Cohabitants, Detriment and the Potential of Proprietary Estoppel: *Southwell v Blackburn* [2014] EWCA Civ 1347

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This commentary critiques the Court of Appeal decision of Southwell v Blackburn *that involved a successful proprietary estoppel claim by a former cohabitant. It will argue that although the decision appears in some respects inconsistent with previous authority, it does suggest that proprietary estoppel could have a greater role to play in cohabitation disputes. Nevertheless* Southwell *is by no means a landmark ruling and nor is proprietary estoppel the panacea for cohabitants as it suffers many of the limitations levelled against the more commonly used common intention constructive trust. If the courts were to prioritise or develop proprietary estoppel further in this context, it would need to modify the traditional requirements of estoppel namely a representation, inducing detrimental reliance. With that process in mind, this commentary questions whether proprietary estoppel should be remodelled in the domestic consumer context to enable the doctrine to have greater application by cohabitants upon relationship breakdown.*

(A) Introduction

In the context of ownership disputes over the family home, the courts and academic community in England and Wales have long flirted with the prospect of developing proprietary estoppel. From as early as the 1980s, this flirtation has, at times, been overt with academics supporting the greater use of estoppel as an effective alternative to securing beneficial ownership through implied trusts.[1] More recently, these explicit calls[2] for a greater role for estoppel appear to be a direct consequence of the absence of statutory rights and remedies for cohabitants[3] coupled with the realisation that the only viable alternative to estoppel is the 'antiquated and unwieldy law of trusts'.[4]

This flirtation has also been somewhat less intentional in light of estoppel's confused relationship with the common intention constructive trust. In several cases,[5] the courts identified commonality between the two devices and questioned whether it really mattered where 'the true analysis lies'.[6] Estoppel was said to have at its core the

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[1] For an early call for the increased use of proprietary estoppel by cohabitants see, J Warburton, 'Interested or Not?' [1986] *Conveyancer and Property Lawyer* 291 at p 295, D Hayton, 'Equitable Rights of Cohabitees' [1990] *Conveyancer and Property Lawyer* 370 and D Burles, '"Promises, Promises" – Burns v Burns 20 Years On' [2003] 33 *Family Law* 797. For a more sceptical view of the development of proprietary estoppel for use by cohabitants, see M Cardinal, 'Inheritance or Estoppel – How the Cohabitant Succeeded' [2004] 34 *Family Law* 362.

[2] See S Gardner, 'Material Relief between Ex-Cohabitants 2: Otherwise than by Beneficial Entitlement' [2014] *Conveyancer and Property Lawyer* 201.

[3] Despite admirable reform proposals, see Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).

[4] The Cohabitation Rights Bill, Hansard, Lord Marks of Henley-on-Thames 12th December 2014 Column 2069.

[5] See *Lloyds Bank Plc v Rosset* [1991] 1 AC 107 at p 132 (Lord Bridge), *Yaxley v Gotts* [2000] Ch 162 at p 176 (Robert Walker LJ) and *Cox v Jones* [2004] EWHC 1486 at para [80] (Mann J).

[6] *Oxley v Hiscock* [2005] EWCA Civ 546 [71] (Chadwick LJ).

'same general principle as that invoked in *Gissing v Gissing'* namely preventing the insistence of strict legal entitlement in circumstances where it would be inequitable to do so.[7] Indeed, Hayton went so far as saying *Gissing* 'reinvented proprietary estoppel in the guise of a common intention constructive trust'.[8] This insouciance generated theoretical debate[9] but for decades stymied the practical development of proprietary estoppel as a distinct and analytically separate claim for cohabitants.[10]

With modern authorities now starting to differentiate estoppel from the common intention constructive trust,[11] an independent examination of estoppel is needed. For present purposes, the key questions become whether estoppel can, and should, be further developed so as to play a greater role in cohabitation disputes. Should estoppel be argued in the alternative to the constructive trust or should it have a more central role in litigation concerning ownership of the family home? With a view to answering these questions, the Court of Appeal decision in *Southwell v Blackburn* provides some insights and hints at future possibilities.[12] Lauded by Resolution as a 'landmark' decision[13] and generating extensive media coverage,[14] *Southwell v Blackburn* saw a cohabitant succeed on the basis of estoppel to secure a lump sum award from her former partner. At face value, this decision goes against the trend of earlier authorities where several former cohabitants were denied an estoppel remedy following relationship breakdown.[15] However, this commentary questions the methodology used by the Court of Appeal and whether the result in the case was in fact consistent with previous authority. The significance of this decision will be assessed but, more importantly, this commentary will use the judgment as a primer for analysing the future role of estoppel in disputes between cohabitants.

(A) Facts and County Court Decision

[7] *Christian v Christian* (1981) 131 NLJ 43 (Brightman LJ) referring to the House of Lords decision in *Gissing v Gissing* [1971] AC 886. The same sentiment was expressed in *Grant v Edwards* [1986] Ch 638 at p 656 (Browne-Wilkinson VC).

[8] D Hayton, 'Constructive Trusts of Homes – A Bold Approach' (1993) *Law Quarterly Review* 485, 486.

[9] See, for example, P Ferguson, 'Constructive Trusts – A Note of Caution' (1993) *Law Quarterly Review* 114 arguing in favour of separating the two devices and D Hayton, 'Equitable Rights of Cohabitees' [1990] *Conveyancer and Property Lawyer* 370. On the unhelpful cross-fertilization of ideas between the two devices, see J Martin, 'Estoppel and the Ubiquitous Constructive Trust' [1987] *Conveyancer and Property Lawyer* 211 at p 213 and B Sufrin, 'Intention and Detriment' (1987) 50 *Modern Law Review* 94 at p 100.

[10] See Mee's observation that the overlap with common intention analysis has meant that proprietary estoppel has had a 'lower profile in the family cases than would otherwise have been expected' in J Mee, *The Property Rights of Cohabitees* (Hart 1999) 93.

[11] See, for example, *Stack v Dowden* [2007] UKHL 17 at para [37] where Lord Walker questioned whether proprietary estoppel and the constructive trust 'can or should be completely assimilated'.

[12] [2014] EWCA Civ 1347. For an earlier questioning of this assimilation, see *Hyett v Stanley & Others* [2003] EWCA Civ 942 at para [27] (Sir Martin Nourse).

[13] Resolution, Groundswell of Support Building for Cohabitation Reform http://www.resolution.org.uk/news-list.asp?page_id=228&n_id=247.

[14] See http://www.dailymail.co.uk/news/article-2795843/man-ordered-pay-28-500-ex-girlfriend-break-landmark-court-ruling-unmarried-couples.html (Daily Mail), http://www.bbc.co.uk/news/uk-england-hereford-worcester-29650048 (BBC News) http://www.mirror.co.uk/news/uk-news/ex-girlfriend-keep-love-split-payout-4457423 (Daily Mirror).

[15] See, for example, *Layton v Martin* [1986] 1 FLR 171, *Coombes v Smith* [1986] 1 WLR 808, *Lissimore v Downing* [2003] 2 FLR 208, *James v Thomas* [2007] EWCA Civ 1212, *Morris v Morris* [2008] EWCA Civ 257.

The parties, David Southwell and Catherine Blackburn met in 2000. Miss Blackburn was recently divorced with two teenage children from a previous marriage. Miss Blackburn had limited resources and spent the money she acquired from the divorce renovating and furnishing a rented property in Manchester. Mr Southwell lived in Portsmouth and was unmarried with no intention of marrying in the future. In 2002 the parties decided to set up home in a location halfway between where they both were currently residing. The property was purchased in Mr Southwell's sole name and was financed through a mortgage of £100,000 coupled with the proceeds of sale from his previous property. Miss Blackburn made no direct financial contributions to the initial acquisition of the property. After seven years of cohabiting, the relationship broke down and Mr Southwell changed the locks on the property.

Miss Blackburn claimed that it was the practicalities of signing documents that caused the legal title to be vested in Mr Southwell. For Miss Blackburn, the property was intended to be a joint home and shared equally. Furthermore, Mr Southwell made numerous assurances to the effect that Miss Blackburn would always have a home which induced her to leave her previous property. Mr Southwell strongly disputed this evidence and stated that it was intended to be his sole acquisition and that he made no promises to her regarding securing a proprietary interest or granting her occupation of the property.

