Dillwyn v. Llewelyn—A Fresh Perspective on a Misconceived Approach

Owen, Gwilym; Parker, Marie

Conveyancer and Property Lawyer

Published: 01/03/2022

Peer reviewed version

Dillwyn v. Llewelyn—A Fresh Perspective on a Misconceived Approach

An Article in Honour of the Late Professor Mark Thompson

Gwilym Owen* and Marie Parker **

Introduction

The nineteenth century case of *Dillwyn v. Llewelyn*[1] is well known to all land lawyers as a case concerning two Welsh brothers who were ostensibly in dispute about a property situated in Swansea, south Wales. The brothers' father had placed his younger son in possession of certain property, following which he signed a memorandum making a gift of the property to his younger son which was ineffective as it had not been executed by way of deed. The younger son built a house on the land on the strength of the memorandum. This led to a high-profile case between the younger son and his elder brother in which it was ultimately decreed that, by reference to principles of what later became known as proprietary estoppel, the fee simple in the property became vested in the younger son notwithstanding the fact that no conveyance of the property had been made by the father in favour of the younger son.[2]

Only one defendant is named in reports of the case, and the impression one gets from the law reports is that the two brothers were at loggerheads and that the family dynamic was not a happy one. Recent research by the authors at the National Archives; the Richard Burton Archives at Swansea University; the West Glamorgan Archive Service; and the National Library of Wales has revealed that the Bill of complaint named no less than seven family members as defendants, and that the family dynamic appears to have been a cordial one. So what, and why are these fresh facts significant? In short, and for reasons which will be analysed in the article, this case reminds us that proprietary estoppel, even in its formative days, was a different doctrine from that of the constructive trust. We appear to have lost sight of this by

* Senior Lecturer, Bangor Law School. ** Lecturer, Bangor Law School.

The authors are grateful to Peter Foden, palaeographer, for transcribing the will of Lewis Weston Dillwyn, for assisting with archival research in the National Archives and for making several helpful comments which have been incorporated in the article. The authors are grateful to Sir Roderick Evans, former Presiding Judge of Wales, for suggesting to them that the family dynamic in this case was a happy one. The authors are also grateful to the audience at the MSPL workshop conference, which took place at Queens' College Cambridge on 10 April 2017, for their constructive comments.

[1] (1862) 4 De G, F&J 517, 45 ER 1285.

[2] See the analysis of the case by B McFarlane, *The Law of Proprietary Estoppel*, (Oxford University Press, 2014), pp 9; 394; 448-449; and 525.

reference to key cases and legislation over the years, and the danger is that proprietary estoppel is viewed as operating on the periphery of various doctrines and devices, rather than being treated as a self-standing remedy in its own right.[3] In order to make the point, this article will examine just one discrete area where courts have consistently looked for an overlap between proprietary estoppel and constructive trusts when seeking to disengage the operation of section 2(1) Law of Property (Miscellaneous Provisions) Act 1989 (the 1989 Act). The fresh facts which have been unearthed concerning *Dillwyn v. Llewelyn* serve as a reminder to illustrate just how far we have veered off course. The late Professor Mark Thompson warned us of this direction of travel years ago,[4] and he was the inspiration for the first named author's previous work on this topic which appeared in the *Conveyancer and Property Lawyer* in 2011,[5] but nothing has been done to arrest this trend.

Significance

As mentioned in the introduction, the significance of this article is closely related to the overlap between the concepts of proprietary estoppel and constructive trusts which the courts feel compelled to demonstrate to disengage the provisions of the 1989 Act. Section 2(1) of the 1989 Act provides that contracts for the sale of land must be in writing. There is a specific exception to this requirement in section 2(5) of the 1989 Act which disengages the provisions of section 2(1) in the case of *implied, resulting and constructive trusts*. On the basis that section 2(5) of the 1989 Act makes no reference to proprietary estoppel, in cases where proprietary estoppel applies, the courts have looked for an overlap between the concept of the constructive trust and proprietary estoppel to justify claims based on proprietary estoppel in such circumstances.

There is a literature concerning this[6] which specifically calls for reform to be made whereby the courts should only consider matters solely from the perspective of proprietary estoppel in appropriate cases, and not to look for artificial overlaps with the doctrine of the constructive trust to disengage the provisions of section 2(1) of the 1989 Act.

---

[3] Make insertion

[4] M P Thompson and M George, *Thompson's Modern Land Law* (6th ed Oxford University Press 2017) 207, and in earlier editions of this work.

