

*Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55 and *Thorner v Major* [2009] UKHL 18

These two House of Lords cases, each of which deals with proprietary estoppel, will be considered together.

**Court: *Yeoman's Row*:** House of Lords (Lord Hoffmann, Lord Scott, Lord Walker, Lord Mance, Lord Brown)

**Court: *Thorner*:** House of Lords (Lord Hoffmann, Lord Scott, Lord Walker, Lord Rodger, Lord Neuberger)

**Relevant to:** E4:3 – Applying the Basic Structure – Land – Proprietary Estoppel

**Related cases:** *Crabb v Arun District Council* [1979] Ch 176; *Gillett v Holt* [2001] Ch 210

**Importance:** \*\*\*\*\*

**Further discussion:** McFarlane & Robertson [2008] LMCLQ 449 (note on *Yeoman's Row*)

McFarlane & Robertson (2009) 125 LQR 535 (note on *Thorner*)

**The background: *Yeoman's Row*:** A (Yeoman's Row Management Ltd) owned a block of flats in Knightsbridge, London. A wished to demolish the flats and build a terrace of six houses in their place: it needed planning permission for this redevelopment. A made an oral agreement with B (Mr Cobbe: a property developer). The oral agreement was that B would prepare an application for planning permission: if the application was unsuccessful, B would be paid nothing. It was understood that, if A dispensed with B's services before a planning application was made, A would pay B a reasonable sum for B's work up to that point. If the application was made and was successful, A would sell its land to B for £12 million. B (or a company nominated by B) would then develop the land in line with the planning permission, and sell off the six houses. If B made any more than £24 million from those sales, he would give 50% of those additional sums to A.

Working for approximately 18 months, B prepared the application for planning permission, and it succeeded. A then refused to sell the land to B. B could not claim A was under a contractual duty to sell the land to B: there was no written contract between A and B and so the formality rule imposed by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 had not been satisfied; and some important points concerning the potential sale of

the land to B had not been agreed by the parties (e.g. would A sell the land to B or to a company nominated by B?; what security right would A receive to protect B's duty to pay A 50% of any proceeds of sale in excess of £24 million?). B might have claimed that A was instead under a contractual duty to pay B a reasonable sum for B's work: B's work had been carried out, and accepted by A, on the understanding that, as long as the planning application was not unsuccessful, B would receive a reasonable sum for his work. No formalities are necessary for such a contract. However, it seems B wanted to claim a right in relation to A's land, so that he could benefit from the increase in its value following on the grant of planning permission. B therefore claimed that A was under a non-contractual duty to B to share that increase in value with B, such duty arising as a result of proprietary estoppel, a constructive trust, or unjust enrichment.

**The background: *Thorner*:** A (Peter Thorner) owned Steart Farm, located near the village of Cheddar in Somerset. David Thorner (B), whose father was a cousin of Peter, worked on that farm, for Peter, for thirty years. B was not paid for that work. B also worked on his parents' farm, and his parents gave him accommodation and pocket money. As a result of working for both his parents and A, B worked very long hours. B believed that, on A's death, he would inherit Steart Farm. There was no explicit promise or assurance by A to B, but B's belief developed over a period of fifteen years and was encouraged by A's conduct. As a result of his belief, B continued to work for A and did not pursue other opportunities. A did in fact make a will leaving the farm to B. However, that will also gave specific sums of money to other individuals; when A later fell out with some of those individuals, he destroyed his will. A died without making a new will and so his property, including the farm, passed not to B but to the closer relatives of A who, by statute, received his estate on the event of his intestacy. B claimed that A (and so A's estate) was under a duty to B, arising as a result of proprietary estoppel.

**The questions: *Yeoman's Row*:** In *Yeoman's Row*, each of A and B knew that their oral agreement was not legally binding. As far as B's proprietary estoppel claim was concerned, this raised the question of whether the oral agreement, coupled with A's conduct in encouraging B to rely on that agreement, could constitute a commitment made by A to B (see [E4:3.1.1](#) for this aspect of proprietary estoppel). Similarly, could B's reliance on the oral agreement be said to be reasonable, given that B knew the agreement was not legally binding (see [E4:3.2.2](#))? If those questions were resolved in B's favour, so that proprietary estoppel did impose a duty on A, there was also a question as to the extent of that duty (see [E4:4](#)). B

did not argue that his expectation should be precisely protected; but he did claim that A should pay him a sum of money reflecting B's role in increasing the value of A's land.

