Neutral Citation Number: [2019] EWCA Civ 890

Case No: A3/2018/1115

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, CHANCERY DIVISION
Mr Justice Birss
C30BS914 & C30BS666

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd May 2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE MOYLAN
and
LADY JUSTICE ROSE

- -

Between :

LUCY ANN ANDREWS HABBERFIELD	**Appellant**
- and -	
JANE SARAH ANDREWS HABBERFIELD	**Respondent**

- -
- -

MR RICHARD WILSON QC (instructed by **Wilsons Solicitors**) for the **Appellant**

MR LESLIE BLOHM QC & MR CHRISTOPHER JONES (instructed by **Stephens Scown Solicitors LLP**) for the **Respondent**

Hearing dates : 14th and 15th May 2019

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Approved Judgment

Lord Justice Lewison:

Introduction

1. This is a sad tale of a farming family: the Habberfields. The main protagonists are Lucy Habberfield and her mother Jane. There are three other children of the family: Emma, Andrew and Sarah. Like the judge I will refer to them by their given names alone. For some 30 years Lucy worked on the family farm at Woodrow in Somerset together with her mother Jane and her father Frank. Following a five-day trial, Birss J found that as a result of various assurances over the years, Lucy had established an equity, based on the principles of proprietary estoppel. He made an order giving effect to that equity. His judgment is at [2018] EWHC 317 (Ch), [2019] 1 FLR 121.

The facts found

2. The judge considered the evidence in detail and made careful factual findings. What follows is a very abbreviated summary sufficient to understand the issues raised on the appeal and cross-appeal.

3. From 1975 Frank and Jane farmed Woodrow farm in partnership. It consisted of a farmhouse and some 116 acres of farmland, together with farm buildings. Lucy began working full time on the farm on leaving school. It was her enthusiasm for dairy farming that persuaded Frank to restart dairy farming, which had ceased in the early 1970s. From 1983 the dairy farming became the cornerstone of the business. In 1989 Frank and Jane bought a further 104 acres of land at Mudford. The farming business for most of the relevant period until 2015 concentrated on dairy farming. Although others worked on the farm, without Lucy's work there would have been no dairy farming at Woodrow. But they also raised beef cattle and did some arable farming. Since 2015 the business has been based on beef cattle and arable.

4. The assurances began in about 1983, shortly after Lucy left school and went to work full time on the farm. Further assurances were made in about 1985, during the late 1980s and 1992. Although the precise words of the assurances varied, the judge held that in substance Frank had assured Lucy that if she continued to work on the farm, then, after he could not run it any more, the farming business would be passed to her; subject to three qualifications. The first was that some land would be made available for Andrew, whose primary interest was in machinery. He had built up a machinery and contracting business which he ran from premises at Woodrow. The second was that some provision would be made for her sisters. The third was that title to the farm and the farmhouse (in which Frank and Jane lived) would not necessarily be conveyed to Lucy in their lifetimes. Among the assurances that the judge found were at least two to the effect that Lucy was working on the farm for the eventual benefit of her children. The judge found that the meaning of the assurances was that not only would Lucy receive the dairy farming business but also, subject to the three qualifications, ownership of the farm itself in due course. He summarised his conclusions by finding that Lucy expected to receive a viable dairy farm at Woodrow. He also found that Frank's assurances were made with Jane's knowledge and authority; so that the consequences for her were the same as the consequences for Frank.

5. The judge found that, in reliance on these assurances, Lucy acted to her detriment. Part of that detriment was her work on the farm, including long hours, low pay and few holidays. Another part was her commitment to farming at Woodrow rather than going elsewhere and setting about building a successful dairy farming business on her own account. In particular, in 2006, there was the possibility of a farming business near Taunton becoming available for rent. By that time, Lucy had three children with her partner Stuart Parker. The judge found that they did not tender for the farm because Frank persuaded them not to; on the basis that Woodrow was their future. He encouraged them to stay for the benefit not only of themselves but also their children. They did not put in a tender.

6. Stuart began helping on the farm in 1999; but kept his full-time job elsewhere. By 2006 he and Lucy were running the dairy side of the business. From 2007 he worked on the farm full time. Nevertheless, Frank and Jane remained in overall control. From 2006 onward Sarah became more involved in running the farm. She was helping with the beef cattle, which led to tensions between her and Lucy.

7. In 2008 Frank and Jane made an offer to Lucy. The offer was that there would be a new limited liability partnership to run the farm, in which Frank, Jane and Lucy would be the partners. Stuart would be taken on as an employee on a two-year trial basis; and after that they would consider bringing him into the partnership. Lucy would end up being the owner of the farm, and the live and dead stock, after her parents' deaths; although some land would be passed to Andrew, and bequests would be made to Emma and Sarah. Lucy (and Stuart) rejected the proposal. The judge found that her reasons were two-fold:

> "First she was not happy about the offer relating to Stuart. She felt her parents had gone back on what they had originally said. Second, as one of three partners in a partnership with her parents she would not have been in control and her siblings interference in the farm, via their parents, would continue."

8. The judge commented on the rejection in two parts of his judgment. At [178] he said:

> "With the benefit of hindsight, including knowledge of Mr Robinson's original advice in the letter and the later events, perhaps it would have been better if Lucy had kept her cool and tried to negotiate a better offer with a closer involvement for Stuart. But that did not happen, no doubt in part due to Lucy's temperament and attitude but also the temperament and attitude of her parents and the influence and temperament of her siblings. The offer was not presented as open to negotiation."

9. And at [212] he said:

> "… looking back from today it is probable that if [the offer] had been accepted by Lucy and if it had been implemented in full by her parents (who would have to have resisted a likely outcry from some of Lucy's siblings), the result would have led to Lucy receiving the farm in the long run as a viable dairy farm. I am sure the need to fund legacies to her sisters by

> mortgaging the farm was not intended to prejudice its long term viability."

10. Following the rejection of that offer both Lucy and Stuart continued to work on the farm. It is not suggested that any further representations were made after that rejection. But as the judge put it: "Lucy stayed at Woodrow because she hoped she would get what she expected in the long run and staying was the way to do that."

