

# legalupdate

YOUR UPDATE OF  
REGENT CHANCERY &  
COMMERCIAL LAW

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Rodney Stewart Smith

**Practitioners faced with a client who is aggrieved by the provision that has been made for him by a will or by the intestacy rules should remember that there is more than one way of skinning a cat. These are (i) an attack on the validity of the will, e.g. for incapacity, (ii) reliance on a proprietary estoppel and (iii) a claim under the Inheritance (Provision for Family and Dependents) Act 1975. *Baker v Baker* [2008] 2 FLR 767, the subject of this article, covers all three. John Ross Martyn in the next article concentrates on estoppel and Tim Akkouch in the last deals with cases in which unfortunately none of them helps because the estate is insolvent.**

### ***Baker v Baker*: the facts**

The case concerned the inheritance of a family home which constituted virtually the whole estate of Mr George Baker. The claimant was Mr Baker's only child, Cassandra. The defendants were Mr Baker's brother, Richard, and Mrs Monica Hazel with whom Mr Baker had been living at the time of his death. Richard and Mrs Hazel were named as executors in a will executed by Mr Baker five days before his death, and Mrs Hazel was the sole legatee.

Cassandra claimed that the will was invalid because of lack of testamentary capacity and want of knowledge and approval, so Mr Baker died intestate. Mrs Hazel counterclaimed for (a) probate of the will, (b) alternatively, a declaration that she was entitled to the whole estate by reason of a proprietary estoppel and (c) in the further alternative, reasonable provision under the 1975 Act which, she claimed, would be the whole estate.

## A wide-ranging contentious probate claim

The will was made by Mr Baker in hospital when he was being treated for liver cirrhosis. On the previous day he said that he wanted to make a will and wanted to make provision for Mrs Hazel, but also for Cassandra and for Mrs Hazel's daughter Nicola on Mrs Hazel's death. He was insistent that he and Mrs Hazel should simultaneously make reciprocal wills under which the estate of the first to die would pass to the survivor and the estate of the survivor would pass to Cassandra and Nicola equally.

Overnight Richard obtained will forms and prepared reciprocal wills in accordance with Mr Baker's wishes. On the evening of 22 April 2005 Mr Baker executed his will. The consultant who was treating Mr Baker had twice expressed doubts to Richard and Mrs Hazel about Mr Baker's testamentary capacity. The basis of these doubts was that Mr Baker was suffering from a degree of encephalopathy (a disease of the brain) which would materially have affected his ability to understand, retain, weigh up and communicate. His judgment and attention span would also have been impaired.

### **(a) Testamentary capacity**

The judge began by citing the 'classic formulation' of the test for mental capacity, namely "... *that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect ...*" (*Banks v Goodfellow* (1870) LR 5 QB 549). He held that the evidential onus of establishing capacity, and knowledge and approval, consequently fell on Mrs Hazel, who was propounding the will.

Mrs Hazel and Richard said that Mr Baker had remained clear and lucid until the end of his life but the judge rejected that evidence. The two attesting witnesses satisfied themselves in a brief conversation that Mr Baker was content to

execute the will but neither of them knew that the consultant had expressed any doubts about Mr Baker's capacity.

The judge considered it possible that Mr Baker had capacity on the previous day when he discussed the contents of his will. But he found that when he executed it the next day Mr Baker lacked the necessary capacity and did not know and approve the contents of his will. He largely based this finding on a crucial fact which came to light only at the outset of the trial: although Mrs Hazel had produced a will executed by her which was a "mirror image" of Mr Baker's will and also dated 22 April 2005, she had not in fact executed it until after his death.

The judge concluded that Mr Baker's execution of his own will without insisting on Mrs Hazel also executing her will could only be explained by the effect of his encephalopathy. Given his previous insistence on reciprocal wills he would never have executed his own will without being sure that Mrs Hazel had executed hers; and the effect of his doing so was to produce a result significantly different from that he had intended the day before. Hence Mrs Hazel could not rely on the principle that, if a testator has full capacity when he gives instructions, it is sufficient that at the time of execution he understands that he is executing a will drawn in accordance with those instructions even though by then he is incapable of understanding the provisions themselves (see *Richards v Allen* [2001] 1 WTLR 1031).

