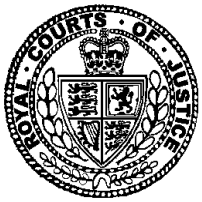

Neutral Citation Number: [2019] EWHC 869 (Ch)

Case No: D31BS620

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY COURTS AT BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (Ch)

Bristol Civil & Family Justice Centre
2 Redcliff Street, Bristol BS1 6GR

Date: 16/04/2019

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

- -

Between :

ANDREW GUEST	**Claimant**
- and -	
(1) DAVID GUEST	
(2) JOSEPHINE GUEST	
	Defendant

- -
- -

Philip Jenkins (instructed by **Clarke Willmott LLP**) for the **Claimant**
Guy Adams (instructed by **Twomlows**) for the **Defendants**

Hearing dates: 5-7 November and 17-19 December 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE RUSSEN QC

His Honour Judge Russen QC :

Introduction

1. In these proceedings a son, Mr Andrew Guest who is now aged 52, makes a claim against his parents Mr David and Mrs Josephine Guest. Because of their common surname and without intending any discourtesy towards any of the parties, I will refer to the claimant as Andrew and to the defendants, as appropriate, either by their own first names or by reference to their relationship with Andrew (and his siblings).

2. Andrew's claim is upon the family farm known as and situate at Tump Farm, Sedbury, Tutshill, Chepstow, Monmouthshire ("Tump Farm") and the farming business carried on there. The freehold of the farm and buildings is owned by David who lives with Josephine in the farmhouse there. Since Andrew left the farm in 2015 (and, with that departure, the partnership he had more recently carried on with his parents since 2012 under the name of the Ladysmith Farming Partnership) the parents have continued to carry on its dairy farm business in partnership.

3. Andrew's claim rests upon principles of proprietary estoppel. The setting for the claim is the not unfamiliar one of the next generation farmer claiming an interest in the farm owned by his father and doing so by reference to alleged assurances that he would inherit the farm (or a substantial interest in it) and devoting his working life accordingly for no great financial reward. Josephine is also a defendant to the claim because, with Andrew and David, she is a continuing partner in the dairy farm business.

4. Andrew worked full time at Tump Farm between 1982, when he left school at the age of 16, having previously helped out with farming tasks during his childhood as one might expect a farmer's son, with an interest in farming, to have done. He continued to do so until the Spring of 2015 when the parents offered him terms, for carrying on under a Farm Business Tenancy ("FBT") following the dissolution of the Ladysmith Farming Partnership, which he felt unable to accept on the ground that they were unaffordable.

5. Andrew's claim also extends to Granary Cottage, a dwelling situated on Tump Farm (it is semi-detached from Tump Farmhouse) and subject to an agricultural occupation tie under the planning permission granted in early 1989 which permitted its conversion from a former barn. Allowing for the fact that Andrew has quite recently had to move closer to his alternative places of work since he fell out with his parents, Granary Cottage had since November 1989 been the home of Andrew and his wife Tracey (and later his children) following their marriage in June of that year. The parents gave Andrew and his family notice to quit Granary Cottage in July 2017 having the month before pointed out in a solicitors' letter the significance of the agricultural occupancy tie. That notice followed Andrew's receipt in early 2016 of a letter from the Forest of Dean District Council alleging such a breach. That letter in turn reflected the fact that someone must have told the Council that, as a result of him falling out with his parents, Andrew no longer worked at Tump Farm and had found it necessary to seek alternative employment elsewhere.

6. Andrew has had several different jobs since leaving the farm. He, Tracey and their adult son Richard (who works in Cirencester) are currently living near Tewkesbury and a few miles away from Andrew's current place of work. Their adult daughter Hannah is a teacher and living near Reading. At the time of the trial, he was working as senior

herdsman at a salary of £33,000 p.a. on terms that his employer also paid the rent on his home situated a couple of miles from his workplace.

7. When he issued his Claim Form in August 2017 Andrew's Particulars of Claim sought, in addition to a declaration of an entitlement to occupy Granary Cottage, a declaration of entitlement under the doctrine of proprietary estoppel to the entire beneficial interest of Tump Farm and the farming business carried on there, with an alternative claim to an equity over the farm and business to be satisfied in such manner as the court might decree.

8. Relief was sought in that form (on the primary basis that Andrew was entitled to the entirety of Tump Farm) notwithstanding the express recognition in the Particulars of Claim that, before the parties fell out, there had been discussion of succession arrangements under which Andrew's younger brother Ross Guest ("Ross") would also feature. I will return to those contemplated succession arrangements below. For the purposes of this introduction, it is sufficient to note that Ross is 12 years younger than Andrew, and is now aged 40, and that he now farms beef cattle on the neighbouring Dayhouse Farm under a FBT in the ownership of a third party (through a partnership with his parents known as the Dayhouse Farming Partnership also established in 2012). In circumstances where Andrew and Ross do not get on - father had tried to get them to work together by providing capital which enabled them to set up a quad bike and paintball activity business at Tump Farm which they ran for some years before later falling out in the early 2000's - Andrew's Particulars of Claim recognise that the implementation of those arrangements would have meant he would have to have bought out Ross' anticipated interest in Tump Farm, arising alongside Andrew's own anticipated interest on the second of the deaths of his parents.

9. As appears below, there is also the interest of a sister, the middle child Janice Morris ("Jan"), to be considered when considering the impact of Andrew's proprietary estoppel claim.

10. As early as October 1981 the father had made a Will which, in essence, was designed to ensure that the two sons would inherit Tump Farm and its business in equal shares (contingent upon each attaining 25) but on terms that they would have to raise monies to pay a pecuniary legacy to their sister Jan which was equal to one-fifth of the value of the residuary estate (payable in 5 equal annual instalments beginning one year from father's death). If Josephine survived David, so that she would first inherit David's interest in the farming land and buildings under a trust for sale, his trustees had power to grant agricultural and occupation tenancies which would have covered the sons' position during her remaining life. To cover that eventuality of her surviving her husband and taking under his Will, Josephine's 1981 Will was broadly to the same effect (though the respective terms of the 1981 Wills indicate that the land and buildings were not partnership assets but held by David and his mother in their own right). A manuscript alteration to father's 1981 Will indicates that he had previously had it in mind to equate Jan's legacy to the value of one-quarter of the residuary estate.

11. Things have since moved on so far as the parents' testamentary wishes are concerned. They now defend Andrew's claim in the light of a new Will, made by David Guest on 5 January 2018 and therefore after the commencement of these proceedings, which makes it clear that (after providing for Josephine's right to occupy the farmhouse and to be paid her living expenses out of the business income) only Ross and Jan will

benefit. In essence, the 2018 Will provides Ross to receive to receive Tump Farm (and his father's share of the business) and that Jan should receive a legacy of £120,000 and a 2.5 acre field behind the farmhouse (and the rental income from the telecommunications mast which stands on that piece of land).

12. In what might be described very loosely as a letter of wishes but is really a letter of justification (bearing the same date of the Will and headed "to whom it may concern") David set out his reasons for not including Andrew in his Will. Of course, no testator really has to justify the exercise of his testamentary discretion and the date and content of the letter indicate to me that it is as much about David justifying his position in relation to Andrew's departure from the farm after the first 30 years or so of his adult working life. The letter talked of Andrew continuing to occupy Granary Cottage whilst refusing to pay a market rent and that "*I have excluded him completely from my will today because over the years I have lost all trust in him*" (this followed by a reference to Andrew failing to honour an agreement to pay David's income tax from the Ladysmith partnership account, to make agreed transfers aimed at providing some subsidy to the Dayhouse business, and to certain other matters). It concluded with a statement that David did not inherit Tump Farm from his own parents and "*I have never promised any of my children any sort of inheritance*".

13. Whereas the terms of the parents' 1981 Wills were never openly discussed within the family – Andrew said he only became aware of it in the context of these proceedings and his expectation of an inheritance was based upon more general comments – the 2018 Will (and letter) is therefore designed to let each of the three children (and especially Andrew) know where he or she stands.

14. In fact, because of the deterioration in his relationship with his parents (certainly his father) referred to below, by the summer of 2014 it was clear that they wished to disinherit Andrew. On 21 May 2014, David and Josephine each made Wills. David's was materially the same as what is now in the 2018 Will save that it included provision for Andrew to occupy Granary Cottage as his residence for so long as he wished on terms that he paid for its outgoings and insurance. That was before the Council's letter and the subsequent notice to quit. Josephine's 2014 Will (which appears to be her current one and which does not extend to any ownership interest in Tump Farm) made provision for her sister-in-law to receive a pecuniary legacy before dividing her residuary estate between her six grandchildren (including Andrew's two children).

15. The parents' testamentary freedom and legal ownership of Tump Farm and Granary Cottage is such that they are of course free to divide their property between such of their children as they wish. It is to avoid what he claims to be the injustice of their testamentary whim that Andrew brings the present claim to establish that a significant part of what they now wish to leave only to Jan and Ross in equity "belongs" to him.

16. In his opening submissions at the start of the trial Mr Jenkins, Andrew's counsel, suggested the following alternative forms of relief – falling short of that mentioned above as sought in the Particulars of Claim - as appropriate ones for satisfying the equity asserted by his client:

    i) the transfer Granary Cottage to Andrew for nominal consideration, the registration of Andrew and David as joint proprietors of all of the remainder of Tump Farm (comprising two registered freehold titles GR306204 and

GR97668) with them holding it beneficially as tenants in common and the transfer to Andrew of a 50% interest in the farming assets. Andrew should be entitled to occupy and to farm all of Tump Farm for his own account, without payment of any charge or occupation rent to David, who for his part would be entitled to retain all the income from the solar energy park and telecoms base stations on the land.

Alternatively, by way of a clean break between the parties:

ii) A capital payment to Andrew of 50% of the value of Tump Farm and the farming business, as indicated by the joint expert valuation reports. This option would give Andrew the chance to try to farm on his own account elsewhere.

17. In his closing submissions and by reference to the evidence then given, Mr Jenkins submitted that an appropriate "clean break" payment to Andrew would be one reflecting two-fifths of the property at Tump Farm and half the value of the farming business. He said a payment of that order would enable Andrew to set himself up again as a farmer elsewhere. The submission was no doubt made with the provisions of the earlier 1981 Will well in mind.

18. In response to Andrew's claim his parents advance a counterclaim for possession of Granary Cottage. The parents also seek from Andrew the payment of an occupation rent in respect of the property for the period since April 2015.

Background

19. The following, largely uncontroversial summary of events leading up to Andrew's claim is drawn from the parties' combined evidence.

20. Tump Farm is a working dairy farm which has been farmed by the Guests over three generations since 1938. The farm comprises three dwelling houses (Tump Farmhouse, Granary Cottage and Stone Cottage), farm buildings, pasture land of around 150 acres, separated into two enclosures by a 5 megawatt solar park of 32 acres which is leased to a commercial operator under a 25 year lease, and woodland of around 45 acres. There are also now two telecoms masts on the farm which are respectively leased to Vodafone and O2.

21. The joint valuation reports are in respect of Tump Farm as a property and the farm as an agricultural business. Mr McLaughlin of Carter Jonas valued Tump Farm and his reports indicate a freehold value of all the buildings and land (including the woodland and rental income from the solar park and telecoms masts) of £2,855,000 as at August 2018. Ms Dooley of Hazlewoods has valued the farm as an agricultural business and the result indicates a value of around £3.35m (the dairy farm business being attributed with a value of just under £500,000).

22. Tump Farm had been leased to David's parents from 1938. When his father died in 1964, David and his mother bought the farm with aid of a mortgage. In his evidence, David referred to inheriting £7,000 from his father. Son and mother then farmed in partnership – then known as the ML and DG Guest Partnership - until 1992 when the

mother died. For about the last ten years of their partnership, David's sister, Sally Giles, assisted their mother with the administrative side of the business and then took over the paperwork when the mother became too infirm.

23. David and Josephine married in October 1964. Josephine had been working on the farm since 1958. By the time David's mother died in 1992, Josephine was also a member of the partnership and her 1981 Will proceeded on that basis.

24. Andrew, the eldest child of David and Josephine, was born in 1966. Jan was born in 1968 and Ross in 1977.

25. In October 1981, David and Josephine each made a Will in the terms outlined in paragraph 10 above. Each expressed the wish that Andrew and Ross should ultimately own the agricultural land and premises at Tump Farm "and any other agricultural premises owned wholly or in part by me at my death" and have the opportunity to continue the farming business then carried on by the ML and DG Guest Partnership. I have already noted that Andrew did not know of their terms until the Wills were disclosed in these proceedings though (as I explain below) he says there was an understanding that the boys would get the farm and Jan would receive cash.

26. It is common ground between the parties that Andrew started to work full-time on the farm from 1982, having left school at the age of 16.

27. There is less agreement over the level of his input whilst he was at school. Andrew said he assisted out on evenings and weekends and helped out considerably with calf-rearing when his mother was pregnant with Ross and after his birth. At that time David was also assisted by a farm hand, Chris Brace, with another man, Mick Jones, also helping out in his spare time. In his cross-examination, David accepted that, as a schoolchild, Andrew "*did help out a bit*" and said he would have been expected to roll up his sleeves and assist. The gist of David's evidence was that Andrew did no more work on the farm as a child than what his two siblings came to do when they were old enough. However, Andrew's claim of a proprietary estoppel is based upon the detriment he has incurred in working on the farm full time from the age of 16 until his fifties.

28. By the time Andrew left school, Chris Brace had been replaced by Margaret Sayce but she stopped working on the farm about a year after Andrew started working full time in 1982. Andrew said that this resulted in a significantly increased workload for him and his father. Mick Jones helped out on weekends.

29. David said it was his own mother's idea to pay Andrew a basic wage when he started to work full time in 1982. Andrew's evidence was that he worked throughout the summer of 1982 for no wages and he started to receive the minimum wage in September 1982. He paid his mother for board and lodging out of his wages. It was around that time that Andrew's grandmother also encouraged him to undertake an agricultural apprenticeship. The evidence of both Andrew and David was that, initially, he was not keen to do so. As a compromise, Andrew agreed to attend agricultural college for one day a week and spend the rest of it at the farm. David's evidence was that he did not know that Andrew's training would in fact go on for three years.

30. From the Spring of 1983, the assistance of Mick Jones on the weekends meant that Andrew could take the Saturday off, so that he could play rugby, and his father (and his

mother to the extent she would otherwise cover for father) were able to have the Sunday free. In 1984, Paul Ronan, another farmhand who had previously helped out on a casual basis, joined the team and worked on the farm for a few years.

31. In his witness statement Andrew explained that his working day began at around 5:20 a.m. in readiness for the first milking at 6 a.m. (later, the milking took place at 5 a.m.). David said that Andrew sometimes needed encouragement to get out of bed to start the day's work. The second milking took place at 3:30 p.m. and, as the herd grew larger, continued until around 6 p.m.. The nature of the work required on the farm outside the dairy parlour obviously depended on the time of year. Making silage, haymaking (between the silage cuts), baling and carting straw and harvesting the maize crop could involve David and Andrew working very late into the evening, as could calving. David's evidence was that, even on the longest days, Andrew would not generally be working for more than 10 hours when account was taken of rest periods. Based presumably on his knowledge whilst he was still at school, Ross put Andrew's average working day (taking account of seasonal variations) at 9½ hours.

32. Andrew said that after the summer of 1982 he quickly took over sole responsibility for calf rearing, using the practical and management skills he was learning at college.

33. In 1984 Andrew took a course in artificial insemination of cattle with a view to reducing costs. David said the farming partnership (between him, his mother and Josephine) paid for Andrew to attend the course. Thereafter Andrew took responsibility for the artificial insemination of cows and the selection of bulls and breeding cows.

34. After Andrew's apprenticeship finished in 1985 he did two further part-time courses of one year each in farm enterprise management and whole farm management. In his evidence, David could not remember Andrew undertaking a third course and said that Andrew just took it upon himself to do a management course. His doing so led him to take on more responsibility for some of the paperwork which his aunt Sally had been doing. Initially, this comprised straightforward cash analysis but it soon progressed to greater financial management and administration, including such matters as managing farm subsidies and business planning. As a consequence, Andrew attended any meetings that his father had with the partnership accountant or bank manager at which finances and business matters were discussed.

35. In their evidence, both David and Ross said there was a limit to the amount of paperwork required to be done by Andrew and that he was often found asleep in the kitchen when he claimed to have been doing administration. Ross observed that the administration in relation to the Dayhouse Farming Partnership now takes no more than an hour or so to complete. The comparison made by David (now that the Ladyship Farming Partnership with Andrew has been dissolved) is that the farm administration is done by someone who comes to the farm for less than a day once a month.

36. In June 1989 Andrew and Tracey were married and in November of that year they moved into Granary Cottage. The conversion works to render the cottage habitable (in accordance with the agricultural occupation tie) were funded by a mortgage from the Agricultural Mortgage Corporation which was in turn funded by the farming partnership. The liability was later transferred to the Ladysmith Farming Partnership (of which Andrew was a member) in 2012 and subsequently paid off, though it appears that the £5,000 was accounted for by being debited to David's drawings. Andrew and

Tracey did not pay any rent for their occupation but they did pay for the maintenance and repairs in relation to the property. The fact that the parents' partnership paid other outgoings in respect of the property, such as utility bills, was something which surfaced in connection with the wages dispute referred to below. A later, recorded conversation between them in April 2014 suggests that there may be disagreement between them as to whether the business paid for the Council Tax on Granary Cottage before, or much before, the commencement of the Ladysmith Farming Partnership (though in his evidence Andrew said that it had been paid by the partnership since 1997).

37. In 1991 the Integrated Administration and Control Scheme ("IACS") was introduced; a new land based system that required cropping records to be kept and the submission of an annual claim. Andrew attended a workshop organised by the local branch of the NFU and took responsibility for the IACS submissions. In due course, Andrew became responsible for processing the claims under the Single Payment Scheme and then the Basic Payment Scheme which replaced IACS.

38. David's mother died in 1992 and the farming business was thereafter carried on by David and Josephine in partnership under the name DG Guest.

39. Ross left school in 1993 he went to Hartpury College to study for a first diploma in Agricultural Engineering. Initially he went for one year but he stayed on for a second and third year to obtain a national diploma. In 1996 he started to work for Frank Sutton, an agricultural engineering company. He stayed in that employment until 1999 when the quad bike business (mentioned below) established for him and Andrew at Tump Farm was able to support him full time. Throughout the period between 1993 and 1999 Ross helped out on the farm on weekends in return for what he described as pocket money.

