* [1965] 2 WLR 212 (CA)
[1019] *Dillwyn v Llewelyn* [1862] 45 ER 1285 (QB)
[1020] *Crab v Arun District Council* [1976] Ch 179 (CA)
[1021] [1976] Ch 179 (CA)
[1022] [1967] 2 QB 379 (CA)

Many of the modern cases[1023] seem to be in the farming context where the claimant's livelihood depends on income from the farm[1024], or they have worked on the farm for their entire life in the expectation of owning it one day[1025]. They also revolve around the context of family relationships to ensure that the farming legacy continues after the landowner's death. These cases show that the claimant is more likely to succeed in establishing estoppel where the land itself is a key attribute to their ability to derive an income on which to live. The land is more likely to be significant to the claimant who is still alive than the disappointed beneficiaries of the deceased's will.

Further, where the claimant has spent his or her whole livelihood expecting to inherit the land, the courts are more likely to secure the promised inheritance for the claimant. For example, in ***Thorner***[1026], the claimant had spent his livelihood working for no wages and long hours in the expectation of inheriting the farm promised by the deceased. The court awarded the claimant a proprietary estoppel based on his detrimental reliance on the assurances of the deceased. Similarly, in ***Suggitt v Suggitt***[1027], the court granted the claimant the farm which had been promised to him at an early age and he had worked for no wages for many years in the expectation of inheriting the farm. The claimant's father bequeathed the farm to the claimant's sister instead and disinherited the claimant. The court granted the claimant a proprietary estoppel based on his detrimental reliance on the promises of the deceased.

[1023]See *Thorner v Major* [2009] UKHL 18, *Suggitt v Suggitt* [2012] EWCA Civ 1140, *Davies v Davies* [2016] EWCA Civ 463, *Haberfield v Haberfield* [2018] EWHC 317 (Ch), *James v James* [2018] EWHC 43 (Ch)
[1024] *Thorner v Major* [2009] UKHL 18, *Haberfield v Haberfield* [2018] EWHC 317 (Ch)
[1025] *Suggitt v Suggitt* [2012] EWCA Civ 1140, Haberfield v Haberfield [2018] EWHC 317 (Ch)
[1026] [2009] UKHL 18,
[1027] [2012] EWCA Civ 1140

There are also similar family and domestic cases[1028], and other local authority dispute cases[1029] in the modern day, which illustrate that the type of cases determined from the early times to the present day continue to take place in the same socio-economic context. Thus, the recurring theme in those cases is the detriment suffered by the claimant in reliance of a promise for an inheritance. The court intervenes in equity to secure the promised inheritance to the claimant. The law on proprietary estoppel is also more settled since ***Thorner***[1030] and the courts are more open-minded to the doctrine which accounts for the success of many cases in proprietary estoppel.

Both the early cases and modern cases show the common purpose of equity to perform the exact function described by Lord Ellesmere in the ***Earl of Oxford's Case***[1031] – that equity "corrects men's consciences for frauds, breach of trust, wrongs and oppressions of what nature soever they be and to soften and mollify the extremity of the law"[1032]. Thus, the unconscionable conduct of the defendant causes the court to invoke equity for the claimant. Further, the principle that equity will not suffer a wrong to be without a remedy invokes the equitable jurisdiction of the court to ensure an equitable outcome in a case. Therefore, equity is the defining factor in the case law on proprietary estoppel as its object is to prohibit the unconscionable conduct of the defendant.

[1028] *Southwell v Blackburn* [2014] EWCA Civ 1347, *Moore v Moore* [2016] EWHC 2202 (Ch), *Lothian v Dixon* [2014] Ch D, *Bradbury v Taylor* [2012] EWCA Civ 1208, *Davies v Davies* [2016] EWCA Civ 463, *Burton v Liden* [2016] EWCA Civ 275.
[1029] *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 782 is a local authority dispute like *Crab V Arun District Council* [1976] Ch 179 (CA)
[1030] [2009] UKHL 18
[1031] [1615] 21 ER 485 (Ch)
[1032] *Earl of Oxford's Case* [1615] 21 ER 485 (Ch) 486 (Lord Ellesmere LC)

10.5 Remedies Awarded by the Court

The remedies in proprietary estoppel are both personal and proprietary. The early cases show the courts were more disposed to granting a proprietary remedy on the basis of the detrimental reliance suffered on a promise or representation. For example, in ***Dillwyn***[1033], the court granted a freehold interest in the land, in ***Inwards v Baker***[1034] the court granted a licence to remain on the land, and an easement in ***Crab v Arun District Council***[1035] or a right of way in ***Ives v High***[1036], and compensation in ***Jennings v Rice***[1037]. In ***Gillett v Holt***[1038], the court awarded a combination of a personal remedy in compensation, and a proprietary remedy by an interest in the property. Thus, the principle that equity will not suffer a wrong to be without a remedy, dominates the court's discretion for a remedy, as it enforces the promise made to the promisee.

In the modern day cases, the courts continue to grant a proprietary interest in land on the same criteria of assurance, reliance and detriment. Unless the claimant can prove the assurance was made and that he or she had suffered a detriment in reliance thereon, then no remedy will be awarded. For example, in ***James v James***[1039], the claim in proprietary estoppel failed as the claimant had failed to prove the assurance that was relied on to cause a detriment. Conversely, the elements of assurance, reliance and detriment were proved in similar cases like ***Thorner v Major***[1040], ***Suggitt v***

[1033] [1862] 45 ER 1285 (QB)
[1034] [1965] 2 WLR 212 (CA)
[1035] [1976] Ch 179 (CA)
[1036] [1967] 2 QB 379 (CA)
[1037] [2002] EWCA Civ 159
[1038] [2000] EWCA Civ 66
[1039] [2018] EWHC 43 (Ch)
[1040] [2009] UKHL 18

Suggitt[1041] and ***Haberfield v Haberfield***[1042] and a proprietary estoppel was granted in the land. The modern day cases often involve a substantial monetary interest in land worth millions of pounds, compared to the establishment of a third party right over the land of another in the early cases, such as a right of way or easement. The common requirement for a remedy in proprietary estoppel in both the early and modern cases, is the detriment suffered in reliance on a promise. Also, both the early and modern cases show the court's remedy is proportionate to the expectation created or encouraged by the defendant.

10.6 The Operation of Proprietary Estoppel by the Courts

The early cases in the ***Earl of Oxford's Case***[1043], ***Hunt v Carew***[1044] and ***Huning v Ferrers***[1045] show that the courts applied equity to prevent the strict reliance on legal rights where it was inequitable to do so. Equity was applied as an estoppel to prohibit unconscionable conduct.

Following these cases, in ***Dillwyn***[1046], equity was applied as an estoppel against the claimant because the claimant had acquired an equitable interest in the land and was granted a freehold interest. In ***Plimmer v Wellington***[1047], the court adopted an equitable estoppel against a land owner where a party had established an equity in the land. The cases following ***Plimmer***[1048] including ***Inwards v Baker***[1049] and ***Crab v***

[1041] [2012] EWCA Civ 1140
[1042] [2018] EWHC 317 (Ch)
[1043] [1615] 21 ER 485 (Ch)
[1044] [1649] Nelson 46 (Ch)
[1045] [1711] Gilb Ch 85 (Ch)
[1046] [1862] 45 ER 1285 (QB)
[1047] [1884] 9 App. Cas. 699 (PC)
[1048] [1884] 9 App. Cas. 699 (PC)
[1049] [1965] 2 WLR 212 (CA)

Arun[1050] show the court's intervention of equitable estoppel for a claimant's detrimental reliance on a promise for an interest in land.

Owing to its proprietary nature, equitable estoppel was renamed "proprietary estoppel" in ***Ives v High***[1051] and the succession of cases following adopted that terminology. Arguably, the climax of proprietary estoppel in the early cases was in ***Taylor Fashions***[1052] where Oliver J had simplified the requirements of the doctrine to include an assurance, reliance, detriment and unconscionability. These requirements were approved and affirmed by their Lordships in ***Thorner v Major***[1053], which case represents the leading authority in proprietary estoppel.

The requirements of assurance, reliance and detriment for estoppel was implied in the early cases, and gradually developed into express terms in ***Taylor Fashions***[1054]. This characterizes proprietary estoppel as a historical doctrine of equity which the courts developed to enforce the principles of equity to produce an equitable outcome where the common law could not.

[1050] [1976] Ch 179 (CA)
[1051] [1967] 2 QB 379 (CA)
[1052] [1982] QB 133 (Ch)
[1053] [2009] UKHL 18
[1054] [1982] QB 133 (Ch)

10.7 The Progression of Proprietary Estoppel

Considering the genesis of the doctrine from ***Ramsden v Dyson***[1055] to ***Thorner v Major***[1056], the doctrine followed a very slow trajectory in the courts. There were about six cases dealing with proprietary estoppel including the Privy Council case of ***Plimmer v Wellington***[1057]***, Inwards v Baker***[1058]***, Ives v High***[1059]***, Crab v Arun District Council***[1060], ***Taylor Fashions v Liverpool Victoria Trustees Ltd***[1061]***, Gillett v Holt***[1062] before its elevation to the House of Lords in ***Thorner v Major***[1063]. These cases all contributed to the development of the doctrine and its principles of operation. Further, they facilitated the transition of the doctrine from a traditional to a modern approach by the courts. For example, in ***Ives v High***[1064], Danckwerks L.J. had coined the term "proprietary estoppel" which was a major transformation from the original term "equitable estoppel" by which it was referred to in the earlier decisions. Proprietary estoppel distinguished the proprietary nature of the doctrine, and gave primacy to its status as creating an interest in land. Likewise, in ***Taylor Fashions***[1065], Oliver J formulated the requirements of the doctrine into an assurance, reliance and detriment which was later approved by the House of Lords in ***Thorner***[1066].

[1055] [1866] LR 1 HL 129
[1056] [2009] UKHL 18
[1057] [1884] 9 App. Cas. 699 (PC)
[1058] [1965] 2 WLR 212 (CA)
[1059] [1967] 2 QB 379 (CA)
[1060] [1976] Ch 179 (CA)
[1061] [1982] QB 133 (QB)
[1062] [2000] EWCA Civ 66
[1063] [2009] UKHL 18
[1064] [1967] 2 QB 379 (CA)
[1065] [1982] QB 133 (CA)
[1066] [2009] UKHL 18

Following ***Thorner***[1067], the doctrine surged into a repertoire of cases including ***Henry v Henry***[1068]***, Lothian v Dixon***[1069]***, Moore v Moore***[1070]***, Bradbury v Taylor***[1071]***, Suggitt v Suggitt***[1072]***, Southwell v Blackburn***[1073]***, Hoyl Group Ltd v Cromer Town Council***[1074]***, Davies v Davies***[1075]***, Burton V Liden***[1076], ***James v James***[1077] ***and Haberfield v Haberfield***[1078], ***Thompson v Thompson***[1079]***, Gee v Gee***[1080]. These cases illustrate the impetus created by ***Thorner***[1081] in the sphere of proprietary estoppel. There is more transparency in the courts and a willingness to consider proprietary estoppel, and to apply the principles explained, consolidated and modified in ***Thorner***[1082]. For example, with the exception of ***James v James***[1083]***,*** each of the decided cases was determined on the basis of proprietary estoppel in the claimant's favour, thereby demonstrating the flexibility of the courts in their application of the concept. Further, these cases display the willingness of both legal practitioners and litigants to pursue a claim in proprietary estoppel, as they are more confident in pleading the doctrine, in the expectation of securing an appropriate remedy. Hence, ***Thorner***[1084] created the impetus for the further development of proprietary estoppel.

[1067] [2009] UKHL 18
[1068] [2010] UKPC 3
[1069] [2014] 11 WLUK 851
[1070] [2016] EWHC 2202 (Ch)
[1071] [2012] EWCA Civ 1208
[1072] [2012] EWCA Civ 1140
[1073] [2014] EWCA Civ 1347
[1074] [2015] EWCA Civ 782
[1075] [2016] EWCA Civ 463
[1076] [2016] EWCA Civ 275
[1077] [2018] EWHC 43 (Ch)
[1078] [2018] EWHC 317 (Ch)
[1079] [2018] EWHC 1338 (Ch)
[1080] [2018] EWHC 1393 (Ch)
[1081] [2009] UKHL 18
[1082] [2009] UKHL 18
[1083] [2018] EWHC 43 (Ch)
[1084] [2009] UKHL 18

10.8 Perspective on the Modern Day Cases in Proprietary Estoppel

The socio-economic context of the modern day cases reflect that proprietary estoppel is frequent in a family context involving contesting relatives within a family. For example, the majority cases decided following ***Thorner*** including ***Lothian v Dixon***[1085], ***Suggitt v Suggitt***[1086], ***Davies v Davies***[1087], ***Henry v Henry***[1088], ***Moore v Moore***[1089], ***Bradbury v Taylor***[1090], ***James v James***[1091], ***Haberfield v Haberfield***[1092], ***Thompson v Thompson***[1093] ***and Gee v Gee***[1094] evolved in a family context of a promised inheritance. This indicates that the doctrine is more prevalent within the family context.

Another significant factor in the modern cases entails the interrelationship between the parties. Most concern family relationships where parents or other relations reneged on a promised inheritance to their son, daughter or relative. For example, in ***Davies v Davies***[1095], the parents promised their daughter the farm upon their death, but later reneged on their promise; in ***Suggitt v Suggitt***[1096], a father promised his son the farm at death, but instead bequeathed it to his daughter; in ***Lothian v Dixon***[1097], a cousin promised her estate to another cousin, but left no will in her favour; in ***Moore v Moore***[1098], a son was promised the farm and farming business by his father, but was instead disinherited. Thus, the repeated pattern of 'broken promises' and willful

[1085] [2014] 11 WLUK 851
[1086] [2012] EWCA Civ 1140
[1087] [2016] EWCA Civ 463
[1088] [2010] UKPC 3
[1089] [2016] EWCH 2202 (Ch)
[1090] [2012] EWCA Civ 1208
[1091] [2018] EWHC 43 (Ch)
[1092] [2018] EWHC 317 (Ch)
[1093] [2018] EWHC 1338 (Ch)
[1094] [2018] EWHC 1393 (Ch)
[1095] [2016] EWCA Civ 463
[1096] [2012] EWCA Civ 1140
[1097] [2014] 11 WLUK 851
[1098] [2016] EWHC 2202 (Ch)

betrayal or deception of parents and relatives against their own family have arguably influenced the court's deployment of proprietary estoppel. Equity does not permit a landowner to lead another to suffer a detriment in reliance on his or her promise, and the courts have vigorously and consistently utilized proprietary estoppel to redress such unconscionable behaviour.

Entwined with this is disruption of the anticipated economic arrangements between the parties with the attendant capacity to impact seriously upon the claimant's life and livelihood. In each case, the latter depended on the promise made, which, in turn, was undermined by the landowner reneging on his or her promise. For example, in ***Davies v Davies***[1099], the claimant devoted her life working for low wages and long hours on the farm which became her sole livelihood, and was assured of economic security by inheriting the farm to continue the farming legacy of her parents; in ***Suggitt v Suggitt***[1100], the son worked for no wages on the farm as a young boy, because of his father's assurance of having a secure livelihood in inheriting the farm upon his death, and in ***Lothian v Dixon***[1101], the cousin had given up her family, livelihood and business, on the promise of a secure livelihood in inheriting the deceased's entire estate at death.

Similarly, in ***Haberfield v Haberfield***[1102], the claimant at 16 years of age had given up further education, and devoted her entire life to the farm which became her sole livelihood, and the father's assurance of taking over the farm one day upon his death

[1099] [2016] EWCA Civ 463
[1100] [2012] EWCA Civ 1140
[1101] [2014] 11 WLUK 851
[1102] [2018] EWHC 317 (Ch)

provided a reliable source of income for the future; in ***Moore v Moore***[1103], the son had devoted his whole life to the farm, which was his sole livelihood, and the promise of inheriting it was to provide financial security in the future; and in ***Thorner v Major***[1104], the claimant had worked for thirty years on the farm without pay and for long hours on the promise of inheriting the farm to provide his livelihood upon the death of the landowner.

In each of the above authorities, the landowner reneging on his or her promise had caused a substantial detriment to the claimant, in being deprived of their livelihood and, upon which basis, they had organized their entire lives. The substantial detriment of the loss of livelihood, and the financial safeguards accorded by the acquisition of title to the land promised, have influenced the courts' perception and willingness to invoke equity to enforce the promise of the landowner. The courts have demonstrated a readiness and, indeed seemingly an imperative to intervene with equity to prevent the loss of livelihood by the claimant because of his or her detrimental reliance on the deceased's promise. Thus, the 'bait and switch' posture of parents and relatives to deprive family members of their livelihood, and the economic guarantee of inheriting the land is effectively redressed by the courts via the invocation and application of the doctrine of proprietary estoppel. Hence, the social relationships and economic arrangements between parties have seemingly underpinned and contributed to the current prevalence of proprietary estoppel, as manifested in the previously discussed array of modern cases.

[1103] [2016] EWHC 2202 Ch
[1104] [2009] UKHL 18

In the economic context, land has been a prominent feature in each of the proprietary estoppel cases. This reflects the importance of land as a source of livelihood to the parties involved. The modern line of authority relates to promises of a landowner to his or her family to preserve a farming legacy for the future. For example, in ***Haberfield v Haberfield***[1105]***, Davies v Davies***[1106]***, Suggitt v Suggitt***[1107]***, Moore v Moore***[1108]***, and Thompson v Thompson***[1109]***,*** a proprietary estoppel was granted because of a detrimental reliance on a promise to inherit the farm.

It is clear therefore, that the judiciary has demonstrated a readiness to exercise equitable discretion where the claimant is being deprived of his or her livelihood from the land. Often a landowner reneges on his or her promise to share the inheritance promised to other family members. For example, in ***Thompson v Thompson***[1110]***, Haberfield v Haberfield***[1111], ***Davies v Davies***[1112]***, Suggitt v Suggitt***[1113] ***and Moore v Moore***[1114]***,*** landowners had reneged on their promise to share the inheritance with the landowner's wife or other siblings. In every case, the court has been true to the essence of equity by enforcing the promise made to the claimant via the concept of proprietary estoppel. If a claimant is deprived of the land to which he or she has devoted their whole life farming, in expectation of the promise of owning that land upon the landowner's death, then the claimant will not have only lost his or her livelihood, but also has to start his life afresh, having forfeited his education or other

[1105] [2018] EWHC 317 (Ch)
[1106] [2016] EWCA Civ 463
[1107] [2012] EWCA Civ 1140
[1108] [2016] EWHC 2202 (Ch)
[1109][2018] EWHC 1338 (Ch)
[1110][2018] EWHC 1338 (Ch)
[1111] [2018] EWHC 317 (Ch)
[1112] [2016] EWCA Civ 463
[1113] [2012] EWCA Civ 1140
[1114] [2016] EWHC 2202 (Ch)

form of employment because of the landowner's promise. The deprivation of a claimant's livelihood, and the opportunities forgone on the promise of inheriting the farm, have significantly influenced the courts' decision-making process. The claimant cannot go back in time to start his whole life again. Thus, the court's predilection to preserve a secure livelihood for the claimant, in the context of the "farming" cases, has contributed to the modern incidence of the principles of proprietary estoppel, itself a paradigm for the embodiment and practical application of equity's insistence on the prevention of unconscionable conduct.

In the political context, there are no policy regulations or legislation to impede or restrict the doctrine of proprietary estoppel within the aegis of the courts. Despite the growing number of proprietary estoppel cases, the decisions of the courts - however controversial they may be perceived to be – have not thus far been considered an issue for legislative intervention. For example, the decisions in ***Lothian v Dixon***[1115] and ***Suggitt v Suggitt***[1116] where the courts decided to invoke proprietary estoppel in contravention of the contents of the deceased landowner's will, do not appear to have sparked political disapprobation or acted as a catalyst for the delimitation of estoppel. In the event of a clash between common law and equity, the latter has prevailed since the ***Earl of Oxford's Case***[1117], as subsequently ratified by section 25(11) Judicature Acts of 1873 and 1875 and more latterly by section 49 of the Senior Courts Act 1981.

'Political" influence has, therefore, endorsed rather than impeded the supremacy of equity over the common law where the courts discern that equitable principles and,

[1115] [2014] 11 WLUK 851
[1116] [2012] EWCA Civ 1140
[1117] [1615] 21 ER 485 (Ch)

with them, proprietary estoppel, should be applied to address unconscionability. Equity's insistence on providing a remedy to deal with unconscionable behavior has comprised an enduring and consistent thread, from its initial inception in feudal England to the modern day deployment of the concept of proprietary estoppel. Underpinning both are clear examples of the courts' readiness to utilize equitable principles to accord a measure of economic security to claimants who implicitly invoke the maxim that "equity will not suffer a wrong without a remedy".

10.9 Conclusion

The ***Earl of Oxford's Case***[1118] established that where common law and equity clashed, the latter should prevail. It characterized equity's determination to apply principles of "fairness" to correct men's consciences and to mitigate the rigour of the common law. This landmark decision laid the foundation for the exercise of judicial discretion based upon equitable principles, enabling equity to intervene to provide remedies where the common law was inadequate.

The line of cases between the ***Earl of Oxford's Case***[1119] and the House of Lords decision in ***Thorner v Major***[1120] and subsequently, those following, highlight the court's predilection to apply the concept of estoppel. The courts have consistently invoked equity, via estoppel to prevent reliance on strict legal rights where it is unconscionable to do so, and where the claimant has suffered a detrimental reliance on a promise for an interest in land. Thus, equity acts against the conscience of a defendant who has acted unconscionably towards the claimant.

