Proprietary Estoppel

1. **What is Proprietary Estoppel?**

Proprietary Estoppel is an equitable remedy, which will operate to prevent the legal owner of property from asserting their strict legal rights in respect of that property when it would be inequitable to allow him to do so.

i) Megarry and Wades Law of Real Property (8th Edition) summarises the requirements in relation to proprietary estoppel as follows:

“A representation or assurance made to the Claimant that the claimant has acquired or will acquire rights in respect of the property. The claimant must act to his detriment in consequence of his (reasonable) reliance upon the representation. There must also be some unconscionable action by the owner in denying the Claimant the right or benefit which he expected to receive.”

ii) There are therefore three required elements (see **Taylor Fashions Ltd. v. Liverpool Victoria Trustees Ltd. [1982] QB 133**):

i) A representation or assurance;

ii) An act of detrimental reliance;

iii) An unconscionable denial of the claimant’s right.
2. **Some General Observations in Relation to the Requirements.**

Before examining the required elements in detail there are some general observations of importance:


The required elements of a Proprietary Estoppel “cannot be treated as being subdivided into three or four watertight compartments”. It will be apparent when examining the applicable case law that there is often a significant degree of overlap between the required elements and Walker L.J. was also clear that ultimately, “the court must look at the matter in the round.”

Despite the flexibility that may be employed in terms of establishing the required elements, practitioners and courts have been required to adopt a “rigorous analytical approach” to the process of establishing the existence of a proprietary estoppel (*Yeoman’s Row Management Co. Ltd. v. Cobbe [2008] 1 WLR 1752*).

ii) Lord Scott in *Thorner v. Major [2009] UKHL 18*: The three main elements must always be present, they might in any particular case not be sufficient to constitute an estoppel. The mere existence of the required elements will not be enough – the representations and the detrimental reliance will need to satisfy their own individual criteria (as referred to below).

iii) The required elements of proprietary estoppel are very similar to those required to establish a constructive trust but the two concepts are not identical: Constructive trusts require a ‘common intention’ (whether expressed, implied or inferred) as between the parties that the claimant should have an interest in the property: proprietary estoppel will operate where the claimant is under a unilateral misapprehension that he has acquired or will acquire such rights where that
misapprehension was encouraged representations made by the legal owner or where the legal owner did not correct the claimant’s misapprehension.

3. **The Promise or Assurance.**

i) The first point to note is that there need not be any active representation at all. If the legal owner stands by and allows the claimant to, for example, build on his land or improve his property in the mistaken belief that the claimant had acquired or would acquire rights in respect of that land or property then an estoppel will operate so as to prevent the legal owner insisting upon his strict legal rights (*Taylor Fashions Ltd v. Liverpool Victoria Trustees Ltd.*).

ii) Any active representation must relate to a right in relation to land (*Parker v. Parker [2003] EWHC 1845 Ch*). The property over which the right is alleged to have been acquired must be clearly identified by the assurances in the sense that it must be ascertained or at least objectively ascertainable (*Lissimore v Downing [2003] 2 FLR 308 para.12*). In *Lissimore*, representations to the effect that the claimant would ‘never want for anything’ as the defendant had ‘always looked after his girlfriends’ were not sufficiently specific in terms of the rights that the claimant was to acquire or as to the property over which those rights would be exercisable. The Judge said “it is difficult to conceive of an estoppel attaching to or a constructive trust imposed upon, entirely unascertained and unascertainable property. That would make satisfaction of the equity the same process of identification of the equity” *

*Layton v Martin [1986] 2 FLR 227*: A representation that the defendant would provide the claimant with “financial security” could not be regarded as a representation that she was to have some equitable or legal interest in any particular asset or assets. *Per Scott J*: “*The proprietary estoppel line of cases are concerned*
with the question whether an owner of a property can, by insisting on his strict legal rights therein, defeat an expectation of an interest in that property, it being an expectation that he has raised by his conduct and which has been relied on by the claimant. The question does not arise other than in connection with some asset in respect of which it has been represented or is alleged to have represented, that the claimant is to have some interest...A representation that ‘financial security’ would be provided by the deceased to the plaintiff...is not a representation that she is to have some equitable or legal interest in any particular asset or assets” (pages 238 and 239).

