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Proprietary Estoppel: Undermining the Law of Succession?

BEN MCFARLANE*

1. OVERVIEW

The decision of the House of Lords in *Thorner v Major*[1] confirmed that the doctrine of proprietary estoppel may apply, and give rise to a cause of action, where a claimant (B) has acted in reliance neither on a mistaken belief as to her current legal rights,[2] nor on a representation of existing fact or law,[3] but instead on a promise made by another (A). That promise-based strand of proprietary estoppel has evolved very quickly over the last 50 or so years, and many of the cases crucial to its development, like *Thorner v Major* itself, involved an alleged testamentary promise.[4] By considering a number of specific points as to the operation of the promise-based proprietary estoppel doctrine (in Section 3),[5] this chapter examines the claim (set out in Section 2) that it undermines settled aspects of the law of succession.

The conclusion reached (in Section 4) is that the promise-based strand of proprietary estoppel does not, in itself, undermine the law of succession. On the contrary, it can instead be seen as performing a role characteristic of equitable doctrines: by preventing parties from unconscionably exploiting strict legal rules, it

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[1] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776.

[2] As in the 'classic case' (*Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR 1764 at [62] (Lord Neuberger)) of proprietary estoppel by acquiescence: see eg *The Earl of Oxford's Case* (1615) 1 Chan Rep 1, 21 ER 485; *Dann v Spurrier* (1802) 7 Ves 231, 32 ER 94.

[3] As in the case of proprietary estoppel by representation: see eg the analysis of Lord Evershed MR in *Hopgood v Brown* [1955] 1 WLR 213 (CA) 223.

[4] See eg *Re Basham* [1986] 1 WLR 1498 (Ch) and *Gillett v Holt* [2000] Ch 210 (CA).

[5] Lack of space precludes a discussion of all the concerns that may be raised as to the operation of the doctrine in the context of succession. For discussion, for example, of the application of inheritance tax rules where a proprietary estoppel is made out, see eg B McFarlane, *The Law of Proprietary Estoppel* (Oxford, Oxford University Press, 2014) [10.11]–[10.21].

supports the continued existence of those rules by ensuring that they do not become a source of palpable injustice.[6]

This does not mean, however, that there is room for complacency. The point is that, to perform this role successfully, the doctrine must be carefully limited, so that intervention occurs only when the lack of it would lead to a result which would 'shock the conscience of the court'. The risk is that the courts may take too generous a view of the requirements, or effect, of the doctrine. The particular context of succession cases decided after the death of the alleged promisor (A) may heighten this risk: a court may consider that the parties who will lose out if B's claim succeeds, as objects of the bounty of A or of the intestacy rules, would have less cause for complaint than a living promisor deprived of her property by B's proprietary estoppel claim. Similarly, where A did in fact make a will in B's favour, but destroyed it for reasons unrelated to B, a court may consider that, by permitting a proprietary estoppel claim, it will in fact give effect to A's wishes.[7] It may even be the case that a court is tempted to respond to a defect in, for example, the scope of a statutory jurisdiction such as the Inheritance (Provision for Family and Dependants) Act 1975, by distorting the requirements of proprietary estoppel.[8]

It will be argued here that this risk has eventuated in a number of succession cases, with detrimental effects upon the clarity of the principles regulating when a promise-based proprietary estoppel claim arises and the proper response to such a claim. As those principles, of course, operate beyond testamentary promises, the problem can be seen as one of decisions made in the context of succession undermining the requirements and operation of proprietary estoppel more generally. So, just as the law of succession must be supplemented by a (carefully limited)

[6] For a general discussion of this function of particular equitable rules, see eg H Smith, 'Property, Equity, and the Rule of Law' in L Austin and D Klimchuk (eds), *Private Law and the Rule of Law* (Oxford, Oxford University Press, 2014), referring to equity's ability to offer a limited 'safety valve' and thus to strengthen the force of more formal private law rules. See too M Harding, 'Equity and the Rule of Law' (2016) 132 *LQR* (forthcoming), arguing that 'equity's function of restraining unconscionable reliance on legal rights may serve the rule of law in a distinctive way, through contributing to conditions under which citizens are likely to form and maintain a disposition to engage with law'.

[7] Although note that in *Powell v Benney* [2007] EWCA Civ 1283, this temptation was (rightly) resisted: even though A had signed a piece of paper (unattested) purporting to leave property to B1 and B2, their successful proprietary estoppel claim led only to the award of a relatively small sum, which reflected the relatively small extent of the detriment suffered by B1 and B2.

[8] See the discussion in Section 3.6 below of *Wayling v Jones* (1993) 69 P & CR 170 (CA).

doctrine of promise-based proprietary estoppel, so the proper functioning of the law of proprietary estoppel depends on a satisfactory law of succession.

2. THE THESIS TO BE EXAMINED

2.1. Some Concerns

Support can certainly be found, both amongst commentators and the judiciary, for the idea that, in some cases at least, judges have been tempted to reach for the 'portable palm tree'[9] and, in permitting a proprietary estoppel claim, have elected to 'dispense discretionary justice to the parties before the court [rather] than … to apply, in a more mechanical way, the strict rules of property law and succession law'.[10] One case that has been subjected to such criticism is *Suggitt v Suggitt*.[11] A, a farmer, had made a valid will leaving his entire estate to his daughter, also expressing the wish, without imposing a trust, that the daughter should transfer the farmland to his son, B, if – in the daughter's opinion – B should 'show himself capable of working on and managing my farmland'. It was found that A had decided, before making that will, that B was not capable of running the farm: B had, for example, failed to complete his studies at agricultural college, and had previously left the farm for nine months for the bright lights of York. The Court of Appeal, however, confirmed the finding at first instance that A had promised B that the farmland, and the farmhouse on it, would unconditionally go to B on A's death; that B had 'positioned his whole life on the basis of the assurances given to him';[12] and that, notwithstanding countervailing advantages received by B, such as accommodation, B would suffer a detriment, as a result of that reliance, if no remedy were available to him. The Court of Appeal also

[9] See *Taylor v Dickens* [1988] 1 FLR 806 (Ch) 820.
[10] See J Mee, 'Proprietary Estoppel and Inheritance: Enough is Enough' (2013) 77 *Conv* 280 at 297, criticising, in particular, *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] WTLR 1607 and *Bradbury v Taylor* [2012] EWCA Civ 1208, [2013] WTLR 29. See too D Hayton, 'By-Passing Testamentary Formalities' (1987) 46 *CLJ* 215, criticising *Re Basham* [1986] 1 WLR 1498 (Ch), and M Dixon, 'Estoppel: A Panacea for All Wills' (1999) 63 *Conv* 46, defending the first instance decisions which denied proprietary estoppel claims in *Taylor v Dickens* [1988] 1 FLR 806 (Ch) and *Gillett v Holt* [1998] 3 All ER 917 (Ch) (the latter was reversed on appeal: *Gillett v Holt* (CA) (n 4 above)).
[11] *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] WTLR 1607.
[12] ibid [38], quoting from the first instance judgment.

upheld the decision that A's promises should be enforced, so that B would acquire the farmland and farmhouse, together worth 'some £3.3 million'.[13]

