NEUTRAL CITATION NO: [2020] EWHC 584 (CH)

IN THE HIGH COURT OF JUSTICE **Claim No PT-2018-000177**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Mr M H Rosen QC sitting as a Judge of the Chancery Division
12 March 2020

BETWEEN:

DOROTHY MARIAN HORSFORD **Claimant**

-and-

PETER WILLIAM DAVIS HORSFORD **Defendant**

JUDGMENT

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(1) Introduction

1. The Claimant, familiarly known as Marian, is now 88 years old. She married Davis Horsford is 1954 and they had three children, Helen (now Mrs Blunn) born in 1957, Elizabeth ("Liz", now Mrs Koufou) in 1960 and the Defendant Peter (now married to Gail) in 1964. Marian and Davis separated in 2011 and Davis, in his early 90s, now lives in a care home, suffering from dementia. Neither Peter nor Liz have any children but Helen has two daughters.

2. In 1967 Marian and David bought College Farm, some 414 acres of arable farmland and buildings in Cambridgeshire and in 1987 she was given the adjoining 137 acres (approximately) and buildings of Whitleather Lodge Farm by her father. By then Peter had finished 3 years at Writtle Agricultural College and, after a stay in Australia, joined his parents' farming partnership on an equal basis.

3. In the following year 1988, Marian gifted the house and an acre of Whitleather Lodge Farm to Peter, and the rest of it to all three of her children, who then transferred it to Peter for a price of £35,000 to each of Helen and Liz.

4. There were a number of later developments affecting the two farms, including some reconfiguring after the A14 was routed through their land in 1995, improvement to buildings, the gift of some "development land" by Marian and Davis to Helen and Peter in October 2007, the purchase of "Additional Land" by Peter on trust for the partnership in June 2013 and October 2015, and a valuable leasing of some of the land for a Wind Farm for a term of 27 years as from 26 February 2014.

5. The present proceedings (that is, between mother and son), issued on 9 March 2018 and heard at trial between 27 November and 6 December 2019, arise from Marian's retirement from the partnership, then subject to a written partnership agreement dated 19 June 2012 ("the 2012 PA") by a notice dated 15 December 2016 taking effect on 30 June 2017, and the service of an option notice by Peter dated 23 November 2017 to buy her interest rather than allow the partnership to be dissolved.

6. Marian claims payment of the price for her share in the partnership (for which the partners variously held College Farm and Whitleather Lodge Farm on trust) which she calculates as more than £2.52 million, payable in half yearly instalments over 5 years commencing on 31 December 2017, taking into account valuations of relevant land largely but not entirely based on an expert determination of a Mr Jeremy Zeid dated 3 December 2018 (referred to further towards the end of this judgment).

7. As well as disputing some elements of that calculation, Peter defends and counterclaims on the grounds that he has an equity arising by way of proprietary estoppel as a result of his having relied to his detriment on assurances by his parents Marian and Davis that he would inherit their shares in the partnership assets on death.

8. These are but some of the various disputes which have riven this family apart. Peter's eldest sister Helen is on the side of Peter (who is represented by Christopher Stoner QC and Sebastian Kokelaar of counsel, instructed by Birketts LLP). Liz is on the side of Marian (represented by Stephen Jourdan QC and Ciara Fairley of counsel instructed by Leeds Day) who attended throughout the trial but did not give evidence.

(2) The issues

9. Following numerous directions (which I need not set out in detail), the main issues for resolution at the trial arising from the parties' pleadings may be summarised as follows:-

   (a) Did Peter acquire an equity by way of proprietary estoppel which prevents Marian from enforcing her rights under the Partnership Agreement, because

(i) she made a promise to Peter, in sufficiently clear terms, that he would inherit her share in the partnership assets (ii) he acted in reasonable reliance on that promise and (iii) he suffered detriment in consequence of such reasonable reliance ?

(b) Has any such equity in Peter's favour been extinguished or released or barred by the PA 2012 and/or *laches* ?

(c) Unless prevented by such an equity in Peter's favour, what sums is he liable to pay Marian on purchase of her share under the PA 2012 relating to: (i) the value of land under clause 19.7 of the PA 2012 and whether it should (A) take account of 'marriage value' and be valued as a whole and then be apportioned to Marian's Land Capital Account - or not, because what has to be valued is Marian's beneficial interest in College Farm alone; and (B) apportion the value of the Wind Farm between College Farm and the Additional Land, and Whitleather Lodge Farm, or divide it equally between the partners; and (ii) whether Peter is liable to reimburse Marian for half of Mr Zeid's fees (£3,747.74) as paid by her in full, pursuant to a term to be implied in the 2012 PA ?

(d) Finally, how should any equity in Peter's favour be satisfied or order for payment from one side to the other be framed ?

10. Peter had raised other issues, in particular (i) whether Marian was liable to make restitution of £50,000 paid by him out of partnership funds to discharge a loan from NatWest to a separate partnership between her and Davis called "DM Properties" and if so, whether Peter was entitled to set it off against the £23,954 outstanding on Marian's current account; and (ii) whether the PA 2012 was varied as he alleged or Marian was right as regards adjustments to her Capital Account. However, Peter abandoned his contentions in these respects before the end of the trial.

11. This judgment approaches the remaining issues which were tried, essentially in two broad stages: (1) whether Peter acquired an equity in relation to inheriting her share of the partnership and retained it on and after the PA 2012; and (2) whether he is obliged or not to pay Marian the sums which she calculates under the PA 2012 under her Capital and Land Capital Accounts for the acquisition of her share following her retirement, together with reimbursement of half Mr Zeid's valuation fee.

(3) The evidence

12. As usual there were a large number of bundles before the court, containing copy documents to which, in most cases, no reference was made. However, given the detail of the dealings between the parties over many years, including accounting and taxation

aspects, this was not a case where they could be criticised for not having restricted the documents to what was eventually needed, in advance.

13. The parties agreed that as the oral evidence related to the proprietary estoppel claim and it logically came first, Peter's evidence should be heard before Marian's. Peter gave evidence himself, including some documents not previously adduced for which the Court gave permission, and called on his behalf his wife Gail, Helen and her husband Gordon Blunn and Mr Philip Hutley of Strutt & Parker, who had advised Peter, Marian and Davis as regards the written partnership agreement in 2011-2012.

14. On Marian's side it was said shortly before the trial that her memory was failing and that she was prone to confusion and that whilst there was no medical issue, it had therefore been decided that evidence from her would not assist in deciding on the material facts. On her behalf Liz gave evidence, largely hearsay (although not subject to any formal counter-notice under the Civil Evidence Act), and she also called Mr Ian Greenwood, the partnership accountant between 1995 and 2007.

15. Peter was suspicious of Marian's failure to give evidence and indeed it emerged from Liz's cross-examination that the reasons given were not wholly correct: she contradicted them and proudly defended her mother's acumen, emphatic that Marian's memory was not a problem but she was depressed.

16. Peter submitted that the Court can draw adverse inferences from the failure of a party to give evidence (see *Prest v Prest* [2012] UKSC 34 at paras 43 and 44) especially when the person not giving evidence in the present instance is the Claimant herself (*R (Stapleton) v Revenue & Customs Prosecution Office* [2008] EWHC 1968 at paras 36–38, and that in this case the Court should infer that Marian did not give evidence because under cross-examination she would have supported Peter's factual case on proprietary estoppel.

17. Whilst it might have been better for Marian to give evidence and the decision that she should not do so voluntarily may be regarded as tactical, in all the circumstances of this case (some of which appear further hereafter), I decline to draw that inference. It may well have been feared that her evidence would not advance her case, and that she would have been easily confused: after all, in dealing with half a century of family history, especially on questions as to the partnership and of fairness and equality as between the three siblings, Peter often seemed confused. That does not mean that she would have positively supported his case on positive aspects against her and I consider that unlikely.

18. On the contrary, I also bear in mind that under CPR 33.2, Marian complied with sections 1 and 2 of the Civil Evidence Act 1995 and Peter did not apply for an order that he be entitled to call Marian to be cross-examined on the contents of those parts of Liz's statement that recorded her evidence under CPR 33.4 so as to test it rather than simply having to consider the weight to be attached to a written statement. So there may have been tactical decisions on this aspect from both sides.

19. Of course, the weight to be attached to Liz's testimony, largely as a commentary to what Marian has stated in the past, is limited. However much of it was based on Marian's contemporaneous diary, which contained almost daily entries recording her relations with Peter, Davis and others, and the authenticity of which was not challenged.

20. Liz's evidence, in addition to hearsay, included many opinions. But then so too did the evidence of all the witnesses, in particular the other family members, Peter, Gail, Helen and Gordon. Whether conversations amounted to assurances rather than statements or acknowledgements of intentions, and the balance of benefit and detriment between close relatives connected to the farms, can involve nuance and always depend on context, best judged against the documents and common sense probabilities.

21. As is not uncommon in disputes of this nature, much of what they each said was based on emotion and impression, much affected by loyalty or hostility, rather than detailed objective factual recollection. Although I do not decide the case on this basis, I am bound to say that, despite its shortcomings (and the aspersions cast on her as Marian's attorney and the main beneficiary of her current will), Liz's evidence seemed to me, in at least some if not all respects, to make more sense, against the uncontroversial narrative and documents, than Peter's and his witnesses.

22. Thus for example Peter's wife Gail claimed to remember some specific events (about accommodating a farm student and discussing over dinner a proposal for Peter to declare a trust for his nieces when he inherited the whole of the farm) which, if they had occurred, would have featured earlier in the detailed pleaded versions of Peter's case.

23. For his part, Peter's brother-in-law, Helen's husband Gordon Blunn, barely did more than advocate Peter's case to the effect that, until 2016, it "had always been understood by the family and by family friends… [that] Peter has dedicated his life's work to the farm in the firm belief that he would eventually run the business, and inherit the farm from his parents when they died".

24. In any event, Gail, Helen and Gordon were not party to the key conversations about Marian and Davis's intentions - they did not know about any contemplated equalisation payments if and when Peter inherited his parents' partnership shares, which Peter most certainly did. For his part, Mr Hutley said nothing at all to support Peter's case that he had been promised the farm, although (somewhat in contrast to Mr Greenwood's straightforward account) he appeared at times partisan and unreliable on some details.

(4) Principles of proprietary estoppel

25. Since the decision of the Court of Appeal in *Gillett v Holt* [2001] Ch 210 the doctrine of proprietary estoppel has been invoked successfully in a number of cases (some in a farming context) to prevent a party from reneging on a promise to make certain testamentary dispositions with regard to his or her property.

26. Proprietary estoppel is concerned with the acquisition of interests (often by a promisee) in the property of another person (often the promisor). It differs fundamentally from other forms of estoppel in that regard and can thus found a cause of action: *Crabb v Arun District Council* [1976] Ch 179 at 187D-G per Lord Denning MR.

27. If the promisee establishes the necessary elements - and if the promise and detriment are proved, reliance will be presumed unless rebutted (see *Gillett v Holt* at 228F) - the Court will provide for "the minimum equity to do justice": *Moore v Moore* at para 28, *Gillett v Holt* at 235.

28. At the heart of the doctrine is the Court's power to do what is necessary to avoid an unconscionable result: *Davies* at para 38(vi). This is an objective value judgment on behaviour, regardless of the state of mind of the individual in question, which unifies and confirms the other elements. "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": *Cobbe v. Yeoman's Row Management* [2008] 1 WLR 1752 at para 92 per Lord Walker.

29. The question of unconscionability is not concerned exclusively with the actions of the promisor. If the promisee has himself or herself behaved badly, then that can be taken into account in deciding whether the promisor is estopped. "*When a party raises an equity of this character and it is alleged against him that his own behaviour has been wrong, the court has to decide on the facts whether a sufficient answer to his equity has been made out*": *Williams v Staite* [1979] Ch 291 at 299 per Goff LJ.