[1118] [1615] 21 ER 485 (Ch)
[1119] [1615] 21 ER 485 (Ch)
[1120] [2009] UKHL 18

The socio-economic context in which estoppel cases have occurred is diverse, involving, for example family and domestic disputes contesting an interest in land[1121], commercial dealings involving a lease[1122], local authority dealings relating to an easement[1123], and neighbour disputes for a right of way[1124].

The remedies granted in proprietary estoppel varied from the early cases to the modern day cases, as each case was determined on its own facts. However, in each case the court sought to award to the claimant the expectation that was created or encouraged. Although the modern day cases tend to involve multi-million pound farm estates that were not a feature of the earlier cases, the issues in dispute in the earlier cases were significant to the claimant in other ways. Historically, the remedy granted in proprietary estoppel was not contingent on precedent, but on the nature of the assurance made and the detrimental reliance thereby. This principle continues to be reflected in the modern day cases.

The operation of proprietary estoppel from the early cases to the modern day cases is dominated by the principles of assurance, reliance and detriment. Although these principles are implicit in the early decisions of the courts, it was nonetheless expressly established as the basis for a proprietary estoppel in ***Taylor Fashions***[1125] and later approved by the House of Lords in ***Thorner v Major***[1126]. Thus, the rationale for the determination of a proprietary estoppel has remained consistent from its inception to

[1121] *Southwell v Blackburn* [2014] EWCA Civ 1347, *Moore v Moore* [2016] EWHC 2202 (Ch), *Lothian v Dixon* [2014] Ch D, *Bradbury v Taylor* [2012] EWCA Civ 1208, *Davies v Davies* [2016] EWCA Civ 463, *Burton v Liden* [2016] EWCA Civ 275
[1122] *Taylor Fashions* [1982] QB 133 (Ch)
[1123] *Crab v Arun District Council* [1976] Ch 179 (CA)
[1124] *Ives v High* [1967] 2 QB 379 (CA)
[1125] [1982] QB 133 (Ch)
[1126][2009] UKHL 18

the modern day. Proprietary estoppel is a long established doctrine of the courts, which seeks to protect those who have suffered a detriment in consequence of their reliance on the promise, assurance or representation of another.

The next chapter will focus on a comparison of proprietary estoppel with the similar equitable doctrine of constructive trusts.

PART 3: COMPARISON BETWEEN PROPRIETARY ESTOPPEL AND CONSTRUCTIVE TRUSTS AND COMPARISON BETWEEN PROPRIETARY ESTOPPEL AND UNJUST ENRICHMENT IN THE UNITED STATES AND ENGLISH LEGAL SYSTEM

Chapter Eleven: Proprietary Estoppel versus Constructive Trusts

11.1 Introduction

This chapter seeks to compare and contrast the doctrine of proprietary estoppel with constructive trusts to illustrate its benefits and limitations over a similar equitable doctrine. It highlights the essential features, application and operation of proprietary estoppel as a distinct equitable remedy in contradistinction to the constructive trust. It provides a comprehensive analysis of the court's approach to both doctrines and describes the rationale underpinning the selective application of the constructive trust and proprietary estoppel respectively.

The discussion in this chapter is distinct, as it involves a thorough investigation of both doctrines including their nature and purpose; similarities and differences; the inherent flexibility of each concept; whether they can be assimilated as a single doctrine; the overlap of the two doctrines by the court, and the problems confronted by legal practitioners in pleading both doctrines on the same facts. It examines these issues through the lens of decided cases so as to draw conclusions on the validity and viability of the two doctrines to establish which doctrine is more frequently adopted by the courts and which provides the more appropriate remedy or relief. Other legal scholars[1127] have discussed some of the differences between the two doctrines, but have not examined them to the same extent and depth as this thesis, and neither have

[1127] Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2003); Holker Meggison, *A Treatise of the Administration of Assets in Equity* (Saunders and Benning 1832); Mark P. Thompson, *Modern Land Law* (OUP 2009); Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2016); Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell, 1996); Terence Etherton, *"Constructive Trusts and Proprietary Estoppel: the search for clarity and principle"* [2009] 73 Conv. 104

contrasted the doctrines by the analysis of case law to determine their validity and viability.

The chapter further considers the question on whether the doctrine of proprietary estoppel is sound in terms of its nature, application, strengths and weaknesses, and benefits and limitations in contrast to the similar equitable doctrine of constructive trusts. Other legal scholars[1128] have discussed some of their differences in nature, but have not presented a holistic analysis via case law as presented by this thesis.

This chapter links to the other chapters of the thesis in demonstrating the efficacy and effectiveness of proprietary estoppel over the similar equitable remedy of constructive trusts.

11.2 What is Constructive Trusts?

A constructive trust is an equitable doctrine which determines proprietary interests where a claimant has acted to his or her detriment upon a promise of ownership to property.[1129] The effect of a constructive trust is that the legal owner of the property will be subject to a role as trustee to the extent of the claimant's beneficial interest.[1130] The justification for a constructive trust is premised on the original common intention

[1128] Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2003); Holker Meggison, *A Treatise of the Administration of Assets in Equity* (Saunders and Benning 1832); Mark P. Thompson, *Modern Land Law* (OUP 2009); Alastair Hudson, *Equity and Trusts*(9th edn, Routledge 2016); Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996); Terence Etherton, 'Constructive Trusts and Proprietary Estoppel: the search for clarity and principle' [2009] 73 Conv. 104

[1129] Rupert Butler & Thomas Horton, 'Legal Update Commercial – Constructive Feedback' (NLJ, 09 May 2014) <https://www.3harecourt.com/assets/asset-store/file/articles/090514-nlj-commercial-butler.pdf> accessed 12 October 2017

[1130] Rupert Butler & Thomas Horton, 'Legal Update Commercial – Constructive Feedback' (NLJ, 09 May 2014) <https://www.3harecourt.com/assets/asset-store/file/articles/090514-nlj-commercial-butler.pdf> accessed 12 October 2017

of the parties that is subsequently denied or reneged, and equity deems the defendant's repudiation to be unconscionable.[1131] The foundation of constructive trusts emanated from the House of Lords decisions in ***Pettitt v Pettitt***[1132]***, Gissing v Gissing***[1133] and ***Lloyds Bank Plc v Rosset***[1134] which established that a constructive trust arose only where it was the common intention of the parties that the plaintiff would obtain the beneficial interest in the property, and the plaintiff had acted upon that common intention to his or her detriment.[1135]

The recent case of ***Agarwala v Agarwala***[1136] illustrates how a constructive trust establishes a beneficial interest in property. J was S's sister-in-law who had persuaded S to purchase a property to convert to a bed and breakfast. The legal title to the property and mortgage was put in J's name as S had a poor credit rating. The parties agreed that S would operate the running of the business and undertake any works on the property. The parties fell out and J and her husband took over the business and changed the locks to prevent S's access. S issued proceedings claiming beneficial ownership of the property.

The Court of Appeal held that a constructive trust had arose in S's favour. The Court decided that this was a business venture where the parties had agreed on the terms by which the property was to be bought, held and used. Although, the mortgage was in

[1131] Rupert Butler & Thomas Horton, 'Legal Update Commercial – Constructive Feedback' (NLJ, 09 May 2014) <https://www.3harecourt.com/assets/asset-store/file/articles/090514-nlj-commercial-butler.pdf> accessed 12 October 2017
[1132] [1970] AC 777 (HL)
[1133] [1971] AC 881 (HL)
[1134] [1991] 1 AC 107 (HL)
[1135] Terence Etherton, 'Constructive Trusts and Proprietary Estoppel: the search for clarity and principle' [2009] 73 Conv. 104
[1136] [2013] EWCA Civ 1763

J's name and she paid the installments, this did not decide the issue of beneficial ownership as the mortgage installments were paid from the profits of the business venture. S had acted to his detriment on the common agreement between the parties in buying, converting and running the business. J made no financial contribution to the business venture, but S suffered a detriment following the agreement which was sufficient to establish that J held the property in trust for S, who had the beneficial interest in the property.

An alternative remedy in the case of ***Agarwala***[1137] is the resulting trust[1138], which focuses on the financial contribution of the parties to determine beneficial ownership. S provided the finance for purchasing and developing the property, including the mortgage repayments. J made no financial contribution but merely facilitated the operation of the business for S. Therefore, the application of a resulting trust could have determined the beneficial interest of S as the constructive trust. Accordingly, Lady Hale and Lord Walker in ***Jones v Kernott***[1139] asserted that:

> … the decision in Agarwala[1140] suggests a dwindling application of the resulting trust in favour of the constructive trust as the norm in acquisition cases (rather than quantification cases, such as Stack v Dowden[1141]), and which has permeated through the Privy Council's decision in Abbott v Abbott[1142] […] and more recently witnessed in Aspden v Elvy[1143]…[1144]

[1137] [2013] EWCA Civ 1763
[1138] See Rupert Butler and Thomas Horton, 'A constructive trust establishes beneficial interest in property' (NLJ, 09 May 2014) <https://www.newlawjournal.co.uk/content/constructive-feedback> accessed 30 September 2017
[1139] [2011] UKSC 53 (SC)
[1140] [2013] EWCA Civ 1763
[1141] [2007] UKHL 17
[1142] [2007] UKPC 53
[1143] [2102] EWHC 138 (Ch)
[1144] See Rupert Butler and Thomas Horton, 'A constructive trust establishes beneficial interest in property' (NLJ, 09 May 2014) <https://www.newlawjournal.co.uk/content/constructive-feedback> accessed 30 September 2017

Arguably, the constructive trust approach was more appropriate as the issue decided was the detrimental reliance on the agreement by S for the beneficial ownership of the property. J made no contribution towards the acquisition of the property, and there was no agreement, arrangement or understanding for the property to be shared beneficially, hence J's retention of the property would be unconscionable or inequitable. S could rely on constructive trust having acted upon the shared agreement to his detriment as per ***Lloyds Bank v Rosset***[1145]***.*** Following ***Lloyd's Bank***[1146], a party whose name did not appear on the legal title could prove the common intention constructive trust by evidence of express discussions of the financial contribution towards the purchase price of the property. Hence, the constructive trust approach was more suitable based on the facts of the case.

In sharp contrast to constructive trusts is proprietary estoppel. ***Panesar***[1147] asserts that the principle behind proprietary estoppel is to prevent a legal owner of land from denying a proprietary right in land which he or she had promised to another. The principle of proprietary estoppel is explained by ***Gray and Gray*** as follows:

> In particular, the doctrine of proprietary estoppel gives expression to a general judicial distaste for any attempt by a legal owner unconscientiously to resile from assumptions which were previously understood, and acted upon, as the basis for relevant dealings in respect of his land. In curtailing the unconscionable disclaimer of such underlying assumption, the estoppel principle is ultimately directed against the abuse of power.[1148]

Constructive trusts and proprietary estoppel are distinct categories of equitable relief in their application by the Courts. The principle behind the two doctrines varies as well

[1145] [1991] 1 AC 107 (HL)
[1146] [1991] 1 AC 107 (HL)
[1147] Sukhninder Panesar, 'Enforcing Oral Agreements to develop land in English Law' [2009] ICCLR Vol.20:5 165
[1148] K. Gray and S. Gray, *Elements of Land Law* (5th edn, OUP 2009) 1197

as their objective in that, whereas constructive trusts recognizes an existing right, if necessary, with retrospective effect, proprietary estoppel establishes that right anew with prospective effect. Also, whereas constructive trusts is based on the common intention between the parties, proprietary estoppel is founded on a unilateral representation.[1149] This distinction was patently described by ***Pawlowski***[1150] as follows:

> ..the common intention constructive trust involves a "bilateral understanding or agreement" whereas, for a successful claim based on proprietary estoppel, the claimant need only show "unilateral conduct" by the legal owner which leads the former to believe that he or she has or will acquire an interest in the latter's property.[1151]

Thus, constructive trusts involves a bilateral agreement or understanding between two parties, whereas proprietary estoppel involves a unilateral conduct from the landowner.

Further, whereas constructive trusts always recognizes an equitable proprietary interest in land as it is the only remedy, proprietary estoppel is capable of not only creating an equitable proprietary interest in land, but the court can also award other remedies such as damages. Both doctrines operate to provide a proprietary interest in land and are directed at prohibiting unconscionable conduct in the dealings of parties. Further, both constructive trusts and proprietary estoppel are exceptions to the need for 'formality' in land transactions, as they are a means of enforcing an informal promise by a landowner in favour of a claimant.[1152]

[1149] See *Kinane v Mackie-Contech* [2005] EWCA Civ 45; Cook v Thomas [2011] EWCA Civ 227
[1150] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) citing D. Hayton [1990] Conv. 370, 371
[1151] Per Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 12
[1152] See Martin Dixon, *Modern Land Law* (8th edn, Routledge 2012) 385

11.3 What are the Similarities between Proprietary Estoppel and Constructive Trusts?

Pawlowski[1153] pointed out that there are judicial dicta which favour the view that constructive trusts and proprietary estoppel are largely indistinguishable. For example, in ***Grant v Edwards***[1154] Sir Nicholas Browne-Wilkinson V.C. "opined that the principles underlying the law of proprietary estoppel were "closely akin" to those laid down for the establishment of a constructive trust"[1155].

Lord Browne-Wilkinson stated that:

> In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them, but they rest on the same foundation and have on all other matters reached the same conclusions.[1156]

Similarly, in ***Lloyd's Bank plc v Rossett***[1157] Lord Bridge established the criteria for the beneficial interest in property of a non-owning co-habitee in both constructive trusts and proprietary estoppel without drawing any difference between the two concepts.[1158] His Lordship stated that:

> …it will only be necessary … to show that [the claimant] has acted to his or her detriment … in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.[1159]

[1153] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996)
[1154] [1986] Ch. 638 (CA); Pawlowski also references *Christian v Christian* [1981] 131 NLJ 43 (CA) and *Savva v Costa and Harymode Investments Ltd* [1981] 131 NLJ 1114 (CA) (Brightman L.J.)
[1155] See Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 10
[1156] Grant v Edwards [1986] Ch 638 (CA) 656 (Lord Browne-Wilkinson)
[1157] [1991] 1 A.C. 107 (HL)
[1158] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 11
[1159] *Lloyds Bank plc v Rossett* [1991] 1 A.C. 107 (HL) 132 (Lord Bridge)

In ***Austin v Keele***[1160], Lord Oliver of Aylmerton (delivering the judgment of the Privy Council) asserted that a common intention constructive trust was an application of the doctrine of proprietary estoppel[1161]; and in ***Re Basham (dec'd)***[1162] Mr. Edward Nugee Q.C. (sitting as High Court judge) was of the view that the principle of proprietary estoppel, where the claimant's belief is that he is going to be given a right in the future, was to be regarded as giving rise to a species of constructive trust.[1163]

In ***Sen v Headley***[1164], Nourse L.J. posited that where the doctrine of proprietary estoppel gives the promisee a right to call for a conveyance of the land, it equally gives rise to a constructive trust.[1165]

Nourse L.J. stated thus:

> ….no doubt it could be said … that that right is the consequence of an implied and constructive trust which arises once all the requirements of the doctrine have been satisfied.[1166]

In ***Yaxley v Gotts***[1167], the courts articulated that the circumstances which give rise to a proprietary estoppel will also support a finding of constructive trust. In ***Yaxley***[1168], it was held that the two doctrines 'coincide' and 'are clearly akin to each other' whereas in ***Kinane v Mackie-Conteh***[1169], estoppel was said to 'overlap' or 'amount to' a constructive trust.

[1160] [1987] A.L.J.R 605 (PC); See Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 11
[1161] See Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 11
[1162] [1986] 1 W.L.R 1498 (Ch)
[1163] See Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 11
[1164] [1991] Ch. 425 (CA)
[1165] See Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 11
[1166] *Sen v Headley* [1991] Ch. 425 (CA) 440 (Nourse L.J)
[1167] [2000] Ch. 162 (CA)
[1168] [2000] Ch. 162 (CA)
[1169] [2005] EWCA Civ 45

According to ***Professor David Hayton***[1170]***,*** "any distinction between proprietary estoppel and constructive trusts is illusory and the principle of unconscionability underlies both concepts"[1171].

Therefore, the similarities between the two doctrines emerge in their mode of operation. For example, both doctrines are equitable remedies and apply in land transactions. They provide an informal means whereby a person may acquire an interest in property, except that for a constructive trust, a common intention is needed. They are based on the common principles of reliance and detriment and require a person to have suffered a detrimental reliance to obtain the remedy or relief. Each case is determined on their particular facts, and the courts apply the test of unconscionability to determine whether relief should be granted in all the circumstances of the case. Ultimately, they can both create a proprietary interest in land in the absence of a formal declaration of trust compliant with Section 53(1)(b) of the Law of Property Act 1925, or deed of transfer compliant with Section 52(1) of the Law of Property Act 1925. Also, the criterion for equity's intervention in both doctrines is unconscionability on the part of the landowner that determines when and how the court intervenes in a given case.

11.4 What are the Differences between Proprietary Estoppel and Constructive Trusts?

According to ***Hayton***[1172]***,*** the two doctrines vary by the type of agreement involved. The common intention constructive trust involves a bilateral understanding or agreement, whereas proprietary estoppel requires the unilateral conduct of a

[1170] David Hayton, 'Equitable Rights of Cohabitees' [1990] Conv 370, 380 6
[1171] See Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 10
[1172] D. Hayton, 'Equitable Rights of Cohabitees' [1990] Conv. 370, 371

landowner to lead another to believe that he or she has, or will acquire, an interest in the latter's property. For example, where A leads B to believe that B will inherit A's land and B undertakes improvements to A's land in reliance of A's promise, then the circumstances will give rise to proprietary estoppel and not a constructive trust as there is no common intention between the parties.

Pawlowski[1173] maintains that a major difference between the two doctrines is the time at which the interest arises. An interest arising under a constructive trust exists from the date of its creation, whereas a proprietary estoppel arises only from the date that it is declared by the court.[1174] For example, where A had promised to bequeath A's property to B at death if B had worked on A's farm but failed to leave the property to B at death, then the court may find a proprietary estoppel for B where B makes a claim. However, with the constructive trust the court does not decide whether the property should be subject to a trust, as the constructive trust does not arise from the judgment of the court. The court merely enforces the beneficiary's pre-existing proprietary interest in the property.

According to ***Ferguson***[1175]***,*** the element of discretion distinguishes proprietary estoppel from constructive trusts. In proprietary estoppel, the court exercises a broad discretion on what remedy is appropriate, and may award damages, or a share of the property, or a proprietary interest in land.[1176] There is no discretion in constructive trusts as it is founded on a common intention, and the parties are entitled to the particular share

[1173] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 12
[1174] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 12
[1175] P. Ferguson, 'Constructive Trusts – a note of caution' [1993] 109 LQR 114, 121
[1176] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 13

that they intended.[1177] For example, in ***Southwell v Blackburn***[1178] the remedy for the estoppel was a monetary award, and in ***Sledmore v Dalby***[1179] the claim to a life interest was denied notwithstanding there had been the necessary assurances, as the court held the claimant had by the date of the hearing received all that he could have expected to receive. In contrast, the remedy in ***Arif v Anwar***[1180] was a 25 % share of the equitable interest under a constructive trust.

Pawlowski[1181] advocated that a significant difference between the two doctrines is that the evidentiary requirements for a constructive trust are more stringent than for proprietary estoppel. For example, in the absence of an express agreement between the parties, then direct financial contributions to the purchase price by the non-owning partner (either initially or by payment of the mortgage instalments) are required to raise the inference for the creation of a constructive trust.[1182] By contrast, the detrimental reliance necessary to support a proprietary estoppel claim need not necessarily take the form of financial contributions,[1183] but may take the form of working for over thirty years without pay as in ***Thorner v Major***[1184]; the sale of land on a promise of an easement as in ***Crab v Arun District Council***[1185]; building a garage on adjoining land on a promise of a right of way as in ***Ives v High***[1186]; expending monies

[1177] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell, 1996) 13
[1178] [2014] EWCA Civ 1347; see also *Jennings v Rice* [2002] EWCA Civ 159 where a monetary award was granted, and Walker LJ affirmed that a remedy in proprietary estoppel comprise the minimum equity to do justice as established by Scarman LJ in *Crab v Arun District Council* [1976] Ch 179 (CA)
[1179] [1996] 72 P & CR 196 (CA)
[1180] [2015] EWHC 124 (Fam)
[1181] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 14
[1182] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 14
[1183] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 14
[1184] [2009] UKHL 18
[1185] [1976] Ch 179 (CA)
[1186] [1967] 2 QB 379 (CA)

on land on a promise to remain there as long as desired in ***Inwards v Baker***[1187] or providing long term care as in ***Campbell v Griffin***[1188] and ***Jennings v Rice***[1189].

