

## CASE COMMENTARY

# PROPRIETARY ESTOPPEL: A NEW CHAPTER DAWNS?

**Thorner v Major and others [2009] 1 WLR 776**

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## THE BACKGROUND TO THE CASE

The decision of the Court of Appeal in *Thorner v Major*<sup>1</sup> briefly constructed an almost impossible strait-jacket around potential claimants under proprietary estoppel, reminiscent of the way the strict requirements under the *Willmot v Barber*<sup>2</sup> probanda had earlier limited such claims<sup>3</sup>. The Court of Appeal held in *Thorner v Major*<sup>4</sup> that an assurance of rights had to be clear and unequivocal in order to give rise to property rights and on the facts of this case the assurances had been too vague to give rise to such rights. In an area of law based on informality and often vague promises it appeared that the law was now in retrenchment and was reasserting the need for very strict limitations on the circumstances in which property claims under proprietary estoppel could arise. As Brian Sloan in his case comment stated:

“In *Thorner*, the Court of Appeal tightened the requirements for a relevant representation, thereby shifting that balance in favour of the alleged representor and his or her estate.”

Other writers went as far as to suggest that as a result of this decision and also the House of Lords decision in *Yeoman's Row Management v Cobbe*<sup>5</sup>

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<sup>1</sup> [2008] EWCA Civ 732.

<sup>2</sup> (1880) 15 Ch D 96.

<sup>3</sup> See Gray and Gray *Elements of Land Law* (Oxford: Oxford University Press 5<sup>th</sup> edn, 2009) p 1207 where the five *Willmot v Barber* probanda are described as “a strait-jacket imposed on the development of proprietary estoppel.”

<sup>4</sup> Above n 1.

<sup>5</sup> [2008] UKHL 55.

there would be a dramatic curtailment of the scope of the doctrine.<sup>6</sup> However, within a matter of months the decision of the High Court had been reasserted and the House of Lords upheld the claim of David Thorner, based not on an express promise of property rights but on an indirect expression of intention that the claimant would inherit the property and, more significantly took into account the surrounding pattern of conduct.

This article examines the basis on which a claimant can make a successful claim based on proprietary estoppel today and considers whether the courts now regard the House of Lord's decision in *Thorner v Major*<sup>7</sup> as having introduced a lower standard for an assurance in a proprietary estoppel claim both in respect to the promise of rights made and also as to the identification of the property concerned. It will also consider the wider issue of the difficulties presented to the courts where an assurance is made which relates to future testamentary rights.

## THE FACTS OF THE CASE

David Thorner was a farmer in Somerset. For nearly thirty years, from 1976 he worked without pay on the farm of his father's cousin, Peter Thorner and contended that he had been encouraged by Peter Thorner for a period of fifteen years before he died to believe that he would inherit Peter's farm. He maintained that in reliance on this encouragement he had continued to work without pay. Peter Thorner had made a valid will under which he left the farm to David but had revoked it prior to his death and died intestate. The revocation of the will was unconnected with his relationship with David. They had not fallen out and David had continued to work for Peter until he died in 2005. Both the Court of Appeal and the House of Lords held quite correctly that the existence of an earlier but unenforceable will was irrelevant to the proof of a claim under estoppel. For David to make a successful claim against those who had rights in the farm under the intestacy rules,<sup>8</sup> he had to rely on proprietary estoppel and to prove the three established elements namely, an assurance, reliance on that assurance and detriment.<sup>9</sup> Although Deputy Judge

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<sup>6</sup> See generally B McFarlane and A Robertson "The Death of Proprietary Estoppel" [2008] *Lloyd's Maritime and Commercial Law Quarterly* 449.

<sup>7</sup> [2009] 1 WLR 776.

<sup>8</sup> Under the Administration of Estates Act 1925, Intestate Estates Act 1952 and the Family Provision (Intestate Succession) Order 1987 the estate of Peter Thorner would pass to his next of kin who were his siblings, two sisters and also a niece so David Thorner would inherit nothing.

<sup>9</sup> As established in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133.