30. Deciding whether an equity has been raised and, if so, how to satisfy it, is a retrospective exercise looking backwards from the moment when the promise falls due to be performed or is repudiated, to decide whether, in the circumstances which have happened, it would be unconscionable for the promise not to be kept, either wholly or in part: *Gillett v Holt* [2001] Ch 210 at 232.

31. To prove a sufficient promise to found proprietary estoppel, especially as regards a future testamentary disposition, the promisee must prove statements which a reasonable person would have understood to be more than statements of current intentions and to constitute assurances which are "tantamount to a promise": *Gillett v Holt* at 227-8, *Cobbe v Yeoman's Row* at para 66.

32. Whether the detriment alleged to have been suffered in reliance on such a promise "… *is sufficiently substantial, is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded…The detriment alleged must be pleaded and proved*": *Gillett v Holt* at 232. In evaluating whether there was detriment, any benefits received by the promisee as a result of acting as he did must be taken into account and the alternatives must be considered: *Creasey v Sole* [2013] WTLR 931 at para 111.

33. It is difficult to improve upon the recent summary of nine relevant principles by Lewison LJ in *Davies v Davies* [2016] EWCA Civ 463 at para 38:

> *(i) Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part.*
>
> *(ii) The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance.*
>
> *(iii) However, no claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined, and whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood.*
>
> *(iv) Detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.*

(v) *There must be a sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability.*

(vi) *Thus the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result.*

(vii) *In deciding how to satisfy any equity the court must weigh the detriment suffered by the claimant in reliance on the defendant's assurances against any countervailing benefits he enjoyed in consequence of that reliance.*

(viii) *Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application ... In particular there must be a proportionality between the remedy and the detriment which is its purpose to avoid... This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way.*

(x) *In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion. However the discretion is not unfettered. It must be exercised on a principled basis, and does not entail … a "portable palm tree".*

34. Regarding the last two of these propositions, Peter relied on the approach to satisfying an equity arising from proprietary estoppel, enunciated in *Jennings v Rice* [2002] EWCA Civ 159 per Robert Walker LJ

> *"50. … if the claimant's expectations are uncertain, or 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… 51. But that does not mean that the court should in such a case abandon expectations completely, and look to the detriment suffered by the claimant as defining the appropriate measure of relief. Indeed in many cases the detriment may be even more difficult to quantify, in financial terms, than the claimant's expectations. Detriment can be quantified with reasonable precision if it consists solely of expenditure on improvements to another person's house, and in some cases of that sort an equitable charge for the expenditure may be sufficient to satisfy the equity ... But the detriment of an ever-increasing burden of care for an elderly person, and of having to be subservient to his or her moods and wishes, is very difficult to quantify in money terms. Moreover the claimant may not be motivated solely by reliance on the benefactor's assurances, and may receive some countervailing benefits (such as free bed and board). In such circumstances the court has to exercise a wide judgmental discretion.… 52. It would be unwise to attempt any comprehensive enumeration of the factors relevant to the exercise of the court's discretion, or to suggest any hierarchy of factors. In my view they include, but are not limited to… misconduct of the claimant or particularly oppressive conduct on the part of the defendant ... To these can safely be added the court's recognition that it cannot compel people who have fallen out to live peaceably together, so that there may be a need for a clean*

break; 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; the likely effect of taxation; and (to a limited degree) the other claims (legal or moral) on the benefactor or his or her estate. No doubt there are many other factors which it may be right for the court to take into account in particular factual situations."

35. In *Davies v Davies* Lewison LJ referred (at para 39) to the "lively controversy" about whether the essential aim of the court's "broad judgmental discretion" should be to give effect to the claimant's expectations (unless it would be disproportionate to do so), or to protect his reliance interest by compensating him for such detriment as he has suffered.

36. In *Moore v Moore* [2018] EWCA Civ 2669 Henderson LJ said (at para 26) that "*although the second approach is logically attractive, I would be wary of according it primacy in a field where cases are so fact sensitive and proportionality has such a prominent role to play".*

37. In *Guest v Guest* [2019] EWHC 869 (Ch) HHJ Russen QC said that:

> *"165. In my judgment, therefore, the court should approach the question of remedy by looking first at the claimant's expectation based upon the nature of the assurance made to him. Before contemplating the grant of a remedy which would satisfy that expectation it should first check that doing so would not produce one out of proper proportion to the value of the detriment suffered by the claimant. That is the eighth proposition in Davies. But identifying the true measure of "the equity" to be satisfied may not stop there… satisfying the equity may well not involve satisfying the claimant's expectation for other reasons that might support the conclusion that, in the circumstances, it is too extravagant… the court must also do justice to the defendant. That may involve taking account of the defendant's continuing interest in the property (particularly when the claimant's expectation was to inherit only after his death) and the interests of others, aside from the claimant, whose occupation may derive from that interest or who may have their own claims or expectations in relation to it*."

38. In *Habberfield v Habberfield* [2019] EWCA Civ 890, Lewison LJ said

> *"68. … Both [counsel] 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 [counsel for the respondent] 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."

39. The issue of the effect of a later contract on an earlier oral promise is a fact-sensitive one: *McFarlane, The Law of Proprietary Estoppel* (2014), paras. 6-113 to 6-119. There is little direct authority on whether a claimant can succeed on a proprietary estoppel claim based on a promise which is absent from a later written contract between the parties. In *Whittaker v Kinnear* [2011] EWHC (QB) 1479 Bean J, noting "the fact-sensitivity of claims based on proprietary estoppel or constructive trust", allowed such a claim (by way of defence to a summary possession claim) to proceed to trial.

(5) Peter's alleged equity

40. Whilst the parties' cross-examination and submissions of fact were very detailed, the over-arching questions overlap and can be given this overall shape: were assurances made to Peter that he would inherit the farm on which he reasonably relied to his detriment and how does that stand with the 2012 PA and his acquisition of Marian's partnership share thereunder ?

41. Looked at overall and with hindsight, for the purpose of deciding ultimately whether it would be unconscionable for Marian to enforce the payment for her share under the PA 2012, each of the main factual elements impacts on the others. Thus if Peter did not suffer real detriment overall, or the PA 2012 was inconsistent with his alleged equity, it may be thought unlikely that the family discussions as to inheritance were irrevocable promises as he now alleges, rather than revocable statements of intention.

42. Nonetheless analysing the main elements separately, Peter's case that the promise was made stresses that he "grew up on" it, and it was a constant theme in his discussions with the family and later with advisers. His parents told him from childhood that the farm would be his one day, and encouraged him to work on it and go to agricultural college so that he would be in the best position to manage the farm properly.

43. Everything subsequently – including his salary, the partnership, capital payments, building development which he managed, Davis' retirement and Gail's book-keeping work – were all said to be "part of the process" by which the farm would be handed over to him, as his inheritance and to do with as he pleased.

44. It is said that this understanding was also communicated to, and readily understood by, other members of the family, that is Helen, Gail, and Gordon who all gave evidence for Peter; and that at meetings with advisers - with Mr Graham Smith in January 1997 and

Philip Hutley in October and November 2011 - Davis and Marian "confirmed that Peter was to inherit the farm and farming business".

45. Much of this however misses the crucial distinction between promises and mere statements of intention. The best evidence on this are not subjective recollections after so many years and events and feelings, but the contemporaneous documents and conduct of the parties.

46. Repeated, continuous or constant statements or "themes" do not mean entail or imply that expressions and discussions as to intentions were or became irrevocable assurances. In claiming otherwise, Peter and his witnesses were partisan: whilst not dishonest, they were manifestly influenced by his agenda and their sympathy for him.

47. Over such a long time and so many changes of circumstances, the nuance of a "theme" in family discussions could tend to be either a promise or a mere intention. Indeed the length of time and repetition may lean towards suggesting a changeable intention rather than assurance: why constantly repeat what was already an irrevocable promise, rather than confirm that it remained the intention ?

48. As if to highlight the problem, it was submitted on Peter's behalf that the documentary evidence before the court "demonstrates a long-standing, settled intention on the part of Davis and Marian to leave the farm to Peter". The examples given are just as consistent with an intention rather than an assurance: (a) the instructions they gave to Graham Smith, as reflected in his letters to them of 12 November 1996 and 24 January 1997 and in the wills and letter of wishes then drafted by him; (b) the objective identified in their discussions with Philip Hutley, as recorded in his letter to them of 13 October 2011 ("*for Peter to inherit the farm and farming business"*); (c) Marian's instructions in seeking independent advice on the proposed terms of the partnership agreement from Bob Dewdney of Leeds Day (that Peter "*will succeed*" to the business); and (d) the wills executed by Marian dated 22 February and 11 July 2012 (and Bob Dewdney's file note dated 18 July 2012, referring to the latter as something that Marian wanted to put in place before she went on a long holiday but which might be changed and in respect of the farm "*If Marian decides that she does want Peter to acquire the farm free of IHT I probably need to ask to assist with some changes"*) as well as Davis' will dated 5 October 2012, leaving their shares in the partnership to Peter.

49. It was also submitted that the transfer of the Lodge by Marian to Peter in 1988, and Marian's strong encouragement (if not direction) that Peter should purchase his sister's shares in Whitleather Lodge Farm, "only really make sense when viewed through the prism of a shared understanding between Peter and his parents that Peter would eventually inherit the farm".

50. In my judgment, however, there are more obvious reasons why Marian's (and Davis') statements of intention were not irrevocable assurances. First, the former chimes better

with how matters affecting the future of the farm were dealt with, with Peter's parents' authority and freedom to act as they thought, from time to time, was best; and secondly, the future ownership of the farm was subject to issues of fairness and some approximation towards equality between the three siblings, and what and how much compensation or balancing transfers Peter's sisters should have, which were not finally settled.

51. Peter did not deal with these prominent issues well in his cross-examination, perhaps not surprisingly as his contention that from his childhood there was an assurance that he would inherit the farm was uncertain because of any conditions relating to his sisters and what they would receive either by inheritance or by compensation from Peter. Given his sisters' interests and other uncertain and fluctuating considerations (to start with, as to Marian and Davis's needs and wishes, and further or other descendants, relatives or dependents), such an assurance would likely be unworkable in practice and I also consider it implausible in principle given the context and the events which unfolded.

52. An example is indeed the transfer of Whitleather to Peter. He paid his sisters each for a notional one third of its value. He emphasised the burden to him of borrowing for that purpose and for that and other obvious reasons, it must have been considered thoroughly at the time and subsequently. But he could not explain what might have been the terms of the alleged assurance of his inheritance as regards any rough or notional "equalisation" or balancing transfer of some part of the value to his sisters: that was obviously a matter for future consideration and decision, involving his parents and their wishes as time moved on. The necessary flexibility and involvement of his parents was inconsistent with the alleged assurance.

53. I accordingly find that whilst Marian said a number of things over the years to Peter to the effect that she intended him to inherit her interest in the partnership business and land, but this would probably involve him having to make a substantial payment to his sisters, which would be up to her, Peter (and any reasonable person in his position) could not have understood this to constitute a promise or assurance rather than a statement of intention which might change.

54. Peter seemed unable in cross-examination to remember the representations allegedly made to him in 2011-12 as pleaded on his behalf and set out in his witness statement. In successive versions of his Defence it was alleged that (a) when he asked his parents about a partnership agreement in the autumn of 2011, they both "initially questioned whether it was necessary since the Farm was going to belong to Peter anyway when they died" and (b) then (as from June 2019) that further representations were made at meetings in November 2011 and April 2012.

55. Peter was given ample opportunity in cross-examination to corroborate this and failed to do so. They were the most recent of the alleged representations upon which he relied

and if he could not address those, his evidence of earlier assurances was at least dubious. Similarly with another allegation on which he was cross-examined, that on or around 30 June 1992, nearly 30 years ago, when he was given £3,000 by each of his parents, he was told this was part of the process of handing the business over to him. He could provide no sensible explanation of how it was that this was only added to his case in June 2019.