Another potential distinction lies in the location of the onus of proof[1190]. In proprietary estoppel cases, the decision in ***Greasley v Cooke***[1191] establishes that there is a presumption of reliance once an assurance on the part of the legal owner has been shown.[1192] Hence, in the absence of proof to the contrary, the court would infer that the claimant's conduct was induced by the assurances given to him or her.[1193] Contrariwise, in constructive trust cases, no such presumption applies.[1194] This is because there is no suggestion in constructive trust cases that, once the requisite representation and detrimental conduct have been proven, the court will infer the requisite link between the two.[1195]

The distinction between the common intention constructive trust and estoppel is also evident in the remedy they each provide. A claim for constructive trust requires the court to be satisfied that it will be unconscionable if the defendant is permitted to deny a common intention which the claimant has relied upon to his or her detriment.[1196] The focus is on the proof of the elements of common intention and detrimental reliance.[1197] In contrast, with estoppel, the court must be satisfied that the evidence supports the finding of an estoppel before it exercises its discretion to satisfy

[1187] [1965] 2 WLR 212 (CA)
[1188] [2001] EWCA Civ 990
[1189] [2002] EWCA Civ 159
[1190] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 15
[1191] [1980] 1 WLR 1306 (CA)
[1192] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 15
[1193] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 15
[1194] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 15
[1195] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 15
[1196] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 12
[1197] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 12

the equity raised by that estoppel.[1198] Consequently, proprietary estoppel is a remedial institution operating at the discretion of the court to award a personal remedy such as a sum of money, or a proprietary remedy such as an interest in land or both.[1199] For example, in ***Gillett v Holt***[1200] the claimant received both money and property to prevent the unconscionable detriment suffered.[1201] Constructive trusts, on the other hand is institutional as it recognizes retrospectively the pre-existing equitable property rights.[1202] Hence, proprietary estoppel operates at the remedial discretion of the court, and does not command an institutional response like the trust.[1203]

Thus, the distinctions between the doctrines of constructive trusts and proprietary estoppel arguably override their potential similarities and reflect a wide gap of opposing variables. The distinctions are particularly significant in the judicial application and operation of the respective doctrines. The particular facts of a case determine which doctrine will be applied by the Courts, as well as the type of equitable relief sought by the claimant. Neither doctrine is superior to the other, as the Court's determination is based on which doctrine best fits the given facts. Of paramount significance is the nature of the right that is created by the two doctrines. Whereas constructive trusts is backward looking to the time of creation of the proprietary right by the agreement of the parties, proprietary estoppel on the other hand is forward looking to the possible creation of the proprietary right by the Court. Hence, the ultimate thrust of the doctrines is the agreement of the parties in constructive trusts versus the court's decision for a remedy arising from proprietary

[1198] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 13-14
[1199] Alastair Hudson, *Understanding Equity and Trust* (5th edn, Routledge 2015) 129
[1200] [2000] EWCA Civ 66
[1201] Alastair Hudson, *Understanding Equity and Trust* (5th edn, Routledge 2015) 129
[1202] Alastair Hudson, *Understanding Equity and Trust* (5th edn, Routledge 2015) 129
[1203] Alastair Hudson, *Understanding Equity and Trust* (5th edn, Routledge 2015) 129

estoppel. However, whichever of the doctrines apply in a given case is left to be determined by the Court.

11.5 Is Proprietary Estoppel more flexible than Constructive Trusts?

The application of the two doctrines varies widely. Whereas constructive trusts applies in family and commercial cases, it is far more difficult to rely on proprietary estoppel in a commercial context per ***Yeoman's Row Management Ltd v Cobbe***[1204].[1205] Lord Scott explained that it is because the factual matrix in ***Yeoman's Row***[1206] involved a commercial transaction where the parties are expected to have completed a contract before investing in a future opportunity. Lord Walker also emphasized that commercial parties engage with sufficient certainty in their transactions that preclude the need for proprietary estoppel. Lord Walker further illustrated why proprietary estoppel is likely to arise in a domestic rather than a commercial transaction as follows:

> In the commercial context, the Claimant is typically a business person with access to legal advice and what he or she is expecting to get is a contract. In the domestic or family context, the typical Claimant is not a business person and is not receiving legal advice. What he or she wants is and expects to get is an interest in immovable property, often for long-term occupation as a home. The focus is not on intangible legal rights but on the tangible property which he or she expects to get. The typical domestic Claimant does not stop to reflect (until disappointed expectations lead to litigation) whether some further legal transaction (such as a grant by deed, or the making of a will or codicil) is necessary to complete the promised title.[1207]

Hence, a proprietary estoppel is more likely to arise in a domestic context because the claimant is not a business person with the benefit of obtaining legal advice, and whose

[1204] [2008] UKHL 55
[1205] Jennifer Brenton, 'Constructive Trust or Proprietary Estoppel: To Force the Matter' (ealaw, 09 December 2013) <http://www.ealaw.co.uk/news/constructive-trust-or-proprietary-estoppel-to-for> accessed 05 May 2016
[1206] [2009] UKHL 55
[1207] *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55 [68] (Lord Walker)

expectation is focused on obtaining tangible property rather than intangible legal rights to property.

Another difference in the application of the two doctrines is that constructive trusts relates to present interests, whereas proprietary estoppel deals with future interest.[1208] Thus, an interest in constructive trusts exists from the date of its creation, so that the court is confirming an existing right which has retrospective effect. In contrast, proprietary estoppel provides more of a remedy than a right, and comes into existence when it is declared by the court and thus has prospective effect.

A constructive trust is also exempt from the operation of Section 2 (5) of the Law of Property (Miscellaneous Provisions) Act 1989, which provides that an agreement lacking the requisite formalities can create an interest under a constructive trust,[1209] whereas this exception does not specifically extend to an interest by proprietary estoppel per ***Yaxley v Gotts.***[1210]

The flexibility of proprietary estoppel over constructive trust was explicated by Etherton J in the Court of Appeal case of ***Yeoman's Row Management Limited & Another v Cobbe***[1211]***.*** His Lordship articulated that the traditional requirements of proprietary estoppel, including a clear representation, detriment or change of position and its remedy being the minimum equity to do justice, is considered to be a more

[1208]Jennifer Brenton, 'Constructive Trust or Proprietary Estoppel: To Force the Matter' (ealaw, 09 December 2013) <http://www.ealaw.co.uk/news/constructive-trust-or-proprietary-estoppel-to-for> accessed 05 May 2016

[1209]Jennifer Brenton, 'Constructive Trust or Proprietary Estoppel: To Force the Matter' (ealaw, 09 December, 2013) <http://www.ealaw.co.uk/news/constructive-trust-or-proprietary-estoppel-to-for> accessed 05 May 2016

[1210] [2000] Ch 162 (CA)

[1211] [2008] UKHL 55

reliable and certain instrument for remedying unconscionable conduct rather than constructive trusts.[1212] ***Justice Etherton*** also stated that the attractiveness of proprietary estoppel is enhanced by the wide discretion of the Court on the choice of actual remedy, whether proprietary or personal, which makes it appropriate for achieving justice.[1213] However, proprietary estoppel by its principle to apply the minimum equity to do justice may give rise to a lesser remedy than a constructive trust which satisfies the expectation of the claimant.[1214]

According to **Smith**[1215]**,** proprietary estoppel is a more flexible doctrine to be applied by the courts rather the constructive trust. He stated thus:

> Proprietary estoppel with its traditional requirements of a clear representation and detriment or change of position and the remedy restricted to the minimum to do justice has usually been considered a more reliable and certain instrument for remedying unconscionable conduct than the rather fluid concept of the constructive trust.[1216]

Hayward[1217] argues that proprietary estoppel will always be available as a remedy when constructive trusts is not. He stated that proprietary estoppel:

> …should be preferred for it will always be available where a common intention constructive trust is available, there is no need to search for an artificial intention and the remedy can be adjusted to fit the circumstances of the case.[1218]

[1212] John Wilson, 'Proprietary Estoppel: An Oasis without Palm Trees (or Water)' (Family Law Week, 11 February 2009) <http://www.familylawweek.co.uk/site.aspx?i=ed32401> accessed 21 May 2016
[1213] Lionel Smith, 'Constructive trust and constructive trustees' (2009) 2 Conv 104, 125
[1214] Imogen Moore, 'Proprietary estoppel, Constructive trust and Section 2 of the Law of property (Miscellaneous Provisions) Act 1989' [2000] MLR 63(6), 916 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1468-2230.00302> accessed 10 August 2017
[1215] Lionel Smith, 'Constructive trust and constructive trustees' (2009) 2 Conv 104, 125
[1216] Lionel Smith, 'Constructive trust and constructive trustees' (2009) 2 Conv 104, 125
[1217] Martin Dixon, 'More Moves in Constructive Trusts and Estoppel' [2017] Conv 2, 89
[1218] See Andy Hayward, 'Cohabitants, detriment and the potential of proprietary estoppel: *Southwell v Blackburn* [2014] EWCA Civ 1347' [2015] CFLQ 303, 312

For example, in ***Arif v Anwar***[1219] and ***Southwell v Blackburn***[1220] the Court held that proprietary estoppel was established as there was insufficient common intention to support a constructive trust.

However, ***Alison Dunn***[1221] argues there are clear difficulties with a proprietary estoppel approach. Whereas proprietary estoppel may be a better way forward in obviating the artificial search for a common intention, the search for an assurance will equally lead the courts to make similar fictional presumptions.[1222] Also, although proprietary estoppel may be easier to establish, it may be less predictable in outcome as satisfying the estoppel will not automatically lead to a proprietary interest in land.[1223]

Irrespective of the disparities of application in the two doctrines and the approach adopted by the courts, estoppel does show equity at its most flexible in providing a proprietary remedy or a personal remedy to a successful claimant, since a constructive trust will grant no greater benefit than what was actually agreed between the parties. Although proprietary estoppel only gives the minimum amount required to do justice, which may not meet the claimant's expectation, there must be proportionality between the expectation created or encouraged and the detriment suffered per ***Jennings v Rice***[1224]***.***

[1219] [2015] EWHC 124 (Fam)
[1220] [2014] EWCA Civ 1347
[1221] Alison Dunn, 'The ebb and flow of trusts and estoppel' [2004] KCLJ 15:436 <https://www.tandfonline.com/doi/pdf/10.1080/09615768.2004.11427584?needAccess=true accessed> 10 August 2017
[1222] Alison Dunn, 'The ebb and flow of trusts and estoppel' [2004] KCLJ 15:436 <https://www.tandfonline.com/doi/pdf/10.1080/09615768.2004.11427584?needAccess=true accessed> 10 August 2017
[1223] Alison Dunn, 'The ebb and flow of trusts and estoppel' [2004] KCLJ 15:436 <https://www.tandfonline.com/doi/pdf/10.1080/09615768.2004.11427584?needAccess=true accessed> 10 August 2017
[1224] [2002] EWCA Civ 159

11.6 The Overlap of Proprietary Estoppel and Constructive Trusts by the Courts

A number of decided cases show that both constructive trusts and proprietary estoppel may arise on the same facts. For example, in ***Ghazaani v Rowshan***[1225] which involved a dispute over an exchange of property, the Court of Appeal held that a proprietary estoppel and/or constructive trusts had arisen since the parties had orally agreed to transfer their properties, and R had in breach of the agreement failed to transfer his property to G. G and R had made an oral agreement to exchange a property in Leeds owned by R with an apartment in Tehran owned by G. The Leeds property was at the time of the agreement being rented out to B who paid rent to G, whereas the Tehran property was subject to a tenancy agreement, whereby the tenant J was entitled to a refund of a deposit totaling Iranian Rial (IR) 400m (£9,800 approximately per 2015 exchange rate). G had given R the IR400m, but R had refused to complete the exchange of the Leeds property to G, and so G commenced proceedings.

G argued that a constructive trust/proprietary estoppel had arisen on the facts as R had agreed to sell the Leeds property to G by way of the exchange of the Tehran apartment and in Iranian Riels. The Court held it was unconscionable for R to refuse to complete the transfer to G in the circumstances of the case, and decided to put the parties in the position in which they would have been, if the contract had been concluded. The Court ruled that both proprietary estoppel and constructive trusts had arisen on the facts of the case to enforce the contract between the parties.

[1225] [2015] All ER (D) 263 (Ch)

Similarly, in ***Matchmove Limited v Dowding and Church***[1226] the Court held that there was an overlap of constructive trusts and proprietary estoppel such that it was irrelevant which label was applied.

In ***Matchmove***[1227], the parties were former friends and reached a common understanding and an oral agreement for the purchase of a plot of land and a meadow. The claimants had paid a third of the purchase price for the plot and the meadow. A draft conveyance for the sale of the plot and meadow was drafted but was not executed. The defendant had permitted the claimants to commence building on the plot of land. Later, the defendant's solicitor informed the claimants' solicitor that the defendant did not intend to proceed with the sale of the meadow until the right-of-way dispute over the meadow was resolved. The parties therefore completed contracts for the purchase of the plot of land. Special condition 6 of the contract of sale for the plot provided that the claimants had entered into the contact solely on the terms thereof. Thereafter, the claimants made a series of payments for the meadow and contributed to the costs of the proceedings for the meadow. By the time the proceedings for the meadow were over, the parties were in dispute and the defendant wrote to the claimants informing them that they could have only have one half of the meadow and enclosed a refund cheque which the claimants did not cash. The claimants had sold their house and paid the full purchase price for the meadow, but no written contract for the sale or conveyance of the meadow was executed. The claimants sought a declaration that the defendant held the meadow on trust for them.

[1226] [2016] EWCA Civ 1233
[1227] [2016] EWCA Civ 1233

The trial judge held that this was a case where there was an overlap between the principles of proprietary estoppel and constructive trusts. The claimants were entitled in equity to the entire meadow on the basis of proprietary estoppel and constructive trusts, so the nature of the equitable remedy was irrelevant. The defendant held the meadow in trust for the claimants and the defendant was ordered to transfer the meadow to the claimants.

On appeal, ***Etherton MR*** gave judgment that the meadow was held by the defendant on a common intention constructive trust for the claimants and dismissed the appeal. The Court established that on the facts of the case, the judge had correctly concluded that the claimants had established that, from the payment of the deposit, the meadow had been held by the defendant on a common intention constructive trust for them. The Court held that the parties' agreement was clear as to the extent of the land in question, the claimant's prospective interest and the price payable. In reliance on the agreement, the claimants had acted to their detriment in paying the agreed sums for both the plot and the meadow and were entitled to the whole of the meadow on the basis of proprietary estoppel and constructive trusts. Special condition 6 of the written contract related only to the building plot and did not apply to the meadow. The meadow was held on constructive trusts for the claimants and was exempt from the need of a written contact.

According to ***Martin Dixon***[1228], proprietary estoppel could defeat constructive trusts on the facts in ***Matchmove***[1229]***.*** The claimants could establish an assurance, reliance

[1228] Martin Dixon, 'More Moves in Constructive Trust and Estoppel' [2017] Conv 2:89 7
[1229] [2016] EWCA Civ 1233

and detriment and demonstrate that it would be unconscionable for ***Matchmove***[1230] to go back on its promise.[1231] The parties had undertaken business in the same manner before and the defendant was considered a man of his word and his handshake had affirmed their agreement.[1232] In reliance on the agreement, the claimants paid the full purchase price for the meadow before the conveyance was finalized, and also contributed to the proceedings for the meadow which payments were accepted by the defendant.[1233]

The claimants had suffered a detriment by the defendant's refusal to convey the whole of the meadow that was already paid for in full.[1234] It was therefore unconscionable for the defendant to rely on formality rules when the defendant had acted on the informal agreement.[1235] An equity by estoppel arose as the defendant's conduct had led the claimants to believe that the formality requirements were not necessary.[1236] ***Dixon***[1237] argues that proprietary estoppel does not in itself side-step the formality rules, but the essential ingredient of unconscionability integral to estoppel, overrides the formality rules by enforcing the informal agreement between the parties.

In both cases of ***Ghazaani***[1238] and ***Matchmove***[1239]***,*** a proprietary estoppel had arisen on the facts because the claimant had paid the agreed price for the property which the other party had failed to transfer. With proprietary estoppel, the elements of

[1230] [2016] EWCA Civ 1233
[1231] Martin Dixon, 'More Moves in Constructive Trust and Estoppel' [2017] Conv 2:89 7
[1232] Martin Dixon, 'More Moves in Constructive Trust and Estoppel' [2017] Conv 2:89 7
[1233] Martin Dixon, 'More Moves in Constructive Trust and Estoppel' [2017] Conv 2:89 7
[1234] Martin Dixon, 'More Moves in Constructive Trust and Estoppel' [2017] Conv 2:89 7
[1235] Martin Dixon, 'More Moves in Constructive Trust and Estoppel' [2017] Conv 2:89 7
[1236] Martin Dixon, 'More Moves in Constructive Trust and Estoppel' [2017] Conv 2:89 7
[1237] Martin Dixon, 'More Moves in Constructive Trust and Estoppel' [2017] Conv 2:89 7
[1238] [2015] All ER (D) 263 (Ch)
[1239] [2016] EWCA Civ 1233

assurance, reliance and detriment were satisfied as the claimant had suffered a detriment in reliance on the claimant's assurance in paying the agreed price of the property with the defendant refusing to transfer title. Therefore, the Court's approach to determine both cases by a constructive trust analysis instead of proprietary estoppel is rather confusing, as neither case shows a common intention of the parties for the shared ownership of the property, nor for the acquisition of a beneficial interest in the property.

In fact, both cases should suggest proprietary estoppel arising from the claimants' assurances for an interest in land upon the payment of an agreed price. This begs the question of how does the court determine what amounts to a common intention or an assurance? The Court's decision in both cases may be explicated by the fact that the claimant held the property on constructive trusts for the defendant, from the time that the agreed price had been paid rather than upon the determination of a proprietary estoppel by the Court. In this way, the common intention of the parties had been satisfied upon the payment of the agreed price, and the claimant held the property in trust for the defendants who were the beneficial owners, pending the transfer of title by the claimants to the defendants.

The benefit of the Court's ruling in constructive trusts is that the defendants' ownership of the properties was established from the time that the agreed price had been paid rather than upon the determination of a proprietary estoppel against the claimant by the Court. Further, the Court's decision in both cases illustrates a broad approach towards the determination of a party's interest in land. According to

Chadwick LJ in ***Oxley v Hiscock***[1240], the law of constructive trusts has moved on since the Court of Appeal's decision in ***Drake v Whipp***[1241].[1242] The Court is not restricted to the application of proprietary estoppel but on the facts of the case will apply constructive trusts to arrive at the same decision. This broad approach was advocated by Peter Gibson LJ in ***Drake v Whipp***[1243], where he "emphasized that all that was required for the creation of a constructive trust is a common intention and an act of detrimental reliance; and that once these things have been shown, the court can take a "broad brush approach" to determine the extent of the parties' interest"[1244].

However, the limitation of the court's ruling in constructive trusts is that it precludes the discretionary power of the Court to establish and award a proprietary interest in the land. Instead, it allows for the Court to enforce the agreement of the parties in constructive trusts based on the contribution of each party's interest in the land.[1245] As Lord Walker asserted in ***Stack v Dowden***[1246], the object of the constructive trust is to identify the true beneficial owner or owners, and the size of their beneficial interests; whereas proprietary estoppel seeks to enforce an equitable claim against the conscience of the true owner. Another limitation on the court's ruling is that it

[1240] [2004] EWCA Civ 546
[1241] [1996] 1 FLR 826 (CA)
[1242] Alison Dunn, 'The ebb and flow of trusts and estoppel' [2004] KCLJ 15:436, 440 <https://www.tandfonline.com/doi/pdf/10.1080/09615768.2004.11427584?needAccess=true accessed> 10 August 2017
[1243] [1996] 1 FLR 826 (CA)
[1244] Alison Dunn, 'The ebb and flow of trusts and estoppel' [2004] KCLJ 15:436, 440 <https://www.tandfonline.com/doi/pdf/10.1080/09615768.2004.11427584?needAccess=true accessed> 10 August 2017
Dunn cited that Chadwick LJ asserted that the Court's approach in *Drake* [1996] 1 FLR 826 (CA) had previously been approved in *Gissing* [1971] AC 886 (HL), endorsed in *Grant v Edwards* [1986] Ch 638 (CA) and accepted in *Stokes v Anderson* [1991] FLR 391 (CA)
[1245] *Although see Jones v Kernott* [2011] UKSC 53 *where there was an obiter suggestion that a common intention could be inferred from the course of dealings of the parties (i.e. without there needing to be a financial contribution by the claimant)*
[1246] [2007] UKHL 17 [37]

undermines the doctrine of proprietary estoppel as a remedy to be applied in last resort to constructive trusts.

In relation to the decisions of ***Ghazaani***[1247] and ***Matchmove***[1248], the Court of Appeal had, in the previous case of ***Yaxley v Gotts***[1249], elucidated the overlap between the constructive trusts and proprietary estoppel. In ***Yaxley***[1250], Walker L.J. asserted that proprietary estoppel gave rise to a constructive trust because of the defendant's unconscionable conduct. Lord Walker elucidated that the doctrines of proprietary estoppel and the common intention constructive trust are very similar as follows:

> A constructive trust of that sort is closely akin to, if not distinguishable from, proprietary estoppel. Equity enforces it because it would be unconscionable for the other party to disregard the claimant's rights. Section 2(5) expressly saves the creation and operation of a constructive trust.[1251]

According to ***Lionel Smith***[1252]***,*** the leading exposition of the overlap between common intention constructive trust and of proprietary estoppel was articulated by Robert Walker in ***Yaxley v Gotts***[1253] where he stated that:

> At a high level of generality, there is much in common between the doctrines of proprietary estoppel and the constructive trust. […] in the area of joint enterprise for the acquisition of land which may be (but is not necessarily the matrimonial home) where the two concepts coincide.[1254]

[1247] [2015] All ER (D) 263 (Ch)
[1248] [2016] EWCA Civ 1233
[1249] [2000] Ch. 162 (CA)
[1250] [2000] Ch. 162 (CA)
[1251] *Yaxley v Gotts* [2000] Ch. 162 (CA) [48] (Walker LJ)
[1252] Lionel Smith, 'Constructive trust and constructive trustees' (2009) 2 Conv 104, 123
[1253] [2000] Ch. 162 (CA)
[1254] *Yaxley v Gotts* [2000] Ch. 162 (CA) [35] –[36] (Walker LJ)

Gwilym Owen and Oslan Rees[1255]***,*** also articulate that "the doctrine of proprietary estoppel and constructive trusts overlap in cases where section 2(1) of the 1989 Act is engaged".