11. Frank's health deteriorated; and family tensions began to mount. Those tensions boiled over in October 2013, when there was a fight between Lucy and Sarah in the milking parlour. Lucy and Stuart resigned in the following month. At the time when they left, there were about 63 cows in the dairy herd. That number increased to 120, but milk production ceased in 2015. At the time of trial the cost of setting up a dairy unit at Woodrow (buying in stock, feed and machinery; and reinstating the milking parlour) was of the order of £400,000.

12. Frank died in 2014. Lucy began her claim by claim form on 29 June 2016. In her Particulars of Claim she set out the assurances on which she relied, and the detriment that she claimed to have suffered. She sought an order for the transfer of the farm and the assets of the farming partnership (or their value). But she pleaded in paragraph 29:

> "For the avoidance of doubt, [Lucy] is content that such order the Court should make provision for the entitlement of [Jane] to live at Woodrow farmhouse for her life, and should make adequate provision for [Jane's] reasonable needs for the remainder of her life."

13. At the time of trial Jane was 81.

The judgment

14. The judge repeated his conclusion that the assurances had been proven. As far as their meaning is concerned, the following parts of his judgment are relevant:

> "However looking at the matters as a whole and in context I find that in making these statements the idea which was intended to be conveyed to Lucy was not only the idea that the farming business would be hers in future after Frank could not run it anymore but that the farm as a piece of property itself would be passed on to her too, subject to a point below." (paragraph [99])

> "When the idea was conveyed to Lucy that the farming business and the farm itself would be hers, this did not mean that every single acre of land at Woodrow would necessarily pass to Lucy nor was it focussed on whether making some provision for Lucy's siblings was to be ruled out. And Lucy did not understand it to mean either of these things." (paragraph [100])

> "As I have said I find that her parents intended and Lucy understood that the farming business would be hers in future after Frank could not run it anymore. However the precise circumstances in which the land would be passed on to Lucy [were] not discussed. By the time her parents had died Lucy would be the owner of the farm (subject to the previous qualification about what "the farm" would consist of) but I do not believe they meant or Lucy understood that the farmland and farmhouse would necessarily be conveyed to her in their entirety during her parents' lifetime rather than, for example, Lucy working it while her parents were elderly." (paragraph [103])

> "Frank wanted Lucy to do the work not only in the sense that the work had to be done, but in the wider sense that he wanted Lucy to be committed to dairy farming at Woodrow and he wanted that commitment to continue. He intended her to understand that the reward for her commitment would be that the farm would be hers in future. Lucy understood what was meant." (paragraph [104])

15. Having repeated his conclusion that Lucy had suffered detriment in reliance on the assurances, he went on to assess the financial value of those parts of the detriment (i.e. low pay) that were capable of quantification. He found that the upper limit of Lucy's quantifiable reliance loss was £220,000.

16. Having found that the combination of the assurances and detrimental reliance established an equity on Lucy's behalf, the judge went on to consider how to satisfy it. He summarised his findings at [207]:

> "The detriment overall can be summarised as pay lower than she could have reasonably expected for her work, long hours, few holidays and the continued commitment to Woodrow. This applied for all the time she was at the farm. By 2013 Lucy had acted in this way for just under 30 years. A notable feature of this detriment is that it does not only consist in the level of pay and conditions, it also involves her commitment to farming at Woodrow rather than elsewhere. She became and is a highly skilled dairy farmer. It is hard to imagine what would have happened if Lucy had not been assured she was working to build and maintain a successful dairy farm which she would inherit, because that is a long way from what happened. The assurances had been given from more or less the start of her working life in the early 1980s and continued until 2008. If they had not been given things would have been very different. Most likely Lucy would still have learned dairy farming from her father but then she would have gone elsewhere, probably sometime in the 1990s. She probably would have sought a farming tenancy elsewhere long ago. To borrow an expression from other cases, in this case the claimant has positioned her working life based on her parents' assurances."

17. At [225] the judge asked himself whether the detriment could be fairly quantified, such that Lucy would receive full compensation for that detriment. He said that the answer to that question was "a clear no". Although part of it was quantifiable, compensation for having been committed to the farm for three decades and not building a different life elsewhere was not. Second, he asked himself whether Lucy's expectations were certain and capable of specific vindication. He held that they were. Third, the judge asked himself whether the level of Lucy's expectations was fairly derived from the assurances. He held that the answer was "yes".

18. The judge characterised the case as a "quasi-bargain" case in which Lucy had kept her side of the bargain. She did what was asked of her and that meant that it would not be equitable merely to compensate her for her quantifiable reliance losses. He considered that Lucy ought to receive compensation based on what she was promised, subject to any relevant deductions. What she was promised was a viable dairy farm at Woodrow.

19. The judge then went on to consider in more detail how the equity was to be satisfied. He took the value of Woodford farm (with the farmhouse) as £1,600,000; the value of the land at Mudford as £950,000. Thus the whole farm was worth £2,500,000. Without the farmhouse, Woodford farm was worth £1,170,000. The total cost of purchasing an equivalent farm would have been just over £3.1 million. He made allowance for land to be given to Andrew and for legacies to be given to Lucy's sisters. The land in question was Mudford. That land, he held, would not have been essential to a viable dairy operation at Woodrow, so was not necessary to give effect to Lucy's expectation. Thus, he found that the most Lucy should receive was the farm at Woodrow with the farmhouse, or its monetary equivalent. He then turned to consider whether that upper limit should be scaled down. In so doing he took into account a number of different factors:

    i) The farmhouse was Jane's home; and was also the home of Andrew and one of Sarah's sons. Lucy did not expect necessarily to inherit any property itself until after the deaths of both her parents.

    ii) Jane and Frank had offered Lucy a partnership in 2008, which Lucy had refused. The judge held that although refusal of the offer did not justify denying Lucy's claim in its entirety, it was something to be taken into account as a genuine attempt by Frank and Jane to resolve the issue of succession. I will come back to that offer in due course, because it is one of the main issues in the appeal. If Lucy had accepted the offer, or if she had stayed on the farm after 2013, dairy farming would have continued, and there would have been no need for the set up costs of £400,000.

