Neutral Citation Number: [2021] EWHC 3180 (Ch)

Case No: H90CF017

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

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff CF10 1E7

Date: 30/11/2021

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court
Between :

(1) THE RIGHT HONOURABLE IVOR EDWARD OTHER WINDSOR-CLIVE EARL OF PLYMOUTH **(2) LADY EMMA WINDSOR-CLIVE** **(3) THE HONOURABLE DAVID JUSTIN WINDSOR-CLIVE** **(as Trustees of St Fagans No 1 and No 2 Trusts)**	**Claimants/Pt 20 Defendants**
- and -	
(1) JENKIN THOMAS REES (Deceased) (by his representative GERALD PHILLIP REES) **(2) GERALD PHILLIP REES**	**Defendants/Pt 20 Claimants**

Ms Penelope Reed QC and Dr Christopher McNall (instructed by **Burges Salmon LLP**) for the **claimants**
Ms Rebecca Cattermole (instructed by **Ebery Williams**) for the **defendants**

Hearing dates: 18 and 19 November 2021

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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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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC:

1. This possession claim is the latest round of litigation between the claimants as the landlords of Maesllech Farm (the farm) Radyr, Cardiff and the second defendant's late father, Jenkin Rees, as tenant of the farm under tenancies dated 1965 and 1968. The second defendant, Phillip Rees, left school in 1977 and farmed the farm with his father, who passed away in September 2021. Thereafter, Phillip Rees was substituted as a defendant as his father's personal representative, as well as being a defendant in his own right.

2. The tenancies were protected under the Agricultural Holdings Act 1986 (the 1986 Act). On 9 August 2016 and 20 March 2017 the claimants obtained planning permission for a substantial housing development on the farm and other land. The permitted development, known as Plasdŵr, is to be carried out in a number of phases over twenty years and also includes schools, supermarkets and a new ring road. The development has now commenced.

3. On the basis of the permissions, the claimants served notices to quit in respect of each tenancy, including the farmhouse, in which Phillip Rees now lives with his mother. The notices were served in January 2018 under Case B of Schedule 3 Part 1 of the 1986 Act on the basis that the land was required for development under the planning permissions granted in 2016 and 2017.

4. The notices to quit were challenged by Jenkin Rees and an arbitrator was appointed under the 1986 Act to determine their validity. One of the issues was whether all of the land specified in the notices was required for the purposes of the development, given its phased progress over many years. In an award dated January 2020 the arbitrator determined that three of the notices were valid, accepting the evidence of the claimants' agents that having regard to such matters as the diversion of electricity and gas mains and the construction and alteration of roads for the development, all of the land was required at the date of the expiry of the notices or shortly thereafter. Jenkin Rees appealed that award, which appeal was heard and dismissed by me in October 2020. A request to extend time until the notices to quit took effect was granted by the arbitrator until 20 August 2020.

5. Thereafter the present claim for possession of the farm was issued by the claimants on 5 October 2020. A defence and Part 20 claim dated 25 January 2021 was served on behalf of Jenkin Rees in the present possession claim. The gist of the defence and Part 20 claim was that he had been promised by one of the directors, Richard Knight, of the claimants' agent Cooke & Arkwright, that no part of the farm would be taken back by the claimants until required to be built on, that he and his wife would not have to give up possession of the farmhouse, that the claimants accepted that Phillip Rees would succeed to the tenancy of the farm and enjoy security under the 1986 Act, and that they would be offered further land on the estate, if available, to continue their farming business or compensated for the costs of relocating their farming business.

6. It was further pleaded that in reliance on those promises Jenkin and Phillip Rees acted to their detriment, including by taking on extra responsibilities, by not objecting to the claimants' applications which led to the planning permissions, by giving up some land to the claimants for development, and by Phillip Rees committing to remain at the farm in his 40s and 50s rather than seeking to secure his livelihood elsewhere.

7. The Part 20 claim therefore sought a declaration that the claimants' ability to recover possession of the farm is "subject to an equity" in favour Jenkin and Phillip Rees or "such satisfaction of the equity" as the court thinks fit. At the hearing of the proceedings the claimants were represented by Ms Reed QC and Dr McNall, and Phillip Rees was represented by Ms Cattermole.