In ***Herbert v Doyle***[1256]***,*** *Arden LJ (with whom Jackson LJ and Morgan J* agreed) commented on the overlap of proprietary estoppel and constructive trusts as follows:

> In my judgment, there is a common thread running through the speeches of Lord Scott and Lord Walker [in the Cobbe case]. Applying what Lord Walker said in relation to proprietary estoppel to constructive trust, that common thread is that if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement, which does not comply with section 2(1), is incomplete, they cannot utilize the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of section 2(5) of the 1989 Act.[1257]

Similarly, ***Lord Bridge*** explicated how the two doctrines overlap in the case of co-habitees in ***Lloyd's Bank v Rossett***[1258], as follows:

> The first and fundamental question … is whether independently of any interference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. […] Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel.[1259]

[1255] Gwilym Owen and Oslan Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: a misconceived approach?' [2011] Conv 6:495. 9
[1256] [2015] WTLR 1573 (CA)
[1257] *Herbert v Doyle* [2015] WTLR 1573 (CA) [57] (Arden LJ)
[1258] [1990] UKHL 14
[1259] *Lloyds v Rossett* [1990] UKHL 14, 1118 (Lord Bridge)

Martin Dixon[1260]**,** remains skeptical of the overlap between the two doctrines and states that: "….this conflation of constructive trust and estoppel claims is misplaced."[1261] ***Dixon***[1262] surmises that two questions arise on the facts of a case, "… is there a constructive trust? If not, is there an estoppel? They are independent claims."[1263]

Emerging from scrutiny of the two doctrines is that proprietary estoppel and constructive trusts are distinct and independent equitable remedies following unconscionable conduct by a landowner. Although the Courts recognize that there is an overlap between the two doctrines, does it exist in every case or in particular cases? In what circumstances will there be an overlap of the two doctrines? Is the overlap invoked in circumstances where a party has suffered a detriment in paying the agreed price for an interest in land and the landowner refuses to transfer title? Or does the Court prefer to deduce an artificial intention and a beneficial interest based on the party's expenditure to acquire an agreed interest in land? Clearly, the Court has not defined how this overlap arises, and has not defined the circumstances by which it arises on the facts of a case.

Whatever the rationale of the Courts may be in promoting an overlap of the two doctrines, it is clear that in the notable cases of ***Ghazaani***[1264] and ***Matchmove***[1265], the court was not minded to establish the beneficial interest of the parties by reference to their contributions nor to arrive at an arbitrary judgment on what would be a fair

[1260] Martin Dixon, 'More Moves in Constructive Trusts and Estoppel' [2017] Conv 2 89 7
[1261] Martin Dixon, 'More Moves in Constructive Trusts and Estoppel' [2017] Conv 2 89, 91 7
[1262] Martin Dixon, 'More Moves in Constructive Trusts and Estoppel' [2017] Conv 2 89 7
[1263] Martin Dixon, 'More Moves in Constructive Trusts and Estoppel' [2017] Conv 2 89, 91 7
[1264] [2015] All ER (D) 263 (Ch)
[1265] [2016] EWCA Civ 1233

share. The outcome of these cases reflects the Court's willingness to enforce the beneficial interest in the property that was created by a party's expenditure in a landowner's agreement for an interest in land.

Pertinently, the Court may be minded to rely on constructive trusts where a beneficial interest arises on the agreement between the parties, rather than seeking to determine the existence of a proprietary estoppel by the tripartite formula of assurance, reliance and detriment. In other words, the Court may elect to confirm an existing or pre-existing proprietary interest in the property by constructive trusts, rather than engage in a long process of establishing that future right by proprietary estoppel. With proprietary estoppel, the claimant's equity (payment of the agreed price as in ***Ghazaani***[1266] and ***Matchmove***[1267]) merely invokes the discretion of the court as it remains "inchoate" until the court decrees a specific interest or award in favour of the estoppel claimant. It is only at the date of the court's order that the equity materializes into a full property right. Thus, whereas proprietary estoppel focuses on a remedy to potentially satisfy the equity arising in the land, constructive trusts actually enforces an existing or pre-existing proprietary interest in the land. Hence, the facts and circumstances of the case will determine whether a remedy of constructive trusts or proprietary estoppel is applied by the court.

[1266] [2015] All ER (D) 263 (Ch)
[1267] [2016] EWCA Civ 1233

11.7 Problems for the Legal Practitioner in Pleading Constructive Trusts in the Alternative to Proprietary Estoppel.

Although constructive trusts provide an alternative remedy for proprietary estoppel, the onus of proving both doctrines on the facts lie with the legal practitioner. There may be conceptual difficulties and impediments to overcome. For example, if the facts support a finding of proprietary estoppel, then it seems unnecessary to prove that the facts also support a finding of constructive trusts.[1268] However, the remedy provided by constructive trusts is more certain and well-defined, as estoppel does not guarantee an equitable interest in the land at all, which may be a potential risk for the claimant who only relies on estoppel. Also, because a constructive trust operates with retrospective effect, it will be enforceable against later created equitable proprietary interests in the land, and will also bind a trustee in bankruptcy of the landowner's creditors if the landowner has for example, become bankrupt in the intervening period.[1269] An estoppel does not have the same advantages because it has prospective effect only, even if it creates an equitable interest in the land at all.

Another example, is that a constructive trust can result in legal practitioners delving deeper into the law to investigate whether or not a constructive trust is applicable to the facts.[1270] This level of complexity can increase the cost of litigation.[1271]

[1268] Gwilym Owen & Osian Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: A misconceived approach?' [2011] Conv 6:495 7

[1269] *See Re Sharpe* [1980] 1 WLR 219 (Ch)*, where monies loaned was not considered as a gift and hence did not amount to a contribution for the purchase price of the property, and also did not equate to a trust for an interest in the property. However, since the loan agreement had stated the lender could remain in the property for as long as she liked, the lender had a contractual right of occupation in the property until the loan was repaid to her.*

[1270] Gwilym Owen & Osian Rees, "Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: A misconceived approach*?* [2011] Conv 6:495

[1271] Gwilym Owen & Osian Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: A misconceived approach*?*' [2011] Conv 6:495 7

Therefore, depending on the facts and circumstances of the case, the pleading of constructive trusts as an alternative remedy can prove to be costly to the potential litigant. Although the legal practitioner may advise the potential litigant that he or she has a case in proprietary estoppel or constructive trusts, the potential litigant may not possess the financial resources to pursue the case. Hence, the lack of financial resources by the potential litigant may be a bar to the remedy of proprietary estoppel or constructive trusts, whichever basis the claimant chose. Although estoppel is far less predictable than constructive trusts, its advantage is that there is no need to establish common intention.

11.8 Should the two Doctrines of Constructive Trusts and Proprietary Estoppel be Assimilated?

According to ***MacKenzie***[1272]***,*** many judicial decisions and dicta illustrate an aversion for the assimilation of the two doctrines. For example, ***Sir Andrew Park*** of the Chancery Division of the High Court in ***Lalani v Crump Holdings Ltd***[1273] argued that the two doctrines are widely distinguishable. He stated that:

> While there was an affinity between the two types of claim for beneficial interest, a common intention trust tended to focus upon the current state of affairs, whereas proprietary estoppel was concerned with promises to do something in the future that would change the pre-existing situation. Moreover, the remedies available to the court were different.[1274]

[1272] Judith-Anne MacKenzie, *Textbook on Land Law* (16th edn, OUP 2014)
[1273] [2017] EWHC 47 (Ch)
[1274] Per Judith -Anne Mackenzie*, Textbook on Land Law* (16th edn, OUP 2014) 413

Lord Walker in ***Stack v Dowden***[1275] articulated although he had been given some encouragement about the similarities of the two doctrines in ***Yaxley v Gotts***[1276], he was now less enthusiastic of their assimilation as follows:

> I have to say that I am now rather less enthusiastic about the notion that proprietary estoppel and 'common intention' constructive trust can or should be completely assimilated. Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the 'true' owner. The claim is a 'mere equity'. It is to be satisfied by the minimum award necessary to do justice … which may sometimes lead to no more than a monetary award.[1277] A 'common intention' constructive trust by contrast is identifying the true beneficial owner or owners, and the size of their beneficial interests.[1278]

Lord Scott in ***Thorner v Major***[1279] advocated that each doctrine has a distinct role to play in the expectation of future rights. His Lordship wished:

> ..to keep proprietary estoppel and constructive trust as distinct and separate remedies to confine proprietary estoppel to cases where the representation … on which the claimant has acted is unconditional and to address the cases where the representations are of future benefits, and subject to qualification on account of unforeseen future events, via the principle of remedial constructive trust .[1280]

[1275] [2007] AC 432 (HL)

[1276] [2000] Ch 162 (CA)

[1277] *See for example, Baker v Baker* [1993] 25 HLR 408 (CA) *where the plaintiff had contributed to the purchase price of a house on the agreement of free accommodation for life, but left the house after a dispute arose with the owners. The court held that his equitable right to compensation was to be measured by the value of the right to free accommodation which he had lost, rather than the amount of his initial contribution. Also, in terms of a monetary award, if the defendant has no liquid funds out of which to satisfy the award or the defendant has been recently declared bankrupt, the claimant may be left without any remedy at all.*

[1278] *Stack v Dowden* [2007] AC 432 (HL) [37] (Lord Walker)

[1279] [2009] UKHL 18

[1280] *Thorner v Major* [2009] UKHL 18 [20] (Lord Scott), *The remedial constructive trust referred to by Lord Scott is innovatory, as English law does not recognize the remedial constructive trust unlike some other common law jurisdictions such as Canada. English law arguably uses estoppel similarly to how other jurisdictions utilizes the remedial constructive trust. The type of constructive trust discussed throughout this chapter is the 'institutional constructive trust' i.e. the type which has retrospective effect and which is supposed to recognize a pre-existing equitable interest rather than to create one out of nothing.*

According to ***Pawlowski***[1281], "….under current English law the two concepts remain separate and distinct"[1282]. For example, a constructive trust requires proof of a common intention (whether express or implied) to be established, whereas proprietary estoppel requires a mere assurance to be proved. ***Pawlowski***[1283] also articulates that in many of the cases, a constructive trust and proprietary estoppel are pleaded in the alternative and are treated as distinct doctrines.[1284]

Nourse LJ in ***Stokes v Anderson***[1285] articulated that the assimilation of the two doctrines is yet to be resolved by the Courts as follows:

> It is possible that the House of Lords will one day decide to solve the problem [presented by earlier decisions] either by assimilating the principles of Gissing v Gissing and those of proprietary estoppel, or even by following the recent trend in other (British) Commonwealth jurisdictions towards more generalized principles of unconscionability and unjust enrichment.[1286]

Despite the above lack of clarity in adopting a unified doctrine, the fact remains that an equity arising by proprietary estoppel is not a constructive trust and it is difficult for the two doctrines to be successfully assimilated. Any assimilation would be artificial as both doctrines are distinct in terms of the remedies that each provide, and of the fact

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[1281] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996)
[1282] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996) 12
[1283] Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell 1996)
[1284] See examples referred to by Pawlowski: *Walker v Walker* [1984] (CA) unreported; *Warnes v Hedley* [1984] (CA) unreported; *Bristol and West Building Society v Henning* [1985] 1 WLR 778 (CA); *Philip Lowe (Chinese Restaurant) Ltd v Sau Man Lee* [1985] (CA) unreported
[1285] [1991] 1 FLR 391 (CA)
[1286] *Stokes v Anderson* [1991] 1 FLR 391 (CA) 398-399 (Nourse LJ); *The concept of unjust enrichment links with the idea of a remedial constructive trust referred to by Lord Scott in Thorner v Major at page 321. It is because English law does not have a fully developed concept of unjust enrichment that the notion of the remedial constructive trust has not been adopted. Hence the courts here have instead relied on proprietary estoppel to grant or create a remedy which may or may not be an equitable proprietary interest in the land.*

that the constructive trust relates to trusts.[1287] Further, the analogies drawn are more conceptual than pragmatic as the application and operation of the doctrines are vastly distinct and independent of each other. Since both doctrines can be established on the same facts as in the case of ***Ghazaani v Rowshan***[1288]*,* then constructive trusts can be pleaded in the first option, with proprietary estoppel as the back-up claim if the constructive trusts claim fails.

11.9 Conclusion

Proprietary estoppel and constructive trusts are equitable doctrines that are designed to redress unconscionable dealings between parties. The pre-requisite common intention of constructive trusts creates a key distinction between the two doctrines. However, the particular facts of the case determine which doctrine is to be applied, whether it is a present or future interest, and in what context it ought to be applied, whether in domestic, commercial, personal or family cases. Both doctrines aim to provide a just outcome to address the detrimental reliance on informal agreements for an interest in property, and can be pleaded in the alternative on the same facts.

The flexibility of equity in providing equitable relief by both doctrines is illustrated in the case of ***Eves v Eves***[1289] where Lord Denning stated: 'Equity is not past the age of childbearing. One of her latest progeny is a constructive trust of a new model. Lord Diplock brought it into the world and we have nourished it.''[1290] Hence, the equitable principles underpinning the doctrines ensure that a party is not without a remedy or

[1287] Gwilym Owen & Osian Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: A misconceived approach?' [2011] Conv 6:495
[1288] [2015] All ER (D) 263 (Ch)
[1289] [1975] 1 WLR 1338 (CA)
[1290] *Eves v Eves* [1975] 1 WLR 1338 (CA) 1341 (Lord Denning)

relief in terms of a shared agreement for an interest in property, or a promise by a landowner for an interest in land.

Although the doctrines may arise on the same facts, they are distinct in application[1291] and the ultimate question before the Court is whether there is a constructive trust? Or whether there is a proprietary estoppel? Of course, the court will determine which doctrine best fit the facts so that a party is not left without a remedy.[1292] However, confusion and uncertainty still prevail as to how the courts arrive at their decisions regarding either proprietary estoppel or constructive trusts or both.

The next chapter will focus on the comparison between proprietary estoppel and unjust enrichment in the American[1293] and English legal systems.

[1291] *For example, where there is common intention followed by reliance, detriment and unconscionability the facts could equally support both a constructive trust and a remedy based on estoppel. Where there is a unilateral representation however, then estoppel is the only remedy available as the facts will not support a constructive trust.*

[1292] *There could be situations where no remedy is available at all, for example in circumstances where detrimental reliance cannot be established, or where there is no proof of unconscionability.*

[1293] The word 'American' is used synonymously with 'US'.

Chapter Twelve: Proprietary Estoppel versus the American and English Doctrine of Unjust Enrichment

12.1 Introduction

This chapter seeks to compare and contrast proprietary estoppel with the doctrine of unjust enrichment in the American and English legal systems. It illustrates the distinctive nature, features and application of proprietary estoppel against that of unjust enrichment, and considers which doctrine is a more suitable remedy. The chapter also examines whether proprietary estoppel can be applied in the United States, and compares the American and English systems of unjust enrichment. It defines the court's approach to the two doctrines, and determines whether a claim in proprietary estoppel equates to a claim in unjust enrichment.

The discussion adopted in this chapter is exclusive, as it compares the nature and purpose of the two doctrines, and their similarities and differences operating in the two jurisdictions. It draws further comparison between unjust enrichment in the two legal systems, and considers whether proprietary estoppel can be applied in the United States. Other legal scholars[1294] have not investigated unjust enrichment between the two jurisdictions to the same extent and depth as this thesis. These legal

[1294] C. Scott Pryor, 'Third Time's the Charm: The Coming Impact of the Restatement (Third) Restitution and Unjust Enrichment in Bankruptcy' [2013] 40 Pepperdine Law Review 4; James S. Rogers, 'Restitution for Wrongs and The Restatement Third) of the Law of Restitution and Unjust Enrichment' [2007] Wake Forest Law Review 42, 55; Edwin W. Patterson, 'The Scope of Restitution and Unjust Enrichment' [1936] The Missouri Law Rwview Vol.1:3; Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004); Douglas Laycock, 'Restoring Restitution to the Canon' [2012] Michigan Law Review Vol.110:929; Learned Hand, 'Restitution or Unjust Enrichment' [1897] Harvard Law Review Vol.11:4 249; Howard O. Hunter, 'Measuring Unjust Enrichment' [1989] Sydney Law Review Vol.12:1 76; Douglas Laycock, 'The Scope and Significance of Restitution' [1989] Texas Law Review Vol.67:1277; Graham Virgo, *The Principles of Equity & Trusts* (3rd edn, OUP 2018); Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2017); Gary Watt, *Trusts & Equity* (8th edn, OUP 2018); Mohamed Ramjohn, *Unlocking Equity and Trusts* (6th edn, Routledge 2017; Martin Dixon, *Modern Land Law* (10th edn, Routledge 2016) Elizabeth Cooke, *Land Law* (2nd edn, OUP 2012); Judith-Anne MacKenzie & Aruna Nair, *Textbook on Land Law* (17th edn, OUP 2016)

scholars[1295] tend to focus on theoretical aspects of restitution and unjust enrichment, and have not explicitly compared and contrasted the American and English system of unjust enrichment with proprietary estoppel, and neither explored the influence of English proprietary estoppel in America. Further, they have not drawn a comparison of proprietary estoppel with the English system of unjust enrichment, and neither have contrasted the American and English systems of unjust enrichment.

This chapter further considers the question of whether the doctrine of proprietary estoppel is sound in terms of its nature, application, strengths and weaknesses, benefit and limitations in comparison to the similar equitable remedy of unjust enrichment. Other legal scholars[1296] have not explicitly investigated the two doctrines in the two differing jurisdictions on the same issues, and neither through the analysis of case law as presented in this thesis.

[1295] C. Scott Pryor, 'Third Time's the Charm: The Coming Impact of the Restatement (Third) Restitution and Unjust Enrichment in Bankruptcy' [2013] 40 Pepperdine Law Review 4; James S. Rogers, 'Restitution for Wrongs and The Restatement Third) of the Law of Restitution and Unjust Enrichment' [2007] Wake Forest Law Review 42, 55; Edwin W. Patterson, 'The Scope of Restitution and Unjust Enrichment' [1936] The Missouri Law Rwview Vol.1:3; Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004); Douglas Laycock, 'Restoring Restitution to the Canon' [2012] Michigan Law Review Vol.110:929; Learned Hand, 'Restitution or Unjust Enrichment' [1897] Harvard Law Review Vol.11:4 249; Howard O. Hunter, 'Measuring Unjust Enrichment' [1989] Sydney Law Review Vol.12:1 76; Douglas Laycock, 'The Scope and Significance of Restitution' [1989] Texas Law Review Vol.67:1277; Graham Virgo, *The Principles of Equity & Trusts* (3rd edn, OUP 2018); Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2017); Gary Watt, *Trusts & Equity* (8th edn, OUP 2018); Mohamed Ramjohn, *Unlocking Equity and Trusts* (6th edn, Routledge 2017; Martin Dixon, *Modern Land Law* (10th edn, Routledge 2016) Elizabeth Cooke, *Land Law* (2nd edn, OUP 2012); Judith-Anne MacKenzie & Aruna Nair, *Textbook on Land Law* (17th edn, OUP 2016)

[1296] C. Scott Pryor, 'Third Time's the Charm: The Coming Impact of the Restatement (Third) Restitution and Unjust Enrichment in Bankruptcy' [2013] 40 Pepperdine Law Review 4; James S. Rogers, 'Restitution for Wrongs and The Restatement Third) of the Law of Restitution and Unjust Enrichment' [2007] Wake Forest Law Review 42, 55; Edwin W. Patterson, 'The Scope of Restitution and Unjust Enrichment' [1936] The Missouri Law Rwview Vol.1:3; Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004); Douglas Laycock, 'Restoring Restitution to the Canon' [2012] Michigan Law Review Vol.110:929; Learned Hand, 'Restitution or Unjust Enrichment' [1897] Harvard Law Review Vol.11:4 249; Howard O. Hunter, 'Measuring Unjust Enrichment' [1989] Sydney Law Review Vol.12:1 76; Douglas Laycock, 'The Scope and Significance of Restitution' [1989] Texas Law Review Vol.67:1277; Graham Virgo, *The Principles of Equity & Trusts* (3rd edn, OUP 2018); Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2017); Gary Watt, *Trusts & Equity* (8th edn, OUP 2018); Mohamed Ramjohn, *Unlocking Equity and Trusts* (6th edn, Routledge 2017; Martin Dixon, *Modern Land Law* (10th edn, Routledge 2016) Elizabeth Cooke, *Land Law* (2nd edn, OUP 2012); Judith-Anne MacKenzie & Aruna Nair, *Textbook on Land Law* (17th edn, OUP 2016)

The chapter links to the other chapters of the thesis in illustrating a broad perspective of the nature, purpose and efficacy of proprietary estoppel in comparison to the similar equitable doctrine of unjust enrichment.

