PROPRIETARY ESTOPPEL

Recent Developments in England and Wales

This article analyses the contrasting reasoning and outcomes in two cases concerning proprietary estoppel that recently came before the highest court in England and Wales. It argues that a context-based dichotomy may emerge in the application of estoppel principles in order to reconcile the Law Lords' opinions. The article highlights the difficulties in drawing distinctions between "domestic" and "commercial" cases. It then discusses general difficulties raised by the use of proprietary estoppel in the "domestic" context and specifically in connection with the enforcement of oral testamentary promises. With an eye to developments in the comparative law, the article concludes that a statutory scheme for the enforcement of such promises could remedy the difficulties outlined by removing many "domestic" cases from the realm of estoppel.

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I. Introduction

1 The very word "estoppel" is defensive. As such, proprietary estoppel was classically used to prevent landowners from unconscionably asserting their strict legal entitlement as against an improver of the land's value.[1] In the modern era, however, it has become a powerful "sword" for claimants who have detrimentally relied on representations given by property owners. The detrimental reliance, moreover, need not be in the form of improvements to the land. In *Watts v Story*, Slade LJ decided that it was not "possible, or even desirable, to attempt to define the nature and extent of the prejudice or

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1 See, *eg, Plimmer v Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App Cas 699.

detriment which has to be established".[2] Indeed, as Lord Walker has pointed out, most English estoppel claims are now founded on the claimant's "assistance" to the defendant.[3]

2 The concept of an estoppel *claim* and the recognition of a wide range of detriment make the precise nature of the requisite representation a vital question, and it is one with which the Singaporean courts have struggled in recent years.[4] The attributes of a qualifying representation have attracted particular controversy in England and Wales in cases where a claimant uses estoppel to enforce an alleged oral testamentary promise,[5] thus circumventing the formality requirements relating to wills[6] and the intestacy rules.[7]

3 This article discusses two recent House of Lords decisions on proprietary estoppel, and ascertains the extent to which it is necessary to rely on their factual contexts in order to justify the differing conclusions of the Appellate Committee in each case. It then evaluates the utility of a context-based approach to property law and considers an alternative solution to the use of estoppel for the enforcement of testamentary promises.

4 Part II of the article begins the analysis by outlining the facts and the results in the two cases. The first is *Yeoman's Row Management Ltd v Cobbe*,[8] an unsuccessful estoppel claim in a commercial scenario involving an anticipated contract that did not materialise. *Thorner v Major*,[9] by contrast, was more of a domestic affair relating to a testamentary promise of sorts, where the promisee's claim was allowed to succeed.

5 Part III of the article asks whether context must be invoked to justify the differing conclusions in the two cases, or whether *Thorner* marks a departure from *Yeoman's Row* notwithstanding the fact that the two cases were decided within a year of each other. Part IV explores some of the difficulties of using context as a distinguishing mechanism

2 *Watts v Story* Transcript No 319 of 1983 (14 July 1983).
3 Robert Walker, "Which Side 'Ought to Win'? – Discretion and Certainty in Property Law" [2008] Sing JLS 229.
4 See, *eg*, *Fook Gee Finance Co Ltd v Lim Cho Chit* [1998] 2 SLR 121; *Keppel Tat Lee Bank Ltd v Teck Koon Investment* [2000] 2 SLR 366; *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR 292.
5 See, *eg*, *Re Basham* [1986] 1 WLR 1498; *Wayling v Jones* [1995] 2 FLR 1029; *Gillett v Holt* [2001] Ch 210; *Jennings v Rice* [2002] EWCA Civ 159.
6 Wills Act 1837 (c 26) (UK).
7 Administration of Estates Act 1925 (c 23) (UK) s 46.
8 [2008] UKHL 55; [2008] 1 WLR 1752.
9 [2009] UKHL 18; [2009] 1 WLR 776. The case is also referred to as *Thorner v Majors*, due to a typographical error (see John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 367 n 1).

in estoppel, and includes a comparison with the treatment of similar issues in the realm of the common intention constructive trust. Finally, Part V considers the question whether a statutory mechanism for the enforcement of testamentary promises, such as New Zealand's Law Reform (Testamentary Promises) Act 1949, would be preferable given the difficulties inherent in using estoppel for that purpose.

II. The cases

6 This part provides a summary of the two cases that inspire most of the discussion in this article. The differing approaches of the members of the House of Lords will be used to assess whether a context-based dichotomy is likely to emerge in the application of proprietary estoppel principles. Such a dichotomy may require any given case to be classified as either "domestic" or "commercial" at the outset of the analysis.

A. *The* Yeoman's Row *case*

7 Mr Cobbe, a property developer, reached an oral agreement in principle with Mrs Lisle-Mainwaring to purchase and develop property. The property in question, a block of flats, was owned by a company effectively controlled by Mrs Lisle-Mainwaring. As part of the arrangement, Mr Cobbe was to obtain, at his own expense, planning permission for the demolition of the existing flats and the building of some houses on the site. Only when he did so would the property be sold to him for £12m. There was also a term whereby he would pay to the company half of any proceeds above £24m from the eventual sale of the houses.

8 The agreement in principle did not cover all of the relevant terms, but the planning permission was successfully obtained in the interim as a result of considerable effort and expenditure on Mr Cobbe's part. Although Mrs Lisle-Mainwaring had encouraged the expenditure and had led Mr Cobbe to believe that a formal contract would be forthcoming, she then refused to adhere to the original financial terms of the agreement. Relations between the parties soured and Mr Cobbe brought several claims, including one based on estoppel. His proprietary claims failed before the House of Lords.[10]

10 A claim based on the *Pallant v Morgan* equity (see Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) at paras 7.3.42–7.3.43) was also rejected: [2008] UKHL 55 at [30]–[36].

9 In rejecting Mr Cobbe's estoppel claim, the House of Lords[11] reached the opposite conclusion to both Etherton J at first instance[12] and the Court of Appeal.[13] Lord Scott of Foscote could not find a point of fact or law whose denial could justify a claim to a specific proprietary interest, which he regarded as an essential element of an estoppel claim. Meanwhile, Lord Walker of Gestingthorpe focused on Mr Cobbe's lack of belief that Mrs Lisle-Mainwaring was legally obliged to transfer the property to him as a result of the arrangement. These similar but distinct approaches are explored in more detail in Part III. Both main speeches had the potential to undermine the abilities of estoppel in testamentary cases, and generally, such that *Yeoman's Row* was branded a "jurisprudential milestone".[14] As we shall see, however, *Thorner v Major* suggests that *Yeoman's Row* has had less of an impact than some had predicted.[15] In the words of McFarlane and Robertson, "the apocalypse … has been averted".[16]

10 Mr Cobbe was awarded a *quantum meruit* on the basis of a questionable analysis of the relevant principles of unjust enrichment,[17] but that aspect of the decision is not addressed here.