Miss Blackburn applied to Worcester County Court and before His Honour Judge Pearce Higgins QC secured a lump sum payment of £28,500 on the basis of proprietary estoppel. In reaching that outcome, HHJ Pearce Higgins QC made several findings of fact. It was clear that the decision to purchase the property was a joint one as it was convenient for both concerned and, if the evidence of Mr Southwell was to be believed, it would have been 'almost an accident that they both took up residence together'.[16] Yet it was apparent that Mr Southwell was 'shrewd' and guarded' and thus the acquisition had to be 'on his terms'.[17] However, whilst neither party was 'blind to the realities' of their relationship potentially ending,[18] Mr Southwell did in fact make assurances to Miss Blackburn that 'she would always have a home and be secure in [the property concerned]'.[19] For HHJ Pearce Higgins QC these assurances evinced a long-term commitment to support Miss Blackburn that, as a direct consequence, encouraged her to 'give up independence and security'. [20] Mr Southwell's personal commitment to her was further supported by evidence that Miss Blackburn was to receive a lump sum payment and pension entitlement following his death. As a result, the constituent elements of proprietary estoppel were made out; namely an assurance inducing detrimental reliance on the part of the claimant.

When satisfying the equity, HHJ Pearce Higgins QC sought to place Miss Blackburn in the same position as she was before leaving her Manchester home. The combined expenditure on the Manchester property and setting up the new property with Mr Southwell was £20,000 which, when updated in light of inflation and approximated, resulted in an award of £28,500. Mr Southwell appealed on three grounds; namely, that the alleged assurances were too imprecise, that any detriment to Miss Blackburn

[16] [2014] EWCA Civ 1347 at para [4] citing the County Court judgment, at para [11] (unreported).
[17] Ibid at para [4] citing the County Court judgment, at para [12] (unreported).
[18] Ibid at para [4] citing the County Court judgment, at para [15] (unreported).
[19] Ibid.
[20] Ibid.

had been dissipated over the course of their relationship and that Mr Southwell's conduct was not unconscionable.

(A) Court of Appeal Decision

Tomlinson LJ gave the main judgment with McFarlane and Macur LJJ agreeing. On the first ground of appeal, namely the specificity of the representation, Tomlinson LJ referred to Lord Scott's opinion in *Thorner v Major* and stated that the representation must be 'clear and unequivocal'.[21] Although counsel for Mr Southwell asserted that the right claimed was unclear as it could be construed as a life interest, a home dependent on the duration of the relationship or even a pledge of financial support, Tomlinson LJ was satisfied that the right identified sufficiently related to land. Citing observations in *Taylors Fashions Limited v Liverpool Victoria Trustees Co Ltd* that cautioned against placing the elements of estoppel into some 'preconceived formula',[22] Tomlinson LJ found that, in effect, Mr Southwell had made a promise of a secure home for life and this promise was inconsistent with claim made by his counsel that Miss Blackburn was to have accommodation only for as long as the relationship lasted. Arguments made by counsel that a home for life would be inconceivable in light of Mr Southwell's refusal to marry Miss Blackburn or share beneficial ownership were also rejected. Tomlinson LJ noted that:

> 'Just because the Appellant avoided any assurance as to equal ownership it does not follow that he could not have given an assurance as to security of rights of occupation in the house that they were in effect buying together.'[23]

On the second point of appeal concerning the detriment suffered by Miss Blackburn, Tomlinson LJ cited Robert Walker LJ's observations in *Gillett v Holt* stating that, whilst detriment was needed, it was 'not a narrow or technical concept'.[24] Detriment also was to be analysed as 'part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances'.[25] For Tomlinson LJ, the key point in time was when the promise fell to be performed and, after that point had passed, the detriment needed to be 'assessed and evaluated over the course of the relationship'.[26] Furthermore, the court accepted that detriment need not be financial in nature and thus its assessment was not an 'exercise in financial accounting'.[27]

When analysing the course of the relationship, Tomlinson LJ found that benefits flowed both ways. Miss Blackburn received rent-free accommodation for herself and her daughters coupled with financial assistance in helping her complete a three-year degree course. Mr Southwell enjoyed an increase in earnings and pension entitlement alongside an increase in the value in the home, in part, through Miss Blackburn's

[21] [2014] EWCA Civ 1347 at para [6] citing *Thorner v Major* [2009] UKHL 18 at para [15] (Lord Scott).
[22] Ibid at para [7] citing *Taylors Fashions Limited v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 at pp 151-152 (Oliver J).
[23] Ibid at para [10].
[24] Ibid at para [12] citing *Gillett v Holt* [2001] Ch 201 at p 232 (Robert Walker LJ).
[25] Ibid at para [12].
[26] Ibid at para [13].
[27] Ibid at para [17] echoing statements in *Davis v Davis* [2014] EWCA Civ 568 at paras [50]-[51] (Floyd LJ).

'major housekeeping activities'.[28] Tomlinson LJ conceded that there may be cases, such as *Sledmore v Dalby*,[29] where the flow of benefit and detriment may cancel each other out.[30] However, this was no such case, particularly as cases where parties were living as husband and wife do not lend themselves readily to that sort of 'arithmetical accounting exercise'.[31] In this instance:

> 'The various asserted benefits, flowing in both directions, were the incidents of the relationship whilst it successfully subsisted rather than direct consequences of reliance upon the promise as to security.'[32]

Therefore Tomlinson LJ affirmed the approach of HHJ Pearce Higgins QC that accepted that the flow of benefit and detriment was useful context, but nevertheless it was the causal link between the promise of a secure home made by Mr Southwell and the detriment of Miss Blackburn giving up a home that was key.

As to the final appeal point, namely that the conduct of Mr Southwell had not been unconscionable, Tomlinson LJ dismissed this swiftly. Counsel for Mr Southwell asserted that as he had catered for virtually all of Miss Blackburn's financial needs and those of her children, it was not unconscionable for him to require her to leave the property. Tomlinson LJ found that unconscionability was 'not a watertight element in the estoppel but rather a feature which permeates all of its elements'.[33] By focusing on the provision of support by Mr Southwell and whether that provision negated a finding of unconscionability, there was a failure to recognise a promise on the strength of which Miss Blackburn gave up her home. In essence, Mr Southwell's argument focused on incidents of the relationship and not the promise resulting in detrimental reliance. There was no need for Miss Blackburn to add further evidence of unconscionability, such as her being excluded from the home, once detrimental reliance upon an assurance had been made out. After dismissing the appeal, Tomlinson LJ affirmed the original award made by HHJ Pearce Higgins QC.

(A) Analysis

Southwell v Blackburn is a significant decision on the use of estoppel by cohabitants. After rejecting the application of a common intention constructive trust, a more routinely applicable device in this context,[34] *Southwell* is a notable example of the Court of Appeal recognising that proprietary estoppel has clear application in these types of disputes. This is telling as when both constructive trust and proprietary estoppel are argued, often the rejection of the former results in the dismissal of the latter.[35] Miss Blackburn's success also suggests that rather than pleading estoppel in the alternative to a common constructive trust, as was common in cases following *Stack v Dowden*,[36] estoppel has the potential to be developed as the preferred claim for disappointed former cohabitants. Indeed, as will be explored further below, there

[28] Ibid at para [15].
[29] [1996] 72 P&CR 196.
[30] [2014] EWCA Civ 1347 at para [17].
[31] Ibid.
[32] Ibid at para [18].
[33] Ibid at para [20].
[34] See, for example, *Jones v Kernott* [2011] UKSC 53 at para [51] (Lady Hale and Lord Walker).
[35] See *James v Thomas* [2007] EWCA Civ 1212, *Morris v Morris* [2008] EWCA Civ 257.
[36] [2007] UKHL 17.

may now be cogent reasons for counsel to rely solely on estoppel because evidence justifying that particular claim may actually undermine an argument based on sharing of beneficial ownership under a common intention constructive trust.