[5] G Owen and O Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: a misconceived approach?' Conv. 2011, 6, 495-506.

[6] For example see, M Dixon, 'More moves in constructive trusts and estoppel' Conv. 2017, 2, 89-92 and G Owen and O Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: a misconceived approach?' Conv. 2011, 6, 495-506.

The majority of this literature has considered the issue by reference to doctrinal analysis, but Crozier considers the matter by reference to historical analysis.[7] Crozier, by analysing the precursor to section 2(1) of the 1989 Act, namely section 4 of the Statute of Frauds 1677 (SoF), concludes that the SoF did not relate exclusively to contracts for the sale of land. Had it done so, the proviso in the SoF relating to trusts would have been unnecessary. However, the provisions of the SoF went further than just dealing with contracts; they also dealt with trusts. It was for that reason that the proviso in the SoF for dealing with trusts was introduced. Crozier argues convincingly that on its true construction section 2 of the 1989 Act is only meant to deal with contracts and not trusts. On that footing, equitable remedies such as proprietary estoppel exist quite independently to disengage the provisions of section 2 (1) of the 1989 Act, without having to rely on the proviso contained in section 2(5) of the 1989 Act. The proviso contained in section 2 (5) of the 1989 Act would have been required had a wider construction of section 2 of the 1989 Act been justified, namely that it applied to trusts as well as contracts. As this is not the case, then the wording in the proviso to section 2(5) of the 1989 is just 'verbiage' and no attention should be paid to it.

This article also considers the issue by reference to historical analysis but from a different perspective. In all the cases examined in the existing literature adopting the doctrinal approach, the parties seeking to make out the claim for proprietary estoppel were at loggerheads with their opponents, and some of these cases will be analysed later in this article The significance of this article is that in *Dillwyn v. Llewelyn* archival research by the authors has unearthed new evidence to show that the litigants (two brothers) got on. Not only does this provide a more nuanced understanding of the case, but it also shows that as the parties got on (not readily apparent from just reading the judgment) it might be said that the matter could have been settled by consent without recourse to expensive litigation. However, it will be argued that having regard to the prevailing law at the time *Dillwyn v. Llewelyn* was decided, the parties had to avail themselves of the estoppel argument. It will be argued that as the parties were on good terms then it might be thought that all that would have been needed would have been for the parties to have accepted the *status quo* (i.e. the terms of the brothers' father's will) and merely signed a consent order to vary the *uses* (the precursor of the modern trust) under the father's will. However, the analysis demonstrates that it was not possible to simply vary the *uses* (trusts)

[7] R Crozier, 'Estoppel and elephant traps: section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989.' Conv. 2015, 3, 240-244.

in this way and the reasons for this are examined in the article. Recourse to another quite separate concept (what later became known as proprietary estoppel) was required to bring about the desired solution. Therefore, and by reference to one of the oldest cases on the formation of proprietary estoppel, the doctrine of proprietary estoppel operates quite independently of the law of trusts. It was not possible to resort to any principles of the law of *uses* (trusts) to vary those *uses*.

The article highlights by reference to a different historical approach that the law of proprietary estoppel is distinct from the law of trusts, as evidenced by the fact that the parties could not resolve the problem in accordance with the prevailing law of trusts and had no choice but to resort to the doctrine of what became known as proprietary estoppel. This article adds to the existing body of analysis and adds a further historical approach to demonstrate that the existing approach by the courts to seek an artificial overlap between the doctrines of proprietary estoppel and the constructive trust to disengage the provisions of section 2(1) of the 1989 Act is misconceived.

The article will begin by setting out the facts of the case, followed by the new evidence which the authors have unearthed concerning the family dynamic. The article will then go on to consider if, on the new facts which have emerged, *Dillwyn v. Llewelyn* might be decided differently by a modern court. Finally, there is a brief analysis of the most recent cases which have been decided by reference to section 2(5) of the 1989 Act to show that the law is going in the wrong direction.

The Case

To assist the reader, a convenient summary of the chronology of the case is set out first:[8]

- On 15 July 1861, the Bill is filed.
- Between July 1861 and February 1862 various orders are obtained and affidavits filed joining into the action all members of the family with an interest in the terms of the will of Lewis Weston Dillwyn (the father) who would have been affected by the proposed conveyance to the younger brother.