### **(b) Proprietary estoppel**

Mrs Hazel's failure to execute a reciprocal will was also fatal to her claim based on proprietary estoppel. In 2003, Mrs Hazel sold her house and the parties agreed that the proceeds would be used to fund their lifestyle. Mrs Hazel felt some anxiety about this and Mr Baker reassured her that he would take care of her and that their assets belonged to both of them.

Article continued >



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The question of reciprocal wills also first arose at that time and Mrs Hazel's evidence was that Mr Baker sought to persuade her to make a will but she was reluctant to contemplate the finality of death. Her case was that in selling her house and pooling the proceeds she had incurred detriment in the expectation encouraged by Mr Baker that he would leave his estate to her.

The judge rejected her case. Right up to his death Mr Baker had made it clear that he would leave his estate to her only if she also made a will safeguarding Cassandra's position. As she had consistently failed to do so she could not reasonably have expected him to leave his property to her.

The judge also rejected an alternative argument that Mr Baker's general promise to look after her could give rise to a proprietary estoppel. The absence of any reference to defined property of Mr Baker was fatal to such a claim. The judge's view on this point is consistent with the subsequent House of Lords decision in *Thorne v Major* (see the next article) in which an unspecific promise of "financial security" was held to be incapable of founding a proprietary estoppel.

### **(c) The 1975 Act**

When it came to the claim under the 1975 Act, Cassandra conceded that Mrs Hazel was qualified to claim under section 1(1)(e) as a dependant but Mrs Hazel primarily claimed to qualify under section 1(1)(ba) as a cohabitee. Although the judge doubted whether the precise basis of claim would make any difference, he held that she was qualified to claim under section 1(1)(ba). He found that her primary need was for a home and awarded her a life interest in it. He declined to award her an absolute interest in the property since Mr Baker had clearly wanted to make provision for Cassandra after Mrs Hazel's death.

**Rodney Stewart Smith, who acted for the claimant in *Baker*, was called to the Bar in 1964 and is the head of chambers. His practice embraces all aspects, both litigious and non-litigious, of the administration of trusts and estates. He is described in the traditional chancery section of *Chambers & Partners 2009* as "God's gift when it comes to all things technical."**

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John Ross Martyn

## **Proprietary estoppel after *Cobbe*: still alive and kicking**

**The House of Lords considered the doctrine of proprietary estoppel in *Thorne v Major* [2009] 1 WLR 776. Their useful decision has re-affirmed the doctrine in its generally accepted form and dispelled doubts raised by the House's decision in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752.**

### **The facts**

David Thorne was a farmer in Somerset who did substantial work without pay on the farm of Peter Thorne, his father's cousin. Peter died intestate in 2005 and other relatives were entitled to his estate under the intestacy rules. David claimed that from 1990 to 2005 Peter had encouraged him to believe that he would inherit the farm, that he had acted in reliance on that encouragement, and that by reason of the encouragement and reliance Peter's estate was estopped from denying that he had acquired a beneficial interest in the farm.

The trial judge found the case proved. The Court of Appeal reversed that decision, but the House of Lords restored the decision of the trial judge.

### **The speeches**

The main speeches were made by Lord Walker and Lord Neuberger. Lord Walker began by quoting an academic comment that "[t]here is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither)". Nevertheless, said Lord Walker, most scholars agree that the doctrine is based on three main elements: (i) a representation or assurance made to the claimant, (ii) reliance on it by the claimant and (iii) detriment to the claimant in consequence of his (reasonable) reliance.

### **The issues**

The appeal raised two issues. The first and main one concerned the character or quality of the representation or assurance made to the claimant. The second was whether, if the other elements of proprietary estoppel were established, the claimant must fail if the property to which the assurance related had been inadequately identified, or had undergone a change in its situation or extent, during the period between the giving of the assurance and its eventual repudiation.

#### **(a) The quality of the representation**

Decided cases establish that the representation must be clear and unequivocal, must be intended to be acted on, and in fact acted upon. The Court of Appeal had decided that there was no material on which the judge could have found that what Peter had done and said was intended to be relied upon, or found that it was intended as a promise rather than a statement of present intention (and indeed that he had made no such findings). Lord Walker disagreed. He thought that the trial judge had found that Peter's assurances, objectively assessed, were intended to be taken seriously, and relied upon, and that there was no sufficient reason for the Court of Appeal to reverse that finding.