12.2 Proprietary estoppel and Unjust Enrichment in the United States

In the United States, the law of unjust enrichment arguably fulfils some aspects of the role played by the English law of proprietary estoppel. The American doctrine of unjust enrichment maintains that a person who receives benefits unjustly should make restitution for those benefits. It embraces the principle whereby a plaintiff recovers a defendant's unjust enrichment arising from a violation of a legally protected right without the plaintiff having to establish or prove any further harm.[1297] For example, a person is considered unjustly enriched where he or she obtains a benefit from another under such circumstances that give rise to an implied or quasi- contract to repay.[1298] An implied or quasi-contract imposes an obligation by law to do justice notwithstanding no promise was made and/or intended; or that the defendant is holding money or property that rightfully belongs to the plaintiff.[1299]

The case of ***Olwell v Nye & Nissen***[1300] illustrates the pervasive principle of unjust enrichment and restitution. Olwell (O) transferred his interest in an egg-packing corporation to Nye & Nissen (N & N) but retained ownership of an egg-washing machine. O stored the machine on property adjacent to the premises occupied by N &

[1297] C. Scott Pryor, 'Third Time's the Charm: The Coming Impact of the Restatement (Third) Restitution and Unjust Enrichment in Bankruptcy' [2013] 40 Pepperdine Law Review 4 <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2308&context=plr> accessed 14 October 2017

[1298] *Allen v Berry* [1982] Tex. App. San Antonio 645 S.W.2d 550,553

[1299] *Allen v Berry* [1982] Tex. App. San Antonio 645 S.W.2d 550,553

[1300] [1946] 173 P.2d 652 (Wash.)

N. Without O's knowledge and consent, N & N took the egg-washing machine out of storage and put it to use in their business. O did not suffer any material damage as the egg-washing machine was in good condition and O never claimed title to it. O sued N & N in quasi-contract to recover the profits procured by N & N in its unauthorized use of the machine. The Supreme Court of Washington held that although no material harm was done to O, N & N was nonetheless liable for the benefit it obtained by O's machine. Hence, unjust enrichment focuses on the benefit obtained by the defendant to the loss of the plaintiff.

Although restitution is of the common law[1301], the courts tend to consider restitution and unjust enrichment as equitable in nature.[1302] ***Sherwin***[1303] asserts that although quasi-contract remedies were originally granted by the law courts from which restitution developed, both "restitution and unjust enrichment have been associated with equity in a broader sense"[1304]. For example[1305], in ***Kossian v American National***

[1301] Steve Hedley, 'Unjust Enrichment' [1995] CLJ 54(3) 578

[1302] See Michael Traynor, 'The Restatement (Third) of Restitution & Unjust Enrichment: Some Introductory Suggestions' [2011] 68 WASH. & LEE L. REV. 899, who asserts that the Restatement explicates that restitution may be legal or equitable or both <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3315&context=wlulr> accessed 14 October 2017

[1303] Emily Sherwin, 'Restitution and Equity: An Analysis of the Principle of Unjust Enrichment' [2001] Texas Law Review Vol.79:2083 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1949&context=facpub> accessed 14 October 2017

[1304] See Emily Sherwin, 'Restitution and Equity: An Analysis of the Principle of Unjust Enrichment' [2001] Texas Law Review Vol.79:2083, 2086-2087 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1949&context=facpub> accessed 14 October 2017

However, see Colleen P. Murphy, 'Recognizing Restitutionary Causes of Action and Remedies Under Rhode Island Law' [2015] Roger Williams University Law Review Vol.20:3 429, 436 <http://rogerwilliamslawreview.org/files/2014/02/CMurphy.pdf> accessed 14 October 2017 which states that as a historical and technical matter, some strands of restitution are equitable while others are legal. For example, a legal remedy include a money judgment for the value of a benefit obtained by the defendant, or a monetary restitution of a defendant's unjust gain of money. In contrast, the remedies of constructive trust and equitable lien are technically equitable remedies; See also Michael Traynor, 'The Restatement (Third) of Restitution & Unjust Enrichment: Some Introductory Suggestions' [2011] 68 WASH. & LEE L. REV. 899 <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsr

Insurance Co.[1306], a portion of a hotel was destroyed by fire. The property was subject to a deed of trust in which the defendant was the beneficiary. The hotel owner hired the plaintiff to clean up the debris after the fire, but the plaintiff was never paid for his services. The hotel owner defaulted on the mortgage and filed for bankruptcy. The defendant took possession of the hotel premises that was cleaned of the debris, and also benefited from the insurance policy for the mortgage. The plaintiff instituted a restitution claim against the defendant for a monetary remedy from the insurance proceeds for the debris removal. The court allowed the claim despite the fact that the defendant had not hired the plaintiff, and the insurance payment emanated from the independent contract between the hotel owner and the insurer. The court decided that by the equitable doctrine of unjust enrichment the defendant should not "be indemnified twice for the same loss, once in labor and materials and again in money, to the detriment (forfeiture) of the party who furnished the labor and materials".[1307] Hence, unjust enrichment is considered as an equitable doctrine for a remedy in restitution.

In ***Sharp v Kosmalski***[1308], the court also applied equitable principles for a finding of unjust enrichment.[1309] The plaintiff was a fifty-six year old farmer and the defendant was a forty-year old school teacher who became co-habitees following the death of

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edir=1&article=3315&context=wlulr> accessed 14 October 2017 who asserts that the Restatement explicates that restitution may be legal or equitable or both.

[1305] See Emily Sherwin, 'Restitution and Equity: An Analysis of the Principle of Unjust Enrichment' (2001) Texas Law Review Vol. 79:2083, 2089 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1949&context=facpub> accessed 14 October 2017

[1306] 2[1967] 54 Cal. App. 2d 647

[1307] [1967] 54 Cal. App. 2d 647, 651

[1308] [1976] 351 N.E. 2d 721

[1309] See Emily Sherwin, 'Restitution and Equity: An Analysis of the Principle of Unjust Enrichment' [2001] Texas Law Review Vol.79(2083) <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1949&context=facpub> accessed 14 October 2017

the plaintiff's wife. The defendant refused the plaintiff's repeated marriage proposals despite their courtship over several years, and in giving numerous gifts to the defendant. The plaintiff ultimately gifted his principal asset being the farm to the defendant who evicted the plaintiff off the farm after their relationship broke down and they split. The plaintiff claimed for a remedy in constructive trust to obtain the title to his farm. The trial court's decision was reversed by the New York Court of Appeals which held that an unjust enrichment had occurred. The court held that the "purpose of the constructive trust remedy is to prevent unjust enrichment," and that unjust enrichment is determined "through the application of the principles of equity".[1310] Further, the court maintained that the facts presented "the classic example of a situation where equity should intervene to scrutinize a transaction pregnant with opportunity for abuse and unfairness"[1311]. Thus, unjust enrichment was considered as a principle of equity.

In the case of ***Scrushy v Taylor***[1312], the Alabama Supreme Court asserted that the doctrine of unjust enrichment is an equitable remedy that prevents a party from being unjustly enriched at the expense of another.[1313] The Court affirmed as follows:

> The doctrine of unjust enrichment is an old equitable remedy permitting the court in equity and good conscience to disallow one to be unjustly enriched at the expense of another … A claim for restitution is equitable in nature, and permits a trial court to balance the equities and to take into account competing principles to determine if the defendant was unjustly enriched. Consequently, the success of a claim for unjust enrichment depends on the particular facts and circumstances of each case.[1314]

[1310] [1976] 351 N.E. 2d 721, 2090
[1311] [1976] 351 N.E. 2d 721, 724
[1312] [2006] No. 1050564, WL 2458818
[1313] See Chaim Saiman, 'Restating Restitution: A Case of Contemporary Common Law Conceptualism' [2007] 52 Villanova Law Review Vol.52:487, 494 <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1143&context=vlr> accessed 14 October 2017
[1314] [2006] No. 1050564, WL 2458818 [11]

Thus, equity provides the balancing scale for unjust enrichment and restitution.

The major similarity between proprietary estoppel and unjust enrichment is the application of equity to provide remedies and cause of action for inequitable or unconscionable conduct of parties. However, these two doctrines are distinct in terms of approach, principle, application and operation. They illustrate the varying circumstances for the intervention of equity to remedy unconscionable conduct, and the unjust retention of a benefit at the claimant's expense.

Whereas proprietary estoppel gives rise to a remedy bestowed by the courts, the remedies of unjust enrichment are entrenched by statute[1315]. The law of unjust enrichment is enshrined in the Restatement of the Law Third, Restitution and Unjust Enrichment (R3RUE) which provides that every unjust enrichment gives a right in restitution. It provides that "A person who is unjustly enriched at the expense of another is subject to liability in restitution."[1316] The Restatement also advocates that the liability in restitution arises from the economic benefit derived in circumstances where its retention without payment would result in the unjust enrichment of defendant at the expense of the claimant.[1317] The R3RUE defines the terms "at the expense of another" as a violation of another's "legally protected rights" without proof that the claimant has suffered a loss.[1318] Thus, the enrichment must be unjustified under the law, and not unjust because a party may think so.

[1315] See Chapter Seven of the Restatement of the Law Third, Restitution and Unjust Enrichment (R3RUE) for the remedies in unjust enrichment.
[1316] Restatement of Restitution (1937), s. 1; Restatement (Third) of Restitution & Unjust Enrichment § 1 (2011)
[1317] Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004)
[1318] Restatement (Third) of Restitution and Unjust Enrichment § 2(1)

The Restatement provides remedies, apart from compensatory damages (based on the plaintiff's loss), that focus on what the defendant has received rather than what the plaintiff has lost.[1319] It includes remedies enforceable against identifiable property such as rescission and restitution, constructive trust, equitable lien and subrogation.[1320] The Restatement also defines categories of liability such as "a recipient who obtains a benefit without payment does not establish that the recipient has been unjustly enriched; or a valid contract which defines the obligations of the parties on matters within its scope, displaces to that extent any inquiry into unjust enrichment; that no liability in restitution arises for an unrequested benefit that is voluntarily conferred, unless the circumstances of the transaction justify the claimants' intervention in the absence of contract; and that liability in restitution may not subject an innocent recipient to a forced exchange meaning an obligation to pay for a benefit that the recipient should have been free to refuse".[1321]

The principles of application vary for both doctrines. Whereas proprietary estoppel requires the fulfilment of the criteria of assurance, reliance and detriment, underpinned by unconscionability, unjust enrichment considers the gain to the defendant in relation to the loss of the plaintiff. Also, whereas proprietary estoppel affords both a cause of action and a defence to a claim, unjust enrichment provides only a cause of action as it is strictly a gains theory doctrine – based on the defendant's

[1319] Michael Traynor, 'The Restatement (Third) of Restitution & Unjust Enrichment: Some Introductory Suggestions' [2011] 68 WASH. & LEE L. REV. 899 <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3315&context=wlulr> accessed 14 October 2017

[1320] Michael Traynor, 'The Restatement (Third) of Restitution & Unjust Enrichment: Some Introductory Suggestions' [2011] 68 WASH. & LEE L. REV. 899 <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3315&context=wlulr> accessed 14 October 2017

[1321] Douglas Laycock, 'Restoring Restitution to the Canon' [2012] Michigan Law Review Vol.110:929 <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1101&context=mlr> accessed 14 October 2017

gain and not the claimant's loss. It follows that proprietary estoppel is about promise or representation versus detrimental reliance, whereas unjust enrichment is about gain versus loss.

For example, in ***Everhart v Miles***[1322] restitution was awarded to the plaintiff where the defendant had unjustly benefited by labour and improvements to the defendant's property that were willingly accepted by the defendant. In that case, Bruce and Sharon Miles (plaintiffs) had negotiated the purchase of rural land including a farm from Edwin Everhart (the defendant) for the total sum of USD$279, 000. The plaintiffs had travelled to the farm to take possession thereof. The Plaintiffs made a down payment to execute the contract of sale, but the contract was not executed and negotiations continued. During the negotiations, the plaintiffs lived on the farm and undertook numerous improvements including taking over the farm's dairy business, fixing the barn roof, renovating the farmhouse and installing a septic system. The plaintiffs later reduced their offered price which the defendant rejected, at which the plaintiffs left the property. The plaintiffs brought suit against the defendant in restitution. The trial court determined that the plaintiffs had lived on the farm with the defendant's blessing, and awarded restitution to the plaintiffs on the ground that the defendant had been unjustly enriched by the plaintiffs actions.

The defendant appealed but the appeal court upheld the trial court's decision. Justice Weant affirmed that the defendant knew of the plaintiffs presence, had approved of their presence, had accepted the benefits of their work and expenditures and had

[1322] [1980] Court of Special Appeals of Maryland, 422 A 2d 28

made no attempt to stop or remove them. Hence, restitution was awarded to the plaintiffs.

The above case reflects the principle of unjust enrichment whereby restitution is awarded where one party is enriched at the expense of another, and the enriched party will disgorge the benefit to the other party instead of retaining the benefit. Since fixtures and improvements in real property cannot be disgorged as these benefits are affixed to the property, then restitution is awarded by compensation for the fixtures and improvements.

The basis of liability of the two doctrines is distinct. Whereas proprietary estoppel requires the claimant to prove that he or she has suffered a detrimental reliance on a promise, an unjust enrichment on the other hand requires the plaintiff to show that he or she is the source of defendant's enrichment, either by the loss suffered that ensued to the defendant's gain, or the defendant's gain was acquired by a violation of the plaintiff's rights. Hence, unjust enrichment has no regard to the change of position for a promise as in proprietary estoppel, but concerns a legally protected right of the plaintiff that is "acquired or retained in a manner that the law regards as unjustified."[1323]

In the case of ***University of Colorado Foundation, Inc. v. American Cyanamid Company***[1324], two university professors conducted studies on a prenatal supplement

[1323] C. Scott Pryor, 'Third Time's the Charm: The Coming Impact of the Restatement (Third) Restitution and Unjust Enrichment in Bankruptcy' [2013] 40 Pepperdine Law Review 4 <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2308&context=plr> accessed 14 October 2017

[1324] [1999] 196 F.3d 1366 (Fed. Cir.)

for the defendant. The professors disclosed the results in a confidential memoranda to the defendant. However, the defendant invented a reformulated supplement based on the memoranda and obtained a patent for the product. The professors claimed for relief including unjust enrichment against the defendant. The court held that the defendant claimed the benefit of the professor's studies to obtain the patent, and also benefited from the monopoly profits of the patent. It was inequitable for the defendant to enjoy the profits without compensating the plaintiffs. The Court of Appeals for the Federal Circuit held that the professors were entitled to recover on the unjust enrichment principle.

In contradistinction to proprietary estoppel, the law of restitution in R3RUE addresses both liabilities and remedies for unjust enrichment. The Restatement explicates that restitution may be legal or equitable or both.[1325] For example, a monetary award for the benefit obtained by the defendant is a legal remedy; and equitable remedies such as equitable lien and constructive trust are granted in respect of property.[1326] Whereas a remedy in proprietary estoppel lies in the discretion of the court, unjust enrichment is granted in accordance with the recognizable claims defined in the R3RUE. Restitutionary relief for unjust enrichment is classified in two forms as the recovery of the value of benefits transferred from the plaintiff to the defendant; or the disgorgement of profits by wrongful conduct where a claimant recovers more than a provable loss from the defendant's gain. The recovery under unjust enrichment is an

[1325] Michael Traynor, 'The Restatement (Third) of Restitution & Unjust Enrichment: Some Introductory Suggestions' [2011] 68 WASH. & LEE L. REV. 899 <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3315&context=wlulr> accessed 14 October 2017

[1326] Michael Traynor, 'The Restatement (Third) of Restitution & Unjust Enrichment: Some Introductory Suggestions' [2011] 68 WASH. & LEE L. REV. 899 <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3315&context=wlulr> accessed 14 October 2017

equitable right and is not dependent on the existence of a wrong.[1327] It provides a right of restitution to a plaintiff who is unfairly deprived of his or her property.

For example, in the case of ***City of Hastings v Jerry Spady***[1328], a purchaser who knew he was acquiring property under suspicious circumstances arising from a breach of fiduciary duty was made subject to a constructive trust. In that case, around 1977 and 1978, the City of Hastings (plaintiff) sought to purchase an abandoned railway right of way (the property) owned by the Missouri Pacific Railroad Company (MPRC). Duane Stromer, the attorney for the plaintiff was also the attorney for Jerry Spady (defendant). Stromer made a written offer to MPRC to purchase the property, and also falsely informed MPRC that the plaintiff was not interested in purchasing the property. Later, Stromer contracted with MPRC to purchase the property for USD$10,900 and informed the plaintiff that he had acquired the property and would sell it to the plaintiff for USD$20,000. The mayor had a meeting with Stromer by which Stomer agreed to withdraw from the contract to allow the plaintiff to purchase the property, and informed MPRC of his decision. However, Stromer advised MPRC by telephone that the deed should be issued to a corporation owned by the defendant. Stromer sent the check of USD$10,900 from Spady to MPRC and requested the property be deeded directly to the defendant. The property was deeded to Spady and the deed was mailed to Stromer. Meanwhile, the plaintiff had completed appraisals on the property in the expectation of purchasing it, and had passed a motion to offer USD$18,000 for the property. The plaintiff never authorized Stromer to negotiate on its behalf, nor did the plaintiff know that Stromer was dealing with the property. The

[1327] Bransom v Standard Hardware Inc. [1994] Tex.App. Fort Worth 874 S.W. 2d 919, 927
[1328] [1982] Supreme Court of Nebraska 212 Neb. 137

plaintiff sought restitution in equity for a constructive trust on the property, and the district court imposed a constructive trust on the property for the plaintiff.

The defendant appealed, but the appeal court upheld the decision of the district court. The court determined that the Stromer's participation in acquiring the property, knowing that the plaintiff was interested, was a breach of fiduciary duty. The defendant was not a bona fide purchaser for value as Stromer's knowledge of the plaintiff's interest in the property was imputed to the defendant, as notice to an attorney was notice to his client. The court held that the defendant had actual or constructive notice of Stromer's breach of fiduciary duty in transferring the property to the defendant, and the defendant was subject to a constructive trust to prevent unjust enrichment.

The equitable remedy of constructive trust was thereby applied to prevent the unjust enrichment of the defendant. Stromer was in breach of his fiduciary duty to the plaintiff and consequently his breach and knowledge of the plaintiff's interest in the property led to the defendant being unjustly enriched at the expense of the plaintiff. Hence, unjust enrichment provided a proprietary remedy in restitution by way of constructive trust to the plaintiff against the defendant.

In sharp contrast to the tripartite formula of assurance, reliance and detriment in proprietary estoppel, unjust enrichment embraces a much broader formulae for proof as a cause of action such as: "(1) that party (A) conferred a benefit upon party (B) from whom relief is sought; (2) that the recipient (B) appreciated the benefit; and (3) that the recipient (B) accepted the benefit under such circumstances that it would be

inequitable for (B) to retain the benefit without paying the value thereof."[1329] Hence, unjust enrichment deals with the defendant's gain rather than the claimant's loss. It does not require proof of harm, except a violation of a plaintiff's legal right and the defendant obtains a benefit whether by money, property, service or some other means. The recovery under unjust enrichment is a right in restitution to a plaintiff who is unfairly deprived of his or her property.

In contrast to proprietary estoppel which relates to an interest in land and intellectual property[1330], the scope of unjust enrichment extends beyond land to include chattels (tangible property), intellectual property rights such as copyrights, trademarks and patents; contracts and quasi-contracts such as contractual relations and performances, precontractual expectations, trade secrets, individual reputation and dignity, commercial attributes of personality, and identity and physical integrity.[1331] Hence, the doctrine of unjust enrichment is all encompassing to personal property, commercial, real property, contracts and reputation so long as the principle of gain is acquired in the violation of another's rights.

Unlike proprietary estoppel, unjust enrichment is a predictable doctrine as it gives a right to a restitutionary remedy under the R3RUE. Whether an unjust enrichment is

[1329] C. Scott Pryor, 'Third Time's the Charm: The Coming Impact of the Restatement (Third) Restitution and Unjust Enrichment in Bankruptcy' 40 Pepperdine Law Review 4 <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2308&context=plr> accessed 14 October 2017
See also cases such as *Hegel v. Brunswick Corp.* [2010] No. 09-C-8822010 U.S. Dist. LEXIS 82257(E.D. Wis. July 20); *Buckett v. Jante* [2009] 767 N.W.2d 376, 380 (Wis. Ct. App.)
[1330] See *Motivate Publishing FZ LLC et al v Hello Ltd* [2015] EWHC 1554 (Ch) where the court established that proprietary estoppel applies to intellectual property rights and not only for an interest in land.
[1331] James Steven Rogers, 'Restitution for wrongs and the Restatement (Third) of the law of restitution and unjust enrichment' [2007] Wake Forest Law Review Vol. 42(55) <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1163&context=lsfp> accessed 10 October 2017

founded depends on whether the defendant's act falls within the prescribed circumstances or categories established in the R3RUE. Further, the claimant can only proceed with the claim for unjust enrichment if he or she has a legal right to the property by which the defendant has become unjust enriched. In sharp contrast, proprietary estoppel is an unpredictable doctrine that is determined solely by the court in exercise of its discretion. Unless the court makes a favourable determination of the facts and circumstances of a case, it is not possible to predict in advance whether a proprietary estoppel exist. Also, unless the claimant in proprietary estoppel can prove that he or she has suffered a detrimental reliance on a promise for an interest in land, then there can be no finding of an estoppel, and the court cannot grant a remedy.