[8] See the National Archives, Chancery Cause Book C 32 / 92, Reference D85.

- On 14 February 1862, a conference is held with Counsel to discuss the obtaining of the decree (order).
- On 15 March 1862, the decree was made by the Master of the Rolls by which it was ordered that Lewis Llewelyn Dillwyn (the younger brother) only had a *life interest*.
- On 28 April 1862, the younger brother lodged his appeal.
- On 12 July 1862, the decree was obtained by the Lord Chancellor (Lord Westbury) entitling the younger brother to the *fee simple* of Hendrefoilan, the property which was the subject matter of the dispute

The father executed his last will and testament on 21 June 1847, and made three codicils on, respectively, 25 January 1849; 8 August 1852; and 22 August 1852.[9] The will and the three codicils were proved in the Prerogative Court of Canterbury on 22 October 1855 by Lewis Llewelyn Dillwyn (the younger brother).[10] Power was reserved to John Dillwyn Llewelyn (the elder brother). The elder brother did eventually prove the will and codicils as the action was brought by the younger brother against the elder brother for him to execute a conveyance in favour of the younger brother. In the will the father made provision in favour of his younger son, Lewis Llewelyn Dillwyn. The reason for this was that provision had already been made in favour of the elder brother by his grandfather.[11] Under the terms of the father's will, the father's widow was to enjoy a life estate, with a life interest in remainder to the younger brother and remainder to the younger brother's eldest son; and if the younger brother had no son, the elder brother and his heirs would take:[12]

> " I give and devise all and singular my real estates both freehold and copyhold whereof I am seised…in the two Counties of Glamorganshire and Carmarthenshire unto the Reverend John Montgomery Traherne of Coedrigian in the said County of Glamorgan and my two sons John Dillwyn Llewelyn and Lewis Llewelyn Dillwyn… upon Trust…for the sole use of my dear Wife during the term of her natural life with remainder to the use of or in trust for my second son Lewis Llewelyn Dillwyn and his assigns for life…with a proper limitation to Trustees…to support contingent remainders with remainder to the use of or in trust for the son or sons of the said Lewis Llewelyn Dillwyn in such proportions if there should me [*recte be*] more than one

[9] The father's diary notes for 1847 inspected at the National Library of Wales for the years 1847 and 1852 provide no details concerning the background to the execution of his will and codicils: NLW 1847 GB 0210 LEWWYN/31 and 1852 GB 0210 LEWWYN/36. The only entry concerning the will is an entry on 21 June 1847 stating that on that morning he executed a will witnessed by H Davies his butler and W Allen his footman.
[10] PROB 11/222/317.
[11] The elder brother had already inherited from his maternal grandfather the Penllergaer and Ynysygerwn Estates and changed his name in the process to Dillwyn Llewelyn.
[12] PROB 11/222/317.

> son as he may choose by will to appoint or if he should make no such appointment to his eldest son only and default of his having any son who may attain to the age of twenty one years then with remainder to my Son John Dillwyn Llewelyn his and assigns for ever…"

The above provision then went on to provide that should the younger brother die without any male issue the father's freehold and copyhold estates were to stand charged with the payment of annuities in favour of his daughters, Fanny Llewelyn Moggridge and Mary Dillwyn.

The father then overrode the terms of his will by way of a written memorandum dated 10 February 1853, (the 1853 memorandum) and signed by the father and the elder brother in the following terms:

> "Hendrefoilan, together with my other freehold estates, are left in my will to my dearly beloved wife, but it is her wish, and I hereby join her in presenting the same to our son Lewis Llewleyn Dillwyn, for the purpose of furnishing himself with a dwellinghouse." [13]

Following the signing of the memorandum, the younger brother built a residence, later named Hendrefoilan, at a cost of £14,000, but without having secured a conveyance of the property into his name. It is indeed surprising that the father did not put his affairs into better order following the trouble from his wife's (Mary) relations (not from the younger brother) when the elder brother inherited from his maternal grandfather, Colonol Llewelyn: [14]

> "When Colonol Llewelyn's will was read in 1817 and it emerged that he had left his fortune to Mary's son there was a flood of litigation by various disgruntled members of the family who had fully expected the Penllergaer estates to revert to them. But Lewis Dillwyn, with his Quaker's head for business and a streak of ruthless ambition for his children, succeeded in warding off all the attacks on his son's precious inheritance and within a few years had secured his family's hold on some of the most valuable properties in south Wales."