56. Referring to a few chronological details: Marian's diary entries for 25 February 1988: D/224, and the evidence of Mr Greenwood (the partnership accountant from 1995 to 2007) satisfy me that from the time Peter became a partner she intended that he would eventually inherit her share in the land and the business but she equally wanted fairness between her three children, and the way to achieve a balance in these objectives changed from time to time and were a matter for her, as Peter was well aware.

57. Marian's diary entry for 30 November 1992 shows that she was very upset that her father's will had not left her enough to help her achieve this equality objective: "I cannot stop thinking about my darling girls. How can I help them - to think my father was so mean to us all, why, why". Liz explained this in her statement: "Mum had always felt that her own parents had not treated her the same as her two sisters, and she was generally keen to try and make things as fair, and as equal, as possible between the three of us." She was not challenged on this.

58. In 1996/1997 Peter went with his parents to see a solicitor and his parents told him at that time that they intended to leave him the partnership business and the farm land, but they wanted him to raise £200,000 within a year of the death of the survivor, so that he could make a payment of £100,000 to each of Helen and Liz. Peter said that he thought that, in the mid-1990s £200,000 would probably have produced something like equality, although without knowing the true values at that time, he could not say exactly.

59. He was also aware at around this time that his father was contemplating selling up and Peter could then take a tenancy of land, as recorded in the diary entry for 22 January 1997 - "D wanting to sell farms. P become a tenant". So it cannot be right that Peter was assured that he would get the farm without having to pay anything for it, which is what he claimed he thought was the position by 2011.

60. A letter from Mr Smith in January 1997 says a discretionary trust was to be established under Marian's and Davis' wills with a letter of wishes - not a testamentary gift to him. It says that Marian and Davis's intention was that Peter would get the farm but would have to pay £200,000 to his sisters within a year. The letter of wishes says "our intention is…". No-one reading that material could get the impression that a promise or commitment or assurance had been made. And Peter knew that the documents discussed with Mr Smith were never drawn up.

61. Peter eventually accepted in cross-examination, after a struggle, that when Mr Greenwood was the partnership accountant (up to 2007) he knew that a payment of some sort from him might be required and the amount was up to his parents:

> "Q. … Mr Greenwood's recollection is that your parents were concerned about the inequality that would result if you inherited the farm. I'm asking if that's right?
>
> A. I don't... Yes, I suppose they were slightly concerned.
>
> Q. Thank you. If we can then go on to paragraph 14, he says he remembers things as being that Marian and Davis hadn't made up their minds about what to do when they died. That's correct, isn't it? When he was the accountant, nothing definite had been decided?
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> A. I don't know what was in their wills at the time so...
>
> Q. But as far as you were concerned, you knew it was all up in the air. You would probably inherit the farm but you would probably have to make a compensation payment of some sort, but exactly what would happen was up to your parents?
>
> A. At that possible time."

62. Peter also accepted that after January 1997 his parents never told him that he could forget about having to make an equalisation payment for the land. But despite this, he claimed that in 2011, he believed he would be left the land and business without making a payment of any kind.

63. He made two attempts at an explanation. First, that it was because his parents had retired from the business and that led him to believe they would no longer require him to make a payment to his sisters. Second, that it was because by 2011 his parents had 3 properties - although he also then said that he would have made a payment to his sisters if his parents wanted him to:

> "Q…. your evidence yesterday was that by September 2011 you had it firmly in your mind that you were going to get the farm without having to pay anything for it? Do you remember?
>
> A. Yes.
>
> Q. And I asked you whether anything had been said between 1997 and 2011 to suggest that that understanding was justified and you couldn't point to anything. Do you remember?
>
> A. Yes.

> Q. And you've now accepted that there were other discussions after 1997 in the presence of Mr Greenwood about your making a compensation payment in the period up to 2007, haven't you?
>
> A. Well, the main discussion was with Graham Smith but there were other discussions ongoing I believe.
>
> Q. So can you explain how you got it into your head by 2011 that you were entitled to get the farm without paying anything?
>
> A. It wasn't a question -- I would have -- if my parents had wanted me to, I would have paid a sum to either sister**.** But it had been -- bear in mind we had now got three properties and it was always their intention for them to have the property and me to have the farm."

64. To cap it all, Davis and Marian acted as if there was no promise to Peter of the sort alleged. For example, in December 2005, over Christmas lunch at Liz's house, Davis suggested that the farm should be left to his grandchildren. On 11 July 2012, after the 2012 PA had been entered into, Marian made a new will leaving 25% of the business (or the sum of £1000,000 if greater) to Helen and Liz. I am wholly unsatisfied that any promise was made to Peter of the sort which he claims to have relied on, as regards his inheriting the farm or their shares in it.

(6) Reliance and detriment

65. As Lewison LJ said in *Davies*, detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement for detriment is part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances; and the court should guard itself against falling into "*the familiar trap of spurious precision*" (*Habberfield*, para. 46).

66. In determining the extent of Peter's detriment, the value of any countervailing benefits are to be taken into account, but only to the extent that they are causally linked to Peter's reliance on the promises made: see *Henry v Henry* [2010] UKPC 3 at para. 51 and McFarlane, *The Law of Proprietary Estoppel*, para. 4.125.

67. Peter claims that there was extensive evidence of reliance and detriment on his part, mainly non-financial in nature. Peter has positioned his entire life on the assurances given to him by Marian and Davis. The farm has been the principal focus of his life. He has not spent any significant time away from the farm apart from his time at agricultural college between 1983 and 1986, and when he was travelling in Australia from November 1986 to April 1987.

68. Detriment of this nature is not capable of reduction to pounds and pence (see *Gillett v Holt* at 234-5 and *Habberfield* at para 47) and it does not help to speculate about what might have been if the assurances relied upon had not been made (see *Thorner v Major* [2009] 2 P & CR 24, at para 65 and *Habberfield* at para 48).

69. Peter submits that if Marian were now permitted to insist on her strict legal rights under the PA 2012 thereby forcing Peter to buy part of the inheritance that he was promised, the farm would in all likelihood have to be sold, and Peter would lose his life's work, and this would plainly be an unconscionable result.

70. Thus Peter claims first that as a child and teenager he worked on the farm every summer, carrying out increasingly onerous and complex tasks, for little more than pocket money and his decisions then (a) to attend agricultural college rather than pursue other interests such as geology, and likewise (b) to return to England in 1987 rather than pursue opportunities in Australia was heavily influenced by his parents and their promise that the farm would be his one day.

71. He complained secondly that from then onwards he worked long hours on the farm, far in excess of that which would have been expected of him if he had been employed, for comparatively low wages. In 1997, after a golfing accident, he even decided to have his eye removed so that he could return to his work on the farm as quickly as possible

72. Thirdly, in 1988 Peter agreed to purchase his sister's shares in Whitleather, which he said put a great deal of financial strain on him, and he and Gail invested substantial sums of money in the Lodge over the years, which they would not have done so but for the promises made to Peter. He agreed to the re-location of the farm buildings to Whitleather larger than it required, investing his own money in this project and agreed that the loan taken out by the partnership to fund the balance should be secured on Whitleather.

73. Fourthly, from 1 July 2001 he managed the business of the partnership in effect on his own notwithstanding that he was content for Marian and Davis to continue to draw a 1/3 share of the profits of the partnership each and to use partnership funds to pay for holidays and other personal expenditure, although Marian ceased to have any meaningful involvement in the 1970s and Davis only assisted with seasonal tasks between 2001 and 2007.

74. Gail assumed responsibility for the partnership accounts (and the accounts for DM Properties, the separate partnership between David and Marian) for no remuneration, and from 2012 to 2015 Peter agreed to draw only 2/3 of his salary, and to forego the back-dating of his salary increase to 2010.

75. Fifthly, at various times, Peter devoted substantial time and effort in 2004 to the conversion into offices of The Stables (not a partnership property) for no remuneration,

and to the wind farm project, which enhanced the value of the farm and generates a significant income for the partnership.

76. Peter claimed that he (and Gail) would not have done these things, had he not been led by Marian and Davis to believe over all this time that he would inherit the farm on their death. He said in evidence: *"…reflecting now, I would say that marrying Gail is the only important decision I have ever taken in my life which is not referable to the farm and the promises my parents made from my early years*".

77. As for financial detriment, Peter claimed that (a) his salary from 1987 was significantly less than a proper wage for the work he did, and (b) his one third share of the partnership's profits was depleted because of Marian's drawings from 1 July 1988 (totalling £668,782 to 30 June 2017) and Davis' drawings after his retirement on 1 July 2001 (totalling £430,141 to 30 June 2017), which he only accepted because of the promises of inheritance made to him; and that (b) if he had simply rented College Farm from his parents from 2001 onwards, rather than continue farming in partnership with them, that would have been significantly to his financial advantage, to an extent calculated by him at around £600,000.

78. Peter's claims as regards financial detriment include the £35,000 which he invested in the project to relocate the farm buildings from College Farm to Whitleather Lodge Farm in 2004, and the difficulty he endured in meeting the mortgage repayments when required to buy out Liz and Helen's interests (when his gross salary was less than the mortgage repayments - and even after a pay rise 6 years later, 77% of his gross salary was used for that purpose).

79. Peter sought to quantify his below-market salary from 1987 by anecdotal evidence based on conversations with farming friends and neighbours - together with some late evidence as to reported surveys, which I permitted at trial despite objection for reasons I then gave - although in the end I found his calculations unconvincing. He also quantified 1/3 of his salary between 2012 and 2015 and his back-dated salary increase to 2010, both of which he agreed to forego, as amounting to a further £114,000.

80. He did not attribute a specific sum to (a) his work on the Lodge which benefitted the farm, including the construction of an office, nor (b) his time in managing the project to convert The Stables into office accommodation and (c) the wind farm project, and (d) for Gail's time spent in keeping the books for the farming partnership and DM Properties, nor his lost profits from the partnership as regards: (e) additional costs incurred on the relocation project by the partnership (which borrowed £100,000); (f) his allowing personal expenditure of Marian and Davis to fall on the partnership; and (g) the costs of the extension to the Stables car park, paid by the partnership.

81. For her part, Marian identified a number of countervailing benefits, which allegedly showed that Peter has "*profited immensely as a result of his decision to go into farming, join the partnership and to farm as a member of the partnership*".

82. She claimed that she "largely funded" Peter's trip to Australia in 1986; that she gave him and his sisters – whose shares he then bought - Whitleather Lodge Farm (from which he received rent, among other things); gave him the Lodge and some money to furnish it (and looked after him there until his marriage); and gave him £43,000 from the proceeds of the sale of a house in Barham that had been left to Marian by a friend in 2003 (with similar gifts also to Helen and Liz0.

83. Peter says that all of these and more arose from natural love and affection and did not result from his work on the farm, and should thus be regarded as a separate matter, which is not relevant to the assessment of the extent of Peter's detriment: see *Esther Chan Pui Chun v Gilbert Leung Kam Ho* [2002] EWCA Civ 1075 at para. 89 per Jonathan Parker LJ, cited in McFarlane at para. 4.145.

84. As for the compensation received by Peter from the Department of Transport when the A14 was diverted through the farm land (which Peter says was some £17,000) he contends that this should also be disregarded on the basis that the benefit was *res inter alios acta* in that it was not causally linked to Peter's reliance, but to the exercise of the State's compulsory purchase powers: see McFarlane, paras. 4.161 – 4.166.

85. I also have regard to the facts that Marian and Davis contributed £28,000 between 1987 and 1993 to Peter's capital in the partnership, by transfer from Marian and Davis' capital accounts to Peter's capital account, that Peter was permitted to use farm machinery belonging to the partnership to carry out contract work and allowed to keep a part of the income for himself and that the partnership provided Peter with the use of a vehicle (estimated by Peter as worth between 1993 and 2011 some £57,000).

86. The question of detrimental reliance should not be divorced from the prior question of whether there were promises as alleged – the facts on both questions must be assessed together. In the end, they fall to be considered and decided in the light of other relevant matters regarding the conduct of the parties as close relatives and in their partnership, and in particular the 2012 PA, to which this judgment will shortly turn.