At first instance, Etherton J found that the requirements of proprietary estoppel had been satisfied. The oral agreement covered "all points of principle which were at the core of the commercial deal" and contemplated that a subsequent formal contract was needed only to take care of "legal mechanics" (see [2005] EWHC 266 at [110] and [68]). So the agreement, coupled with A's willingness to allow B to continue working on the planning application, constituted a commitment by A; and B's reliance on the agreement was reasonable. As to the extent of B's right, Etherton J ordered that B "should share equally the increased value or commercial potentiality arising from the grant of the Planning permission" (see [2005] EWHC 266 at [140]). In practice, this meant that B could expect to receive around £2m from A: B's attempt to share the increase in value of A's land was thus successful.

A's appeal to the Court of Appeal was unsuccessful: see [2006] 1 WLR 2964. However, as noted in [E4:4 \(p.458, at n 61\)](#), the Court of Appeal did seem troubled by the question of how best to decide on the extent of B's right. A then appealed to the House of Lords. If the House of Lords were to reject B's proprietary estoppel claim, it would have to consider his claim in unjust enrichment, and his claim for a constructive trust. In relation to the unjust enrichment claim, a key question was whether A's enrichment consisted simply in the receipt of B's services, or whether it instead extended to the increase in the value of A's land caused by the grant of planning permission. In relation to B's constructive trust claim, it was important to know whether such a trust could arise simply as a result of A's unconscionable conduct (see [F3:2.1.4\(iii\)\(f\) at pp.565-566](#)). If not, it was important to know if the principle applied in cases such as *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 (referred to in the book as the 'receipt after a promise' principle: see [E3:2.2.2](#)) could encompass a case in which A and B's planned joint venture concerned the improvement of A's land, rather than the acquisition of land by A.

**The questions: *Thorner*:** The question in *Thorner* was relatively simple: had A made the necessary commitment to B (see [E4:3.1.1](#))? B admitted that A had made no single, definitive statement promising to leave his farm to B. However, B argued that A's conduct over a number of years, taken in the context that A and B were each taciturn farmers, sufficed to lead B reasonably to believe that A was committed to leaving the farm to B.

At first instance, Mr John Randall QC, sitting as a Deputy High Court judge, found in B's favour and ordered that A (and so now A's estate) was under a duty to transfer Steart Farm to B. The Court of Appeal, however, reversed that decision ([2008] EWCA Civ 732). As noted in the update previously appearing on this web-site, it was held that, for a proprietary estoppel claim to arise, A needed to make a "clear and unequivocal" commitment to B. The Court of Appeal's view of the evidence was that whilst A, at one time or another, may have indicated that he had a current intention to leave the farm to B, A had never made a promise that he would do so. B then appealed to the House of Lords.

**The decision: *Yeoman's Row*:** The House of Lords was unanimous in allowing A's appeal, and finding that B had no proprietary estoppel claim. Given the rejection of B's proprietary estoppel claim, the House of Lords had to consider B's other claims. It was also held that no constructive trust had arisen; and that A's enrichment at B's expense did not include the increase in value of A's land caused by the grant of planning permission. However, B did not go away entirely empty-handed. Lord Scott found that, whilst B's 'proprietary' claims failed, B succeeded in his 'in personam claims' based on unjust enrichment, a quantum meruit, and for a restitutionary remedy arising on a total failure of consideration. Lord Scott's decision was that B had established each of those three personal claims and, as a result, was entitled to receive from A a sum equal to the expenses he had reasonably incurred in applying for and obtaining planning permission as well as an appropriate fee for the services he had provided to A. That sum was to be determined by an inquiry, but £150,000 was suggested by Lord Scott as "some indication of the amount a *quantum meruit* might provide". The remainder of their Lordships agreed with Lord Scott's view, although Lord Mance entered the caveat that £150,000 should not necessarily be used as an estimate of sum B would receive.