20. Although he considered other factors, none warranted any further adjustment. Ultimately, he concluded that Lucy should receive a cash payment of the value of the Woodrow farmland and farm buildings (but excluding the farmhouse) which, on the evidence before him was £1,170,000. He had two reasons for opting for a cash payment rather than a transfer of the land itself. The first was that it would be very tax inefficient to separate the farmhouse from the farmland. That was because, if separated, the farmhouse would not benefit from agricultural relief from inheritance tax. The second was that it was undesirable to order a transfer that would "inevitably force Jane to leave her home". A cash award at least allowed for the possibility of

raising the money without having to sell the whole property. At [258] the judge put it this way:

> "The appropriate compensation is a cash payment rather than a transfer of property for two reasons. I am not satisfied it would be fair to require the farmhouse to be split from the rest of the holding. Nor am I satisfied that I should make an order for transfer which inevitably forces Jane to leave her home. It may not be possible to raise the money due without selling all the property but at least by making the award in this way it allows for the possibility."

21. Following the judgment, the judge held a further hearing to determine the terms of the order. The principal bone of contention was whether the cash payment to be made to Lucy should be deferred until Jane's death. It was argued on Jane's behalf that she did not have the resources to raise the cash sum without selling the entire farm (i.e. Woodrow, the farmhouse and Mudford). The consequence of a sale would deprive her of her home, and of reasonable financial provision for her lifetime. Lucy, on the other hand, sought a clean break and wished to farm. The judge held that the "desperately difficult situation" in which Jane found herself was of her own making. Although his judgment contemplated the possibility of the cash sum being raised without having to sell the farm, it also recognised that might not be possible. He decided, therefore, that the order should provide for the payment of the cash sum within 14 days; but that enforcement should be stayed pending the sale of the farm.

The appeal and cross-appeal

22. With my permission, Jane now appeals on four grounds:

    i) Lucy's refusal of the offer made in 2008, which would have resulted in her ultimately receiving a viable dairy farm, meant that it was not inequitable or unconscionable for Frank and Jane to resile from their earlier assurances.

    ii) In the light of that refusal, the judge was wrong in principle in treating Lucy's continued work on the farm as relevant detrimental reliance.

    iii) The judge's award was disproportionate to the detriment that Lucy suffered.

    iv) The judge was wrong to order the cash sum to be paid during Jane's lifetime.

23. Again with my permission, Lucy cross-appeals on two grounds:

    i) The judge was wrong not to take into account the detriment suffered by Lucy as a result of Stuart's work on the farm.

    ii) The judge ought not to have reduced the amount of the award to reflect the offer of 2008 or the cessation of milk production in 2015.

The approach of an appeal court

24. The exercise performed by a trial judge in deciding how an equity should be satisfied has been authoritatively described as "a wide judgmental discretion": *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 at [51].

25. Plainly, this imposes constraints on the ability of an appeal court to substitute its own decision. An appeal court can only interfere with the trial judge's exercise of discretion if (a) he has misdirected himself in law; or (b) he has taken irrelevant considerations into account; or (c) he has failed to take relevant considerations into account; or (d) his decision is outside the area of legitimate disagreement (in other words, his decision is one that no reasonable judge could have reached).

The 2008 offer and its rejection

26. Mr Wilson QC, on Jane's behalf, argued before the judge that once Lucy had rejected the 2008 offer it was no longer unconscionable for Frank and Jane to resile from their previous assurances. I think it necessary to quote a lengthy extract from the judgment to show how the judge dealt with this argument:

> "[211] In principle the offer plays a part in two ways. First a refusal by the person who would otherwise have established an equity, to accept an appropriate offer made by the owners of the property, might be such that the estoppel never arises (or if it does, it would not be inequitable for the owners to resile from it). Second and separately however, even if the circumstances are not such as to allow the owners to resile from their assurances, the circumstances may still be relevant in an overall consideration of how an equity is to be satisfied. At this stage I am concerned with the first point.
>
> [212] I have not found this aspect an easy matter to decide because looking back from today it is probable that if it had been accepted by Lucy and if it had been implemented in full by her parents (who would have to have resisted a likely outcry from some of Lucy's siblings), the result would have led to Lucy receiving the farm in the long run as a viable dairy farm. I am sure the need to fund legacies to her sisters by mortgaging the farm was not intended to prejudice its long term viability. There are two reasons I find this difficult. First although counsel for the claimant is right that the offer was not an offer of an interest in the farm then and there; as I have already held the assurances given to Lucy did not descend into the detail of whether and in what circumstances prior to Frank's and Jane's death the farm or an interest in it might be conveyed to her. In any case Lucy did not reject the offer because of the terms about property ownership.
>
> [213] Second, one of the two major reasons why Lucy rejected the offer was about Stuart's position. But Lucy's proprietary estoppel case does not establish and does not seek to establish

that Stuart was entitled to anything from Frank and Jane nor that Lucy was entitled to require Jane and Frank to give Stuart anything. Therefore Lucy's refusal on that ground was because she was not offered something which her estoppel claim cannot entitle her to demand from her parents.

[214] It seems to me that the decisive factors are the following. Lucy had been assured that the farming business would be hers in future after Frank could not run it anymore. By the time of the offer in 2008 Lucy and Stuart were in practice running the dairy farm, which was the heart of the farming business at Woodrow. Frank was 77 years old and his health was deteriorating. Really it was time for him to retire and *it was the point at which Lucy could legitimately have expected to take over.* I recognise that Frank and Jane continued to retain control after this date but it was a struggle and does not falsify the idea that in 2008 Frank ought to have retired.

[215] One of Lucy's reasons for refusing the offer was that it would make her one of three partners with her parents, whom she felt were being influenced by her siblings. *That is less than the assurance Lucy had been given about the business.* Control of the business, on the footing that Frank's age and health meant he, and inevitably therefore Jane, were retiring from the business, was not on offer. The lack of control was a real problem.

[216] No doubt part of the motivation for the offer was the need for Jane and Frank to maintain an income. Also I suppose Jane's age and health would not have prevented her from continuing in the role she had alongside someone else and therefore other possible arrangements might have been possible, perhaps a partnership between Lucy and Jane; but whether that would have been practical was never considered.