John Randall QC had at first instance found evidence of an assurance<sup>10</sup> in favour of David Thorner, the Court of Appeal had greater difficulty.<sup>11</sup> Peter Thorner had been a man of very few words and there was little evidence that he had ever discussed the farm and who would own it after his death in any detail with David Thorner. David's case principally relied on a conversation in 1990, when Peter had handed over an insurance policy bonus notice with the words "that's for my death duties" and also on inferences to be derived from the circumstances of their relationship over thirty years. The Court of Appeal found against David Thorner on two main grounds.

Firstly, the court considered to what extent an assurance had to be clear and unequivocal in order to give rise to rights. There had been some difference of opinion prior to *Thorner* as to precisely how clear the assurance had to be in proprietary estoppel. Although in previous cases such as *Re Basham*<sup>12</sup> and *Jennings v Rice*<sup>13</sup> the court had been prepared to uphold claims based on fairly loose assurances such as "all this will be yours one day"<sup>14</sup> the Court of Appeal in this case were more reluctant to uphold a claim on such a loosely worded assurance of rights. Lord Justice Lloyd suggested that the conduct of Peter Thorner in this case could have been consistent with a current intention to leave David the farm but was not a definite assurance of future rights on which the court held proprietary estoppel rests. He quoted from *J.T. Development Ltd v Quinn*<sup>15</sup> where Lord Justice Ralph Gibson said

"The law requires that a representation, if it is to provide the basis of an estoppel, be clear and unequivocal and that it be intended to be relied upon."<sup>16</sup>

Lord Justice Lloyd concluded that although the law did not lay down any precise form for an assurance or promise there was a general requirement that it must be clear and unequivocal. He suggested further that even where the assurance was based on conduct alone it too must be clear and unequivocal.<sup>17</sup>

Secondly, the Court of Appeal revisited the difficult issue of the testamentary promise. For many years it was assumed that such promises could not be relied on in proprietary estoppel because they stifled the

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<sup>10</sup> *Thorner v Curtis* [2007] EWHC 2422 (Ch).

<sup>11</sup> Above n 1.

<sup>12</sup> [1986] 1 WLR 1498.

<sup>13</sup> [2003] 1 P & CR 100.

<sup>14</sup> *Ibid* at para 17.

<sup>15</sup> [1991] 2 EGLR 257.

<sup>16</sup> *Ibid* at 261.

<sup>17</sup> Above n 1 at para 54.

important principle of testamentary freedom. Even as recently as 1998<sup>18</sup> a claim based on the promise of property rights under a will was rejected by Judge Weeks Q.C. on the basis that the deceased had never given an assurance that she would never change her will. Judge Weeks took the view that in such cases the claimant must also establish that the deceased had encouraged a belief that he/she would not revoke her will and the claimant had also relied on that encouragement. This view was criticised widely<sup>19</sup> and the apparent limit it placed on many claims under proprietary estoppel. The point was addressed two years later in *Gillett v Holt*<sup>20</sup> where Lord Justice Robert Walker held that an assurance of property rights under a will can be binding on the future testator so that the assurance will crystallise into a binding assurance. The point when the assurance or promise will crystallise into rights occurs when the promisee acts in reliance on that promise to his/her detriment. In *Gillett*, the promisor was still alive so it was significant that the court upheld the claim of the promisee against the promisor's estate.<sup>21</sup> Lord Justice Lloyd considered this judgment and others and concluded:

“while there is no special rule as to the form or nature of the promise, representation or assurance which is capable of providing the basis of a proprietary estoppel case as regards a claim against a deceased's estate, it seems to me that the general requirements that there must be a clear and unequivocal representation, and that it must be intended to be relied on, or at the very least that it must be reasonably taken as intended to be relied on, are of no less importance in this type of case than others, and they must be applied with care.”<sup>22</sup>

He pointed out that in the case of statements made about testamentary intentions may not necessarily be intended to be taken as promises of future property rights.<sup>23</sup> He concluded that where assurances of future property rights under a will, proprietary estoppel cannot be based on conduct or standing by or indeed anything less than a clear promise or assurance that the claimant will inherit.