It may well be the case that the reason why the father did not execute a formal conveyance was because he did not think that there would be any trouble in his family as everyone got on so well together.

[13] See para 519 of Lord Westbury's judgment.
[14] See, David Painting, *Amy Dillwyn*, (2nd ed., University of Wales Press, 2013), p5.

The younger brother contended that following the 1853 memorandum he had acted to his detriment by building a substantial dwelling house at Hendrefoilan following the assurance by his late father that Hendrefoilan was to be his, albeit that no formal conveyance of the property had been executed in his favour. Ultimately, this argument was successful. On this basis, the father's will being an executory document, was held not have comprised Hendrefoilan within the provisions concerning his residuary estate, as his estate was estopped from contending that Hendrefoilan formed part of the estate. However, the elder brother in his capacity as executor needed to be careful to ensure that the father's estate was bound by the 1853 memorandum before a conveyance to the younger brother could be made with safety.

This must have been an expensive case for the parties; the younger brother instructed Sir Charles Jasper Selwyn QC and Sir Henry Arthur Hobhouse as his junior in the case. The Bill settled by Sir Henry Arthur Hobhouse shows that he was a junior when this case was heard but he took silk shortly afterwards. Reading Lord Westbury's judgment one is left with the impression that this was a heavily contested matter, and that the legal issues were significant, not least because of the seniority of counsel. [15] Counsel for the elder brother argued that the Bill ought to have been struck out as equity does not assist a volunteer, and if the memorandum had any effect, then it was only effective to convey an estate for life. There was agreement that equity would not assist a volunteer. However, the issue for the court was whether the subsequent acts of the father in signing the memorandum, after putting the younger brother in possession of the property, gave the younger brother grounds to compel the father's estate to convey the fee simple. The court held that the actions of the younger brother following the promises made by the father entitled the younger brother to call for a conveyance of the fee simple. The younger brother's mother was content for a conveyance of the fee simple to be made in his favour, but the elder brother contested the matter on behalf of the younger brother's eldest child (then a minor), Henry Delabeche Dillwyn, who had an interest under the ultimate remainder provisions , details of which have been provided above. However, there was more to this case than meets the eye.

The Master of the Rolls decreed on 15 March 1862 that the younger brother was only entitled to a conveyance of *a life estate* in the father's realty. What appears to have exercised

[15] The official transcript of the case records that the elder brother was represented by a Mr. Lloyd and a Mr. Surrage. Neither appears to have been as senior as Counsel who appeared for the younger brother and neither is mentioned in the Order Books. Mr Surrage was probably John Surrage, Barrister, of 40 Chancery Lane and 7 New Square Lincoln's Inn (d1869), called to the Bar, Middle Temple, 1843.

the mind of the Master of the Rolls is the fact that the father did not alter his will following executing the memorandum, and he therefore considered that only a life interest was intended to be given by way of the memorandum. At this point, the younger brother's argument on the estoppel point had failed with the result that, in the absence of a successful appeal, Hendrefoilan formed part of the provisions of the father's will. At that point, the elder brother in his capacity as executor could not have made a conveyance of the fee simple in favour of the younger brother in contravention of the court order of 15 March 1862. This would have left him open to a claim by the younger brother's son on his attaining the age of majority. On 28 April 1862, the younger brother appealed this decision to the Court of the Queen's Bench, and on 12 July 1862 Lord Westbury decreed that the younger brother was entitled to a conveyance of the fee simple. However, a point of interest here is what were the options open to the younger brother following the decree by the Master of the Rolls dated 15 March 1862? This question is addressed under the section headed Variation of Trusts below, but before considering that issue, the new evidence unearthed by the authors concerning the case needs to be analysed and this is considered next.

New Evidence

The first point of interest is the fact that the elder brother was a witness to the 1853 memorandum which has been detailed above. If he had been so much against the gift by the father, then one might have expected him to have had nothing to do with the transaction. Further, the authors have inspected diaries kept by the younger brother located in the Richard Burton Archives at Swansea University, which cover the period during which this litigation took place, and which make no reference to any antagonism between the two brothers. However, these facts, on their own, amount to no more than mere speculation, and more cogent evidence is required. More concrete evidence exists and is discussed next.