Coupled with the prioritisation of estoppel, *Southwell* also demonstrates judicial appreciation of the domestic consumer context. It hints at the prospect of the courts developing estoppel further to acknowledge the interactions, interdependency and potential vulnerability found in cohabitating relationships.[37] Whilst some have criticised developing equitable doctrines to fit a particular context,[38] this process has to an extent already occurred in the context of common intention constructive trust.[39] In relation to proprietary estoppel, it was also predicted as a likely result of the House of Lords decision in *Thorner v Major*.[40] That decision intimated that, in contrast to cases originating in a commercial context,[41] estoppel may be more likely to succeed in the domestic context in light of the doctrine's greater tolerance of informality.[42] Whilst the development or as some have called it 'familialisation' of equitable doctrines and principles can be viewed as both beneficial and modernising,[43] *Southwell* exposes some of the difficulties of modifying estoppel for specific use by cohabitants.

Before analysing key aspects of *Southwell*, it should be noted that, at a general level, the Court of Appeal judgment is certainly no master class in judicial reasoning. Although an appeal on the facts and not specifically on the law, the laconic and short judgment struggles to reconcile some of the first instance findings with accepted legal principle and the reasoning often hides behind statements as to the breadth and flexibility of proprietary estoppel. Similarly, by failing to clarify and correct specific points of law, the Court of Appeal appears implicitly to endorse a less than satisfactory first instance decision. For example, although Tomlinson LJ noted that the facts were very much in dispute, in his view the first instance judge had made 'clear findings'.[44] However, when the Court of Appeal reproduces these findings they do appear somewhat contradictory. One cannot help wondering whether Tomlinson LJ's support of observations made in *Thorner* that an appellate court should be slow to interfere with findings of a first instance judge perhaps explains why the court

[37] Lending support to Gardner's call to modify the transactional requirements of estoppel, see S Gardner, 'Material Relief between Ex-Cohabitants 2: Otherwise than by Beneficial Entitlement' [2014] *Conveyancer and Property Lawyer* 201.

[38] See, for example, N Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31(2) *Legal Studies* 175. See also A Hayward, 'The 'Context' of Home: Cohabitation and Ownership Disputes in England and Wales' in M Diamond & T Turnipseed, *Community, Home and Identity* (Ashgate 2012) 179.

[39] See J Dewar, 'Land, Law, and the Family Home' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998) and J Dewar, 'Give and Take in the Family Home' [1993] *Family Law* 231. See also *Stack v Dowden* [2007] UKHL 17 where Baroness Hale advocated a context specific approach to be adopted in the domestic consumer context.

[40] [2009] UKHL 18 as noted in N Piska, 'Hopes, Expectations and Revocable Promises in Proprietary Estoppel' (2009) 72(6) *Modern Law Review* 984 at p 1015.

[41] See *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55.

[42] See Lord Neuberger of Abbotsbury, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy' (2009) 68(3) *Cambridge Law Journal* 537.

[43] See A Hayward, 'Family Property and the Process of Familialization of Property Law' [2012] 23(3) *Child and Family Law Quarterly* 284 and A Hayward, 'Finding a Home for "Family Property"' in N Gravells, *Landmark Cases in Land Law* (Hart 2013).

[44] [2014] EWCA Civ 1347 at para [3].

sought to gloss over these inconsistencies.[45] Of course, there must be a degree of deference to the judge who saw and heard the witnesses giving evidence; however, that respect alone cannot be used as a justification for dispensing with the functions of an appellate court. Whilst it will be argued that *Southwell* is a useful example of a post-*Thorner* case demonstrating a use of estoppel cognisant of the cohabitation context, there are two key areas where the decision and its future impact on the law requires closer inspection.

(A) The Nature and Specificity of Representations

It is trite law that for an estoppel to arise there needs to be a representation or assurance. [46] In *Thorner*, Lord Walker noted the absence of a comprehensive definition of proprietary estoppel but identified the fact of a representation or assurance as a key element of the doctrine.[47] This observation naturally is consistent with earlier authorities stating that an assurance was required.[48] However, there is inconsistency in the case law as to the degree of specificity required for this representation or, phrased differently, the uncertainty tolerated for such representations to generate liability. As a result, there is a tension found in this requirement that has particular resonance in the cohabitation context. If the specificity bar is set too high, the courts could restrict claims and thereby allow the insistence of strict rights by the legal owner in circumstances that would be deemed inequitable.[49] If set too low, poorly defined representations could generate an equity but, by being vague, an equity that would suffer from even worse unpredictability when the court comes to craft the appropriate remedy.

In *Southwell*, Tomlinson LJ recognised the requirement of a representation but proceeded on the basis that the representation must be 'clear and unequivocal', which he attributed to Lord Scott's opinion in *Thorner*.[50] Obviously, the selection of this particular viewpoint could be linked to Mr Southwell's counsel arguing in favour of a higher test for the representation. However, the selection of this test, adopted by the Court of Appeal in *Thorner* and deriving originally from promissory estoppel, is curious. It is well known that the opinion of Lord Scott, who fully supported this test in the House of Lords, is widely viewed as somewhat out of line with the other Lordships in *Thorner*.[51] In relation to this specific requirement, both Lord Walker and Lord Rodger were critical of the need for the representation to be 'clear and

[45] Ibid at para [19].
[46] See, generally, B McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 2.01.
[47] [2009] UKHL 18 at para [29].
[48] See *Matharu v Matharu* (1994) 68 P & CR 93.
[49] See R Walker, 'Which Side "Ought to Win": Discretion and Certainty in Property Law' (2008) 6 *Trust Quarterly Review* 5. Also note that a degree of ambiguity should be tolerated to distinguish estoppel from a contractual claim.
[50] Lord Neuberger, at para [84] in *Thorner*, also did not seek to cast doubt on the need for a 'clear and unequivocal' representation.
[51] For example, Lord Scott stated in *Cobbe*, at para [14], that proprietary estoppel was a subspecies of promissory estoppel; a view which Lord Walker cast doubt upon in *Thorner* at para [67]. Similarly, Lord Scott also sought to controversially analyse testamentary promise cases through a remedial constructive trust. On the difficulties of Lord Scott's analysis in both *Cobbe* and *Thorner* see M Dixon, 'Proprietary Estoppel: A Return to Principle' [2009] *Conveyancer and Property Lawyer* 260 at pp 266-268 and B Sloan, 'Proprietary Estoppel: Recent Developments in England and Wales' (2010) *Singapore Academy of Law Journal* 110 at pp 116-119.

unequivocal'. Indeed, they preferred to say that, in light of the context of the dispute, the representation needed to be 'clear enough'.[52] Lord Hoffmann did not directly comment on this test but said that it sufficed that the representations were intended to be 'taken seriously'.[53] These viewpoints also map onto those found in previous cases that have supported a lower benchmark.[54] Therefore, by Tomlinson LJ accepting a more stringent test for a representation in *Southwell*, this makes the analysis and acceptance of the wide-ranging and somewhat *equivocal* representations made by Mr Southwell rather problematic. This apparent inconsistency between the legal test and its actual application was particularly noticeable in *Thorner*, where the respondent had an aversion to speaking in direct terms yet both Lord Scott and Lord Neuberger were able to satisfy themselves that clear and unequivocal representations had in fact been made.[55]

A closer inspection of the representations in *Southwell* shows that although the Court of Appeal largely accepted the findings of fact of the first instance judge, the representations made to Miss Blackburn were varied. In the County Court, HHJ Pearce Higgins QC believed both parties to be 'untruthful' as to the events leading up to the acquisition of the property.[56] Nevertheless, Mr Southwell was deemed to have made several assurances, namely that Miss Blackburn 'would always have a home and be secure in this one'[57] and that Mr Southwell was 'taking on a long term commitment to provide her [Miss Blackburn] with a secure home'.[58] HHJ Pearce Higgins QC provided a more detailed explanation of Mr Southwell's assurances when he said:

> 'The discussions they had were not specific as to ownership of the home they were moving into. They were specific as to the nature and extent of his commitment to her and the provision of secure accommodation for her. He promised her secure rights of occupation at the house that they were in effect buying together, although in his sole name. He led her to believe that she would have the sort of security that a wife would have, in terms of accommodation at the house, and income.'[59]

Counsel for Mr Southwell argued that there was no attempt made by him to clarify what provision of a secure home meant[60] and that, as a result of this ambiguity, several questions could be asked as to the nature of the entitlement. For example, was Mr Southwell offering a home for life or a home for as long as the relationship endured? Similarly, what would happen if Miss Blackburn formed a new relationship? What precisely was meant by the sort of security a wife would have? Arguably HHJ Pearce Higgins QC failed to address these different types of representations and conflated representations as to Mr Southwell's commitment and

[52] *Thorner v Major* [2009] UKHL 18 at paras [26] and [56].
[53] [2009] UKHL 18 para [5].
[54] Such as *Uglow v Uglow* [2004] WTLR 1183 at para [9] (Mummery J).
[55] See B McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) at para 2.194 and B Sloan, 'Estop me if you think you've heard it' (2009) 68(3) *Cambridge Law Journal* 518 at pp 519-520.
[56] [2014] EWCA Civ 1347 at para [3].
[57] Ibid at para [4] citing the County Court judgment, at para [15] (unreported).
[58] Ibid.
[59] Ibid at para [4] citing the County Court judgment, at para [16] (unreported).
[60] Ibid at para [6].

provision of economic security (which cannot form the basis of an estoppel claim) with those of residential security (which can).[61] Again without fully confronting these issues by delineating what can and cannot form the basis of a representation, these questions were also dismissed by Tomlinson LJ. He merely accepted these findings of fact, stating that the 'thrust' of them was that Miss Blackburn 'would have an entitlement which would be recognised in the event of breakdown of the relationship'.[62]

The treatment of these representations is interesting and, as noted below, lacks analytical rigour, particularly as to the court's analysis of the precise nature of the entitlement being conferred. Even though the parties need not identify the precise legal interest conferred,[63] was the entitlement conditional on the relationship enduring and was it bound up too closely with pledges of financial security that cannot form an estoppel? It appears that these considerations were not pertinent as the cumulative effect of the somewhat ambivalent assurances appeared to be enough to dispense with the need for specificity as to the representation. Indeed, Tomlinson LJ even stated that he did not think it 'necessary to attempt further juristic analysis of the proprietary interest promised'.[64] This broad-brush approach to both the nature and specificity of the representations may further facilitate the application of proprietary estoppel to the often unstructured and undocumented dealings between cohabitants but is unfortunate for several reasons.

(B) Consistency with Previous Authority

It must be questioned how far *Southwell* is consistent with earlier decisions. Of course, there is no expectation that the parties will name the type of proprietary or non-proprietary interest conferred. However, one dividing line in the case law is that a representation as to financial security cannot form the foundation of an estoppel claim. This can be explained on the basis that it does not link to an identifiable piece of property and, more practically, it has a greater chance of being ambiguous as to future entitlement.[65] Three earlier cases provide insight as to what side of the line the decision in *Southwell* falls.

The early case of *Coombes v Smith*, decided in 1986, shares some similarities with *Southwell*.[66] In that case, the parties were married to others but wished to live together. The defendant purchased a property and, after becoming pregnant by defendant, the plaintiff moved into the property and gave up her job. Although the defendant never actually moved into the property, Jonathan Parker QC, sitting as deputy High Court judge, accepted that representations had been made to the effect that the defendant 'would always provide her with a roof over her head'.[67] Despite the case being determined using the *Willmott v Barber* probanda such that the court was

[61] See *Layton v Martin* [1986] 2 FLR 227 and *Lissimore v Downing* [2003] 2 FLR 308, discussed further below.
[62] [2014] EWCA Civ 1347 at para [9].
[63] See Lord Scott in *Cobbe* at paras [18]-[21] insisting on a 'certain interest' in land.
[64] [2014] EWCA Civ 1347 at para [7].
[65] On the limitations of this approach, see S Gardner, 'Material Relief between Ex-Cohabitants 2: Otherwise than by Beneficial Entitlement' [2014] *Conveyancer and Property Lawyer* 201 at p 205.
[66] [1986] WLR 808.
[67] Ibid at p 813.

thus looking for a mistaken belief as to legal rights,[68] the reasoning of Jonathan Parker QC still has significance when considering *Southwell* for several reasons.

In dismissing the plaintiff's claim, it was found that the fact that the defendant would always provide her with a roof over her head was very different from a belief that she had a legal right to remain against his wishes. Jonathan Parker QC was persuaded by the fact that in spite of the plaintiff asking on two occasions to have the property transferred into joint names, the defendant refused on both occasions. Crucially, there was no evidence of discussion as to what would happen in the event that the relationship broke down and the defendant wanted to live with another. Perhaps typical for cohabiting relationships,[69] the plaintiff said 'I didn't ask that sort of question in the early days. I thought things would be OK'.[70]

Here there are several similarities with *Southwell,* yet interestingly this evidence is used in *Coombes* to defeat the generation of an equity rather than to support a finding of a representation.[71] Thus even though there was an identifiable property in *Coombes*, the fact that there was no discussion of what would happen following relationship breakdown appeared to negate the finding of a representation capable of sustaining an estoppel.[72] In the later case of *Ottey v Grundy,*[73] Arden LJ accepted that a conditional representation could negate a proprietary estoppel claim.[74] However, whilst counsel for Mr Southwell raised this point,[75] it was not deemed an issue in *Southwell* nor was it addressed in substantive detail. It appears that the fact the relationship had ended had no direct bearing on the representation. This finding suggests a continuation of the light-touch approach taken to the estoppel representation requirements; a trend running through the earlier decisions in *Gillet v Holt,*[76] *Jennings v Rice*[77] and *Thorner.*

Coombes also supports the view that the assurance of accommodation, namely 'a secure home for life', also helped defeat the finding of co-ownership under a trust. In light of *Southwell,* this fact again should make practitioners pause when deciding whether to argue estoppel and common intention constructive trust in the alternative. This strategy is quite common in family property litigation but comes with risks where discussions limiting the right conferred to something less than some form of shared ownership can undercut the trust argument. Thus where representations fall short of a sharing of beneficial title or are clearly unilateral, this obviously would

[68] (1880) 15 ChD 96.
[69] On the common misconceptions held by cohabitants as to the level of legal protection see, R Probert, 'Why Couples Still Believe in Common-Law Marriage' [2007] 37 *Family Law* 403, R Probert, 'Cohabitation: current legal solutions' (2010) 62 *Current legal problem*s 316 and A Barlow & J Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' [2010] 22(3) *Child and Family Law Quarterly* 328.
[70] [1986] WLR 808 at p 811. See comments made by the claimant in *Midland Bank v Cooke* [1995] 4 All ER 562 (CA) on not needing legal protection as she believed she would be protected in the event of relationship breakdown.
[71] It is perhaps the case this this case took an overly strict approach to estoppel principles; see D Hayton, 'Equity and the Quasi-Matrimonial Home' [1986] *Cambridge Law Journal* 394 at p 394.
[72] A similar approach can be viewed in *James v Thomas* [2007] EWCA Civ 1212.
[73] [2003] EWCA Civ 1176.
[74] See B McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) at para 2.127.
[75] [2014] EWCA Civ 1347 [6].
[76] [2001] Ch 201.
[77] [2002] EWCA Civ 159.

necessitate arguing estoppel as opposed to a constructive trust. However, where these representations are equivocal as to what was being conferred, arguing in the alternative, with estoppel *now as the lead argument*, may be advantageous. When faced with a choice practitioners have been advised that estoppel:

> 'should be preferred for it will always be available where a common intention constructive trust is available, there is no need to search for an artificial intention and the remedy can be adjusted to fit the circumstances of the case'.[78]