A case such as *Suggitt v Suggitt* can give rise to both conceptual and practical concerns. Conceptually, the essential question concerns the justification for giving at least some legal effect to an informal non-contractual promise: as discussed below,[14] this turns on identifying the requirements for, and consequences of, a successful proprietary estoppel claim. The question is raised most starkly in cases such as *Suggitt v Suggitt* and *Thorner v Major*, in which proprietary estoppel is used as a means to enforce A's promise to B[15] and thus leads to the same outcome as a contractual claim,[16] or even a valid will in favour of B.[17] Such cases, which might be seen to interfere with the 'basic and well understood feature of English law' that A has a 'right to decide, and change one's mind as to, the devolution of [A's] estate',[18] will be discussed below.[19] Practically, there may be doubts as to whether a first instance court has been sufficiently robust in applying those requirements: has 'careful, and sometimes sceptical, scrutiny'[20] been applied to the evidence as to A's promise[21] or B's reliance?[22] These two sets of concerns are of course linked: in each of *Suggitt v Suggitt* and *Thorner v Major*, for example, practical concerns as to whether a promise

[13] ibid [50].
[14] See Section 3.1 below.
[15] For the concern that the remedy awarded in *Suggitt v Suggitt* was excessive, see eg Mee (n 10 above) 283–87; for the same doubt as to *Thorner v Major* (HL) (n 1 above), see eg J Mee, 'The Limits of Proprietary Estoppel: *Thorner v Major*' (2009) 21 *Child and Family Law Quarterly* 367 at 381–82.
[16] See eg M Davey, 'Testamentary Promises' (1988) 8 *Legal Studies* 92 at 110 for the criticism that proprietary estoppel may be used to give binding effect to a non-contractual promise.
[17] For example, the earliest modern case applying proprietary estoppel to a testamentary promise, *Re Basham* [1986] 1 WLR 1498 (Ch), was criticised for allowing an informal promise to determine, in practice, the devolution of part of A's estate by D Hayton, 'By-Passing Testamentary Formalities' (1987) 46 *CLJ* 215.
[18] See *Gillett v Holt* (Ch) (n 10 above) 930 (Carnwath J), in a judgment overturned on appeal: *Gillett v Holt* (CA) (n 4 above).
[19] See Section 3.4 below.
[20] The phrase used by Lord Walker in *Thorner v Major* (HL) (n 1 above) [60]. See too *Creasey v Sole* [2013] EWHC 1410 (Ch), [2013] WTLR 931 at [105].
[21] See Section 3.3 below.
[22] See Section 3.6 below.

by A could be found[23] are linked to a conceptual question as to the certainty required of such a promise.[24]

Such concerns may also be magnified in the context of succession. First, as A's death will often seem, not least to A, to be some way in the future, A may be willing to make general assurances as to the disposition of her property on death, even if those promises are not seriously intended as capable of being relied on by B. This tendency is encouraged both by the fact that any problems created by the honouring or breaking of such a promise may not arise until after A's death and by the point noted by Robert Walker LJ in *Gillett v Holt*: 'it is notorious that some elderly persons of means derive enjoyment from the possession of testamentary power, and from dropping hints as to their intentions, without any question of an estoppel arising'.[25] Secondly, the assumed remoteness of A's death may also make it more likely that A's promise is to be subject to implied but ill-defined qualifications, that the property to which it relates will not be specified,[26] and that the parties' circumstances may change significantly before the time when performance of the promise is due.[27]

2.2. Two Comparisons

Two comparisons, one contemporary and one historic, may also lend some support to criticisms of proprietary estoppel. First, the Court of Appeal has recently sought to restrict the doctrine of *donatio mortis causa*,[28] preferring to emphasise the importance

[23] In *Suggitt v Suggitt* [2011] EWHC 903 (Ch), [2011] 2 FLR 875, for example, the first instance judge, whilst finding in favour of B, noted that the evidence as to A's alleged assurances was 'opaque to say the least' and that B was not a 'very reliable witness'. In *Thorner v Major* [2008] EWCA Civ 732, [2008] 2 FCR 435, the Court of Appeal held that the evidence did not support the finding of a promise and, whilst the House of Lords restored the contrary finding at first instance, it was noted that A's remarks were 'oblique': see eg *Thorner v Major* (HL) (n 1 above) [2], [24], [50] and [80].

[24] In *Suggitt v Suggitt* (n 11 above), for example, there was a question as to whether A's assurances related to the farmhouse as well as the farmland; in *Thorner v Major* (n 1 above), there was a question as to whether a promise to leave the 'farm' to B was sufficiently clear to give rise to a claim. In each case, the question was resolved in favour of B.

[25] *Gillett v Holt* (CA) (n 4 above) 228.

[26] There is also a particular problem as to whether a claim can be based on A's promise to leave B the whole of (or a specified proportion of) A's estate, or of A's residuary estate: see Section 3.2 below.

[27] Indeed, in *Thorner v Major* (HL) (n 1 above), Lord Scott at [19]–[20] thought those problems to be so acute that proprietary estoppel should be inapplicable to such promises and would have preferred to base a decision in B's favour on the finding of a remedial constructive trust.

[28] *King v Chiltern Dog Rescue* [2015] EWCA Civ 581, [2015] WTLR 1225, especially [54] (Jackson LJ): 'it is important to keep DMC within its proper bounds. The court should resist the temptation to extend the doctrine to an ever wider range of situations'. The specific restriction applied by the Court of Appeal to reverse the first instance finding of a *donatio mortis causa* was that the purported gift in question had not been made in contemplation of impending death.

of testamentary formality provisions 'intended to provide protection for the testator and his estate against abuse'[29] and noting that the doctrine 'paves the way for all of the abuses which those [statutory formality rules] are intended to prevent'.[30] The analogy between the doctrines of *donatio mortis causa* and proprietary estoppel is far from exact; nonetheless, a concern behind allowing post mortem claims based on an alleged oral statement of the deceased applies equally to the two doctrines.[31]

Secondly, a comparison can be made between proprietary estoppel and the defunct equitable doctrine of 'making representations good'.[32] The facts of *Loffus v Maw*,[33] for example, if repeated today, might well lead to a proprietary estoppel claim: A persuaded B to continue as his live-in carer by promising to give her, in his will, the right to take, for her life, the rents and profits on two of A's properties, and B continued to care for A until A's death three years later.[34] A's will did not give B the promised right, but the Court of Chancery held that, as B had acted on a representation made by A with the purpose of influencing B's conduct, A was, at the time of his death, obliged to make that representation good. The decision in *Loffus v Maw* was, however, one of the final examples of the doctrine's application, as it was pushed out of the law by the hardening of the classical doctrine of consideration,[35] and the re-assertion of earlier authority[36] establishing the (surely correct) point that the law of estoppel by representation 'is applicable only to representations as to some state of facts alleged to be at the time actually in existence'[37] and so cannot apply to a promise to leave property to another. The fate of the doctrine of making representations good raises a key question: might a decision such as that in *Thorner v Major* one day be regarded, like that in *Loffus v Maw*, as the high-water mark of an

[29] *King v Chiltern Dog Rescue* (n 28 above) [90] (Patten LJ).
[30] ibid [51] (Jackson LJ).
[31] In *Davies v Davies* [2015] EWHC 1384 (Ch), for example, in which a proprietary estoppel claim succeeded, it was noted at [9] that: 'It is easy to assert such oral promises when the person making the promises has passed away, when the only other witness is elderly and not available to give oral evidence, where there is little contemporaneous documentation and none that directly refers to such promises'.
[32] For full discussion of that doctrine and its demise, see eg F Dawson, 'Making Representations Good' (1982) 1 *Canterbury Law Review* 329; P Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney, Law Book Co Ltd, 1985); and P Matthews, 'The Words Which Are Not There: A Partial History of the Constructive Trust' in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart Publishing, 2009) 25–44.
[33] *Loffus v Maw* (1862) 3 Giff 592, 66 ER 544 (Ch).
[34] A close modern parallel in which a proprietary estoppel claim succeeded might be eg *Ottey v Grundy* [2003] EWCA Civ 1176, [2003] WTLR 1253.
[35] See eg *Maddison v Alderson* (1883) 8 App Cas 467 (HL).
[36] See eg *Jorden v Money* (1854) 5 HLC 185 (PC).
[37] *Maddison v Alderson* (n 35 above) 473 (Earl of Selborne LC).

ultimately unjustifiable equitable intrusion onto the solid territory of common law principles?