**The decision: *Thorner*:** The House of Lords was unanimous in allowing B's appeal. Lord Hoffmann, Lord Walker, Lord Rodger and Lord Neuberger found that A had made the necessary commitment to B and that B did therefore have a proprietary estoppel claim. Lord Scott was content to concur, but preferred to find that A's duty to B arose under a remedial constructive trust. The decision of the first instance judge was re-instated, and A's estate was thus under a duty to transfer the farm to B.

**The effects of the decisions:** We can consider the effects of the decisions by looking at proprietary estoppel; constructive trusts; and unjust enrichment.

**(a) Proprietary Estoppel:** In *Yeoman's Row*, the decision that B had no proprietary estoppel claim might have been reached relatively easily by applying the pre-existing test for proprietary estoppel. On the facts, it could perhaps have been said that A had not made the necessary commitment that B had, or would get, a right *in relation to A's land*. Such a commitment could not be spelled out from the parties' oral agreement, even when coupled with A's encouragement of B. After all, B was an experienced businessman and knew that further negotiations had to be completed before any legally binding agreement could be concluded. However, in their speeches, Lord Scott and Lord Walker each took a surprisingly narrow view of the reach of proprietary estoppel. Lord Hoffmann and Lord Brown each agreed with Lord Scott; Lord Mance also agreed with Lord Scott's analysis of proprietary estoppel.

Lord Scott's approach was based on seeing proprietary estoppel as a form of evidential estoppel (see [D1:3.3.1\(i\)](#)) and therefore as depending on A's being prevented from denying a matter of fact or of law. On this view, B's claim could not succeed as he could not identify a matter of fact or law that A was prevented from denying. For example, B could not show that A had told him that B *already* had a right in A's land; B could only argue that A had made a commitment to act in a particular way *in the future*. There are a number of problems with this view: for a discussion, see McFarlane & Robertson [2008] LMCLQ 449. In particular, it is inconsistent with a number of Court of Appeal decisions in which B's successful proprietary estoppel claim has been based on A's promise that A will give B a right in the future, eg by leaving his land to B: see e.g. *Gillett v Holt* [2001] Ch 210 and *Jennings v Rice* [2003] 1 P & CR 100. It is interesting to note that the problem is caused by the very name 'proprietary estoppel'. As pointed out on [pp.473-474](#), the doctrine is very different from each of 'evidential estoppel' and 'defensive estoppel' (see [D1:3.3.1\(ii\)](#)); yet Lord Scott's view seems to ignore those differences.

Lord Walker, whilst agreeing with Lord Scott's speech, adopted a slightly different limit to proprietary estoppel. His Lordship seems to suggest (at [66]) that B must believe that "the assurance on which he or she relied was binding and irrevocable." Of course, it is well known that B cannot base a proprietary estoppel claim on the mere hope that A will act in a particular way in the future (see [E4:3.1.1](#)). However, Lord Walker goes further and suggests that, in cases where B bases a claim on A's promise of future action, B must believe not only that A has made a promise, but also that the promise is legally binding. Again, there are a number of problems with this view: for a discussion, see McFarlane & Robertson [2008]

LMCLQ 449. In particular, it is again inconsistent with a number of Court of Appeal decisions in which B's successful proprietary estoppel claim has been based on A's promise that A will give B a right in the future, eg by leaving his land to B: see e.g. *Gillett v Holt* [2001] Ch 210 and *Jennings v Rice* [2003] 1 P & CR 100. Funnily enough, in *Gillett v Holt*, A made the very argument that, as B did not believe A had made a legally binding promise to B, no proprietary estoppel claim could arise. The Court of Appeal rejected that argument – the leading judgment was given by Robert Walker LJ (later Lord Walker)!

The decision in *Yeoman's Row* thus left the doctrine of proprietary estoppel in a very uncertain state: in particular, it was not clear whether the results in cases such as *Gillett v Holt* and *Jennings v Rice* could be reconciled with the approaches taken by Lord Scott and Lord Walker. Further, the decision in *Crabb v Arun DC* [1976] Ch 179 might also be open to question: given that, in a commercial situation, B acted in reliance on A in the absence of a concluded contract, should B's proprietary estoppel claim have been permitted? In *Yeoman's Row* (at [22]), Lord Scott attempted to justify the decision in *Crabb* on the basis that, when selling off part of his land without reserving a right of way, B (Mr Crabb) believed that A (the council) had *already* given him a right of way. However, on the facts of *Crabb*, that analysis is questionable: after all, B expected to pay for his right of way and, when selling off part of his land, knew that he had not paid A.