In a letter posted by the younger brother to the elder brother on 22 January 1868, the younger brother begins by saying "My dear John," and ends the letter, "Your affectionate brother." [16] He begins the letter by saying that he was "truly grieved" to learn that the circumstances of either a relation or friend of theirs had given the elder brother cause for concern. The letter is also evidence that following the transfer of the freehold of Hendrefoilan into the younger

[16] West Glamorgan Archive Service, RISW/DL 4.

brother's sole name, he proceeded to mortgage the property in favour of the elder brother to secure a loan by the elder brother in favour of the younger brother:

> "I want your consent to deal with Burrows Lodge (which is with Hendrefoilan secured to you) as I may think proper…I had intended to have paid you off at the end of this month…but the difficulty about the Hendrefoilan title which I explained to you arose and delayed this part of the arrangement…I have no doubt as to the Hendrefoilan security being ample to cover your mortgage without Burrows Lodge but if you should doubt it I would offer you the security of the Cambrian Pottery deeds as a collateral and additional security…"

A letter written by the younger brother to the elder brother dated 19 February 1869 sheds some further interesting light on the loan referred to above.[17] It will be recalled that the father's memorandum was signed and witnessed on 10 February 1853 and that thereafter the younger brother acted to his detriment in building Hendrefoilan at a cost of £14,000. It is the authors' belief that the elder brother loaned the younger brother part of this money and that this was the subject matter of the elder brother's security over Hendrefoilan. The letter says:

> "In August 1853 you advanced me £8,000 and in August 1854 this was made up to £10,000 by a second cash advance of £1,640 and £360 due for investment. Of this I paid off £8,000 in September 1862 and in June 1862 I gave D Davies (your Solicitor) a promissory note for the balance I owed you calculated with interest up to October 1st 1863, the date of the said note…While upon this matter I may say that as you kindly told me I need not put myself to inconvenience about the payment of interest I have availed myself of your permission and allowed it to run on…I make this long statement to you as having been treated by you at all times with the greatest confidence and kindness."

In a much later letter dated 7 December 1877 from the elder brother's son, John Talbot Dillwyn Llewelyn, to the younger brother, he addresses the younger brother as "My dear uncle Lewis."[18] The younger brother's nephew is writing to his uncle in a cordial manner on behalf of the elder brother, who was by now rather elderly, requesting the younger brother to acknowledge the debt in writing. This was obviously done to avoid any possible limitation problems. Then in a letter dated 23 December 1877 from the younger brother to the elder brother he even pointed out that he owed the elder brother 4/- more than had been calculated by the elder brother.[19] It is suggested that there is nothing in this exchange of correspondence

[17] West Glamorgan Archive Service, RISW/DL 4.
[18] West Glamorgan Archive Service, RISW/DL 4.
[19] West Glamorgan Archive Service, RISW/DL 4.

which would lead anybody to think that there was anything but a cordial relationship between the two brothers.

Indeed paragraph 4 of the Bill of complaint is evidence for the proposition that the elder brother played a major role in helping the younger brother select where the house should be built:[20]

> "The plaintiff decided to build on Hendrefoilan and in the beginning of the year 1853 the plaintiff went with his brother the defendant John Dillwyn Llewelyn to Hendrefoilan for the purposes of looking at and selecting a site on which the plaintiff should build and it was soon afterwards arranged between the plaintiff and his father with the privity and assent of his mother Mary Dillwyn that the said Lewis Weston Dillwyn should give the estate of Hendrefoilan to the plaintiff for the purposes aforesaid."

Keep it in the family

There is further evidence concerning what would appear to be cordial relations within this family by reference to the way in which the parties were represented in the final hearing before Lord Westbury. The Solicitors named on the Bill were Jenkyns & Co of 14 Red Lion Square London.[21] They appear to have acted for all the parties which would be very unusual in litigation in which parties were at loggerheads.[22] By reference to the *Dillwyn v. Llewelyn* Chancery Orders,[23] this firm is named in both the first and third columns- *Names &c. of Plaintiff's Solicitor* and *Appearances and Defendant's Solicitor's Names, &c.* respectively. They appeared for 'Group One' of the Defendants on 25 July 1861 and for 'Group Two' on 24 January 1862. 'Group One' comprised the elder brother, Mary Dillwyn (widow), and Henry Delabeche Dillwyn. 'Group Two' was the married sisters and their husbands. The groupings begin with the executor, the elder brother, and then follow the order of the beneficiaries as they appear under the provisions of the father's will.

---

[20] The National Archives, Chancery Cause Book C32/92, reference D85.