It should be noted however that decisions in relation to this issue of specificity of subject property are not always easy to reconcile:

**Negus v. Bahouse [2008] 1 FLR 381:** The defendant’s promise that the claimant would have “a roof over her head” in the event that anything happened to the defendant was insufficient to establish an estoppel

**Holman v. Howes [2008] 1 FLR 1217:** A finding that the defendant had said “something to the claimant giving her the impression that she would be secure in the property” was held by the Court of Appeal to require recognition of the claimant’s clear right to live in the property for as long as she wished under a proprietary estoppel.

In **Thorner v. Majors** the House of Lords drew an important distinction between the specificity of representation and subject required in ‘commercial’ cases and that required in ‘family’ cases. The requirement of a clear and unequivocal assurance remained but that requirement had to be seen within the factual context of the case. It should not be applied too rigorously in cases involving co-habitees and relatives.
iii) The representation need not be the only reason why the claimant acted to his detriment. Provided there is a sufficient link between the representations relied upon and the detrimental reliance, then an estoppel can be established even though the representations may not have been the sole reason for the claimant’s actions.

**Wayling v. Jones [1995] 2 FLR 1029**: The claimant lived with the defendant between 1971 and 1987, living in the deceased’s house and helping him run his business, for which he received no substantive payment. The deceased repeatedly promised the claimant that he would leave his business to the claimant but did not do so. The claimant’s appeal was allowed even though he accepted in evidence at the original trial that he would have remained with the deceased even if the promises had not been made. There was a sufficient nexus between the promises and the actions and the fact that the claimant may have had mixed motives for acting as he did would not prevent the estoppel.

iv) Self-evidently, the representations must precede the detrimental reliance:

**Churchill v Roach [2004] 2 FLR 989**. In Churchill the parties had knocked their adjoining houses into one but the court held that there had been no intention formulated that the properties should be put into joint names prior to the deceased’s unexpected death.

4. **Detriment.**

i) The detriment suffered by the Claimant must be ‘substantial’. (**Gillett v. Holt** affirmed in **Layton v Martin**)

When seeking guidance from the case law it is important to note that there is no distinction drawn between the detriment required to establish a constructive trust and that required to establish a proprietary estoppel. Consequently, many of the
authorities in relation to the issue of detrimental reliance in proprietary estoppel cases take guidance from decisions where the court was in fact dealing with constructive trust claims.

When assessing whether the detriment is ‘substantial’ it was said in Grant v. Edwards [1987] 1 FLR 87) that a detrimental act was described as “conduct on which the woman could not reasonably be expected to embark unless she was to have an interest in the house “ (page 95). Looking after the home, the Appellant and the children would not constitute detriment in this sense that these would be the actions that could reasonably be expected to be undertaken by a party to a quasi-matrimonial relationship: “when the house is taken in the man’s name alone, if the woman makes no real or substantial financial contribution towards either the purchase price, deposit or mortgage instalments by the means of which the family home was acquired, then she is not entitled to any share in the beneficial interest in that home even though over a very substantial number of years she may have worked just as hard as the man in maintaining the family in the sense of keeping the house, giving birth to and looking after and helping to bring up the children of the union” (Burns v. Burns [1984] FLR 216 at page 242).

In Windeler v. Whitehall [1990] 2 FLR 505 Millet J found that the claimant’s claim for a proprietary estoppel was unsustainable on the basis that a number of bases but in relation to detriment, he found that the claimant’s actions in undertaking basic domestic tasks and supervising some maintenance and renovation work carried out the property could not constitute acts to her detriment as “any wife or mistress would do the same.”

ii) Within the context of a quasi-matrimonial case it is clear therefore, that undertaking the usual ‘day-to-day domestic tasks’ will not be regarded as an ‘act to
detriment’. In *Lissimore v. Downing* the judge found that the assistance provided by the claimant in helping to run the defendant’s estate simply mean that she had “played a full part in the relationship, doing what anyone in such a relationship would do” and that such actions were not sufficient to constitute detriment.

Although the discharge of day-to-day domestic duties will not constitute detriment within this context, the detriment does not have to be in the form of money or identifiable financial expenditure (*Gillett v. Holt*).