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<sup>18</sup> *Taylor v Dickens* [1998] 1 FLR 806.

<sup>19</sup> See generally M P Thompson “Emasculating estoppel” [1998] *Conveyancer and Property Lawyer* 210.

<sup>20</sup> [2001] Ch 210.

<sup>21</sup> See Martin Dixon “Estoppel and Testamentary Freedom” [2008] *Conveyancer and Property Lawyer* 65 where he reflects that in this context estoppel becomes “a very sharp sword indeed.”

<sup>22</sup> Above n 1 at para 54.

<sup>23</sup> *Ibid.*

Within a matter of months the House of Lords unanimously reversed the decision of the Court of Appeal and upheld the claim. The House of Lords revisited the nature of the assurances made. The real difficulty presented to the court was the lack of a definitive moment when the property rights arose and also the issue of whether it was material whether or not Peter Thorner believed that David would rely on the assurance given. Although there was no definitive assurance made by Peter, the judges were persuaded that the pattern of conduct after the indirect assurance as well as the context in which it was said was as important in proving a clear and unequivocal express assurance of rights. As stated by Lord Hoffman “past events can provide context and background for the interpretation of subsequent events and subsequent events throw retrospective light upon the meaning of past events”<sup>24</sup>. He drew a wonderfully evocative comparison with the owl of Minerva which he said “will only spread its wings with the falling of dusk.”<sup>25</sup> The reference was later embraced by Lord Neuberger in his critical appraisal of *Thorner v Major* and *Cobbe v Yeoman’s Row Management* given in a lecture in June 2009.<sup>26</sup> Lord Neuberger reiterated Lord Hoffman’s view that the meaning of words and judgment should always be assessed in their factual context. He commented “the meaning of words and actions was to be assessed within their factual context, which assessment the judge had conscientiously and carefully carried out.”<sup>27</sup> Lord Neuberger had also heard the case of *Thorner* and he stated in his judgment as follows:

“It would be wrong to be unrealistically rigorous when applying the ‘clear and unambiguous’ test. 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.”<sup>28</sup>

He continued by stating that:

“...it is sufficient for the person invoking the estoppel to establish that he reasonably understood the statement or action to be an assurance on which he could rely.”<sup>29</sup>

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<sup>24</sup> Above n 8 at 780 para 8.

<sup>25</sup> *Ibid.*

<sup>26</sup> “The stuffing of Minerva’s owl? Taxonomy and Taxidermy in Equity” [2009] *Cambridge Law Journal* 537 at 544. The second memorial lecture for Jonathan Brock QC at the Inner Temple Hall London on June 9 2009.

<sup>27</sup> *Ibid* at 540.

<sup>28</sup> Above n 8 at 801 para 85.

<sup>29</sup> *Ibid.*

Their Lordships, in particular Lord Neuberger, also considered at some length the uncertainty as to the extent of the property Peter promised to David. Over the years the size of the farm had varied as parts had been sold and parts had been purchased. The Court of Appeal found that this also undermined the clarity of the assurance made. Lord Neuberger commented as follows:

“It would represent a regrettable and substantial emasculation of the beneficial principle of proprietary estoppel if it were artificially fettered so as to require the precise extent of the property the subject of the alleged estoppel to be strictly defined in every case.”<sup>30</sup>

Their Lordships concluded that the identification of the property must be sufficient to give the promise the clear and unequivocal character required to found estoppel but it need not be defined with precision. This is a very important issue since there may be a considerable lapse in time between the representation and the moment when the equity is satisfied. In the context of property such as a farm there may be many changes from year to year as the exact extent of the farm fluctuates.

The claim of Peter Thorner clearly engendered support from the House of Lords and it is hard to criticise a claimant who on the evidence had often worked tirelessly for a relative with virtually no pay apart from pocket money. However this decision may be said to have highlighted the inherent problems in proprietary estoppel rather than providing a coherent solution.<sup>31</sup> The effect of this decision will become increasingly clear as its impact is seen on subsequent decisions.