[21] John Jenkyns is listed at 14 Red Lion Square in the 1842 Post Office Directory of London, and so was probably the senior partner of the firm by 1862, and there is evidence that the Jenkyns and Hobhouse families were intermarried. See the notes on the Jenkyns genealogy at the Balliol College Archives. The authors have been unable to find a business archive for the firm and its records are not at Balliol. John Jenkyns was a brother who died without issue and there is unlikely to be a family archive. Arthur Hobhouse was John Jenkyns' first cousin once removed (Arthur Hobhouse's grandmother and John Jenkyns' father were siblings.)

[21] West Glamorgan Archive Service, RISW/DL 6.

[22] See NLW GB 0210 LLYSDINAM [ref B783], this is a letter dated 23 May 1861 from Jenkyns, Phelps & Bennett to Richard Lister Venables, and [ref B3223] a letter from John Jenkyns to Sir J.E. Winnington, bart, dated 8 May 1856. From this slim sample it may be seen that the firm specialised in Chancery work, although neither letter has any bearing on the case under discussion.

[23] The National Archives, Chancery Cause Book C32/92, reference D85.

There is nothing in the correspondence between the brothers concerning estate affairs between 3 November 1841 and 11 January 1882 which throws any light on this question,[24] nor in the pocketbook of the younger brother in relation to his rental income and household expenditure between 1862 and 1875.[25] The first clue comes from the Bill of complaint in the case, which states at paragraph 12: [26]

> "The Plaintiff has applied to the defendant John Dillwyn Llewelyn to execute to him a conveyance of the said Hendrefoilan but the last named defendant is advised that he cannot do so with safety."

What therefore was the danger? As has been stated in the introduction, there were no fewer than seven defendants in the action. The first named defendant was the elder brother, who was also one of the executors of the father's will; followed by the father's widow, Mary Dillwyn who was named in the will. The father's daughters, Fanny Llewelyn Moggridge and Mary Dillwyn, along with their respective husbands, were also joined into the action as defendants. It will be recalled that the father's will went on to provide that should the younger brother die without any male issue, the father's freehold and copyhold estates were to stand charged with the payment of annuities in favour of his daughters, Fanny Llewelyn Moggridge and Mary Dillwyn. Finally, paragraph 11 of the Bill of complaint recites that the younger brother had one son, Henry Delabeche Dillwyn, who was an infant at the time that proceedings were commenced, and who was also joined into the proceedings.

Lord Westbury's judgment recites the consent of the father's widow to a conveyance of the fee simple to the younger brother. No mention is made of the two daughters who do not appear to have been represented at the final hearing. However, the important issue appears to have been the position of Henry Delabeche Dillwyn. Lord Westbury states in his judgment:[27]

> "…but inasmuch as the estates of the testator under the will are given to the first and other sons of the Plaintiff, his eldest child, who is an infant, is interested in contesting the effect of the transaction, and it requires therefore to be narrowly examined by reason of the infancy of the child."

[24] West Glamorgan Archive Service, RISW/DL 6.
[25] West Glamorgan Archive Service, RISW/DL 17-19.
[26] The National Archives, Chancery Cause Book C32/92, reference D85.
[27] *Dillwyn v Llewelyn* (1862) 4 De G, F&J 517, 45 ER 1285. See para 520 of judgment.

The younger and elder brothers were the surviving executors of the father's will. Therefore, the danger for the elder brother, in his capacity as one of the executors of his late father's will, was that he could be faced with proceedings by Henry Delabeche Dillwyn once he attained his majority, should matters proceed without an order of the court. In other words, the interest of Henry Delabeche Dillwyn under the father's will needed to be considered before a conveyance of the fee simple could be executed in favour of the younger brother. Although the estoppel argument was ultimately successful, it is possible that other solutions might have been considered and rejected by the parties' respective lawyers before embarking on this expensive litigation, and this is considered next.

Variation of trusts

It was certainly possible for trusts to be varied by 1862, as *Saunders v. Vautier*[28] had been litigated some twenty years earlier, and beneficiaries under a trust could apply to the court to vary the provisions of a trust. However, there were two problems in this particular case with making an application to the court under the principles of *Saunders v. Vautier*: first, all of the beneficiaries had to be *sui juris* and ascertained, and secondly the inherent jurisdiction of the court has never permitted a remoulding of beneficial interests.[29] In *Dillwyn v Llewelyn*, the defendant Henry Delabeche Dillwyn had not attained his majority, and what the plaintiff, the younger brother, wanted was a complete remoulding of the beneficial interests set out in the father's will. If an application to vary the terms of the trusts set out in the father's will could not be made, another means had to be found for effectively varying the will trusts. Therefore, what precise will trusts had the father set up in his will?