[217] Finally, the offer was consistent to a significant degree with the assurances Lucy had been given up to that point since it was put on the footing that she was going to inherit a viable dairy farm at Woodrow. *It was not put to Lucy on the basis that by refusing the offer of partnership she would forfeit that inheritance.* Whether such a term in the offer would have been effective or not does not matter because it was never put that way.

[218] I conclude that Lucy's refusal in 2008 does not entitle Jane (nor would it have entitled Frank) to resile from the assurances Lucy had been given." (Emphasis added)

27. Mr Wilson argues that the judge was wrong. If Lucy had accepted the offer, the judge's finding was that it would have resulted in her ultimately receiving a viable dairy farm at Woodrow. Having refused the offer, it cannot have been unconscionable

for Frank and Jane to have regarded themselves as no longer bound to honour their previous assurances. They could not have been expected to offer Lucy any more. Nor could they have been expected to have kept the offer open, on the off-chance that Lucy would change her mind. It is hard to see how it can be fair to Frank and Jane for Lucy to have refused the offer, and yet to be awarded that which she had previously refused. The purpose of proprietary estoppel is to remedy an equitable wrong. Once the offer had been made and refused, there was no continuing wrong. It follows, therefore, that there is no need for the intervention of equity.

28. In support of his submission, Mr Wilson relied on the well-known observations of Sir Barnes Peacock in *Lindsay Petroleum Co v Hurd* (1873-74) LR 5 PC 221, 239:

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable."

29. Reliance on the principle of laches will usually require some detrimental reliance on the delay (such as a change of position). Delay on its own is unlikely to be enough: *Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR 1764 at [64].

30. The first step in the argument is that acceptance of the offer would have satisfied any equity that had arisen by the time of the offer. Mr Blohm QC, for Lucy, challenges this. Lucy's expectation was that she would be given a viable dairy unit on the farm when Frank could no longer run it; and that the property itself would be hers after her parents' death. The 2008 offer did not offer Lucy control of a viable dairy unit: Frank and Jane were to be partners in the proposed partnership. So even if Lucy had accepted the offer, that would not have fulfilled her expectation. It follows, therefore, that the first step in Mr Wilson's argument is flawed.

31. Mr Blohm also argues that the judge was right (or at least entitled) to take into account the fact that the offer was not presented as a "take it or leave it" offer, whose refusal would result in Lucy's loss of her expected inheritance.

32. There are cases in which a claim to have raised an equity is defeated because of things that have happened since the expectation was created, and the detriment suffered. But the typical case in which that is so is a case in which the claimant has already received sufficient benefit. In *Sledmore v Dalby* (1996) 72 P & CR 196, Mr Sledmore had already enjoyed 15 years' rent-free occupation by the time that he tried to raise the equity. This court held that any equity had been satisfied. Likewise, in *Clarke v Swaby* [2007] UKPC1, [2007] 2 P & CR 2 many years of rent-free occupation of the

property in question was enough to satisfy an equity. In *Uglow v Uglow* [2004] EWCA Civ 987, [2004] WTLR 1183 the claimant's expectation of inheriting his uncle's farm was held to have been satisfied by his uncle's grant to him of a protected transmissible tenancy of it, under which the claimant had paid no rent during his uncle's lifetime. In each of these cases, however, the claimant received something in exchange for the detriment upon which his claim had been based. Here, by contrast, if the rejection of the offer is determinative Lucy would be left with nothing. In *Uglow*, the court referred to Robert Frost's poem "The Road Not Taken" as illustrative of different life choices making all the difference. But there is another line by the same poet in "Stopping by Woods on a Snowy Evening" which is pertinent to this point:

> "The woods are lovely, dark and deep,
>
> But I have promises to keep."

33. Underpinning the whole doctrine of proprietary estoppel is the idea that promises should be kept. We were not shown any case in which the rejection of an offer meant that the claimant, who had kept her side of the bargain, received nothing.

34. In my judgment the judge was entitled to conclude that the making of the offer did not amount to a complete defence to Lucy's claim. If Lucy is to be taken to have waived whatever rights she might have had by 2008, it would have been necessary for her to have known that she had such rights; and to have communicated the fact that she was giving them up. None of that happened on the facts. In addition, the judge made no finding that Frank or Jane thought that Lucy had abandoned her expectations. Subject to one point, to which I will come, on the judge's findings Frank and Jane had not changed their position in the belief that Lucy had no further claim upon them; and there was no relevant change in circumstances. It follows therefore that it would not be "practically unjust" to deny Lucy a remedy merely because she refused the 2008 offer. In addition, because the question whether an equity has been raised is a retrospective exercise undertaken from the time when the promisor goes back on the promise it is wrong to concentrate on one event only in the course of a long history of dealing. I also agree with Mr Blohm that the offer made to Lucy would not in fact have satisfied her expectation because it did not give her control of the dairy business. The judge made that express finding at [215].

35. Having rejected the argument that the refusal of the offer barred Lucy's claim entirely, the judge went on to consider what (if any) impact that refusal might have on satisfying the equity. He dealt with that as follows:

> "[254] The other factor I take into account is the refusal of the offer in March 2008 and separately Lucy's departure in 2013. As to the former, although refusing the offer does not justify denying her claim in its entirety, it seems to me that some account should be taken of it because the offer was a genuine attempt by Lucy's parents to resolve the issue of succession. Also the fact that Lucy and Stuart left in 2013 should be taken into account too. It is not possible to say who was to blame for the fight in the milking parlour but Lucy can hardly complain that dairy farming has ceased at Woodrow since she chose to leave. If Lucy had accepted the offer in 2008 or if she had

> stayed after 2013, while no doubt it would have been a struggle, there would still today have been a working dairy unit at Woodrow. In my judgment it is right to take some account of these points without attributing blame for what happened. The fair way to do so is to measure Lucy's compensation by reference only to the value of the land and farm buildings at Woodrow itself (excluding Mudford and excluding the farmhouse). That is a piece of property which is capable of being a viable dairy farm, excluding the cost of reinstating a working unit."