8. The only witness who gave oral evidence before me was Phillip Rees. He confirmed that he heard Mr Knight making the promises relied upon in conversations with his father over many years from the 1990s whilst the prospect of the development of the farm was under discussion. The claimants' pleaded case was that as no mention of such promises was made in prior proceedings, including the arbitration proceedings, the defence in the current claim was just a rear guard action to stave off possession. Ms Reed QC asked Phillip Rees in cross-examination why this was. His response was that he and his father were fighting a rearguard action and dealing with whatever was coming to them. He added that they thought that any promises had "gone" when Mr Knight retired sometime in the early 2000s and that they didn't understand the legal implications.

9. Phillip Rees gave his oral evidence in my judgment in an entirely straightforward and at times vivid way, and readily made concessions in cross-examination, which Ms Reed QC relied upon in her closing submissions. In those circumstances she made it clear in closing submissions that she was not seeking to persuade me not to accept any part of his evidence. In my judgment that was a realistic and proper stance to take. It follows that by closing submissions it had become clear that there was no substantial dispute of fact between the parties. The focus of the submissions was upon whether the evidence of promises, taken at its highest, was sufficient to amount to the sort of promises which can found a case of proprietary estoppel.

10. Accordingly the evidence of such promises must be looked at with some care. This includes not only the evidence of Phillip Rees, but that of his father in a short witness statement taken shortly before he died, which was admitted under the Civil Evidence Act 1995. It also includes attendance notes taken from Mr Knight by the defendants' solicitor, Mr Williams, in April 2021 when Mr Knight was 76 years old. These were amended slightly and signed by Mr Knight. However, no witness statement was taken from him because his son suggested that he had issues which would make giving evidence inappropriate. No medical evidence was put before me. The claimants' solicitor, Mr Kennedy, also sought to take a witness statement from Mr Knight but did not seek to call him on the basis that his evidence may not be reliable. It is a matter for the parties whether they call a witness. In all the circumstances, in my judgment it is appropriate to place only little weight on the attendance notes taken by Mr Williams. Given the ultimate acceptance of the evidence of Phillip Rees, such notes take the evidence little further, if at all.

11. The gist of the promises as recalled by Phillip Rees is that the claimants would not seek possession of the farm without fair compensation, enough for him and his father to move on and carry on farming elsewhere. The amount of compensation due under the 1986 Act is only £45,000. He said that as the development of the farm had been discussed over many years, they always thought there might come a time when they would have to leave, but that they would carry on until the development made this impossible. He said that at an early stage Mr Knight mentioned that the claimants may make available a greenfield site on the estate. This excited him as a relatively young

man because the farm was situated near the urban fringe which brought its own challenges such as trespass.

12. He accepted that if no other farm was available then they could not relocate on the claimants' estate, and he also accepted that they did not expect the claimants to buy them a farm. Any such arrangements would be as tenants. If they could not relocate on the claimant's estate, then it would be a matter of fair compensation, and that "everything" would be a matter of negotiation. He said that they may be able to buy somewhere if the negotiations went well, or at least to purchase some land. When asked what would happen if the negotiations didn't go well, he replied that he did not know because they didn't get to that situation. He also accepted that no boundaries to the negotiations were discussed. He maintained that Mr Knight assured them that they would be taken care of, although he did add that many years ago Mr Knight indicated to them that in the negotiation they would be made one offer and one offer only.

13. As to his succession to any tenancy, he said that he and his father were expecting, and Mr Knight acknowledged, that he would be the natural successor to his father. He was referred to a letter dated 1 August 2000 which Mr Knight wrote to his father, which he says he did not see at the time. This letter acknowledged his father's request to retire as tenant of the farm in favour of his son. Mr Knight said that "in principle" he believed that the claimants would be agreeable but that if a formal application were to be made in due course all the relevant information would have to be provided. He confirmed that the claimants were prepared to accept Phillip Rees as first succession tenant at that time subject to a new written tenancy agreement in modern form being entered into. Phillip Rees accepted in cross-examination that this was not a promise and was subject to a new tenancy in new form.