Lord Neuberger reasoned along the same lines. He emphasised that he was not seeking to cast doubt on the proposition that the relevant assurance must be clear and unequivocal. However, that had to be read subject to three qualifications. First, the effect of words or actions must be assessed in their context. Secondly, it would be quite wrong to be unrealistically rigorous when applying the "clear and unambiguous" test. Thirdly, where the statement relied on could amount to an assurance having more than one possible meaning, the person relying on it should not normally be deprived of all relief. Maybe he should be accorded relief on the basis of the interpretation least beneficial to him.

#### **(b) The identity of the property**

On the suggested uncertainty about the identity of the property to which the assurances related, Lords Walker and Neuberger had no difficulty. The property was sufficiently identified, because it was the farm as it existed from time to time. Changes in the character or extent of the property are relevant to the relief that equity will provide, but do not exclude the remedy where there is an identifiable property.



*The Lords' useful decision in Thorner has re-affirmed the doctrine of proprietary estoppel in its generally accepted form and dispelled doubts raised by their decision in Cobbe ...*



## Discussion

In itself, the case turned on these two short points. Its wider importance derives chiefly from its re-affirmation of the traditional principles of proprietary estoppel in the context of family relationships. But five other comments can be made about the decision.

- > It is now clear that the earlier decision of the House in *Cobbe* has not severely curtailed the doctrine of proprietary estoppel. The factual background of that case was very different, being commercial dealings at arm's length between business people.
- > Their Lordships' treatment of the *Cobbe* case emphasises that the application of the doctrine of proprietary estoppel is decidedly fact-sensitive. An assurance may create an estoppel on one set of facts, while a very similar assurance may not do so on another. Similarly, reasonable reliance in one factual situation may not be reasonable reliance in another.
- > As the application of the doctrine is fact-sensitive, appellate courts must give especial weight to the advantage that trial judges have in seeing and hearing the witnesses.
- > The argument about the relationship between proprietary estoppel and constructive trusts has not ended. Lord Scott said he thought the rights of people such as the claimant ought to be recognised under the law of constructive trusts, rather than proprietary estoppel. He concurred with the other Lords because he was satisfied that the case would have justified a remedial constructive trust under which the claimant would have obtained the relief awarded him by the judge.
- > Peter had made a will giving his residuary estate, including the farm, to David. He had revoked it because he wished to remove a pecuniary legacy and, despite the advice of his solicitor, had not made a new one. *Thorner* may, then, be a useful case for solicitors to cite to their clients when warning them of the dangers of dying intestate.

**John Ross Martyn was called to the Bar in 1969 and has a general chancery practice. He is a qualified arbitrator and mediator, and is also the joint editor of *Theobald on Wills* (16th ed 2001) and *Williams, Mortimer and Sunnucks, Executors, Administrators and Probate* (19th ed 2007).**

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Tim Akkouch

## Advising on insolvent estates

**With low property prices, rising unemployment and high levels of debt, the number of insolvent estates is on the increase. Such estates raise a number of thorny issues for those advising personal representatives ('PRs') or creditors of a deceased. A PR may, for example, want to know how to administer an estate that is or may be insolvent. And a creditor may want to know how best to ensure that the deceased's assets are properly realised for his benefit and what other remedies he may have.**

### Three methods of administering an insolvent estate

Nobody is under a legal obligation to obtain a grant of probate, unless he has intermeddled, or to take out letters of administration. So where an estate is obviously insolvent, the best advice will often be that no grant should be taken, as administering an insolvent estate is a complicated and time-consuming job.

But a PR may have already obtained a grant, or may feel morally obliged to take one. He then has three options.

- > *To administer the insolvent estate himself.*  
A PR may elect to administer an insolvent estate himself. Here he will, generally speaking, be bound to administer the estate in the same way as if a bankruptcy order had been made against the deceased during his lifetime. He must, therefore, apply the usual insolvency rules as to the rights of secured and unsecured creditors, priority of payments, proof and valuation of debts, etc. A PR with no knowledge of insolvency law will need to take advice to enable him to comply with these obligations.

- > *To obtain an insolvency administration order ('IAO').* A PR may instead decide to seek an IAO under section 264 of the Insolvency Act 1986. Such an order, which can also be obtained by a creditor of the deceased, operates in a similar way to a bankruptcy order against a living person. Once an IAO is obtained, an insolvency practitioner will usually be appointed as the deceased's trustee in bankruptcy and the PR's obligations to administer the estate will fall away. The PR will, however, be obliged to co-operate with the newly appointed trustee by delivering to him all books, papers, records and assets relating to the estate.