## SUBSEQUENT CASES

Several cases on proprietary estoppel have been decided in the light of the decision in *Thorner v Major*. Although these are relatively few in number and even fewer are based on facts which are similar to *Thorner* the following analysis of these cases may show whether there has been a sea-change in the

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<sup>30</sup> *Ibid.*

<sup>31</sup> See “Proprietary Estoppel: a Return to Principle?” [2009] *Conveyancer and Property Lawyer* 260 at 267 where Dixon comments “that *Thorner* is important is undeniable, but perhaps also for what it omits to discuss, as much as for what it does decide.” See also “Apocalypse averted: Proprietary estoppel in the House of Lords” [2009] *Law Quarterly Review* 535 at 542 where McFarlane and Robertson comment “In the longer term, the decision in *Thorner v Major* may force a re-examination of some of the more tricky questions relating to proprietary estoppel, such as the extent of the rights it gives rise to and the scope of its application beyond cases involving land.”

court's approach to some key issues in proprietary estoppel such as proof of both an assurance and the extent of property in such cases.

One of the first cases to be heard was *Stallion v Albert Stallion Holdings*<sup>32</sup> It is difficult to draw more than a passing inference from the approach of the judge in this case<sup>33</sup> since the facts of *Stallion* and *Thorner* were very different. However the relevance lies in the fact that the nature of the assurances made in *Stallion* were in dispute in the same way as the assurance in *Thorner*. The claim was made by Porntip Stallion against Albert Stallion, the deceased. She was his third wife and had been married to him for six years. The marriage had ended when the deceased had asked the claimant to divorce him in order for him to marry his fourth wife Lilibeth. She had agreed but on certain terms which were agreed between them both orally and in the form of two separate written agreements. One of the agreed terms was that she would be able to live rent-free for the rest of her life in property, which had once constituted their matrimonial home and to be granted a five year contract of employment with an agreed salary and to be given a fully serviced car in lieu of an order for ancillary relief. On his death the deceased left his entire estate to Lilibeth. On being asked to leave the premises Porntip had claimed that she had a life-time right to occupy the premises based on proprietary estoppel. The judge referred to Lord Scott's judgment in *Thorner*<sup>34</sup> accepting that in this case only those representations which were clear and unequivocal could be binding and on that basis the judge upheld an oral agreement which allowed the claimant to live rent-free in the premises for the rest of her life. It is difficult to draw much from this judgment since in this case both representations had been written down and the oral representations had been made in front of witnesses. However it is worth noting that the judge placed great weight on the nature of the representation and took pains within her judgment to justify why she found in favour of the claimant rejecting the agreement of June 30 as follows "I would have found that the representation contained in the 30 June Agreement was insufficiently clear in relation to the extent of the premises over which Porntip was intended to have exclusive occupation and the date from which it was intended to take effect, to be effective."<sup>35</sup>

In *MacDonald v Frost*,<sup>36</sup> another first instance decision, based on proprietary estoppel a claim was made by two daughters Averil Macdonald and Deborah Bannigan against their deceased father's estate. Their father had made a will under which they and their children had been left nothing. They argued that their father had given them both assurances of property rights

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<sup>32</sup> [2009] EWHC 1950.

<sup>33</sup> Sarah Asplin QC sitting as a High Court Judge.

<sup>34</sup> Above n 28 at para 123.

<sup>35</sup> Above n 23 at para 125.

<sup>36</sup> [2009] EWHC 2276 (Ch).