The trusts under the father's will

As we have seen, the father's widow was given a life interest, followed by a life interest to the younger brother with remainder in trust for the younger brother's son or sons, and in default of the younger brother having any sons, remainder to the elder brother. In default of the younger son having any male issue, provision was made for the father's estate to stand charged with annuities in favour of his daughters. It will be recalled that the father's will included 'a proper limitation to Trustees… to support contingent remainders' and to raise various sums of money for the maintenance of the daughters, as detailed above. The insertion of the trustees was done

[28] (1841) 4 Beav 115, 49 ER 282.
[29] J.E.Penner, *The Law of Trusts*, 10th ed., (Oxford University Press, 2016), pp 307-310.

to protect the contingent remainders from destruction by the common law principles. The problem was that the trusts under the father's will were set in stone with trustees appointed to protect the remainder interests. Therefore, as the trusts could not be varied, the estoppel point had to be pursued.

What happened after the case?

At some point after having the title of Hendrefoilan transferred to him, the younger brother evidently vested the property to his son, Henry Delabeche Dillwyn, to put the property beyond the reach of his creditors. Henry died in April 1890 aged 46 and under his will he left Hendrefoilan to John Illtyd Dillwyn Nicholl, Henry's cousin, subject to a life interest in favour of his father, the younger brother. In 1892 the younger brother died and Henry's sister, the novelist and businesswoman, Amy Dillwyn had to leave Hendrefoilan which had been her home for over forty years.[30] The contents of the property had to be sold off to pay the younger brother's business creditors: [31]

> "…although the mansion itself remained in the family under the terms of Harry's will, the contents had to be sold to help meet the demands of Lewis Dillwyn's many creditors."

Therefore, we can see that at some point after the vesting of Hendrefoilan in the younger brother, he realised that his creditors were going to drive him into bankruptcy. For this reason he transferred the property to his son but retaining a life interest which allowed him to live out the remainder of his days in Hendrefoilan. Ironically, he was in the same position insofar as the title to Hendrefoilan is concerned as he had been under the provisions of his father's will.

How might the case have been decided by a modern court?

As already mentioned above, variation of trusts was a possibility at the time of the case by virtue of the decision in *Saunders v. Vautier,*[32] however as noted the beneficiaries had to be *sui juris*, and the beneficial interest could not be remoulded. Application of more recent statutory provisions reveals that it is unlikely that the case would be argued or decided differently today. The consent principle established in *Saunders* was extended by the Variation of Trusts Act 1958 (the 1958 Act).[33] In the 1958 Act the court was empowered to consent on behalf of

[30] See, David Painting, *Amy Dillwyn*, (2nd ed., University of Wales Press, 2013), p69.
[31] Ibid, p73.
[32] (1841) 4 Beav 115.
[33] Specifically s. 1 jurisdiction of courts to vary trusts.

beneficiaries who are unable to authorise the transaction.[34] The 1958 Act allows the court to approve arrangements which seek to vary or revoke a trust, or to increase the powers of the trustees. The 1958 Act also enables the variation of beneficial interests.[35]

If the case facts of *Dillwyn v. Llewelwyn* were to be examined under the Variation of Trusts Act 1958 then the court would be asked to provide consent on behalf of Henry Delabeche Dillwyn, as a minor in the case. When considering the use of this discretion, Lord Denning commented: 'In exercising its discretion, the function of the court is to protect those who cannot protect themselves. It must do what is truly for their benefit.'[36] It is difficult to advance an argument to suggest that such a variation would be beneficial to Henry from a purely financial perspective.

However, it is also necessary for the court to consider non-pecuniary benefits. For example, the courts have given weight to maintaining family harmony and the avoidance of family conflict when using its discretion to vary a trust.[37] In *Dillwyn v. Llewelyn,* however, the new evidence suggests that there would be no concern for family conflict to persuade a court to use its discretion to approve the variation of the trust.