40. By 1993 Andrew had stopped playing rugby on Saturdays and that left more time for him to take more interest in wider farming issues.

41. Following the abolition of the Milk Marketing Board in 1993, Andrew organised some local farmers into an informal group so that milk processing companies, offering direct supply contracts, might make presentations to the group. In 1994, Andrew was nominated as a Vice Chairman of the district branch of the Northern Milk Partnership which he had caused Tump Farm to join. The Defence stated that it was David's decision to join that consortium and he did not rely on Andrew's advice.

42. The Milk Marketing Board had previously offered dairy farmers and farming business consultancy service which had been known as Farm Management Services and which, some time after the Board ceased to exist, became known as Genus Management and, later still, as Promar. Andrew dealt with the local consultant, John Capewell who visited Tump Farm on a monthly basis, and was responsible for providing him with the input and output data which was then processed and translated into a performance indicator report for the benefit of the business.

43. Andrew said that the reports indicated that the farm's performance was average, at best, and that his father had wanted to cancel the service when Mr Capewell retired so as to avoid the attendant cost, but left it to Andrew to decide whether to continue with it without his (David's) involvement. Andrew said that, with Mr Capewell's help, he succeeded in securing an additional 10% milk quota allocation (a further 65,000 litres)

when David had thought an appeal against the initial allocation was a waste of time. He also said that, through the development of a business plan with Mr David Thomas of Genus (Mr Capewell's successor) the business was lifted from its rating of "average" into the top 20%. This was in part the result of changes in feeding regime and in the feeds themselves, and of the cows being housed in a new building. In due course, Mr Thomas was replaced by Mr Ainsley Baker. Andrew and Mr Baker discussed the farm's under-performance due to low stocking rates which was addressed by a decision to breed more replacements. Andrew was able to implement this in the light of his experience with artificial insemination.

44. Andrew and Tracey started their family with the birth of Richard in February 1994.

45. Andrew's and Tracey's second child, Hannah, was born in February 1997.

46. By 1997, Andrew was responsible for compiling the business' accounting information and its VAT returns.

47. David accepted that Andrew also kept the herd's medicine books up to date and was responsible for the cows "heat records" as well as arranging the passports for movements and records for deaths in the BSE crisis in 2000. However, David said he had no knowledge of Andrew completing forms for the Beef Special Premium Scheme which Andrew said he did on the sale of any cattle. He did accept that Andrew had done the paperwork to secure the farm's accreditation with the Red Tractor quality assurance scheme. He also accepted that Andrew completed the necessary paperwork for cattle movement when there was a spread of bovine tuberculosis in Gloucestershire in 2003.

48. In July 1997, Andrew and Ross launched their partnership business of the Chepstow Quad Trekking Centre ("CQTC"). The DG Guest partnership funded the capital start-up costs of around £10,000 and David agreed to that and to the business using the land (and also to making a later application for planning permission to permit the construction of customer toilets and a coffee shop when the business extended into paintballing) with a view to encouraging his sons to work together. Part of that parental aim involved diversifying the farming business so that the additional income from CQTC might support Ross leaving his employment and returning to Tump Farm. The business of CQTC involved taking groups on quad bikes on trails laid around the farm. Once he had left his employment, Ross took the leading role at CQTC while Andrew's primary focus remained on farming. Tracey did the bookkeeping for CQTC.

49. In 1999, David had a nasty fall at the farm and ruptured his spleen. Andrew was due to go on holiday at that time but postponed joining his family while his father had an operation, so that the hay could be gathered. What was described as a serious illness, coupled with Mr Graham Wildin, of Wildin & Co., taking over as accountant to the AG Guest Partnership, prompted Mr Allen of Francis & Co. (the partnership's solicitors) to write to Mr Wildin in December 2000 summarising the advice he had given to the parents as David wanted "*to take things a bit easier and they came to see me recently to discuss succession*". This advice involved bringing Andrew and Ross into the partnership (so that they each had a 40% share to their parents' 10% interest), transferring the land and buildings into the names of the parents as tenants in common in equal shares and granting a Farm Business Tenancy (excluding the farmhouse) to the partnership at a market rent. Mr Allen said the parents were keen to "*generally revamp*

their wills". He questioned the ability of the partnership to cover an anticipated market rent of £13,200 p.a. but said he was not comfortable with David's idea of perhaps agreeing a nominal rent.

50. No steps were taken at that time to implement Mr Allen's advice and, as I return to below, the exchanges between him and Mr Wildin indicate that David was reluctant to start the process of transferring land to his sons because of the risk that either of them might encounter matrimonial difficulties that might result in the wife making an adverse claim upon it.

51. In 2000, CQTC started offering customers paintball games in the woodland on the farm and the name of the business was changed to Chepstow Outdoor Activity Centre ("COAC"). It was run through a limited company of that name.

52. The business of COAC suffered from the foot and mouth crisis in 2001 which restricted public access to agricultural land. In addition, Andrew and Ross had a disagreement which involved Ross accusing Andrew of having forged his signature on a cheque drawn on the business. The cheque was either for £35 (per Andrew) or £80 (per Ross) and, according to Andrew, given to someone who had helped out with catering for a paintballing party. Andrew denied having forged Ross' signature. Ross involved David in the issue and Andrew regarded the event as the start of the decline in relations between him and his father. In his witness statement, Ross referred to a perceived shortfall of £2,000 in the takings of COAC and to the fact that, whilst it was a plausible one, he did not accept Andrew's explanation that the discrepancy reflected the fact that not all those customers who had made bookings duly turned up and paid.

53. During the period 2002 to 2005 Andrew served as Regional Vice Chairman for the South West England Area of the Express Milk Partnership (as the Northern Milk Partnership became). This involved attendance at 6 board meetings a year (in London and Kenilworth) and attendance at the Royal Show and the Dairy Farming Event. Andrew received about £20,000 to cover his time and expenses over the three year period.

54. In February 2004 Ross and his girlfriend Sarah left for a trip to Australia. Ross' witness statement said they went with the intention of emigrating but in his testimony he said it was a working holiday without emigration in mind. They did return in 2005 when Ross stated that he wanted to live on the farm and work full-time in the farming business. Before his foreign trip, Ross had started to work on the farm in 2002 (in place of an injured Mick Jones) with Andrew directing his efforts to the livestock and Ross to field work. That was in addition to the work required by CQTC. During his absence in Australia, Ross's work on the farm was covered by Steve Price who continued to do some contract work after his return. On their return, Ross and Sarah moved into a flat on the top two floors of Tump Farmhouse and married about a year later.

55. Not long after Ross's return in 2005, Andrew bought him out of his share of COAC for £15,000. Andrew then carried on the COAC business (through the limited company) until around 2013 when increasing insurance costs and wear and tear on the quad bikes made it financially unviable. In the years 2012 and 2013 the company made an operating loss after certain accounting allowances. Andrew did not take a wage from the business and Tracey was paid £1,000 a year for her bookkeeping.

56. In October 2006, Andrew was awarded a postgraduate diploma in Agricultural Business Management.

57. In 2007 the opportunity arose to take a five year Farm Business Tenancy ("FBT") of the neighbouring farm to Tump Farm, known as Dayhouse Farm. Dayhouse Farm had shortly before been put up for sale and the Guest family had arranged borrowing for the purpose of making a bid. They did so but lost out to a higher bidder, though the sale to that rival bidder eventually fell through.

58. The DG Guest partnership instead took the FBT of Dayhouse Farm and farming operations there were integrated with those on Tump Farm. As a result, Andrew wanted to significantly increase the size of the herd and the amount of cereal cropping, which would have necessitated the business borrowing working capital. David and Ross were only prepared to agree to an increase in herd size of 10% and to drill 100 of the potential 200 acres for growing wheat. Andrew says he was frustrated by their cautious attitude.

59. I have already touched on the length of Andrew's working day. The Particulars of Claim allege that Andrew worked between 60 and 80 hours a week on the farm. David recognised that no time records were kept but says that Andrew's working hours on the farm would generally be no more than 60 hours a week and that some of the 6 days a week might involve no more than 6 hours of labour. Ross' witness statement referred to Andrew doing, on average, a 50 or 55 hour week. Josephine's said that, on average, Andrew worked a 54 hour week (6 days of 9 hours) which was considerably less than David and "certainly not an unexpected level of work for a farm hand."

60. Andrew says that until 1996 his wages kept track with the base rate set by the Agricultural Wages Board ("AWB"). A record of the wages that Andrew received in later years for his work on the farm, over the period February 2000 to May 2012, was contained within the trial bundle. It also showed the wages of David and Ross. Until July 2009 (and the resolution of the wages dispute mentioned next) Andrew's weekly wage was higher than that paid to Ross. And it remained higher throughout than the weekly sum drawn by David. For example, in the year 2000, Andrew was paid £175 per week, David £148 and Ross £135. By 2009, their respective weekly wages (or drawings in the case of David) were £200, £140 and £190. Andrew's weekly wage had been £190 between February 2004 and April 2008. Therefore, his annual earnings for his work on the farm were modest: £9,100 in 2000 rising to £11,050 by 2008.

61. In addition, the DG Guest Partnership paid for certain of Andrew's living expenses. These and other "benefits" (including an entitlement to sick pay which he never called upon and the ability to "*attend meetings for private business and farm business*") were enumerated in a letter dated 26 March 2009 from Francis & Co, on behalf of David, which put the value of these further benefits at around £8,000 to £10,000 per annum. The letter also referred to the parents' understanding that COAC was then capable of producing a profit of £10,000 to £11,000 per annum. In his letter in reply, dated 27 March 2009, Andrew did not dispute that the partnership relieved him of certain domestic expenses – such as rent and the payment of his car insurance and water bills (and Council Tax) – but he did say the value of some had been exaggerated and "*my extras are worth considerable [sic] less than you suggest*."

62. I return below to the Francis & Co letter of 26 March 2009 in connection with the dispute between the parties over whether any assurances were made about Andrew

inheriting the farm, or a share of it. It was written in response to Andrew writing to the AWB in October 2008 because of his concern that, despite having two children to support, his wages had not significantly increased since 1996. In his evidence, Andrew said that when milk prices increased he felt it was fair that his wage should rise and that, as discussing finances with his father was always difficult, he felt he had to "*bring him to the table by force*" by referring the matter to the AWB. He also explained that he had told the Agricultural Wages Board that he worked an average of 60 hours a week even though that ignored the work he did on administration and the much longer days worked at busy times of the year such as when harvesting.

63. In an earlier letter dated 7 November 2008, prepared for him by Francis & Co, David said that he was "*somewhat saddened that you wish to be regarded as an ordinary employee rather than a valued member of the family*". He said he had been unaware of the Agricultural Wages Order but would ensure that he adhered to the regulations, indicating that Andrew's correct pay grade would be Grade 3 not Grade 5. The other benefits received by Andrew were quantified at £306 per week and David suggested that, as "*it is not essential for your employment that you live on the farm*", there should be factored in a notional rent of £75 per week. A warning shot was also sent about COAC's use of farmland and the letter concluded by saying employment contracts would be prepared for all employees and that "*I do not require you to work more than 39 hours a week so that no overtime will accrue*."

64. In fact, it was necessary for Andrew to pursue the matter to the Agricultural Wages Team within DEFRA. The upshot of further correspondence (which included the AWB's view that Andrew was Grade 3 not Grade 5) and a meeting between Andrew and Mr Quinlivan of Francis & Co in early June 2008 was that Andrew agreed to an additional £25 pay per week backdated to 1 April 2008, a bonus of £1,800 and the receipt of £500 from shooting rights over the farm.

65. Andrew confirmed his acceptance of those terms by a letter dated 18 June 2009, to which I also return below. By that letter Andrew stated that the compromise did not address anticipated rises in the future cost of living. In relation to the future, he said: "*A mechanism for further annual increases needs to be agreed so that we do not find ourselves in this position again, and resolving the matter of succession will finally rid us of the root cause of conflict.*"

66. On 17 February 2010, Andrew wrote to Mr Wildin (the partnership's accountant) saying that he had been reading about succession planning in a farming journal. The letter referred to the fact that David was aged 69 and expressed concern that they had not even discussed the issue. He referred to the fact that he had "*always assumed that I would take over the farm from my father, maybe in partnership with my brother*" but that he was unaware whether any arrangements were in place and, if they were, "*whether they are acceptable to all concerned*". He told Mr Wildin it was a difficult subject to discuss with his father, who was reluctant to discuss it, but wanted to be reassured that everything was in hand.

67. In 2011 each of the parents broke their hips, in separate incidents, and Andrew took on sole responsibility for milking the cows.

68. In 2012 the FBT of Dayhouse Farm came up for renewal. By that stage, and given what had come of COAC, it was clear that the idea of Andrew and Ross continuing to farm

together was not really a workable one. The renewal of the Dayhouse tenancy also carried with it the new opportunity to rent the farmhouse, and not just the land, at Dayhouse Farm. It therefore meant that Ross, his wife and young children could move there from the top floor of Tump Farmhouse.

69. Therefore, in 2012 it was decided to split what by then had become the business of the DG Guest Partnership into two parts and into two new partnerships: the Ladysmith Farming Partnership between Andrew and the parents, running Tump Farm, and the Dayhouse Farming Partnership between Ross and the parents, running Dayhouse Farm. It was clear that each son was to be the principal farmer of "his" farm.

70. That decision was reached with the benefit of advice given to the family by the accountant, Mr Wildin, the parents' bank manager, Mr Tim Sowerby, and Mr John Warrington of Promar. They all attended a meeting at Tump Farm with David, Andrew and Ross to discuss the arrangements.

71. Promar prepared separate Business Budget Reports for Ladysmith Farming Partnership (dated June 2012) and the Dayhouse Farming Partnership (dated September 2012). The respective budgets indicated that Dayhouse partnership would bear a higher rent than that budgeted for Ladysmith (which included land rented from a neighbouring farm called Woodland Farm) but also would receive a subsidy of £24,000 under the EU's Single Farm Payment Scheme ("SFP") compared with £21,000 for Ladysmith. By reference to those and other figures it was agreed (and reflected in the Dayhouse budget as "Misc - £13,000") that Ladysmith would make a free transfer of calves to Dayhouse with a value of £13,000.

72. By this time, 2012, the parents had in place (in the form of an investment with Scottish Widows worth about £100,000) some provision to meet Jan's anticipated entitlement under the terms of their 1981 Wills. In his evidence, David said that he thought that sum might at the time (before subsequent increases in land prices) been enough to meet his daughter's one-fifth entitlement.

73. After the Ladysmith partnership had been established, the liability to make the mortgage repayments on Granary Cottage (which then stood at just over £5,000) was transferred to that partnership's bank account. In his evidence, Andrew said "*since it was my house, it made sense that my business paid for it*." However, as I explain below, the fact that Andrew understood Ross would be inheriting half of Tump Farm (including Granary Cottage) quite soon surfaced as a reason why Andrew questioned the fairness of the Ladyship partnership bearing the burden of the mortgage.

74. The new partnerships were established on the basis that each son would have a 50% share of profits with the other half being split equally between the parents. However, there was a notable lack of formality behind the new arrangements. No Partnership Agreements were drawn up. In relation to Tump Farm, Wildin & Co did prepare draft accounts for each of the years ended 31 March 2013, 2014 and 2015 showing the three partners but with the partnership still described as "DG Guest". (It seems that the separate partnership between the parents may have continued under that name for the purposes of leasing the plots with the telecommunications masts and also the shooting rights). They showed the percentage profit split and that the value of the partnership assets (the herd, plant and machinery, stocks and trade debtors) being credited to the parents' respective capital accounts rather than to Andrew's.

75. The Ladysmith Farming Partnership did not work out as had been envisaged. Although some of the reasons for this were explored in the evidence in some detail, those that accounted most directly for the breakdown in relations between Andrew and David can be summarised as follows:

i) the SFP subsidy in respect of Dayhouse Farm proved to be £29,000 not £24,000 and that for Tump Farm £19,000 instead of £21,000. As the idea had been a notional equal split of the total SFP entitlement between the two farms, and idea of balancing out the figures was one which underpinned the proposed transfer of calves worth £13,000 from Tump Farm to Dayhouse Farm, Andrew felt it was unfair that he still had to transfer calves to that value to Ross for nothing;

ii) in August 2012, a VAT refund of just over £14,000 was due in respect of the Tump Farm business. Approximately £3,500 of that refund should have been apportioned to the Ladysmith Farming Partnership but, although the full refund was received that month, it went into the DG Guest Partnership bank account and was then paid to another bank account of the parents. In a conversation between the brothers in April 2014, which Ross secretly recorded, Andrew referred to David having told him that he was going to pass the refund to Ross;

iii) in September 2012, Ross invoiced Andrew for some wheat transferred from Dayhouse Farm to Tump Farm. As the anticipated VAT rebate had not been paid promptly into the Ladysmith Farming Partnership account, there was a cash-flow difficulty. Andrew therefore decided to invoice Ross for calves that had been supplied by Tump Farm to Dayhouse even though some of them should, at that stage, have been covered by the free transfer of £13,000 worth. In his evidence, Andrew said that, during the course of 2012-13, Ross did receive a free transfer of calves to that value as well as further calves for which he was to pay;

iv) by 2014, Andrew and David were in disagreement as to whether the business should be borrowing from the bank in order to expand the herd size. Andrew's position was that the Promar budget for Tump Farm had anticipated such an increase, which would be necessary if he was to make the transfer of calves worth £13,000 to Ross, and that Mr Wildin had made the suggestion of borrowing against the farm (but not the farmhouse which was the parents' home) at the initial meeting at which the formation of the Ladyship and Dayhouse partnerships had been discussed. However, David refused to permit such borrowing and in January 2014 he also refused to agree that the partnership's £20,000 overdraft facility should be renewed;

v) in January 2014, David asked Andrew to write a cheque to cover David's income tax bill in respect of the earlier trading of the DG Guest Partnership. Andrew said he would do so if David first agreed to discuss issues that had arisen under the succession arrangements. In his evidence Andrew explained that this was his attempt to get David to have a discussion about, and take an interest in the business of the new partnership. He said: "*I eventually decided that I was going to see if I could get him to talk to me by not doing something that he wanted*." The upshot of his refusal to provide the cheque was that David caused the payment to be made anyway and changed the bank mandate so that both

their signatures were required for cheques drawn on the partnership account; and

vi) in 2014, about one-third of the land at Tump Farm (including some of the rented land on Woodland Farm) was earmarked for the proposed solar energy park.