14. Notice of retirement was given on behalf of Jenkin Rees as from 29 September 2001. In response, Mr Knight wrote to Phillip Rees saying that he was entitled to follow formal procedures for succession if he wished to do so and there would need to be a formal hearing which would be dealt with "by the book." He in turn filed an application in the Agricultural Lands Tribunal in February 2001 for a direction giving him entitlement to the tenancies. The claimants put him to strict proof of eligibility and requested documentation, including audited accounts, other sources of livelihood and capital, a full farm budget and details of milk quota attached to the farm. In 2004 however, Phillip Rees wrote to the Tribunal saying he would like to withdraw his application.

15. When he was asked about this in cross-examination, he said that he had made the application on the advice of the land agent of his father and himself, Davis Meade and Partners. However, he then divorced and said that it was his wife who had been pressing him to succeed his father. That pressure then came to an end and it was nice to carry on as they were. They both expected that he would apply for succession on his father's passing. He agreed that his wife's lawyers in the divorce proceedings thought that the farm had a value, but he maintained that this had nothing to do with the succession issue.

16. He accepted also that in 2016 there was an issue as to whether the claimants' agents could have access to the farm to carry out investigatory works for the purpose of the planning permission. He said that the agents' vehicles were obstructing a road when

his father wanted access to carry out spraying on part of the farm. It was the claimants' choice to seek an injunction.

17. The first hearing of that application was listed on 23 September 2016 which was adjourned for a week. By then, Mr Knight had retired and his role had been taken over by Rod Perons. Phillip Rees said that the relationship between him and his father on the one hand and Mr Knight on the other had always been good, but their relationship with Mr Perons was not so good. After that first hearing Mr Perons sent him an email which included the following:

> "In respect of your family's conversations with Richard Knight in the past and my discussions with you now, there has never been any intention by the landlords not to treat you fairly and, furthermore, generously in return for your co-operation. The statutory basis for compensation is five times the rent, so £45,000 for the entire holding, but we have offered you £500,000 which is over ten times as much. Through you[r] agent, you have asked for £1 million and that is w[h]ere the difference lies. Of course, it is for Barry Meade to advise you on these matters and I do not seek to discuss this with you directly."

18. The email went on to refer to the reference to arbitration, which right was expressly acknowledged, but continued:

> "However, I can say that we remain open to further discussions to see if an amicable agreement can be reached. In those circumstances, as above, we would expect to be more generous than a compensation payment of five times the rent providing that we can reach an agreement in a timely way."

19. It is not in dispute that such an agreement was not reached in a timely way. This was not a matter that was investigated in great detail before me. Phillip Rees in cross-examination said that they were advised by their agent not to accept the offer and they thought this was the start of negotiations. He thought that they might agree £1.8 million, but this was not based on anything said on behalf of the claimants. Later he and his father agreed they would reduce this to £1.2 million. No evidence from the parties' respective agents on how the respective figures were calculated or how the negotiations proceeded, or did not proceed, was adduced before me.

20. As indicated, in my judgment Phillip Rees was an impressive witness and I accept his evidence as to the above matters, and indeed all matters on which he gave evidence.

21. There was no suggestion before me that any alternative land is or was available for him to farm. In light of his evidence, Ms Cattermole on his behalf in her closing submissions as to what relief, if any, is appropriate, confined herself to saying that this should be by way of monetary payment of fair compensation. She accepts that the evidence before me was not sufficient for me to come to a conclusion as to what that fair compensation might be, even if such relief were appropriate, and submits that if necessary there could be a further hearing with further evidence to determine that question. That was not a course that had been canvassed during case management.

22. Just as there was, in the end, no substantial dispute as to the facts in these proceedings, there was no substantial dispute as to the principles of proprietary estoppel, which is the only basis for relief advanced on behalf of the defence in this case. Rather the dispute is as to how those principles should be applied to the facts of this case.