12.3 Does a Claim in Proprietary Estoppel Equate to a Claim in Unjust Enrichment?

It is arguable that in proprietary estoppel, the defendant is enriched at the expense of the claimant as the defendant obtains the benefit of the claimant's services such as: working without pay or for low wages[1332]; or giving up paid employment or education in reliance and expectation of the defendant's promise[1333]. However, the claimant could not enforce a claim in unjust enrichment as he or she has no pre-existing legal right in the defendant's land to enforce a claim. Thus, the equitable doctrine of proprietary estoppel intervenes to prohibit the defendant's enforcement and reliance on strict legal rights where the claimant has suffered a detriment in reliance on the defendant's promise of an interest in land. Therefore, unlike unjust enrichment the doctrine of proprietary estoppel protects a claimant who suffers a detrimental reliance

[1332] [2009] UKHL 18
[1333] [2009] UKHL 18

on the defendant's promise of an interest in land notwithstanding that the claimant has no legal interest in the defendant's land.

Another factor which illustrate that a claim in proprietary estoppel does not equate to a claim in unjust enrichment is the scope of the two doctrines. Proprietary estoppel does not apply to contracts or quasi contracts as established in ***Yeoman's Row Management Ltd v Cobbe***[1334], but arises from the informal arrangements of parties that involve the making of an assurance or representation to which another relies thereon to their detriment. Unjust enrichment on the other hand, applies where a person is unjustly enriched in obtaining a benefit from another under such circumstances that give rise to an implied or quasi- contract to repay.[1335] Thus, the implied or quasi-contract in unjust enrichment imposes an obligation by law to do restitution where no promise was made and/or intended[1336]. Hence, unjust enrichment does not require a promise or representation as in proprietary estoppel, as it provides a right of restitution to a plaintiff who is unfairly deprived of his or her property by implying a contract or quasi-contract. Thus, the question on whether proprietary estoppel equates to the American system of unjust enrichment is to be answered in the negative.

12.4 Can the Doctrine of Proprietary Estoppel be Applied in the US?

It is arguable that proprietary estoppel can be applied in the United States. Proprietary estoppel applies equity, which is pervasively applied in the doctrine of unjust

[1334] [2008] UKHL 55

[1335] C. Scott Pryor, 'Third Time's the Charm: The Coming Impact of the Restatement (Third) Restitution and Unjust Enrichment in Bankruptcy' 40 Pepperdine Law Review 4 <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2308&context=plr> accessed 14 October 2017

[1336] *Allen v Berry* [1982] Tex. App. San Antonio 645 S.W.2d 550, 553

enrichment. Hence, the introduction of the equitable doctrine of proprietary estoppel would not be a novel equitable remedy. Also, in England, proprietary estoppel is more prominent in the farming cases[1337], which is adaptable to the United States which have similarly large farms. Thus, the creation of informal arrangements in exchange for low wages[1338] or in forfeiting education[1339] or other employment[1340] to work on a farm may not be uncommon in the US as in England. Further, the application of proprietary estoppel in intellectual property[1341] in England may also apply in the US jurisdiction that also deal with intellectual property rights.

The tripartite formula of assurance, reliance and detriment in proprietary estoppel may also be applied in the informal relations of parties in the domestic or family context, to land or other property such as a home, or in intellectual property. It prevents the enforcement of strict legal rights, or the prohibition of unconscionable conduct where a party had induced another to rely on a state of affairs and that other party suffered a detriment thereby. So long as the requirements of the estoppel is satisfied, then an estoppel can arise on the facts to create a personal or proprietary remedy. Hence, the flexibility and practicality of proprietary estoppel and of equity allows it to be applied in the US.

The tenor of proprietary estoppel to redress unconscionable conduct in acting against the conscience of the defendant, and to provide the minimum equity to do justice in a particular case produces a rational system of rights in personam that may be applied in

[1337] See *Thorner v Major* [2009] UKHL 18; *Suggitt v Suggitt* [2012] EWCA Civ 1140; *Davies v Davies* [2016] EWCA Civ 463; *James v James* [2018] EWHC 43 Ch; *Haberfield v Haberfield* [2018] EWHC 317 (Ch)
[1338] *Suggitt v Suggitt* [2012] EWCA Civ 1140
[1339] *Davies v Davies* [2016] EWCA Civ 463
[1340] *Thorner v Major* [2009] UKHL 18
[1341] *Motivate Publishing FZ LLC et al v Hello Ltd* [2015] EWHC 1554 (Ch)

the US. Since proprietary estoppel is a judicial doctrine and not a creature of statute, then it can be developed by the courts if they can show a willingness to adopt its doctrinal principles. Thus, the question on whether proprietary estoppel can be applied in the US is to be answered in the positive.

12.5 Proprietary Estoppel versus Unjust Enrichment in English Law

Proprietary estoppel and unjust enrichment are two distinct and independent doctrines in English law. Unjust enrichment is a newly recognized subject, accepted into English law by the House of Lords in 1991, in ***Lipkin Gorman v Karpnale Ltd***[1342],[1343] which established the foundation of unjust enrichment.[1344] Proprietary estoppel, in contrast is a more longstanding doctrine that originated in English law from the House of Lords decision of Lord Kingsdown in ***Ramsden v Dyson***[1345] in 1866. Just as proprietary estoppel was approved by the House of Lords in ***Thorner v Major***[1346], the doctrine of unjust enrichment was likewise approved in limited contexts by the House of Lords in ***Lipkin Gorman v Karpnale Ltd***[1347] and ***Woolich Equitable Building Society v IRC (No.2)***[1348].

The case of ***Lipkin Gorman v Karpnale Ltd***[1349] involved the recovery of money stolen from a gaming club. The plaintiffs/appellants were a firm of solicitors which had a partner who was addicted to gambling, and was an authorized signatory to the firm's client account. The partner took large sums of money from the client account and

[1342] [1988] UKHL 12
[1343] See Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) ix
[1344] See Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 11
[1345] [1866] LR 1 HL 129
[1346] [2009] UKHL 18
[1347] [1991] 2AC 248 (HL)
[1348] [1993] AC 70 (HL)
[1349] [1991] 2AC 248 (HL)

gambled all away at the defendants'/respondents' club. It was unknown to the club that the partner was using money to which he was not entitled. The plaintiffs/appellants argued that the gaming contracts were void by law[1350], and since the club had given no consideration for the money given, then the partner could not have passed title to the stolen money under the equitable tracing rules, even if the club was an innocent party. The club argued that they had given consideration for the chips, and were an innocent recipient, and also that the money could not be traced as it had been mixed with other money.

Their Lordships gave judgment for the plaintiffs/appellants. The gaming contract was declared void by section 18 of the Gaming Act 1945, and the chips used were not purchased by the partner as they were used to facilitate gambling. The club had given no consideration for the money given, and was a mere donee or volunteer having received the solicitors' money without their consent. Also, under the equitable tracing rules, an innocent person receiving money had to repay the owner if no consideration was given for it. The club established a defence of 'change of position'[1351] for a reduction in the measure of its liability to reflect the money paid out on occasions when the gambler won, against the common law restitutionary claim of the firm. Their Lordships held that the club was unjustly enriched at the expense of the solicitors from whom the money had been stolen, and the club had to repay the monies to the extent it had been "enriched" i.e. after making deduction of the winnings paid to the partner, and the gambling taxes paid to the Government. Thus, their Lordships established that it is right for English law to recognize a claim in restitution based on unjust enrichment.

[1350] Refers to the Gambling Act 1945, s 18

[1351] See Jason W. Neyers, Mitchell McInnes and Stephen G.A. Pitel, *Understanding Unjust Enrichment* (Hart Publishing 2004) 19 where change is described as the defendant's good faith loss of the advantage received, i.e. disenrichment.

Similarly, in ***Woolwich Equitable Building Society v IRC***[1352] their Lordships determined whether the payment of taxes demanded under ultra vires regulations were recoverable as of right. The defendant had issued a demand to the claimant for the payment of tax, to which the claimant submitted payment and commenced action by way of judicial review disputing the regulations. The claimant succeeded in the judicial proceedings to have the regulations quashed, but the defendants refused to pay any interest on the sums paid. The defendants challenged the demand for interest by judicial review.

Their Lordships ruled in favour of the plaintiff by the principle of unjust enrichment. They maintained that the tax was demanded but not due, and there was no consideration for the money paid. Their Lordships held that at common law, taxes extracted ultra vires statute were recoverable as of right without the need to invoke a mistake of law by the payer.[1353] Thus, at common law there was a general restitutionary principle that payment to an unlawful demand for tax for which there was no basis in law, acquired a right to be repaid.

Proprietary estoppel and unjust enrichment vary by nature, application and operation by the courts. Whereas proprietary estoppel deals with an assurance or representation to a party for an interest in land or in intellectual property[1354], and that party relies thereon to his or her detriment; unjust enrichment in contrast deals with the "receipt

[1352] [1993] AC 70 (HL)
[1353] *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL)
[1354] *Motivate Publishing et al v Hello Ltd* [2015] EWHC 1554 (Ch)

of an enrichment at the expense of another in circumstances which call for that enrichment to be given up to that other"[1355].

For example, in ***Yeoman's Row Management Ltd v Cobbe***[1356] Lord Scott determined that the value of the property had been increased by the grant of planning permission, obtained at the expense of the respondent. The respondent was awarded a quantum meruit payment for his services in obtaining the planning permission, because he had earned it, and not because he was unjustly enriched in this regard. However, since the respondent had "unlocked" the development potential of the property, the property owner was unjustly enriched by obtaining the value of the respondent's professional services without payment. The remedy for unjust enrichment overlapped with the respondent's entitlement to the quantum meruit payment. Thus, unjust enrichment focuses on a party being unjustly enriched at the expense of another, but proprietary estoppel focuses on the detrimental reliance on a representation.

In terms of application, proprietary estoppel involves a tripartite system of assurance, reliance and detriment to prove the estoppel, but unjust enrichment invokes a fourfold formula[1357] by which the claimant must prove that the defendant has been enriched, that the enrichment is at the claimant's expense, that the enrichment is unjust and that no recognized defence applies. Thus, the requirement of proof varies between the two doctrines.

[1355] Charlie Webb, 'What is Unjust Enrichment' [2009] Oxford Journal of Legal Studies 29(2):215, 219 <https://doi.org/10.1093/ojls/gqp008> accessed 10 October 2017
[1356] *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55
[1357] Andrew Lodder, *Enrichment in the law of unjust enrichment and restitution* (Hart Publishing 2012) 6

The operation of the two doctrines varies widely. Whilst proprietary estoppel seeks to remedy unconscionable conduct based on the prior dealings of the parties, unjust enrichment conversely seeks to reverse the defendant's unjust enrichment or benefit that arise from the claimant's expense[1358]. Further, whereas the change of position is available as a defence in unjust enrichment, it is conversely available as a claim in proprietary estoppel whereby the claimant has altered his or her position in reliance of the defendant's representation. Hence, the purpose and rationale of operation varies between the two doctrines.

The similarities between the two doctrines arise by their nature and the remedy proffered. Both proprietary estoppel and unjust enrichment are equitable[1359] in nature, and both provide a personal remedy by way of compensation, or proprietary remedy for an interest in property such as a constructive trust in unjust enrichment[1360] or a freehold interest[1361] in proprietary estoppel.

The disparity between proprietary estoppel and unjust enrichment largely outweighs the similarities. Therefore, the two doctrines are autonomous in English law and neither influences the other. If unjust enrichment is introduced on a wholesale basis, it is likely to encroach into many of the areas currently occupied by equitable remedies.

[1358] See Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 5

[1359] See *Crab v Arun District Council* [1976] Ch 179 (CA) where Lord Denning describes proprietary estoppel as an equitable doctrine; also see *Mitchell v Moore* [1999] 729 A.2d 1200 (Pa. Super. Ct.) where unjust enrichment is described as an equitable doctrine whereby the law implies a contract between parties so one party can pay another for the value of a benefit received where no express contract exists; and in *Caldas v Affordable Granite & Stone Inc.* [2012] 820 N.W.2d 826 (Minn.) where the court held that unjust enrichment is an equitable doctrine that allows a plaintiff to recover the benefit conferred on a defendant when its retention is not legally justifiable.

[1360] See Eoin O'Dell, 'The Principle against Unjust Enrichment' [1993] 15 Dublin ULJ 27, 34-35 that emphasize unjust enrichment grants equitable remedies such as constructive trust, equitable lien, tracing and subrogation.

[1361] See *Dillwyn v Llewelyn* [1862] 45 ER 1285 (QB)

Proprietary estoppel is a longstanding doctrine that has arguably gained in utility and prevalence following ***Thorner v Major***[1362], and subsequent cases[1363].

12.6 Unjust Enrichment in the US and England

Unjust enrichment comprises a cause of action in restitution in both the above jurisdictions, and tenders both legal[1364] and equitable[1365] remedies. The distinguishing feature between the two jurisdictions is that unjust enrichment and restitution are operative under the R3RUE in the US, whereas unjust enrichment in the English system such as it has been accepted is a product of case law. The common bond between the two doctrines in the differing jurisdictions is that unjust enrichment gives a right to restitution against the defendant who is unjustly enriched at the claimant's expense.

12.7 Conclusion

Unjust enrichment and proprietary estoppel are not synonymous. Whereas proprietary estoppel deals with the claimant's loss, unjust enrichment deals with the defendant's gain. Further, whereas unjust enrichment provides an equitable remedy for an unjustified wrong by restitution to a plaintiff who is unfairly deprived of his or her property, proprietary estoppel requires proof of the factual circumstances of a detrimental reliance on a promise or representation for an interest in land. The major similarity between proprietary estoppel and unjust enrichment is that both embrace equity to provide remedies and causes of action to deal effectively with inequitable or

[1362] [2009] UKHL 18

[1363] See *Thorner v Major* [2009] UKHL 18; *Suggitt v Suggitt* [2012] EWCA Civ 1140; *Davies v Davies* [2016] EWCA Civ 463; *James v James* [2018] EWHC 43 (Ch); *Haberfield v Haberfield* [2018] EWHC 317 (Ch)

[1364] See for example, an award of money had and received, a quantum meruit or an account for profits per Jason W. Neyers, Mitchell McInnes and Stephen G.A. Pitel, *Understanding Unjust Enrichment* (Hart Publishing 2004) 23-24

[1365] For example, equitable lien, subrogation, tracing, constructive trust Jason W. Neyers, Mitchell McInnes and Stephen G.A. Pitel, *Understanding Unjust Enrichment* (Hart Publishing 2004) 24

unconscionable behavior in proprietary estoppel, and to provide restitution where a party is unjustly enriched at the expense of another in unjust enrichment[1366].

This chapter leads to a conclusion of the thesis on whether or not, or to what extent proprietary estoppel is sound in theory and practice.

[1366] See *Pyeatte v Pyeatte* [1982] 661 P. 2d 196,202-07 (Arizona Appeal) in which a wife's quantum meruit claim for the value of her husband's legal education received an "equitable award of restitution on the basis of unjust enrichment", and *Beacon Homes Inc. v Holt* [1966] 146 S.E. 2d 434, 469 (N.C) where the court ruled that the retention of a house mistakenly built on the defendant's property was "against equity and good conscience", cited by Emily Sherwin, 'Restitution and Equity: An Analysis of the Principle of Unjust Enrichment' (2001) Texas Law Review Vol. 79:2083, 2087 <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1949&context=facpub> accessed 14 October 2017

CONCLUSION

Equity evolved to address the deficiencies inherent within the common law, and emerged as a distinct and independent conscience-based doctrine in English law. It operates as a gloss on the common law and is frequently invoked to overcome its frailties. Without the intervention of equity, the common law would have continued to operate in an overly-rigorous manner creating undue hardship and injustice to aggrieved parties.

The intervention of equity has not been linear, but rather as an ad hoc response to the perceived problems of the common law. The courts continue to apply the historical doctrine of equity to instill fairness and conscience in the prohibition of inequitable conduct, as imbued by a range of political, social, cultural and economic factors referred to in this thesis. A judgment in proprietary estoppel is a judgment of conscience, based on all the facts and circumstances of a case, and should be founded on principle rather than personal decision. The progression of equitable estoppel since the ***Earl of Oxford's Case***[1367] reflects the primacy of equity over the common law wherever the two jurisdictions clashed. Integral and pivotal to the development of proprietary estoppel has been its role in consistently seeking to overcome the formal strictures of the common law, for the purpose of preventing unconscionable behaviour. Over the years, the realization of this purpose by the courts has elevated its doctrinal status by unwavering adherence to the imperative of redressing unconscionability on the part of a legal owner of land who seeks to renege from informal assurances upon which claimants have relied to their detriment.

[1367] [1615] 21 ER 485

Proprietary estoppel is not thwarted by the technical rules of formality as it seeks to prevent unconscionability and inequity in the dealings of parties. It demonstrates the court's jurisdiction to arrive at broad equitable solutions based on the oral agreements of parties for an interest in land that would otherwise be unenforceable under Section 2 of the Law of Property (Miscellaneous Provisions Act) 1989. As a judicial doctrine, it provides a fashion of remedial justice for informal or formally defective dealings in land transactions.

The ultimate question on whether or not or to what extent proprietary estoppel is 'sound' in theory and in practice, is best answered by a judicious review of chapters one to twelve of the thesis, specifically to consider whether the purpose of the doctrine in seeking to prevent and redress unconscionable behaviour has been upheld and fulfilled by the courts. The thorough investigation into the historical and contemporary development of the doctrine, and its progression in the courts over the years present a clear perspective and insight on its status in English law today.

First, in considering the nature, purpose and benefits of proprietary estoppel,[1368] the questions which arise are: Is the doctrine complex in nature? Do the benefits of proprietary estoppel have contradictory or ambiguous implications? Does it operate to deprive a party of their strict legal rights? The answer to these questions is in the negative and positive. The nature of the doctrine is widely described by notable scholars[1369] and case law[1370] as a sword and a shield, and its attributes are stated

[1368] See Chapter One dealing with the nature of proprietary estoppel

[1369] Kevin Gray and Susan Gray, *Elements of Land Law* (6th edn, OUP 2009); John Mee, 'Proprietary estoppel and inheritance: enough is enough?' (2013) Conv. 280; John Cartwright, 'Protecting Legitimate Expectations and Estoppel in English Law' (2006) Electronic Journal of Comparative Law 10(3);

clearly without contradictions or ambiguity. The purpose of the doctrine is likewise illustrated by case law, and the courts have explicated its precepts in a consistent manner to prevent a party from enforcing their strict legal rights where he or she has caused another to suffer a detriment in reliance of a promise for an interest in land. The benefits of proprietary estoppel also portray how broadly the doctrine is being applied by the courts, and that such categories are not exhaustive, with each case being determined on its particular facts. Further, proprietary estoppel is applied by the courts in fulfilment of its intrinsic purpose that enables an equitable outcome to be achieved. It does not operate to automatically deprive a party of their strict rights, except in circumstances where that party has behaved unconscionably towards another. Notably, the attitude of the courts towards the nature, purpose and benefits of the doctrine has been consistently upheld throughout the centuries. It is this cohesive implementation of the underlying rationale of proprietary estoppel which has rendered it an indispensable instrument of equitable discretion.

Second, in pondering on the influence of social change and the development of common law and equity,[1371] the questions that arise are: Is the doctrine based on a vague and uncertain foundation? Does it comprise internal contradictions or ambiguity? Are there any latent defects in its development? Does it operate in conflict with the common law? The answer to these questions is in the negative. The development of equity to remedy the defects of the common law ascertain its firm and definitive foundation in English law. The flexibility of equity enabled it to

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<https://www.ejcl.org/103/art103-6.pdf> accessed 10 January 2015; Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Landlaw Text, Cases and Materials* (3rd edn, OUP 2012)

[1370] See Lord Denning in Crab v Arun District Council [1976] Ch 179, Scott L.J. in Layton v Martin [1986] 2 FLR 227

[1371] *See Chapter 2 dealing with the influence of social change and the evolution of common law and equity.*

progress to a formulation of equitable estoppel and then proprietary estoppel in asserting its primacy and efficacy over the common law. Whilst the interrelationship of social change and the evolution of the common law and equity illustrate that law is not static but evolves with the social events that transpire in society, equity's invocation of conscience against inequitable conduct demonstrates that proprietary estoppel is neither contradictory nor ambiguous, as its fundamental purpose together with its consistent adherence by the courts have remained consistent, and, therefore, certain since the original genesis of the doctrine in the courts of equity.

Third, in considering the theoretical underpinning of proprietary estoppel,[1372] the questions that arise are: Is the theoretical perspective of the doctrine ambiguous? Is it complex and confusing? Does it exert any influence on the decisions of the court? How significant is the rationale for a decision in proprietary estoppel? The answer to these questions is both in the affirmative and negative. The doctrinal foundation of estoppel is not confusing, and its purpose is pivotal. Proprietary estoppel is founded in natural law theory which reflects the moral character of equity. The doctrine imputes conscience in judicial decision making to prevent reliance on formality, and the enforcement of strict legal rights. Further, it gives the court a discretion to do what is deemed equitable on the particular facts and circumstances of a case. It permits equity to act against the conscience of the defendant to prevent him or her from retaining that which was promised to the claimant.