76. From Andrew's perspective, as he explained in evidence, the upshot of these disagreements was that he felt he needed control of the business of Tump Farm if he was going to make it work. He emphasised that this meant control over business decisions rather than immediate ownership of the farm and its assets. He said: "*The issue was control of the business in order to raise finance to invest in the business and make a success of it*." Andrew felt he needed such control and had expected it in circumstances where he understood the arrangements of 2012 were part of the succession planning that he had touched upon when concluding the wages issues in 2009 and reflected his father's desire to take a step back from the business. He thought that his parents' continuing interest in the Ladysmith Farming Partnership was as much about securing succession relief against Inheritance Tax as anything else. Andrew said that it was on that basis that the drawings of £25,000 p.a. anticipated by the Promar budget were to be his drawings. He said his parents were to receive the income from the telecommunications masts on the land and that income was not shown in the Ladysmith Farming Partnership accounts.

77. During the short life of the Ladyship Farming Partnership, Andrew arranged for the partnership to borrow money from the bank to pay for the costs of improvements at the farm (concrete grooving in the hard standing for cows and an electronic activity monitoring system to detect signs of illness within the herd). In his evidence, Andrew explained that it was necessary to carry out these works by a certain time so as to take advantage of an EU grant for expenditure in respect of animal welfare. He said that the works cost in the region of £20,000 and 40% of their cost was reclaimed by way of that grant.

78. Andrew's refusal to agree to pay David's tax bill in early 2014 provided the first occasion for David to indicate that he would dissolve the Ladysmith Farming Partnership. On 19 January 2014 Andrew sent an email to Mr Wildin in which he referred to his own suggestion that Ross should pay the tax bill as he (Andrew) paid his parents' Council Tax, in response to which his father "*threw a tantrum and now says he wants to dissolve the partnership*." Mr Wildin responded by saying that he could see no mention in his files that there was to be a written partnership agreement and that, although it was best to check with a solicitor, it was effectively a partnership at will which could be ended by any partner at any time.

79. By May 2014 a draft Notice of Dissolution of the Ladysmith partnership, by David and Josephine, had been prepared. On 12 May 2014, Andrew sent another email to Mr Wildin referring to his father's determination to "*dissolve the partnership and keep the assets.*"

80. On 21 May 2014, David and Josephine made new Wills. As I have explained in paragraph 14 above, they operated to exclude any entitlement for Andrew beyond his right to occupy Granary Cottage for as long as he wished, subject to him meeting the outgoings. In his testimony, David said that the £120,000 pecuniary legacy that Jan was to receive under the Will (in addition to the bequest of the 2.5 acre field with the

telecoms mast) reflected the value of the investment held with Scottish Widows. Some late disclosure by the parents showed that their earlier investment with Scottish Widows, which they had thought might cover Jan's interest under that Will and the earlier 1981 Wills, are now held in the form of ISA's and an Investment Bond with a value of £106,763 as at October 2018.

81. It was around that time, May 2014, that David engaged the services of Mr Iwan Price, a business consultant, to sort out the disagreement with Andrew. Mr Price was familiar with Tump Farm as he had previously worked with Promar, though his last involvement was in around 2006. Mr Price and Andrew met in late May 2014 and, by an email dated 2 June, reported back to Andrew with his father's response to the options they had discussed. This was to the effect that the status quo was not an option, David would dissolve the partnership and would lease Tump Farm (at a rent to be negotiated) and herd (at no cost) to Andrew. Andrew would be able to sell calves for his own account but there would be no transfer of working capital or assets to him. Mr Price expressed the hope that "*this is the first stage of a journey to achieving a workable agreement for all involved*."

82. In another message, Mr Price told Andrew that his father was proposing to ask an independent agent to work out a rental value for Tump Farm. He referred to both sides having strong, valid viewpoints and having made up their minds as to how things should go forward. He cautioned against taking "the legal route" which would be costly and leave the family with irreconcilable differences. In a message to Mr Price, Andrew had said that "*the only solution that is acceptable to me is one that will allow me to carry on farming*", indicating that if his father's conditions made that difficult then they would have to resolve matters through the courts.

83. The valuer who David engaged with a view to proposing a rental was Mr Tom Pullin of Voyce Pullin, auctioneers, valuers and rural surveyors. Mr Pullin visited Tump Farm in early July 2014 and, by a letter dated 11 July, advised David of his view that, including the buildings (and SFP entitlement), "*we would advise a rental figure in the region of £250 per acre for the land and buildings, but with a guide of £200-£300 per acre for advertising purposes*." By including a rent of £7,500 for Granary Cottage, Mr Pullin reached a figure of £45,000 per annum. It is clear that Mr Pullin's initial advice reflected his assumption that the farm would be advertised to the market, for a marketing commission of 10% of rental plus the costs of drawing up a FBT for a 10 year term (with a fifth year break clause) and a percentage based tenancy management fee.

84. Andrew's view was that the business would not be viable if a rent was payable at that level. His position, which he confirmed in evidence, that the rent should be the same as Ross paid for Dayhouse Farm, namely £125 per acre.

85. In a recorded conversation with his mother on 25 September 2014, during which Andrew expressed his frustration over his father's attitude which was preventing him borrowing to buy more cows and increase the milk yield, Andrew concluded:

> "*Like I said, he's got a choice, he's either got to do it himself or he's got to hand it over all properly but, as we are, I've got no control of it anymore. I've got a final demand for the water bill out there which I don't know whether you've sent the cheques or not. The first thing you've got to do is get the overdraft sorted so we*

can start paying bills again and then we can run through, get when the cows start calving the milk cheque will increase, the corn price is low so feed prices will come down but the short term necessity is cash so either he pumps some cash in of his own or he lets us have an overdraft but he's not going to want to do that because that's like he has admitted defeat [inaudible] 12 months ago [inaudible]."

86. By the time of his letter to Andrew dated 22 October 2014, Mr Pullin had been given instructions by David to "*negotiate a Tenancy Agreement with yourself at a discounted rent as it is his intention to retire from the existing dairy enterprise at Tump Farm.*" The rent proposed for the farmland, farm buildings and Granary Cottage was £30,000 p.a., to include also the lease of livestock and machinery (some to be given to Andrew and some to be shared with Dayhouse Farm).

87. The solar energy park came to be constructed on Tump Farm after planning permission for it was granted in May 2015. Before then, David's plans for one to be built were publicised in the local press. In articles in the Chepstow Beacon and South Wales Argus in December 2014 there was reference to the length of time that the Guest family had been farming at Tump Farm, and to the family's plans that Andrew's son Richard might, as the next generation, take the span to 100 years; and in the former David was pictured and quoted as saying: "*Lots of farmers are having to diversify these days and a solar park could help guarantee the future of our farm into the next generation after my sons retire*." At that stage, there was still a prospect that David and Andrew might agree the terms of a FBT for Tump Farm. In re-examination David said that he had not spoken to any journalist and did not know where the paper had obtained the information.

88. Andrew's dialogue with Mr Pullin over the terms of any such tenancy continued after October into 2015. By a letter dated 24 February 2015, Mr Pullin made a revised offer which excluded 35 acres that might be earmarked for the solar panels and any entitlement to SFP. The proposed rental figure was £28,500. The letter contemplated there might be part payment through the transfer of calves to Dayhouse Farm. Andrew responded by saying the suggested terms were neither acceptable nor formed the basis for negotiation. He said it would not be possible to operate a dairy business on the proposed 115 acres which would produce a turnover large enough to carry the current level of staff. His letter to Mr Pullin of 3 March 2015 concluded with his looking forward to "*receiving a more realistic proposal in due course*." Mr Pullin reported back to David, by a letter dated 2 April, saying that Andrew appeared unwilling to discuss a rental until the partnership issues were resolved.

89. On the same day, 2 April 2015, Francis & Co wrote a letter to Andrew containing an ultimatum: that if he did not, by close of business on 13 April 2015, accept the offer contained in Voyce Pullin's letter of 24 February (in addition, Andrew would be entitled to use the land proposed for the solar panel farm, rent free, until October 2015 when he would be required to vacate it) "*the partnership will be dissolved on 14 April and the partnership bank account will be frozen*." The letter said the parents would agree to Andrew occupying Granary Cottage rent-free for 3 months commencing with the dissolution and that they would take over the business.

90. On 10 April 2015, Andrew hand delivered a letter beginning "Dear Mum and Dad". It began by saying "*I am saddened that after 30 years of loyal and dedicated service it has come to this*" and concluded "*I have nothing more to say".* Andrew said that he considered the rent of £28,500 to be unfair and unaffordable and that he had *"offered*

to pay a rent similar to what Ross pays on Dayhouse Farm, but you have not even acknowledged that offer. I now have an ultimatum from your solicitor."

91. In addition to addressing certain practical matters necessary to ensure continuity of the farming business, and saying that it was imperative that his family stayed in Granary Cottage while Hannah completed her A-levels even though the "*ill feelings that your actions have caused make it difficult for my family and I to remain much longer than that*", Andrew said:

> "*It is clear to me that I cannot run a profitable business, paying you what amounts to twice the rent Ross pays for Dayhouse. Therefore I cannot accept your offer. My solicitor has informed me that the only legal avenue open to me is something they call Proprietary Stopol [sic]. This is a very serious step so I will take some time to consider it."*

92. I refer below to the decision of the Court of Appeal in *Davies v Davies* in addressing the principles applicable to a proprietary estoppel claim. That decision was given on the second appeal to the Court of Appeal in the course of that piece of litigation. The first appeal led to a decision by the Court of Appeal in May 2014 (on a challenge to the trial judge's determination of certain preliminary issues as to whether the threshold for the grant of some equitable relief had been crossed). It was the earlier decision that Andrew said he had read about in a press article, which caused him to mention proprietary estoppel in his April letter, and which he remembered having a later conversation about it with Mr Jonathan Clifford of Clarke Willmott at the Three Counties Show in June 2015 (though he accepted in cross-examination that they may have touched on the subject at an earlier point in time).

93. By a letter dated 16 April 2015, Francis & Co wrote to Andrew to confirm that the Ladysmith Farming Partnership had been dissolved on 14 April, that if a rent for the occupation of Granary Cottage after the expiry of 3 months could not be agreed then the property would have to be vacated, and that any deficit on Andrew's capital account would have to be repaid within 7 days of the completion of any accounts showing as much.

94. At some point around this time, Josephine wrote Andrew a handwritten letter (saying that David did not know she had) in which she began by asking "*<u>Why</u> <u>Why</u> has it come to this, with tears in my eyes and an ache in my heart I am writing this letter to you*". Her letter went on to refer how David had "*tried to help you boys into farming*", trying to be "*fair to you both*" and that Andrew had "*pushed him as far as he can go with your tactics*" and "*pushed him into this action*." Her letter referred to Andrew having lost respect for his parents and drew a comparison with how hard it had been for David to carry on farming when his father died "*when you had it all in your lap and seemed to want to throw it all away*."

95. Andrew replied to his mother's letter, saying David had refused to discuss the implications of land on Warren Farm being lost to the solar farm, to him not providing the cheque for David's income tax until there was a discussion, and "*I fail to see what I have done to push him to this*" as "*it's all in his head*." Andrew said he would be happy to go to mediation, but his father refused to talk to anyone about it, and that there was "*still time to avert a looming disaster, but only if he is prepared to talk. I did not involve the professionals*."

96. By late June 2015 Andrew had sought his own professional advice from Mr Jonathan Clifford of solicitors Clarke Willmott. The month before Andrew had secured alternative employment as an Animal Health Adviser under a fixed term contract with the NFU, relating to the pilot badger cull in Gloucestershire. He stayed in that role until March 2016.

97. On 24 June 2015, Ms Judith Burke of Francis & Co was writing to Mr Clifford seeking payment by Andrew of the deficit on his partnership capital account (of just over £7,000) and the parents' expectation that he would pay £600 per month for the occupation of Granary Cottage with effect from mid-July. On 18 September she wrote again chasing Andrew's signature of forms relating to the bank account and the milk contract with ARLA, saying that the planning authority had been in touch with her clients to say that it was an offence for the cottage to be occupied in breach of the agricultural tie and seeking confirmation as to whether Andrew was an eligible occupier.

98. On 5 January 2016, the Senior Planning Enforcement Officer of the Forest of Dean District Council wrote to "The Occupier" of Granary Cottage stating his belief that the agricultural tie condition was being breached.

99. Clarke Willmott wrote a detailed letter of claim to Francis & Co on 20 June 2016 running to 74 paragraphs and setting out Andrew's case based on a proprietary estoppel. The letter of response was sent by Francis & Co on 15 September 2016. In engaging with the alleged representations (implied and express) that Andrew would in due course inherit "*a significant portion of the parents' assets, specifically Tump Farm and the related farming assets*", Francis & Co. said: "*Your client has never been given any assurance that he would inherit more of the family farm than his siblings*" and "*Our clients have never promised any particular share of their estate to your client.*"

100. In April 2016 Andrew, through an employment agency, obtained work as a warehouse operative with Next Distribution. He stayed in that job until July 2017 before becoming head herdsman at Hartpury College in July 2017.

101. Andrew issued his Claim on 25 August 2017.

102. On 5 January 2018, David made his latest Will and signed the letter of wishes (referred to in paragraph 12 above) which operated to remove Andrew entirely from its terms, so that his right to occupy Granary Cottage was removed.

103. In September 2018 Andrew left his job at Hartpury College, then worked for a short time in a temporary job (obtained through the agency) making door and window frames, and in October 2018 began his current employment as senior herdsman near Tewkesbury.

104. There is no great controversy between Andrew and his parents over the events summarised in the above narrative.

105. What is in dispute between them are the following essential points:

    i) whether any representations were made by the parents (in particular by David) before 1997 about Andrew inheriting Tump Farm after the surviving parent had

died. The Particulars of Claim allege that from an early age he had been given to understand by his father that Tump Farm and its business would eventually be his and, after he and Tracey moved into Granary Cottage in 1989, that it was also understood that the home was their property. Such understandings, and the suggested basis for them, are denied in the Defence;

ii) whether any such representations were made about Andrew and Ross inheriting in around 1997 when David agreed to set them up in the quad bike venture of CQTC. The Particulars of Claim allege that Ross's intention to come back to the farm pleased David who said that his sons would have to learn to work together and he intended to leave the farm to them jointly to run after his death. Although David accepts that the establishment of CQTC reflected his hope that his sons would learn to work together, the alleged intention is denied in the Defence;

iii) whether any such representations were made about Andrew and Ross inheriting during the course of making what Andrew describes as the succession arrangements of 2012. The Particulars of Claim allege that key terms of those arrangements were that (a) Tump Farm would remain the property of the parents to be divided equally between Andrew and Ross upon the second parental death and that the assets of the separate Ladysmith and Dayhouse partnerships would pass to Andrew and Ross respectively and (b) that the mortgage on Granary Cottage was transferred to the Ladysmith partnership because it was Andrew's house. This too is denied in the Defence; and

iv) whether Andrew can be said to have suffered detriment in working at Tump Farm when he received wages (as increased following his reference to DEFRA in 2009) and incidental benefits through his occupation of Granary Cottage. This too has been put firmly in issue by the parents.

106. In relation to the alleged representations about Andrew inheriting anything, the parents' position may be summarised by quoting from paragraph 6.5 of their Defence:

> "*In fact at no time was it represented to the Claimant by the First Defendant or the Defendants or by anyone on his behalf of their behalves that he would have any particular interest whatsoever in the future in the farm or its business. The Defendants were at all times aware that circumstances might change and that it was their wish to provide for each of their 3 children and, other than entering into partnership with him in 2012, did not encourage any belief on the part of the Claimant that he would in the future have any particular interest in the farm or its business. Nor was there any discussion with any of the 3 children about succession planning*."

The Proceedings

107. As I have already mentioned above, the letter before action was written on 20 June 2016 and Andrew issued his claim in August 2017. The parents served their Defence and Counterclaim (seeking an occupation rent of Granary Cottage for the period since the Ladysmith Farming Partnership was dissolved in April 2015) on 9 October 2017.

108. The Pre-Trial Review took place on 10 October 2018. At that hearing I dismissed the parents' application for specific disclosure of documents relating to Andrew's employment by others (in particular his later employment by Hartpury College and the termination of that employment) and also any documents relating to any attempts to obtain alternative employment during the period of employment by his parents, the period of the Ladyship Farming Partnership, or after the dissolution of that partnership. By the time of the PTR, Andrew had summarised his employment since leaving Tump Farm in his second witness statement.

109. The evidence in support of that application said it was relevant to know whether Andrew was capable of obtaining better remunerated work elsewhere and whether or not he sought such work. The documentation in relation to Andrew's employment as a herdsman by Hartpury College, when he lost his job after a year, was also said to be relevant to Andrew's case that he had suffered detriment in working for his parents for low pay. Yet it was clear that Andrew had *not* sought to pursue an alternative life away from the farm during the 32 years he had spent on it, and the terms and length of any subsequent employment (started by him in his fifties) appeared to me to be of marginal relevance, at best, as to the true worth of his work on the farm over those decades.

110. The trial took place before me in two stages, over 2½ days in early November and 3 days in mid-December 2018.

111. The trial had been listed for the full week in November but was adjourned half way through because of the parents' late disclosure of some taped recordings of separate conversations which either or both of them had had with Andrew, without him knowing he was being recorded, or their bank manager (Mr Sowerby) or a local auctioneer (Mr Foxwell). These recordings had been produced by the defendants to their solicitors on the morning of Friday 2nd November (the last working day before the start of the trial) and Andrew's solicitors had been told of their existence by an email that evening. By the start of the trial the following Monday, three of the recordings had been transcribed and during his cross-examination Andrew was asked some questions about two of the taped conversations.

112. However, by the morning of the third day of the trial it was apparent that there were yet further recorded conversations which were disclosable but which had not been disclosed. This unsatisfactory state of affairs was referable to the very late production of them by the defendants to their own solicitors, which was compounded by the fact that they had been delivered on a digital recording device which lacked a power lead and was suffering from a leaking battery. The first three recordings had been transcribed over the weekend once a power lead had been obtained.