23. In *Layton v Martin* [1986] 2 FLR 227, Scott J, as he then was, considered the doctrine of proprietary estoppel in the context of a representation between partners in a personal relationship that one would give the other financial security by means of his will. At page 238, the judge referred to previous authority *Crabb v Arun District Council* [1976] Ch 179 and *Taylor Fashions Ltd v Victoria Trustee Company Ltd* [1982] QB 133, and then continued:

> "The proprietary estoppel line of cases are concerned with the question whether an owner of property can, by insisting on his strict legal rights therein, defeat an expectation of an interest in that property, it being an expectation which he has raised by his conduct which has been relied on by the claimant. The question does not arise otherwise than in connection with some asset in respect of which it has been represented, or is alleged to have been represented, that the claimant is to have some interest. All the relevant cases…raise that question.
>
> The present case does not raise that question. A representation that 'financial security' would be provided by the deceased to the plaintiff, and on which I will assume she acted, is not a representation that she is to have some equitable or legal interest in any particular asset or assets."

24. The judge, by now Lord Scott, returned to this theme in *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, where he said at paragraph 18:

> "Mr Cobbe's expectation, encouraged by Mrs Lisle-Mainwaring, was that upon the grant of planning permission there would be a successful negotiation of the outstanding terms of a contract for the sale of the property to him, or to some company of his, and that a formal contract, which would include the already agreed core terms of the second agreement as well as the additional new terms agreed upon, would be prepared and entered into. An expectation dependent upon the conclusion of a successful negotiation is not an expectation of an interest having any comparable certainty to the certainty of the terms of the lessees' interest under the *Taylors Fashions* option. In the *Taylors Fashions* case both the content of the estoppel, i.e. an estoppel barring the new freeholders from asserting that the option was unenforceable for want of registration, and the interest the estoppel was intended to protect, i.e. the option to have a renewal of the lease, were clear and certain. Not so here. The present case is one in which an unformulated estoppel is being asserted in order to protect Mr Cobbe's interest under an oral agreement for the purchase

> of land that lacked both the requisite statutory formalities (s.2 of the 1989 Act) and was, in a contractual sense, incomplete."

25. Lord Scott was a member of the House or Lords which heard the well-known case of *Thorner v Major* [2009] UKHL 18, which also concerned whether a representation had sufficient clarity to establish a proprietary estoppel and whether it was a necessary element that the assurances related to identified property. As to clarity, Lord Walker, at paragraph 56 of his leading opinion, said this:

> "I would prefer to say (while conscious that it is a thoroughly question-begging formulation) that to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context. I respectfully concur in the way Hoffmann LJ put it in *Walton v Walton* (in which the mother's "stock phrase" to her son, who had worked for low wages on her farm since he left school at fifteen, was "You can't have more money and a farm one day"). Hoffmann LJ stated at para 16:
>
> "The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made."

26. As to identified property, Lord Walker at paragraph 61 said:

> "In my opinion it is a necessary element of proprietary estoppel that the assurances given to the claimant (expressly or impliedly, or, in standing-by cases, tacitly) should relate to identified property owned (or, perhaps, about to be owned) by the defendant. That is one of the main distinguishing features between the two varieties of equitable estoppel, that is promissory estoppel and proprietary estoppel. The former must be based on an existing legal *relationship* (usually a contract, but not necessarily a contract relating to land). The latter need not be based on an existing legal relationship, but it must relate to *identified property* (usually land) owned (or, perhaps, about to be owned) by the defendant. It is the relation to identified land of the defendant that has enabled proprietary estoppel to develop as a sword, and not merely a shield: see Lord Denning MR in *Crabb v Arun DC* [1976] Ch 179, 187."

27. At paragraph 63, Lord Walker distinguished the decision in *Layton v Martin* as follows:

> "The situation is to my mind quite different from a case like *Layton v Martin* [1986] 2 FLR 227, in which the deceased made an unspecific promise of "financial security"."