B. *The* Thorner *case*

11 The late Peter Thorner was a Somerset farmer, a "man of few words" who tended to speak in indirect terms.[18] David Thorner, the son of Peter's cousin Jimmy, began to help at Peter's farm after Peter's first wife died. At one time, he was working 18-hour days, splitting his time between Peter and Jimmy's farms. He was never paid for almost 30 years

11 [2008] UKHL 55.
12 [2005] EWHC 266 (Ch).
13 [2006] EWCA Civ 1139.
14 Terence Etherton, "Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle" [2009] The Conveyancer and Property Lawyer 104 at 116.
15 The relationship between the two cases has generated an enormous amount of interest among academics and others. Aside from the material cited elsewhere in this article, see *eg* Stuart Bridge, "Proprietary estoppel: where are we now?" (Blundell Lecture, 29 June 2009); Timothy Morshead, "Proprietary estoppel: where are we now? Or, needlework for equity lawyers" (Blundell Lecture, 29 June 2009); Nick Piska, "Hopes, Expectations and Revocable Promises in Proprietary Estoppel" (2009) 72 MLR 998; Lord Neuberger of Abbotsbury, "The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity" [2009] CLJ 537.
16 Ben McFarlane & Andrew Robertson, "Apocalypse Averted: Proprietary Estoppel in the House of Lords" (2009) 125 LQR 535 at 535.
17 Joshua Getzler, "Quantum Meruit, Estoppel, and the Primacy of Contract" (2009) 125 LQR 196.
18 [2007] EWHC 2422 (Ch); [2008] WTLR 155 at [31] (Deputy Judge John Randall QC).

of being "at Peter's beck and call",[19] and he turned down other career opportunities in order to remain in Somerset with Peter and his parents.

12 Peter had made a will under which David would have inherited the farm, but it was revoked after Peter apparently fell out with one of the other beneficiaries and the will was never replaced. When Peter died, David brought a proprietary estoppel claim against his estate. He had been hoping since the 1980s to inherit the farm and claimed that Peter had made "various noises" causing him to believe that he would so inherit, but admitted that "nothing very definite" was said.[20] The main event on which David based his claim consisted of Peter handing David a bonus notice relating to two life insurance policies on the former's life, with the remark: "that's for my death duties".[21] David also sought to rely on other indirect remarks made to him by Peter concerning the running of the farm, which he claimed reinforced his expectation that he would inherit it. Finally, he cited statements that Peter had made to others, which gave the impression that David would succeed him.

13 While David was awarded Peter's farm at first instance,[22] the Court of Appeal overturned that decision.[23] Although he accepted the factual findings that Peter wished David to inherit the farm and that he intended to indicate as much through the remarks made, Lloyd LJ decided that representations must be "clear and unequivocal" and "intended to be relied on" or reasonably taken as so intended.[24] In this case, the bonus notice event was insufficient since it was "at most, a statement of present intention".[25] Lloyd LJ emphasised that Peter knew nothing of the specific opportunities that David sacrificed in reliance on the alleged representations, which meant that the statements could not reasonably be taken as intended to be relied upon.

14 In spite of the fact that the House of Lords had decided *Yeoman's Row* after the Court of Appeal's judgment in *Thorner*, the Appellate Committee unanimously reinstated the decision of the trial

19 [2007] EWHC 2422 (Ch); [2008] WTLR 155 at [82].
20 [2007] EWHC 2422 (Ch); [2008] WTLR 155 at [86].
21 [2007] EWHC 2422 (Ch); [2008] WTLR 155 at [94].
22 [2007] EWHC 2422 (Ch); [2008] WTLR 155 at [86]. See Martin Dixon, "Estoppel and Testamentary Freedom" [2007] The Conveyancer and Property Lawyer 65.
23 [2008] EWCA Civ 732. See Brian Sloan, "Estoppel and the importance of straight talking" [2009] The Conveyancer and Property Lawyer 154.
24 [2008] EWCA Civ 732 at [54]. The Court of Appeal in Singapore espoused the "clear and unequivocal" requirement in *Fook Gee Finance Co Ltd v Lim Cho Chit* [1991] 2 SLR 121. See *Tan Sook Yee's Principles of Singapore Land Law* (Tan Sook Yee, Tang Hang Wu & Kelvin F K Low eds) (LexisNexis, 3rd Ed, 2009), at para 7.73 for analysis of subsequent cases.
25 [2008] EWCA Civ 732 at [72].

judge in David's case.[26] Lord Walker and Lord Rodger of Earlsferry were particularly critical of the "clear and unequivocal" requirement espoused by the Court of Appeal, preferring to stipulate that the representation must be "clear enough" in the circumstances.[27] Lord Hoffman was unimpressed by the notion that the defendant must know of the claimant's specific acts of reliance when making a representation, and considered it sufficient that the representations were intended to be "taken seriously".[28] On the other hand, Lord Scott and Lord Neuberger of Abbotsbury were willing to accept the "clear and unequivocal" requirement. This did not prevent all the Law Lords from agreeing that there was a qualifying representation on the facts of this "unusual" case involving "taciturn and undemonstrative men committed to a life of hard and unrelenting physical work, by day and sometimes by night, largely unrelieved by recreation or female company".[29] That said, Lord Scott did prefer to analyse the case in terms of the "remedial constructive trust",[30] and to confine proprietary estoppel to cases where the representation is unconditional and relates to an immediate interest.[31]

15 The Committee found it difficult to reconcile Lloyd LJ's apparent acceptance of the factual findings with his conclusion that David's claim should fail. Finally, while the respondents pointed out that the extent of the property constituting the "farm" fluctuated over the remainder of Peter's life, the Committee held that there was sufficient certainty to render the property identifiable. As Lord Walker pointed out, Peter and David were both aware of the potential for the extent of the farm to fluctuate over time. As a result, it was found that "their common understanding was that Peter's assurance related to whatever the farm consisted of at Peter's death".[32] The judge's order was therefore restored.

III. The role of context in justifying the outcomes

16 The result in *Yeoman's Row* is uncontroversial. Although Lord Scott said that "debate about subject-to-contract reservations has only a peripheral relevance"[33] to *Yeoman's Row* because an oral contract

26 [2009] UKHL 18. For a comprehensive analysis of the decision, see John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367.
27 [2009] UKHL 18 at [26] and [56].
28 [2009] UKHL 18 at [5].
29 [2009] UKHL 18 at [59] (Lord Walker).
30 [2009] UKHL 18 at [14].
31 [2009] UKHL 18 at [20].
32 [2009] UKHL 18 at [62] (Lord Walker).
33 [2009] UKHL 18 at [27].

would be unenforceable in any event, in substance it was a subject-to-contract case.[34] The parties had intentionally avoided making a formal commitment. Although Mr Cobbe expected that his expenses would be reimbursed should the deal fall through, both parties knew that some of the terms of the anticipated enforceable agreement had yet to be negotiated. John Mee, for example, opines that the outcomes in *Thorner* and *Yeoman's Row* can be reconciled on this basis,[35] and Lord Neuberger recognised the significance of that aspect of the case.[36]

17 The problem comes in attempting to reconcile the general remarks of Lords Scott and Walker with the successful claims of testamentary promisees, (eventually) including that of David Thorner. The aim of this part is to examine the approaches of Lords Scott and Walker in *Yeoman's Row* and the extent to which these approaches were applied in *Thorner*. More specifically, it is asked whether the context in each case was used to justify any discrepancies between them, potentially requiring future cases to be classified as "domestic" or "commercial", or whether *Thorner* simply marks a departure from the reasoning in *Yeoman's Row*.