36. The effect of this part of the judgment was that the judge scaled down the expectation by the rough equivalent of the cost of reinstating a working dairy unit.

37. Mr Blohm argues that by 2008 Lucy had raised an equity, which should have been vindicated at that time by passing on control of the dairy unit. Accordingly, her refusal of an offer which fell short of vindicating that equity ought not to result in any reduction. The decision to stop dairy farming in 2015 was nothing to do with Lucy, and she should not be penalised by any reduction in the value of her equity in consequence of that decision.

38. In my judgment this submission in effect proceeds on the basis that the assurances that were given to Lucy were contractual. If they were contractual promises, then of course they would have to be kept. But as Hoffmann LJ pointed out in *Walton v Walton* [1994] CA Transcript No 479 (referred to in *Thorner v Major* [2009] UKHL 19, [2009] 1 WLR 776):

> "[20] But a contract, subject to the narrow doctrine of frustration, must be performed come what may. This is why Mr Jackson, who appeared for the plaintiff, has always accepted that Mrs Walton's promise could not have been intended to become a contract.
>
> [21] But none of this reasoning applies to equitable estoppel, because it does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept."

39. As he said in a preceding paragraph:

> "When it [i.e. the promise] was first made, Mrs Walton did not know what the future might hold. Anything might happen which could make it quite inappropriate for the farm to go to the plaintiff."

40. Likewise, in *Jennings* at [52], one of the factors that Robert Walker LJ said should be taken into account in satisfying the equity was:

> "… alterations in the benefactor's assets and circumstances, especially where the benefactor's assurances have been given, and the claimant's detriment has been suffered, over a long period of years."

41. So I do not consider that the question is whether Lucy should be "penalised" on account of the fact that the dairy unit had ceased to function. The Habberfields decided, no doubt for commercial reasons, that they no longer wished to run the dairy unit. Unless that decision was in some way culpable (which is not suggested) the absence of a dairy unit is simply a change of circumstance which makes it inappropriate to give full effect to Lucy's expectation.

Detriment

42. Following the rejection of the 2008 offer, Lucy stayed on the farm. The judge's factual finding was that she did so because she hoped she would get what she expected in the long run and staying was the way to do that. His finding at [207] makes it clear that reliance on the assurances made in and before 2008 continued until Lucy left the farm in 2013.

43. Mr Wilson argues that post-2008 reliance/detriment should not have been taken into account at all. The argument is that the 2008 offer was an unambiguous statement by Frank and Jane as to what they were prepared to give Lucy. No further representations were made after Lucy refused that offer; and therefore Lucy's continued work on the farm "cannot have been in reliance on any promises" made by Frank or Jane.

44. I would be prepared to accept that the 2008 offer was an unambiguous statement by Frank and Jane as to what they were prepared to give Lucy *at that time*. But, as the judge found, it was not put to Lucy on the basis that by refusing the offer she would forfeit her inheritance. In other words, it was not an unambiguous *final* offer. In those circumstances, I do not consider that the judge's finding that Lucy continued to rely on the previous assurances that she had been given is capable of being undermined in this court. Nor do I consider that there is any legal error in that finding of fact.

45. Mr Wilson also argued that, in quantifying that part of the detriment that was capable of quantification, the judge had not taken into account countervailing benefits that Lucy had received. The judge referred to these at [154]:

> "Lucy received a benefit in that Jane helped look after the children while Lucy and Stuart were working. Mr McVicar [the single joint accountancy expert] was asked what information he needed to quantify this and he gave an answer but I have not had my attention drawn to a calculation in which he attempted to quantify it. Other benefits which Mr McVicar referred to in the same appendix to his letter of 13th April 2017 are the value of the free use of Jane's car, beef cattle upkeep, Lucy and Stuart's oil tank, the Mole Valley Farmer's account and the free milk and eggs provided to Lucy and Stuart. Some of these others would also apply to the first period (1983-1999) but those were not as significant as the ones applicable in this period [i.e. 1998 to 2007]."

46. The judge did, however, consider whether these benefits should form part of his overall assessment in the very next paragraph. At [155] he said:

> "It is not possible to demonstrate numerically whether these benefits would cancel out the difference between Lucy's actual wages and what the typical remuneration for someone doing that work would have been. However given all the inherent uncertainties, to put numbers on all these things and [then] purport to add them up would fall into the familiar trap of spurious precision."

47. There are two reasons why I do not consider that this demonstrates any error on the judge's part. First, the exercise upon which he was embarked was a broad judgmental discretion. Second, his finding was that only part of the detriment was quantifiable. The main detriment that Lucy suffered was that she had "positioned her working life" on Frank and Jane's assurances. That detriment was incapable of reduction to pounds and pence: compare *Gillett v Holt* [2001] Ch 210 at 234-5. The judge so found at [225].

48. Mr Wilson next argued that in evaluating the detriment the judge had not taken account of the fact that this was not a case in which Lucy had made life-changing decisions. The main detriment was financial in nature; and the judge had been able to quantify that. Lucy had always wanted to be a dairy farmer; and had always wanted to farm at Woodrow. She had not given up any other opportunity; and when the farm at Taunton did come up for tender in 2006, Lucy and Stuart's putative bid would have been unsuccessful. But in my judgment, it is not possible to recreate an alternative life for Lucy in a world without the assurances. As Lord Walker said in *Thorner v Major* at [65]:

> "But it is unprofitable, in view of the retrospective nature of the assessment which the doctrine of proprietary estoppel requires, to speculate on what might have been."

49. Moreover, to the extent that it matters, the judge's findings at [123] were that it was the assurances that "kept her at Woodrow;" at [157] that part of the detriment was her commitment to Woodrow "rather than going elsewhere"; and at [207] that if the assurances had not been given, most likely "she would have gone elsewhere, probably sometime in the 1990s". She would have sought a farming tenancy elsewhere. I do not consider that we can go behind those findings of fact.

50. I would reject this ground of appeal.

51. For his part, Mr Blohm argued that the judge was wrong to exclude from his overall evaluation detriment suffered by Lucy as a result of Stuart's work on the farm. The argument is that although Stuart had no independent claim, the fact that he was underpaid and overworked was a detriment to Lucy. Had he been better paid and had more free time, he would have contributed more to the household both in financial terms and in terms of childcare.