during his lifetime which would be binding on the estate. As in *Thorner* everything hinged on the nature of the assurance made, the nature of the property over which the assurance had been made and whether or not the assurances were binding. The daughters argued that their father had made a clear and unequivocal promise with his first wife and their mother that “whatever happened, the estate of the survivor would pass to their daughters in equal shares” and in reliance on that promise they both supported their father financially until his death some twenty years later. The father remarried seven years after the death of the daughters’ mother and he had made a new will under which the two daughters did not take any benefit. The background to the case suggests that the daughters and the second wife were not on good terms although it was clearly stated in court that the daughters had no wish to deprive the second wife of her home but merely to claim the residuary estate after her death based on the earlier promise made by their father. Such cases are the very stuff of claims in proprietary estoppel. There was no doubt that they had acted to their detriment by supporting their parents financially for such a long period of time but as in *Stallion* the judge<sup>37</sup> was at pains to point out that “the crucial question that she had to decide was whether there was an assurance or series of assurances that was sufficiently clear and unequivocal to give rise to a proprietary estoppel, bearing in mind the guidance in *Thorner*<sup>38</sup>.” The father had made a payment of £20,000 to one daughter and discounted the price of property he owned on sale to the other daughter. The judge could find no assurances or promises of property rights after their father had remarried. The judge continued “if and insofar as the monthly instalments were also made by Joe’s daughters in the expectation of receiving the balance of the inheritance, that expectation was not fostered by any specific promises made to Averil and Deborah.”<sup>39</sup> So in spite of what the judge referred to as “a tacit assumption that Averil and Deborah would inherit their parent’s estate in equal shares”<sup>40</sup> their claim failed. This decision seems to lean against any relaxation in what must be proved for an assurance to be binding. The judge said she had sympathy with the claimants but “it is not the function of the court to re-write Joe’s will so as to produce a fairer distribution of his estate than he himself intended.”<sup>41</sup> Such words must suggest that there is no particular relaxation in the judicial approach to proof of an assurance post-*Thorner* indeed if anything it could suggest a greater need for clarity. The

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<sup>37</sup> Geraldine Andrews QC (sitting as a Judge of the High Court).

<sup>38</sup> n 37 at para 21.

<sup>39</sup> n 37 para 128.

<sup>40</sup> *Ibid.*

<sup>41</sup> n 37 para 130.

clear message from this judgment echoed Lord Hoffman's view that context is everything.<sup>42</sup>

On the same day as the decision in *MacDonald v Frost* another proprietary estoppel judgement at first instance was given. The claimant's case in *Gill v Woodall*<sup>43</sup> was complicated by disputes over the validity of the will and the possibility of undue influence. The judge<sup>44</sup> found the will to have been validly executed but since there was evidence of undue influence he duly set it aside and the issues of proprietary estoppel took a lesser role in the case. However the judge reviewed the various judgments in the House of Lords as to what constitutes an assurance concluding *inter alia* "that an assurance may be sufficient to found an estoppel even if it is not made expressly; it can be made in oblique and allusive terms; it may be subject to unspoken and ill defined qualifications."<sup>45</sup> He also concluded that "this is an issue of fact heavily dependant upon the context in which the assurance or assurances was or were made (including the characteristics of the protagonists, the relationship between them and whether assurances were repeated and formed part of a pattern) on which evidence of the parties' subjective understanding of what they were agreeing is admissible."<sup>46</sup> The claimant successfully contested the will of her deceased mother made in favour of a Charity, the RSPCA. In addition to the claim of undue influence she also relied on a number of assurances made to her over a period of time, sometimes in front of witnesses, such as her father's conversations with a number of people that he wished the farm to be kept for the "next generation" a comment by her father to friends about the farm "after all it'll be hers one day" and advice from her mother that she should keep a copy of some plans of drains about the farm as they would be of use to her sometime in the future. Cumulatively these promises were sufficient to persuade the judge that there had been an assurance of property rights which would have been binding on the court even if the will had not been set aside. There was much here to echo the facts of *Thorner and Gillett v Holt*.

*Cook v Thomas*<sup>47</sup> was one of the first cases to be heard by the Court of Appeal since *Thorner* and perhaps gives the best indication of all as to the impact of the case on estoppel claims. As Lord Justice Lloyd aptly commented in the opening words of his judgment "the litigation arises from a

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<sup>42</sup> n 37 para 21 "I have to consider and evaluate the evidence of Averil and Deborah against the background of any relevant contemporaneous documents, the behaviour of all main protagonists, and the underlying probabilities." Geraldine Andrews QC.