87. However it should be said at this stage that I am not satisfied that Peter suffered any significant net detriment in reliance on any assurance that he would inherit the farm, or indeed his expectation to that effect. He benefitted (as his sisters were also intended to) from his parents' generosity and regard for their farm, family and future. He worked hard and contributed to the same cause. In context, his efforts to that end were and are not to be regarded as detrimental to him. Any notion of equality within the family would strongly suggest the opposite, as it also suggests that he did not receive and/or rely on the promises alleged.

88. By the time of the 2012 PA, Peter was a wealthy man, who had been running the farm business for 10 years, owning a house in an acre of land and Whitleather Lodge Farm (together worth £2.25 million in 2017) plus one third of the partnership property, and income in addition to his salary, Peter had benefitted substantially from the choice he made to farm with his parents and all that followed.

89. In cross-examination, Peter accepted that overall his decision to farm with his parents had been beneficial – partly due to them and partly due to his own hard work:

> "Q. … So, looking back from June 2012, back over your life ---- would you not agree that your decision to go into farming with your parents, resulting in your mother making an incredibly generous gift to you when you were a young man, meant overall that the decision had been very beneficial to you, not detrimental at all?
>
> A. It was -- obviously my mother wanted me to farm, as did my father, so it's all been done in the process and obviously in the long-term I have, you know, benefited, but also through my hard work and my endeavours to make the business as it is today….
>
> … JUDGE: - and have used your own resources for -- or her resources, not derived from the farm or from your parents, to renovate. I understand all that. But are you saying that what you had from your parents, what you have had from your parents, has been a net detriment, rather than a net benefit?
>
> A. It's now -- well, it is now a net benefit, yes. Obviously.
>
> JUDGE: Before that, it was -- it wasn't a benefit, it was a potential benefit?
>
> A. It was a potential benefit.
>
> JUDGE: But you had to make it work very hard to turn it into an actual benefit?
>
> A. Exactly."

(7) The 2012 PA

90. In order to understand the effect of the 2012 PA on Peter's proprietary estoppel claim, and to explain the issues as to the calculation of the price he must pay for Marian's share, it is necessary to set out many but not all of the relevant clauses.

91. Under clause 1 of the 2012 PA, amongst other definitions, (a) "the Business" meant "the business of farming which is or is to be carried on by the Partnership"; (b) "the Partnership" meant the Business as it is or is to be conducted by the Partners (Davis, Marian and Peter, under the Partnership Name "DSS Horsford"); and (c) "the Property" (from which under clause 4.1 the Business was to be carried out by the Partnership) meant the property "which is or is to be occupied by the Partnership for

the purposes of the Business as set out in Schedule 1 (which listed a half share in College Farm introduced by Davis, a half share in College Farm introduced by Marian, and Whitleather Lodge Farm introduced by Peter) and/or any additional or substituted property so occupied by the Partnership".

92. Clause 2.2 provided that the terms of the deed should, from the Commencement Date of 1 July 2010, be "deemed to have governed the affairs and operation of the Partnership and shall supersede any earlier agreement (written or verbal) that there may have been" and clause 2.4 provided that, subject as is specifically provided for in the agreement, the Partnership should subsist until wound up in accordance with the provisions of the Partnership Act 1890.

93. By clauses 4.4 and 4.5 "A Partner or Partners may, from time to time, introduce real property held by them into the business of the Partnership through a declaration that they hold the same as part of the Partnership property and, for the avoidance of doubt, the property listed at Schedule 1 shall be deemed to be Introduced Property" (defined in clause 1 as "real property introduced into the Partnership by Introducing Partners") and "A separate Land Capital Account shall be maintained in the books of the Partnership to record all Introduced Property and all profits and losses associated with each item of Introduced Property."

94. Clause 5.6 provided that the annual profit and loss account and the balance sheet, (that is, not the Capital Accounts, Current Accounts or Land Capital Accounts) shall be approved by the Partners, distributed in the form of copies of the approved version to all Partners, and binding on all Partners once approved save that any Partner may request the rectification of any manifest error discovered in any such accounts within 3 months of receipt of a copy of the approved version of them.

95. Also under Clause 1 references to "capital" meant all money or assets invested by the Partners in the Partnership in order to finance the Business (excluding Introduced Property and any goodwill in the Partnership), and that references to 'capital accounts' are references to accounts in respect of each of the Partners showing the balances of capital respectively belonging to them in accordance with clause 7.

96. Clause 7 provided among other things that all Capital should belong to the Partners jointly and be held by them in the respective proportions which their respective Capital Accounts bear to the total of the Capital Accounts, and that the Partners' Capital Accounts "shall on the Commencement Date be credited with the respective amounts of Capital belonging to them on that date" and should at the relevant time have credited or debited to them any share of any capital profit or loss belonging to or to be borne by them, at the time when the item in question is paid or realised.

97. By clauses 8.1 and 8.2, current accounts were to be kept in respect of each of the Partners. These were to show (a) the amounts of profit or loss, other than profit or loss

of a capital nature, to be credited or debited to them in accordance with clause 10, (b) any drawings to be debited to them, and any payments or provisions for tax or releases of such provisions to be made in accordance with clause 9.2, and (c) other credits or debits which the Partnership's Accountants advised are of an annual and not of a capital nature.

98. Upon the approval or deemed approval of the accounts in respect of any Accounting Period the credit or debit balance as the case might be of the current accounts of each partner for the Accounting Period in question was to be payable either to or by each of the Partners (as the case may be) by or to the Partnership unless the Partners otherwise determine.

99. Clauses 9.1 and 9.2 provided that there should be paid to each Partner such sum by way of regular drawings as the Partnership may from time to time decide and that a partner who has overdrawn their current account must repay the excess plus interest. By clause 12 Peter was entitled to an annual salary of £45,000 from the Commencement Date, deducted from profits prior to division between the Partners.

100. By clauses 10.1 and 10.2, the profits and losses of the Partnership were to be divided equally amongst the Partners or in such proportions as they shall from time to time agree and all profits and losses of the Partnership of a capital nature in respect of each item of Introduced Property should accrue to and be borne by the Introducing Partner(s) in respect of each such item.

101. Clause 11.1.2 stated expressly that "Each partner shall at all times … be just and faithful to the other partners and give them at all times full information and explanation of all matters relating to the Partnership".

102. Clause 25 provided that "This agreement constitutes the whole of the agreement between the Partners as to the Business" and clause 13.2 provides that the unanimous vote of all the Partners is required for a number of matters, including (by clause 13.2.9) "the amendment of this agreement".

(8) The retirement provisions

103. At the crux of this dispute are the retirement provisions under the 2012 PA, of which clause 16 provided that: "If any partner gives to all the other Partners notice of a duration not less than the Notice Period of his intention to retire from the Partnership then on the Accounts Date next following the expiry of the notice he shall retire from the Partnership." The Notice Period was defined as 6 months.

104. Clause 17 made provision for circumstances in which a partner was to be deemed to retire and clauses 18 and 19 make provision in relation to a "Determining Event", defined as meaning, in relation to an "Outgoing Partner", death, actual retirement, or

deemed retirement. The "Remaining Partners" referred to the Partners other than the Outgoing Partner and the "Cessation Date" for an Outgoing Partner who served a retirement notice under clause 16, was the date of his retirement.

105. Clause 18.2 provided that "The balance standing to the credit of his current account shall be paid to the Outgoing Partner within one month of the approval by the Remaining Partners of the accounts as at the Accounts Date next following (or, if applicable, coinciding with) the Cessation Date … provided that if such approval has not been given within 9 months of the end of the Accounting Period in question then the Remaining Partners shall at the end of that period make an interim payment of three quarters of the amount shown in the management accounts of the Business as standing to the credit of the Outgoing Partner's current account and shall pay the balance immediately upon approval of the said accounts."

106. By clause 19.1, on a Determining Event, each of the Remaining Partners had an option (referred to as "the Option") to purchase the "Outgoing Partner's Share", defined as meaning the Outgoing Partner's share of the "Partners' Funds", in its turn defined to mean "the aggregate of the Partners' capital accounts, their current accounts, and any loans made by a partner to the Partnership (including each Land Capital Account)".

107. It was common ground in the present case that, as payment of the amount standing to the credit of an Outgoing Partner's current account was provided for in clause 18.2, the reference in the definition of "Partner's Funds" to current accounts is to be disregarded as an obvious mistake, and that the Outgoing Partner's Share therefore does not include the Outgoing Partner's entitlement to be paid the amount standing to the credit of their current account.

108. Clause 19.2 provided that the Option may be exercised by any one or more of the Remaining Partners by way of an "Option Notice", that is, a notice in writing served upon the Outgoing Partner, which under clause 19.3 might be served at any time during the "Option Period" of 6 months starting on the Cessation Date.

109. Any Partners who served an Option Notice exercising the Option were referred to as "the Purchasing Partners" and clause 19.5 provided that, if the Option is exercised, the Outgoing Partner's Share shall be deemed to have accrued in the "Appropriate Ratio" (the ratio which the profit shares payable in accordance with clause 10.1 to each of the Purchasing Partners at the Cessation Date bear to each other) to the combined capital accounts and Land Capital Accounts of the Purchasing Partners upon the Cessation Date.

110. In the present case, after Marian served notice of retirement, only Peter served an Option Notice, so the whole of Marian's Outgoing Partner's Share was deemed to have accrued to Peter's capital and Land Capital Accounts on 30 June 2017.

111. Under clause 19.6 “The amount payable to the Outgoing Partner pursuant to any exercise of the Option shall be the Outgoing Partner's Share (which for the avoidance of doubt includes the Outgoing Partner's Land Capital Account).” Any freehold or leasehold land was to be valued at market value, but there was no provision for the revaluation of the other assets of the Partnership so that other assets in the balance sheet had to be taken as having their book value, and no allowance is made for the goodwill of the Partnership retained by the Remaining Partners.

112. Clause 19.7 provided that “Any freehold or leasehold property (including the property of the Outgoing Partner held in the Land Capital Account) shall be valued on the Cessation Date on the application of the Purchasing Partners or the Outgoing Partner. Such valuation shall be agreed between the Purchasing Partners and the Outgoing Partner or in default of agreement determined on the application of any party by a valuer appointed by the President of the Royal Institution of Chartered Surveyors on the application of any party. Such valuer shall act as an expert and not as an arbitrator and his decision shall be final and binding on the parties. Any profit or loss on such revaluation shall be credited or debited to the Partners' capital accounts in proportion to their respective shares in the profits of the Partnership immediately prior to the Cessation Date or to their Land Capital Account in respect of any profit or loss on the revaluation of property held in their Land Capital Account.”

113. Clause 19.8 provides that the amount due under clause 19.6 shall be payable by equal half yearly instalments over the “Payment Period” of 5 years. If, as in the present case, the Cessation Date is also an accounts date, then the first payment is due 6 months after that date, although the Purchasing Partners are entitled to make payments at any earlier time as they think fit at their absolute discretion.

114. Clause 19.9 provided that, upon the making of any payment under clause 19.8 there shall also be payable interest at the “Interest Rate” on the balance then outstanding to the Outgoing Partner from the Cessation Date or the date of the last such payment to him (as the case may be). The Interest Rate was specified at 2% over NatWest’s base rate as varied from time to time. That base rate increased from 0.25%. to 0.5% on 2 November 2017 and to 0.75% on 2 August 2018.

115. If no Remaining Partner had exercised the Option within the 6 months Option Period, then (a) under clause 19.10, the Partnership would have been deemed to have been dissolved upon the expiry of the Option Period, and the provisions of the Partnership Act 1890 apply to the dissolution; and (b) under clause 18.3, all property included in the Outgoing Partner's Land Capital Account was to be distributed *in specie* to the Outgoing Partner as soon as practicable, and under clause 24, all Introducing Partners would have the right to take a distribution of their Introduced Property *in specie* (in each case, unless that would render the Partnership with too few assets to meet its

liabilities and the Outgoing or Introducing Partner did not opt to fund such shortfall in cash to be added to his Capital Account).