113. I was informed of this by Mr Adams, counsel for David and Josephine, on the morning of the third day who also told me that there were also recordings of other conversations between the parents and their solicitors in farming and partnership matters (Francis & Co.) which had also been recorded and in respect of which privilege would be claimed. In addition, there was mention of Ross also having recorded a conversation he had with Andrew.

114. Although Mr Jenkins, for Andrew, had been quite phlegmatic about the late production of the three transcripts (having read them he was relaxed about Andrew being cross-examined upon them despite their lateness) the position as it was revealed to me on the

third morning led him to submit that there had to be an adjournment of the trial. At one point during that morning it was also contemplated that it might be appropriate for me to issue a witness summons against Ross (despite his intention to attend voluntarily to give oral testimony at trial in support of his parents) in order that his recording might be produced. In the event, the production of that recording by Ross was the subject of agreement before the trial was adjourned to the dates in December.

115. The upshot of these developments in early November was that the trial was therefore adjourned with an order that the defendants pay the claimant's costs of that third day in any event. Fortunately, the dates in December on which the trial resumed had just become available to the court. By the time the trial resumed in December the further non-privileged recordings (including the one made by Ross) were available to the parties and the court.

116. I feel bound to remark that this was not the only unsatisfactory aspect of the defendants' approach to the trial so far as their recordings are concerned.

117. In addition to the late, and staggered, production of transcripts of the disclosable recordings, the defendants also provided the relevant audio files by emails to the court. At the hearing in November, Mr Adams urged me to listen privately to the first three recordings in my chambers. Mr Jenkins did not object to me doing so and, in fairness to Mr Adams, by 10 December and before the second stage of the trial, he had at my suggestion produced a list of the particular extracts suggested to be worthy of being listened to by me in advance of the resumed hearing. The total playing time suggested by that list amounted to approximately 1 hour and 20 minutes, though a saving of approximately 10 minutes was identified in relation to one recording if the court did not have the time available to listen to the whole of it.

118. As I made clear to Mr Adams at both hearings, I had concerns about this approach even though, by the time Andrew gave evidence at the first hearing, I had listened privately to one recording (labelled "No 32") whilst following it in the transcript. Andrew was then asked some questions about that recorded conversation in cross-examination, but that was only by reference to the written transcript that had just been added the trial bundle. No part of the audio recording was played in court and neither was Andrew taken through the whole of the transcript. My listening to that one recording, which the transcript appeared to reflect adequately enough, led me to be unsurprised that Mr Adams did not press to have that recording played in court so that certain suggested nuances of speech, perhaps not apparent from the written word, might then be put to Andrew.

119. In those circumstances, my concerns about me listening privately to the recordings were two-fold and emanated from different aspects of the overriding objective. The first concern reflected the defendants' assumption that the court was able to devote more time listening to evidence than the parties' trial listing accommodated. I recognise that Mr Adams' politely worded "listening list" of 1 hour and 20 minutes was relatively light fare compared with the out-of-court preparation for hearings usually required of judges in the Business and Property Courts, though it was in addition to what had already been set before me in this case. I should also make clear again that - given the reason for the adjournment and what had already been urged upon me in relation to "No. 32" - I had, when adjourning, directed that the parties should by 4pm on 10 December specify which particular parts of the audio recordings it was suggested the

court should listen to. Nevertheless, whereas the parties were fortuitous enough to benefit from another piece of litigation disappearing from what then became their December trial dates, so that I was able to give them those dates when adjourning on 7 November, the timing of the defendants' late disclosure, coupled with their request that the court should then devote more of its own time to it, paid scant regard to the need for the court to devote resources to other cases.

120. The second concern was much more important and it related to the potential unfairness of me listening privately to the recordings and perhaps drawing an adverse inference against a party, on one or more aspects of the conversation, without that party (or his or her counsel) having an adequate opportunity to resist any such quasi-inquisitorial leanings. If one side wishes to argue that something more, of forensic significance, emerges from a particular statement than what appears from the written record of it then, generally, that is something that should be put to the maker of it, if he is giving evidence. That is what the adversarial process usually requires and, once that is recognised, Mr Adams' time estimate for the private listening can be seen to have been a potentially beguiling one. Had I felt myself to be in danger of forming an adverse but untested inference against Andrew (for that is presumably what his parents had in mind) then I would have wished to have heard Mr Jenkins further on the point. I imagine that one of the preliminary points he might have made is that a private listening should be no substitute for structured cross-examination.

121. Nevertheless, and despite my misgivings about the process expressed at stage one of the trial, by the end of its second stage it was clear there was no such danger of me privately drawing an inference from the extracts of the recordings to which I did listen in chambers. Having already listened to part of "No. 32" at stage one of the trial, I observed to Mr Adams during that first hearing that I could not see what more I was supposed to gain from listening to the recording that did not otherwise emerge from reading the transcript of it. Mr Adams was unable to assist me with any specific suggestions. By the second stage of the trial he had provided me with the "listening list" (his solicitors copying Mr Jenkins and his solicitors into the message of 10 December). Consistent with his relaxed response to the earlier, more general request that I should listen to the audio files, Mr Jenkins indicated to me at the start of the resumed hearing that he had no wish to recall Andrew to address the further recordings disclosed even later. Andrew's legal team had by then listened to all the recordings and indeed had input in relation to the transcription of them (including making amendments to the three initially transcribed). Again, I asked Mr Adams what further points his side were suggesting could and should be drawn from listening to them. As before, nothing specific was identified.

122. All in all, the request that I should listen to the recordings disclosed by the defendants on the eve of the trial, and then during it, was a little wasteful of court resources. Better that, however, than the danger of drawing an inference from a statement without its maker having an adequate opportunity to avert it.

Legal Principles

123. Since *Gillett v Holt* [2001] Ch 210 there has been a plethora of proprietary estoppel cases in the farming context. That was probably the inevitable result of a decision

which firmly scotched the idea that a proprietary estoppel claim could be met by the submission that, whatever else he might have said to encourage the claimant, the defendant had not also promised the claimant that he would not subsequently have a change of testamentary intention (and this regardless of the extent of the claimant's detrimental reliance upon the defendant's earlier expression of his then intention). Obviously, there must first be established some initial assurance about those intentions which renders it sensible to talk about a later (and, assuming such intervening detriment, arguably unconscionable) "change". Further, the decision confirmed that cases had to be looked at "in the round" when testing whether a doctrine which rests upon the fundamental principle of preventing unconscionable conduct had been triggered.

124. In the present case, and in addition to disputing the suggestion that Andrew had reasonably relied to his significant detriment upon whatever they might have said or otherwise encouraged him to believe, the parents make much of their point (to quote from Mr Adams' skeleton argument, with my emphasis) that:

> "*they were careful not to make any representations that could be construed as promises or assurances that Andrew would <u>definitely</u> have any interest in Tump Farm or the business carried on from it (except to the extent that it was agreed he should be a partner in 2012). At best, in so far as he thought about it at all at the time, he made an assumption that he would inherit the farm, but he had no reasonable grounds for any belief that he would <u>definitely</u> inherit the farm and they did not do anything to encourage such a belief*."

125. That this sounds very much like a throwback to some reasoning upon the doctrine in the last century (specifically the decision of Judge Weeks QC in *Taylor v Dickens* [1998] 1 FLR 806 of which Robert Walker LJ, as he then was, expressly disapproved in *Gillett v Holt*) is reinforced by paragraph 17 of the skeleton, again with my emphasis:

> "*Mr and Mrs Guest deny that Andrew had any such belief as a matter of fact. It is also not obvious how somebody could believe that they would <u>definitely</u> inherit, unless it had expressly been promised to them, <u>as it is in the nature of inheritance that testamentary intentions can change</u> with time and events*."

126. The parents (expressly mindful of the difficulties in the way of such a claim by an adult child and saying, as they do in defending the present claim, that Andrew is capable of earning a living equal to or better than the one he might have from working the farm) conclude their argument on this aspect of the doctrine by saying that if, in the exercise of their testamentary freedom, they duly fail to make reasonable financial provision for Andrew on their deaths then he "*has a limited legal remedy*" under the Inheritance (Provision for Family and Dependants) Act 1975.

127. Yet the principles governing a proprietary estoppel claim are now clear and they are equitable ones (having nothing to do with statutory constraints) which, in this type of case, are built upon the inherent revocability of present testamentary intentions. They also deal with the "here and now" and, whether or not the claim comes to be pursued against his executors or any rival successors, they support a claim - an equitable cause of action - against the legal owner. The claim is likely to be based upon a whole host of matters arising in his lifetime going well beyond the notion of a testamentary "failure" at the end of it (that notion resting essentially upon the expectant heir's relationship with him). Where the claim is a good one, the result is to undermine the

assumption (per paragraph 20 of their skeleton argument) that "*Mr and Mrs Guest remain free in equity to deal with their land and business as they think fit*."

128. In *Thorner v Major* [2009] 1 WLR 776, the later farming case decided at the highest judicial level, Lord Walker (at [29]) identified the three main elements of a proprietary estoppel claim which he had been at pains to point out in *Gillett v Holt* do not exist in watertight compartments. They are a representation or assurance made by the owner to the claimant, reliance upon it by the claimant, and detriment to the claimant in consequence of his reasonable reliance upon it. Consideration of one element may flow into one or more of the others because the nature of the assurance is likely to influence the degree of reliance reasonably to be placed upon it and although such reliance may carry with it incidental benefit - a point the parents seek to emphasise in the present case - it is through such reliance that the case on detriment will be built. Obviously, there has to be some connection between the assurance relied upon and the detriment said to have been suffered by the claimant.

129. These points and others were recognised by Lewison LJ in *Davies v Davies* [2016] 2 P&CR 10, at [38], in a series of nine propositions. Others include the point that "the detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial" and (a basic point which again serves to highlight that equity's support for such inter-vivos claims cannot be marginalised by reference to the 1975 Act) that "the issue of detriment must be judged at the moment when the person who has given the support seeks to go back on it." Lewison LJ also addressed the question of relief, in the event of an equity being established, and the concept of proportionality between the remedy and the detriment to be redressed (the eighth proposition mentioned below). As to that, he emphasised that the court enjoys "a broad judgmental discretion" but one which must be exercised on a principled basis and (the one bit of *Taylor v Dickens* to survive) not from the shade of a "portable palm tree".

130. In relation to that last point, in *Gee v Gee* [2018] EWHC 1393 (Ch), [97], Birss J recognised that a proprietary estoppel case can never simply be about unfairness, and neither may the court "simply substitute its view of what might be a better solution to the family dispute as it now stands."

131. Ultimately, therefore, the outcome of a proprietary estoppel claim will depend upon a close investigation of the three core elements identified above. To quote the first proposition of Lewison LJ in *Davies v Davies*, at [38]:

> "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 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.: *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776 at [57] and [101]."

132. In the light of the way the argument between the parties has developed, there are only two particular aspects of these familiar principles that deserve further mention.

133. The first relates to what might qualify as a relevant assurance (or promise) or representation. The first of the three elements was described in *Davies* (by reference to *Thorner v Major*) as requiring "an assurance of sufficient clarity".

134. In *Thorner v Major* the deceased (against whose personal representatives the claimant brought his proprietary estoppel claim) was found by the trial judge to have been a private and taciturn man who, by his oblique remarks on a number of occasions, had intended to indicate to the claimant that he was to inherit his farm. Lord Hoffmann said, at [2] and by reference to a remark of Lloyd LJ in the Court of Appeal, that it was a distinctive feature of the case that the representation (as to inheriting the farm) was:

> "…. never made expressly but was "a matter of implication and inference from indirect statements and conduct". It consisted of such matters as handing over to [the claimant] in 1990 an insurance policy bonus notice with the words "that's for my death duties" and other oblique remarks on subsequent occasions which indicated that [the deceased] intended [the claimant] to inherit the farm."

135. The trial judge in that case had found that the deceased's words and acts were reasonably understood by the claimant that he would inherit the farm and that the deceased intended them to be so understood. Although it did not stand alone, the judge was satisfied by that by making the remark, when handing over the policy bonus notice, the deceased was intending to indicate to the claimant that he would succeed to the farm. By reference to the first and other two elements of a proprietary estoppel claim he therefore upheld the claim to the farm.

136. The Court of Appeal reversed his conclusion on the ground that the deceased's representation was not sufficiently clear and unequivocal in conveying an invitation by him that it should be acted upon by the claimant. In the absence of an invitation on the maker's part, within the implicit statement about the claimant inheriting the farm, the court (whilst respecting the judge's finding of fact as to how the claimant had understood it) found that the deceased was only indicating his present intention rather than making any promise or commitment on which he intended the claimant to act. The Court of Appeal therefore introduced into the test of "unequivocality" in the representation or assurance – the test to be applied when determining, objectively, whether or not one has been made or given - the notion that the person responsible for it must also subjectively intend or understand its inducing effect on the claimant.

137. However, the reversal of the Court of Appeal's decision by the House of Lords, and the reasoning by which they restored the first instance judgment, demonstrate that an assurance may be "clear enough" even though the necessary element of an intention to induce is established by showing that the claimant's understanding that it should be acted upon was a reasonable one, in all the circumstances, rather than by proving that is what the maker of it actually intended (and then communicated, with commensurate understanding of the intention on the part of the claimant). Looking at the matter "in the round", as the courts have been required to do since *Gillett v Holt*, whether or not an assurance is of sufficient clarity is to be judged objectively. This necessarily involves consideration of the context and reflection upon how the person to whom the assurance was made (the claimant) might have been expected to interpret it and act upon it: see the speeches of Lord Rodger (at [26]), Lord Walker at [56]-[57]) and Lord Neuberger (at [80]). An objective assessment of the parties' position and the drawing of permissible inferences may mean that a proprietary estoppel claim is sustained by a statement or series of statements which to an outsider, lacking knowledge of the relationship between "representor" and "representee", could appear more Delphic than clear and unequivocal. If context is everything, then, as Lord Walker noted, asking

whether an assurance is "clear enough" is bound to be "a thoroughly question-begging formulation".

138. The formulation therefore requires the court to consider the alleged assurance in the context of the relationship and dealings between the parties. Lord Walker said, at [58], "[W]hen a judge, sitting alone, hears a case of this sort his conclusion as to the meaning of spoken words will be inextricably entangled with his factual findings about the surrounding circumstances".

139. The approach to the evidence required by *Thorner v Major* is reflected in the decision of HHJ Davis-White QC, sitting as a High Court Judge, in *Thompson v Thompson* [2018] EWHC 1338 (Ch), at [98] and [149]; yet another farming case. In that case, the claimant son had been unable to identify precise occasions or precise words spoken in support of his evidence that both parents had made it very clear that he would get the farm after their deaths, but the judge was satisfied that there had been a very long-standing promise or assurance that had been made consistently over time. The claimant's inability to pinpoint a specific occasion on which that assurance was given did not mean it was not "clear and definite."

140. It is and has long been recognised that a proprietary estoppel claim may also be built upon a representation which arises out of the owner's acquiescence in, or encouragement of the claimant's belief. In *Thorner v Major*, at [55], Lord Walker noted that the case was not one of acquiescence (or standing-by) but observed that "if all proprietary estoppel cases (including cases of acquiescence or standing-by) are to be analysed in terms of assurance, reliance and detriment, then the landowner's standing by in silence serves as an element of assurance." Obviously, the concept of standing by (with its implication that the owner has some obligation to speak up and correct the position, engendered by his passivity or silence, if he is not to become estopped from asserting the true legal position) is one which most obviously applies where the claimant believes he has *already acquired* an interest in the property. It is on the basis of that belief, and with the knowledge and acquiescence of the true owner, that his efforts or money are invested in the property. The continuation of the quoted paragraph of the judgment confirms that to be the classic scenario.

141. Where, on the other hand, the proprietary estoppel claim is based upon the claimant's *expectation* of acquiring a proprietary interest at *some point in the future* then the owner cannot be estopped by mere passivity, or silence, in the absence of some prior representation or assurance by him which encouraged the expectation in the first place. In an expectation case, there has to be some commitment on his part upon which (assuming the elements of reliance and detriment are also present) the estoppel may bite. The greater part of a lifetime's toil by Andrew at Tump Farm would not support a proprietary estoppel claim if it rested solely upon the fact that David never told Andrew that he did not intend to include him in his will. So much is obvious from the likelihood that, in those circumstances and lacking the knowledge that he was not to inherit, Andrew would have no cause to consider bringing a proprietary estoppel claim during his father's lifetime. Instead, he would discover the disappointing position (about which his father had said nothing either way) only after his father's death and he would then be confined to whatever financial provision, if any, the 1975 Act might support.

142. The final point which I think calls for mention in relation to the clarity of the assurance, given the facts of the present case, relates to the certainty of expectation created by it. I say that because Andrew's expectation has, on his own case, diminished over time. His assumption prior to 1997 was that he would take over Tump Farm was then displaced by a realisation that he would inherit it jointly with his brother. In *Thorner v Major*, at [61], Lord Walker emphasised that it is a necessary element of proprietary estoppel that the assurance should relate to identified property.

143. However, other observations by him (at [64]-[65]) and by Lord Neuberger (at [85]-[86]), which I recognise were directed to the point in that case over the fluctuating extent of the farm during the deceased's lifetime, indicate that the representation may be "clear enough" even though it leaves the representee uncertain as to the precise extent of the promised interest. Likewise, the remarks of then Robert Walker LJ in *Gillett v Holt*, at 226B-C (addressing the unreported decision of the Court of Appeal in *Jones v Watkins* in 1987) recognised that the equitable doctrine obviously admits of more flexibility, in terms of certainty of interest, than the law of contract. I turn below to the principles governing the satisfaction of any equity that the claimant may establish. It is clear both from the retrospective nature of the exercise and from the fact that the equity may be raised in a case where the promise falls some way short of an initial "quasi-contractual" assurance that, provided he can identify the property in question, the claimant may be permitted some uncertainty as to the scope of his expectation; even if that might mean that (per Lord Neuberger in *Thorner v Major*) he should be "accorded relief on the basis of the interpretation [of the assurance] least favourable to him".