In *Jennings v. Rice [2002] EWCA Civ 159* the Court of Appeal the claimant had begun his involvement with the Claimant as a part-time gardener and developed to the point where he undertook maintenance on her property, took her shopping and even slept on the sofa at her property every night for the three years prior to her death after she was concerned about her security following a burglary. The claimant had been paid nothing for his efforts since the late 1980s on the basis that the deceased had promised that he ‘did not need to worry’ and that she would ‘see him right’. She died intestate and the claimant received nothing. The claimant was awarded a lump sum of £200000 from the estate.

iii) The assessment of detriment is to be undertaken at the time at which the representor seeks to go back on the alleged representation (*Gillett v. Holt*).

In *Thorner v. Majors* Lord Walker quoted with approval Hoffman L.J’s observations in *Walton v. Walton (unreported)* that proprietary estoppel looks backwards and asks whether “in the circumstances which have actually happened” it would be unconscionable for the promise not to be kept.

The fact that the detriment must be assessed at the time at which the legal owner seeks to go back on the assurance necessitates an evaluative assessment of the detriment as against any benefits that the claimant has received over the relevant
period. It is even possible that the equity that has arisen as the result of an established estoppel could be regarded as having been extinguished by the benefits received by the Claimant.

In *Sledmore v. Dalby (1976) P and CR 195* The court found that some relatively limited expenditure incurred by the claimant in improving a rental property on the basis of assertions by the owners that property “would be his one day” should be weighed against the fact that he had enjoyed rent-free occupation of the property for 15 years after the improvements had been carried out. Hobhouse L.J. found that “the effect of any equity that may at any earlier time have existed has long since been exhausted and no injustice has been done to the defendant”.

In *Campbell v. Griffin [2001] EWCA Civ 990* the claimant moved in to the deceased couple’s property as a lodger in 1978. Their relationship developed to the point where they treated his like a son and as their health failed he effectively became their full-time carer. The deceased couple assured the claimant that he “would have a home for life”. A codicil in the deceased’s will that the claimant would have a life interest in the property was rendered ineffective by lack of capacity and the property passed to the deceased’s nieces. The claimant’s claim for an estoppel was upheld by the Court of Appeal but his contention that he should be allowed to occupy the property for life was held to be disproportionate to the detriment he had suffered. The court took account of the fact that he would expect to be paid a substantial wage for the work he had undertaken as, in effect, a live in carer, in addition to free board and lodging but that had to balanced against the fact that he had not paid any rent since 1992 and had exclusive occupation of the property until 1994. The claimant was awarded £35000 charged against the property and realisable upon its sale.
**Gillett v. Holt**: The defendant was a wealthy farmer and the claimant came to work for the defendant on the farm and was effectively treated as his protégé. After his marriage the claimant and his wife lived in a farmhouse owned by the defendant’s farming business. The claimant frequently asserted that the business would be the claimant’s after his death but when the parties eventually fell out the claimant was summarily dismissed from the business. His claim under proprietary estoppel was dismissed at first instance on the basis that there was nothing said or done by the defendant that could be said to constitute an irrevocable promise that the defendant would inherit the business nor had the claimant suffered any detriment.

The Court of Appeal disagreed on both counts. The claimant’s assurances were completely unambiguous and it was the claimant’s reliance on them that rendered them irrevocable. Detriment was not a narrow or technical concept and the trial judge had taken too narrow a view of it. The claimant and his wife had given the best years of their working lives to the defendant’s business rather than developing their careers elsewhere and that detriment was clearly established.

5. **Unconscionable Behaviour.**

   i) Even where the assurance and the resulting detriment are established, the legal owner’s behaviour in denying the claimant’s rights must still be regarded as ‘unconscionable’.

   It was said in **Gillett v. Holt** that the fundamental principle of equity is to “prevent unconscionable conduct” and that principle “permeates all the elements of the doctrine” (page 279). The type and extent of the assurances made and the extent of the consequential detriment will clearly be central to the determination of whether the repudiation of those assurances is unconscionable.
6. **Satisfaction of the Equity.**

i) The main reason why proprietary estoppel is usually pleaded as an alternative to a constructive trust is that the remedy will be to provide the claimant with an award, which represents “the minimum equity to do justice between the parties” ([Crabb v. Arun District Council [1976] Ch 179](#)).

ii) The remedy must be proportionate to the detriment suffered and the court has a complete discretion as to the manner in which the equity is satisfied. It need not make any declaration or realisation of beneficial ownership and will often grant an entirely different form of relief such as a right to occupy or a cash payment. In [Jennings v. Rice](#) Robert Walker LJ reviewed the authorities and said:

“It is no coincidence that these statements of principle refer to satisfying the equity (rather then satisfying, or vindicating, the claimant’s expectations)”. In that case the claimant was awarded a cash sum from the estate of £200000. The Court of Appeal upheld the award and said that the claimant’s expectation that he should receive the entirety of the deceased’s estate (sworn for probate at £1,285,000) or even her house and its contents (valued at £420000), would be disproportionate to the detriment he had suffered.