116. Whilst clause 20.1.1 provided that an Outgoing Partner must deliver to the Partnership forthwith upon request and at the expense of the Outgoing Partner all property belonging to the Partnership and all paperwork relating to the Partnership, during any subsequent period in which money is owed to the Outgoing Partner by the Partnership, the Outgoing Partner is allowed to inspect partnership papers relating to any period before the Cessation Date.

(9) More background to the 2012 PA

117. The circumstances leading to the execution of the 2012 were explored in depth at the trial and in the end, the most germane facts were not seriously in dispute. By late 2011, Marian was separating from Davis after over 50 years of marriage and moving into the Stables which had previously produced a rental income. Her money worries were expressed in her diary entries at the time.

118. Although Peter said in evidence that he thought perhaps she did not need to be so worried, his witness statement said "I understood my mother's need for more money. She clearly wanted financial independence, and had lost the income from the Stables when the commercial tenant had left in October 2010…" and he wanted a partnership agreement "to have something in writing to regulate the affairs of the farm business ... I thought that a written PA would make it less likely that a dispute between my parents would damage the business."

119. There was a fact-finding meeting with Philip Hutley on 4 October 2011 followed by his letter of 13 October 2011, which he said recorded everything of importance said at the meeting but which in fact contained a number of errors, not least as regards its being "most important to confirm that all property land, houses and building are partnership property" when in fact the houses and buildings were never made partnership property.

120. On 23 November 2011 Peter had a further meeting with his parents, which Peter described as "particularly difficult": Marian complained that her monthly drawings were not high enough and said that if this was not sorted out then she would leave the partnership. Her diary entry said "I asked for 750 per month rise of 300 and +Bonus Annual Share of profits if not I would come out of Partnership and expect to be paid my share. Rang Liz as I upset. D threatened me in front of Peter who did nothing … I must now go all out for my rights - I cannot believe Peter let alone Davis behaviour".

121. It must have been crystal clear to Peter that his mother regarded herself as entitled to leave the partnership and be paid her share but, far from suggesting that she could not fairly do so given her promises and his reliance on them, he accepted this without

objection: whether or not Marian still intended to leave Peter her share of the business at that stage, she could obviously change her mind if she wanted and take it out instead.

122. There was then another difficult conversation between Peter and his mother about 10 days later on 3 December 2011. This conversation is referred to in Marian's diaries, where she says: "... Peter came in with cheque £1,800, had a go but I told him a few home truths. D came in and out". When Peter discussed his mother's position with Mr Hutley on 12 December 2011, the latter noted that Peter told him that Marian was threatening to give the farm to Peter's sisters (only one of whom, Helen, would give it back) and Mr Hutley said that the proposed partnership agreement would therefore need to include a right to buy Marian's share with the price payable over a period of 3-5 years to help cash flow.

123. Marian's diary entry for 13 December 2012 recorded that "Peter came with card and chat talk about PA". Adlams sent out the first draft of the agreement later that month, on 22 December 2011, and some manuscript amendments were made the following month on 31 January 2012. The first draft includes an option to buy out the share of a retiring partner (though not yet at "market value").

124. Marian's diary records a further discussion with Peter about the PA on 9 January 2012 and says "Had long chat to Chris Dyke I am so worried doing paperwork and finance" and on the same day, Mr Hutley made a note of a phone call from Peter, saying "Mother changes her mind. Wanted buying out of her share".

125. On 27 January 2012, Marian's diary says: "To see Paul Rogers with Peter took 1½ hours but went OK". Mr Rogers' attendance note says that the meeting lasted 1 hr 15 mins, the option to buy provisions were specifically discussed, and there were only two issues left, one of them being "the time for payment by remaining Partners under the 'option to buy' provisions…".

126. Immediately following this meeting, the draft PA was amended – in particular, the reference to "value" in the option to buy provisions became a reference to "market value". That must have been done at Marian's insistence at the meeting. The agreement could have referred to book value – that is, after all, what Graham Smith had suggested in 1996. Marian had received advice shortly before the meeting from Mr Dewdney: see his letter of 26 January 2012: F2/410. He advised that "there should be an entitlement to an outgoing Partners enjoying a revaluation of assets": p.413 para 18.

127. As a result of the above conversations Peter knew there was a substantial possibility that his mother would exercise her right to leave the partnership, and he also knew that he would have the right to buy her interest at market value, rather than at a nominal or book value. If there had been endless promises, which induced Peter to work very hard for low pay as he now claims, then he would have protested at the time. He did not.

128. There was a further meeting on 12 April 2012 with Marian, Davis, Chris Dyke, Mr Hutley and Peter York of Adlams all in attendance. Marian asked for the sum of £50,000 "as a starter". Marian said nothing at this meeting to indicate that she intended to give up the right to retire and be paid out the value of her share or the idea that she might leave her share to her daughters. It was of no relevance to Mr Hutley, giving tax advice, who she left her interest to in her will – the tax objective of securing BPR would be the same regardless of who she left her property to. Mr Hutley accepted in cross-examination that the question of whether Marian might retire, or leave her interest to her daughters did not need to be mentioned at the meeting

> "MR JOURDAN: It didn't need to be mentioned, did it, because it had no bearing on the issues, which were to try and maximise -- from your point of view, to maximise inheritance tax reliefs for all three partners, for Peter as well?
>
> A. Correct".

129. On 4 May 2012 Peter sacked Adlams and instructed Louise Davies at VSH. Ms Davies' first attendance note, recorded that "Peter has 2 sisters – gets on very well with one … but doesn't get on at all well with other. Mother is siding with this sister, so there is a bit of a split with mother and one sister on one side, and father, Peter and other sister on other. Not sure that this is of immediate concern but he is worried about mother has in her Will and whether this sister will get a share of the farm. LMD advised that she couldn't become a partner but he may have to buy her out. He is aware of that and said he will do so if necessary. He said it was his parents' intention (and still is his father's, query mother's) that on death, Peter should have the farmland (but not the properties)."

130. Thus Peter knew that he might be left the farm and hoped he would, but he might not be. He was not aggrieved or upset about the possibility that he might be required to buy out his mother instead, and apparently he did not make any protest, apparently to his mother, other close relatives or the many advisers involved (Ms Davies being the third solicitor to act for Peter and the partnership). He also had a land agent and an accountant working for him. He did not say to any of them, at any point, that it would be unfair if he had to buy his mother out as he now claims. He obviously did not consider it unfair at that time - or, if he did, he decided not to say anything or obtain advice about it.

131. In his statement and in cross-examination, Peter claimed that he did not take his mother's threats to leave the partnership "too seriously". But he agreed to the £50,000 payment which she had demanded, notwithstanding that it meant having to arrange an overdraft with NatWest at short notice, about which he was discontent, and I find that he did take her threats seriously, and that is why he discussed with her the option to buy her interest.

132. In his evidence he was asked about this:

> "JUDGE: But just to go through it once more, that was your fear in May 2012… that mother's share in the business was not going to come to you. And your answer to that fear was to make sure you had a right to buy her share.
>
> A. But I never thought I'd need to enact that right…
>
> MR JOURDAN: You hoped you wouldn't but you knew you might have to, yes?
>
> A. Yes."

133. Ms Davies' first attendance note records that Marian was happy to see her about a will, but Peter did not know what Marian's will would say. In any event, wills can always be changed, as everyone knows. They are quite unlike a contract since that can only be changed by mutual agreement.

134. Peter had another meeting with Ms Davies on 10 May 2012 when she gave him a new draft of the PA, having gone over highlighted parts with him including clauses 2.1 and 2.2, which stated that the terms of the PA are to "supersede any earlier agreement". Ms Davies emailed a copy of the new draft agreement on 11 May 2012 to Mr Hutley, forwarded to Peter, stating "I have not seen Mr and Mrs Horford's Wills and therefore the uncertainty of what happens to the land on their deaths does concern me, particularly as it would appear that the partnership does not have any lease or tenancy of the land".

135. On 6 June 2012, Ms Davies emailed Philip Hutley and Chris Dyke, again forwarded to Peter, summarising the objectives of the PA as meeting the needs (a) to formalise arrangements between the partners (which is what originally got the ball rolling); (b) to secure tax relief in the event of death of any of the partners (including Peter); and (c) to ensure the business could continue on the death of a partner no matter what his or her will might say.

136. On 8 June 2012 Peter called Ms Davies saying that he had been through the paperwork and that Marian might want to speak to a solicitor friend of Liz. Peter therefore knew that entering into the PA was very far from a formality as far as his mother was concerned. This is confirmed by Ms Davies' further email to Peter on 13 June 2012, on which there was a handwritten note indicating that Marian had 12 questions about the PA, which Peter was proposing to try and deal with in the first instance.

137. Marian's diaries for 11 and 13 June show that she went to see Mr Dewdney on 11 June 2012, and spoke to him about the PA for half an hour, having previously made a list of comments. She then spoke to Peter on 13 June and they went through the document together.

138. So again, it must have been obvious to Peter that Marian had been over the document carefully and that she was concerned to understand what rights she was getting and what obligations she was assuming. It was far from being a formality or something Marian did not care about, and Peter knew that.

139. On 19 June 2012, the three partners met Ms Davies to go through the documentation and to sign it. Marian still had questions at that late stage, which she regarded as sufficiently important to have answered before signing. Ms Davies' attendance note records, of the documents, that Marian in particular had "read them thoroughly" and that shows again that Marian was concerned with the detail.

140. Peter signed the final version of the PA as a deed in the presence of Ms Davies and said in cross-examination that he attached significance to the fact that he was signing a written document and that he understood that he was committing himself to the obligations contained in the PA; that he recognised the rights which it gave to him and his parents and understood that one of the rights it gave to each of the partners was a right to retire by serving a notice; and that if that happened, the remaining partners had 6 months in which they could decide whether they wanted to buy the share of the outgoing partner and if they did decide to buy it, they had to pay for it over 5 years.

141. All three partners also executed declarations of trust and Marian and Davis were also asked to, and did, sign a notice of severance in respect of their joint tenancy of part of College Farm, which referred to each having the right to dispose of their individual interests under their wills. That is also inconsistent with Marian having already promised to dispose of her interest in his favour, as Peter now claims.

142. In the entire period up to execution of the 2012 PA on 19 June 2012, Peter does not appear to have ever asked for advice on whether it was possible for the PA to provide that, on his parents' retirement or death, their share in the partnership business and land should vest in him at book value, or at less than its market value.

143. Later, in early 2013, Ms Davies spoke to a colleague at VSH, Shelly Phillips (who was working on the wind farm file for the partnership) and shared her impression of the three partners and their relationships, The note of that conversation suggests that Peter was not speaking to Marian at this time (although he denied that in cross-examination) and that Marian would consider any report which Ms Phillips might send her carefully.

144. Peter's witness statement stated for the first time (this did not appear in his Defence, initially or as amended) that he thought at the time that the 2012 PA could not include a reference to gifts for tax reasons. It was then alleged at trial that Peter agreed with Marian that the PA should not include a reference to promises by his parents to leave him the farm because of advice that this would cause tax problems.

145. The earliest document which suggests that advice may have been given that the agreement should not include anything that appeared to be a gift is an attendance note

dated 8 May 2012 of Ms Davies's conversation with Chris Dyke. His concern was that a gift might give rise to a reservation of benefit or PET (potentially exempt transfer).

146. Mr Dyke first became involved in discussions about the PA following Mr Rogers' letter of 1 March 2012. This led to a phone call to Chris Dyke on 26 March and Mr Dyke then came to the 12 April 2012 meeting. So any suggestion from him of the kind alleged could not have been before that.

147. In any event Peter's claim (in evidence although unpleaded) that he avoided asking for the alleged promises to be included in the agreement for tax reasons, made little sense. Mr Hutley said in cross-examination that he thought he had said something at the 12 April meeting to the effect that the agreement should not include provision for transfer at less than market value. This was because he had – and still has – a belief that such a provision could be construed as a "binding contract for sale" which could prevent APR from being claimed.