144. The second question arising from consideration of the well-established principles of proprietary estoppel, and worthy of further reflection in this judgment in the event of Andrew raising an equity by establishing the three elements of the claim, relates to how, looking backwards, the court should exercise its broad judgmental discretion. In *Davies*, at [39], Lewison LJ referred to the "lively controversy" about the aim of the exercise. In that paragraph and the following two paragraphs the judge considered two lines of authority. The first focused upon the court giving effect to the claimant's expectation, unless it is disproportionate to do so, whereas the second is directed to the protection of the claimant's "reliance interest" and compensating for the detriment suffered. Lewison LJ also mentioned a third approach which favoured an outcome that would "normally" be somewhere between the two options of satisfying the expectation and compensating for the detriment.

145. Mr Jenkins drew specific attention to this passage and invited me to reach my own view upon the differences in approach.

146. In *Davies*, Lewison LJ noted that the court was not required to resolve the controversy on the appeal before the court but said that, logically, there was much to be said for the second approach. The logic is that without detriment, the third element of the claim, there can be no viable proprietary estoppel claim. Therefore, and also at [39], if "the detriment can be fairly quantified and a claimant receives full compensation for that detriment, that compensation ought, in principle to, to remove the foundation of the claim."

147. Although I have been invited to form my own view upon the two or three schools of thought, the parties did not refer me to or address me upon the academic articles or

authorities mentioned by Lewison LJ and I have not consulted them. Indeed, neither side took me to the decision of the Court of Appeal in *Jennings v Rice* [2002] EWCA Civ 159, though in preparing my judgment I have considered that authority in the light of its centrality to the passage in the judgment of Lewison LJ.

148. For my part, reminding myself that the point is one of principle under the doctrine of *proprietary estoppel* and looking at the propositions set out in *Davies*, my instinct leads me to side with those who take "the view that the essential aim of the discretion is to give effect to the claimant's expectation unless it would be disproportionate to do so" (per Lewison LJ at [39]). I should add that it is the "normally" in the third approach summarised by him – with its presumptive shift away from meeting the expectation – which causes me to doubt the correctness of that approach. However, I would recognise that there will often be good reasons in a particular case for making the shift and it need not be confined to the avoidance of a "windfall" for the claimant. It seems to me that the caveat about proportionality covers not just the idea of a disproportionate benefit to the claimant but also a disproportionate burden to the property-owner and others who may have interests in the property.

149. The doctrine being one where the concept of detriment serves the purpose of identifying those cases where it would be unconscionable to leave un-remedied the repudiation of *the assurance of some proprietary interest*, one would expect to start by looking at the "expectation interest" rather than the "reliance interest". Indeed, in cases where the claimant's detriment (which may or may not be financially quantifiable) was sufficiently substantial so as not to be vulnerable to the caveat based upon disproportionality, the expectation should identify "the equity", at least as it is asserted to be by the claimant. A proprietary estoppel claim will, on that basis, and as has been done in the present case, identify the primary relief in terms of the proprietary expectation rather than in terms, say, of a quantum meruit claim aimed at making the claimant good financially on his resulting detriment. That said, the fall-back prayers referring to an alternative exercise of the court's discretion and/or for "further or other relief" will also invariably be invoked (both have been in the present case) to cover the risk of the court being unpersuaded by the claimant's primary position and deciding that the equity required to be satisfied falls short of that asserted by the claimant.

150. The eighth proposition in *Davies* is:

> "Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application; *Henry v Henry* at [65]. In particular there must be proportionality between the remedy and the detriment which is its purpose to avoid: *Jennings v Rice* at [28] (citing from earlier cases) and [56]. 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: *Jennings v Rice* at [50] and [51]."

151. In the relevant passage in *Davies*, at [39]-[41], Lewison LJ was addressing the judicial discretion on the grant of equitable relief to be exercised at the conclusion of a successful claim founded upon a proprietary estoppel. So far as that broad judgmental discretion and its exercise on a principled basis is concerned, the way the propositions are expressed in *Davies*, at [38], indicates to me that there are real limits upon the court's ability to adopt the strictly logical approach of focusing upon detriment (even

assuming it can be fairly quantified) in isolation from the expectation. To do so would risk the court not looking at the issue "in the round" when that exhortation could be said to be the leitmotif of the first eight propositions identified by Lewison LJ in his paragraph [38]. In particular, the suggested logic in compartmentalising any financially quantifiable detriment, for the purpose of making that element the focus of the court's remedy, appears to be at odds with the last sentence of the eighth proposition quoted above.

152. The eighth proposition in *Davies* was based in part upon statements in *Jennings v Rice*. In *Davies*, at [40]-[41], Lewison LJ referred to another paragraph in *Jennings v Rice* where Robert Walker LJ had referred to cases where the claimant's expectations were either uncertain or perhaps not fairly derived from the actual assurances made to him. In such cases, and in contrast to claims involving assurances and reliance of a quasi-contractual nature, or something approaching that, where Lewison LJ said the court is likely to vindicate the claimant's expectations, Robert Walker LJ said (at [45]) that the claimant's expectations would be "no more than a starting point".

153. Lewison LJ then remarked that it was not entirely clear what the court was to do with the expectation when it was just a starting point. He was attracted to the claimant's suggestion that a useful working hypothesis would be to adopt a sliding scale on which the clearer the expectation, the greater the detriment and the longer the passage of time during which the expectation was reasonably held, the greater the weight to be given to the expectation. That certainly is one way of summarising the propositions, especially the first, fifth and eighth, though I think it is important to recognise that other factors in the case – aside from what I might describe as disproportionately light or unwarranted detriment - may operate to shift the claimant away from having his expectation met: see paragraphs 159 and 160 below.

154. The way that the concepts of reliance and detriment are expressed in the second and third propositions make it clear that the quality of the assurance informs the court's analysis of the reliance and the detriment. It is also said that reliance and detriment do not sit within "watertight compartments" and the exercise is a retrospective one of looking backwards from the situation of later disappointment in the expectation. That said, and confining myself to the one, dry measuring instrument contemplated in *Davies* – the sliding scale - there must be something akin to a non-return ratchet between those two elements and the first relating to the quality of the assurance or representation. A greater degree of detrimental reliance cannot somehow operate to enhance the quality of the assurance (and resulting expectation) when the function of the former is to feed the estoppel that arises, contingently, when the latter is subsequently resiled from. That would make a nonsense of the concepts of reasonable reliance and proportionality, each of which should be conditioned by the nature and quality of the prior assurance or representation.

155. There may, for example, be cases, perhaps comparatively rare, where the quantifiable value of the detriment may in fact exceed the value of the property claimed. The claimant may have provided an adult lifetime of significantly underpaid labour in the belief that he will inherit the farm which in fact proves to be so heavily mortgaged that the equity in it is worth less than any notional (and notionally non-time barred) claim for underpaid labour. In any such case, the first, third, fifth and eighth propositions in *Davies* would operate to "cap" the remedy by reference to the property (and its value). The assurance will have been one in relation to the conferment of a proprietary interest

rather than the belated payment of a market wage. I emphasise that I am looking at the position under the doctrine of proprietary estoppel and not what (making due allowance for the pitfalls of pleading what might well be a factually inconsistent case) might be advanced as a quantum meruit claim under the rubric of "further or other relief"; or what Robert Walker LJ contrasted in *Jennings v Rice*, at [54], as being "a restitutionary claim for services which were not gratuitous".

156. Therefore, in the many cases which do not involve a disproportionately modest and financially quantifiable element of detriment, I would have thought that any defendant who is contemplating making an open or without prejudice offer - designed to attack the "foundation of the claim" and to forestall any exercise of the judgmental discretion - would have to recognise as much and not just focus upon the value of the detriment (if quantifiable) down to the date when the promise or assurance is broken. As I say, I am not sure the three interconnected grounds for a successful proprietary estoppel claim support the logic of stripping out just one of them as the basis for addressing it. In my view, the sliding scale should not be deployed as a scalpel unless, perhaps, the initial assurance was so uncertain as to not really justify much of a place on it.

157. I note that in *Gee*, at [140]-[144], Birss J referred to both *Davies* and *Gillett v Holt* on the question of remedy. In that case the judge said that he had not attempted to quantify the overall detriment experienced by the claimant in reliance upon the relevant representations, though the quantifiable aspects produced an estimate of approximately £180,000. He noted that this was "modest relative to the value of the property at stake" (the value of the land and limited company farming business was about £8m). Recognising as much, Birss J said that providing compensation to the claimant which was gauged to the value of the detriment would not satisfy the equity established in his favour. By reference to the facts of the case, he said "[T]he appropriate approach is to base the remedy on expectation, not on the financial value of the measurable parts of the detriment." In order to satisfy the equity, Birss J said that the claimant should receive 52% of the company's shares and 46% of the land.

158. At least for a case where the detriment suffered by the claimant is significant and reflects his reasonable reliance upon the relevant assurance, I respectfully concur with the approach adopted by Birss J in *Gee* in tempering the suggested logic of looking only at the measure of the claimant's detriment (to the extent it or some part of it is financially quantifiable).

159. As to the question raised by Lewison LJ about shakier expectations (as I might describe them) providing no more than a starting point in identifying the appropriate relief, I read paragraphs [45] to [56] of *Jennings v Rice* as providing guidance as to where the court might end up in its decision-making in such cases. In particular, the non-exhaustive and non-hierarchical list of factors identified by Robert Walker LJ, at [52], are ones which might justify a retreat from the line marked by the claimant's expectation. It is paragraph [56] of *Jennings v Rice* which underpins the sixth proposition of Lewison LJ: "… the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result".

160. Although none of the propositions in *Davies* use the phrase, that sixth one most clearly encapsulates the notion of the court forming a view as to "the minimum equity to do justice": compare *Gillett v Holt*, at 235E and 237A, and *Jennings v Rice* at [32]-[33] (per Aldous LJ) and [48] (per Robert Walker LJ). Putting to one side the quasi-

contractual situation between claimant and defendant where the latter's interest might almost be said to be already encumbered by the claimant's expectation (compare *Jennings v Rice* at [45] and *Davies* at [40]) the potential for a gap between the minimum equity necessary to do justice, on the one hand, and the fullness of the claimant's expectations, on the other, enables the court to take account of the kind of factors mentioned in *Jennings v Rice* at [52]. As Robert Walker LJ expressly contemplated, they may include such matters as balancing the need for a clean break with consideration of tax consequences that might have been mitigated if the defendant had instead made good on his assurance in due course; and the need to consider any other legal or moral claims upon the defendant which bear upon his interest in the property. As will be seen from my summary of the facts, those are two matters which fall to be considered in the present case.

161. In relation to this part of my judgment, I should note that the final day of trial was devoted to oral closing submissions with each party having half a day each, Mr Jenkins going first. In fact, Mr Adams benefited from the greater period of time (between 2:06pm and 5:28pm) as a result of extended court sitting, and he chose to devote most of it to challenging the first element of Andrew's claim, the alleged assurance, and, by references to the benefits that Andrew had received during his time on the farm and in Granary Cottage, matters pertaining to the issues of detriment and unconscionability. His skeleton argument contained a couple of sentences which chimed with what Birss J said in *Gee* about the court not being able to impose its view as to what is "fair" (see paragraph 130 above) and to the court not going beyond "the minimum extent necessary to avoid [such] an injustice" but Mr Adams did not address me orally on what that might involve in the event that I found in favour of Andrew.

162. I mention this because what Mr Adams did do, in what were almost his final words in oral closing, was to mention two authorities that he had provided to the court - *Uglow v Uglow* [2004] EWCA Civ 967 and what was the very recent decision in *Moore v Moore* [2018] EWCA Civ 2669 – with the request that I should read them. I have acted upon the request before writing this judgment.

163. Having done so, I note, in relation to remedy, that the Court of Appeal in *Moore* also noted the existence of the "lively controversy" over the exercise of the discretion noted by Lewison LJ in *Davies*. In *Moore*, at [25]-[26], Henderson LJ (with whom Leggatt and Floyd LJJ agreed) said he would have wished to receive much fuller argument on the law if it had been necessary to resolve it. However, he also said: "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." Pending resolution of the controversy at a higher level, I do not read that statement as providing any discouragement of the view that I have expressed (also without real argument on the point) in paragraph 148 above.

164. In the earlier case of *Uglow*, at [9], and having referred to *Gillett v Holt* and *Jennings v Rice*, Mummery LJ referred to the need for the court to "stand back and look at the claim in the round in order to decide whether the conduct of the testator had given rise to an estoppel and, if so, what is the minimum equity to do justice to the claimant and to avoid an unconscionable or disproportionate result". As I have said above, I believe the sixth proposition in *Davies* reflects this.

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. The ninth proposition refers to the principled exercise of "the broad judgmental discretion" and it is clear from what Robert Walker LJ said in *Jennings v Rice*, at [49], that 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. Together with the fifth one, that last proposition encompasses the notion that 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.

The Evidence

166. The fact-sensitive nature of a proprietary estoppel claim, particularly where the making of a clear assurance of a proprietary nature is contested, means that a sound assessment of the testimony is critical to its outcome. In this case, there is also some significant correspondence and, less predictably, the existence of the recorded conversations.

167. For the reasons which emerge from this section of my judgment, the testimony of Andrew and David is of a different level of importance than that of the other witnesses. That is perhaps unsurprising when it is those two who farmed side-by-side over the 30 year odd period upon which Andrew relies where (and this much is accepted by David) there was a hope that, with Ross, he would succeed to the farm.

168. I therefore turn to my assessment of the evidence.

(a) Witnesses

Andrew

169. Andrew gave his evidence in a straightforward manner. He gave his answers spontaneously and, in my judgment, he had a good recollection of detail but, importantly, did not seek to read too much into particular events so far as his case on the making of parental assurances is concerned. Equally importantly, I regard what he said in an unguarded manner, during the conversations that he did not know were being recorded, to be generally corroborative rather than destructive of his case.

170. His evidence is to be considered against the backdrop of him slipping into the role of farmer's son, working full-time on the farm, the moment he left school. Despite the initial encouragement needed for him to attend college, the courses that he subsequently attended show that he regarded farming as his future. Although he does not claim to

have known about its terms before these proceedings, his father's 1981 Will would presumably have come as no surprise to Andrew once it later became apparent to him that Ross also wanted to farm. The unspoken terms of the Will do not, of course, meet the parents' denial that any assurances about an inheritance were ever made but, if their denial is questionable, the terms do indicate that it is inherently likely that the assurance would have been consistent with David's consistent testamentary wish over three decades.

171. In relation to the period prior to 1997 and the first 15 years of Andrew's full-time work on the farm, Andrew's witness statement gave two particular examples of how David would shut down a discussion where they disagreed over a particular farming decision. David would do so by saying that one day the farm would be Andrew's but for the moment it was his. The first was at an agricultural show in 1993 when Andrew suggested that they should trade in their tractor for a specialist materials handler (which he believed would perform better the only two tasks for which the tractor was used). His evidence was that his father disagreed, saying: "*It's my farm, when you take over you can do what you want*." The second was in 1995 or 1996 when he said David responded by saying much the same thing when Andrew suggested that using a contractor to make silage would reduce a heavy daily workload over a period of about three weeks (David's objection was based on expense). According to Andrew, these were particular illustrations of a number of responses from David, over the years, to the effect that Andrew's time would come.

172. In circumstances where Andrew accepted that the actual details of the proposed succession were never addressed, as it was not in his father's nature to discuss such matters, Mr Adams cross-examined him with a view to establishing that his position was based upon his own assumption rather than any parental assurance. Andrew responded by saying that his father made no secret of his intention to leave the farm to the next generation. When Mr Adams said that must have meant Ross as well as him, Andrew responded: "*Well, Ross was never interested in farming so I understood that I would take over the farm because Ross wasn't interested. When Ross started to show an interest then obviously I accepted that he would be there alongside me*."

173. Andrew said in evidence that, prior to the partnership arrangements of 2012, he did not know what his father's intentions were in relation to the farm "*apart from in the broadest sense that we were building up the farm for my brother and I to inherit*." He said his father "*would not talk about the details but it was always his intention that his sons would follow him in the farm*."

174. He also said in cross-examination that, although he did not think his hard work and dedication to the farm prior to 2012 had been fully reflected in the arrangements put into place in 2012 (with the Ladysmith and Dayhouse partnerships) he was prepared to accept them as "*the way it was going to be*".

175. Andrew's pleaded case is that it was a key term of the 2012 "succession arrangements" that he and Ross would inherit Tump Farm and its assets (and also the farming assets used on Dayhouse Farm) in equal shares; it being his intention that he would seek to buy out Ross's interest in Tump Farm. When Mr Adams put to him that no promise of an equal inheritance had been made, he said that it had been promised by his father. He answered:

> *"…. at that point, it had been expressly promised, yes. We were to inherit, were each to inherit the assets, the total assets of the individual businesses. Dayhouse farming assets would go to my brother, and Ladysmith farming assets would come to me. The land at Tump Farm would then be split between the two of us, between those farming businesses. From there on it would be a decision between my brother and I whether I would purchase his share of Tump Farm, or whether I would rent his share of Tump Farm. Discussions on that had not really taken place. It was just what would happen in the future*".

176. I have already touched upon Andrew's view that the Ladysmith Farming Partnership between him and his parents did not work out because he needed control over business decisions that his father was not prepared to give him. Although he protested, in the face of cross-examination, that his aim at that stage was to secure such control, rather than ownership of assets, he said "*I understood that the assets would be inherited anyway*."

177. In his witness statement Andrew had stated that the commencement of the Ladyship Farming Partnership business carried with it an entitlement that he could borrow up half the value of Tump Farm (excluding the farmhouse which was his parents' home) against the security of the land. Mr Adams suggested that father would never have agreed to such borrowing given what Andrew accepted was his cautious attitude in business matters. In response, Andrew said that father had himself had to borrow in his early years, when establishing the farm, and that the proposal that he (Andrew) might incur such secured borrowing had been made by the accountant, Mr Wildin, at the initial meeting. Andrew said that father had neither agreed nor objected to the idea.

178. At the trial, transcripts of three of the recorded conversations that had taken place with Andrew were referred to in evidence. The first, on 8 April 2014, was between the three of them; the second, on 25 September 2014, was between Andrew and his mother; and the third, on an uncertain date, took place between Andrew and Ross (on what was thought to be on or shortly before 28 April 2014). Andrew was asked questions about the first two, the recording of the conversation with his brother not having been disclosed or transcribed until after he had given evidence at stage one of the trial.