- > *To seek the administration of the estate by the court.* The final alternative is for a PR to seek administration by the court. If such an order is granted, the PR's powers can only be exercised with court approval. As this procedure is cumbersome and costly, it will only be appropriate in particularly complicated cases.

### Doubts as to solvency

It may not be clear at the outset whether an estate is insolvent. Here caution is the watchword. A PR should administer the estate as if it is insolvent until he can conclude that it is not.

Practically, this means that a PR should not make distributions to beneficiaries until all creditors have been paid in full. Nor should a PR make payments to particular creditors without being sure that he has sufficient funds to pay all known creditors: the reason is that a PR must comply with bankruptcy principles by treating all creditors equally. So if an estate has £500 of assets and a deceased had two creditors, each owed £500, the PR should pay each creditor £250. If the PR pays one creditor £500 – because, for instance, he is pressing for payment – he will be personally liable to the other for the £250 he should have received.

Slightly different problems arise where a creditor intimates that he has a claim against an estate but does not bring it. An example might be a creditor who sends a letter before action to a PR asserting a large but somewhat dubious claim, the limitation period for which will not expire for several years. Here, if the PR distributes to other admitted creditors and the dubious claim is then successfully brought, he will again be personally liable. Advertising under section 27 of the Trustee Act 1925 will not help when the PR knows of the claim.

Article continued >



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The courts grappled with the problem of known claims which are not brought in *Re Yorke* [1997] 4 All ER 907 and *Re K* (2007) 9 ITEL 759. The decisions in those cases establish that the court has discretion to permit a PR to pay undisputed debts and distribute money to beneficiaries without the risk of personal liability, notwithstanding the existence of a known claim. The court is likely to make such an order where years have passed without the claim being launched or where it is particularly important for a beneficiary to receive a payment.

#### How creditors can protect their interests

The deceased's creditors may be content to let a PR continue with his administration of the estate. The creditor should nevertheless check that all assets are accounted for and that bankruptcy principles are respected.

But a major creditor may not be content with a hands-off approach. If such a creditor manages to clear off all those entitled to a prior grant, he himself can apply for a grant of letters of administration. As this is likely to be a protracted process, a better alternative will often be to seek an IAO against the estate. Obtaining an IAO will, as mentioned above, usually ensure that an insolvency practitioner is appointed to administer the estate. As such a professional is used to protecting the interests of creditors, he should do a better job than a lay PR (though he will be entitled to be paid).

A further advantage of obtaining an IAO is that it paves the way for an application under section 421A of the 1986 Act. This section applies where a deceased, immediately before his death, was beneficially entitled to an interest in any property as a joint tenant. It is an important section because the *prima facie* position is that property held by the deceased as a joint tenant before his death will not fall into his estate but will pass to other joint

tenant(s) by survivorship. Section 421A allows a trustee appointed under an IAO to seek an order that the surviving joint tenant(s) pay to him an amount not exceeding the value of the joint tenancy lost to the estate. So where H and W own a £1 million house as joint tenants, that house will vest in W on H's death. But an application under section 421A gives the court a discretion to order W to pay the trustee the £500,000 lost to the estate. An application under the section is only possible where an IAO has been made on a petition presented within five years of the death.

**Tim Akkough was called to the Bar in 2004, and was appointed to the Attorney General's panel of Counsel to the Crown in 2008. He has a broad traditional and commercial chancery practice. Tim is currently acting for one of the defendant trustees in the long-running *Alhamrani* litigation.**

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Stop Press



Stephen Schaw Miller

## Dealing with the estate's interest in a bankrupt's home - update

In our March 2009 issue (available on our website), Gary Pryce's article called attention to section 283A of the Insolvency Act 1986. That section imposes a time-limit of three years on a trustee in bankruptcy who wants to deal with the bankrupt's interest in his home. One way in which a trustee can deal with the interest is if he "realises" it; and the trustee in this case, at the end of the three-year period, assigned it on terms that the assignee paid the trustee a share of the proceeds of the interest when it (or the property as a whole) was sold. Effectively the time-limit was being circumvented. Had the trustee "realised" the interest? In *Lewis v MPRL* [2009] EWCA Civ 448, decided in June, the Court of Appeal said no: "realises" means "sells for cash down".

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