***Thorner*** gave the House of Lords the chance to consider, and perhaps to re-consider, its decision in *Yeoman's Row*. Lord Scott essentially stuck to his position in the earlier case, weakening it only slightly to allow proprietary estoppel to operate where B believes that he has, *or will very shortly acquire*, a right in A's land ([2009] UKHL 18 at [20]). On this view, in *Thorner*, B had no proprietary estoppel claim. Instead, according to Lord Scott, B could be protected by means of a remedial constructive trust, attaching to A's farm (we will discuss that point below, when looking at constructive trusts).

In contrast to Lord Scott, the other Law Lords seemed to distance themselves from the restrictive view of proprietary estoppel adopted in *Yeoman's Row*. Certainly, as pointed out by McFarlane & Robertson (2009) 125 LQR 535, their finding that B did in fact have a proprietary estoppel claim is incompatible with the view that B, when acting in reliance on A, must believe that he *already* has a right in A's land. It is also incompatible with the view that B, when relying on A, must believe that A is already under a legal duty to B. After all, in *Thorner*, B simply believed that A would keep his commitment to leave his land to B.

*Thorner* also provides useful guidance on applying the requirements of proprietary estoppel. First, it must be reasonably understood by B that A is making a commitment. In assessing this, the court must be aware of the particular context in which A has acted: for example, in *Thorner*, given that each of A and B were taciturn farmers, it was reasonable for B to believe that A had made a commitment to B, even though no definitive statement had been made. The result in *Thorner* certainly suggests that the Court of Appeal were mistaken in insisting that A must have made a 'clear and unequivocal' statement to B. Whilst it is true that Lord Neuberger (at [84]) supported such a requirement, he also permitted a number of exceptions to it (at [85]): the effect of those exceptions is to remove the need for a 'clear and unequivocal' statement of any practical force.

Second, B's reliance on A will only be reasonable if A's commitment reasonably appears to B to have been intended by A to be taken seriously by B. We do not have to ask if A intended B to rely: after all, A may have no specific acts of reliance in mind. The better question, focussed on in *Thorner* (see eg Lord Hoffmann at [5]) is whether B can reasonably believe that A *intended the commitment to be taken seriously*: if it was, then this will provide strong support for a finding that reliance was reasonable.

The decision in *Thorner* provides little real guidance as to how we determine the extent of the right B acquires through proprietary estoppel. The decision of the first instance judge was reinstated, so that A's estate was under a duty to transfer the farm to B. As a result, B's expectation was protected. That result is not however inconsistent with the test suggested at pp.458-461: in a case such as *Thorner* (see too *Gillett v Holt*), where B has relied on A over a very long period, it may well be that satisfying B's expectation is the only way to prevent B suffering a detriment as a result of his reliance: see pp.462-464.

**(b) Constructive Trusts:** In *Yeoman's Row*, Lord Scott forcefully rejected the idea that a constructive trust could arise simply as a result of B showing that A had acted 'unconscionably' (at [36]). This supports the view taken on pp.565-566. Lord Scott also considered the more specific claim that a constructive trust could arise under the principle applied to planned joint ventures in cases such as *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372. Etherton J, at first instance, had been willing to find such a constructive trust. However, Lord Scott (at [33]) held that such a trust could not arise in relation to land that was *already held* by A when the agreement for the planned joint venture

was made. That decision is consistent with the analysis of the *Banner Homes* constructive trust given in at pp.764-765: as the trust depends on the 'receipt after a promise' principle, it can apply only where A acquires a right *after* having made a promise to use that right, in some way, for B's benefit. The principle therefore could not apply to the facts of *Yeoman's Row*: B claimed that A held its freehold on trust for B; however, A had that freehold even before A made its promise to B. It was therefore impossible for B to show that A's receipt of that freehold was affected by an earlier promise to give B a right in relation to that freehold.

