

TROUBLE AT'

**Julie Butler
FCA asks
whether
more farms
could be lost
due to lack
of protection
together with
proprietary
estoppel?**

The recent case of *Davies & Another v Davies* [2014] EWCA Civ 568 shows the vulnerability of farms to legal claims by family members.

With farms now worth much larger sums together with the historic farming situation whereby there has been a lack of legal documentation to support trading arrangements, promises and assurances between family members creates a potential background for legal claims. Historically which family members stay working on the family farm and ultimately who inherits the farm has been a cause of much conflict. The need for good legal agreements for protection against claims also ties into the need for tax protection.

APPLICATION TO EVICT

Eirian Davies' claim was precipitated by her parents' application to evict her and her family to gain possession of the farmhouse. It could be argued that this legal action was the spark that ignited the firework display that followed. In response to the attempt by her parents to evict her, Eirian made a claim on the farm.

The summary was that there was then an appeal in relation to a successful claim that had been made by a daughter (Eirian) against

her parents (Tegwyn and Mary Davies) with respect to an interest in their pedigree dairy farm (Henllan) which she asserted, based on the doctrine of proprietary estoppel.

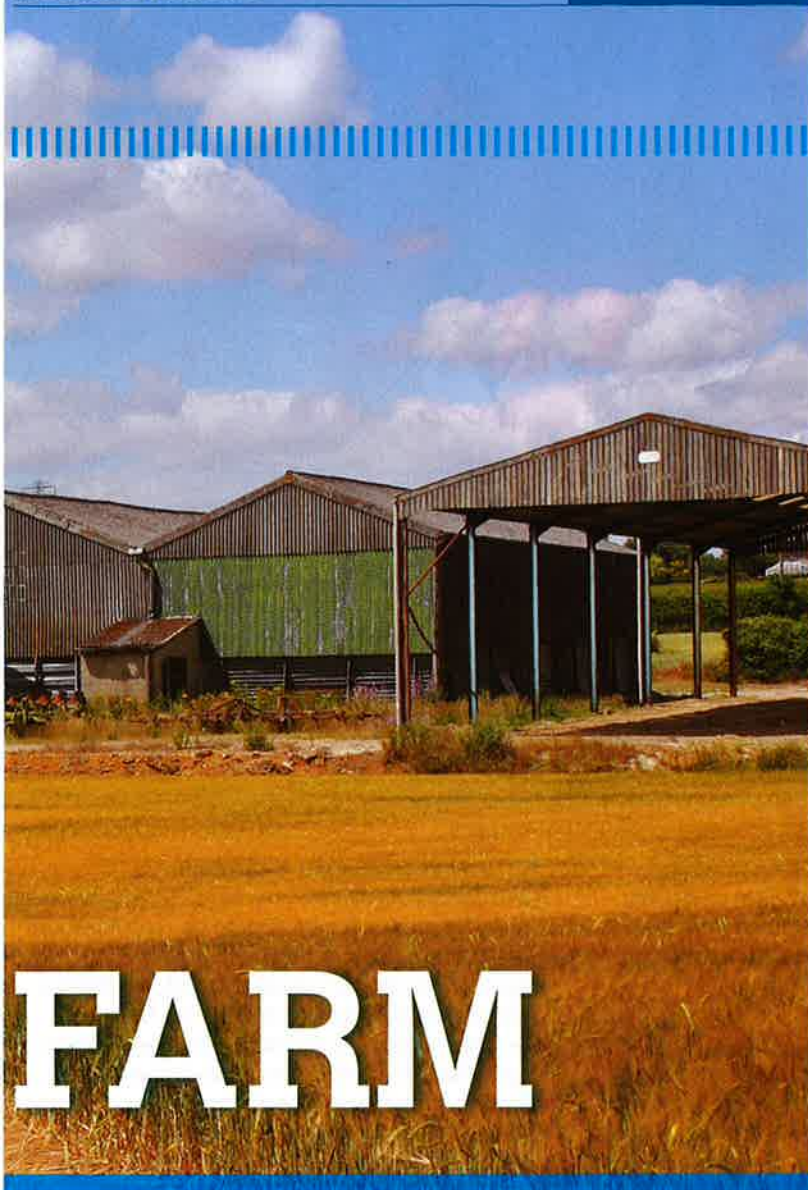
The core issue in the appeal brought by Eirian Davies' parents (the appellants) was whether Eirian's reliance on the assurances made by her parents gave rise to sufficient detriment so as to entitle her to a share in the ownership of the family farm. The appellants made three key arguments.

In considering the arguments and rejecting them, the Court of Appeal found that the judge at first instance had not erred and his conclusion that there was a net detriment to Eirian in reliance on the representations made by her parents was a justified one.

The appeal was allowed on the narrow issue (pertaining to the concession made on behalf of Eirian) insofar as the doctrine does not necessarily entitle Eirian to an immediate beneficial interest after the trial, only of the preliminary issue, and that the nature of her equity would be decided at the later hearing.

DETRIMENTAL RELIANCE

Eirian's occupation of the farmhouse was by gratuitous licence which was terminated



FARM

by her parents. She defended the eviction and put in a counter claim arising out of her detrimental reliance on the representations made by Tegwyn and Mary.