A. Lord Scott's approach

18 In the view of Lord Scott, Mr Cobbe was not entitled to a remedy that was either estoppel-based or proprietary. He opined that proprietary estoppel was a mere sub-species of *promissory* estoppel. In England and Wales at least,[37] the doctrine of promissory estoppel is generally thought to be available only as a shield and in the context of a pre-existing contractual relationship between the parties,[38] limiting its potential as compared to the modern use of its proprietary equivalent. Moreover, Lord Scott suggested that the proprietary estoppel doctrine operates only to prevent the denial of a point of fact or law standing in the way of an existing proprietary claim.

19 Mr Cobbe claimed neither that the agreement was complete or enforceable nor that he had a certain proprietary interest in the flats before he brought the claim. His expectation, Lord Scott emphasised, was merely that there would be a successful negotiation of a formal contract encompassing the core terms already agreed upon. Lord Scott

34 See *Attorney General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114 (Privy Council).

35 John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 374.

36 [2009] UKHL 18 at [93].

37 *Cf Walton Estates v Maher* (1988) 164 CLR 387 at 426 (Brennan J).

38 See, *eg*, Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) at para 9.2.5.

feared that the conclusions of the courts below had been largely based on the sheer unconscionability of Mrs Lisle-Mainwaring's conduct.

20 Lord Scott's analysis, while founded on the absence of the anticipated contract, implied that the proprietary claim to which estoppel would give effect must exist independently of the doctrine itself. This was the interpretation adopted by McFarlane and Robertson.[39] If Lord Scott's approach were followed, at least on McFarlane and Robertson's view, claimants in testamentary cases would merely be able to estop a representor or her estate from denying the existence of an oral promise that is unenforceable in any event. That proposition clearly leaves little room for estoppel to create proprietary interests and, as a result, McFarlane and Robertson contemplated the "death" of proprietary estoppel.[40]

21 In the light of *Thorner*, it could be that Lord Scott did not intend to lay down the proposition gleaned by McFarlane and Robertson or at least that he did not intend it to have implications for testamentary cases. It is true that his primary concern was with the lack of certainty in the proprietary interest claimed by Mr Cobbe, and this was apparently the sole aspect of Lord Scott's reasoning that Peter Thorner's personal representatives sought to invoke in contesting David's claim.[41] Nevertheless, McFarlane and Robertson's interpretation was a reasonable one, and it was important to dispel it properly in *Thorner* even if the remarks were *obiter*. Lord Scott did not do so. In fact, he did not refer to *Yeoman's Row* at all in his speech in *Thorner*.

22 Mee argues that Lord Scott underwent an "apparent change of mind" in *Thorner*.[42] This would be consistent with his admission that he was "in no way disagreeing with [the other Law Lords'] conclusion that David can establish his equity … via proprietary estoppel".[43] For his part, Lord Walker admitted that he now had "some difficulty" with Lord Scott's characterisation of proprietary estoppel as a sub-species of promissory estoppel, further suggesting that a retreat from *Yeoman's Row* was being made.[44]

23 On the other hand, McFarlane and Robertson think that Lord Scott retained in *Thorner* the "narrow view" of estoppel that he set

39 Ben McFarlane & Andrew Robertson, "The Death of Proprietary Estoppel" [2008] Lloyd's Maritime and Commercial Law Quarterly 449.
40 Ben McFarlane & Andrew Robertson, "The Death of Proprietary Estoppel" [2008] Lloyd's Maritime and Commercial Law Quarterly 449.
41 [2009] UKHL 18 at [31] (Lord Walker).
42 John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 378.
43 [2009] UKHL 18 at [14].
44 [2009] UKHL 18 at [67].

out in *Yeoman's Row*.[45] This, they argue, explains his preference for deciding the case using the "remedial" constructive trust, which he considered more suitable for cases involving future interests. Mee similarly suggests that Lord Scott's earlier restriction of estoppel effectively forced him to re-classify the earlier estoppel cases as applications of the constructive trust.[46]

24 Whatever Lord Scott's present view of his own reasoning in *Yeoman's Row*, it was left largely to Lord Neuberger to reconcile *Thorner* with the earlier decision, and he relied heavily on context when doing so. All of the other Law Lords attached significance to the context of the relationship between Peter and David.[47] Moreover, while he made no specific reference to domestic cases in *Yeoman's Row*, in *Thorner* Lord Scott did emphasise that "the significance and implications of the conduct of David and Peter respectively in the years leading up to Peter's death have to be assessed in the context of their familial relationship".[48] Nevertheless, it was Lord Neuberger who expressly used the notion of context to explain the differing reasoning in the two cases, thereby suggesting that the application of proprietary estoppel principles could differ according to whether the context of the case is categorised as domestic or commercial.

25 Admittedly, Lord Neuberger went some way towards justifying the discrepancies between the cases using an analysis that does not suggest a purely context-based dichotomy. For example, he accepted that the conscious decision on the part of Mr Cobbe and Mrs Lisle-Mainwaring not to enter a binding contract was a key explanation of the reasoning in *Yeoman's Row*.[49] He also pointed out that the uncertainty in relation to the interests involved in the two cases was of a different kind. In *Thorner* it was merely the precise extent of the farm at Peter's death that was unclear, while the very nature and terms of the benefit that Mr Cobbe could expect were open to question.

26 On the other hand, Lord Neuberger made further remarks suggesting that a context-based dichotomy may develop in the application of estoppel principles. He emphasised that "the relationship between Peter and David was familial and personal, and neither of them, least of all David, had much commercial experience".[50] As a result

45 Ben McFarlane & Andrew Robertson, "Apocalypse Averted: Proprietary Estoppel in the House of Lords" (2009) 125 LQR 535 at 538.

46 John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 379–381.

47 [2009] UKHL 18 at [8] (Lord Hoffman), at [12] (Lord Scott), at [24]–[26] (Lord Rodger), at [58]–[60] (Lord Walker).

48 [2009] UKHL 18 at [12].

49 [2009] UKHL 18 at [93].

50 [2009] UKHL 18 at [97].

of this, Lord Neuberger opined, they never would have contemplated entering a contract and could not reasonably have been expected to do so. This focus on the lack of any reasonable expectation that the parties would enter a contract, rather than the simple *fact* that they did not do so, suggests that a domestic context is important in itself. This inference is reinforced by Lord Neuberger's bold statement that he saw "nothing" in Lord Scott's reasoning in the earlier case that "assists" Peter's personal representatives and by his view that it would cause "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".[51]

27 Admittedly, Lord Neuberger narrowed his analysis of Lord Scott's speech to the issues of certainty as to the extent of the proprietary interest. But it is clear that he saw *Yeoman's Row* and *Thorner* as different cases requiring distinct analyses due to their respective commercial and domestic contexts. Much of the reasoning in *Yeoman's Row*, on his view, "was directed to the unusual facts of that case".[52] Moreover, because of the context he considered it "unlikely in the extreme"[53] that Lord Scott was intending to disapprove of the Court of Appeal's decision in *Gillett v Holt*,[54] a paradigmatic example of a successful claim by a testamentary promisee.