3. SPECIFIC CONCERNS

3.1. Giving Effect to Non-Contractual Testamentary Promises

At a conceptual level, there is no inconsistency between the operation of proprietary estoppel and the formality requirements for a valid testamentary disposition.[38] In a case such as *Suggitt v Suggitt*, for example, whilst B's successful claim could be seen as placing B in the same practical position as if A had indeed left the farmland and farmhouse to B, B did not arrive there as a result of A's having exercised a power to dispose of his property on death. Proprietary estoppel operated to impose a liability on A, arising during A's life,[39] and did not depend on any actual or assumed testamentary transfer.

This is why the concerns about the *donatio mortis causa* doctrine, noted above,[40] do not arise in the same way in connection with proprietary estoppel. The former doctrine runs the risk of undermining formal testamentary requirements, as it gives effect to a disposition of property taking effect on death and revocable until then; the latter instead recognises a liability imposed on A before A's death and which cannot simply be revoked by A. The point can also be seen by comparing the position in relation to an *inter vivos* transfer of land. It cannot plausibly be argued that a promise-based proprietary estoppel claim is subject to section 53(1)(a) of the Law of Property Act 1925, which regulates A's power to create or dispose of an interest in land.[41] It has similarly been accepted, for example, that formal requirements imposed by s 53(1)(c) of the 1925 Act for the disposition of a subsisting equitable interest do not apply to a contract to make such a disposition.[42]

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[38] See Wills Act 1837 (c 26 7 Will IV & 1 Vict), s 9.
[39] See eg *Gillett v Holt* (CA) (n 4 above): the parties' relationship broke down during A's lifetime, and a proprietary estoppel claim, based on A's testamentary promise, was available to B. For a more general discussion of the point at which a liability arises through proprietary estoppel, see eg B McFarlane, 'Proprietary Estoppel and Third Parties after the Land Registration Act 2002' (2003) 62 *CLJ* 661.
[40] See Section 2.2 above.
[41] See *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] WTLR 345 at [35].
[42] See eg *Neville v Wilson* [1997] Ch 144 (CA).

It may thus be argued that the suggestion of proprietary estoppel's undermining the law of succession in fact adds nothing to the broader argument that the promise-based strand of the doctrine undermines the law of contract.[43] It is therefore useful to see how that broader argument may be rebutted. There is a question, for example, as to the relevance of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 to promise-based proprietary estoppel claims: it has been judicially suggested[44] that the statute operates to render an *agreement* for the sale or other disposition of an interest in land void, and so can prevent a non-conforming promise from having *any* effect. The wording of the statute, however, makes clear that it applies only to deny *contractual* effect,[45] and the better view is that 'the fact that, if there was a contract it would be void is irrelevant: indeed, the very reason for mounting the proprietary estoppel claim is that there is no enforceable contract'.[46]

The crucial conceptual question, then, is whether proprietary estoppel is sufficiently distinct, in its requirements and operation, from contract law. In this connection it is helpful to consider the influential, but unreported, judgment of Hoffmann LJ in *Walton v Walton*,[47] which involved a testamentary promise. As in *Suggitt v Suggitt* and *Thorner v Major*, B had, over many years, worked for low pay and long hours on the farm of A, a relative. When B had complained as to his pay, the stock phrase of A, B's mother, was that 'You can't have more money and a farm one day'. The first instance judge found against B on the basis that, although promises had been made to B, they had not been intended by A to create a legal obligation, nor had they been treated as such by B. Hoffmann LJ accepted these findings of fact, and also, of course, that 'an intention to bring into existence an immediately binding contract' is a requirement of a contractual claim. A's promise was likely to have been subject to

[43] This assumes that contracts to make testamentary dispositions do not raise any special conceptual concerns distinct from those of contract law in general: that seems to be the case, in England at least. For discussion see A Braun, 'Formal and Informal Testamentary Promises: A Historical and Comparative Perspective' (2012) 76 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 994.

[44] *Cobbe v Yeoman's Row* [2008] UKHL 55, [2008] 1 WLR 1752 at [29] (Lord Scott). This expressly obiter view was considered, and rejected, by Bean J in *Whittaker v Kinnear* [2011] EWHC 1479 (QB).

[45] See too Law Commission, *Transfer of Land – Formalities for Contracts for Sale Etc of Land* (Law Com No 164, 1985) para 5.2.

[46] Lord Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' (2009) 68 *CLJ* 537 at 546.

[47] *Walton v Walton* (CA, 14 April 1994). See further B McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in J Pila and P Davies (eds), *The Jurisprudence of Lord Hoffmann* (Oxford, Hart Publishing, 2015).

'unspoken and ill-defined qualifications', and so it could not have been reasonable for B to believe that A had intended to enter into a contract which 'subject to the narrow doctrine of frustration, must be performed come what may'. This uncertainty did not, however, prevent a claim based on proprietary estoppel, as, in contrast to contract law, the principle applied

> 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.

Thus conceived, proprietary estoppel performs a different role to that of contract law, and no inconsistency is caused by its availability even where a contractual claim would fail.

The analysis of Hoffmann LJ in *Walton v Walton* was relied on by Lord Walker and Lord Neuberger in *Thorner v Major*,[48] and it plays a crucial role in addressing the concerns expressed in the same case by Lord Scott.[49] The 'backwards-looking' nature of proprietary estoppel requires a court to ask, at any given point,[50] whether it would be unconscionable for A to leave B to suffer a detriment as a result of B's reasonable reliance on A's promise. The doctrine does not impose an immediately binding duty on A to perform the promise, and so a relevant change in circumstances can be taken into account when applying that test.[51] The point here is not that B can succeed in a proprietary estoppel claim simply by showing that A's actual or threatened behaviour is unconscionable in a general sense.[52] Nor is it that a court can exploit the vagueness of unconscionability in order arbitrarily to reject B's claim even in a case where B has established the core elements of promise, reliance, and the prospect of detriment. It is rather that the broader notion of unconscionability can operate, as suggested by Lord Walker in *Cobbe v Yeoman's Row*,[53] as a form of

[48] *Thorner v Major* (HL) (n 1 above) [56]–[57], [62] and [101].
[49] See n 27 above.
[50] Where, for example, property was transferred by A to C, and B wishes to make a claim against C, the court needs to establish whether B had any rights in that property at the time of the transfer to C.
[51] This flexibility may offer an important advantage over, for example, the approach in German law, under which a contract to make a testamentary disposition is invalid (§ 2302 BGB), but a binding testamentary disposition can be made by means of an inheritance contract in notarised form (§§ 2274 ff BGB, especially § 2276).
[52] As rightly noted by Lord Scott in *Cobbe v Yeoman's Row* (HL) (n 44 above) [16]: 'unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present'.
[53] *Cobbe v Yeoman's Row* (HL) (n 44 above) [92]: 'If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again'.

check on A's liability and can thus provide a means by which a court can develop specific rules to address two key issues: first, when is a change of circumstances significant enough to have an effect;[54] and secondly, how should the effect of such circumstances be determined? The doctrine thus has the principled flexibility necessary to deal with the concerns raised by a testamentary promise intended to benefit B only many years after having been made by A.