<sup>43</sup> [2009] EWCA 834.

<sup>44</sup> Mr James Allen QC sitting a Deputy Judge of the High Court.

<sup>45</sup> Above n 44 para 518.

<sup>46</sup> *Ibid.*

<sup>47</sup> [2010] EWCA Civ 227.

most unfortunate and regrettable dispute.”<sup>48</sup> The claimant Mrs Thomas was the only daughter of an elderly widow. The parties had fallen out and the mother sought to evict her daughter and husband from the property, a farm and smallholding in Ross-on-Wye. The daughter relied on certain promises made to her over a period of time and thereby claimed rights arising under proprietary estoppel as well as rights under a constructive trust and an alternative claim based on unjust enrichment. None of these succeeded. The daughter had been on poor terms with her parents after her marriage to the second defendant, her husband. However after her father died the daughter and her husband had moved back to the farm and lived in a mobile home in the grounds of her mother’s farm paying a small ground rent to her mother. Mrs Thomas contended that over a period of five years her mother had led her to believe that she would gain rights in the property both expressly and impliedly by her conduct. Then the parties fell out again and eventually the mother sought to evict them and this was the basis of the claim before the court. There was evidence that the mother had invited them to live in the property when, after a storm, their mobile home became uninhabitable but she contended that this was because she felt sorry for them. On the other hand the claimant and her husband contended that she had told them that if they carried out certain repairs to the property “then they could move in the farmhouse and occupy that part of it from then on as long as they needed to while she was alive, instead of waiting until her death.”<sup>49</sup> Much of the Defendants case was based on the findings of fact made by the judge at first instance. Lord Justice Lloyd once more gave the leading judgment in this case having given the leading judgment in *Thorner v Major* in the Court of Appeal. His decision relied in part on rules of evidence and he used a range of cases where the credibility of witnesses had been at issue.<sup>50</sup> Of course this decision differs from the vast majority of proprietary estoppel cases because in this case the assurer was able to come to court to give evidence about what had been said. The mother, in spite of her age, was quite clear in her evidence that she had not given the daughter and her husband any assurances about property rights and had merely helped them out in an emergency when the roof of their mobile home had blown off and they had nowhere to live. It is rare in estoppel cases for the assurer to be able to give evidence as shown above in *Thorner v Major*, *Stallion v Albert Stallion Holdings*, *MacDonald v Frost* and *Gill v Woodall*. Where the assurer has died it is for the judge to decide whether or not he believes the evidence of the estoppel claimant since the assurer cannot be questioned about the exact nature of any assurances given. Lord Lloyd

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<sup>48</sup> Ibid at para 1

<sup>49</sup> Above n 48 at para 19.

<sup>50</sup> *Benmax v Austin Motor Co* [1955] AC 370; *Biogen Inc v Medeva Inc* [1997] RPC 1; *Assicurazioni Generali SA v Arab Insurance Group* [2003] 1 WLR 577.

revisited *Thorner v Major* and in the light of the House of Lords reversal of his judgment in that case commented on the evidence in *Cook v Thomas* as follows:

“I see no indication in the judgment that the judge failed to take proper account of any relevant conduct. He looked at the evidence as regards the first promise in the light of circumstances as they then stood...nothing had been done by then which was relevant in support of the Defendant’s case, unlike the history in *Thorner v Major*... where the claimant had been helping the deceased voluntarily for years before anything was said to him that could amount to a promise or representation.”

## COMMENTARY

Proprietary estoppel has been recognised as a doctrine for many centuries. As Thompson comments “equitable estoppel is a doctrine of considerable antiquity.”<sup>51</sup> However the modern requirements as laid down in *Taylor Fashions*<sup>52</sup> are very broad and leave much to the court’s discretion. This has resulted in a large body of case law surrounding what the court would regard as an assurance or representation which could be deemed to give rise to an equity in favour of the claimant. Proprietary estoppel had not been substantively discussed by the House of Lords since *Ramsden v Dyson*<sup>53</sup> so the decision was awaited with particular interest and anticipation. Does the decision herald a new chapter in the development of proprietary estoppel or merely a postscript to what has gone before?