52. The first difficulty that this argument faces is that the judge made no finding that Stuart's (underpaid) work on the farm had any causal relationship with the assurances

given to Lucy. The judge might have found that the reason why Stuart began to work full-time on the farm in 2007 had something to do with Frank's statement in 2006 that "Woodrow was their future". He did not, however, make that finding. The second difficulty is that what Stuart would have contributed to the household, either in cash or in childcare, is speculative. The judge made no finding that the household income fell after Stuart gave up his full-time job to work on the farm; and the judge made no finding that before he did so Stuart contributed to childcare. On the contrary, the judge's finding was that Jane looked after the children while Lucy was working. But let it be assumed that, in principle, Mr Blohm is right to say that Stuart's underpayment was a relevant detriment suffered by Lucy. The period during which he worked full time on the farm ran from 2007 to 2013. Let it be further assumed that if the judge had taken that into account, the quantified detriment, measured in financial terms, would have been double the amount that he found: i.e. £440,000 (which is unlikely to have been the case, given that Stuart's period of full time work was much shorter than Lucy's). That still falls far short of the award which the judge in fact ordered. In those circumstances I cannot see that it could have made any difference to the judge's order whether Stuart's underpayment was or was not taken into account. I would reject this ground of the cross-appeal.

Proportionality

53. The concept of proportionality necessarily entails a comparison between two things in order to decide whether one is proportionate to the other. The first question, therefore is: what is the relevant comparison? In *Sledmore* Hobhouse LJ quoted with approval the statement in an Australian case that "there must be proportionality between the remedy and the detriment which is its purpose to avoid." Aldous LJ approved that citation in *Jennings* at [28] – [29]. But the clarity of that comparison was to some extent obscured by his subsequent statement at [36] that:

> "The most essential requirement is that there must be proportionality between the expectation and the detriment."

54. At [50] Robert Walker LJ said that:

> "… if the claimant's expectations are … out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way."

55. I agree with Mr Blohm that both these statements should be read in the context of a case in which the main submission for the unsuccessful appellant was that once the equity had been established, the award should coincide with the expectation interest. Thus, the proportionality which both Aldous and Robert Walker LJJ had in mind was a comparison between the detriment and the ultimate award. That, to my mind, is supported by Robert Walker LJ's statement at [56]:

> "… I respectfully agree with the view expressed by Hobhouse LJ in *Sledmore v Dalby* that the principle of proportionality (between remedy and detriment), emphasised by Mason CJ in *Verwayen*, is relevant in England also."

56. In that passage the comparison between remedy and detriment is clear. We were taken to the decision of this court in *Suggitt v Suggitt* [2012] EWCA Civ 1140 in which Arden LJ gave the only (extempore) judgment. She referred to what Robert Walker LJ had said in *Jennings* at [50]; and said at [44]:

> "In my judgment, this principle does not mean that there has to be a relationship of proportionality between the level of detriment and the relief awarded. What Walker LJ holds in this paragraph is that if the expectations are extravagant or "out of all proportion to the detriment which the claimant has suffered", the court can and should recognise that the claimant's equity should be satisfied in another and generally more limited way. So the question is: was the relief that the judge granted "out of all proportion to the detriment" suffered?"

57. This is, with respect, a difficult passage to understand. First, it overlooks Robert Walker LJ's express endorsement at [56] of the proportionality between remedy and detriment (rather than remedy and expectation). I do not consider that Arden LJ should be taken as having disagreed with that. Second, although in the first sentence Arden LJ denied the relationship of proportionality between remedy and detriment; in the final sentence the question she posed herself raised exactly that relationship. In view of the way that Arden LJ formulated the relevant question to be posed, it seems to me that the first sentence of that paragraph cannot be taken literally.

58. In my judgment the question that Arden LJ posed at the end of that paragraph is the correct question. The relevant comparison for the purposes of proportionality is a comparison between detriment and remedy. Nevertheless, proportionality is not a question of mathematical precision. Like all cases in which the court decides how to satisfy an equity, it must exercise a judgmental discretion, and may do so in a flexible way.

59. The principal attack under this head is the disparity between the quantifiable detriment suffered by Lucy (£220,000) and the award (£1,170,000). The judge was well aware of the disparity. He said at [222]:

> "… even without looking at the figures it is obvious the quantifiable amount which Lucy would typically have been entitled to expect to have earned over the whole period will end up around £½ million and once what she did earn is subtracted, the loss will be no more than a sum of the order of £¼ million. So Lucy's quantifiable reliance loss could be a factor of ten smaller than the value of the fullest expression of her expectation."

60. But one must not lose sight of the fact that, as the judge found, the three decades of her life that Lucy spent on the farm are not susceptible of quantification.

61. To some extent, this part of the appeal raises the unsolved question: what is the objective that the court pursues in deciding how to satisfy an equity of this kind? I discussed this question in *Davies v Davies* [2016] EWCA Civ 463, [2017] 1 FLR 1286. It is not necessary to repeat that discussion. In the course of that discussion I

referred to *Jennings* in which Robert Walker LJ referred to a class of case in which the assurances and reliance had a consensual character not far short of a contract. In such a case "both the claimant's expectations and the element of detriment will have been defined with reasonable clarity." He added:

> "In a case like that the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate."

62. Accordingly, in that kind of case, subject to countervailing considerations, the court is likely to vindicate the claimant's expectations. I added at [40]:

> "Although Robert Walker LJ does not say so in terms, it is implicit that in such a case the claimant will have performed his part of the quasi-bargain."

63. That was not the case on the facts in *Davies*, as I said at [43]. Here, by contrast, on the judge's findings Lucy had performed her side of the bargain. Indeed, on one view she had more than performed it. Had her expectation been vindicated, she would have had control of the farm in 2008 (even if she would not then have owned the property outright). In fact she stayed on for another five years.