This again perhaps indicates the enhanced future role of estoppel in these cases. Two other cases provide guidance on pledges of financial security, which also formed part of the representations in *Southwell*. In *Layton v Martin*, the plaintiff formed a relationship with the defendant, a much older married man.[79] The defendant wrote to plaintiff requesting she live with him and pledged 'what emotional security I can give, plus financial security during my life and financial security after my death'.[80] They lived together for around seven years and when the relationship broke down, the plaintiff was cut out of the will. Following the defendant's death, the plaintiff made a claim for financial provision out of the deceased's estate and specifically argued proprietary estoppel on the basis of detrimental reliance induced by the representations in the defendant's letter. Drawing comparison to the application of the common intention constructive trust,[81] Scott J rejected her proprietary estoppel claim as the representations made by the defendant did not relate to a specific asset and were expressed broadly as pledges of 'financial security'. As Scott J noted:

> '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'.[82]

A similar approach to *Layton* can be identified in *Lissimore v Downing*.[83] Here, the plaintiff lived with the defendant on a large country estate for approximately eight years and during that time was assured that she was the 'Lady of the Manor'.[84] The defendant also said 'I bet you never thought all this would be yours in a million years'.[85] Other representations were made that she would be taken care of and would not 'want for anything'.[86] The plaintiff said that she had given up employment to live with the defendant, including better job offers, and had looked after the country estate. His Honour Judge Norris QC rejected the plaintiff's proprietary estoppel claim.

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[78] L Tucker, N Le Poidevin & J Brightwell, *Lewin on Trusts* (19th Edition Sweet & Maxwell 2014) at para 9-083. See also R Taylor, 'Predicting the Remedy in a Proprietary Estoppel Claim: Which Route Home?' http://www.jordanpublishing.co.uk/practice-areas/family/news_and_comment/predicting-the-remedy-in-a-proprietary-estoppel-claim-which-route-home#.VVIC-Y5VhBd

[79] [1986] 2 FLR 227.

[80] Ibid 230.

[81] Ibid at pp 237-238.

[82] Ibid at pp 238-239. This was affirmed in *Thorner v Major* [2009] UKHL 18 at para [63] (Lord Walker).

[83] [2003] 2 FLR 308.

[84] Ibid at paras [29] and [47].

[85] Ibid at para [29].

[86] Ibid at para [18].

Although conceding that cases have permitted a degree of inference when identifying the property covered by the estoppel,[87] the representations made by the defendant did not relate to any specific property and were 'not expressed in terms which enable any objective assessment to be made of what is promised'.[88] As the representations were to unascertained property, satisfaction of the equity would involve the same process as identification of the equity.[89]

Distinctions can be drawn between these two cases and *Southwell.* What appears to be the case in *Southwell* is that the multiple representations went further than those provided in these earlier cases. By putting to one side the issue of representations as to provisions of income and maintenance as a wife, the Court of Appeal was able to focus on representations made by Mr Southwell as to a secure, but more importantly, identifiable, home for life. Whilst that finding helped to negate the finding of a common intention constructive trust, it appears that this reference to the home was enough for the Court of Appeal to find the requisite representation for estoppel. As will be explored below in relation to detriment, this also shows that whereas the representations were clearly bound up with statements as to Mr Southwell's financial commitment to Miss Blackburn, those statements could be downplayed as merely the background context of the case. This is reminiscent of Lord Neuberger's remarks in *Thorner* that where an assurance had multiple meanings, an estoppel claim could be made out 'if the facts otherwise satisfy all the requirements of an estoppel'.[90] What can be viewed here are almost acts of severance whereby the problematic statements as to economic support are cut out of the representation. This also resonates with the observation made in *Macdonald v Frost* that the representations need to be analysed with regard to the:

> 'specific context in which they are given, bearing in mind that members of a family are less likely to be precise and legalistic when discussing such matters than people in a commercial relationship'.[91]

In addition, the phrasing of the overarching nature of proprietary estoppel in the broadest possible terms by the Court of Appeal may also have enabled the court to sidestep the need for a truly clear and unequivocal representation despite the apparent insistence on that test. Therefore the criticisms levelled at both *Coombes*[92] and *Lissimore* that estoppel principles were expressed in an overly strict manner seem to be correct as such strictness is no longer present.[93] What is clearly visible in *Southwell* is further evidence of a holistic, context-sensitive approach being adopted by the court when dealing with representations made in a domestic context.

(B) The Nature of Representations made by Cohabitants

Thinking more broadly as to the implications of this case for future cohabitation disputes, *Southwell* appears to suggest that the courts may be more willing to tolerate

[87] See *Wayling v Jones* [1995] 2 FLR 1029 and *Jennings v Rice* [2002] EWCA Civ 159.
[88] [2003] 2 FLR 308 at para [18].
[89] Ibid at para [12].
[90] [2009] UKHL 18 at para [86].
[91] [2009] EWHC 2276.
[92] D Hayton, 'Equity and the Quasi-Matrimonial Home' (1986) *Cambridge Law Journal* 394 at p 394.
[93] R Bailey-Harris, 'Lissimore v Downing' (Comment) [2003] *Family Law* 566 at p 568.

a greater degree of ambiguity as to the precise nature of the representation. This fact may open up estoppel more readily to cohabitants for several reasons. Firstly, it offers some judicial recognition and accommodation to the unstructured, informality of dealings in this context, particularly dealings that may have lasted for several years. With *Southwell,* the assurances took place over a long period of time and although they were more explicit than those in *Thorner*, Tomlinson LJ was clearly exploring what Lord Walker had termed a 'continuing pattern of behaviour'.[94] Thus the initial representations when the property was purchased were considered in light of much later conduct such as Mr Southwell providing for Miss Blackburn in his will. What can be seen here is the court refusing to break down the behaviour into discrete elements[95] and to analyse the representation in a narrow manner. Similarly there is toleration of a degree of ambiguity. After all, as Mee has noted:

> 'lovers are more likely to promise in vague terms that they will love and take care of each other forever than to specify the precise benefits which their eternal love will confer'.[96]

There are other examples of the courts going even further than merely interpreting a vague representation but instead engaging in a process of inference to piece together representations. *Thompson v Foy* is a good example of this approach where both direct evidence of the representation and subsequent reliance on that representation was 'to say the least, thin'.[97] Here Lewison J inferred an understanding from other evidence such as the dealings between the parties because there was found to be no 'specific conversation or…specific words spoken or written'.[98] So whilst Mee noted that 'the basic requirement of a representation is likely to prove fatal in the context of many family property disputes', this view may be somewhat out-dated in light of *Thorner*[99] and now also *Southwell.*

Secondly, this type of analysis in *Southwell* provides a stark contrast to the strict requirements of the common intention constructive trust. This juxtaposition may render the use of estoppel more attractive for cohabitants. It is clear from the academic discourse relating to the implied trusts that parties in an interpersonal relationship very often fail to talk with specificity as to property ownership.[100] As Jacob LJ stated in the Court of Appeal in *Jones v Kernott*:

> 'In the real world unmarried couples seldom enter into express agreements into what should happen to property should the relationship fail and often do not settle matters clearly when they do. Life is untidier than that. In reality

[94] [2009] UKHL 18 at para [60].
[95] As cautioned by Lord Walker in *Thorner* at para [60].
[96] J Mee, *The Property Rights of Cohabitees* (Hart 1999) at p 102.
[97] [2009] EWHC 1076 (Ch) at para [93] (Lewison J).
[98] Ibid at para [92].
[99] J Mee, *The Property Rights of Cohabitees* (Hart 1999) at p 102. For the position post-*Thorner,* see J Mee, 'The Limits of Proprietary Estoppel *Thorner v Major*' [2009] 21(3) *Child and Family Law Quarterly* 367.
[100] See J Eekelaar, 'A Woman's Place – A Conflict between Law and Social Values' [1987] *Conveyancer and Property Lawyer* 93, S Gardner, 'Rethinking Family Property' (1993) 109 *Law Quarterly Review* 263, N Glover and P Todd, 'The Myth of Common Intention' (1996) 16 *Legal Studies* 325 and U Riniker, 'The Fiction of Common Intention and Detriment' [1998] *Conveyancer and Property Lawyer* 202.