This view of promise-based proprietary estoppel may be seen as linked to its function of supporting, rather than competing with, contract law and rules relating to the disposition of property. Whereas the latter two sets of rules can be seen as concerned with the exercise by A of a power, proprietary estoppel can play the secondary, and more limited role, of protecting parties from risks caused by the existence of that power. Whilst it is possible for Lord Walker's 'elderly persons of means'[55] to enjoy their testamentary power by dropping hints as to its exercise, proprietary estoppel recognises that there comes a point when an equitable line is crossed and the nature of A's conduct, and B's reliance on it, means that A comes under a liability to B. The possibility of such a liability not only reduces the risk of A's abuse of that power; it may also, somewhat paradoxically, assist A. It has been argued that, in a commercial context, it is useful to A to have the ability to make a form of pre-contractual commitment which, whilst not immediately binding, does have some legal effect:[56] by doing so, A can, for example, encourage B to undertake preparatory work which may well be of benefit to both parties. It could similarly be said that, if the law gives protection in at least some cases where B acts in reliance on a testamentary promise of A, it can benefit A by reinforcing B's motivation for acting in particular ways often requested by A. On this view, the existence of promise-based proprietary estoppel, far from undermining the law of succession, can be seen as a useful corollary to A's testamentary power. Perhaps more importantly, the existence

[54] In *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch), [2004] Ch 142 at [201], for example, Neuberger J invoked the notion of unconscionability in explaining why events occurring after B's reliance may be taken into account in determining if an estoppel by convention has been established: 'Estoppel is a doctrine designed to do justice, and, at least normally, it seems scarcely consistent with doing justice to ignore facts, which have occurred since the date upon which an action was taken in reliance upon the estoppel, and which may well impinge significantly, or even determinatively, on the issue of unconscionability'.

[55] See *Gillett v Holt* (CA) (n 4 above), 228.

[56] See B McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 10 *Oxford University Commonwealth Law Journal* 95, drawing on eg A Schwartz and R Scott, 'Precontractual Liability and Preliminary Agreements' (2007) 120 *Harvard Law Review* 661.

of the equitable doctrine can help to support the strictness of the rules relating to testamentary dispositions, or to contracts to dispose of interests in land, by ensuring that such rules do not work a particular form of injustice upon B.

3.2. Promises in Relation to A's Estate or Residuary Estate

Even if it is accepted that it is not illegitimate to give effect to at least some non-contractual testamentary promises, a specific question arises as to whether a proprietary estoppel claim can be based on a promise that relates not to specific, identified property of A, but instead to all or part of A's residuary estate. Such a claim is supported by *Re Basham*,[57] but some doubt was cast on that decision by Lord Walker in *Thorner v Major*[58] and it has also been judicially described as 'mark[ing] the widest boundary of the application of the doctrine of proprietary estoppel thus far in [England] (and, so far as I have been able to ascertain, in any other common law jurisdiction)'.[59]

The resolution of this question turns on whether there is anything in the conceptual nature of a promise-based proprietary estoppel claim that prevents its application to such a promise. For example, Lord Walker's doubts as to the correctness of *Re Basham* are based on the judge's use in that case of authorities on mutual wills:[60] the implication then is that there is a relevant conceptual difference between the two doctrines which explains why a proprietary estoppel claim cannot be based on such a promise. Certainly, Lord Walker's discussion of the point is linked to his view that:[61]

> it is a necessary element of proprietary estoppel that the assurances given to the claimant (expressly or impliedly, or, in standing-by cases, tacitly) should relate to identified property owned (or, perhaps, about to be owned) by the defendant … It is the relation to identified land of the defendant that has enabled proprietary estoppel to develop as a sword, and not merely as a shield.

This raises a fundamental question as to the nature and scope of the principle underlying the promise-based strand of proprietary estoppel. As has been pointed out

[57] *Re Basham* [1986] 1 WLR 1498 (Ch).
[58] *Thorner v Major* (HL) (n 1 above) [63].
[59] *Macdonald v Frost* [2009] EWHC 2276 (Ch), [2009] WTLR 1815 at [13] (Geraldine Andrews QC).
[60] *Thorner v Major* (HL) (n 1 above) [63]. See too D Hayton 'By-Passing Testamentary Formalities' (1987) 46 *CLJ* 215. For discussion of mutual wills, see Ying Khai Liew's contribution in Chapter 5 of the present volume.
[61] *Thorner v Major* (HL) (n 1 above) [61].

by commentators,[62] and judges in other jurisdictions,[63] it is difficult to see why the underlying notion of unconscionability should be triggered only where the detriment incurred by B arises as a result of reliance on a promise relating to A's property, as opposed to any other seriously intended promise. Lord Walker's suggested distinction is an even finer one, however, as it depends on the difference between identified property and A's general property. The difficulty with the suggestion is that it derives from the analysis of Lord Denning MR in *Moorgate Mercantile Co Ltd v Twitchings* that the effect of an estoppel on an owner of property may be that 'his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein'.[64] Lord Denning's analysis, however, relates to the general doctrine of estoppel by representation, and merely depends on the fact that, if B can use such an estoppel to prevent A from asserting A's title to goods,[65] this may allow B, by relying on his or her own possessory title, to have a practically secure title to such goods.[66] The promise-based principle given effect to in a case such as *Thorner v Major*, however, is not subject to any such inherent limit: it does not operate simply to preclude A from denying A's title to goods, but can instead impose a liability on A.

The question then is whether there is any reason why such a liability can arise only if A's promise relates to specifically identified property. One concern is that if A's promise relates simply to her estate or residuary estate, it may be that A has reserved a power unilaterally to reduce the extent or the value of the rights to be acquired by B, and so has qualified the promise in such a way that it cannot be reasonably understood by B as seriously intended by A as capable of being relied on. In such a case, A's promise is 'likely to be regarded as too vague and imprecise'[67] to give rise to a proprietary estoppel claim. That result arises, however, by simply

[62] See eg D Jackson, 'Estoppel as a Sword' (1965) 81 *LQR* 223 at 241–42; D Nolan, 'Following in their Footsteps: Equitable Estoppel in Australia and the United States' (2000) 11 *King's College Law Journal* 202; B McFarlane and P Sales, 'Promises, Liability, and Detriment: Lessons from Proprietary Estoppel' (2015) 131 *LQR* 610.
[63] See eg *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (HCA).
[64] *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 (CA) 242, relied on by Lord Denning MR in *Crabb v Arun District Council* [1976] Ch 179 (CA) 187 (decided in the brief period before the Court of Appeal's decision in *Moorgate* was overturned in the House of Lords), which was in turn relied on by Lord Walker in *Thorner v Major* (HL) (n 1 above) [61].
[65] As was the case in eg *Pickard v Sears* (1837) 6 A & E 469, 112 ER 179.
[66] Lord Denning MR's analysis also drew on ostensible authority, which is again clearly distinct from promise-based proprietary estoppel and, as noted by Devlin J in *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600 (CA) 607–11, may also differ from estoppel by representation.
[67] *Macdonald v Frost* (n 59 above) [20].

applying the general requirements of proprietary estoppel and so does not require any specific rule as to testamentary promises. A second possible concern is as to A's position in the period after B's claim arises (ie after B has relied in such a way as to raise the prospect of detriment) and before A's death: can A, for example, make a substantial contribution to charity? That concern can, however, be met without denying that A is under any liability to B. It has been accepted, for example, that A may make a valid contractual promise to leave B a share of A's estate.[68] Whilst Lord Walker in *Thorner v Major* described mutual wills as a 'special case',[69] it does prove that a way can be found to deal with A's position when subject to a liability that will crystallise only on A's death.[70] Indeed, as Lord Neuberger noted in *Thorner v Major*,[71] a further parallel can be drawn with the position of a debtor who has created a floating charge. It is therefore suggested that, Lord Walker's concerns notwithstanding, there is no reason for adopting a general rule that a proprietary estoppel claim can never arise from a promise to leave B all or a specified part of A's residuary estate.