179. Andrew told me that he was unaware that the conversations were being recorded and - allowing for the fact that I (and Mr Jenkins) understood one of David's first answers in the witness box to suggest that Andrew was aware he was being recorded – the parents did not come to suggest otherwise. In relation to the above-mentioned understanding that he would be able to borrow against the farm for the purposes of developing the partnership business, the terms of the conversation on 8 April 2014 clearly indicate that Andrew held a genuine belief that such borrowing would be permitted. Importantly, his exchanges with his parents on that day also indicate an understanding on Andrew's part that he had some kind of claim upon one half of the farm (which, so he appears to have thought, would be the security for such borrowing) even though the freehold was not a partnership asset.

180. Indeed, the recording begins with a reference that embodies an assumption about Ross's anticipated ownership of the other half. Although, the payment in question is not clearly identifiable from the recording, Andrew accepted in cross-examination that his suggestion that "*the payments should be made half and half*" was a reference to the fact that the repayment of the £5,000 odd outstanding on the mortgage of Granary Cottage

had been made solely from the Ladysmith bank account. Tellingly, the basis for Andrew's suggestion that Ross should have borne half was "*if he is going to own half of the house that I live in that I paid then he should pay half isn't that fair*" [sic]. Then Andrew moved on to the cost of repairs to the barn and the fact that "*Ross'll own half of the barn yet you want me to pay for all of the repairs*."

181. The recorded exchanges on 8 April 2014 became ever more heated. At a still relatively early stage in the conversation the following was said:

> *Andrew: "When we had the agreement it was that I was going to be able to borrow money against my half of the farm."*
>
> *David: "Oh no it wasn't."*
>
> *Andrew: "There you go changing your mind."*
>
> *David: "I'm not."*
>
> *Andrew: "We had. What we [inaudible]. What we need to do is sit down, sort things out and get a proper legal agreement so that everybody knows what's what and then, you know, we can always refer back to that rather than your sketchy memories."*

182. In that conversation with his parents on 8 April 2014, Andrew was also recorded as saying "*I was under the impression that I was to run the business as my own, you were running as a farmer for tax reasons …*". In his testimony, Andrew referred to his parents as sleeping partners.

183. And then:

> "*Because you are going to be leaving the farm to each of us you know. If you are going to have half of the assets, we ought to share the bills equally. Now I don't see why, you know, you have to ply all the negatives on to me and then let Ross have a share of the farm equally.*"

184. The notable point about these statements by Andrew about the business being his to run, and the assumption that he and Ross were to come into equal ownership of Tump Farm is that they were not met with objection by his parents. As Andrew put it in evidence, when it was suggested that David disputed he had agreed in 2012 to step back from the business, "*he does now, he didn't at the time.*"

185. It is the case that the first observation made by Andrew on that Ross should bear half the lump sum mortgage repayment on Granary Cottage was followed by his mother saying: "*I'm not saying anything*". Andrew then responded: "*Oh no, you don't want to get involved because you know that I am right*." To which his father retorted "*No you're not right*." As to the last statement by Andrew, which assumed David would be leaving the farm to both sons but required Ladysmith to bear the bills, David simply said "*Because this business is the most profitable business you got the milk. You are the most profitable part of the business in the first place*."

Tracey, Hannah and Richard

186. I can deal with the evidence given by the members of Andrew's immediate family together because it did not claim to bear directly upon the principal factual issue – the making of any promise or assurance in Andrew's favour. The evidence of Tracey, Hannah and Richard Guest was therefore of limited weight even though I found each of them to be truthful witnesses.

187. Tracey confirmed, and I accept, that she has always assumed that Andrew would inherit Tump Farm so that they would be on the farm "forever" and that she also understood that Granary Cottage was "ours" and that they had paid for its upkeep on that basis. However, she volunteered in her witness statement that she never discussed business with her parents-in-law and that no-one specifically said to her that Andrew would inherit the farm. However, she did say that there were general discussions about the generations carrying on the farming business. Tracey also confirmed that Andrew had worked long hours on the farm and that "*if I knew we would be in this position at our age when I was younger then I would have put pressure on Andrew to get a better paid job (which would probably have involved him working less hours) away from Tump Farm*"

188. Hannah said that, when growing up, she had understood that her father and uncle would inherit the farm - and that this was "*I think because Mum told me*" – and that, in time, Richard would inherit from his father. Hannah said she and Richard had on occasion talked generally about him carrying on the farm. She also said that, during her childhood, she had understood that her father and grandfather did not really get on but that any issues between them were kept away from her.

189. Richard explained how he had helped out on the farm when he was growing up and did some paid work on the farm (to fund a ski-instructing course in Canada) between doing his A-levels and starting at agricultural college in 2013. He said that he had discussed with his father on several occasions the idea that one day he (Richard) might take over the farm. He said that Andrew thought this was a good idea, though the discussions were not particularly lengthy or serious because that would be some distance in the future. Richard also said that he had also discussed the same hope with his grandfather and David had been pleased by the idea. It seems that article in the Chepstow Beacon, referring to the prospect of Richard one day taking over Tump Farm, had been brought to Richard's attention by one of his friends.

190. The evidence of Tracey, Hannah and Richard generally reinforces Andrew's case that he expected to carry on farming Tump Farm after his parents had passed on. Richard's evidence provides some modest support for the conclusion that David had encouraged that expectation.

David

191. My impression of David is that he is a strong-willed man who was not prepared to back down against Andrew once it was apparent that he (Andrew) wanted to exert his

position as a partner in the Ladysmith Farming Partnership so that the business might expand. Although it is not central to my findings, I suspect that David's resolve, in resisting Andrew's efforts to expand the business, was strengthened by the prospect of the farm deriving a significant alternative income from the solar energy park that was in prospect by the time the partnership was dissolved.

192. There is an indication of what might be described as David's intractability in a remark made by Andrew to his mother on 29 September 2014 (about the restoration of the overdraft being an "*admission of defeat*") and also in aspects of David's testimony. For example, although the Francis & Co. letter of 2 April 2015 presented a "take or leave" it approach to the proposed rent of £28,500 p.a., David said that it was not a final offer and that he would not have "*kicked him out*" of Granary Cottage after 3 months. I address David's evidence about Francis & Co.'s earlier letter of 26 March 2009 in the context of my findings below.

193. I found David to be a less reliable witness than Andrew. This was not only because of his willingness to distance himself from statements that had been made by his solicitors well before the commencement of these proceedings. It was also because he appeared determined to get across the point that Andrew's decision to remain at Tump Farm was his (Andrew's) alone and that he could have left to do something else at any time. His testimony also echoed his witness statement by making the point that Andrew had been free to leave the farm at any time and find work elsewhere (as Andrew had on several occasions suggested he might) but had not done so.

194. I regard that an unrealistic position for David to have adopted when it is plain that the parents were as much invested as Andrew in the idea of him carrying on as the next generation farmer. So much is clear from David's 1981 Will, the conversion of property in 1989 to provide Andrew with a home at Granary Cottage, the illness-inspired professional discussion about possible succession arrangements in December 2000, and the entry into the Ladysmith Farming Partnership in 2012. Although I should recognise that much was said in the heat of the moment that might not have been truly meant, I also note that the argument recorded on 8 April 2014 involved David reacting to the breakdown in relations between them by saying "*I'll just sell the whole business*." To my mind, was an indication that David recognised how important Andrew was to the family business.

195. A further ground for treating David's evidence as less reliable than Andrew's evidence emerged from his position on one particular aspect of the ill-fated Ladysmith Farming Partnership. His disagreement with Andrew over the idea of borrowing to expand the herd size was one of the matters which accounted for the partnership's early demise. At first in his cross-examination, David said that the idea had never been agreed and that was the position to which he reverted in re-examination. But his intermediate answers, given by reference to the Promar budget which contemplated the purchase of further cows at a cost of £51,000, suggested that he accepted that Mr Wildin had raised the idea of borrowing against the farm (as opposed to the farmhouse) but that he, David, had later "*changed [his] mind*" about borrowing. He made the observation that, if things "*went up the spout*", he would lose everything whereas Andrew would lose nothing.

196. David's witness statement, which was echoed by Josephine's, supported the denials in the Defence (that relevant representations were made) already mentioned above. His

statement recognised the hope that the farm would not have to be sold after his retirement or his or Josephine's death and that the farm would ultimately pass to his sons and the business carried on by them. However, he stated:

> "*It is of primary importance to make clear at the outset that I have never knowingly or deliberately told or implied to the Claimant, or indeed to either of my two sons what was going to happen to Tump Farm or any farming business which I owned/operated as and when I retire or pass away.*"

197. David accepted in cross-examination that it was his wish, at around the time Andrew started on his agricultural apprenticeship, that he would one day take over the farm. He also said that he suspected that was his mother's wish as well, but did not know for sure. At a much later point in time, when Andrew was pressing for higher wages in 2009, David said he held the hope that both Andrew and Ross would inherit the farm. He went on to say: "*But things change*."

198. Throughout his testimony, David emphasised his understanding that Andrew was working on the farm for the benefit of the family. At one point, when Mr Jenkins pressed him on the point that Andrew would only have done so in the expectation of inheriting the farm, I noted that David said that Andrew was going to "*come into a share of the family business*" (his emphasis).

199. However, David's testimony did continue the theme of his witness statement which was to say that he never said anything to Andrew that would have encouraged that belief. He said: "*I don't know what he understood. I did not tell my children they would inherit. I never told him anything. I did not allow him to believe anything.*"

200. I return to that contention in my findings below. At this stage, I should note that I found David's explanation that the quote in the Chepstow Beacon did not emanate from him to be an unconvincing one. In my judgment, this illustrates that David was anxious to give answers which undermined Andrew's claim even if that jeopardised his own credibility on the particular point

Josephine

201. Josephine's witness statement endorsed what had been said by David in his, and she also addressed certain aspects of Andrew's time on the farm. Josephine painted her eldest son as a headstrong character who would "*never be told [and who] would not listen.*" In relation to this, and the breakdown of the Ladysmith Farming Partnership, her witness statement also gave some insight as to how Andrew appears to have come to regard Tump Farm:

> "*Andrew was unable to separate in his head what was a partnership asset and what was his. For example, he refused to give the calves to Ross as was the agreement between the partnerships as Andrew saw them as his, not the partnerships, and thought Ross should stand on his own two feet."*

202. However, Josephine's witness statement did say that it had always been her view that everything was David's to do with as he wished and that she was never party to any

conversation where anything other was discussed. She referred to the fact that from no later than 2006 (in testimony she said it could have been 2004 or 2005) Andrew had wanted to be made a partner in the business and that she had told him that he did not want to end up working hard for low wages and ultimately not receive anything. On that basis, she said that Andrew cannot have believed that the farm had been promised to him.

203. It was obvious from Josephine's demeanour in the witness box that she remains clearly upset by how things have turned out. She had no firm recollection of particular events but she did accept that Andrew had worked hard on his farm, saying that she had been asked to calculate his weekly hours for the purposes of her statement. Josephine said that she made the recording in September 2014 because she wanted to understand what Andrew was saying about the disagreements with his father and brother.

204. Mr Jenkins did not forcefully challenge Josephine in the witness box and, in circumstances where she plainly was upset, I got the impression that a potentially longer cross-examination was curtailed.

205. I have no reason to doubt any part of Josephine's evidence which is material to the matters I have to decide, though I cannot accept the conclusion she draws from her statement to Andrew that a lifetime of hard work might result in nothing. To do so would be at odds with her husband's 1981 Will and the terms of the letter she wrote to Andrew in 2015 (see paragraph 94 above). I think it more likely that she was reminding her son of the hazards of a farming life rather than negating any assumption of an inheritance. Her witness statement had referred to the volatility of the dairy business and to how she and David had to go without, in order to support Andrew, at times when the farm was not doing well.

Ross and Jan

206. Ross and Jan gave evidence for their parents. I take the evidence of Andrew's brother and sister together because, like his wife and children, neither of them claimed to have direct knowledge of any discussions between David and Andrew which have any significant bearing upon Andrew's case that David made a positive assurance he would inherit.

207. Ross did explain in his witness statement how he had fallen out with Andrew over the business of COAC. He also said that it was not logical for Andrew to treat the 2012 arrangements as an exercise in succession planning when the Dayhouse Farming Partnership only enjoyed a (relatively insecure) FBT under a 5 year term; though he also made the point that the land and buildings at Tump Farm remained in the ownership of the parents and were not assets of the Ladysmith Farming Partnership. According to Ross, the two partnerships were really about enabling each of the brothers to make a living (in relation to the split in farming activity, he said that he enjoyed farming but that dairy farming was "*not my first love*"). He recognised that Andrew had at the outset proposed that he should be able to borrow £50,000 against Tump Farm but this was neither entertained as a serious option nor accepted.

208. Ross said that he was never led to believe that he or Andrew or anyone else would inherit the farm. He said the farm had been his father's life and it was "*always his to the exclusion of everything else so it would never have made sense to have assumed it was going to be given to us*". However, Ross also said it was "*always my assumption that my parents' estate was going to be split three ways equally between me and two siblings*." He said that inheritance was never explicitly discussed, though he did have a vague recollection of Andrew accusing David of having decided to leave everything to Ross, which their father denied. He could not recall the approximate year of that conversation.

209. Ross explained that he had made the recording of his conversation with Andrew in April 2014 on his mobile phone. He accepted that Andrew did not know he was being recorded. The audio file confirms that it took place when Andrew was working in the milking parlour. Listening to it, and reading the transcript of the conversation, it is obvious that Ross (having set his phone to record) was determined to confront Andrew with the challenge to *"explain how I'm better off than you*." Although Andrew had initially been reluctant to engage in the discussion (saying at the outset that he was not in the right mood for it) the brothers then proceeded to argue over their own, contradictory perceptions of the financial inequality between the two partnerships.

210. As with Andrew's recorded conversation with his parents, in this conversation he twice mentioned that Ross would "*inherit half the barn*" (when the Ladysmith partnership was funding the cost of its repair) and that "*he still expects to leave you half the farm whereas I've paid the half the mortgage off*." Ross did not question or challenge this, saying only that the Ladysmith business was an established one.

211. Jan's witness statement briefly addressed the question of Andrew's working hours at Tump Farm, recognising that he did the 5am milking and the evening milking but saying he would not have been working continuously throughout the day.

212. In relation to Andrew's assumption that he would inherit, Jan's witness statement referred to a conversation she had with Andrew about 10 years ago, which stuck in her mind, in which they were talking about inheritance and their thoughts as to what might happen in the future. Jan said she had no idea what would happen and that, for all she knew, it might be left to the dogs' home, and that Andrew had responded by saying he "*did not want to work on the farm for all this time for nothing. He said it was bad enough that he would have to share it with me*." Mr Jenkins asked Jan about this in cross-examination. She said she did not then know what their father's will provided ("*maybe they were going to give it to me at the end of it*") and did not know what was in Andrew's mind.

213. Allowing for the uncertainty over the year in which it took place, the conversation that stuck in Jan's mind may have broadly coincided with the approach that Andrew made to Mr Wildin in early 2010 with a view to securing some formality for the presumed succession by him or by him and his brother.

214. In relation to the entry into 2012 partnerships, which Andrew says was the first step in such arrangements, Jan said her understanding was that they were a means by which their father could support both sons making a living, though she expressed her own belief that "*Andrew agreed to the partnership in order to get his foot in the door [and] so he could then use leverage to get more of what he wanted*."

215. There is, now, clearly no love lost between Ross and Jan and their brother Andrew. Jan's witness statement even extended to referring to a time when, at around the age of 12, Andrew had filched £5 from their aunt Sally. Jan's grievance appears to have been as much about Sally's forgiving response, upon Jan acting as informer, as the youthful peccadillo itself: "*This is the sort of person he was even as a child, self-entitled and always given the benefit of the doubt by the family*". As Mr Jenkins reminded me in his closing submissions, when he asked Jan about the suggested relevance of the event to the present proceedings, she said she understood that it was the kind of thing that was required of her as a witness and that she could have said more positive things about the character of her elder brother (some of which, in fairness to her, she did then quickly run through).

216. In relation to such negative things as Ross and Jan had to say about matters material to Andrew's case, in my judgment their evidence did not really advance matters either way on the question of whether a promise or assurance was made to Andrew. Mr Jenkins described Ross and Jan as coming to court to "say their piece" and I think that is a fair way of putting it. I did not find their evidence persuasive in providing an indication that David had not made an assurance to Andrew. The conversation which Jan recalled, like Andrew's letter to Mr Wildin of 17 February 2010, can equally be interpreted as reflecting a situation where a clear enough assurance had been given to Andrew that he would inherit but, at a time when David was still actively farming, his father appeared reluctant to discuss the lifetime, tax-efficient arrangements that would be part of the transition between the generations.

217. As for their evidence about the 2012 partnerships being really nothing more than providing the sons with an income, in my judgment that failed to pay sufficient regard to the fact that the parents had decided to enter into them in their advanced years and at a time when David was coming to the end of an active farming life. It is common sense to observe that the parents would not have been setting up Andrew in the Ladysmith Farming Partnership if its tenure of Tump Farm was a tenuous one. The statements made by Andrew to Ross in the milking parlour conversation indicate to me that Ross also understood that the partnerships were part of the arrangements by which the sons would inherit Tump Farm.

Sally Giles

218. Sally Giles gave evidence in support of David and Josephine. She explained how David had never discussed succession planning with her and that her own knowledge of her brother and sister-in-law cannot be squared with the idea that David would have promised anything in relation to the farm. She said: "*David is the sort of man who would never promise anything. He was all too aware that things happen which cannot be foreseen and so he would never promise anything outside of his control*." In cross-examination, she said that she never had the impression that Andrew regarded himself as being "*in pole position*".

219. Although I accept Mrs Giles' evidence as truthful, in my judgment it does not detract from Andrew's case once it is recognised, as he himself has recognised since at least the late nineties, that he was not to be regarded as sole presumptive heir. There are limits to the reliance to be placed upon her own assessment as to what David would or

would not have said. This is especially so when (admittedly with her focus upon the scenario of Andrew as sole heir to the farm) she said could not believe that David would favour one child over another. Yet it is clear from the 1981 Will and David's own expressed hope that the sons would take over the farm that he had it mind to leave the larger part of his estate to his sons. And in 2012, when it was hoped the Scottish Widows investment might satisfy Jan's inheritance, David entered into the partnerships with his sons which reflected that hope.

(b) Correspondence

220. In the trial bundle there were a number of contemporaneous documents which have a bearing upon the principal area of dispute between the parties though, whether viewed individually or together, they cannot be regarded as decisive on the point of whether or not a relevant assurance or promise was made to Andrew.