64. Mr Wilson referred us to illuminating articles by Robertson: *The reliance basis of proprietary estoppel remedies* [2008] Conv 295; and McFarlane and Sales: *Promises, detriment, and liability: lessons from proprietary estoppel* (2015) LQR 610. Professor Robertson's thesis is that the objective of the remedy in proprietary estoppel is to prevent the claimant from suffering harm as a result of her reliance on assurances. If the detriment is quantifiable in money, then a monetary award is appropriate. But typically, proprietary estoppel cases include non-pecuniary detriment. The author continues:

> "In some cases the courts have attempted to quantify non-pecuniary reliance loss and, in doing so, have failed to provide adequate protection to the claimant. In most cases, however, the courts avoid the problem of quantification by fulfilling the claimant's expectations *in specie*, and ensure by that means that the claimant does not suffer detriment. We will see that they are right to do so, because compensating reliance loss is rarely the best way to pursue the goal of protecting against harm resulting from reliance."

65. He adds:

> "Where it is not practical to fulfil the claimant's expectations *in specie*, expectation relief in monetary form provides a reliable proxy for the claimant's reliance interest, and is the best available means of ensuring that the claimant suffers no harm as a result of his or her reliance."

66. Professor McFarlane and Sir Philip Sales put the point slightly differently. They say:

> "The relief afforded to B under the promise-detriment principle is protection in respect of B's detrimental reliance, unless and until any performance he or she rendered under a reciprocal arrangement with A of which A's promise forms part amounts to substantial performance by B of the return A wished to secure by making the promise."

67. The authors continue:

> "At that point the law will generally move to protect B's expectation interest: even if the parties' bargain is not contractually enforceable, it does provide evidence that A and B, at one point at least, regarded B's promised right as a proportionate reward for B's reliance."

68. The judge in the present case read the article by McFarlane and Sales; and quoted the last of these passages. Both Mr Wilson and Mr Blohm agreed (rightly in my judgment) that there was no clear point of division between different categories of proprietary estoppel claims. There was a broad spectrum of such claims. Looking back from the moment when assurances are repudiated, the nearer the overall outcome comes to the expected reciprocal performance of requested acts in return for the assurance, the stronger will be the case for an award based on or approximating to the expectation interest created by the assurance. That does no more than to recognise party autonomy to decide for themselves what a proportionate reward would be for the contemplated detriment. As Mr Blohm put it: if you get what you asked for, you should give what you offered.

69. I regard that approach, with an appropriate degree of flexibility, as well-founded. It rests on the principle that if A and B have made a bargain, which B has kept, then in the absence of countervailing factors, it would be unethical (or, if you prefer, unconscionable) for A not to keep his side of the bargain. Accordingly, I consider that the judge was entitled to take the protection of Lucy's expectation interest as an important factor in deciding how to satisfy the equity.

70. It is, I think, generally accepted that save in the most exceptional circumstances, it cannot be equitable to award the claimant more than her expectation: *Watson v Goldsbrough* [1986] 1 EGLR 265; *Baker v Baker* (1993) 25 HLR 408; *Wormall v Wormall* [2004] EWCA Civ 1634 at [32]. But as Robert Walker LJ pointed out in *Jennings* at [49]:

> "It is no coincidence that these statements of principle refer to satisfying the equity (rather than satisfying, or vindicating, the claimant's expectations). The equity arises not from the claimant's expectations alone, but from the combination of expectations, detrimental reliance, and the unconscionableness of allowing the benefactor (or the deceased benefactor's estate) to go back on the assurances."

71. It follows that the expectation is not determinative of the relief to be granted. Accordingly, the judge was also right to consider whether that expectation interest should be scaled down.

72. The only scaling down that the judge accepted was the equivalent cost of reinstating a working dairy unit. For the reasons I have given I consider that he was entitled to do so. I have already dealt with the argument that the judge should have made a deduction to reflect countervailing benefits that Lucy received. There is no other challenge to his assessment.

Time for payment

73. At the subsequent hearing convened to deal with the precise terms of the order, the Judge accepted Jane's evidence that in order to raise the cash sum to which he held Lucy to be entitled, the whole of the farm would have to be sold. That includes both the farmhouse, where Jane and Andrew lived, and also the land at Mudford. It follows, therefore, that the judge's order will not only deprive Jane and Andrew of their home; but will also make it impossible for the land at Mudford to be allocated to Andrew in order to provide a base for his contracting and machinery business. Mr Wilson argued that this was wrong in principle; and that any financial award to Lucy should be deferred until her mother's death.

74. On the basis of the judge's findings Lucy did not have an expectation that ownership of the land would be hers before the death of both her parents. The judge was alive to both these points in his main judgment. As he said at [253]:

> "The farmhouse is Jane's home and is also the home of Andrew and of James, Sarah and William's son. While Lucy did expect to be farming Woodrow before her parents had died (once Frank was unable to do so), she did not expect necessarily to inherit any property itself until both her parents had died."

75. Since the effect of the judge's order is to provide Lucy with a sufficient sum to acquire immediately a viable dairy unit and the land on which the farming will take place, it might be said that the judge's award *exceeds* her legitimate expectation.

76. Mr Wilson also relied on the nature of the pleaded case, which recognised that any order should reflect Jane's *entitlement* to live in the farmhouse for the rest of her days. By making an order whose effect was that Jane would have to leave the farmhouse the judge had gone beyond the pleaded case. It cannot have been any part of Lucy's expectation that she would be entitled to turn her mother out of her home. In addition, a sale of the farm would give rise to a liability (as yet unquantified) to capital gains tax. Although Jane would be entitled to some relief on the farmhouse (as her principal private residence) that would not extend to the whole of the farmland. If no sale took place until after her death, there would have been an increase in the base rate for the purposes of capital gains tax; while agricultural property relief would mean that no inheritance tax was payable. It followed that the judge's order was very tax inefficient. In fashioning his award the judge expressly relied on the fact that to separate the farmhouse from the farmland was tax inefficient. That can only be because the separation would have precluded the entitlement to agricultural property relief for the purposes of inheritance tax. Thus, underlying his award was the

assumption that the property would not be sold during Jane's lifetime. That assumption would be falsified by the order that the judge in fact made.