*Thorner v Major* was decided on a number of issues, in particular it considered how clear an assurance must be in order to found property rights and also how clearly must the property itself be described. In relation to the assurance each judge in the House of Lords in varying degrees retreated from the strict terms set down by Lord Lloyd as to what is needed to constitute a “clear and unequivocal assurance.” Lord Walker relied on the differences that exist between promissory estoppel and proprietary estoppel and relying on various sources<sup>54</sup> showed that there is authority that the “clear and unequivocal” test does not apply to proprietary estoppel. However he added that “to establish a proprietary estoppel the relevant assurances must be clear

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<sup>51</sup> *Modern Land Law* (Oxford: Oxford University Press, 4<sup>th</sup> edn, 2009) p 558.

<sup>52</sup> Above n 11.

<sup>53</sup> (1866) LR 1 HL 129.

<sup>54</sup> Treitel *The Law of Contract* (London: Sweet and Maxwell, 12<sup>th</sup> Edn, 2007); Slade LJ in *Jones v Watkins* (unreported) 26 November 1987; [1987] CA Transcript No 1200.

enough.”<sup>55</sup> He added: “What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context.”<sup>56</sup> Their Lordships comments in relation to an assurance were all carefully applied in the subsequent cases described above. Each judge was careful to consider whether the words or conduct relied upon could constitute an assurance but did not fall into the trap of allowing property rights to arise where there was detriment without the connection to an assurance. So in *Macdonald v Frost* no rights arose for the daughters who had clearly suffered financial detriment, who had clearly believed they had a future right to their father’s estate but could not prove that there had been an assurance from their father even within the more flexible definition laid down by the House of Lords in *Thorner*.

In relation to the description of the property itself there was less difficulty in disposing of Lord Lloyd’s hesitancy over allowing a claim where the assurance related to “Stear Farm” without any reference to the extent of what that meant. As already commented<sup>57</sup> Lord Neuberger dealt with this issue as follows “In this case, the extent of the farm might change, but, on the Deputy Judge’s analysis, there is, as I see it, no doubt as to what was the subject of the assurance, namely the farm as it existed from time to time. Accordingly, the nature of the interest to be received by David was clear: it was the farm as it existed on Peter’s death.”<sup>58</sup>

There are two real fears for property lawyers post-*Thorner*. Firstly, the greater degree of uncertainty surrounding claims under proprietary estoppel. Since an assurance can be made impliedly and the court can infer evidence of an assurance of rights from the context it will be very difficult to advise whether the context is sufficient for the establishment of rights. Of course there are cases prior to *Thorner* where the claim has been based on an implied assurance. Lord Cranworth in *Ramsden v Dyson*<sup>59</sup> makes it quite clear that silence in the face of a neighbours encroachment on your land will give rise to rights but these cases are quite different. These are cases where property may pass where there has never been an express promise or consensus that the property will pass. The facts of *Thorner* itself suggest that this will be strictly applied so rights will only pass where the context is clear that the property owner always intended the property to pass but never articulated this clearly to the claimant. Where this principle begins to unravel is over the question of the location of title prior to the death of the owner. Lord Scott highlights this difficulty clearly. He considers the question of what would happen if after Peter *Thorner* had impliedly assured David of the farm Peter had then become

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<sup>55</sup> Above n 8 at 794 para 56.

<sup>56</sup> *Ibid*.

<sup>57</sup> See above at n 26.

<sup>58</sup> Above n 8 at 803 para 95.

<sup>59</sup> Above n 50.

ill and needed nursing care could the farm be sold and used for his care? If as is suggested David now had rights in the farm Peter would not be able to do this but Lord Scott suggests that Peter still had sufficient rights in order to enforce his rights.

“If, for example, Peter had become, before his death, in need of full time nursing care, so that he could not continue to live at Steart Farm or continue as a farmer and needed to sell Steart Farm or some part of it in order to fund the costs of necessary medical treatment and care, it seems to me questionable whether David’s equity in Steart Farm, bred from the representations and conduct in evidence in this case would have been held by a court to bar the realisation of Steart Farm, or some sufficient part of it, for those purposes.”