> human emotional relationships simply do not operate as if they were commercial contracts and it is idle to wish that they did'.[101]

There are other examples where the courts explicitly acknowledged that agreements as to beneficial ownership were notoriously hard to locate.[102] Nevertheless, in a departure from some of the earlier authorities such as *Eves v Eves*[103] and *Grant v Edwards*[104] where agreements were magically concocted by the courts, more recent cases all maintain the need for a real or genuine common intention between the parties.[105] Recently, the Court of Appeal in *Curran v Collins* endorsed this strict insistence on a true common intention with Lewison LJ calling *Eves* and *Grant* 'fact-sensitive'.[106] Even though *Stack* and *Jones v Kernott* introduced a more context-sensitive and holistic analysis of common intentions and contained obiter statements calling for a relaxation of the acquisition rules for a constructive trust,[107] greater flexibility has not materialised. As noted by Sloan,[108] the High Court and Court of Appeal have been 'largely unable, but occasionally unwilling' to soften the acquisition rules laid down by the House of Lords in *Lloyds Bank v Rosset.*[109] Obviously stare decisis imposes a limit on how far lower courts can redirect legal development but, nevertheless, the fact that the highly criticised *Rosset* principles continue to be rigorously applied poses significant difficulties for a cohabitant arguing for a constructive trust.

The more holistic approach to identifying representations seen in *Thorner* and *Southwell* suggests greater flexibility than the constructive trust and may make estoppel more attractive to cohabitants. Indeed, Pawlowski remarked that *Southwell* highlighted 'the relative ease' in which a cohabitant could acquire an estoppel equity in the family home.[110] However, as will be argued below, it would be unwise to take this argument too far and caution must be exercised when conceptualising estoppel as a newly-minted remedy for cohabitants. Where there is a vague representation, it may be harder to establish the causal link between that representation and reliance. Furthermore, even with the most generous amount of inference and sensitivity to the domestic context, a judge recognising an equivocal representation may struggle to satisfy themselves as to presence of the detrimental reliance required. It should be remembered that representations alone will not generate an equity and a cohabitant must also demonstrate detrimental reliance on these representations. The role played

[101] *Jones v Kernott* [2010] EWCA Civ 578 at para [90].
[102] See *Bernard v Josephs* [1982] Ch 391 (Ch) at p 404 where Griffiths LJ noted the 'air of unreality' involved in the exercise of searching for often 'unexpressed and probably unconsidered intentions'.
[103] [1975] 3 All ER 768.
[104] [1986] 2 All ER 426.
[105] See *James v Thomas* [2007] EWCA Civ 1212 and *Morris v Morris* [2008] EWCA Civ 257. See N Piska, 'A Common Intention or a Rare Bird? Proprietary Interests, Personal Claims and Services Rendered by Lovers Post-Acquisition' [2009] 21(1) *Child and Family Law Quarterly* 104 at p 104 who commented that both of these cases suggest that the 'non-owning claimant may in fact be in a worse position than before *Stack v Dowden*'.
[106] [2015] EWCA Civ 404 at para [69].
[107] [2011] UKSC 53.
[108] B Sloan, 'Keeping Up with the Jones Case: Establishing Constructive Trusts in 'Sole Legal Owner' Scenarios' (2015) 35 *Legal Studies* 226 at p 251.
[109] [1990] UKHL 14.
[110] M Pawlowski, 'Informality and Entitlement in the Family Home: Estoppel or Declaration of Trust? Part One' [2015] *Family Law* 175 at p 175.

by detriment and the limiting effect it may have on claims made by cohabitants will now be explored.

(A) Detriment and the Flow of Benefits and Burdens

Detriment plays a key role in estoppel cases through justifying equity's intervention. Whilst the Court of Appeal's approach to detriment in *Southwell* is largely consistent with earlier authorities, it does offer some insights when applied to a cohabiting relationship. It is well known that there must be a causal link between the promise relied upon and the acts of the claimant constituting detriment.[111] In addition to the issue of finding a representation, this need for a causal link often presented an additional hurdle for litigants in cohabitation cases. Historically, the case law revealed the difficulty of establishing detriment and this was clearly visible in *Coombes* where the plaintiff argued that detriment could involve 'allowing herself to become pregnant by the defendant', leaving her husband and the performance of housework and gardening.[112] Jonathan Parker QC's treatment of these claims is informative. He said it would be 'wholly unreal, to put it mildly' to say that the fact of falling pregnant by the defendant constituted a detriment induced by the defendant's representations.[113] He noted that the plaintiff leaving her husband was equally not capable of being detriment:

> 'The reality is that the plaintiff decided to move into [the property] because she preferred to have a relationship with, and a child by, the defendant rather than continuing to live with her husband. It seems to me have been as simple as that'.[114]

As for domestic contributions and housework, these were performed as occupier, mistress and as mother 'in the context of a continuing relationship by the defendant'.[115] Although the assurance does not have to be the only reason for the detriment, *Coombes* provides an early example of the court breaking the crucial causal connection. Clearly, it is difficult to explain progression of an interpersonal relationship and the deepening of ties between the parties as detriment capable of triggering estoppel liability. The same problem be found in the context of the common intention constructive trust.[116] The well-known example is *Eves v Eves* where the female claimant could demonstrate detriment by virtue of wielding a 14lb sledge hammer to break up a concrete driveway on the understanding there was an agreement between the parties. By stepping outside perceived gender roles,[117] Miss Eves was able to show that her conduct was not attributable solely to 'mutual love and affection' but to a belief that she was acquiring an interest in the home. However, this argument is often difficult to make.[118] Thus to argue that all your conduct was

[111] As shown in *Wayling v Jones* [1995] 2 FLR 1029.
[112] [1986] WLR 808, 813.
[113] Ibid 820.
[114] Ibid.
[115] Ibid.
[116] See A Lawson, 'The Things we do for Love: Detrimental Reliance in the Family Home' (1996) 16 *Legal Studies* 218.
[117] K Gray and S Gray, *Elements of Land Law* (5th edn, Oxford University Press 2009) 893.
[118] As noted in *James v Thomas* [2007] EWCA Civ 1212 at para [36] (Chadwick LJ). See also feminist scholarship on the devaluing of domestic contributions by the law such as M Oldham, 'Homemaker Services and the Law' in D Pearl & R Pickford, *Frontiers of Family Law* (2nd edn, Wiley 1995) 270 at

motivated only by the assurance given looks mercenary but to explain your conduct on the basis of affection severs the link between the assurance and detriment and would defeat the claim. This tension is noted in *Lissimore* where His Honour Judge Norris QC remarked that 'looking at a relationship after its dissolution and through the lawyer's lens of a proprietary claim can give a distorted view'.[119]

Southwell may be informative on the issue of detriment for several reasons. Firstly, *Southwell* emphasises earlier judicial statements that detriment was not a 'narrow or technical concept'.[120] Detriment was also part of 'a broad enquiry as to whether repudiation of an assurance is or is not unconscionable in all circumstances'.[121] This approach built upon the observations made by Floyd LJ in *Davies and Davies v Davies.*[122] In that case detriment not only covered non-financial contributions,[123] but involved a degree of judicial conjecture in contrasting the benefits of working one job against the burdens of working another with 'more difficult working relationships'.[124] Pawlowski has argued that the fact that courts accepted detriment which comprised purely spousal or domestic services gave estoppel a clear advantage over the common intention constructive trust.[125] Here, it can be assumed that the continued recognition in *Southwell* of non-financial contributions constituting detriment is beneficial. Yet, without a sufficiently precise representation, these contributions cannot form the basis of an enforceable equity, no matter how sweeping the court's inquiry. This suggests that estoppel may not always come to the aid of a cohabitant and should not always be preferred over the common intention constructive trust.