3.3. Establishing the Required Promise

A key objection to the outcome in a case such as *Suggitt v Suggitt* or *Thorner v Major* is that there was, on the facts, insufficient evidence from which a court could find that A had made a testamentary promise that B could reasonably understand as seriously intended by A as capable of being relied on by B. A linked objection is that it may be very difficult to predict whether, on the facts of any particular case, a court will find that such a promise was made. Doubts as to whether or not the required promise will be found can of course delay the administration of an estate, and give personal representatives an incentive to reach a settlement when a possibly dubious proprietary estoppel claim is made.[72] This uncertainty may be evidenced by the Court of Appeal's

[68] See eg *Schaefer v Schumann* [1972] AC 572 (PC) 586 (Lord Cross) and 599 (Lord Simon).
[69] *Thorner v Major* (HL) (n 1 above) [63].
[70] *cf* the discussion of this point in Sections 4.1 and 4.2 of Ying Khai Liew's contribution in Chapter 5 of this volume.
[71] *Thorner v Major* (HL) (n 1 above) [95]. An analogy may also be drawn to the 'ambulatory' nature of the common intention constructive trust (see *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 at [62]) and to the trust recognised in *Re Lehman Bros International Europe (in administration)* [2011] EWCA Civ 1544, [2012] 2 BCLC 151.
[72] For the concern that lack of clarity as to the application of proprietary estoppel will give rise to bitter and expensive litigation, see eg S Nield, 'If You Look After Me, I Will Leave You My Estate: The Enforcement of Testamentary Promises in England and New Zealand' (2000) 20 *Legal Studies* 85 at

decision in *Cook v Thomas*.[73] It was accepted that the words used by A when discussing with B the fate of A's property on A's death were 'virtually identical' to those used in *Gillett v Holt*:[74] they were that A's farm was 'all going to be yours when I am gone' (or were substantially along those lines).[75] In *Cook v Thomas*, the Court of Appeal, whilst noting the 'coincidence between the words used',[76] distinguished *Gillett v Holt* and dismissed B's appeal against the finding at first instance that the required promise had not been made.

The objection that the courts are too liberal in finding a required promise may seem to be particularly relevant when considering the decision in *Bradbury v Taylor*.[77] The Court of Appeal[78] refused to interfere with the finding of the first instance judge that a promise had been made by A to leave his house to B1 and B2, and that B1 and B2 had relied on that promise by moving from Sheffield to live with A in Cornwall. That finding had been made even though the judge had inclined to the view that A had sent a letter to B1 and B2, setting out 'the terms of my offer to you to live here', which made no mention of the position after A's death and stated that 'there will be no contract, as this is a friendly arrangement'.

The result in *Bradbury v Taylor* may seem inconsistent with Lord Walker's exhortation to subject the evidence to 'careful, and sometimes sceptical, scrutiny':[79] this is of course particularly important in a case where A's death denies the court a first-hand account from the alleged promisor.[80] Whilst *Bradbury v Taylor* is, no doubt, a borderline case, it is possible to defend the Court of Appeal's approach in that case. The letter must be interpreted against the wider factual context of the parties' dealings. B1 and B2 had been reluctant to move away from their extended family in Sheffield, and to change the school of their elder child, and the judge had

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103; B McFarlane, 'Proprietary Estoppel and Third Parties after the Land Registration Act 2002' (2003) 62 *CLJ* 661 at 686; Mee (n 10 above) 296–97.

[73] *Cook v Thomas* [2010] EWCA Civ 227 at [76].

[74] *Gillett v Holt* (CA) (n 4 above).

[75] *Cook v Thomas* (n 73 above) [72].

[76] ibid [76].

[77] *Bradbury v Taylor* [2012] EWCA Civ 1208, [2013] WTLR 29. For criticism of the finding of the required promise in this case, see Mee (n 10 above) 286–91.

[78] The leading judgment was given by Lloyd LJ and, as Mee (n 10 above) at 294 notes, 'Lloyd LJ may have been made more cautious by his experience in *Thorner*, when his judgment in the Court of Appeal, reversing the trial judge's decision, did not appear to be very well received in the House of Lords'.

[79] *Thorner v Major* (HL) (n 1 above) [60].

[80] See too *Davies v Davies* (n 31 above) [9].

accepted their argument that A had 'wished to do enough to entice them'[81] to move, and that they had sought assurances from A before the letter was sent. As Lord Walker noted in *Thorner v Major*,[82] the three requirements of assurance, reliance, and detriment are often closely related, and an alleged promise will be easier to find if B, as in *Bradbury v Taylor*, embarked on a course of conduct which, in the absence of any promise from A, would be difficult to explain.[83]

This point may also be useful in explaining the apparent inconsistency between *Gillett v Holt*[84] and *Cook v Thomas*.[85] As Lord Neuberger noted in *Thorner v Major*:[86]

> Just as a sentence can have one meaning in one context and a very different meaning in another context, so can a sentence which would be ambiguous or unclear in one context, be a clear and unambiguous assurance in another context.

In *Gillett v Holt*, A's statements were found to be more than merely representations of A's current testamentary intention, because – like the assurances made in *Walton v Walton* – they were made when B raised concerns as to the future security of himself and his wife and could reasonably be understood as intended to be relied on, as they were used to dissuade B from pursuing opportunities elsewhere. More generally, as B had worked on A's farm for over 30 years, the extent of B's commitment to A was such as to suggest that A had assumed an obligation to B.[87] In contrast, in *Cook v Thomas*, B could not point to any substantial action that B would not have undertaken but for a promise by A. Lloyd LJ, for example, noted that an alleged promise by A in fact 'made no immediate difference to the position between the parties' whereas a commitment to leave A's property to B would have been a 'turning point in their relationship, after which everything would be seen differently'.[88]

Whilst recognising that, as in *Thorner v Major*, a promise may be implied from indirect statements and conduct,[89] the succession cases have generally

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[81] Cited by Lloyd LJ: *Bradbury v Taylor* (n 77 above) [25].
[82] *Thorner v Major* (HL) (n 1 above) [29].
[83] For cases demonstrating this point outside the succession context, see eg *Eves v Eves* [1975] 1 WLR 1338 (CA); *Lloyd v Dugdale* [2001] EWCA Civ 1754, [2002] 2 P & CR 13.
[84] *Gillett v Holt* (CA) (n 4 above).
[85] *Cook v Thomas* (n 73 above).
[86] *Thorner v Major* (HL) (n 1) [84].
[87] See too *Davies v Davies* (n 31 above) [44]. In that case, the evidence of independent witnesses (not members of the family concerned) in support of promises having been made was also given particular weight: see at [18] and [21].
[88] *Cook v Thomas* (n 73 above) [79].
[89] This point has also been recognised outside the context of succession, as in eg *Bradley v Heslin* [2014] EWHC 3267 (Ch) [60], where it was acknowledged that a promise may be found as 'a matter of implication and inference from indirect statements and conduct'.

emphasised the need for A to have made a promise or, synonymously, an assurance or commitment.[90] This is significant, as courts have often stated that it suffices if A has simply *encouraged* a particular belief of B.[91] It is doubtful, however, that mere encouragement should suffice in a case where B has relied on a belief as to A's future conduct,[92] and the succession cases may therefore provide a valuable lesson for the wider law of proprietary estoppel.