[1372] *See Chapter 3 dealing with the theoretical underpinning of proprietary estoppel.*

Fourth, in reflection on the evolution of proprietary estoppel,[1373] the questions that arise are: Is it established on a certain or vague foundation? Did it develop haphazardly or at the insistence of the court? Are the cases tracing its evolution consistent or unclear? Did the courts establish a clear path for the doctrine? Do the early decisions of the court reflect the purpose of the doctrine? The answer to these questions is in the affirmative. Proprietary estoppel has a firm foundation rooted in equity which is embedded in case law such as the ***Earl of Oxford's Case***[1374]. It did not evolve haphazardly but at the insistence of the court, because the early cases such as ***Hunt v Carew***[1375] and ***Hunning v Ferrers***[1376] illustrate the court's intervention of equity as an estoppel against the inequitable conduct of the defendant. Further, its evolution is consistent and clear as the trail of cases following the ***Earl of Oxford's Case***[1377] in ***Dillwyn v Llewelyn***[1378], ***Plimmer v Wellington***[1379], ***Crab v Arun District Council***[1380], ***Ives v High***[1381], ***Taylor Fashions v Liverpool Victoria Trustees Ltd***[1382] and ***Gillett v Holt***[1383] demonstrate the invariable objective of the court in invoking equity against a defendant's unconscionable conduct. Thus, this clear path traversed by the doctrine prevailed to the House of Lords in ***Thorner v Major***[1384] where the Lordships approved and affirmed the backbone of proprietary estoppel, to impede the unconscionable conduct of the defendant, and to grant the interest that was promised to the claimant.

[1373] See Chapter four dealing with the evolution of proprietary estoppel.
[1374] [1615] 21 ER 485
[1375] [1649] Nelson 47
[1376] [1711] 1 Gilb Rep 85
[1377] [1615] 21 ER 485
[1378] [1862] 45 ER 1285
[1379] [1884] 9 App. Cas. 699
[1380] [1976] Ch 179
[1381] [1967] 2 QB 379
[1382] [1982] QB 133
[1383] [2000] EWCA Civ 66
[1384] [2009] UKHL 18

Hence, the essence of every case in proprietary estoppel decided by the court today, is founded on the longstanding principle of protecting the claimant from the unconscionable dealings of the defendant. Consistent adherence to fulfilment of the purpose for which proprietary estoppel was conceived, encapsulates the soundness of the doctrine.

Fifth, assessing the transition of proprietary estoppel from a traditional approach to a modern approach in the courts,[1385] gives rise to the following questions: Is the doctrine complicated by the transition from one approach to another? Did the transition create any inconsistency in the law? Are there internal contradictions or ambiguity in the modern approach? Has the modern approach altered the substantive application and operation of the doctrine? Does the case law throughout these phases fulfill the purpose of the doctrine? The transition from the traditional to a modern approach in proprietary estoppel did not complicate the law, but in fact infused more clarity and simplicity in the law of proprietary estoppel. It was through this transition process that the term "proprietary estoppel" emerged, and the application and operation of the doctrine was simplified with the requirements of an assurance, reliance and detriment.

Neither of the approaches presented any internal contradictions, or ambiguity, or inconsistency in the law of proprietary estoppel, as they merely facilitated a more methodological or systematic process by which the courts could determine the estoppel. Further, neither approaches altered the substantive application and

[1385] *See Chapter five dealing with the transition of proprietary estoppel from a traditional to a modern approach.*

operation of the doctrine, as its object, requirements and purpose remained consistent in the case law throughout the years. The transition process imputed a holistic approach in the determination of proprietary estoppel, and gave recognition to its proprietary nature by the name "proprietary estoppel" which the courts apply today. The case by case development of the doctrine in both the traditional and modern approach apply and reaffirm its purpose of preventing inequitable or unconscionable conduct.

Sixth, in considering the House of Lords decision in ***Yeoman's Row Management Ltd v Cobbe***[1386],[1387] the questions that arise are: Was the doctrine approved by their Lordships? Did their Lordships highlight any issues with the application of the doctrine? Did they alter the application of doctrine before the court? Did they influence the operation of the doctrine? The answer to these questions is both in the affirmative and negative. Their Lordships approved the doctrine of proprietary estoppel as applied by the lower courts, and noted its underlying principles of operation. Although their Lordships did not alter the requirements of the doctrine applied by the courts, they nonetheless pointed to the limitations whereby it would not apply to pre-contractual arrangements, and to a similar commercial transaction as in ***Yeoman's Row***[1388]. The decision in ***Yeoman's Row***[1389] created an impact on the law of proprietary estoppel in so far as emphasizing that the character of the doctrine is principled in nature, and relates to a "certain interest in land". The limitations of the doctrine highlighted by their Lordships is novel as the decided cases had not thoroughly examined the application of the doctrine in a purely commercial "arm's

[1386] [2008] UKHL 55
[1387] *See Chapter six dealing with Yeoman's Row [2008] UKHL 55*
[1388] [2008] UKHL 55
[1389] [2008] UKHL 55

length" transaction.[1390]. Therefore, ***Yeoman's Row***[1391] clarified the extent of the application and operation of the doctrine by the courts, whilst reasserting its primary role in redressing unconscionable behaviour in contexts other than those arising on the specific facts of ***Yeoman's Row***[1392] itself.

Seventh, in assessing the House of Lords (now Supreme Court) decision in ***Thorner v Major***[1393],[1394] the questions that arise are: Did their Lordships approve the doctrine of proprietary estoppel? Did they alter the application of the doctrine? Did they change the course of the doctrine operated by the lower courts? Did they identify and redress any latent defects with the application and operation of the doctrine? Did they make the law more complicated or did they simplify the law? The answer to these questions is both in the affirmative and negative. Their Lordships approved the doctrine of proprietary estoppel, and asserted its tenacity in being able to create a proprietary interest in land. Although their Lordships approved the requirements of the doctrine as developed by the lower courts they did, however seek to introduce more clarity in its application and operation by the courts. For example, their Lordships elaborated on the nature of the assurance as comprising indirect statements, mere inferences or implied statements that an assurance must be assessed in the particular context in which it was made, and that an assurance is a finding of fact by the trial judge. Thus, their Lordships sought to simplify the finding of an assurance.

[1390] [2008] UKHL 55
[1391] [2008] UKHL 55
[1392] [2008] UKHL 55
[1393] [2009] UKHL 18
[1394] *See Chapter seven dealing with Thorner v Major [2009] UKHL 18*

Further, their Lordships introduced a "clear enough" test for proprietary estoppel that is novel for the determination of the estoppel. In presenting a new approach to the determination of an assurance, and the "clear enough" test for a proprietary estoppel, their Lordships identified and addressed pre-existing latent defects which they observed in the application and operation of the doctrine. Their Lordships simplified the process of finding a proprietary estoppel, and therefore eliminated possible ambiguities, contradictions or complications which they observed in the law at the time. Thus, the House of Lords (now Supreme Court) decision, in ***Thorner***[1395]***,*** is crucial ratification of the doctrine of proprietary estoppel, as it both affirmed the traditional approach adopted in the decided cases and also imported additional clarity into the operation of the elements required for the determination of an estoppel. In so doing, their Lordships never lost sight of the original and enduring purpose of proprietary estoppel, that is, to prevent a legal owner of land from relying on the enforcement of his or her common law rights where it would be unconscionable to permit them to do so.

Eighth, in considering the critical review of the case law following ***Thorner v Major***[1396],[1397] the questions that arise are: Is the case law contradictory? Do the cases follow the principles established in ***Thorner***[1398]? Has their Lordships decision in ***Thorner***[1399] influenced the decisions of the courts in the cases that follow? Has the law developed further following ***Thorner***[1400]? Does the case law following

[1395] [2009] UKHL 18
[1396] [2009] UKHL 18
[1397] *See Chapter eight dealing with the case law following Thorner v Major [2009] UKHL 18*
[1398] [2009] UKHL 18
[1399] [2009] UKHL 18
[1400] [2009] UKHL 18

Thorner[1401] augment the purpose of the doctrine? The answer to these questions is in the affirmative. The case law following ***Thorner***[1402] is consistent with the previously decided cases, including the principles propounded by their Lordships in ***Thorner***[1403]. To a greater extent, ***Thorner***[1404] represents the pinnacle of proprietary estoppel, by introducing clarity into the application and operation of the doctrine. Each finding of proprietary estoppel is a conscience-based decision consistent with the intrinsic purpose for which the doctrine was conceived and developed.

Following ***Thorner***[1405], a number of cases have succeeded in proprietary estoppel before the courts, which indicate that ***Thorner***[1406] has influenced the court's perception on proprietary estoppel. The courts consider the law of proprietary estoppel to be settled by ***Thorner***[1407], and readily apply the principles of ***Thorner***[1408] in the determination of the estoppel. Whilst the empirical outcome of each case is dependent on the facts before the court, the post-Thorner case law has remained faithful to the unequivocal rationale underpinning the concept of estoppel. Pertinently, no other cases have proceeded to the House of Lords following ***Thorner***[1409], and hence there has been no further development in the law.

Ninth, in evaluating the challenges to proprietary estoppel,[1410] the questions that arise are: Is the doctrine operating in line with equity or has the court created its own path

[1401] [2009] UKHL 18
[1402] [2009] UKHL 18
[1403] [2009] UKHL 18
[1404] [2009] UKHL 18
[1405] [2009] UKHL 18
[1406] [2009] UKHL 18
[1407] [2009] UKHL 18
[1408] [2009] UKHL 18
[1409] [2009] UKHL 18
[1410] *See Chapter nine dealing with the challenges to proprietary estoppel.*

for the doctrine? Is it achieving its purpose? Do the challenges affect the effectiveness of the doctrine? Do the challenges outweigh the benefits of the doctrine? Can the challenges be resolved? Since the genesis of the doctrine and its progression through the courts, proprietary estoppel has focused upon the unconscionable behaviour of the defendant, and the need to prevent it. The courts have not devised arbitrary pathways for the application of the doctrine, but have invoked equity to respond to the particular facts and circumstances of a case. Pivotally, the doctrine developed in response to the intervention of equity against the unconscionable acts of a defendant, and it is to this enduring ethos that the courts still subscribe when dealing with a claim founded on proprietary estoppel.

Given the recent increase in cases following ***Thorner***[1411], it is evident that the doctrine is achieving its purpose, and is operating on the same principles as the decided cases. The objective of the doctrine to prohibit unconscionable conduct and the enforcement of strict legal rights, as established in the decided cases, is clearly pervasive in each case decided by the courts following ***Thorner***[1412]. It is arguable that the benefits of proprietary estoppel outweigh the challenges, as a successful case can produce a personal or proprietary remedy or both. If a claimant does not pursue a claim in proprietary estoppel, then he or she will not obtain a remedy to which he or she may be entitled. Conversely, from a purely outcome-based perspective, if a claimant does not succeed in a claim for proprietary estoppel, monies will have been unnecessarily expended on ultimately unsuccessful litigation. It is, therefore, left to the claimant to

[1411] [2009] UKHL 18
[1412] [2009] UKHL 18

decide whether or not to proceed with a claim in proprietary estoppel, and to accept the consequences of success or failure.

Because, however, many of the challenges identified relate to the fact-based nature of estoppel, these do not impair the soundness of the doctrine in terms of the correlation between its intrinsic purpose and the extent to which this has been upheld by the courts. Unless the facts support a finding of proprietary estoppel, the intervention of equity will not be invoked. Undoubtedly, proprietary estoppel is determined by the factual matrix of a case, which means that there is no litmus test for the courts to decide whether an assurance was made indirectly, or inferred or implied to give rise to the other elements of reliance and detriment. Further, there is no litmus test for the courts to decide the context of an assurance, and thus the circumstances whereby an assurance can arise can be problematic. Therefore, these challenges do inevitably present some unpredictability in relation to the outcome of a claim based on proprietary estoppel. Whether these challenges can be resolved completely is open to speculation. However, the cases following ***Thorner***[1413] continue to increase, which suggests that litigants recognize that proprietary estoppel represents their best, and in many instances their only chance of a remedy. Without the courts' steadfast determination to uphold the intrinsic purpose of estoppel, that of it preventing unconscionability, such hope would be misplaced.

Tenth, in considering the holistic evaluation of proprietary estoppel from the past to the present,[1414] the questions that arise are: Is the doctrine of proprietary

[1413] [2009] UKHL 18

[1414] *See chapter ten dealing with proprietary estoppel from the past to the present.*

estoppel still traditional in nature? Has it progressed over the years? Is there a future for proprietary estoppel? Has the purpose of the doctrine been consistently upheld from the past to the present? These questions are answered in the affirmative. Proprietary estoppel is still the traditional doctrine developed over the centuries, and has not lost its traditional roots as the developing case law continues to cite the early decisions such as ***Dillwyn v Llewelyn***[1415], ***Plimmer v Wellington***[1416], ***Inwards v Baker***[1417], ***Crab v Arun District Council***[1418]. The doctrine was consigned to the lower courts for over forty years, until it proceeded to the House of Lords (now Supreme Court) in ***Thorner v Major***[1419]. The litany of successful cases following ***Thorner***[1420], illustrate that the doctrine is extremely viable, and that its future is assured as a range of varying circumstances occur to which estoppel is able to apply. Further, the courts have adopted a modern trend of using estoppel to grant a proprietary interest in land to those who rely on it for their livelihood, in preference to the beneficiaries of the legal owner's will who do not need the land to sustain their financial security. This modern trend remains wholly consistent with the purpose of the doctrine, that of redressing unconscionable behaviour on the part of a legal owner of land who seeks to defeat the "rights" of a claimant pursuing a remedy via the avenue of proprietary estoppel.

Eleventh, in comparing proprietary estoppel and constructive trust,[1421] the questions that arise are: Do the two doctrines follow the same principles? Do they provide the

[1415] [1862] 45 ER 1285
[1416] [1884] 9 App. Cas. 699
[1417] [1965] 2WLR 212
[1418] [1976] Ch 179
[1419] [2009] UKHL 18
[1420] [2009] UKHL 18
[1421] *See Chapter eleven which draws comparison between the two doctrines.*

same remedy? Do they operate differently? Is one doctrine superior to the other? The answer to these questions is answered both in the affirmative and negative. The two doctrines are distinct genres of equitable relief, and vary by their nature, purpose, application and operation by the courts. The principles behind the two doctrines vary as well as the remedy they provide. For example, whereas proprietary estoppel is based on a unilateral representation, constructive trust is based on a bilateral agreement. Further, whereas proprietary estoppel recognizes a right anew with prospective effect, constructive trust recognizes an existing right with retrospective effect. Neither doctrine is superior to the other, as each is determined on the particular facts of a case. Although, the doctrines can be pleaded in the alternative on the same facts, it is always in the discretion of the court to determine which remedy best fits the facts of a case. Notwithstanding the differences of both doctrines, they redress unconscionable conduct between parties, and the detriment suffered in reliance on an informal agreement for an interest in land. Thus, the disparities between the two doctrines are more diverse than the similarities, but both are applied by the courts to remedy inequitable conduct.

Twelfth, in comparing proprietary estoppel with the American system of unjust enrichment,[1422] the questions that arise are: Do the two doctrines share the same principles? Do they achieve the same objective? Do they provide the same remedy? Is one doctrine superior to the other? The answer to those questions is both in the affirmative and negative. Proprietary estoppel does not follow the same principles as unjust enrichment in the American system. Whereas proprietary estoppel prevents a party from asserting their strict legal rights where it is inequitable to do so, unjust

[1422] *See chapter twelve which draws comparison between the two doctrines.*

enrichment on the other hand provides that a party who is unjustly enriched at the expense of another, should make restitution for those benefits.

The two doctrines vary widely in nature, purpose, approach by the courts, principles of application and operation, and the remedy granted by the courts. For example, whereas proprietary estoppel requires the satisfaction of the criteria of assurance, reliance and detriment for an estoppel, unjust enrichment in contrast considers the defendant's gain in relation to the plaintiff's loss. Further, whereas proprietary estoppel requires the claimant to prove the detrimental reliance on a promise, unjust enrichment in contrast requires the claimant to show that he or she is the source of the defendant's enrichment.

Further, the doctrines do not provide the same remedy, and the basis of liability differs between them. Whereas the courts determine the remedy in proprietary estoppel, on the other hand a remedy in unjust enrichment is entrenched by statute per the Restatement of the Law Third, Restitution and Unjust Enrichment which provides that every unjust enrichment gives a right in restitution. Neither doctrine is superior to the other, as both are distinct doctrines that only share the common bond of equity to provide remedies for inequitable conduct. Therefore, both doctrines are categorically independent.

Similar comparisons between proprietary estoppel and unjust enrichment in the English system illustrate that they are two distinct and independent doctrines. They vary in nature, purpose and by their application and operation by the courts. For example, whilst proprietary estoppel deals with the detrimental reliance on a promise

for an interest in land, unjust enrichment in contrast deals with a party being unjustly enriched at the expense of another. However, both doctrines are equitable in nature, and both are capable of providing a proprietary or a personal remedy.

Proprietary estoppel is a judicial doctrine that is and remains distinct and independent of unjust enrichment. Any similarity is outweighed by the broad disparity that exists between the two doctrines. They are best defined as equitable doctrines to remedy inequitable conduct between parties.

Therefore, having considered all the issues in the thesis, and when assessed against the previously articulated benchmark it can be concluded that proprietary estoppel is 'sound' in theory and in practice. Since its genesis in English law, the doctrine has embattled rigorous scrutiny by the courts and survived to be elevated to the status of a modern doctrine in ***Thorner v Major***[1423]. The recent increase in cases involving proprietary estoppel demonstrate that its application and operation by the courts is more settled since ***Thorner***[1424], and it has become a modern doctrine of significant influence for the future, rather than exclusively a doctrine of the past. The purpose of the doctrine is intended to protect a promisee "so that an injustice may not be perpetrated"[1425] against him or her, and the courts have consistently evinced an insistence on preserving, upholding and applying this purpose, based on the equitable principle of "good conscience".

[1423] [2009] UKHL 18
[1424] [2009] UKHL 18
[1425] *Inwards v Baker* [1965] 2 WLR 212 (CA) 512 (Danckwerts L.J.)

Ultimately, the critical question which arises in proprietary estoppel is: Should a landowner approbate or reprobate; or change his or her mind willy-nilly; or act arbitrarily or with caprice where the landowner has promised an interest in his or her land to party, and that party has relied on the landowner's promise to his or her detriment? Proprietary estoppel intervenes with equity to remedy the unconscionable acts of the landowner.

According to ***Heward***[1426], "The great American judge, Benjamin Cardozo once said: the law has outgrown its primitive stage of formalities, when the precise word was the sovereign talisman and every slip was fatal!"[1427] This, precept adequately sums up the intervention of equity and proprietary estoppel to overcome the rigours of common law. This is aptly summarized by ***Lord Atkin in United Australia Ltd v Barclay's Bank Ltd***[1428], in his assertion that: "When these ghosts of the past stand in the path of justice, clanking their medieval chains the proper course for the judge is to pass through them undeterred"[1429]. Thus, equity permits the court to rule in conscience whenever justice requires it.[1430]

The perennial hurdles of reliance on discretion, and the unpredictability and broad flexibility that pervade the doctrine of proprietary estoppel are attributable to the inherent nature of equity to determine each case on its own particular facts. In ***Bradbury v Taylor***[1431], Lloyd LJ asserted that a case in proprietary estoppel turns on its

[1426] Edmund Heward, *Lord Denning: A Biography* (George Weidenfeld & Nicolson Ltd, 1991)
[1427] Edmund Heward, *Lord Denning: A Biography* (George Weidenfeld & Nicolson Ltd, 1991), 214
[1428] *United Australia Ltd v Barclay's Bank Ltd* [1941] A. C. 1
[1429] Per Lord Atkin in *United Australia Ltd v Barclay's Bank Ltd* [1941] A. C. 1, 29
[1430] See also Lord Denning who described estoppel as a "principle of justice and equity" in *Moorgate Mercantile Co. Ltd v Twitchings* [1976] QB 225, 241
[1431] [2012] EWCA Civ 1208

own facts, and a legal practitioner cannot argue about the facts of one case in light of the previous cases. Therefore, the hurdles of proprietary estoppel are inescapable, and practical recommendations are proposed in the next chapter to deal with the drawbacks of proprietary estoppel, none of which materially impinge on the inherent soundness of the doctrine adjudged in accordance with the benchmark articulated in this thesis.

RECOMMENDATIONS

Proprietary estoppel has emerged as equity's longstanding and enduring sabre against the unconscionable conduct of a defendant, and has gradually attained judicial status via the lower courts and now in the House of Lords (now Supreme Court). The application and operation of the doctrine is not without challenges and controversy. However, if suitable measures can be implemented, these challenges and controversies can be curtailed or lessened to produce more effectiveness in its application and operation. Some pertinent recommendations to address these issues include the following:

First, is the protection of title to land by title insurance.

This concept can be applied to protect a landowner's title against claims in proprietary estoppel. Should a successful claim arise in proprietary estoppel, the insurance can compensate the insured for the loss of title, or compensate the successful party in proprietary estoppel. Title insurers usually conduct a search on public records before insuring the landowner. The landowner can be insured for the value of the land, as security and a guarantee against all claims to the landowner's title. With title insurance, the landowner can therefore take free from an interest in proprietary estoppel.

Second, is the protection against a claim in proprietary estoppel with proprietary estoppel insurance.

This would be novel to protect a landowner against a successful claim in proprietary estoppel. Since proprietary estoppel can be a major obstacle to clear title, such

insurance will eliminate the risk of any loss from unknown or undiscovered interest upon the death of a testator, or of a successful claim in proprietary estoppel. This insurance will apply specifically against proprietary estoppel claims. Before issuing policy coverage, insurers can undertake a discovery process by the use of a standard form of disclosure inquiring whether there are any promises made for a future interest in the land. If the discovery test is satisfied, then the landowner can be insured for the value of the land, so that any future claims arising in proprietary estoppel can be compensated by the insurance. This may be particularly useful in the case of large farms, where a landowner often engages in family or domestic arrangements to ensure continuity of the farm after the landowner's death. Thus, the insurance will guarantee the landowner's title against a claim in proprietary estoppel.