In *Thorner*, Lord Scott made the somewhat surprising suggestion that B could acquire a right under a remedial constructive trust. As noted on pp.566-567, the current position is that the remedial constructive trust is *not* permitted in English law. Whilst Lord Scott's advocacy of such a trust is interesting (in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 714-715, Lord Browne-Wilkinson also floated the possibility of the future recognition of remedial constructive trusts), it seems unnecessary, given that the remainder of the House of Lords based its decision on proprietary estoppel. There is also a tension between Lord Scott's rejection, in *Yeoman's Row*, of unconscionability as a sufficient grounds for B to acquire a right against A, and his support of the remedial constructive trust in *Thorner*: an important reason for limiting unconscionability is the need to promote certainty, and such certainty may be undermined by the recognition of the remedial constructive trust, which is itself often seen as a means to remedy unconscionability.

**(c) Unjust Enrichment:** In *Yeoman's Row*, Lord Scott identifies three apparently separate claims, each of which was said to give B a personal right against A. His reasoning in relation to these three claims is rather brief. It may well be that each of the supposedly separate claims is, in fact, subsumed within just one claim, based on A's unjust enrichment at B's expense. There are some difficulties with such a claim: see McFarlane & Robertson [2008] LMCLQ 449 for discussion. For example, the leading text-book on the subject notes that it is notoriously difficult for B to show that A has been unjustly enriched as a result of services performed by B to A in anticipation of a future contract between the parties: see Goff & Jones, *The Law of Restitution* (7<sup>th</sup> edn, 2007) at 26-010. It is certainly surprising that the House of Lords recognised B's unjust enrichment claim without any analysis of those difficulties: for example, Lord Scott does not give a precise reason as to why it was unjust for A to retain the benefit of any enrichment received by A at B's expense. In particular, if, as suggested by Lord Scott and Lord Walker, B was, in effect, a risk-taker it may be questioned whether any enrichment received by A at B's expense was really 'unjust'. It may also seem

surprising that, if B's claim is based on unjust enrichment, B nonetheless has no claim to share in the increased value of A's land. Lord Scott's explanation of this (at [41]) is not entirely convincing: see e.g. Getzler (2009) 125 LQR 196 at 201.

It may be that the unjust enrichment claim is, in fact, being used as a substitute for a different type of claim. First, as noted above, it may be that B had a straightforward contractual claim to be paid a reasonable sum for his services: after all, B had worked for A on the understanding that he would at least receive such a sum (unless the planning application was unsuccessful). The lack of a written agreement, like the failure to reach a final agreement on the specifics of the transfer of A's land to B, prevented A being under a contractual duty to transfer its land to B, but need not prevent A being under a contractual duty to pay B a reasonable sum for his work. Second, more radically, it may be that B's claim for payment could be justified by allowing an expansion of proprietary estoppel to all situations where B reasonably relies on a commitment made by A, even if that commitment does not relate to A's land. After all, in [E4:3.1.2](#), it is argued that the current limit on proprietary estoppel is very hard to justify.

In *Thorne*, the House of Lords did not consider unjust enrichment; there was no need for this, as B's claim succeeded on the grounds of proprietary estoppel (or, according to Lord Scott, under a remedial constructive trust). The approaches taken by Lord Scott and Lord Walker in *Yeoman's Row* raised the prospect that cases such as *Jennings v Rice* (in which B cared for A following A's promise to leave land to B) could no longer give rise to proprietary estoppel claims. If so, such cases might have to be re-analysed in terms of unjust enrichment (e.g. in *Jennings*, the court's order that A's estate should pay B £200,000 could perhaps be justified on the basis that A should pay B the value of the services B had given A, so as to ensure that A was not unjustly enriched at B's expense). Fortunately, the return to proprietary estoppel in *Thorne* prevents the need for such a re-analysis of cases such as *Jennings*.