3.4. Enforcing Non-Contractual Testamentary Promises

In cases such as *Suggitt v Suggitt* and *Thorner v Major*, the perception of a conflict between proprietary estoppel and the law of succession is strengthened by the fact that the effect of the former can be seen as equivalent to the writing, or rewriting, of a will, so as to dispose of particular property to B. An equivalence of outcomes, in any particular case, does not of course mean that any two doctrines necessarily overlap conceptually.[93] The distinction between the requirements of promise-based proprietary estoppel and of the law of contract nonetheless demands that a different approach be taken when determining the extent of the right acquired under either doctrine. In *Walton v Walton*, for example, Hoffmann LJ emphasised that in proprietary estoppel, '[t]he choice of remedy is flexible' and noted that, whilst a court might require A's promise to be kept, it might instead 'order [A] to pay compensation for the expense which has been incurred'. The variety of relief across particular cases cannot be explained simply as depending on the different content of A's promise, or on the practical difficulties in some cases of enforcing such a promise.[94] The point is rather the conceptual one that the doctrine of proprietary estoppel, unlike contract law, does not operate to impose a duty on A to put B in the position that B would have been in had A's promise been performed. It can instead be seen as imposing a basic liability on A to ensure that B suffers no detriment as a result of B's reasonable

[90] See eg *Thorner v Major* (HL) (n 1 above) [2] (Lord Hoffmann): 'Such a claim, under the principle known as proprietary estoppel, requires the claimant to prove a promise or assurance'.
[91] For a recent example, see *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 782.
[92] After all, in *Cobbe v Yeoman's Row*, it was found at first instance ([2005] EWHC 266 (Ch) [123]) that A had encouraged B to believe that the property would be sold to him, yet the House of Lords found that no proprietary estoppel arose.
[93] For example, a contractual claim based on a promise to repay a sum may have the same outcome as an unjust enrichment claim, but the two claims are clearly distinct.
[94] See eg *Ottey v Grundy* (n 34 above) for an example where A's promise was not enforced, even though it was very clear in its terms and there were no practical difficulties in its enforcement.

reliance on A's promise,[95] although it seems that A's liability should be reduced where A can show that, on the particular facts of the case, it would not be unconscionable for A to leave B to suffer some detriment.[96]

The results in *Suggitt v Suggitt* and *Thorner v Major* notwithstanding, this difference in approach can also be seen in relation to testamentary promises. Two key cases[97] are *Jennings v Rice*[98] and *Henry v Henry*.[99] In the former, the Court of Appeal confirmed an order that A's administrators should pay B £200,000 from A's estate, even though B's claim was based on a promise of property worth (at least) £435,000. The Court of Appeal recognised that the extent of B's net detriment was crucial in assessing the extent of B's right: as Aldous LJ pointed out, it would be absurd if B were awarded the same sum even if B 'had been left £5 or £50,000 or £200,000 in [A's] will, or [A] had died one month, one year or twenty years after making the representation relied on'.[100] In *Henry v Henry*, the Privy Council similarly rejected the view, taken by the Court of Appeal of the Eastern Caribbean Supreme Court, that 'there is no power in the court to say that the promise (and the resulting benefit) is disproportionate to the detriment'. That statement was said to betray a 'fundamental misconception as to the nature and purpose of the doctrine of proprietary estoppel … Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application'.[101]

The language of proportionality has played an important role in emphasising that the promise-based strand of proprietary estoppel need not involve the enforcement of A's promise, but it is insufficiently precise. Parts of the judgments in *Jennings v Rice*, for example, can be seen as demanding that the extent of B's right be proportionate to each of B's expectation and B's detriment:[102] and such a test cannot possibly lead to predictable results. There is also uncertainty as to whether proportionality has a positive or merely a negative role. In *Suggitt v Suggitt*, for

[95] See B McFarlane, *The Law of Proprietary Estoppel* (Oxford, Oxford University Press, 2014) [7.35]–[7.69].
[96] See eg *McGuane v Welch* [2008] EWCA Civ 785, [2008] 2 P & CR 24; *Uglow v Uglow* [2004] EWCA Civ 987, [2004] WTLR 1183.
[97] See too *Ottey v Grundy* (n 34 above) and *Powell v Benney* (n 7 above).
[98] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8.
[99] *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988.
[100] *Jennings v Rice* (n 98 above) [16].
[101] *Henry v Henry* (n 99 above) [65].
[102] See eg *Jennings v Rice* (n 98 above) [36] (Aldous LJ). See too *Davies v Davies* (n 31 above) [55]–[56], where Jarman QC considered the content of A's assurance in deciding if a particular response would be 'out of all proportion'.

example, the Court of Appeal, adopting a view which has also found some support in Australia,[103] preferred to give the concept only a negative role, holding that A's promise would be enforced unless it is 'out of all proportion to the detriment which [B] suffered'.[104] As Mee has noted,[105] however, such an approach can lead to absurd results. Mee's argument is as follows. Consider a case identical in all other respects to *Jennings v Rice*, but in which the value of the property promised to B is £250,000. It might then be said that, given that lower value, the enforcement of A's promise would not be 'out of all proportion' to B's detriment. This would mean, however, that if, as in *Jennings v Rice* itself, the value of the property increases to above, say, £400,000, then the extent of B's right is reduced, as the disparity between that value and the extent of B's detriment means that enforcing A's promise would be disproportionate. Moreover, if proportionality plays only a negative role, it can provide no specific guidance as to what should occur when the prima facie measure based on B's expectation is displaced.

The better view, it is submitted, is that proportionality should play a positive role,[106] and should be limited to ensuring that the right acquired by B does not exceed what is required to ensure that B suffers no detriment as a result of B's reasonable reliance on A's promise. It is also important that, in calculating that detriment, countervailing benefits acquired by B as a result of that reliance (such as rent-free accommodation) should be taken into account.[107] This does not mean, however, that it will never be appropriate for A's liability to be such as to ensure that B is put in the same position as B would have been in had A's promise been enforced. Such a result may be particularly appropriate where B's reliance is such that B has based his or her 'whole life' on A's promises, foregoing other valuable opportunities, so that B would suffer a very large detriment in the absence of any claim. Such cases may well arise in relation to testamentary promises, although it is unclear whether the first instance

[103] See eg *Giumelli v Giumelli* [1999] HCA 10, (1999) 196 CLR 101 at [42], quoting from the judgment of Deane J in *Commonwealth of Australia v Verwayen* [1990] HCA 39, (1990) 170 CLR 394 at 443. See too *Delaforce v Simpson-Cook* [2010] NSWCA 84, (2010) 78 NSWLR 483 at [63] (Handley AJA).
[104] *Suggitt v Suggitt* (n 11 above) [44]. See too *Davies v Davies* (n 31 above) [54].
[105] J Mee, 'Expectation and Proprietary Estoppel Remedies' in M Dixon (ed), *Modern Studies in Property Law, Volume 5* (Oxford, Hart Publishing, 2009) 389 at 399–400.
[106] As advocated by eg Hobhouse LJ in *Sledmore v Dalby* (1996) 72 P & CR 196 (CA) 208, drawing on the dissenting judgment of Mason CJ in *Commonwealth of Australia v Verwayen* (n 103 above).
[107] As was made clear in eg *Henry v Henry* (n 99 above). As confirmed in *Southwell v Blackburn* [2014] EWCA Civ 1347 at [17], just as the calculation of detriment is not 'purely an exercise in financial accounting', then '[t]he same is obviously true of benefit'.

judge adopted the appropriate degree of scepticism in deciding that *Suggitt v Suggitt* was such a case.[108] That is primarily a practical question, however, and there is no conceptual inconsistency in allowing a proprietary estoppel claim, in an appropriate case, to place B in the same position as if a promised testamentary gift had been made to B. The important conceptual distinction between proprietary estoppel and the exercise of a power by A to give B a right, by means of a contract or a will, does however require greater emphasis to be put on the extent of B's detriment, rather than simply the content of A's promise, in assessing the extent of B's right.