28. Lord Neuberger distinguished the decision in *Cobbe's* case at paragraphs 90-99. At paragraphs 94-96, he said this:

> "There are two fundamental differences between that case and this case. First, the nature of the uncertainty in the two cases is entirely different. It is well encapsulated by Lord Walker's distinction between "intangible legal rights" and "the tangible property which he or she expects to get", in *Cobbe* [2008] 1 WLR 1752, para 68. In that case, there was no doubt about the physical identity of the property. However, there was total uncertainty as to the nature or terms of any benefit (property interest, contractual right, or money), and, if a property interest, as to the nature of that interest (freehold, leasehold, or charge), to be accorded to Mr Cobbe.
>
> In this case, the extent of the farm might change, but, on the Deputy Judge's analysis, there is, as I see it, no doubt as to what was the subject of the assurance, namely the farm as it existed from time to time…
>
> Secondly, the analysis of the law in *Cobbe* [2008] 1 WLR 1752 was against the background of very different facts. The relationship between the parties in that case was entirely arm's length and commercial, and the person raising the estoppel was a highly experienced businessman. The circumstances were such that the parties could well have been expected to enter into a contract, however, although they discussed contractual terms, they had consciously chosen not to do so. They had intentionally left their legal relationship to be negotiated, and each of them knew that neither of them was legally bound."

29. It was the requirement of identifiable property which Ms Reed QC took first in submitting that the promises relied upon by the defence in this case are not proprietary in nature and did not relate to tangible property. It is true, as submitted by Ms Cattermole, that the promises were made in the context of an existing landlord and tenant relationship, had proprietary elements such as the promise of alternative land if available and the promises in relation to the farmhouse, and which went beyond the statutory rights to compensation under the 1986 Act.

30. However, as Phillip Rees accepted in cross-examination, although relocation to land on the claimants' estate was mentioned as part of the promises, as was a greenfield site, no such land has since been identified as available. Moreover, he also accepted that he and his father knew they might have to leave the farm when they could no longer farm because of the development, and hoped that they would farm elsewhere, again on unidentified land. That, taken together with the arbitrator's finding that at the date of the arbitration all of the farm was needed for the development, explains why Ms Cattermole properly acknowledged in closing submissions that the appropriate remedy is monetary rather than proprietary in nature. Accordingly, in my judgment, the necessary element of promises relating to identified land owned or to be owned by the claimants is absent.

31. Assuming however that there was a sufficient proprietary element to the promises, Ms Reed QC alternatively submits that the promises were not sufficiently certain to found a proprietary estoppel and in effect amounted to promises to negotiate fair compensation. As in *Cobbe*, a promise to negotiate is not sufficient. As Ms Cattermole submits, in *Thorner* it was established that whether a promise has sufficient clarity to found a proprietary estoppel depends on the context. In that case it was found that the promises were clear enough in the unusual context of two taciturn men who communicated obliquely but understood each other well.

32. In the present case, although the relationship between the Reeses and Mr Knight was good, it remains the fact that the context in which the promises were made was a contractual one between the parties where each had a land agent acting. In my judgment, there was uncertainty as to what was to happen in terms of property, interest, contractual rights or money. In terms of the latter, no boundaries or formula was set for the quantification of fair compensation. Ms Cattermole submits that the formula was sufficient to relocate to another farm. But in my judgment that too is unclear and uncertain given that no farm was identified, and that Phillip Rees accepted that they expected to be tenants of any such farm but also hoped that the fair compensation would be enough to buy some, at least, of the land.

33. In my judgment such uncertainty would not be remedied by a further hearing as suggested by Ms Cattermole. It would remain unclear in any such hearing just how fair compensation in this context should be determined, and the court would not be applying well established principles for the assessment of damages or compensation in other contexts. The promises were not to agree any sum demanded by the Reeses or even to pay any sum determined by a court. They were to negotiate with a view to agreeing a sum. The claimants did make a clear offer in 2016, and this was in the context that Mr Knight had said that the claimants would make one offer and one offer only. Accordingly, I conclude that the promises were not sufficiently clear to establish a proprietary estoppel.

34. That makes it unnecessary to determine whether there was detrimental reliance upon the promises. For the sake of completeness I shall set out my conclusions in this regard, but in the circumstances can do so shortly.