148. Mr Hutley said that he had never been asked to advise on the possibility that the proposed agreement should provide for Peter to acquire his parents' interests at anything other than market value, but he thought he might have volunteered the advice that this was unwise at that meeting. On questioning, he said he thought that in fact, he had just mentioned that the family needed to include a buy out clause without going into the details.

149. I am not at all satisfied that Mr Hutley said anything on 12 April 2012 about the need to avoid a binding contract for sale, but even if he did, it is of no relevance since long before, Marian and Peter had discussed and agreed the need for an option to buy out Marian's interest if she wanted to retire and she had said it should be at market value, following Mr Dewdney's advice.

150. That had nothing to do with tax. Any tax considerations relating to the drafting came in at a much later stage. It could not sensibly be suggested by Peter that, but for the tax advice, the PA would have included provision for him to acquire his parents' interests at less than market value.

151. In any event, for what it may matter, I am not satisfied that either the concern raised by Mr Dyke about reservation of benefit in May 2012, or any concern mentioned by Mr Hutley in April 2012 about the need to avoid a binding contract for sale, was justified. I was not persuaded that there is any inheritance tax reason why a PA should not provide for the acquisition of an outgoing partner's share at less than market value.

152. Put briefly - whilst partnership agreements may provide for an outgoing partner's interest in partnership property to be taken into account at book value with no revaluation (see *Lindley & Banks* paras 10-181 and 10-204) and this may or may not amount to a disposal by way of gift with a reservation of benefit under section 82 of the Finance Act 1986, if it does, and the gift is disregarded for IHT purpose, I do not see

that this would affect in any way the availability of relief (whether Agricultural or Business Property Relief).

153. Nor would I regard such a provision as amounting to a binding contract for sale for the purposes of sections 113 and 124 of the Inheritance Tax Act 1984. If this was right, an option such as that in clause 19 of the 2102 PA would be a binding contract for sale (which it is not and is not alleged to be in HMRC's manual). And the suggestion that such a clause might be a binding contract for sale if it provided for the land to be acquired at less than market value, but not if it provides for market value, to me makes no sense.

(10) The contractual estoppel against Peter

154. In the usual proprietary estoppel case, the alleged promisor owns property, and the alleged promisee seeks an order that the property be transferred to him, or that he be granted an interest in respect of the property. His rights as regards the property, unless and until the Court makes an order in his favour, are at best uncertain.

155. But in the present case, Peter chose to and did acquire the property, as he pleaded in paragraph 34 of the Amended Defence. The expected consequence of that for Marian, as contracted for, is that she is entitled to the debt owed by Peter as a result, under clause 19 of the 2012 PA, and nothing more.

156. Peter advanced various ways around this. He submitted that (a) he had an equity prior to the PA 2012 and did not waive it, because he was unaware of his rights, and (b) was therefore entitled to use the partnership property after 30 June 2017, enjoying the benefit of Marian's interest, without paying for the use of it, and (c) remained entitled to apply to the Court for an order that Marian's interest should be transferred to him, or that some other order in his favour should be made.

157. He also submitted that, because Marian behaved badly in serving her retirement notice under clause 16 and in other ways (unpleaded), this transfer should be ordered without any payment at all, or the Court might, in the exercise of its discretion, decide that Peter should have to pay something for his mother's equitable interest in the partnership property (albeit not too much, such that he would have to sell or encumber any part of the farm).

158. However, in my judgment, a right to apply to the Court for a discretionary remedy that might or might not include the transfer of any remaining interest on the part of Marian is completely inconsistent with both the terms of the 2012 PA and with Peter's exercise of his option to acquire her interest on her retirement.

159. Before coming to the contractual effect of the 2012 PA, the first major problem in Peter's approach is that he did not have any equity before the 2012 PA, as I find - and

the PA 2012 and events leading up to it, support that finding. The second, a matter of principle, is that even if Peter had an equity prior to the 2012 PA (which in my judgment he did not), Peter then acquired Marian's interest in the partnership property and business pursuant to clause 19 of the 2012 PA and since 30 June 2017 has been receiving the income it produces, to the exclusion of Marian.

160. It seems to me impossible for Peter to ask the Court to make a discretionary order requiring Marian to transfer her interest to him, given that it is already vested in him under clause 19.5 with effect from 30 June 2017. Counsel could not direct me to any previous case where a claim to a proprietary estoppel equity has been made still less granted, where a deed has been entered into after the alleged equity arose with provisions specifically governing what was to happen to the property.

161. Both sides cited *Shirt v Shirt* [2010] EWHC 3820 (Ch), [2012] EWCA Civ 1029, where a son's claim to a proprietary estoppel equity against his father (in respect of another farm) was dismissed. In that case, after the alleged representations had been made by the father to the son, there were negotiations about a written partnership agreement, which in the end was never signed; and under the draft agreement, if a partner retired or died, the remaining partner would have the option to purchase the share of the retiring or deceased partner at market value. The trial Judge commented unsurprisingly at para 24: "There is no doubt that if this proposal had been accepted the claim that [the son] now advances would simply not be open to him, but it was not accepted."

162. The most basic answer to Peter on this aspect is just that. By clauses 2.2 and 25 the Partners agreed that "The terms of this agreement shall from the Commencement Date be deemed to have governed the affairs and operation of the Partnership and shall supersede any earlier agreement (written or verbal) that there may have been" and "This agreement constitutes the whole of the agreement between the Partners as to the Business". By clause 13.2, they agreed that the rights and obligations recorded in the deed could only be varied by their unanimous agreement.

163. Despite Peter's argument as to whether these clauses were properly pleaded by Marian (as to which I find the pleading adequate), the point is beyond obvious: the whole point of a deed of this nature is to act as a comprehensive record of the parties' rights and obligations. As Lewison LJ said in *Shirt v Shirt* at [54]: "Formal requirements for the disposition of interests in land exist for a good reason. They are designed in part at least to prevent expensive disputes about half-remembered conversations which took place many years before a dispute crystallised."

164. Subject to consumer protection legislation (eg section.2 of the Unfair Contract Terms Act 1977, section 3 of the Misrepresentation Act 1967 and section 62 of the Consumer Rights Act 2015), the parties to a contract are bound by provisions of this kind. Such clauses take effect by virtue of contractual estoppel: see *Springwell Navigation Corp v*

JP Morgan Chase Bank [2010] 2 CLC 705 and *Matchbet v Openbet Retail* [2013] EWHC 3067 (Ch) at para 132, *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119 at para 14.

165. Even if those specific clauses are ignored, the position would be the same. When a person has rights in respect of property, and then enters into a contract which is inconsistent with the continued existence of those rights, the person is estopped from asserting those rights. Those rights are extinguished by the contract: see *Foster v Robinson* [1951] 1 KB 149. In the same way, the terms of the 2012 PA replaced any previous inconsistent rights.

166. Peter sought to argue that there was no provision in the 2012 PA whereby he agreed to give up any equitable rights he had already acquired and that "clear words" would be necessary to achieve this result. This is a question of contractual interpretation in respect of which the usual principles apply: the factual background may be taken into account, but not the subjective intentions of the parties or the negotiations; and if the terms of a contract are unclear, it will not be interpreted as excluding rights conferred by the law on contracting parties.

167. The discussion in *Lewison: The Interpretation of Contracts* (eg at pp 654 and 651) and specific cases relied on by Peter – such as *Gilbert-Ash (Northern) Ltd, Seadrill Management Services Ltd,* and *Liberty Mutual Insurance Co (UK) Ltd* - are concerned with rights arising after a contract is entered into, not with the different question of whether the parties intend the rights and obligations set out in their written contract to supersede any rights and obligations in respect of the same subject matter which may have existed prior to the execution of the written contract.

168. In the present case, Marian does not rely on the 2012 PA to exclude a right conferred by law on Peter in respect of the operation of the contract. She seeks to enforce a contractual obligation by Peter to pay the debt owed under clause 19, and the language is clear. Peter has offered no plausible analysis of how the words used in the 2012 PA could be interpreted as preventing Marian from enforcing her rights under clause 19 because, if he had sought equitable relief prior to the 2012 PA being entered into, he would have been able to obtain an order from the Court in respect of the partnership property more favourable to him than the 2012 PA.

169. Peter also submitted that there is no absolute rule that a proprietary estoppel claim cannot be based on a promise which is absent from a later contract between the parties, and the issue is a fact-sensitive one. That may be right, the omission in a formal written contract of any reference to alleged pre-contractual right must tend to prove it did not exist, unless there is a satisfactory explanation of why it was omitted from the document – which in this case, there is not, as I find.

170. Thus the textbook cited by the parties, *McFarlane: The Law of Proprietary Estoppel* states (at paras 6.116-118) that it may be the case that "the parties intend the later formal contract to displace any duties arising from their earlier dealings. If so, even if B could have established a proprietary estoppel claim on the basis of the earlier promise, any resulting liability imposed on A is extinguished by the later contract", unless A assures B that the promise will be performed despite the terms of the contract - which was emphatically not the position here.

171. Whilst Peter says that he did not waive his right to make a proprietary estoppel claim by entering into the 2012 PA because he did not know he could make such a claim until later (see *Habberfield* at para 34), waiver is a doctrine different from contractual estoppel, which may apply when a person has a right to choose between two inconsistent courses and communicates an intention to pursue one of them, and is not alleged in the present case.

172. Another way of putting the effect of the 2012 PA against Peter is to say that if he did have any prior equity, the provisions of the deed and the Declarations of Trust satisfied it. The parties' agreement is the best evidence of what was fair at the time and therefore what was needed to satisfy an equity, if one did exist.

173. Peter accepted in cross-examination that he got what he wanted in the 2012 PA:

> "JUDGE: You're a farmer who has lawyers and tax advisers and is obtaining a partnership agreement to protect you and the farm which you want to make sure is yours forever, that's what you were; is that fair?
>
> A. Yes, that's fair, my Lord.
>
> JUDGE: And you asked for what you wanted in the partnership agreement and it was the lawyers' job to sort it out and make sure you got it?
>
> A. To provide that, yes.
>
> JUDGE: What you wanted was a right to buy and that's what you got?
>
> A. Yes, my Lord."

174. In *Habberfield* at para 68, Lewison LJ said that in proprietary estoppel claims, the court should "recognise party autonomy": Here, Peter and Marian agreed on the terms of the 2012 PA, under which Peter could acquire – and now has acquired – Marian's interest, on payment of a price determined under clause 19 payable over 5 years. Peter has to pay book value for all the assets other than the land, but he has to pay market value for the land. Even if the Court has power to override the terms of the 2012 PA, which I doubt, I utterly reject the notion it could be right in this case to do so.

(11) Unconscionability

175. On that note, I turn to consider the question of proprietary estoppel overall. Deciding if a person has the right to apply to court for a discretionary remedy because of proprietary estoppel is a retrospective exercise, which in the particular circumstances of this case requires the Court to look at all relevant factors whether (in this case, as at the time of execution of the 2012 PA and/or Marian's retirement notice) it would have been conscionable for Marian to take the position she did, that (a) she would only make her interest in College Farm a partnership asset if Peter agreed that she could retire if she wanted to; (b) he would then have an option to buy her interest and if he exercised it, he would have to pay her a price calculated on the basis the land would be revalued.

176. Marian advanced powerful reasons why that must be so. First, by the autumn of 2011 much had changed - (a) Peter and Liz had no children whereas Helen did (b) Davis and Marian had made a gift of the Development Land to Peter and Helen (c) there had been a family rift (d) Marian and Davis were splitting up (e) Marian was very worried about money (e) the Stables would no longer be producing a rental income; and (f) the wind farm would produce separate income No-one could reasonably have thought that previous comments about testamentary intentions would be binding or remain applicable.