28 In spite of Lord Scott's reluctance to engage explicitly with the implications of his analysis in *Yeoman's Row*, Lord Neuberger obviously felt it necessary to reconcile it with the decision in *Thorner*. His attempt to do so was not entirely successful because Lord Scott did not himself confine his remarks in *Yeoman's Row* to the commercial context, either at the time he made them or subsequently in *Thorner*. Nevertheless, Lord Neuberger's speech is itself likely to cause the issue of context to come to the fore in future estoppel decisions. The implications of this development are considered in Part IV.

B. Lord Walker's approach

29 Lord Walker's analysis in *Yeoman's Row* may also lead to a focusing on context in future estoppel decisions in a rather more direct sense. There, at a general level, he emphasised that in satisfying the elements of estoppel "[i]t is not enough to hope, or even to have a confident expectation, that the person who has given assurances will

51 [2009] UKHL 18 at [98].
52 [2009] UKHL 18 at [99].
53 [2009] UKHL 18 at [100].
54 [2001] Ch 210.

eventually do the proper thing".[55] He opined that, in successful estoppel claims, "the claimant believed that the assurance on which he or she relied was binding and irrevocable".[56] In the case before him, fatally for Mr Cobbe, "both parties knew that there was no legally binding contract, and that either was therefore free to discontinue the negotiations without legal liability".[57]

30 As Mee points out, under Lord Walker's analysis, the nature of the claimant's belief would effectively become "self-fulfilling":[58] if the claimant believed the promise was binding, it would be, but the converse is also true. This belief-based analysis is less strict than that of Lord Scott. But as McFarlane and Robertson indicated following *Yeoman's Row*,[59] it still raises problems because a testamentary promisee is unlikely to believe that the promisor is legally obliged to transfer the property to him on the basis of an oral promise. Nevertheless, in *Thorner*, Lord Walker explicitly rejected McFarlane and Robertson's "rather apocalyptic" view of *Yeoman's Row*.[60]

31 Lord Walker had at least attempted to make allowances for claimants in domestic cases when setting out his apparently restrictive analysis in *Yeoman's Row*. There, he expressly drew a distinction between the commercial and the domestic contexts. In the commercial context, he emphasised that "the claimant is typically a business person with access to legal advice" who expects to gain a contract rather than an interest.[61] He made several other references to the commercial context. These included his opinion that the insufficiency of mere hopes was clearest in that context,[62] that Mr Cobbe "ran a commercial risk … with his eyes open",[63] and that the lack of an express statement that Mr Cobbe was relying solely on Mrs Lisle-Mainwaring's honour was irrelevant in the context.[64] Lord Walker also identified a general principle that "the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel".[65]

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55 [2008] UKHL 55 at [65].
56 [2008] UKHL 55 at [66].
57 [2008] UKHL 55 at [91].
58 John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 374.
59 Ben McFarlane & Andrew Robertson, "The Death of Proprietary Estoppel" [2008] Lloyd's Maritime and Commercial Law Quarterly 449.
60 [2009] UKHL 18 at [31].
61 [2008] UKHL 55 at [68].
62 [2008] UKHL 55 at [66].
63 [2008] UKHL 55 at [81].
64 [2008] UKHL 55 at [91].
65 [2008] UKHL 55 at [81].

32 By contrast, Lord Walker noted that "[t]he typical domestic claimant does not stop to reflect … whether some further legal transaction … is necessary to complete the promised title",[66] and that the nature of the claimant's belief is not often tested in such cases, suggesting that a more liberal approach would be appropriate. Nevertheless, Mee has described Lord Walker's attempt to explain successful estoppel claims in testamentary cases as "rather implausible" because of the widespread knowledge of the need for a will.[67] It would, Mee points out, require a large amount of faith in the legal system to believe that an oral promise was in itself binding.

33 Moreover, Lord Walker arguably undermined his apparent generosity towards domestic claimants in *Yeoman's Row*. He admitted that it would be "unprofitable to trawl through the authorities on domestic arrangements" to assess the precise nature of the claimant's expectation where it was not "squarely raised".[68] At the same time, he left open the possibility that "some of the domestic cases might have been decided differently if the nature of the claimant's belief had been an issue vigorously investigated in cross-examination".[69] In doing so, he effectively invited counsel in future domestic cases to undertake such a vigorous investigation in cross-examination, and thereby defeat the claim.

34 In any event, Lord Walker did not, when giving judgment in *Thorner*, mention the belief-related requirement that he had set down in *Yeoman's Row*. As a result, Mee infers that he was retreating from his earlier position. This in turn suggests that context cannot fully explain, and is not required to explain, the differences between his approach in the two cases. On the other hand, Lord Neuberger did invoke Lord Walker's approach in *Yeoman's Row* to bolster his conclusion that the differences in reasoning between the cases could be explained on the basis of context.[70] Even if Lord Walker intended to disavow his earlier analysis, then, he may not have seen the last of it.

66 [2008] UKHL 55 at [68].
67 John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 373.
68 [2008] UKHL 55 at [68].
69 [2008] UKHL 55 at [67].
70 [2009] UKHL 18 at [100].

C. Summary

35 The House of Lords has not attempted a full justification for the discrepancies between the reasoning in *Yeoman's Row* and *Thorner*. This being so, the latter case may well represent a revision of the former, and indeed McFarlane and Robertson have expressed the view that in *Thorner* the Appellate Committee was "implicitly rejecting the limits"[71] on estoppel that had been suggested in *Yeoman's Row*. In addition, part of Lord Neuberger's reasoning in *Thorner* justifies the result in *Yeoman's Row* on the accurate basis that *Yeoman's Row* was, in substance, a subject-to-contract case.

36 But following *Thorner*, and particularly in the light of Lord Neuberger's analysis, context looks set to have a significant impact on the reasoning in future estoppel cases. Indeed, in the subsequent case of *Thompson v Foy*,[72] Lewison J described *Thorner* as "[t]he leading authority on proprietary estoppel *in the domestic context*" [emphasis added]. On that basis, Part IV of this paper goes on to highlight some of the difficulties with the notion of context and the distinction between domestic and non-domestic cases.

IV. Problems with "context" and estoppel

37 Mee has expressed concern about the use of context as a justifying factor in *Thorner*, while at the same time recognising the "obvious temptation" to rely upon it in future cases.[73] He argues that attaching labels is not good enough because the boundaries of the categories are insufficiently clear and the principled reasons for treating the two sets of cases differently have not been fully elucidated.[74] This part examines the use of a context-based approach in the arena of the common intention constructive trust and highlights the problems with such an approach to property law. It then moves on to outline some more general difficulties with the use of proprietary estoppel in the domestic context and outside of it.

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71 Ben McFarlane & Andrew Robertson, "Apocalypse Averted: Proprietary Estoppel in the House of Lords" (2009) 125 LQR 535 at 542.

72 [2009] EWHC 1076 (Ch) at [90].