35. The first head of the detriment is that the Reeses carried on farming in a good manner. In my judgment this is no more than Jenkin Rees was obliged to do under the tenancies. In any event, there were rent arrears over the years, although these were eventually paid. In 1995, when the rent was in arrears for more than a year, a notice to pay rent was served under the 1986 Act with a view to serving a notice to quit. However the rent was eventually paid and the notice to quit was not proceeded with, when Mr Knight acknowledged past co-operation of Jenkin Rees. There was however correspondence with him over the sale of milk quota in breach of the tenant's covenants, but Phillip Rees could not shed much more light on this.

36. As for Phillip Rees carrying on farming instead of following other paths in life, it appeared from his evidence that this related to one time when he was thinking of buying a dwelling to renovate and sell at profit, something his brother was involved in. He discussed this with Mr Knight, who queried whether he had time to do this having regard to his farming commitments, a concern which he ultimately accepted. In any event, in re-examination when he was asked why he did carry on farming he

candidly replied that he didn't know any different and it was what he had grown up with.

37. It is clear from correspondence that as the plans for development progressed the claimants were reluctant to spend money on the farm, for example on repairs to the milking parlour. The Reeses' milk buyers complained and Mr Knight expressed concern to his principals that they should comply with their landlord's obligations. In the end they carried out some repairs but the Reeses paid for a new concrete standing and silage walls. The correspondence at the time shows mention of a golden handshake to leave the farm, but Phillip Rees only had a vague recollection about this and it came to nothing.

38. The Reeses also cleared adjoining land and looked after the claimants' cattle at times. I accept that as all this land was on the urban fringe it was not attractive to farm and that Jenkin Rees in particular wished to maintain his good relationship with Mr Knight and through him with the claimants. However, again, as Phillip Rees candidly accepted, they were paid for these arrangements.

39. Jenkin Rees also had a 1986 Act tenancy of adjoining acreage at Radyr Farm, which he appears to have surrendered to the claimants in about 1992 to be replaced by less secure agreements such as a farm business tenancy. However, there are no documents mentioning the surrender and Phillip Rees was unable to recall much further detail. Some of the land was given up by Jenkin Rees at the request of Mr Knight for a housing development which came to be known as Danescourt.

40. As for not objecting to the planning permissions, Phillip Rees recalled that an objection was made to the later application but accepted when the documentation was put to him that objections were made, including to the proposed local plan in 2013 which showed the allocation of the farm for housing. Some of these objections referred to the fact that only £45,000 statutory compensation was payable, and when he was asked about that he said that he thought the promises had "gone out of the window" after Mr Knight retired.

41. In my judgment, such acts of detriment that are shown on the evidence of Phillip Rees, are not sufficiently substantial to amount to detrimental reliance for the purpose of proprietary estoppel, given that his father and he continued to farm the farm for many years which is what they wanted to do (and indeed he still does) in the knowledge of, and latterly, despite, the progress of the development plans. Despite the challenges of farming on the urban fringe, there was no suggestion before me that this was anything other than a commercially successful business over a period of some 50 years.

42. There is also the overarching point, relied upon by Ms Reed QC as to the unconscionability or otherwise of the claimants now seeking to go back on the promises, that they did make an offer in 2016 of 10 times the statutory compensation before any significant costs were incurred in litigation or arbitration, and indeed indicated that they remained open to further discussion to see if an agreement could be reached. It is not clear precisely what happened to that suggestion, but with hindsight it is a pity that the parties could not reach such an agreement but instead embarked upon five years of very expensive arbitration and litigation.

43. Accordingly, whilst I have some sympathy with Phillip Rees as to the position in which he now finds himself, the claim of proprietary estoppel fails and the claimants are entitled to possession.

44. I am very grateful to counsel for their clear and focussed assistance. They helpfully indicated that any outstanding consequential matters can be dealt with on the basis of written submissions. A draft order agreed if possible with any such submissions should be filed within 14 days of hand down of this judgment and I will if necessary determine them in a supplemental written determination.