177. Secondly, after the initial meeting with Mr Hutley in October 2011, there were a number of conversations between Marian and Peter in which Marian made it clear that she considered herself entitled to leave the partnership and be paid her share, and to leave her interest in the farm to her daughters. Peter's response was that he would need to have an option to buy her share with sufficient time to pay the price, rather than any complaint to Marian, Davis, his wife, sister or anyone else that this was unfair or contradicted any earlier assurances.

178. During discussions as to the terms of the 2012 PA and the option to buy, including solicitors, Marian said the land should be revalued to market value, which was agreed, and how long Peter should be given to pay the price. Then when Peter instructed Ms Davies in May 2012, he told her that he thought Marian might leave her interest to Liz, in which case he knew he would have to buy her out.

179. Marian was concerned about the details of the 2012 PA and discussed them both with Peter and with Ms Davies. The principal objectives of the 2012 PA – to record clearly the rights and obligations of the partners so as to avoid possible future disputes, to maximise the chance of getting BPR on the death of a partner (to whomsoever his or her interest was left), and to ensure that the business could continue should a partner decide to retire, or die, no matter what his/her will should say – all confirmed the retirement/buy-out approach, inconsistent with a promise or right that Peter would inherit his parents' shares.

180. Those facts are manifest on the documents and had to be accepted by Peter in cross-examination. Peter obviously did not think in 2011-12 that any promises had been made to him or that there was anything unfair about what Marian was saying, and there was nothing unconscionable about her Marian seeking and obtaining the right to retire, on the terms of the option set out in the 2012 PA.

181. Marian was fully entitled subsequently to retire under those terms in the 2012 PA, which was discussed and negotiated with Peter over several months, drawn up by the solicitor whom he instructed, and agreed when he was well aware that Marian might decide to retire. There is no basis for claiming that this was unconscionable on her part.

(12) Laches etc

182. Marian pleaded laches on the part of Peter and unconscionable conduct in refusing and/or delaying in making payment to her out of the partnership after her retirement by way of the balance of her current account or on account of the price for her share, knowing of her inadequate financial position without some such payment.

183. Whilst it is unnecessary for me to decide on these additional defences, since Peter has failed to establish any proprietary estoppel in the first place or in the light of the 2012 PA, had he done so, it is unlikely that these matters would have wholly debarred him from any remedy, perhaps by way of credit against the price payable by him under clause 19.

184. Delay in claiming the relevant equity may make it unjust to give a remedy, because either: (a) the conduct of the claiming party might fairly be regarded as equivalent to a waiver, or (b) his delay puts the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted: see *Habberfield* at para 28. The loss of evidence of a potentially important witness is in the second category, as exemplified in *Price v Saundry* [2019] EWHC 496 (Ch) at para 37.

185. Laches obviously cannot apply if the claimant is unaware of the facts which give entitle them to the remedy. But there is no hard and fast rule that a right can only be lost if a person also has knowledge of their right to the remedy, although that is obviously a material consideration overall in deciding if granting the remedy would, overall, be unjust because of the delay.

186. Thus in *Allcard v Skinner* (1887) 36 Ch 145, on which Peter relies, the Court of Appeal held that a person can lose an equitable right through waiver if aware of the facts giving rise to the right, but decides not to investigate whether they have a right. Lindley LJ said at p188: “It was urged that the Plaintiff did not know her rights until shortly before she asked for her money back. But, in the first place, I am not satisfied that the Plaintiff did not know that it was at least questionable whether the Defendant could retain the Plaintiff’s money if she insisted on having it back. In the next place, if the

Plaintiff did not know her rights, her ignorance was simply the result of her own resolution not to inquire into them …".

187. Marian contended that it was clear to Peter by late 2011 or early 2012, that she regarded herself as entitled to leave the partnership and be paid the value of her share, and to leave her interest in College Farm and the partnership to her daughters, or to Liz alone, if she chose to. If Peter thought that was unfair, he could and should have taken advice; and if he did have an equity at the time, his failure to assert it until 6 years later is said to make it inequitable for him to do so now, as the passage of time has deprived Marian of the ability to obtain evidence from a key witness – Davis, who might have been able in 2012 but not 2018 to give important evidence on the alleged promises made to Peter.

188. There is however still available some evidence from Davis, at least in the form of his will dated 5 October 2012 which left his interest in College Farm and in the Partnership to Peter but said at clause 10 that he had made no provision for Marian "as she owns a half share of our land and properties and is well provided for", which Davis could not have said if he believed that Marian could not realise the value of her half share due to promises made to Peter.

189. Marian emphasises that any equity to which Peter was entitled could not have justified his refusal to pay Marian anything in relation to her share in the partnership, let alone withhold most of her current account. It tells against him that he paid her nothing for his use of her share of the partnership after her retirement including her third of the wind farm income and of the farming profits (as well as arguing until nearly the end of trial that he could withhold £23,945 on her current account because of a set off for half the repayment of D & M Properties' loan from NatWest).

190. Whilst Peter attempted to defend this position under cross-examination, he eventually admitted the obvious - that it was unfair for him to pay his mother nothing more after 30 June 2017, saying "I mean, it would be fair for my mother to receive something but obviously not the full amount that, you know, that she's claiming."

191. Peter's claim that Marian was so rich she had no need for what she lost when she retired as a partner, did him no credit and tended to support Marian's contention that he intended to starve her of income, and of capital which she might use to fund this litigation. It is submitted on her behalf "If anything should shock the conscience of the Court, it is that. Even if all other elements of Peter's case were to be proved, that alone is sufficient for the Court to say that there is nothing unconscionable about now requiring Peter to pay his mother the money he promised to pay her."

192. Whilst this aspect is hypothetical, since Peter did not have the equity which he has claimed, I respectfully disagree with this approach. This court is not an arbiter of moral outrage, especially in complex family relations. Sadly, the last 10 years has seen

breakdowns in parental and sibling relationships for several causes. The task of the Court is to do no more than decide the issues according to law and fairness. It does not serve to punish the bad son or mother, or the bad brother or sister. On the contrary, it is to be hoped that when the legal issues are resolved, those involved may ultimately find some measure of mutual empathy and compassion in order to effect at least some small repair to their family.

193. Although the parties addressed me (basing themselves on *Moore v Moore* [2018] EWCA Civ 2669) as to how much proportionately Peter should pay Marian for her share if he established an equity insufficient entirely to wipe out the price otherwise due under clause 19 of the 2012 PA - Marian contending for a net lump sum of, at the very least, £1.5 million after payment of any taxes and costs, and Peter expressing concern as to whether he would be able service the loan he will need – their evidence was not so comprehensive as to enable fair and final determination either way and since Peter's claim will be dismissed, none is required.

(13) Marian's claims – capital and land capital accounts

194. As set out above, on considering all the relevant factors and at every stage rejecting Peter's case, there is no equity in his favour which would justify any remedy including any reduction of or credit or discount against the price payable by him for Marian's share in the partnership under clause 19 of the 2012 PA.

195. Marian claims that the price for her share payable by and outstanding from Peter is £2,520,812, as I understand it, taking account of (a) the value of the land under clause 19.7 of the PA 2012 including the 'marriage values' of College Farm (other than the Wind Farm) and the Additional Land which account for £90,000 and £45,000; and (b) the value of the Wind Farm as apportioned between College Farm and the Additional Land, and Whitleather Lodge Farm, namely £1,450,000 rather than £966,667.

196. By way of brief further background, following Peter's service of his option notice on 23 November 2017, there was correspondence between the parties' solicitors and following Marian's application to the RICS dated 3 March 2018, Mr Jeremy Zeid FRICS was appointed to act as the valuation expert under clause 19.7 of the 2012 PA. Although Peter would not sign Mr Zeid's terms, he raised no objection to Mr Zeid's appointment and engaged in the valuation process.

197. Various valuation issues were agreed in a Statement of Agreed Facts signed by the parties' solicitors dated 25/26 July 2018 ("the STOAF") and there was an exchange of submissions in respect of which it was agreed that certain issues (including whether the value of her land should take account of marriage value) turned on the interpretation of the 2012 PA and were not for Mr Zeid to decide.

198. There were two issues where that appeared to turn on valuation rather than construction, and Mr Zeid determined those issues on 3 December 2018, one in favour of Peter (no longer relevant) and the other (the value of the Wind Farm as apportioned) in favour of Marian, but which Peter now alleges was indeed a question of construction rather than valuation. Mr Zeid's fees were some £7,495, which Marian paid in whole, as Peter refused to contribute.

199. In considering the issues of construction affecting land valuations and the calculation of Marian's interest now sold to Peter, the meaning of "capital" in a partnership agreement and the nature of a partner's interest in the partnership property was explained in *Popat v Shonchhatra* [1977] 1 WLR 1367 at 1371.

200. The capital of a partnership (similar to the share capital of a company) represents the agreed money value of the contributions made by the partners to the business. Under section 44 of the Partnership Act 1890, repayment of capital occurs before division of the ultimate residue.

201. Partnership property comprises the assets which are to be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement. Under section 20(2) of the Partnership Act 1890 the legal estate in land is held on trust for the persons beneficially interested. While the partnership continues in existence, each partner owns an equitable interest in the whole of the partnership property, entitling them to a proportion of the surplus after the realisation of the assets and payment of the liabilities of the partnership: see *Lindley & Banks on Partnership* at para 19-07 (second cumulative supplement p.149).

202. Accordingly, from 19 June 2012, under the 2012 PA and the Declarations of Trust, Peter no longer owned Whitleather Lodge Farm and Marian and Davis no longer each owned half of College Farm. Rather, all of the partners had equitable interests in the whole of the land. The Land Capital Accounts should have recorded a figure representing the contribution of the land.

203. Unless a partnership agreement makes it clear how profits made when partnership property is sold - "capital profits" as opposed to "income profits" from the ordinary trading of the business - are to be reflected such profits will be shared equally: see *Lindley & Banks* at paras 17-07 and 08.

204. The 2012 PA distinguished between Introduced Property and other property. Clause 4.4 provided that Marian's 50% beneficial interest in College Farm, Davis's 50% beneficial interest in College Farm, and Peter's 100% interest in Whitleather Lodge Farm were deemed to be "Introduced Property": clause 4.5 provided for a separate Land Capital Account to record all Introduced Property and all profits and losses associated with each item of Introduced Property; and clause 10.2 provided that all profits and losses of the Partnership of a capital nature in respect of each item of

Introduced Property shall accrue to and be borne by the Introducing Partner(s) in respect of each such item.

205. The Declarations of Trust declared that the Introduced Property had been held on trust for the Partnership since 1967 in the case of College Farm and since 1988 in the case of Whitleather Lodge Farm. Given that, and the absence of any requirement for a valuation, the parties must have intended the Land Capital Accounts of Marian and Davis to each include half the historic cost of College Farm shown in the partnership accounts prior to the 2012 PA.

206. Thus (a) if the partnership had sold College Farm, half the difference between the net sale proceeds and the historic cost shown in the Land Capital Accounts would have been credited to Marian's Land Capital Account, and half to Davis's Land Capital Account; (b) if the partnership had sold the Additional Land, any loss or profit made on a sale of that land would have been credited or debited to the partners equally in their capital accounts under clauses 7.4, 7.5 and 10.1; and (c) if the Partnership had sold all its land an apportionment of the sale proceeds would have been needed between Whitleather Lodge Farm (any profit being credited to Peter's Land Capital Account), College Farm (50% of the profit being credited to Marian's Land Capital Account and 50% to Davis's) and the Additional Land (one third of any profit being credited to each partner's capital account).

207. Clause 19.7 stated that "Any freehold or leasehold property (including the property of the Outgoing Partner held in the Land Capital Account)" shall be valued on the Cessation Date. The phrase "property of the Outgoing Partner held in the Land Capital Account" must mean: "property introduced by the Outgoing Partner which is recorded in their Land Capital Account". Since once introduced, the Introduced Property ceases to be property of the Introducing Partner and becomes partnership property, the purpose of the Land Capital Accounts was to ensure that capital profits or losses on sale or revaluation accrue to the Introducing Partner not to the partners generally.