Secondly, Tomlinson LJ provided interesting comments on the cancelling out of the claimant's detriment. Earlier cases have shown that satisfaction of the equity may be refused by the court where benefits accrued to the claimant outweigh the detriment incurred.[126] This power to refuse a remedy stems from the court's remedial discretion and the fact it should grant the claimant 'the minimum equity to do justice'.[127] The power also provides another instance where estoppel may not always be better than the constructive trust. With the latter, the finding of detriment reliance generates an institutional or substantive constructive trust, which cannot then be denied by the court on the basis that the claimant also received a benefit. Once the elements of acquisition are satisfied, it is left to the courts to quantify beneficial ownership on the basis of common intention. This is not the position with estoppel seeing as there is a

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pp 273-278, A Bottomley, 'Women and Trust(s): Portraying the Family in the Gallery of Law' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998) and R Probert, 'Equality in the Family Home? Stack v Dowden [2007]' (2007) 15 *Feminist Legal Studies* 341.

[119] *Lissimore v Downing* [2003] 2 FLR 308 at para [47]. For a similar sentiment, see *H v M (Property: Beneficial Interest)* [1992] 1 FLR 229 at p 243 (Waite J).

[120] *Gillett v Holt* [2001] Ch 201, 232.

[121] Ibid.

[122] [2014] EWCA Civ 568.

[123] A point noted in the early decision of *Greasley v Cooke* [1980] WLR 1307 at pp 1311-1312 (Lord Denning MR).

[124] [2014] EWCA Civ 568 at para [55] (Floyd LJ).

[125] M Pawlowski, 'Informality and Entitlement in the Family Home: Estoppel or Declaration of Trust? Part One' [2015] *Family Law* 175 at p 175. On the ignorance of non-financial contribution see *Burns v Burns* [1984] Ch 317.

[126] See *Sledmore v Dalby* (1996) 72 P&CR 196 and *Uglow v Uglow* [2004] WTLR 1183. See also M Pawlowski, 'Proprietary Estoppel – Satisfying the Equity' (1997) *Law Quarterly Review* 232.

[127] *Crabb v Arun DC* [1976] Ch 179 at p 198 (Scarman LJ).

two-stage analysis focused on generation of the equity followed by satisfaction of that equity by the court.[128]

This issue was addressed in *Southwell*. It was argued by Mr Southwell's counsel that Miss Blackburn received rent-free accommodation and was able to enhance her earning potential through a degree course.[129] Similarly, Miss Blackburn no longer had to pay rent on her previous property and was able to live rent free in the new property with Mr Southwell.[130] When viewed from the opposite perspective, Tomlinson LJ recognised that Mr Southwell had increased earning capacity through a promotion and was able to benefit from the increase in the value of property through Miss Blackburn's work in the home.[131] HHJ Pearce Higgins QC summed this up as Mr Southwell having 'in effect a wife, but without full legal responsibilities'.[132]

Adopting the broad-brush approach to the evaluation of detriment, Tomlinson LJ stated that the judge was 'wise not to be drawn into an exercise of attempted evaluation of the benefits which, as he rightly observed, flowed both ways'.[133] Obviously, there was a difficulty in calculating the cost of particular activities as they comprised non-financial contributions. Tomlinson LJ accepted that there will be conduct that is 'simply incapable of financial quantification'.[134] This is a prominent argument seen in the constructive trust context to deny acquisition of a beneficial interest based on a non-financial contribution. More importantly, the reluctance to engage with the range of detrimental acts alleged by Miss Blackburn may be explained on a different basis. Tomlinson LJ was keen to stress that some aspects were merely 'incidents of the relationship' as opposed to 'direct consequences of reliance upon the promise as to security'.[135]

At face value, this treatment of the flow of benefit and detriments exposes a degree of judicial pragmatism and clearly evinces a wide remedial discretion. However, could there be a contradiction here regarding when the relationship will be viewed as relevant and when it provides merely context? On the one hand, detriment has to be 'assessed and evaluated over the course of the relationship'[136] and, in light of the doctrine's focus on unconscionability, its elements should not be compartmentalised. Thus the 'familial and personal' dimension of the dispute emphasised in *Thorner* or the incidents of the relationship offer an important context when understanding the nature of the representation between the parties.[137] On the other hand, the court's treatment of detriment seems also to work in the opposite direction. Non-financial and domestic activities that need to be recognised if the court was looking at the circumstances in the round have a real risk of being marginalised as merely an ancillary aspect of the case.[138]

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[128] See arguments for a more unified process in S Bright & B McFarlane, 'Proprietary Estoppel and Property Rights' (2005) 64(2) *Cambridge Law Journal* 449.
[129] [2014] EWCA Civ 1347 at para [4] citing the County Court judgment, at para [15] (unreported).
[130] Ibid at para [4] citing the County Court judgment, at para [16] (unreported).
[131] Ibid at para [4] citing the County Court judgment, at para [15] (unreported).
[132] Ibid at para [4] citing the County Court judgment, at para [16] (unreported).
[133] Ibid at para [18].
[134] Ibid.
[135] Ibid.
[136] Ibid at para [13] (Tomlinson LJ).
[137] [2009] UKHL 18 at para [97] (Lord Neuberger).
[138] See B Sloan, *Informal Carers and the Law* (Hart 2013) at pp 58-60.

This unpredictability may present problems for practitioners when arguing estoppel cases. If extensive evidence as to the domestic activities undertaken is adduced, there is a risk that the court will view those activities as background context to the dispute rather than evidence of detriment. Alternatively, they could be explained as, in Mee's terminology, 'life-style' choices.[139] If less but more targeted evidence is provided as to detriment, claimants may fail to show sufficient detriment for the purposes of triggering unconscionability. This would also affect the extent of any remedy that the court is prepared to award when satisfying the equity. In essence, the approach taken in *Southwell* seems to be encouraging litigants to simplify claims so that the link between the detriment and representation is clear.[140] So whilst the flexibility of the doctrine is beyond doubt, it also has practical limitations when it comes to predictability of the result and the receptiveness of the court to accept an act of detriment within a cohabiting relationship.

An alternative interpretation of this particular aspect in *Southwell* could be proffered. Rather than the court switching between recognition and then marginalisation of the parties' relationship through their treatment of detriment, it could be argued that the court is simply taking, as Pawlowski has argued, a 'less legalistic approach to counter-balancing benefits in cohabitee cases'.[141] As *Southwell* concerned a lengthy period of cohabitation, the parties had both generated economic interdependency. Therefore rather than reducing the extent of any remedy to a claimant because of the countervailing benefits they received from the relationship, it seemed more expedient to write-off that stage in the analysis, seeing as both parties actually benefited. This writing-off of the benefit and detriment could therefore explain why several activities became incidents of the relationship rather than elements integral to the estoppel claim.

Lord Hope recognised this aspect of cohabitation in his opinion in *Stack* where he stated that for cohabitants 'living together is an exercise in give and take, mutual co-operation and compromise'.[142] Yet it remains to be seen whether this approach to detriment will assist cohabitants seeking to rely on estoppel. It could mean that cohabitants may find it easier to argue estoppel as whilst there is likely to be a flow of benefit and detriment between both parties, the successful claimant would not necessarily have to account for any benefit through receiving a lesser remedy or a deduction in their monetary award. Equally, the opposite could materialise as the more the courts conceptualise the cohabiting relationship as generating pluses and minuses on both sides, the greater the potential for detrimental acts to be explained merely as incidents of the relationship.

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[139] J Mee, *The Property Rights of Cohabitees* (Hart 1999) at p 104.

[140] A contrast can be made here to the non-exhaustive and extensive list of paragraph 69 factors laid down in *Stack v Dowden* that are used to displace the presumption of beneficial joint tenancy in common intention constructive trust cases. Following *Stack*, cases unsuccessfully argued a long list of factors that were ultimately deemed irrelevant for the purposes of divining common intentions. For examples of this tendency, see *Holman v Howes* [2007] EWCA Civ 877 and, more recently, *Graham-York v York* [2015] EWCA Civ 72.

[141] M Pawlowski, 'Informality and Entitlement in the Family Home: Estoppel or Declaration of Trust? Part One' [2015] *Family Law* 175 at p 178.

[142] [2007] UKHL 17 at para [2].