As indicated above, at a trial of the preliminary issue, the judge found that Eirian had an interest in the farm on the basis of representations made by one or both of her parents on which she relied to her detriment (at one stage giving up a career outside of the farm in order to return to work at the farm at the behest of her parents). Thus it would be unconscionable for her parents to now deny her equity in the farm and/or the farming business.

It is worth looking at other proprietary estoppel cases that were quoted during this case. In *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776, Lord Walker of Gestingthorpe pointed out that there was no universal definition of proprietary estoppel which is both comprehensive and uncontroversial.

The doctrine needs to be supported by three main elements:

- A representation or assurance made to the claimant;
- Reliance on this by the claimant; and
- Detriment to the claimant in response to this reasonable reliance.

FAQ

Proprietary estoppel is a legal claim, especially pertaining to English land law, which arises regarding rights to use the property of the owner, often used in cases of disputed ownership

DETRIMENT AND ASSURANCE

This issue is considered in *Gillett v Holt* [2001]: 'The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.'

Two additional points arise from *Gillett v Holt*. Once the previously given assurances are gone back upon or revoked, this is the point at which the claimant is deemed to have suffered detriment. The second point focuses on whether the detriment is substantial. To be sufficiently substantial, the detriment must be judged by whether it would be unjust or inequitable to allow the assurance to be disregarded.

Another case looked at was Morgan J in *Creasey v Sole* [2013] EWHC 1410 (Ch) at [111]: 'In order to determine whether [the claimant] acted to his detriment in reliance on some promise or assurance, it is necessary to consider what alternative course or courses might have been open to him.'

'If the arrangement which he had with his parents was profitable to him but he gave up the opportunity of a more profitable alternative, then a decision, in reliance on a promise or assurance, to stay with the arrangement could be said to be detrimental to him.'

Up to that point, Eirian was led to understand that if she did not leave home, but continued to work on the farm and show her commitment to it, it would be hers one day.

TAX AND LEGAL PROTECTION

The *Davies* case shows the need to have all legal agreements in place and finalised. There was an 'unsigned' partnership agreement in the *Davies* case and also there is a directorship and shareholding that is unclear. It is interesting to look at point 17 of the judgment: 'On 16 July 2008 there was a meeting between Tegwyn, Mary, Eirian and the family solicitor and accountant to discuss a proposal to issue 49% of the shares in the farming company to Eirian and to appoint her a director.'

'No agreement was reached at the meeting on the salary to be paid to Eirian, although this was later agreed and paid at £1,500 per month, after disclosure of Eirian's outgoings.'

'Eirian resigned from her job at Genus and went back to full-time work on the farm. Although the documents were not signed, the parties behaved as if they had been.'

The reference to 'the parties behaved as if they had been' [signed], underlines the need for clarity on all legal agreements.

Directorships and shareholdings are both serious legal and tax considerations – how many other farms are in a similar position to the *Davies* farm, with issues such as unsigned partnership »44



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agreements, assumption of directorships and shareholding difficulties? One of the key points would be the accounts and tax return disclosures, where dividends and partnership shares have to be shown.

The accounts and tax returns will (and should) reflect the true legal and tax position – all family members should check, better still scrutinise, all the returns to ensure clarity and compliance. For example, has income tax efficiency of profit and loss shares between family members been considered? The timing and quantum of voting dividends between family members can be tied into legal protection.

ACTION POINTS FOR ACCOUNTANTS

Farming families need help from their accountants and tax advisers on tax protection as part of the overall client care. Shareholdings and directorships have to be filed at Companies House and accounts have to be prepared in accordance therewith. The accounts should be based on the signed partnership agreements (with all parties signing) and, if not, the matter should be 'followed through'.

Accountants have the advantage of regular meetings with their farming clients so their accounts and supporting documents have to reflect the legal position and be updated as required. Overall tax planning is needed by a large number of farming families and now is a good time to incorporate all these concerns into the tax planning and legal protection.

Where there are concerns about lack of legal definition, the accountant should always refer the farming family to a lawyer. The regular contact with accounts and tax returns gives ideal opportunities for accountants, tax advisers and the farming family to discuss and push forward good legal protection. The correct legal position can help with tax planning.

ACTION POINTS FOR FARMERS AND LANDOWNERS

Family members do not have to be paid minimum wage but it is essential that their role and expectations are not misunderstood. The *Davies* case, together with cases like *Ham v Ham* (see *The case of Ham, Accountancy Live*, www.aclive.ly/go/176978), highlight the legal concerns. Tax efficiency must always be a prime driver.

There are concerns over promises, and 'this will all be yours one day' statements by senior family members in moments of over-zealous enthusiasm or persuasion, which must be considered with the same legal protection of writing a will.

If assurances relating to the share in the family farm have been made to family members, which they have relied upon, and that family member has sacrificed some alternative, ie, they have accepted it to their 'detriment', then care must be taken. Many farmers would see their position at the other end of the scale as helping family members – out of kindness they provided a job and a house. However, the courts appear to be looking through 'the other end of the telescope'.

Now is the time to seek legal definition and there will be tax planning advantages that can be incorporated into the search for clarity. For example, protect the partnership farm from only 50% business property Relief (BPR) as opposed to the full 100% BPR of 'partnership property'. Such inheritance tax inefficiency can put the survival of farms at risk and they could be lost to a tax bill that is impossible to deal with.



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