73 John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 374.

74 John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 374.

A. Definitional difficulties: A comparison with the constructive trust

38 In England and Wales, the common intention constructive trust[75] has for decades been invoked by unmarried cohabitants seeking to claim an interest in property owned at law by their partner, and not always with success.[76] Following *Lloyd's Bank plc v Rosset*,[77] the common intention of shared ownership necessary to prove a constructive trust could be evidenced by express discussions or a financial contribution towards the purchase price by a party whose name did not appear on the legal title. In Lord Bridge of Harwich's words, it was "at least extremely doubtful whether anything less [would] do".[78]

39 The leading case on the use of the constructive trust by cohabitants is now *Stack v Dowden*.[79] It has generated much controversy and uncertainty,[80] partly since it is unclear whether the House of Lords was intending to liberalise or restrict the earlier analysis in *Rosset*.[81] For present purposes, the most pertinent aspect of *Stack* is Baroness Hale of Richmond's assertion that "[i]n law, 'context is everything' and the domestic context is very different from the commercial world".[82] Among the differences highlighted by Baroness Hale was the assumption that "the importance to be attached to who paid for what in a domestic context may be very different from its importance in other contexts".[83] As a result she held, *inter alia*, that "at least in the domestic consumer context"[84] there is a strong presumption that ownership in equity follows the position at law. This presumption apparently applies whether legal title is held by one party or by more than one.[85] That said, its strength has been undermined by the myriad factors that are relevant

75 For a full discussion, see Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009), ch 7.3.

76 See, infamously, *Burns v Burns* [1984] Ch 317.

77 [1991] 1 AC 107.

78 [1991] 1 AC 107 at 133.

79 [2007] UKHL 17.

80 See, *eg*, Martin Dixon, "The Never-ending Story – Co-ownership after *Stack v Dowden*" [2007] The Conveyancer and Property Lawyer 456; Matthew Harding, "Defending *Stack v Dowden*" [2009] The Conveyancer and Property Lawyer 309; William Swadling, "The Common Intention Constructive Trust in the House of Lords: An Opportunity Missed" (2007) 123 LQR 511; Rebecca Probert, "Cohabitants and joint ownership: the implications of *Stack v Dowden*" (2008) 38 Family Law 924.

81 Terence Etherton has made the bold argument that *Stack* heralds the creation of a new ground of restitution for unjust enrichment: Etherton, "Constructive Trusts: A New Model for Equity and Unjust Enrichment" [2008] CLJ 265.

82 [2007] UKHL 17 at [69].

83 [2007] UKHL 17 at [69].

84 [2007] UKHL 17 at [58].

85 [2007] UKHL 17 at [56] (Baroness Hale).

to its displacement on the basis of common intention[86] and by the fact that it was said to be displaced in *Stack* itself as well as in subsequent cases.[87]

40 The majority held that the common intention constructive trust was now to be preferred over the resulting trust analysis, which allocates shares on the basis of financial contributions to (or possibly financial liability in respect of)[88] the property, in "domestic" cases. Agreeing with Baroness Hale, Lord Hope of Craighead opined that where, conversely, the parties have dealt with each other at arm's length it "makes sense" to start with the resulting trust.[89] Adding a qualification to these complementary principles, Lord Walker acknowledged that the resulting trust may still have a role to play where "two people have lived and worked together in what has amounted to both an emotional and a commercial partnership".[90] This qualification serves only to strengthen both the context-based approach and (as Lord Walker admitted)[91] the confusion that may result from it.[92] As Sir Terence Etherton has noted extra-judicially, "[t]he express drawing of this distinction between the domestic and commercial settings was new, marking a departure from the previous jurisprudence …".[93]

41 Lord Neuberger dissented from the reasoning of Baroness Hale and other members of the majority. Albeit accepting that "the domestic context can give rise to very different factual considerations from the commercial context",[94] and that "both the nature and the characteristics of the particular relationship must be taken into account"[95] when applying the relevant principles of property law, he was also conscious that "the court should be very careful before altering those principles when it comes to a particular type of relationship".[96]

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86 [2007] UKHL 17 at [69].

87 See, *eg*, *Adekunle v Ritchie* [2007] EW Misc 5 (EWCC), but *cf Fowler v Barron* [2008] EWCA Civ 377.

88 See the remarks of Lord Neuberger in *Stack v Dowden* [2007] UKHL 17 at [118]–[119] and in *Laskar v Laskar* [2008] EWCA Civ 347 at [27]–[31].

89 [2007] UKHL 17 at [3].

90 [2007] UKHL 17 at [32].

91 [2007] UKHL 17 at [32].

92 For criticism from a Singaporean perspective of the context-based approach of the majority in *Stack*, see *Tan Sook Yee's Principles of Singapore Land Law* (Tan Sook Yee, Tang Hang Wu & Kelvin F K Low eds) (LexisNexis, 3rd Ed, 2009), at paras 7.57–7.58.

93 Terence Etherton, "Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle" [2009] The Conveyancer and Property Lawyer 104 at 110.

94 [2007] UKHL 17 at [107].

95 [2007] UKHL 17 at [101].

96 [2007] UKHL 17 at [101].

42 In remarks that arguably offer a striking contrast to his approach in *Thorner*, Lord Neuberger was adamant that "the same principles should apply to assess the apportionment of the beneficial interest as between legal co-owners, whether in a sexual, platonic, familial, amicable or commercial relationship".[97] As such, he preferred to begin by applying the presumption of resulting trust even as between cohabitants.

43 Nevertheless, the confinement of the strong *Stack* presumption to the domestic sphere was cemented by Lord Neuberger himself when he sat in the Court of Appeal in *Laskar v Laskar*.[98] In that case, a house registered in the joint names of a mother and daughter was found to have been used primarily as an investment, rather than as a home for the parties. Although Lord Neuberger recognised that the familial connection between the parties meant that they were not truly "in an arm's length commercial relationship", he noted that they had independent lives.[99] Most significantly for present purposes, he said that it was "by no means clear" to him that the *Stack* presumption was intended by Baroness Hale to be applied in such a case as that before him.[100] He therefore invoked the resulting trust presumption, although he held that the *Stack* presumption of joint equitable ownership would have been displaced on the facts in any event.

44 Since Lord Neuberger was arguably applying his own dissenting judgment in *Stack* in a Court of Appeal decision, *Laskar* is perhaps not the strongest authority. Seen from another perspective, it is rather ironic that in spite of his misgivings in *Stack*, Lord Neuberger has had to adopt a contextual approach in deciding both constructive trust and estoppel cases because of the approaches of other members of the House of Lords. Regardless of the judicial politics involved in the application of the *Stack* presumption, *Laskar* does attach significance to the categorisation of a case. As a result, we may have to distinguish between "domestic" and "non-domestic" cases in relation to both proprietary estoppel and the application (or the effective non-application) of the common intention constructive trust.

45 The fundamental nature of the relationship between proprietary estoppel and the constructive trust is a matter of some debate.[101] This debate is likely to continue given Lord Scott's purported

97 [2007] UKHL 17 at [107].
98 [2008] EWCA Civ 347.
99 [2008] EWCA Civ 347 at [15].
100 [2008] EWCA Civ 347 at [15].
101 See, *eg*, Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) at paras 9.2.118–9.2.122; Mark Pawlowski, "Beneficial Entitlement – No Longer Doing Justice?" [2007] The Conveyancer and Property Lawyer 354.

application of the remedial constructive trust in *Thorner*, in spite of previous pronouncements by senior judges that the remedial version is not a part of English Law.[102] Indeed, one High Court judge recently concluded that, following Lord Scott's analysis in *Thorner*, "it is wrong in principle to confuse the two distinct equitable remedies of proprietary estoppel and constructive trust, and to regard the former as a species of the latter".[103]

46 Whatever the precise relationship between the two doctrines, however, both are facing similar problems relating to their application in "domestic" cases. As Piska describes the categorisation process in the resulting/constructive trust sphere, the court must examine the surrounding circumstances of the case and "shoe-horn the parties' relationship into the domestic or commercial dichotomy that determines the appropriate legal principles",[104] and a similar approach could now be necessary in estoppel cases.