**Evaluating the decisions:** The actual *result* in *Yeoman's Row* may be relatively easy to defend. Given the state of the negotiations between A and B, it was perhaps impossible to say that A had made a commitment to sell its land to B, and thereby to allow B to share in the gains A would receive from the grant of planning permission. Nonetheless, looking at A's conduct as a whole, it could well be argued that A *had* made a commitment that, if planning permission were obtained, B would be paid *something* for his work. Such a commitment could be seen as part of a contract: after all, such a contract, as it does not involve A's giving

B a property right or persistent right in A's land, is not caught by the formality rule provided by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. In the absence of a contract, it could be said that, if A made a commitment that B would be paid something should planning permission be obtained, then B's reliance on that commitment meant that B would suffer a detriment if A refused to pay for the work. The problem there for B is that, on the conventional understanding of proprietary estoppel, no action is available to B, as A did not make a commitment to give B a right relating to A's land. However, it is very difficult to justify that restriction on the scope of the principle behind proprietary estoppel.

The *reasoning* adopted by Lord Scott in *Yeoman's Row* was, however, very difficult to defend. It depended on equating proprietary estoppel with other forms of estoppel: in particular with the doctrines described in the book as 'evidential estoppel' and 'defensive estoppel' (see [D1:3.1.1\(i\) and \(ii\)](#)). On that view, proprietary estoppel cannot operate as an independent means by which A can come under a duty to B. At an abstract level, there may be something to be said for Lord Scott's view. It is one way of resolving the current absurdity that A can come under a duty to B where B relies on A's promise that B has or will acquire a right in A's land; but not where A makes a promise to give B a different form of right. However, Lord Scott's view necessarily entails a re-think of the many cases in which the courts have recognised proprietary estoppel as an independent source of rights. Indeed, that view can be seen as an unfortunate result of the point noted on [p.474](#): the name 'proprietary estoppel' is confusing and apt to mislead. Fortunately, in *Thorne*, the House of Lords rejected Lord Scott's radical re-interpretation of the law.

The *reasoning* adopted by Lord Walker in *Yeoman's Row* was also problematic. Unlike Lord Scott's reasoning, it does not deny the existence of proprietary estoppel as an independent source of rights. However, it would limit the application of the doctrine by insisting that, in cases where A promises to give B a right in the future, B must act in reliance on a belief that A is under a legal duty to give B that right. As noted above, such an approach is inconsistent with previous decisions such as those in *Jennings v Rice* and *Gillett v Holt*. It is also inconsistent with the decision in *Thorne*.

Does this mean that, after *Thorne*, we can forget the apparent changes made to proprietary estoppel by the reasoning of *Yeoman's Row*? Perhaps not. One legacy of *Yeoman's Row* may be that, whilst the requirements of proprietary estoppel have not been changed, their application to commercial cases may be complicated. For example, it could be argued that

there is a clear contrast between, on the one hand, a party such as David Thorner, who trusted a relative to honour a promise, and, on the other, a party such as Mr Cobbe, an experienced property developer who should have known better than to think an oral agreement would be honoured. It could be that Lord Walker's approach in *Yeoman's Row* has some application to 'commercial' cases, where it can be argued that, unless he believes A is *already* under a legal duty to him, B acts at his own risk in relying on A's promise.

However, even that limited legacy of *Yeoman's Row* should be treated with caution. First, it seems to be inconsistent with the seminal decision of the Court of Appeal in *Crabb v Arun District Council* [1976] Ch 179. Second, any blanket distinction between 'domestic' and 'commercial' cases would be unprincipled and unworkable – this point is made at pp.771-772 in a different context, when analysing the House of Lords' decision in *Stack v Dowden*. Certainly, it would be naïve to think that business people, unlike family members, do not need to trust each other and act even in the absence of binding contracts. Indeed, economic analysis suggests that, in many situations, *both* contracting parties may benefit if one of the parties puts in useful pre-contractual work (see e.g. Bebchuk and Ben-Shahar, *Pre-Contractual Reliance* (2001) 30 Journal Legal Stud 423). For example, in *Cobbe*, B's work clearly increased the value of A's land and so created extra benefits that could, potentially, be shared between A and B. Similarly, given that commercial contracts are often complex and involve lengthy negotiations, there is often a period in which the parties have to act on the basis of mutual trust, in the absence of a legal agreement. As *Cobbe* itself shows, it would be unfortunate if the law permitted commercial parties to abuse that trust by encouraging reliance and then seeking to monopolise the benefits produced by that reliance.