A final point should be made on the remedy conferred in *Southwell*. The actual award in *Southwell* indicates that the court took a rather narrow interpretation of Miss Blackburn's detriment. None of the conduct undertaken by Miss Blackburn after moving in with Mr Southwell was factored into the monetary award of £28,500. The award remedied purely her reliance on his representations of a secure home and covered the costs she spent on her previous property and setting up costs for the property with Mr Southwell. This suggests that it was the acts outside the actual period of cohabitation that the court focussed on and again this prompts questions as to the judicial treatment of detriment occurring within a subsisting cohabiting relationship.

It should also be noted that even with a wide remedial discretion, the court's award to Miss Blackburn was monetary compensation and not the conferral of a right to reside in the property for life (as could be assumed by Mr Southwell's representations).[143] This choice of a lesser remedy of compensation has clear consequences for cohabitants. In *Southwell*, it could be justified on two grounds. Firstly, it was appropriate in this case as there were readily quantifiable improvements to both properties forming part of Miss Blackburn's detriment. In *Jennings v Rice*, Robert Walker LJ observed that cases involving improvements often militated towards this type of award.[144] Therefore, it was far easier to measure financial contributions and this is likely to be a key consideration for a court when satisfying the equity in cohabitation cases. Secondly, granting a right to occupy would have been simply impracticable as clearly the parties did not want to continue residing in the same property together.[145] The outcome in *Southwell* reveals that, although the award of monetary contribution distinguishes estoppel from the remedy awarded in constructive trust cases, it may not always be practically possible particularly if the conduct is non-financial in nature. Likewise, any expectation of claimants that the court may be generous in satisfying the equity must be carefully managed.[146]

(A) Conclusions

In 2004, District Judge Cardinal (as he then was) said that 'the law relating to proprietary estoppel is not available to "rescue" the claims of the genuine cohabitant in many, if not most, cases'.[147] In light of *Southwell*, that statement may need a critical reappraisal. Although it is still too early to gauge whether *Southwell* will have a significant impact on this area, when viewed in isolation, the decision provides a worked example of a successful proprietary estoppel claim by a former cohabitant. Thus the result in *Southwell* itself does not suggest that cohabitants will now be 'rescued' by the law, but rather reaffirms that estoppel can, in some instances, operate effectively to provide a remedy upon relationship breakdown. The media claims that

[143] As seen in the earlier decisions of *Inwards v Baker* [1965] 2 QB 29 and *Greasley v Cooke* [1981] WLR 1306.
[144] *Jennings v Rice* [2003] 1 P & CR 100 at para [51].
[145] *Shaida v Kindlane Ltd* (Unreported, Chancery Division, 22nd June 1982).
[146] A parallel could be made to the position in Scotland where, despite a wide discretion to award financial provision to cohabitants following relationship breakdown under section 28 of Family Law (Scotland) Act 2006, the awards made have been relatively modest. For a careful assessment of the provisions, see J Miles, F Wasoff & E Mordaunt, 'Cohabitation: lessons from research north of the border' [2011] 23(3) *Child and Family Law Quarterly* 302.
[147] M Cardinal, 'Inheritance or Estoppel – How the Cohabitant Succeeded' [2004] 34 *Family Law* 362 at p 363.

it was a 'landmark ruling',[148] which is probably a reaction to the fact that Miss Blackburn had made no financial contributions to the acquisition of the family home, also need to be viewed with a healthy dose of scepticism.[149] What Miss Blackburn received was a far cry from what she could have received had she been married to Mr Southwell.

When *Southwell* is viewed more broadly and situated within the latest trend of estoppel authorities, the decision may have something more to say. It is not merely the case of a court applying 'old equitable principles to a modern relationship' as Sanders and Carro have suggested.[150] Rather, through expressing those principles in the broadest manner possible and by adopting a more holistic analysis of representations, these are no longer the 'old' Victorian estoppel principles. These principles have, in fact, been modified, albeit not to the extent advocated by Gardner.[151] Although the approach undertaken to detriment may continue to present problems for cohabitants by the side-lining of instances of reliance as 'incidents of the relationship', *Southwell* shows the court applying tailored estoppel principles to a quasi-marital relationship.

Ultimately, this trajectory suggests that a former cohabitant may no longer merely argue estoppel as a residual or backup claim to a common intention constructive trust, but as a viable, distinct alternative. Originally, Gray and Gray[152] and Piska[153] observed that there may have been an early reluctance by the courts to develop estoppel seeing as *Stack* had liberalised the constructive trust. As Gray and Gray noted, *Stack* ushered in the 'retreat of the estoppel doctrine to the task of neutralising unacceptable or intolerable detriment' which prevented it from partaking 'in any larger mission aimed at achieving a distributive justice'.[154] It appears that through post-*Kernott* decisions refusing to innovate the strictures of the acquisition requirements of *Rosset* coupled with general judicial restraint in this area, estoppel may gradually develop a set of pre-requisites more sympathetic to the realities of the domestic context. Indeed, could the courts take this even further by rejecting representations as the basis of estoppel and instead offer an equitable response based on expectations generated by the relationship itself? Going even further, could the

[148] See http://www.dailymail.co.uk/news/article-2795843/man-ordered-pay-28-500-ex-girlfriend-break-landmark-court-ruling-unmarried-couples.html (Daily Mail).

[149] An interesting parallel is the similar media reaction to the constructive trust case of *Fowler v Barron* [2008] EWCA Civ 377 where a female cohabitant had made no financial contributions to the home but by virtue of the strong presumption of beneficial joint tenancy received an equal share of the beneficial ownership. See A Hayward, 'Family Values in the Home: *Fowler v Barron'* [2009] *Child and Family Law Quarterly* 242.

[150] C Sanders & B Carro, 'Proprietary estoppel – does the recent Court of Appeal case of Southwell v Blackburn change anything for cohabitees?' Available http://www.familylaw.co.uk/news_and_comment/proprietary-estoppel-does-the-recent-court-of-appeal-case-of-southwell-v-blackburn-change-anything-for-cohabitees#.VVDCh45VhBd

[151] See S Gardner, 'Material Relief between Ex-Cohabitants 2: Otherwise than by Beneficial Entitlement' [2014] *Conveyancer and Property Lawyer* 201.

[152] K Gray & S Gray, *Elements of Land Law* (5th edn, Oxford University Press 2009) at pp 1255-1256.

[153] N Piska, 'A Common Intention or a Rare Bird? Proprietary Interests, Personal Claims and Services Rendered by Lovers Post-Acquisition' [2009] 21(1) *Child and Family Law Quarterly* 104 at p 110.

[154] K Gray & S Gray, *Elements of Land Law* (5th edn, Oxford University Press 2009) at pp 1255-1256. See Etherton's observation that, by restricting estoppel and developing the liberalised constructive trust instead, the courts may have 'shot the wrong beast', in T Etherton, 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle' [2009] *Conveyancer and Property Lawyer* 104 at p 125.

remedial flexibility of estoppel offer the potential of creating a redistributive jurisdiction similar to the Matrimonial Causes Act 1973?[155]

Southwell acts as a useful primer for this debate. However, when evaluating the application of estoppel to cohabitants today, caution is required. If estoppel were to assume a greater role in cohabitation disputes, cohabitants will still face many of the evidential issues posed by litigants using the common intention constructive trust. Courts may show a willingness to piece together vague conversations, but they can only go so far for even the most meritorious of claimants. Unconscionability permeates the elements of estoppel but is not a self-standing basis for equitable relief. Even without the need to account mathematically for benefits received from the relationship, establishing detrimental reliance in the first place will be difficult if acts can be viewed as motivated by mutual love and affection. These issues represent fundamental obstacles to a cohabitant using proprietary estoppel but, more importantly, they reveal that whilst the doctrine is flexible, it is far from the 'penicillin of equity'.[156]

[155] An approach that was categorically rejected by HHJ Nourse QC in *Lissimore v Downing* [2003] 2 FLR 308 at para [56] but is now being re-examined in S Gardner, 'Material Relief between Ex-Cohabitants 2: Otherwise than by Beneficial Entitlement' [2014] *Conveyancer and Property Lawyer* 201 at p 202.

[156] M Dixon, 'Proprietary Estoppel: A Return to Principle' [2009] *Conveyancer and Property Lawyer* 260 at p 260.