47 The difficulty of this process has been recognised by Lord Neuberger in a lecture to the Chancery Bar Association.[105] It is illustrated by his endorsement of H H J Behrens' conclusion in the county court case of *Adekunle v Ritchie*.[106] There, the judge decided that the *Stack* presumption *did* apply as between a parent and son or daughter where, unlike *Laskar*, the property was occupied by a parent as a home rather than being held as an investment. Moreover, in relation to the "primary purpose" test adopted in *Laskar*,[107] Sir Terence Etherton has argued that "[e]valuation of the comparative importance of anticipated and actual financial, social, familial and emotional expectations and rewards from mixed use of property or temporary use of property may be difficult".[108]

48 Piska has pointed out that the distinction upheld in *Laskar* is likely to become a source of confusion because the same factors are being evaluated in asking whether the case is a domestic one and whether there is a common intention sufficient to found the existence of

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102 *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812 at 823–825 (CA) (Millett LJ). See also *Tan Sook Yee's Principles of Singapore Land Law* (Tan Sook Yee, Tang Hang Wu & Kelvin F K Low eds) (LexisNexis, 3rd Ed, 2009) at para 7.83.

103 *Macdonald v Frost* [2009] EWHC 2276 (Ch) at [15] (Geraldine Andrews QC).

104 Nick Piska, "Two Recent Reflections on the Resulting Trust" [2008] The Conveyancer and Property Lawyer 441 at 446.

105 David Neuberger, "The Conspirators, the Tax Man, the Bill of Rights and a bit about the Lovers" (Chancery Bar Association Annual Lecture, 10 March 2008) at [14].

106 [2007] EW Misc 5 (EWCC).

107 [2008] EWCA Civ 347 at [17].

108 Terence Etherton, "Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle" [2009] The Conveyancer and Property Lawyer 104 at 111.

a constructive trust. If the domestic/non-domestic dichotomy is maintained for the purposes of estoppel, similar confusion could result from the categorisation of the case in combination with the question whether there is a relevant representation.

49 The problem is compounded by the fact that the application of proprietary estoppel and the constructive trust may not fall on the same side of the line when adjudicating upon similar factual scenarios. In *Laskar*, the commercial investment *activity* for which the mother and daughter used the property was apparently more important than their domestic *relationship*,[109] even if they did lead independent lives. This may be at odds with the approach in *Thorner*, where Lord Neuberger considered the informality of Peter and David's relationship and David's lack of business experience sufficient to render the case a domestic one. Indeed, *Thorner* is not a clear domestic case if the nature of the work performed is taken into account, although it would apparently be placed in the same category as more obviously domestic cases involving informal carers.[110]

50 Even where estoppel and the constructive trust do place factually similar cases in the same category, the effect of the categorisation may be different. Strangely, a domestic context seemingly makes it more difficult to show differing legal and equitable interests in the constructive trust sphere, while arguably making it *easier* to do so in the realm of proprietary estoppel. It must be admitted that the precise effect of the distinction between domestic and commercial in the case of estoppel is itself uncertain as yet. *Stack*, on the other hand, imposes a mere presumption according to whether the case at hand is domestic or commercial. While he personally doubts the continued relevance of detrimental reliance in the domestic setting, Sir Terence Etherton notes the lack of judicial suggestion that "within the envelope of those presumptions, the [common intention constructive trust] operates differently in the domestic and commercial fields".[111] The extent of the impact of categorisation in estoppel cases, given the contrasting approaches in *Thorner* and *Yeoman's Row*, remains to be seen.

51 If the doctrines of proprietary estoppel and the constructive trust are indeed distinct, it may be unsurprising that context can have contrasting effects on their operation. In Lord Walker's opinion, as expressed in *Stack*, proprietary estoppel is concerned with "asserting an

109 Harding assumed that the relationship between the parties would be the distinguishing factor following *Stack*: Matthew Harding, "Defending *Stack v Dowden*" [2009] The Conveyancer and Property Lawyer 309 at 315.

110 See, *eg*, *Jennings v Rice* [2002] EWCA Civ 159.

111 Terence Etherton, "Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle" [2009] The Conveyancer and Property Lawyer 104 at 115.

equitable claim against the conscience of the 'true' owner", while a common intention constructive trust "is identifying the true beneficial owner or owners, and the size of their beneficial interests".[112] In relation to the constructive trust, Lord Neuberger was addressing his views on context in *Stack* to "the issue of the ownership of the beneficial interest in property held in the names of two people, who have contributed to its acquisition, retention or value".[113] Adjudicating on an estoppel case, as we have seen, can involve a decision on whether the context means that the claimant was expecting an interest at all, as distinct from a mere contract. Even so, the variable consequences of a contextual approach remain complex and arguably undesirable, however laudable such an approach may be in principle.

52 In a sense the "context" could simply refer to the circumstances of the case. It is inevitable that contextual factors will influence the result of any case, including in areas of law where the applicable principles are apparently much less open to interpretation than those governing proprietary estoppel (or the constructive trust). The judiciary are frequently sensitive to contextual factors when developing the common law, a prime example of this sensitivity being a greater reluctance to assume that parties in certain intimate relationships intend to create legal relations when they deal with each other.[114] Indeed, even when purporting to reject the modification of the principles of property law for particular contexts in *Stack*, Lord Neuberger accepted that "the nature of the relationship [between the parties] will bear on the inferences to be drawn from their discussions and actions".[115]

53 But if it could allocate a set of facts within a dichotomy that effectively determines where the decision-making process begins – as it does in constructive trust cases and may do in estoppel cases – the attachment of importance to context is much more vulnerable to objection. Continuing the analysis, the next section of this paper briefly considers more general objections to the use of estoppel to enforce testamentary promises, as a prelude to the analysis of a statutory alternative that would minimise the need for a contextual approach to estoppel.

112 [2007] UKHL 17 at [37].

113 [2007] UKHL 17 at [107].

114 For an argument in favour of greater recognition of contracts regulating domestic life, see Chris Barton, "Contract – A Justifiable Taboo?", *Family Life and the Law: Under One Roof* (Rebecca Probert ed) (Ashgate, 2007) ch 6.

115 [2007] UKHL 17 at [103].

B. The legitimacy of proprietary estoppel

54 Aside from the uncertainty in their application, the very legitimacy of the principles of proprietary estoppel is open to question. For example Dixon, anxious that estoppel should not become "the penicillin of equity",[116] argues that, for reasons that have never been fully analysed,[117] it has been allowed to circumvent formality requirements relating to wills.

55 Similarly, Mee still urges caution in the use of estoppel even if a distinction could in practice be made between domestic and commercial estoppel cases. He emphasises that oblique representations such as Peter Thorner's are inherently more difficult to interpret than clear ones, and points out that even domestic claimants are usually able to seek clarification as to their entitlement. Adopting Goymour's terminology,[118] Mee accepts that Mr Cobbe was a "commercial risk-taker".[119] But he also describes David Thorner as a "domestic risk-taker".[120] He suggests that as much as one might feel sympathy for a "trusting claimant in the family context",[121] many domestic claimants are in substantially the same position as commercial ones.