221. I have mentioned the correspondence between Mr Allen and Mr Wildin in late 2000 after Mr Wildin had taken over as accountant to the AG Guest Partnership. In response to Mr Allen's letter of 1 December 2000, by a letter dated 8 December 2000 Mr Wildin contemplated that it might be more advantageous to have a partnership between the parents and the sons (with each member having a 25% share) which would include the land. Mr Wildin said: "*I assume it is the intention of Mr and Mrs Guest to transfer the land to their sons at a future date, and therefore it would make sense to commence the procedure now*."

222. Mr Allen responded by an email dated 12 December 2000 in terms which reflected what he had been told by David and Josephine:

> "*I'm not sure I follow the 3rd paragraph of your letter. If Mr Guest grants the Partnership an FBT as per my letter the land will still qualify for 100% Agricultural Relief for IHT purposes. The Guests are reluctant to give the boys any stake in the land at this stage. This is partly because it represents the bulk of their capital and partly because they are concerned as to what might happen if one of their sons were to have matrimonial problems at any stage.*"

223. I have already mentioned above the letter which Francis & Co. wrote on 26 March 2009 in connection with Andrew's reference to the Agricultural Wages Board. The letter was significant in another respect so far as Andrew's present claim is concerned.

224. That letter concluded with the following statements:

> "*In the light of the foregoing, we respectfully request that you consider these options and perhaps also consider the likely impact your current actions have had on the family and in particular your father who has been upset by the implication that he has not been providing for you having built up a working farm for you, your brother and your sister to inherit. It is not without some caution that our client states that any breakdown in relationship inevitably will affect any entitlement in the future to matters that may be inherited by the family once David Guest has effectively retired from work.*

> *Please let us know if this is something you might wish to consider and we look forward to your response in relation to the above*."

225. Andrew's response the next day questioning whether his father had noticed that, for half his working life, "I have been working alongside him and as hard as he has", and the amount of work put in by Ross and Jan. He continued: "*Furthermore, how can I have confidence in the future when at the first sign of disagreement he threatens to disinherit me*?".

226. In a letter evidencing the terms of the compromise of his reference over pay to the Agricultural Wages Team in the summer of 2009, Andrew wrote to Francis & Co. by a letter dated 8 June 2009 which contained the following statement about the value he had provided to his father's business:

> "*I have worked for him for 27 years, averaging 60 hours a week, always on call, never having taken my full holiday entitlement. I have not been paid the going rate during this time, after all "One day all this will be yours." I now find out this is not the case. In fact I will only get the same as my sister who has gone out and got a "proper" job, fully paid, normal hours and has been able to buy her own house as a result. My brother also who has only really worked in the business 5 years, and contrary to my father's claim, does not work as hard as we do. He prefers to start half an hour later, takes regular breaks and only works in the evening in exceptional circumstances. My father and I have always put the farm first, with Ross however the farm comes much further down the list. He spends a couple of hours a day with horses for instance and stops farm work to deal with the horses*."

227. I have also already mentioned above the letter which Andrew wrote to Mr Wildin on 17 February 2010 looking for assurance that succession planning was in place. Andrew referred to his concern that he had spent nearly 30 years building up a business which might be lost for want of adequate inheritance tax planning. The terms of that letter confirm that David was reluctant to discuss such matters openly. Andrew's concern that any succession arrangements might be undermined by "*disagreements within the family*" appears to have been written with the terms of Francis & Co.'s letter of 27 March 2009 well in mind.

228. After the Ladysmith Farming Partnership had been dissolved, on 6 May 2015, Andrew wrote an email to Tim Sowerby, the bank manager who had been present at the meeting at which the formation of the two new partnerships had been discussed. Andrew asked Mr Sowerby whether he had any record of what was agreed and, if not, what his recollection was, but appears not to have received a reply. In his email, Andrew said it was:

> "*my understanding that I would run the business on my own, since my father planned to play much less of a role as he wished to move toward retirement. Then, in the fulness of time, I would inherit half of Tump Farm plus the business (Ladysmith Farming) and all of its assets. It was also my understanding that I would be able to use up to half of Tump Farm (minus the farm house) as security against which to borrow for investment into Ladysmith Farming*."

Findings

Context

229. Having heard each of them give evidence and considered the background to this litigation (including what was said in the recorded conversations) I have formed the clear impression that Andrew and David fell out because they are both strong-willed characters who each had a clear idea of how the value of Tump Farm was best preserved. David's approach was a traditional one, which has served him in good stead over the years in the sense of avoiding the fate of many dairy businesses supplying cut-price milk, and one that was averse to committing the business to substantial borrowing. Andrew, on the other hand, took an approach which no doubt reflected what he had learned through his agricultural studies and his representative roles within the Northern Milk Partnership and Express Milk Partnership. Andrew's evidence conveyed to me the clear message that he felt it was necessary to make substantial capital commitments (which could only have been funded by borrowings) in order to secure the viability of the business. David's aversion to risk can be seen in the reason that Mr Allen gave to Mr Wildin, in late 2000, for David not wanting to implement succession arrangements at that stage: the risk of losing the farm in the event of either son divorcing.

230. Neither of them appears to have been very successful in convincing the other. There was a communication problem. At one point during the recorded conversation between Andrew and his mother on 25 September 2014, Andrew pointed out that Ross did not have the same training or farming experience as he had. Josephine responded by saying "*but he has your dad's experience behind him*" and "*they talk to each other*." In his testimony, David complained that Andrew would "*just go ahead and do things*" (and had encouraged Ross to do likewise by saying it would at worst result in a parental "*rollicking*").

231. Moreover, the central theme of the cross-examination of Andrew, on behalf of the parents, was one designed to show that Andrew has at all times had his own personal reward (out of the farming business) first and foremost in his mind, and that he has done alright by being supported in a job and home for over 30 years. The recorded conversations also feature a number of exchanges where it was suggested to Andrew that his pay and perks were significantly greater than any drawings or expenses received by the parents (a suggestion he vigorously disputed).

232. Therefore, I should infer that it was and remains David's position that Andrew's financial stewardship posed a threat to the business (the evidence is less clear as to whether or not Josephine endorsed it). In circumstances where it is apparent that David was not prepared to assume the role of sleeping partner, as Andrew had envisaged he would, and leave Andrew to decide upon the direction of the farming business, the Ladyship Farming Partnership was probably doomed even without the further tensions (see paragraph 75 above) which sprang from the overall aim that it and the Dayhouse Farming Partnership should achieve some kind of parity.

233. The lack of free communication between David and Andrew not only accounts in large part for the breakdown in their relations but is also very significant when it comes to my assessment of the evidence and whether or not there was a "clear enough" assurance by David that Andrew would inherit the farm or some interest in it.

234. In the conversation with his mother on 29 September 2014, Andrew stated (and his mother did not dissent) that Ross did not initially want to be in farming business and initially had wanted to buy a smallholding. It is a plain fact that between 1993 (and his leaving school) and 1999 (and his leaving the employment of Frank Sutton) Ross's interest appeared to be in agricultural engineering rather than dairy farming. In his evidence, David presented the picture of Ross having to get a job because "*there was no room for him on the family farm*" but more than once he said he expected both sons ultimately to work on the farm.

235. I now turn to the three essential elements of the proprietary estoppel claim.

Representation/Assurance

236. In his opening submissions Mr Jenkins said the representations in this case were both express and implied and the latter could be discerned both from action and inaction on the part of the parents. I have already noted that they deny making any such representation or assurance, whether express or implied.

237. Before turning again to the matters relied upon by Andrew, I should also note that one matter that has been at the forefront of my mind, when considering the evidence, is what might be described as Andrew's shifting expectation in terms of the extent of his anticipated inheritance. It is an obvious point to make that uncertainty on his part, over time, as to what he expected to inherit *might* be an indication that no assurance of sufficient clarity was ever made by David (as the owner of the land) in the first place.

238. I have referred in the Introduction above to Andrew's pleaded claim to an entitlement to the entire beneficial interest of Tump Farm and the farming business when, by 2012 and the establishment of the Ladysmith Farming Partnership and Dayhouse Farming Partnership, he was clearly aware that his father also intended to provide for Ross. Indeed, Andrew's witness statement mentioned how Ross's announcement in early 1997 that he wanted to work on the family farm had pleased their father who "*said that Ross and I would have to learn to work together as he intended to leave the farm to run to us jointly to run after his death. This was the first time that I realised that I would not inherit the whole farm but share it with my brother*."

239. What impact might this have on Andrew's case that an earlier, apparently more exclusive and generous assurance was given to him by David?

240. If the giving of an initial assurance can be established by a claimant and shown to have subsisted for a period of time sufficient to support a case of substantial detriment incurred by reference to it, then in my judgment it should be no answer to his claim to say that, at some point prior to proceedings, he realised his expectation was being scaled down by his parents. After all, most proprietary estoppel claims involve the claimant later discovering that his expectation has been subsequently obliterated. In paragraphs 142 and 143 above I have explained why uncertainty over the specific interest to be acquired, in the identified property, should not be fatal to a proprietary estoppel claim. And looking at the claim more generally (or "in the round") the evidential problem is likely to be greater for a claimant whose expectation is said to have grown rather than diminished over time; not least because of the risk that the "expectation interest" (as it

has come to be) may be shown to be disproportionate to the "reliance interest" (geared as it was initially to the more modest expectation): see paragraphs 154 and 155 above.

241. In my judgment, it does not follow from the parents' denials and the lessening of Andrew's own expectation over time that Andrew has failed to establish the first limb of a successful proprietary estoppel claim. On the contrary, I am satisfied on the evidence that, until the falling out in 2014, David consistently over time led Andrew to believe that he would succeed to the farming business, even though by the late nineties Andrew had been made aware that this would be alongside Ross. I find that the "hope" entertained by David that the farm and its business would pass to his sons (which found reflection in the terms of his 1981 Will) was communicated to Andrew.

242. I have identified the basis of Andrew's case about his father's assurances in paragraphs 171 to 175 above. I accept Andrew's evidence. And in my judgment, David's statements were clear enough to amount to an assurance that Andrew would inherit a sufficient stake in Tump Farm as to enable him to carry on farming after his parents' deaths. Mr Jenkins referred, by reference to the facts of *Thorner v Major*, to "the private language" of the family and I accept that, taken together, the matters upon which Andrew relies support the conclusion that his expectation was built upon parental assurance rather than a misplaced assumption on his part.

243. In explaining the basis of that conclusion, I begin by saying that, on my assessment of the evidence overall, when David made statements (such as those Andrew says were made on the two occasions in the nineties) to the effect that, one day, Andrew would take over the farm, there was no question but that David was referring to all that he, David, then had. In other words, David was not confining himself to the farming business excluding the land itself. Even if the sons' ownership of the farm and land had to await the parents' deaths, and not just David's retirement from farming, there was no question in anyone's minds that Andrew would only be farming under a FBT of the type taken over Dayhouse Farm, with ownership of the freehold lying elsewhere.

244. If they stood alone, the assurances upon which Andrew relies in the context of the 2012 succession arrangements would probably have come too late in the day to support an equity of any real value; and the sliding scale contemplated by the decision in *Davies* would probably point to Andrew being confined to a compensatory award for any resulting detriment suffered by him. However, in my judgment they do not stand alone but are instead to be taken as confirming what had been always been assumed, and sufficiently communicated, within the family.

245. David's intentions in relation to the sons' future on the farm can be seen from the terms of his 1981 Will. That Will provided for both Andrew and Ross to inherit the farm, and for the pecuniary legacy in favour of Jan to the value of one-fifth of the residuary estate. Therefore, at first sight, any assurance by David to Andrew (prior to 1997) that Andrew alone would succeed to the farm would have been disingenuous on his part. However, in my judgment the terms of that Will are consistent with what Andrew was led to believe. When taken in cross-examination to the terms of the Will as contrasted with the statements mentioned in paragraph 171 above, Andrew said: "*I think there is a difference between ownership and control here. I thought as the elder son I would be in control of it [the farm] but I've never expected my brother and sister to be left with nothing*" and "*I expected to take over the farm and run the business*".

246. In my judgment the evidence also shows that, as a partner in the business, Josephine was content to support her husband's plans for family succession. The heartfelt letter she wrote to Andrew after the dissolution of the Ladysmith partnership – referring to him having had it "*all in [his] lap and [seeming] to want to throw it all away*" – is a telling document so far as her own position is concerned.

247. David was taken in evidence to the correspondence between Mr Allen and Mr Wildin in December 2000 which touched on the question of succession in circumstances where he had been unwell. David said that, at that time, he had no intention of "*turning over the land*" (as opposed to the farming business) to his sons before his death, though he said it was most likely the boys would inherit the farm with separate provision being made for Jan. I have no reason to doubt David's evidence on this point, which reflects how his then Will read and (so far as carrying on the farming business during his lifetime was concerned) is supported by what came to be the arrangements of 2012. But it is not inconsistent with Andrew's expectation of a shared inheritance, with him carrying on the farming business after his father's death and not just between his retirement and death.

248. An important piece of documentary evidence in support of Andrew's case that his father had made assurances about him taking over the farm is provided by the correspondence passing between Francis & Co and Andrew in the context of his reference of the wages issue to the AWB in 2009.

249. I have already set out the relevant passage in the Francis & Co letter of 26 March 2009 and Andrew's letter of 27 March 2009 in paragraphs 224 and 225 above.

250. Viewed in the context of his work between 1982 and 2015, the Francis & Co letter was written towards the end of Andrew's time at Tump Farm and it is evidentially significant in my assessment of Andrew's case that earlier representations and assurances had been made by David to the effect that he would inherit something. It is clear that Francis & Co. (on behalf of the parents) and Andrew were both writing in 2009 in the context of a shared assumption that, with his siblings, Andrew would succeed to the farm. The veiled threat within the Francis & Co. letter would have been no such thing if it had not warned Andrew that he risked forfeiting an expectation which, by then, he had been encouraged to believe existed. David's witness statement said the letter had been misinterpreted and that it was simply referring to the fact that "*in the normal way of things*" parents leave their estates to their children and that "*this standard inheritance provision was not a given*". Allowing for the fact that David's own, successive Wills show there is no such standard, my understanding of this explanation does nevertheless involve him recognising that Andrew benefited from a presumption of some inheritance, of some significance, from his own parents.

251. In his testimony about the Francis & Co letter, David gave some further answers which sought to distance himself from what the solicitors had written. The letter had also referred to David's intention to have paid Andrew a bonus of between £1500 and £2000 (a figure recommended by the accountants by reference to the farm's profit figures for 2007-8) at the end of the previous year, saying to Andrew that "*you may not have been aware of this, but of course our client was attempting to be reasonable in offering some of the profits that were received in the farm, and hoped that this would be a nice surprise for you and your family*." In cross-examination, David said that he had not intended to pay any such bonus. As for the solicitors' warning on behalf of David that Andrew

should reflect upon the potential impact of his actions upon the children's inheritance, David said "*I never told him that he was going to get anything or not going to get anything*" and that, although he hoped and the family understood that Andrew and Ross would take over the farming business, "*things change*". In cross-examination, he said that he did not regard the letter as containing a threat of disinheritance and that he had not instructed such a threat to be made.

252. I found these answers by David to be unsatisfactory, in circumstances where it is plain from the terms of the whole letter dated 26 March, and as a matter of common sense and professional etiquette, that the solicitors were writing in connection with the wages issue on his considered instructions. I infer that the only reason for David wishing to put some distance between himself and the last two paragraphs of the letter is because he is not comfortable with the premise upon which they were written. I recognise that one sentence in the relevant part of the letter (quoted in paragraph 224 above) can be read as relating only to taking over the business, once David had "*effectively retired*", but overall the passage supports the idea that Andrew had been led to believe that he would benefit from an inheritance. And the property in question was Tump Farm, in relation to whose overheads Andrew was being urged to show restraint over wages.

253. I have explained in paragraph 141 above that the concept of acquiescence or standing-by does not apply so obviously in an expectation case; and I note that Andrew's expectation was not confounded (whether or not he knew it then) until David changed his will in May 2014. Nevertheless, the way that Francis & Co. expressed themselves carries with it the flavour of David acquiescing in Andrew's presumed inheritance. When coupled with the fact that, despite his success in securing a wage increase, there was no reason for Andrew to think that the implied threat had been acted upon - he later entered into partnership with his parents as part of the succession planning – the terms of the solicitors' letter are also significant in supporting the conclusion that David encouraged Andrew's expectation of an inheritance in his final years on the farm, until they really fell out. In one of his answers in connection with the Francis & Co. letter, David acknowledged that he knew Andrew was expecting to inherit with Ross.

254. It is important to note Andrew wrote his letter of 27 March 2009 and the later one of 8 June 2009 some five years before Andrew became aware of the potential for his present claim when he read the press article about *Davies v Davies* (round one). Indeed, the June letter shows (as does his later one to Mr Wildin of 17 February 2010) that he had in mind consensual arrangements for succession to the farm of the kind he understood were then intended.

255. That June 2009 letter contained Andrew's statement, attributed to David, that "*one day all this will be yours*". In cross-examination, Andrew said that his father had said that, which was why he had put it in quotes, and that it was a "*big comment*" made on a number of occasions in the context of them disagreeing upon a particular farming decision. I accept Andrew's evidence that his father did make such comments from time to time but, that being the context and recognising Andrew's own distinction between the two concepts, it was directed to the notion of control (the idea of Andrew taking over the farming business before Ross expressed an interest in doing so) rather than sole ownership (the idea that, contrary to what was in his 1981 Will, David would leave Tump Farm to Andrew to the exclusion of his siblings).

256. I have already noted that David's evidence about the report on the proposed solar farm in the Chepstow Beacon was unsatisfactory. At that time, December 2014, the Ladysmith partnership had been dissolved but he had not fallen out further with Andrew over the proposed letting of Tump Farm on a FBT. David denied having spoken to the press and he had no recollection of making the statement attributed to him; his position being that only a representative of the company promoting the solar farm had visited him before its construction. Yet, with the photo of him standing on the site published in the newspaper, it is difficult to believe, and I do not accept, that the statement about the keeping the farm in the family "*after my sons retire*" did not emanate from him.