77. Mr Wilson buttressed both these points by reference to the recent decision of this court in *Moore v Moore* [2018] EWCA Civ 2669 (decided after the judge's judgment in this case). That, too, was a case of proprietary estoppel in the context of a farming family. The claimant in that case was Stephen. Roger and Pamela were his parents. Henderson LJ set out his claim. At [17] he said:

> "I pause to emphasise the important point that Stephen understood the promises to mean that he would *inherit* Roger's interest in the farm and the farming business *upon the death of* the survivor of Roger and Pamela. It was also expressly accepted by Stephen … that his claim was subject to adequate provision being made for Pamela for the remainder of her life, should she outlive Roger." (Original emphasis)

78. The trial judge made an order for the transfer to Stephen of the land over which he claimed his interest by proprietary estoppel; subject to a licence to Pamela to remain in the farmhouse, and the provision of an income for her. This court held that the judge's order could not stand. At [91] Henderson LJ said:

> "Stephen's pleaded case was only that he would inherit his father's share of the farm and the business on the death of the survivor of his parents, and subject to reasonable provision being made for Pamela during her widowhood if Roger were the first to die. Stephen's expectation was therefore a future one, and he must objectively have realised that his eventual inheritance would have to be subject to (although it could not be defeated by) such reasonable provision as Roger might choose to make for Pamela, both before and after his death."

79. At [94] he said:

> "… the judge's approach implies that he regarded the case as one of the first type discussed in *Jennings v Rice*, that is to say one where "the assurances, and the claimant's reliance on them, have a consensual character falling not far short of an enforceable contract", and where "the court's natural response is to fulfil the claimant's expectations": see [45] and [50]. I can understand why the judge may have taken that view, because Stephen has spent his adult life working on the farm in reliance on the promises which were made to him, and has suffered a corresponding detriment. But it would in my view be a dangerous over-simplification to regard this case as a paradigm example of the first type. As I have already emphasised, Stephen's expectation has always been that he would inherit the farm on the death of the survivor of his parents, with proper provision being made for Pamela in the meantime. Thus his claim would only be a clear example of the first type if it were brought after the death of the survivor, in a situation where

> Stephen had continued to work on the farm until that date and there had been no material change in circumstances meanwhile. By the time of the trial, however, it was already abundantly clear that this was no longer a realistic scenario."

80. At [95] he said:

> "… although it was in principle open to the judge to adopt a solution which accelerated Stephen's entitlement, by directing an immediate transfer to him of all Roger's interest in the partnership land and business, it was *essential* that this acceleration should not be at the expense of the proper provision for Pamela and Roger during the remainder of their lives to which Stephen's expectation was always subject." (Emphasis added)

81. Henderson LJ also criticised the trial judge for not having taken the impact of taxation into account. That, too, was a relevant factor identified by Robert Walker LJ in *Jennings* at [52].

82. On the other side of the scale, Lucy was 51 at the date of trial. She had not had control of the dairy unit (as she had been promised) for a decade or thereabouts. She wanted to begin farming on her own account before it was too late. Without access to the cash award she would not be able to do so. Although Jane is elderly, she might live for many years. In view of the family breakdown it was also highly desirable for there to be a clean break.

83. I have found this the most troubling aspect of the appeal. In *Sledmore* Roch LJ said at 204 that the trial judge's failure was an omission to balance the needs of the appellant and the respondent. In *Jennings* Robert Walker emphasised at [48] that the court "must also do justice to the defendant". On the face of it, it seems hard that an 82-year-old woman should have to leave the house which has been her home for over 40 years.

84. In the end, however, Mr Blohm persuaded me that the order that the judge made was within his discretion. First, the judge's main judgment already acknowledged the possibility that the award might not be capable of satisfaction without selling the farm. Second, the need to sell the farmhouse (as opposed to the farmland) came about because (so it was said) buyers of the farmland would not be interested if there were no accommodation. That was contrary to the view expressed at trial by the single joint expert. On the land values accepted by the judge, the award could have been satisfied by the sale of the farmland without the farmhouse. Third, there was no computation (even a rough one) of the potential liability to capital gains tax. If this was a point to be relied on, far better evidence should have been placed before the judge. As Mr Blohm pointed out, quite apart from acquisition costs and improvement expenses (both of which were unknown), on Frank's death the value of his half share in the farm would have been rebased for the purposes of CGT. There is also the possibility of entrepreneur's relief. Fourth, although Jane expressed her concern that she might not have enough money left over to house herself and provide an income, the evidence of her solicitor, Ms Croxford, gainsaid that. Ms Croxford's evidence was that:

> "… Jane has reached the conclusion that she will have no realistic option but to sell Woodrow Farm (including the land at Mudford) as that will be the only way for her to raise the funds needed to pay Lucy, to meet the capital gains tax liability that will arise as a result of her being required to sell the farm in her lifetime, and *to have enough money left over with which to meet the shortfall in her income resulting from the farming business coming to an end (and to afford a new home to live in)*." (Emphasis added)

85. On the basis of that evidence the judge was entitled to conclude that even after the sale Jane would have enough left over both to house herself and to make up the shortfall in her income. Thus, Mr Wilson's suggestion that Jane would be "left destitute" is not founded on the evidence. Fifth, I agree with Mr Blohm that it is not legitimate for a liability for costs arising from the unsuccessful defence of a claim in proprietary estoppel to be used as a means of denying or postponing what would otherwise be the claimant's award.

86. It is true that Lucy's pleaded case acknowledged that her expectation was not such as would require her mother to leave the farmhouse. But that expectation was predicated on the continuation of a harmonious family relationship; not on the aftermath of ruinously expensive litigation, in which her claim was denied. That, I think, is what the judge must have meant by his statement that "desperately difficult situation" in which Jane found herself was of her own making.

87. The question is not whether I would have made the order that the judge made. The question is whether the order lay outside the ambit of his "wide judgmental discretion". With some reluctance, because it is a hard outcome, I have been persuaded that it did not.

Result

88. Accordingly, for these reasons I would dismiss both the appeal and the cross-appeal.

Lord Justice Moylan:

89. I agree.

Lady Justice Rose:

90. I also agree.