56 Mee's argument may reflect unrealistic expectations about the options open to a hard-working claimant in a domestic scenario. At the very least, it is at odds with the clear judicial sympathy exhibited towards such claimants. In *Jennings v Rice*, for example, Robert Walker LJ (as he then was) was particularly conscious of the "ever-increasing burden of care for an elderly person, and … having to be subservient to his or her moods and wishes".[122] Regardless of the normative propriety or otherwise of enforcing oral testamentary promises for those who have incurred detriment without fully verifying

116 Martin Dixon, "Proprietary estoppel: a Return to Principle?" [2009] The Conveyancer and Property Lawyer 260 at 261.

117 Martin Dixon, "Proprietary estoppel: a Return to Principle?" [2009] The Conveyancer and Property Lawyer 260 at 261. See also Martin Dixon, "Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability" in *Modern Studies in Property Law*: *Volume 2* (Elizabeth Cooke ed) (Hart, 2003).

118 Amy Goymour, "Cobbling Together Claims where a Contract Fails to Materialise" [2009] CLJ 37. For a discussion of officiousness and risk-taking in the context of unjust enrichment, see *eg* Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) at pp 39–40.

119 John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 374.

120 John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 374.

121 John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 374.

122 [2002] EWCA Civ 159 at [51].

their entitlement, it is necessary to question whether estoppel provides an appropriate means of doing so. This is particularly true if *Thorner* requires a context-based dichotomy to be operated, risking uncertainty and prejudicing principled judicial decision-making. A remedy specifically tailored to "domestic" scenarios may be more desirable.

57 Moreover, a number of other features of the estoppel doctrine are currently sources of debate. These include the significance of unconscionability as an independent element of the doctrine,[123] the relationship between estoppel and the constructive trust (as we have seen), the associated question whether estoppel justifiably falls outside the formality requirements imposed on contracts for the sale of land,[124] the consequences of conditionality and the realisation of the property forming the subject-matter of the representation,[125] the principles governing the remedy in estoppel cases,[126] and the effect of such issues in domestic cases.

58 For all of these reasons, the next part of this article evaluates the merits of an alternative statutory mechanism for the enforcement of testamentary promises. A statutory footing could attach a degree of legitimacy to such enforcement that estoppel may not currently possess, and enable an explicit contextual approach to be adopted without prejudicing the general applicability of judicially-developed principles of property law.

V. A statutory solution?

59 There has been wide recognition of the need for a statutory alternative to the common intention constructive trust as a means of redistributing the property of unmarried cohabitants in England and Wales,[127] and much ink has been spilled on the issue.[128] It is often implied

123 Compare, *eg*, *Yeoman's Row* [2008] UKHL 55 at [92] (Lord Walker) and K R Handley, "Unconscionability in Estoppel by Conduct: Triable Issue or Underlying Principle?" [2008] The Conveyancer and Property Lawyer 382.

124 Law of Property (Miscellaneous Provisions) Act 1989 (c 34) (UK) s 2. See, *eg*, Martin Dixon, "Editor's Notebook" [2009] The Conveyancer and Property Lawyer 85; *Yeoman's Row* [2008] UKHL 55 at [29] (Lord Scott); *Thorner* [2009] UKHL 19 at [99] (Lord Neuberger).

125 See, *eg*, *Thorner v Major* [2009] UKHL 18 at [19] (Lord Scott) and at [87]–[89] (Lord Neuberger).

126 See, *eg*, Simon Gardner, "The Remedial Discretion in Proprietary Estoppel – Again" (2006) 122 LQR 492.

127 The Law Commission proposed such a scheme: Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007). The Government declined to implement the proposal until the publication of research into a similar scheme in Scotland. Its aim was to "extrapolate from it the likely cost to this jurisdiction of bringing into effect the scheme proposed by the Law Commission and the likely benefits it will bring" (Ministry of Justice,

(*cont'd on the next page*)

that the lack of such a scheme is linked to many difficult aspects of Baroness Hale's judgment in *Stack*.[129] Rather than seeking to add to that saturated debate, this part briefly evaluates the merits of an analogous statutory scheme for the enforcement of oral testamentary promises, as an alternative to the use of proprietary estoppel.

60 It seems that only one such statutory mechanism presently exists in the common law world,[130] namely New Zealand's Law Reform (Testamentary Promises) Act 1949. The Act allows for the enforcement of "express or implied" promises of testamentary provision made to reward the claimant for the "rendering of services to or the performance of work for the deceased in his lifetime", in situations where "the deceased has failed to make [the promised] testamentary provision or otherwise remunerate the claimant".[131]

61 The term "promise" is expressed to include "any statement or representation of fact or intention" by the Act.[132] It need not relate to "specified real or personal property",[133] and is sufficiently wide to include statements that the testator will see the claimant "right".[134] Unlike in the realm of estoppel, the promise must be for provision in a will.[135] This is a potentially significant limitation, but in New Zealand the *testamentary* nature of the promise can be inferred from the circumstances.[136] The promise is construed from the point of view of the claimant's reasonable beliefs regarding the testator's intentions.[137]

62 The courts have been generous in setting out the nature of the "services" or "work"[138] considered relevant to a claim under the Act, and

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"Response to article on cohabitation and relationship breakdown" (6 March 2008) <http://www.justice.gov.uk/news/announcement060308a.htm> (accessed 15 November 2009)).

128 See the literature cited in Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown: A Consultation Paper* (Consultation Paper No 179, 2006).

129 See, *eg*, Martin Dixon, "The Never-ending Story – Co-ownership after *Stack v Dowden*" [2007] The Conveyancer and Property Lawyer 456.

130 *Re Welch* [1990] 3 NZLR 1 at 4.

131 Law Reform (Testamentary Promises) Act 1949 (NZ) s 3(1).

132 Law Reform (Testamentary Promises) Act 1949 (NZ) s 2(a).

133 Law Reform (Testamentary Promises) Act 1949 (NZ) s (3)(1).

134 Sarah Nield, "Testamentary Promises: a Test Bed for Legal Frameworks of Unpaid Caregiving" (2007) 58 Northern Ireland Legal Quarterly 287 at 299.

135 *Wischnewsky v Public Trustee* [1995] NZFLR 166. One of the various claims in *Humphrey v New Zealand Guardian Trust* [2004] NZFLR 179 involved a promise that was not testamentary, with the result that a claim under the Act was "misconceived": at [40].

136 See, *eg*, *Rennie v Hamilton* [2004] NZFLR 270 at [33] (Gendall J).

137 *Heathwaite v NZ Insurance Co Ltd* [1951] NZLR 353.