In [Gillett v. Holt](#) it was felt that it would clearly be wrong to award the claimant the entirety of the farm business as that had been promised to him contingent upon the defendant’s death. The claimant was awarded the freehold of the property in which he and his wife had lived while working for the defendant, together with 105 acres and £100000 to compensate for his exclusion from the rest of the farming business.
Equitable Accounting.

1. The Statutory Basis.

   i) Equitable accounting is now dealt with under the statutory provisions set out under sections 12 to 15 of the Trusts of Land and Appointment of Trustees Act 1996 (TLATA). In summary:
      - Section 12 confers on each beneficiary the right to occupy trust property;
      - Section 13 allows the trustees to:
         a) Exclude a beneficiary’s right to occupy (such right not to be exercised unreasonably);
         b) To impose conditions upon any beneficiary’s occupation of the trust property (to include paying applicable outgoings);
         c) To require any beneficiary in occupation of the property to pay compensation to any beneficiary whose right to occupy has been excluded or restricted;

   In quasi-matrimonial cases the trustees and the beneficiaries will almost inevitably be the same people and equally inevitably, will disagree about who should occupy the property and on what terms.

      - Section 13(4) sets out the factors, which the trustees and/or the court must take into account when determining the issue of occupation of the property:
         a) The intention (if any) of the person or persons who created the trust;
         b) The purposes for which the land is held;
         c) The circumstances and wishes of each of the beneficiaries;

   The court must also have regard to the criteria set out in s.15. In addition to a and b above, the court must also consider:

      a) The welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home;
b) The interests of any secured creditor of any beneficiary.

In *Stack v Dowden [2007] 1 FLR 1858* Baroness Hale said that while the equitable accounting process must now be governed by the statutory criteria under TLATA, the result would usually be the same as under the traditional equitable principles. The previous case law therefore remains relevant.

2. **The Common Law Approach.**

i) A co-owner has been required to account to other co-owners for expenditure in relation to the co-owned property since the 19th century. The old equitable accounting concept has been described in *Murphy v. Gooch [2007] 2 FLR 934* by Lightman J. as “a body of (non-binding) guidelines or rules of convenience aimed at achieving justice between the co-owners. The thrust of those guidelines was that, where it is just to do so, co-owners may be given credit for monies paid and expenditure incurred on the jointly owned property, a co-owner in sole occupation of property may be charged with or required to give credit to his co-owner for an occupation rent and these credits may be offset against each other”.

3. **The Significance of the Parties’ Beneficial Interests.**

i) An equitable account cannot take place until the parties’ beneficial interests in the property have been determined due to the fact that a co-owner’s obligations to account to the other owner will, in broad terms, be in proportion to his beneficial share (*Wilcox v. Tait [2007] 2 FLR 871*).
4. **The Commencement of the Account.**

   i) In a quasi-matrimonial case, the general rule is that an equitable account will only begin after the parties have separated *(Bernard v. Josephs (1983) 4 FLR 178)*.

   While the parties are living together, the purpose of the trust continues to subsist and expenses will be discharged in accordance with the arrangements that the parties themselves have agreed. After the parties separate those agreements are no longer in place and each owner becomes obliged to discharge his or her proportionate share of the applicable expenses.

   ii) The courts have referred to the unreality of an account taken while the parties are living together. Lord Walker said in *Stack v. Dowden* that in a domestic (as opposed to commercial) case:

   “…there will be a heavy burden in establishing to the court’s satisfaction that an intention to keep a sort of balance sheet of contributions actually existed or should be inferred, or imputed to the parties.”

   iii) The position may be different where there is a specific agreement as to how a particular item of expenditure was to be discharged while the parties were together and where one party fails to pay his or her share during the relationship then they can be made to account for that following separation (see e.g. *Cowcher v. Cowcher* [1972] 1 WLR 425).