Third, is the purchase of the interest arising by proprietary estoppel.

The successful claimant in proprietary estoppel can be approached by the defendant for the purchase of his or her interest in the land that is granted by the court. Further, if the claimant's interest is discovered before a claim is made in proprietary estoppel, then the landowner's heirs or successors can insist that the claimant sell his or her interest to them. In this way, the claimant's interest is being acknowledged and sold rather than the claimant expending monies in extensive litigation and costs, and the possibility of not obtaining a remedy in proprietary estoppel from the court. Therefore, the purchase of the interest in proprietary estoppel can apply both before litigation, or following the litigation process.

Fourth, the use of a standard questionnaire form for disclosure of an interest promised in land.

The standard form can be titled as follows:

Section 116 of the Land Registration Act 2002

Questionnaire Form

The use of standard questionnaire forms by the Land Registry can be used to inquire of a landowner whether an interest in his or her property has been promised to another. The standard questionnaire form can likewise be used by any party to whom an interest in property has been promised. The Land Registry can require these forms to be completed annually and filed at the Land Registry. The form must be signed by the landowner, or other party to whom an interest is promised and contain a penal clause for a fine or imprisonment if the information provided is false. These forms can be used by a landowner, or the heirs or successors of the landowner to undertake periodic checks on any possible claims against the landowner's title. Also, the form can be used to show when the interest was promised to a party, and how long it has continued in effect. It can also verify whether the promisee is in actual occupation of the land promised. This would help ascertain whether a promise was made by a landowner, and the party to whom it was made. This standard form will not erode the informality of proprietary estoppel, as the landowner or the promisee is not required to state the promise made. The form serves to inquire whether a promise was made to help the parties seek other avenues to resolve the matter before litigation.

Fifth, is the use of a standard form for the discovery of a landowner's promise for an interest in land.

The standard form can be titled as follows:

Section 116 of the Land Registration Act 2002

Discovery Form

The use of a standard discovery form by the Land Registry can be used to report an interest promised in a landowner's estate. Such promise does not have to remain unknown or undiscoverable until litigation ensues for a claim in proprietary estoppel. The form can be completed by the party to whom an interest in property is promised, and is to be filed at the Land Registry. It can require information on the names of the parties, and the land involved. It can also verify whether the promisee is in actual occupation of the land that is promised. The form must be signed by the party to whom an interest is promised, and contain a penal clause for a fine or imprisonment if the information provided is false. Therefore, both a landowner and his heirs or successors would know or discover any future interest against a landowner's estate. This standard form will not erode the informality of proprietary estoppel, as the promisee is not required to state the promise made. The form serves to discover whether a promise was made to help the parties seek other avenues to resolve the matter before litigation.

Sixth, is the execution of a last will and testament by a landowner.

A landowner who promises his estate to a party, can execute a signed will in that party's favour. A copy of the signed will can be furnished to the beneficiary party. Should the landowner change his or her will before death, then the beneficiary party can prove that the interest was promised in the lifetime of the landowner. Although, the landowner can revoke the will before death, the promisee may have acquired an equitable interest in the landowner's land that may give rise to a proprietary interest by proprietary estoppel. Thus, a promisee's interest can be secured by will against the landowner's estate, to preclude a future claim in proprietary estoppel.

Seventh, is the entry of notice on the land register by the promisee.

A party to whom an interest in land has been promised can enter a notice on the land register. A notice can be entered by virtue of Section 34 of the Land Registration Act 2002. The notice can either be an agreed notice by the landowner and the party to whom the interest is promised, or a unilateral notice by the party who is the beneficiary of a promise. The notice will serve to inform of the party's interest in the landowner's estate. A notice will not erode the informality of proprietary estoppel, as the promisee is not required to state the promise made. The notice serves to inform that a promise was made to help the parties seek other avenues to resolve the matter before litigation.

Eighth, is that the court can refer a claim in proprietary estoppel to mediation.

The mediation of a claim in proprietary estoppel can save extensive costs and litigation. Further, it can eliminate the unpredictability that may arise as to whether the court will decide for or against the claimant. The court can refer a claim to mediation upon the filing of a claim. If the mediation process is not successful, then the parties still have the option of continuing to litigation.

Ninth, is that a potential claimant can seek to settle a potential claim with the defendant at mediation before the filing of a claim.

Mediation before the filing of a claim can save both parties time and costs. Before a potential claimant files a claim in proprietary estoppel, a notice can be sent to the defendant of the claimant's intention to file the claim, and reference can be made to supporting documents such as the proposed Land Registry standard questionnaire form or disclosure form at numbers 4 and 5 above, along with a copy of a draft will if

any, or any documentation on promises made, or other notice on the land register. The potential claimant can propose that the parties seek to resolve the matter by mediation before the claim is filed. If the defendant agrees, and the mediation is successful, then both parties would have avoided a long and costly trial, and the attendant unpredictability in outcome that comes with it. If the defendant declines to proceed to mediation, then the potential claimant can file the claim in proprietary estoppel.

Tenth, is the use of practice directions by the court.

Practice directions by the court are profoundly necessary and useful to provide guidance and clarity on proceeding with a claim in proprietary estoppel. There are some terms applied in a claim in estoppel that are imprecisely defined. For example, the requirements of assurance, reliance and detriment for a proprietary estoppel ought to be further defined by the court so that a legal practitioner and litigant can know what is, and what constitutes these elements. Similarly, the court can define what is an implied assurance, an implied statement, a mere inference or an indirect statement for a proprietary estoppel and also clarify what circumstances constitute each for an assurance.

Further definition and clarification are also required on what is and what constitutes the context in which an assurance is made. It would also be immensely beneficial if the court can define and elaborate on the “clear enough” test applied for an assurance. The definitions and guidelines provided by the court will be beneficial to both legal practitioners and litigants embarking on a claim in proprietary estoppel. It would not

only provide clarity on what is required by the court, but also save a party unnecessary litigation and costs if a claim does not satisfy the practice directions of the court.

Eleventh, is the use of application rules by the court.

The court can devise application rules to provide guidelines on how it arrives at a decision in proprietary estoppel. For example, the court can explicate how its discretion is applied for a remedy in proprietary estoppel. The court exercises a 'principled' discretion for a remedy in proprietary estoppel, but it is sometimes unclear what is, and what constitutes that 'principled' discretion, and how it influences a remedy in proprietary estoppel. The court also grants the minimum equity to do justice in every case of proprietary estoppel, but it cannot forecast in advance what constitutes that minimum equity to do justice, and what factors are to be taken into consideration in assessing the minimum equity to do justice. Therefore, the use of application rules can introduce more clarity for the legal practitioner or litigant on the process engaged by the court in granting a remedy. This may influence a litigant's decision to file or not file a claim for proprietary estoppel. It will also help eliminate some of the unpredictability in the remedy granted by the court.

Twelfth, is the documentation of promises made by the landowner and promisee.

Both the landowner and the promisee can keep a diary of events transpiring on a farm, or other property. For example, the exact terms of a promise made to the claimant for an interest in the property of a landowner, and repeated over several years can be noted. Similarly, if a proposed will is drawn up in the name of a claimant, then the landowner's reasons for the will in favour of the claimant can be noted, with the exact terms related by the landowner, together with a copy of the will, can be documented.

If a claimant works for low wages and low pay, then it should be so noted, and if any disagreements should ensue, then they should also be noted. The landowner can likewise keep a diary of the promise made to the claimant, can note whether a will was made in the claimant's favour, and indicate whether or not the promise was revoked before death.

Either party may have heard by television, or may have been told by friends or family, or may have read in the newspapers or the internet about the outcome of cases being determined in proprietary estoppel, and may have grasped the importance or necessity of keeping notes or records. The documentation of a promise will help bring more clarity to the nature of the promise made, and the context in which it was made.

Further, the documentation process will not erode the informality of proprietary estoppel, as the court would still have to determine the facts on whether an assurance was made, the context in which it was made, and whether it was clear enough. However, it serves to inform what transpired between the parties, so other avenues such as mediation can be considered to resolve the matter before litigation.

Thirteenth, is the promisee informing friends and family about the landowner's promise and of their shared relationship.

The promisee can inform friends and family about the relationship that he or she shares with the landowner, and what promises are made by the landowner. Written communication such as letters, cards, emails or texts can suffice, or oral communication by telephone, mobile, or by meeting in public places such as a restaurant. This may help the court ascertain the promise made by the landowner, and

the promisee's reliance thereon. Thus, the promisee will have witnesses to support his or her evidence in a claim of proprietary estoppel.

Fourteenth, is the establishment of a proprietary estoppel indemnity fund by landowners or property holders.

A proprietary estoppel indemnity fund can be established by landowners and property holders to indemnify the loss from a claim in proprietary estoppel. The landowners and property holders can make payments into that fund based on the value of their property. Should a successful claim arise against a landowner or his estate, then the claimant can be indemnified by the fund. This process will help overcome the unpredictability of litigation, and also any loss to the landowner or his estate. Also, the fund can help indemnify the landowner or his estate if the parties decide to settle at mediation. Thus, the proprietary estoppel indemnity fund makes the mediation process more appealing to both legal practitioners and litigants.

Fifteenth, the court can impanel a jury to decide a case in proprietary estoppel.

Since proprietary estoppel is a question of fact to be decided by a trial judge, then a jury can be empanelled to decide whether a proprietary estoppel arises on the facts of a case. The court can give directions to the jury on what should be considered for the assurance, reliance and detriment in proprietary estoppel. Many of the cases on appeal turn on the facts of a case, and having a jury may reduce the number of cases that proceed to appeal. Further, the parties may perceive that a jury is likely to make a 'fairer' determination on the facts, than a single judge.

Sixteenth, is the provision of legal aid for claims in proprietary estoppel.

Since one of the greatest hurdles in a claim for proprietary estoppel, is the extensive litigation costs involved, then legal aid can be made available to those who lack the financial resources to proceed with a claim. Proprietary estoppel claims are often long and costly with the possibility of further appeals, and legal aid can help offset the legal costs that prevents litigants from pursuing a claim. Thus, legal aid can help eliminate the financial hardship of litigation costs in proprietary estoppel.

Seventeenth, is the law reform of Section 116 of the Land Registration Act 2002 (LRA 2002).

Law reform is required to achieve more clarity. Reference is made to the terms, "proprietary estoppel" and "mere equities" without definition or amplification. Section 116 of the LRA 2002, therefore, requires law reform to define the title of the section "proprietary estoppel and mere equities", and to elaborate on the circumstances that give rise to each. Further, the terms in the section "for the avoidance of doubt', "an equity by estoppel" and "a mere equity" are mentioned without explicating how each is defined, and what each constitutes or represents. The clarification of the provisions of law will help eliminate unnecessary confusion and complexity.

Eighteenth, is to educate landowners about proprietary estoppel.

With the recent spate of cases[1432] in proprietary estoppel following ***Thorner***[1433], it is necessary for landowners to be educated about the law of proprietary estoppel. The

[1432] [2009] UKHL 18

[1433] *Henry v Henry* [2010] UKPC 3, *Suggitt v Suggitt* [2012] EWCA Civ 1140, *Davies v Davies* [2016] EWCA Civ 463, *Moore v Moore* [2016] EWHC 2202 Ch, *James v James* [2018] EWHC 43 Ch; *Haberfield v Haberfield* [2018] EWHC 317 Ch, *Thompson v Thompson* [2018] EWHC 1338 Ch, *Gee v Gee* [2018] EWHC 1393 Ch

Land Registry can take the bold initiative to help educate the landowners. They can hold town hall meetings, or send flyers or pamphlets in the mail to landowners about the law and implications of proprietary estoppel.

Similarly, farming associations and groups can organize workshops, seminars or lectures and invite a legal practitioner or Land Registry personnel to educate their members on proprietary estoppel. This would help create an awareness of the doctrine, and landowners can likewise be sensitized on the importance or necessity to keep records of the conversations or events that transpire between the landowner and the promisee on the farm (at number 13 above), or the importance of executing a last will and testament for his or her estate (at number 6 above), or the importance of protecting their title to land by title insurance (at number 1 above), or the importance to have protection against claims in proprietary estoppel by undertaking proprietary estoppel insurance (at number 2 above), or the importance of being part of a proprietary estoppel indemnity fund to be indemnified against such claims (at number 15 above).

Nineteenth, is the presentation of a proprietary estoppel model to help resolve claims in proprietary estoppel.

A claim in proprietary estoppel can lead to protracted litigation and costs. Further, it may present unpredictability in relation to the outcome of such proposed litigation. Moreover, it often involves family members, domestic relationships, or neighbour disputes that can lead to a breakdown in family and social relationships. It is capable of creating animosity and the loss of close personal or social friendships. Mediation represents a win-win situation where both parties can be winners, rather than

permitting the court to decide who wins or loses. The model presented below is intended to help both the claimant and defendant arrive at a solution in the interest of both parties.

The proprietary estoppel model is as follows:

Proprietary Estoppel Model

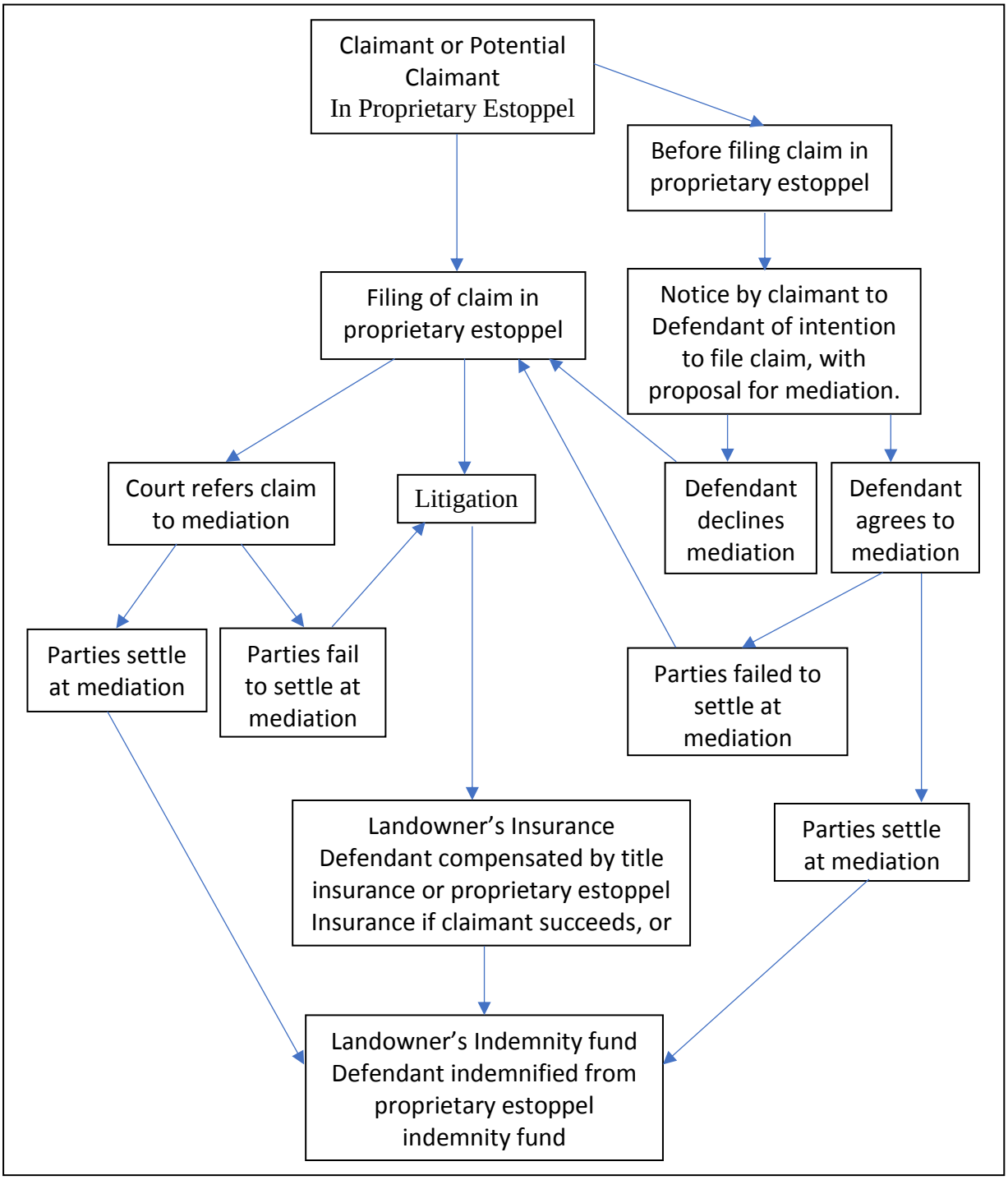

Figure 1 - Proprietary Estoppel Model

Mediation is proposed as the most suitable process to resolve claims in proprietary estoppel as the following presentation illustrates:

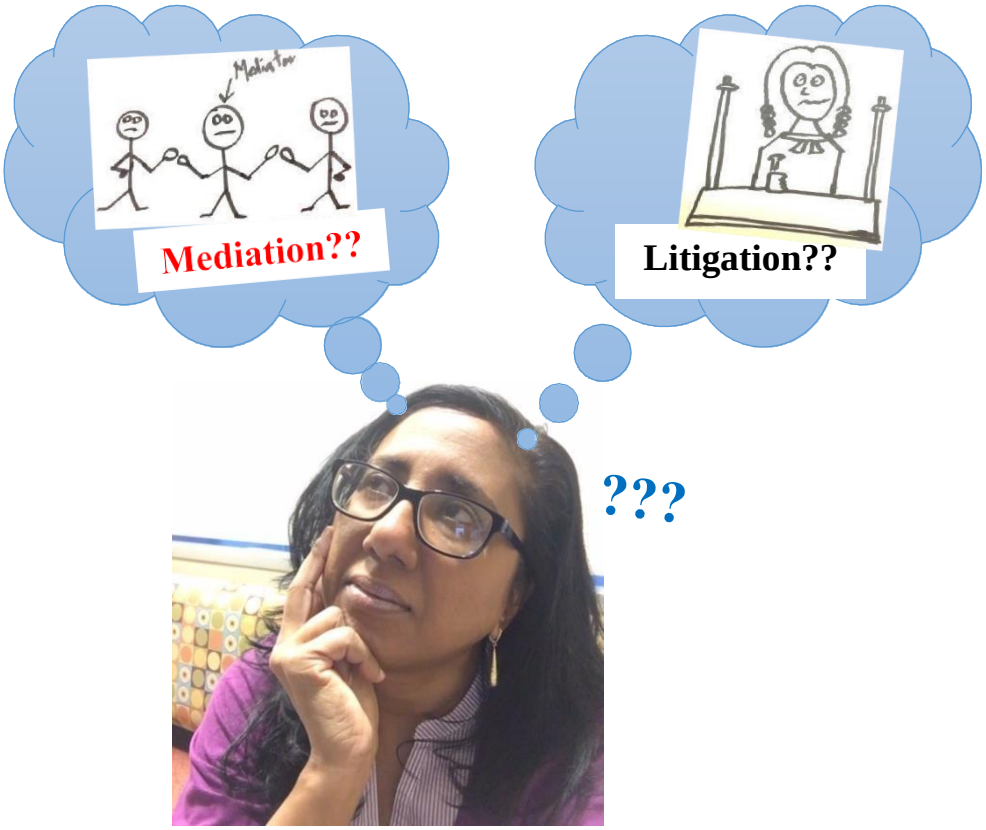

Figure 2 - Mediation v Litigation for Proprietary Estoppel

Figure 3 - Benefits and limitations of mediation and litigation

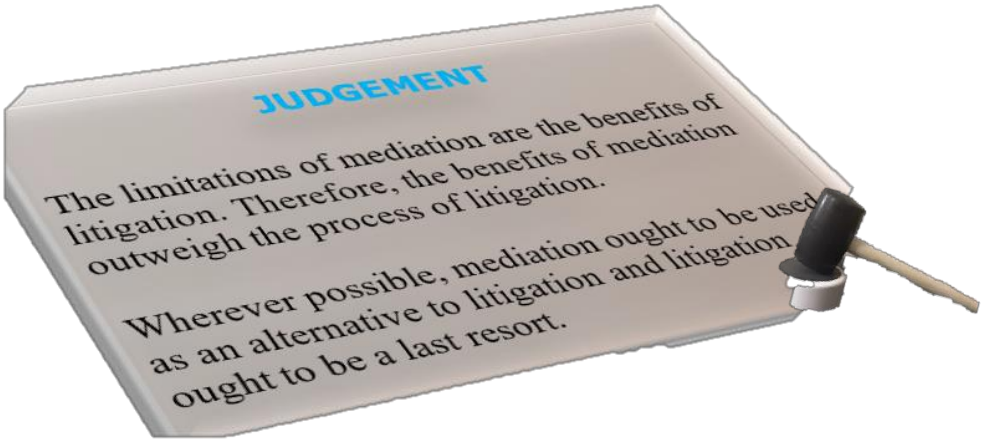

Figure 4 - Judgment

The above model and presentations illustrate that both the landowner or his or her estate, and the claimant can be winners in a claim of proprietary estoppel. Thus, these recommendations provide realistic solutions that are practical and feasible, to help overcome the challenges and controversies in the practical application and operation of the factual components integral to a successful claim founded on proprietary estoppel.

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