138 Law Reform (Testamentary Promises) Act 1949 (NZ) s 3(1).

they have done so with regard to the remedial purpose of the Act.[139] Moreover, while there must be some "nexus or linkage" between the promise and the services or work,[140] the Act applies "[w]hether the services were rendered or the work was performed before or after the making of the promise".[141]

63 The remedy to be granted is one for "such amount as may be reasonable, having regard to all the circumstances of the case",[142] although where the promise related to a particular piece of real or personal property the court has a discretion to award that property to the claimant.[143] The Act has been interpreted in such a way that the value of the promise represents the ceiling of a "reasonable" award.[144] It could be argued that such a remedy is generally less powerful than English estoppel's "inchoate equity",[145] which is capable of binding third parties from the moment it arises.[146] But the uncertainty surrounding the "minimum equity"[147] approach[148] may preclude such a general conclusion. Moreover, given the plurality of potential claims on the deceased's estate, a non-proprietary remedy is arguably more appropriate for a testamentary promisee.[149]

64 Much more could be said on the details of the Act and the case law generated by it,[150] but for present purposes it is sufficient to evaluate the merits of a statutory approach as an alternative to estoppel. Patterson claims that the impetus for statutory intervention in New Zealand was provided by judicial comments on the inadequacy of the common law[151] (including equitable estoppel). As we have seen, the courts have adopted a benevolent and purposive approach to the interpretation of the Act's requirements. One judge expressed the view

139 *Tucker v Guardian Trust* [1961] NZLR 773 at 776.
140 *Byrne v Bishop* [2001] 3 NZLR 708.
141 Law Reform (Testamentary Promises) Act 1949 (NZ) s 3(2).
142 Law Reform (Testamentary Promises) Act 1949 (NZ) s 3(1).
143 Law Reform (Testamentary Promises) Act 1949 (NZ) s 3(3)(a).
144 *Re Collier-Cambus (dec'd)* [1994] NZFLR 520.
145 Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) at para 9.2.88.
146 Land Registration Act 2002 (c 9) (UK) s 116.
147 *Crabb v Arun District Council* [1976] Ch 179 at 198 (Scarman LJ).
148 See, *eg*, Simon Gardner, "The Remedial Discretion in Proprietary Estoppel – Again" (2006) 122 LQR 492.
149 In *Hamilton v Hamilton* [2003] NZFLR 883 at [60], Baragwanath J emphasised that "neither a testamentary promises claim, nor a family protection claim, nor a provision in a will has automatic preference over any of the others".
150 For a full discussion, see W M Patterson, *Law of Family Protection and Testamentary Promises* (LexisNexis, 3rd Ed, 2004) ch 13.
151 W M Patterson, *Law of Family Protection and Testamentary Promises* (LexisNexis, 3rd Ed, 2004) ch 13 at para 13.1.

that "[t]he remedial nature of the Act must be central in the Court's deliberations as that is the object of the statute".[152]

65 It could be said that estoppel is doing an admirable job in providing a remedy for disadvantaged testamentary promisees in England and Wales. Indeed, in the light of *Thorner*, few such promisees are likely to go away empty-handed. Even so, a statutory mechanism could remove many of the difficulties with estoppel highlighted in this article. These include both the concerns over the legitimacy of using proprietary estoppel to circumvent the applicable principles of succession law and the uncertainty created by the context-specific application of property law doctrines.

66 In New Zealand, few claims are brought by testamentary promisees in estoppel, contract, or unjust enrichment in situations where the promisor has died.[153] Such other claims may be available to the promisee, but he is required to elect which remedy should be pursued.[154] If most of these scenarios could similarly be removed from the realm of estoppel in other common law jurisdictions, this would allow the development of estoppel to cater (or, perhaps more accurately, not to cater) for those categories of case that remain exclusively within its remit.

67 Writing about promises made to informal carers, Nield opines that a statutory method of enforcing a testamentary promise "tends to cut through the moral tensions presented by balancing the exploitation of carers against … certainty … and freedom of testamentary disposition".[155] Similarly, Oosterhoff argues that there is "much to be said for codifying the anfractuous law of testamentary promises and [bringing] all of it together in a modern, clear, statement of entitlement".[156] In his view, this would simplify the administration of estates and improve understanding of the law among the general public. These views are arguably applicable to England and Wales (and other common law jurisdictions) in the light of *Thorner* and *Yeoman's Row*.

68 Of course, "context" plays an important part of the decision-making process even in New Zealand cases decided under the 1949 Act. For example, in *Re Welch*, the Privy Council was of the view that "some straining of the scope of the Act is required to bring within

152 *Wilson v Wilson* [2007] NZFLR 555 at [63].

153 New Zealand Law Commission, *Succession Law: Testamentary Claims* (Preliminary Article No 24, 1996) at para 292.

154 Law Reform (Testamentary Promises) Act 1949 (NZ) s 3(8).

155 Sarah Nield, "Testamentary Promises: a Test Bed for Legal Frameworks of Unpaid Caregiving" (2007) 58 Northern Ireland Legal Quarterly 287 at 298.

156 A H Oosterhoff, "Succession Law in the Antipodes: Proposals for Reform in New Zealand" (1997) 16 Estates and Trusts Journal 230 at 250.

the concept of services the natural incidents and consequences of life within a close family group".[157] But flexibility of that sort is likely to be less problematic where the judiciary are exercising a power to provide a specific and discretionary statutory remedy.

69 The New Zealand Act has nevertheless come in for some criticism. Peart argues that the wide discretion possessed by the court in fashioning the remedy means that the Act is "widely regarded as a restriction on testamentary freedom".[158] Nevertheless, she acknowledges that the Act could be analysed as "a means of enforcing a debt rather than a limit on testamentary freedom" because of its quasi-contractual nature,[159] and it would seem strange if the Act were considered to be more of an infringement of testamentary freedom because the court is given a discretion to award less than the value of what was promised.

70 Whatever one's response to the question whether a remedy should be provided for oral testamentary promisees, it is clear following *Thorner* that the senior judiciary in England and Wales are determined to provide such a remedy where the promise is "clear enough" in the circumstances and there is judged to be sufficient detrimental reliance to render the promisor's conduct unconscionable. Against that background, a statutory remedy is arguably preferable to the difficulties highlighted earlier with a contextual approach to estoppel. This is true even if such a remedy would not cover all deserving cases, and in spite of the claim that estoppel may justifiably play a role as an independent source of rights even in a commercial context.[160]

VI. Conclusion: The future of proprietary estoppel

71 *Thorner* undoubtedly represents the last word on proprietary estoppel from the House of Lords *per se*, since the institution has now morphed into the Supreme Court. But it may not be the last time that the doctrine is considered by the highest court in England and Wales. It is hard to disagree with Mee's assertion that *Thorner* and *Yeoman's Row* "do not justify confidence that the House of Lords has yet come fully to grips with the considerable complexities of proprietary estoppel".[161] The future of context-specific property law, whose expansion is likely to be

157 [1990] 3 NZLR 1 at 7.

158 Nicola Peart, "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 Common Law World Review 356 at 361.

159 Nicola Peart, "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 Common Law World Review 356 at 361.

160 Ben McFarlane & Andrew Robertson, "Apocalypse Averted: Proprietary Estoppel in the House of Lords" (2009) 125 LQR 535 at 542.

161 John Mee, "The Limits of Proprietary Estoppel: *Thorner v Major*" [2009] Child and Family Law Quarterly 367 at 368.

provoked by *Thorner*, will be an interesting one. Meanwhile, a statutory alternative to estoppel for the enforcement of testamentary promises is worthy of consideration.