So what could David be said to own after the implied assurance had been made. In the most recent case of *Cook v Thomas* if the court had found in favour of Mr and Mrs Thomas it would have been open for it to have found a property right in their favour which would then have been binding on Mrs Cook during her lifetime. One of the key responsibilities of a sound property law system is to ensure that title to property can be located with a high degree of certainty at all times. It should not be open to a claimant X to suggest that he owns an interest in property dependent on vague promises and the interpretation of events. There is a worrying contrast between the need for reliance on formality for the acquisition of property where it is conveyed to the purchaser and the disregard of formality in cases of proprietary estoppel. Although as a result of *Cobbe v Yeoman’s Row Management Ltd*<sup>60</sup> proprietary estoppel can no longer be used as a way to circumvent the need for an enforceable contract in the purchase of land other formalities such as the requirement of a valid will appear to be approached in a different way. Peter Thorner had once made a valid will and he clearly knew that it was a necessary formality. Some academics have argued that it is the assurance and its effect on the claimant that replaces the formalities of property transfer<sup>61</sup>. Perhaps Lord Lloyd’s strict interpretation of what constitutes an assurance was an attempt to rein in the expansion of informal property rights where clarity and certainty should be paramount. So in allowing an assurance to be based on implication and context the House of Lords have opened the possibility of greater uncertainty in acquiring property rights in this way.

The second fear for property lawyers is the uncertainty surrounding the court’s interpretation of the facts. Lord Hoffmann placed great weight on

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<sup>60</sup> Above n 6.

<sup>61</sup> M Dixon “Proprietary Estoppel: a Return to Principle?” [2009] *Conveyancer and Property Lawyer* 260.

context and this was echoed throughout the other judgments. A very heavy onus will now rest on the findings of fact of any Judge at first instance in estoppel cases. So much rested on the findings of fact of Mr John Randall QC in *Thorner v Curtis*<sup>62</sup>. It would seem from the Court of Appeal's decision in *Cook v Thomas*<sup>63</sup> that considerable weight will now be placed on what was the judge at first instance's view of the witnesses and whether the judge finds that an assurance has been made. The very long and detailed judgement in *Macdonald v Frost*<sup>64</sup> suggests that the judiciary at first instance will now evaluate the evidence in great detail in these cases to ensure that the alleged assurance is considered in its context. However in a case where the equity of the property was valued at approximately £200,000 the thirty-one page judgment seemed unnecessarily detailed. There was disquiet in the House of Lords that Lord Lloyd had been prepared to reverse the findings of fact of the lower court. Lord Neuberger commented that although it would be possible for the Court of Appeal to reverse the first instance decision on fact he concluded "in a case such as this, where the facts are unusual and the first instance judge has made full and careful findings, an appellate court should be very slow to intervene."<sup>65</sup>

Is this a new chapter in the development of this doctrine? Clearly over the centuries it has played an important role in addressing what the court deems to be unconscionable.<sup>66</sup> So often the court in proprietary estoppel seeks to uphold property rights because it would be unconscionable for the claimant to be denied rights<sup>67</sup> indeed many would argue that this is the real basis of proprietary estoppel<sup>68</sup> Laudable as this has always seemed in the context of property rights the parameters of the doctrine should have a clearer definition. However in seeking clarity it is important that the flexibility of estoppel is not lost.

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<sup>62</sup> Above n 11.

<sup>63</sup> [2010] EWCA Civ 227.

<sup>64</sup> Above n 32.

<sup>65</sup> Above n 8 at para 81.

<sup>66</sup> See generally H Delany and D Ryan "Unconscionability: a Unifying Theme in Equity" [2008] *Conveyancer and Property Lawyer* 401.

<sup>67</sup> See *Jennings v Rice* [2002] EWCA Civ 159. "...the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result" Robert Walker LJ at para 56.

<sup>68</sup> Above n 69.