257. David was also taken to the letter of wishes that accompanied his 2018 Will which referred to Andrew's "*sense of entitlement that he should have everything I own*", followed by the statement that "*I have never given him any reason for holding this view and he has had opportunities from business ventures to purchase his own house and to save.*" David explained that "*sense of entitlement*" was not his own phrasing and he recognised that the letter, written with Andrew's claim in mind, was signifying Andrew's "*disinheritance*" because he of his annoyance of what was going on.

258. In the context of his answers in relation to that document, David said something which was quite revealing both in relation to the indirect way in which the family had previously addressed such matters and to Andrew's earlier expectation. He said he had "*heard a rumour that Andrew intended to retire at 55*" and that, if that was so, "*then Ross would have to have bought out Andrew's interest*". I should note that David confirmed that he had not raised the question of such early retirement with Andrew or his family, and that his evidence on this point fell short of what he had said in his witness statement, which is that "*Andrew had made no secret to me of his desire to retire at 55*" (that being given as a reason why it would have made no sense to put in place any succession arrangements).

259. Andrew's case that his father stated in 2012 that he and Ross would inherit Tump Farm and that, as partners in the respective business, they would inherit the other assets of the farming businesses is entirely consistent with the idea (identified by reference to the Promar budgets) that there should be balancing payments between the two farms. At one point in his evidence, Andrew described the premise as being one where his parents were "*trying to equalise things*". His case also gains support from the parents' thought that, as at 2012, their financial investments might go a considerable way towards meeting Jan's one-fifth share.

260. In all the circumstances, on my assessment of the evidence, Andrew has proved that a clear enough assurance was made by his father, during conversations over a number of years and with the tacit support of his mother later made clear by her entry into the Ladysmith Farming Partnership, that he would inherit a substantial share of Tump Farm. Mr Adams' submission in his skeleton argument was that his clients "*did not know of Andrew's belief, if he had one*." The evidence shows otherwise.

261. However, Andrew's own evidence supports the conclusion that statements made to him by his father to the effect that "*one day this will all be yours*" were neither meant as or understood by Andrew to be an assurance that the ownership of Tump Farm would pass to him, exclusively, without any provision being made out of it for Ross or Jan. Although the assurances were specific enough in identifying the farm, and until the late 1990's Andrew alone was assumed within the family to be the successor to the business,

the extent of Andrew's promised inheritance was left open. Nevertheless, it was to be a significant share in the farm, as is evident from the family's expectation (after 1997) that Andrew and Ross would farm side-by-side.

262. Accordingly, although I accept that David did not tell Andrew about the detail of his 1981 Will, I reject David's position that he never had cause to correct Andrew's (suggested) misunderstanding because he had no reason to believe that Andrew held it. In my judgment, David clearly encouraged Andrew to believe he would benefit substantially from Tump Farm. On the basis of what I have said in paragraph 143 above, that is sufficient for a potential estoppel to be raised.

Reliance and Detriment

263. Andrew's case is that he reasonably relied upon that encouragement when (as illustrated by Tracey's evidence) he would otherwise have done something else.

264. The detriment is said to be reflected in him dedicating his life from the age of 16 to Tump Farm and its farming business in return for a very low wage throughout. That did not change with him securing from the AWB, by reference to his qualifications, a higher wage than the AWB base rate. He said that the rent-free occupation of Granary Cottage was just one aspect of the arrangements that enabled him to do so and to be on hand to look after the livestock. In his closing submissions, Mr Jenkins noted that the Agricultural Wages Order 2008 makes an allowance of only £1.50 per week for such occupation by an employee. He also pointed out that Andrew and Tracey had taken out a loan to pay for certain improvements and repairs at the property, and that his low paid work for the DG Guest Partnership enabled that business to service the mortgage on Granary Cottage.

265. Andrew recognised that the family income had been supplemented in later years by the business of CQTC/COAC but he and Tracey received no more from that business than helped to meet some living expenses. That business did not generate substantial sums and, although it was later unable to meet the rising insurance costs, it would not have been viable from the outset had it been required to pay a rent for its use of Tump Farm. It is significant that Andrew did not take significant drawings from the initial partnership business with Ross until its final two years (in the year ended 5 April 2004 they took equal drawings of £5,500 and then, in the following year when Ross was largely absent in Australia, Andrew is shown as taking drawings of £9,684 compared with just £53 for Ross). Andrew therefore provided substantial support for a business venture which David had promoted as an essential part of his plans for his sons' succession to Tump Farm.

266. Allowing for a degree of uncertainty over the period of time when the partnership paid the Council Tax on Granary Cottage, Andrew's case on detriment is neatly summarised by what he said in the recorded conversation with his parents on 8 April 2014;

> "*What I'm saying is that I gave you the best 30 years of my life ……. If I'd gone to work for somebody else I'd have £30,000 a year, plus a house to live in, council tax paid, plus a car. ……. If you had somebody else doing what I did for you, it*

would have cost you a darn sight more than you pay me and you have to realise that ….”

267. In my judgment, the statement made by David during the course of that conversation, to the effect that Andrew had failed to save money so that he might have properties to his own name like his brother and sister, was a completely unrealistic one. It failed to recognise that the only real capital available to Andrew was his own “human capital” which he devoted to Tump Farm.

268. I am satisfied on the evidence that Andrew reasonably relied upon David’s assurance to his significant financial detriment. In my judgment, that is obvious from the fact that he worked hard on the farm for many years for little financial reward, even taking account of the provision of his home at Granary Cottage and the payment of certain living expenses. He would not have done so had David not encouraged the idea of an inheritance.

269. It is obvious that Andrew would not have committed to the farm as he did if he could have foreseen what was to come to pass, in the shape of David’s 2014 and 2018 Wills, and been aware from the outset that his commitment would carry no benefit to him beyond a very modest wage. David’s own letter dated 7 November 2008 recognised as much when, in the context of the wages issues, it expressed sadness that Andrew wished to be “*regarded as an ordinary employee rather than a valued member of the family*”. By the time that letter was written, and allowing for the fact that the legal position was only clarified some four years later with the establishment of the Ladysmith Farming Partnership, Andrew could fairly be described as “the farmer” at Tump Farm. Although he lacked an ownership or partnership interest, his day-to-day farming responsibilities were certainly then as great as his father’s. And, although his reference to AWB in 2009 had ruffled some feathers, in 2012 his parents were prepared to recognise Andrew’s principal role at Tump Farm.

270. As my ruling at the PTR on the parents’ disclosure application indicates, there are limits to any exploration of the counterfactual position premised upon Andrew having no cause to believe that Tump Farm would provide him with anything more than a home, some living expenses and a modest wage for only so long as he remained willing to farm it. Andrew is unable to retrieve “the best 30 years of his life” and the court can only speculate what he might have done instead of working on Tump Farm. However, I am quite satisfied, having heard Andrew in the witness box and reflected upon the agricultural courses he attended during his farming career, as well as the area representative roles with the Northern Milk Partnership (and successor entity) that came to him through his wider interest the dairy business, that he is a hard-working, accomplished and forward-thinking farmer. It was in fact his desire for change, once he had been admitted to the partnership, that led to him and his more cautious and conservative father to fall out.

271. The fact that Andrew offered the Tump Farm business considerably more than the labour of a farm hand strongly supports the inference that, if he had been forewarned that the more innovative and entrepreneurial aspects of his services on the farm would benefit only others and not himself, he would and could have sought better reward elsewhere. Andrew’s current terms of formal employment as a herdsman (in his fifties and starting afresh, away from Tump Farm) provide no real indication of his true worth in his 20’s, 30’s and 40’s.

272. At some points during the trial I detected, from the parents' side, hints that Andrew's competence as a farmer (or herdsman) was to be questioned. There were veiled references to the circumstances of his departure from Hartpury College and he was asked about the short-lived nature of an agency contract which had seen him since spend only 12 days as herd manager on a farm in Sussex. Of the latter, Andrew said in evidence that the circumstances of termination were governed by a confidentiality agreement. That answer, and perhaps my earlier dismissal of the parents' disclosure application at the PTR, meant that this line of inquiry was not pursued. In any event, and as I observed at the PTR, I find it difficult to see how its pursuit could have assisted in the determination of the present claim. For all the other arguments they may come to have had with him, the parents do not appear to have found fault with Andrew's performance as a farmer in the period 1982 to 2015.

273. Detriment is to be looked at in the round rather than with mathematical precision. In my judgment, its presence in this case is plain from the fact that Andrew invested what for many is a lifetime's worth of work for a very modest reward which involved him sacrificing the likely prospect of bettering himself elsewhere. Andrew gave the correct answer when his father suggested on 8 April 2014 that he had not saved anything or acquired property as his siblings had. He said: "*I haven't had a chance to*."

274. That conversation ended with Andrew reverting to the point that he had given his father the best 30 years of his life and "*if I hadn't worked for you I would have worked for someone else*". David then retorted: "*Why didn't you go? Ross went out and got work*." Andrew did not then answer the question but the answer, in the light of the assurances I have found to have been made by the parents, is obvious. Unlike Ross, whose interest in the farm only revived after some years in his job away from it, Andrew always thought his future lay in the farm. He stuck with it for over three decades even though the relationship with his "employer" was not the easiest when it came to discussing such matters as wages or decisions over equipment.

Unconscionability

275. The parents have resiled from their assurance that, with Ross, Andrew would take over the farm and do so on the basis that he would come to inherit a substantial share of it. The question arises as to whether it was unconscionable, or inequitable, for them to have done so in the circumstances prevailing by May 2014 when the parents made their new wills which (allowing for his right to reside in Granary Cottage, on terms) Andrew was cut out of his inheritance.

276. Although instinct suggests there is something quite wrong in the notion of Andrew having unwittingly spent almost all of his working life to date in doing his bit to preserve an increasingly valuable asset for his siblings to inherit, the conclusion that it would be unconscionable for the parents to be kept to their assurance does not follow automatically from my finding that he relied upon it to his significant detriment. That is because the parents rely upon the circumstances in which the Dayhouse Farming Partnership came to be dissolved. A significant part of the cross-examination of Andrew was devoted to showing that he was at fault in his dealings with David, and Ross in relation to the transfer of calves that had been agreed upon in the light of the Promar budgets, and to his reaction when a FBT was proposed to him after its

dissolution. The point that Andrew had since been able to find employment off the farm was also relied upon by David and Josephine on this aspect of the claim.

277. I do a disservice to Mr Adam's submission that, in all the circumstances, it would not be unconscionable to see Andrew kept out of his inheritance when I describe it as kind of "he had his chance and he blew it" point. However, reflecting upon the suggested significance of the partnership disputes after 2012, it seems to me that it essentially amounts to that. That was the general tenor of Josephine's letter to Andrew in 2015.

278. In my judgment, the matters which led the Ladysmith Farming Partnership to founder (see paragraph 75 above) have no adverse impact upon Andrew's claim. It must be remembered that the parties' entry into that partnership came very late in the timetable of events upon which Andrew relies. Indeed, their entry into the partnership, as a step in the succession arrangements, reflected his efforts and position achieved at Tump Farm prior to that date. Although Andrew expressed some regret in the witness box about his approach to the transfer of calves to Ross, the subsequent falling out with his father really stemmed from him wishing to exert more influence over the farming business, as presumptive heir to the farm, and his sense of injustice that Tump Farm was being asked to subsidise Dayhouse Farm beyond the call of "equality". On the latter point, and having considered the recorded argument between him and Ross in the milking parlour, I feel unable to say that Andrew's position was "wrong" or that it can be said in any way to lessen the force of his equitable claim.

279. In my judgment, the part played by Andrew in the clash with his father (of personality and over business direction) which came to the fore in the couple of years that the partnership operated, does not diminish the injustice that results from David since reacting in the way he has done.

280. As for the various forms of employment which Andrew has found it necessary to obtain, as a consequence of being unable to agree terms for an FBT, these in my judgment are also immaterial to his claim. I recognise that the first proposition in *Davies* requires the court to look backwards from the moment the promise or assurance fell to be acted upon. In this case of an inheritance promised by a living defendant, that moment has not yet arrived but the exercise is to be undertaken now. In circumstances where Andrew felt the proposed rent for Tump Farm was unaffordable (and where David gave evidence that he expected Andrew to come back with an acceptable counter-offer) I do not consider either the failure to agree terms for a tenancy or Andrew's alternative remuneration to be of any (negative) significance to his claim. Neither the previously contemplated grant of a FBT (equivalent to that enjoyed by Ross over a farm which is outside the ownership and disposal of the parents) nor Andrew's receipt of a modest wage from alternative employment addresses his proprietary expectation.

281. In the light of my other findings, Andrew has therefore established an equity in his favour.

Remedy

282. My findings above mean that it is necessary to exercise the "broad judgmental discretion" in an endeavour to do what is necessary to avoid an unconscionable result

or, alternatively, to identify the minimum equity to do justice. It is perhaps unsurprising that I have found this to be the most difficult aspect of the case to decide when the outcome rests upon that discretion and not just findings of primary fact. As I have addressed in paragraphs 159 and 160 above, other matters, beyond those that were contested in these proceedings and decided by me, may bear upon the exercise of the discretion.

283. In this case, I do not regard Andrew's equity as being built upon an assurance of a quasi-contractual character. The promised extent of Andrew's inheritance of Tump Farm was too uncertain for that and his own recognition of his siblings' expectations upon the parents' estate confirms as much. Although it follows from my findings that Andrew would have been prepared to continue his life on the farm had he known of the terms of his parents' 1981 Wills, the fact is that he did not know of them and he cannot be said to have struck any kind of bargain with his parents along those terms. In my judgment, that is the first point to bear in mind when considering Mr Jenkins' ultimate submission on the extent of his client's equity (see paragraph 17 above).

284. The next point which arises when considering that submission is that the relevant assurance was as to an inheritance, after the second death of his parents, and David and Josephine may expect to live for many more years yet, in their home at Tump Farmhouse. Even though Andrew expected to take on the farming business at Tump Farm after his father's retirement (and thought he effectively had in 2012) he did not expect to acquire any interest in the land and buildings before his father's death. And, although he did not know of the terms of the 1981 Will to that effect, there is no indication that Andrew believed anything other than that Tump Farmhouse would remain his parents' home for so long as they, or the survivor of them, wished.

285. I must determine the extent of Andrew's equity now, during the parents' lifetime, but the fact that the exercise involves an acceleration of his "entitlement" does not mean that this inchoate aspect of his expectation is immaterial. The point is further illustrated by David's lifetime grant of a 25 year lease to the operator of the solar panel farm in November 2016. That disposal has operated to reduce the extent of the farm (a fact of which Andrew was keenly aware when matters came to a head within the Ladysmith Farming Partnership) even though I understand the rental to be treated as income of the farming partnership. That said, I believe the evidence firmly supports the conclusion that it was and remains the parents' wish to retain the freehold of the land (including leased parts on which the solar farm and telecoms masts stand) within their ownership. I therefore proceed on the basis that Andrew's equity is to be measured against the current extent of Tump Farm, including the leased parts.

286. The sad fact that Andrew and the other members of his family have fallen out badly means, in my judgment, that it is appropriate to identify relief which will achieve a clean break between them. The family is not functioning as it ought, so far as Andrew's place within it is concerned, and the secret recording of his conversations reveals the level of mistrust. It is not realistic to think that Andrew might continue farming at Tump Farm alongside his father or brother, taking up again with Tracey the home at Granary Cottage.

287. The regrettable consequence of that conclusion, on my understanding of the parents' finances, is that it seems almost inevitable that the mitigation of tax (which seems to have been in David's mind since around 2000) will not be achieved. It will probably

be necessary for the parents to sell Tump Farm, or a substantial part of it, to satisfy a financial award to Andrew and capital taxes are likely to be incurred. Although I have found that Andrew was not to blame for the failure of the succession arrangements in a way that wholly undermines his equity, in all the circumstances of this case I see no reason why he should not bear his share of any taxes (actual or notional) that are to be treated as the price of satisfying it.

288. In my judgment, the appropriate remedy to satisfy Andrew's equity is a lump sum payment to him which reflects the following components:

i) 50% after tax (see paragraph (iii) below) of the market value of the dairy farming business identified in the Supplementary Report of Ms Dooley dated 25 October 2018 or 50% (after tax) of any actual value realised by, or apportioned to, the sale of that business in consequence of this judgment;

ii) 40% after tax (see paragraph (iii) below) of the market value of the freehold land and buildings at Tump Farm identified in the Reports of Mr McLaughlin dated 8 August and 8 October 2018 or 40% (after tax) of any actual value realised by the sale of that property in consequence of this judgment. If the percentage share is determined by reference to the valuation then the tenure is as stated at paragraph 22 of the first Report save that Tump Farmhouse shall be treated as being subject to a "life interest" in favour of the parents and the survivor of them (on terms that they are responsible for its upkeep for so long as they live there) and Granary Cottage is to be valued on the basis of MR1 and not MV1 or MV2. In the event of the percentage being determined by reference to actual proceeds of sale, the parents shall first be credited with the notional value of the life interest. In the absence of agreement between the parties, that life interest shall be the subject of further independent valuation; and

iii) the percentage share payable to Andrew shall be net of any taxes that either are payable by the parents in respect of their realisation of sale proceeds or would properly have been payable on a sale of the dairy business (per (i) above) and/or Tump Farm (per (ii) above).

289. I do not make any Order on the parents' counterclaim for an occupation rent of Granary Cottage (or what, in the light of the above, might be said to be their share of it) for any part of the period claimed by them. I have had regard to the counterclaim when identifying the appropriate remedy on Andrew's claim and, in particular, the fact that he has not enjoyed his "share" of the property since moving out of the property (including the period since the date of the valuation by reference to which the value of that share is to be fixed).

290. I propose to hand down this judgment in the absence of the parties so that they may first consider its implications before any hearing is held to settle the terms of an Order upon which they cannot agree.

291. As there is likely to be some delay before any further hearing, the procedure identified in *McDonald v Rose* [2019] EWCA Civ 4, [21], shall apply in relation to any proposed appeal. Accordingly, in the event of either party indicating by solicitor's letter prior to the handing down of this judgment that he or they wish to appeal any finding in it, I shall direct that an application shall be made to me in writing within 21 days of handing

down. Any submissions in response shall be filed within 14 days thereafter. If made, the application(s) for permission will be determined by me on the papers and the hand-down shall be adjourned for that limited purpose. The time for filing an Appellant's Notice with the Court of Appeal under CPR 52.12(2)(a) shall be 21 days from my determination of the application for permission.