3.5. Relationship with the Inheritance (Provision for Family and Dependants) Act 1975

A number of questions, yet to be considered by the courts, arise when considering the interaction of proprietary estoppel with a possible claim for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975. It is clear, of course, that the requirements and effect of such a claim differ from those of a claim under the 1975 Act, and so there is no inconsistency in a successful proprietary estoppel claim giving B benefits well in excess of any sum that might instead have been awarded under the 1975 Act.[109]

A question arises, however, when applying the detriment requirement of proprietary estoppel. It might be argued that the possibility of B's making a 1975 Act claim reduces, or even eliminates, B's detriment. It was suggested in Section 3.1 that proprietary estoppel has a secondary nature: this suggests that, in ascertaining whether or not B would suffer a detriment, any other rights or claims available to B must first be taken into account.[110] Certainly, if a valid contract exists between A and B, the existence of that right can be seen as a countervailing benefit that removes any detriment.[111]

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[108] Note that the first instance judge accepted that B had based his 'whole life' on A's promises, despite also noting that the purported reliance by B was 'all in all nothing like the sort of work done in *Thorner v Major*': [2011] EWHC 903 (Ch) [59].
[109] As noted in eg *Ottey v Grundy* (n 34 above) [51].
[110] See eg the analysis of Deane J in *Waltons Stores (Interstate) Ltd v Maher* (n 63 above) 453–54.
[111] This seems to be the best explanation of *Lloyds Bank plc v Carrick* [1996] 4 All ER 630 (CA). Further, in assessing the detriment requirement in estoppel by representation, it seems that if B's reliance also gives B the benefit of a change of position defence to an unjust enrichment claim by A, that benefit can eliminate B's detriment and so prevent an estoppel arising: *Scottish Equitable v Derby plc* [2001] EWCA Civ 369, [2001] 3 All ER 818 at [47].

Where a 1975 Act claim can be made, it is likely to be the case that A's failure to honour the testamentary promise is a pre-requisite of the statutory claim: it is then possible to argue that the existence of such a claim is a benefit that can be taken into account in assessing the extent of B's detriment. Of course, as far as A's personal representatives are concerned, any *pro tanto* diminution of a right arising through estoppel is irrelevant if matched by an award under the 1975 Act. The argument may however appeal to C, a third party who acquired property from A before A's death, and who has no defence against any right acquired by B in that property as a result of proprietary estoppel.

The complication in evaluating C's argument, however, is that a claim under the 1975 Act, like a proprietary estoppel claim, can also be seen as subordinate. The question of whether reasonable financial provision has been made, like the question of whether B faces the prospect of detriment, must depend on what other claims are available to B. It cannot, of course, be the case that the presence of each claim diminishes the other. As a result, a tie-break is needed. The better solution, it is submitted, is that, given the nature of the 1975 Act as a statutory last resort, a proprietary estoppel claim should be determined first, and without reference to possible claims under that Act. As a result, a court should reject C's argument that the extent of the right acquired by B can be reduced by the possibility of a 1975 Act claim.

A more finely balanced question arises when considering the effect on B's proprietary estoppel claim of a possible 1975 Act claim by X. In assessing X's claim, a court must have regard to the 'size and nature of the net estate of [A]'[112] and therefore A's personal representatives might well wish to point to B's proprietary estoppel claim as a means of limiting any financial provision made to X under the Act. The more difficult issue is whether a court, when assessing the extent of the right acquired by B through proprietary estoppel, should take account of X's possible statutory claim. This practical issue turns on the nature of the approach to be adopted when assessing the extent of A's liability to B in proprietary estoppel and so depends on the conceptual nature of B's claim. If, as courts have sometimes suggested, there is a large measure of discretion in calculating the extent of A's liability, then it would be no surprise if X's position were taken into account. For example, in *Jennings v Rice*,

[112] Inheritance (Provision for Family and Dependants) Act 1975, s 3(1)(e).

Robert Walker LJ stated that, in assessing the extent of a right arising through proprietary estoppel, a relevant factor would be '(to a limited degree) the other claims (legal or moral) on [A] or his or her estate'.[113] Similarly, in *Macdonald v Frost*, the estoppel claimants (A's daughters from a previous marriage) alleged that A had promised to leave his property to them, but also accepted that, even if their claim succeeded, 'the court would have to take into account the need to make some provision for [A's widow]'.[114]

It is nonetheless worth noting that, in *Jennings v Rice* itself, Robert Walker LJ emphasised that 'the court must take a principled approach, and cannot exercise a completely unfettered discretion'.[115] B might argue that, whilst the interests of third parties can affect the particular *remedy* awarded to protect B's right,[116] they should not, as a matter of principle, alter the *extent* of that right. Certainly, a right acquired as a result of a contract, or A's commission of a tort, will not be reduced simply because of another party's claim on A. It may be, however, that the 'backwards-looking' nature of a proprietary estoppel claim calls for a different approach, at least in a case such as *Macdonald v Frost*, where the potential 1975 Act claim is to be made by a party (A's future spouse) whose position was not taken into account at the time of A's alleged promise. A's legal and moral obligations to such a party might then be seen as a significant change of circumstances that can be taken into account in assessing the extent of B's right. To that extent, a court's likely desire to take into account a 1975 Act claim by a third party when assessing how to respond to B's proprietary estoppel claim can therefore be accommodated by adverting to the specific conceptual nature of B's claim.

3.6. The Test for Reliance

[113] *Jennings v Rice* (n 98 above) [52]. See too *Campbell v Griffin* [2001] EWCA Civ 990, [2001] WTLR 981 at [34]–[35]. Such claims were considered in *Davies v Davies* (n 31 above) [57], without ultimately having any effect on the award made to B.

[114] *Macdonald v Frost* (n 59 above) [6]. A's widow, at the time of trial, was aged 86 and in poor health. B1 and B2 sought a declaration that the property and its proceeds of sale be held on trust 'in such shares as are found to be appropriate to achieve the minimum equity to do justice, with a power in the trustees to advance capital as and when required to meet [A's widow's] needs; the residue to go to [B1 and B2] when [A's widow] passed away'. Note, too, that in *Davies v Davies* (n 31 above) [58], it was noted that B was continuing to make a monthly payment to his mother, and it was held that: 'it is just as part of the equity which I have found that he should continue to do so for her life'.

[115] *Jennings v Rice* (n 98 above) [43].

[116] For example, *in specie* protection of B's right by means of an injunction or an order of specific performance might be inappropriate if this would cause harm to third parties: see eg *Giumelli v Guimelli* (n 103 above).

The reasoning of the Court of Appeal in *Wayling v Jones*[117] provides an example of how the temptation for a court to make up for a perceived – but binding – deficiency in the law of succession may lead to a distortion in the principles of proprietary estoppel. As in *Thorner v Major*, there was a strong reason to believe that permitting B to acquire the property in question would be consistent with the wishes of A. There had been no falling out between the parties, and A's failure to honour his promise to leave a particular hotel to B seems to have been caused simply by A's failure to update an earlier will, which left the hotel then owned by A to B, rather than the hotel since acquired by A after selling the previous hotel. Further, although B had lived with A for over 15 years at the time of A's death, it was not possible for A's lack of reasonable financial provision for B to be addressed by a claim under the 1975 Act, as it then stood, as A and B were in a same-sex relationship and so B could not be said to have been living in the same household as A as the husband or wife of A.[118] This failing in the Act has now been remedied,[119] but it may well be that it motivated the court to press proprietary estoppel into service. Whilst this might be seen as having met the needs of justice in the specific case, to the extent that it served to disguise the flaw in the coverage of the Act by over-extending proprietary estoppel, it could be seen as having done a disservice to the law of succession as well as to proprietary estoppel.