(14) Marriage values

208. On dissolution under clause 18.3 of the 2012 PA, *"*all property included in the Outgoing Partner's Land Capital Account*"* had to be transferred back to the Outgoing Partner, unless that would leave the Partnership "with too few assets to meet its liabilities at the time of the distribution". In that case, the Outgoing Partner had "…the option of funding any such shortfall in cash and taking the distribution, any such cash funding being added to the Outgoing Partner's Capital Account".

209. In ascertaining for the purposes of clause 18.3 whether there was a shortfall, and if so how much, it would be necessary to value all the partnership property, including all its land, and compare that with the amount owed by the Partnership. The land would have

to be valued as a whole for this purpose – the exercise would not value the partners' beneficial interest in any property and any marriage value attributable to the different parcels of land being more valuable if sold together rather than separately would therefore have to be included in the valuation.

210. Similarly, clause 19.7 required a valuation of any freehold or leasehold property of the Partnership (but not other assets), and not just some of that property. Then, once the valuation has been done: "Any profit or loss on such revaluation shall be credited or debited to the Partners' capital accounts in proportion to their respective shares in the profits of the Partnership immediately prior to the Cessation Date or to their Land Capital Account in respect of any profit or loss on the revaluation of property held in their Land Capital Account."

211. The context for clause 19.7 is that the Purchasing Partners are acquiring all of the Outgoing Partner's interest in all the land which is partnership property. If there is marriage value, if the land is more valuable together than separately, the Purchasing Partners will acquire the Outgoing Partner's interest in that marriage value. It would be extraordinary if they could acquire it without paying the Outgoing Partner their share of it. It would be even more extraordinary if they could reduce the amount payable because, if the Outgoing Partner was to sell their interest to someone outside the partnership, with no partner buying or seeking to buy, they could expect to sell it at a discount. There is no sensible reason why the Purchasing Partners should be able to benefit at the expense of the Outgoing Partner in that way.

212. Peter submitted that on its proper construction, clause 19.7 required the valuation of the Outgoing Partner's Share in the partnership's land, but that is in my judgment incorrect. On the contrary it provided that "any freehold or leasehold property… shall be valued", with any profits or losses then apportioned to the appropriate Land Capital or capital accounts. The Purchasing Partner was to pay the Outgoing Partner the aggregate credit balance of the Outgoing Partner's capital and Land Capital accounts, and the capital accounts would already reflect the net book value of the partnership property other than land.

213. Peter also submitted that the parties must be taken to have intended that the valuation provided for in clause 19.7 would be conducted on the usual basis upon which valuations are conducted, namely the definition of 'market value' contained in the RICS 'Red Book' which expressly disregards 'any price distortions caused by special value or synergistic value (i.e. marriage value)".

214. But the present issue is not about whether the possible presence of a special purchaser should be disregarded. It is about whether the land was to be valued as if sold on the open market as a whole, or as if sold on the open market in separate parcels on the assumption that each parcel will end up being owned by somebody different. In my judgment, it should obviously be valued as a whole, because it would achieve a higher

price and it is a general principle of open market valuations that, when different properties are being valued, and they would be worth more if sold together than separately, that is how they should be valued: see *IRC v Gray* [1994] STC 360, 372-3.

215. But in any event clause 19.7 does not refer to the Red Book or to "market value" as used in the Red Book, which directs that special purchasers should be disregarded because it is intended to produce not a one-off value, but a reliable and repeatable value, as required for example in mortgage valuations. Where the question is, as here, what the property would have sold for on the valuation date, any "special" influence actually applying to the price that would have been achieved, can and here should be taken into account: see RICS UKGN 3 and *IRC v Clay* [1914] 3 KB 466. It would make no sense, in the context of the 2012 PA, to ignore the so-called "marriage values".

(15) Apportionment of the Wind Farm

216. The Wind Farm Lease granted a number of easements for the benefit of the demised premises in Schedule 2, which might theoretically at least become exercisable over Whitleather Lodge Farm, and clause 2.2 provided that, in certain circumstances, the tenant could if necessary vary the location of the turbines, access roads, electricity sub-station, anemometers and cables, so part of the Wind Farm might move to Whitleather Lodge Farm in the future.

217. It was agreed in the STOAF that the reversion on the Wind Farm Lease had a value of £1.45 million on 30 June 2017 and that in principle, this value could be apportioned between College Farm, which included the demised premises, and Whitleather Lodge Farm which was part of the "Landlord's Property" as defined in the Wind Farm Lease.

218. In the STOAF (see paras 27 and 28(c)) Peter agreed that this issue was one for Mr Zeid to determine, but he later sought to change his position, to argue that he was not bound by Mr Zeid's determination because the apportionment was a matter of law, for the Court alone to decide; and, because Davis, Peter and Marian were the landlords in a lease granting rights over Whitleather Lodge Farm, and the reversion was partnership property, each of them must be treated as entitled to one third of the value.

219. It was not open to Peter to depart from his agreement that Mr Zeid should decide this issue. If parties agree to a statement of agreed facts on which a valuer should decide an issue, they are bound by that agreement: see *Great Dunmow Estates v Crest Nicholson* [2018] EWHC 1460 (Ch), [2019] EWCA Civ 1683 (in which the judge's decision was only reversed because the statement of agreed facts in that case did not comply with a specific contractual provision governing how variations had to be documented).

220. In any event, the apportionment does not turn on a disputed construction of the 2012 PA, but was a matter for expert valuation based on the assessment of the relative

contributions made by College Farm and Whitleather Lodge Farm to the value of the reversion on the Wind Farm Lease. The easements granted to the tenant over Whitleather Lodge Farm might have been valuable (if, for example, the only way of getting to the wind turbines was over a road crossing Whitleather Lodge Farm) or of little or no value (if the tenant would have paid the same rent on the same terms without the rights given in respect of Whitleather Lodge Farm).

221. Mr Zeid considered this issue and determined it, to the effect that the whole of the agreed value of £1.45 million rested with College Farm. Even if, contrary to my judgment, that was a question of law rather than valuation, I would uphold that apportionment, absent good legal grounds to invalidate it. I do not accept Peter's submission, for which there is no evidence, (a) that "… the figure of £1.45 million, which has been agreed between the parties, is nothing more than the capitalised value of [the] income stream (plus a modest allowance for the residual agricultural value of the land)…".

222. As regards further submissions as to this by Peter:

(a) that "… This income stream does not constitute an item of Introduced Property which is to be credited to the Introducing Partner's Land Capital Account. Nor does it derive exclusively from one particular parcel of Introduced Property": of course the Wind Farm Lease itself was not Introduced Property but whether the income stream thereunder derives exclusively from Introduced Property in the form of College Farm, or partially from College Farm and Whitleather Lodge Farm, is a matter of valuation not law;

(b) that "… the Wind Farm Lease does not affect College Farm only. It also grants the tenant rights over Whitleather Lodge Farm. It must be assumed that those rights were included because the tenant regarded them as necessary (or at the very least desirable) for the operation of the wind farm. There is no evidence to suggest that the tenant would have been prepared to enter into the Wind Farm Lease without those rights": but there is no reason to assume that the rights in respect of Whitleather Lodge Farm were of any particular value and whether they were, was indeed for evidence and/or independent expert valuation opinion;

(c) that "… As the value of the Wind Farm Lease represents capitalised income arising in the course of the business of the partnership, rather than a profit or loss arising on the revaluation of a particular item of Introduced Property, clause 19.7 requires that it be credited to the partners' capital accounts in proportion to their respective shares in the profits of the Partnership immediately prior to the Cessation Date (i.e. one-third each)": the enhancement to the Partnership's land resulting from the presence of the Wind

Farm on 15.6 acres of College Farm land and the benefit of the covenants in the Wind Farm Lease, indeed needs to be apportioned between the various parcels of land so that the appropriate credit can be made to the appropriate account, and that is a matter of valuation not law; and

(d) that "… If Marian were correct in her contention that the value of the Wind Farm Lease should be treated as a profit attributable exclusively to her and Davis' Introduced Property, and that she is therefore entitled to have her Land Capital Account credited with half of that value, she would receive a much greater share of the income stream generated by the Wind Farm (on an accelerated basis) as a result of retiring from the partnership than she would have done if she had continued as a partner. That would be an extraordinary result and cannot have been the intention of the parties": this fails to recognise the difference between income profits of the partnership (shared equally under clause 8.1 and 10.1) and profits of the Partnership of a capital nature in respect of each item of Introduced Property, which accrue to the Introducing Partner(s) under clauses 4.and 10.2 - so if the Wind Farm land had been sold, the profit on such a sale would have been a capital profit, and would have accrued to Marian and Davis, unless part of the value was properly attributable to the rights granted by the Wind Farm Lease over Whitleather Lodge Farm, in which case there would have been an apportionment.

223. Accordingly, in my judgment, Peter is bound by the apportionment determined by Mr Zeid in accordance with the STOAF and he has produced no legal basis upon which to invalidate it.

(16) Mr Zeid's fees

224. Whilst clause 19.7 of the 2012 PA provides says that any land shall be valued by agreement "or in default of agreement determined on the application of any party by a valuer appointed by the President of the Royal Institution of Chartered Surveyors on the application of any party…", it says nothing about a valuer's fees. Following Mr Zeid's appointment by the President of the RICS to act as the expert valuer, he proposed that his fees be paid 50/50 but Peter did not agree and so Marian paid it in whole.

225. Peter's suggestion is that the person who applies for the expert to be appointed must pay all the expert's fees, but Marian says that this makes no sense. None of *Kendall on Expert Determination*, Halsbury's Laws or the RICS Guidance directly address the issue which she raises, as to whether a term should be implied into the 2012 PA that each of the Purchasing Partners and the Outgoing Partners are liable to pay 50% of the

fees of the valuer appointed pursuant to clause 19.7, subject of course to any power on the part of the valuer to determine costs.

226. In my judgment, such a term is to be implied as necessary to give the 2012 PA, and in particular clause 19.7, business efficacy. Where in a written contract both parties agree that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect: see *Chitty on Contracts* (33rd ed) vol 1 at para 14-023.

227. In *Cream Holdings Ltd v Davenport* [2011] EWCA Civ 1287, [2012] 1 BCLC 365, according to Patten LJ at paras 30 and 37, where a party refuses to accept an expert's terms of engagement prior to disclosure of further financial information, then

> *"assuming … that the experts term's of engagement are reasonable and are consistent with the rights and obligations of the parties under the contract, the implication of a term requiring the parties to co-operate in the valuation process by accepting the appointment on those terms is an obvious and necessary means of giving effect to the contract…."*.

228. In the present case, had Peter accepted Mr Zeid's terms, his liability equally to share the fees would have been explicit. The fact that he participated thereafter and jointly benefitted from Mr Zeid's work (even if Peter is not capable of seeing it in that way) amounts to the same thing, in terms of underlying obligations regarding the fees thereby incurred.

229. Peter could not throw that fees burden wholly on the other party to the valuation by his attempted failure to cooperate. He submitted that such duty of cooperation depends on necessity and that it can be seen in the present instance that "the implied term is simply not needed to make the contract workable: indeed Mr Zeid having concluded his determination is the best evidence of this."

230. That seems to me both cynical and unrealistic. As regards Peter's postulation that three or more former partners might all have different views on value, that makes no difference to the need for (a) the Outgoing Partner and (b) the Purchasing Partner(s) to bear the valuer's fees 50/50, unless they agree or the valuer imposes something else. In this case, Peter is liable to reimburse half Mr Zeid's fees to Marian.

(17) Conclusion

231. For the reasons set out above, I will grant Marian judgment on her claim and dismiss Peter's counterclaim. I would be grateful if Counsel, in relatively short order, would submit a draft order or orders giving effect to the Judgment together with written submissions as to the consequences, including costs, and whether they ask that any remaining differences be determined at a further hearing rather than on paper.