5. **Occupation Rent.**

   i) Undoubtedly the most prevalent form of equitable accounting is the payment of an occupation rent. As stated above, the House of Lords were clear in *Stack v. Dowden* that any compensatory payment ordered to be paid by a co-owner in
Occupation, to another co-owner who is excluded from occupation, is now governed by sections 12 to 15 of TLATA.

ii) There is no requirement that the party claiming an occupation rent should have been forcibly excluded or ousted from the property. While this used to be the case the courts had recognised even before TLATA that it was entirely unrealistic to expect a co-habiting couple to continue to live together after the breakdown of their relationship (Re Pavlou (A Bankrupt) [1993] 2 FLR 751). The statutory provisions contain no requirement at all that there should be any form of ouster or ejection from the property before an occupation rent can be claimed.

iii) In terms of quantification, the courts have shied away from taking a commercial rental value of the property as the starting point for an occupation rent but have used the measurement of ‘mesne profits’ – the archaic basis for provision of compensation for use and occupation of the land.

There have however, been judicial moves to bring the assessment onto a more commercial footing. In Dennis v. McDonald (1982) 3 FLR 398 Purchas J assessed occupation rent by reference of a ‘fair rent’ as assessed by a rental officer, for an unfurnished letting of the property on the basis of a secure tenancy.

Lord Neuberger also suggested in his dissenting judgment in Stack v. Dowden that the court should be able to award damages based upon the notional rental value of the property or the costs of alternative accommodation.

The court’s reluctance to assess compensation on the basis of a commercial rent seems to stem largely from the desire to off-set the notional rental payments against mortgage payments made by the party in occupation.
6. **Off-Setting Occupation Rent Against Mortgage Payments.**

i) In *Leake v Bruzzi* [1974] 1 WLR 1528 the Court of Appeal drew a distinction between the payment of the interest and capital elements of the mortgage. The interest element was treated as off-setting a notional rent but the payer should receive credit for 50% of payments in relation to the capital element.

ii) The off-setting process as between occupation rent and mortgage payments has also been held to apply as against a trustee in bankruptcy. In *Re Gorman* [1990] 1 WLR 616 the estranged husband was made bankrupt while the property was still in the joint names of the husband and wife. The husband’s trustee in bankruptcy applied for a sale of the property and the Court of Appeal held that from the net proceeds of sale the trustee was entitled to be credited with 50% of an occupation rent from the time that the receiving order was served upon the bankrupt to be off-set by 50% of the mortgage instalments paid over the same period.

iii) After the advent of TLATA and the decision in *Stack v. Dowden* that required the application of sections 12 – 15 to the issue of equitable accounting, a trustee in bankruptcy’s right to receive an occupation rent was called into question on the basis that since the trustee in bankruptcy had no right of occupation in respect of the property as required by section 12. In *French v. Barcham* [2008] EWHC 1505 (Ch) the trustee’s claim for an occupation rent was dismissed at first instance on precisely that basis. On appeal it was accepted that the trustee in bankruptcy could not be entitled to an occupation rent under TLATA but that there was no reason why the old common law principles could not be applied and an occupation rent was awarded.
7. **Renovation and Improvement Works.**

i) An account in relation to money spent on improvement and/or renovation work carried out to a jointly owned property will depend upon whether the claimant can establish whether the work was carried out with the agreement of the other co-owner.

Generally, where a co-owner unilaterally incurs expenses in relation to the co-owned property he is not entitled to demand a contribution or compensation from his co-owner (*Leigh v. Dickeson* (1884) 15 QBD 60).

The position is different where the work is carried out with the express or implied approval of the co-owner or where it is carried out pursuant to an obligation that relates to both of them. In those circumstances, the paying party is entitled to be credited with:

- 50% of the increase in the value of the property resulting from the expenditure; or
- 50% of the actual expenditure, if less. (*Re Pavlou* [1993] 2 FLR 751 and *Re Gorman* [1990] 2 FLR 284).

8. **Other Expenses.**

i) In the period post separation and pre sale the payment of joint bills can be the subject of an account.

- If the party out of occupation continues to pay expenses relating to the property he is entitled to an account from the co-owner who has remained in occupation;
- If the party in occupation pays expenses that benefit both owners (e.g. building and contents insurance) he will be entitled to an account.
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