The distortion in *Wayling v Jones* occurred because B had stated in cross-examination that he would have 'stayed with' A even if no testamentary promise had been made, and also that he would have stopped working for A if A had told him that the promise would not be honoured. To allow B to establish the reliance element of his claim, based on having worked for A for a long period for low pay, the Court of Appeal stated the test as being whether B would have acted in the same way had A told him that the promise would not be honoured. The *Wayling* test is certainly favourable to B: given the breach of trust that may well be involved in withdrawing a promise once made, it is likely to be simple for B to show that B would have acted differently if told by A that the promise would not be honoured. As a matter of

[117] *Wayling v Jones* (1993) 69 P & CR 170 (CA).
[118] Note that s 1(3) also prevented B from claiming as a party who had been maintained by A, as B had worked for A, and so A had thus received 'full valuable consideration' in return for maintaining B.
[119] Law Reform (Succession) Act 1995 added s 1(1A) to the Inheritance (Provision for Family and Dependants) Act 1975. As a result of the Civil Partnership Act 2004, s 1(1B) of the 1975 Act was added. For the effect of the Human Rights Act 1998 in a comparable case, see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

principle, however, the test is impossible to defend.[120] The purpose of the reliance requirement is to establish a causal link between A's promise and the prospect of B's detriment. If B would have acted in exactly the same way even in the absence of A's promise, responsibility for that detriment cannot be attributed to A, and so no proprietary estoppel should arise.[121] As with any causation test, its aim is to compare what has actually occurred with what would have happened in the absence of the events constituting the cause of action.[122] A's promise is one such event; A's failure to inform B of an intention not to perform the promise is not.[123] So, for example, in establishing whether B acted in reliance on a misrepresentation of A, the test is how B would have acted in the absence of such a misrepresentation, not how B would have acted if, having made the statement, A then told B that it was false.

It is also worth noting that, on the facts of *Wayling v Jones* itself, B may well have satisfied a standard causation test asking what B would have done had no testamentary promise had been made. B's admission was simply that he would have 'stayed with' A had A's promise not been made: it did not necessarily mean that B would have continued to work for A on the same terms, as A's promise had been made to B in response to B's complaints as to his low wages.[124] Nonetheless, there do seem to be some cases in which the application of the *Wayling* test was crucial to B's claim: in *Ottey v Grundy*,[125] for example, a claim was allowed based on a testamentary promise, even though it was far from clear that A's promise, not made in response to any complaint from B, caused B to change her behaviour. In such a case, then, criticisms of proprietary estoppel are well-founded. The problem is not, however, that the doctrine is undermining the law of succession; it is rather that it has

[120] For academic criticism of the *Wayling* test, see eg E Cooke, 'Reliance and Estoppel' (1995) 111 *LQR* 389 and J Mee, *The Property Rights of Co-Habitees* (Oxford, Hart Publishing, 1999). Note too that, when carefully analysing the reliance requirement in *Campbell v Griffin* (n 113 above), Robert Walker LJ made no mention of the *Wayling* test.
[121] See eg *Jones v Watkins* (CA, 26 Nov 1987); *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204 (CA).
[122] It may also be noted that the so-called 'presumption of reliance' stemming from *Greasley v Cooke* [1980] 1 WLR 1306 (CA), if anything more than a statement that some facts will support an inference of reliance, is very difficult to justify, given that it is generally the task of the claimant to make out the elements of his or her claim: see eg *van Dyke v Sidhu* [2014] HCA 19, (2014) 251 CLR 505; *Steria Ltd v Hutchison* [2006] EWCA Civ 1551, [2007] ICR 445 at [129].
[123] Indeed, as shown by *Thorner v Major* (n 1 above), B's claim can be made out even if A never had such an intention not to perform the promise, but instead failed to do so as a result of inadvertence.
[124] Note that Balcombe LJ was minded to accept that submission as to the meaning of the admission that B would have 'stayed with' A: *Wayling v Jones* (n 117 above) 175. In *Walton v Walton* (n 47 above), A's promises – as in *Wayling v Jones* – were made in order to induce B to continue working for A for low pay, and it would seem that B could have passed a standard 'but-for' test of causation.
[125] *Ottey v Grundy* (n 34 above).

been extended beyond its conceptual basis and so is unjustified even on its own terms. Indeed, given that the problem in *Wayling v Jones* could be seen to arise from gaps in the law of succession (either in relation to the rectification of wills or the scope of the 1975 Act), it could be said that the case provides an example of the law of succession undermining proprietary estoppel.

4. FINAL THOUGHTS

The principal conclusions of this chapter were set out in Section 1 and will not be repeated here. A further key point is that a proper understanding of the still-developing promise-based strand of proprietary estoppel must involve addressing the conceptual and practical concerns as to the potential of the doctrine to undermine the law of succession. This should occur, however, not as a result of a simple desire to protect the territory of the law of succession, but rather in order to secure the wider goal of ensuring that this form of proprietary estoppel is limited to addressing a specific form of unconscionable conduct and does not give the courts a general licence to adjust the rights of the parties. The approach taken by proprietary estoppel to testamentary promises will be a crucial test of whether the doctrine can be developed in that way: as demonstrated by decisions such as *Wayling v Jones*,[126] there may be significant practical reasons why a court might be tempted to depart from the specific requirements of proprietary estoppel in order to allow B some protection.

Even if it is motivated in part by a desire to protect the law of succession, the application of appropriate limits to proprietary estoppel will be of benefit to the general doctrine, which of course applies beyond the context of succession.[127] It would therefore be unfortunate if this jurisdiction were to follow New Zealand and instead adopt a context-specific statutory scheme in an attempt to meet some of the practical problems discussed in this chapter.[128] Whilst some support for enacting such

[126] See also *Ottey v Grundy* (n 34 above).
[127] See in particular the point noted at the end of Section 3.3 as to the emphasis placed in succession cases on the need for A to have made a promise or assurance to B, and to the desirability of such a requirement beyond the context of succession.
[128] For discussion of the Law Reform (Testamentary Promises) Act 1949 (NZ), see eg Nield (n 72 above); Braun (n 43 above) 1018–19. As Braun notes at 1006–7, a more limited German provision (§ 2057a I 2 BGB) also provides some specific protection in the case of gratuitous care provided by a descendant of A.

legislation in England can be found,[129] it would have a clarifying effect only if it set up an exclusive regime, and there seems to be no good reason why the specific form of unconscionable conduct with which proprietary estoppel deals should go unchecked in the context of succession.[130]

To broaden matters further, it is possible to identify a tension which also informs the operation of other equitable doctrines.[131] On the one hand, an important justification for the very concept of promise-based proprietary estoppel is its ability to play a secondary role in mitigating some of the severity of the strict rules of contract law, property law, and of the law of succession. On the other hand, a role should not be mistaken for a rationale, and any such doctrine can only be called on when its specific requirements are met, and not whenever a failing is perceived in contract law, property law, or the law of succession. Some gaps, after all, are much needed.

[129] See eg Nield (n 72 above); B Sloan, 'Proprietary Estoppel: Recent Developments in England and Wales' (2010) 22 *Singapore Academy of Law Journal* 110 at 131–35.
[130] Note, for example, that the New Zealand Act – in contrast to the law of proprietary estoppel – allows a claim only against A's estate.
[131] For discussion see Smith (n 6 above); L Alexander and E Sherwin, *The Rule of Rules: Morality, Rules and the Dilemmas of Law* (Durham NC, Duke University Press, 2001), especially chs 3 and 4; McFarlane and Sales (n 62 above).