Another non-financial consideration to examine is to what extent the court should consider the settlor's intention when approving such arrangement. Mummery LJ comments:[38]

> "The fact that the rules of court require a living settlor to be joined as a party to proceedings under the 1958 Act does not mean that the court attaches any overbearing or special significance to the wishes of a settlor…the nature of the jurisdiction under the 1958 Act is such that even the most carefully planned and meticulously drafted intentions of a settlor or testator are liable to be overridden by an arrangement agreed between sui juris beneficiaries and by the sanction of the court under the 1958 Act."

Applying this reasoning, any intention which could be demonstrated by the 1853 memorandum would stand little chance of being a regarded as significant. Moreover, if the function of the court is to provide consent on behalf of someone who is unable to provide consent then its duty to protect should override the observance of intentions, and therefore it seems very likely that

[34] Graham Virgo, *The Principles of Equity and Trusts* (3rd ed OUP 2018) 461
[35] Graham Virgo, *The Principles of Equity and Trusts* (3rd ed OUP 2018) 460
[36] *Re Weston's Settlements* [1969] 1 Ch 223, [245].
[37] See *Re Remnant's Settlement Trust* [1970] Ch 560.
[38] *Goulding v James* [1997] 2 All ER 239

the intentions of the settlor would have little or no significance if the case came to court today. It is suggested, therefore, that the parties would be advised not to follow this line of argument today, just as they were in 1862. It seems likely that the approach of the modern court would be no different today.

Going in the Wrong Direction

As set out in the introduction, the article will consider the artificial overlap the courts have sought to find between proprietary estoppel and constructive trusts to disengage the operation of section 2 (1) the 1989 Act. This analysis, considering the new understanding presented on *Dillwyn v. Llewelyn,* highlights further that the law has moved in the wrong direction. The discussion has distanced trusts and proprietary estoppel even further as trust law did not provide a solution to the issue in this leading case.

In the interests of clarity at this point it is worth repeating that section 2 (1) of the 1989 Act states: 'A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.' Section 2 (5) sets out: 'nothing in this section affects the creation or operation of resulting, implied or constructive trusts.' There is no mention of proprietary estoppel in section 2 (5) and so the courts have sought to establish an artificial overlap between these doctrines to disengage section 2 (1). The Law Commission intended that contracts for the sale of land should be enforceable even if the requisite formalities were missing in situations in where proprietary estoppel arose. The Commission did not advocate section 2(5) of the legislation.[39] The poor drafting of this section meant that it is not clear if proprietary estoppel can save an informal agreement, and therefore the courts have perceived the need to seek an artificial overlap between two separate doctrines. It has been argued that it is unnecessary to assimilate the doctrine of proprietary estoppel with constructive trusts.[40]

The approach taken in three cases will be set out briefly to demonstrate this point. In the 2005 Court of Appeal case, *Kinane v. Mackie-Conteh,*[41] Lord Justice Neuberger stated: 'For the

[39] See for example, L Bently and P Coughlan, 'Informal dealings with land after Section 2' (1990) 10 L.S. 325.
[40] G Owen and O Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: a misconceived approach?' Conv. 2011, 6, 495-506
[41] [2005] EWCA Civ 45

purposes of this appeal, I am content to assume, in favour of Mr Mackie−Conteh, that it would not be open to Mr Kinane to avoid the consequences of Section 2(1) of the 1989 Act if he could only establish a proprietary estoppel, and not a trust.'[42] Lord Justice Neuberger was particularly cautious in his interpretation of the statutory provisions created by Parliament and therefore sought to find the overlap between a constructive trust and proprietary estoppel:

> "… one must, I think, avoid regarding the subsection as an automatically available statutory escape route from the rigours of section 2(1) of the 1989 Act, simply because fairness appears to demand it. A provision such as section 2 … was enacted for policy reasons which, no doubt, appeared sensible to the legislature … the Court should not allow its desire to avoid what might appear a rather harsh result in a particular case to undermine the statutory policy."[43]

In the 2010 case *Herbert v. Doyle*[44] the Court of Appeal noted that a distinction between the two doctrines must be kept in mind.[45] Yet, section 2(5) of the 1989 Act prevented the court from making a finding of proprietary estoppel in its own right, which may well have been possible. The reasoning is set out below:

> "….if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement (which does not comply with section 2(1)) is incomplete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of section 2(5) of the 1989 Act."[46]

In the 2016 case *Matchmove Ltd v. Dowding*[47] the Court of Appeal commented:

> "Although the judge based his decision upon both proprietary estoppel and constructive trust, counsel for Mr Dowding and Ms Church was content to rely solely upon constructive trust, or more specifically a common intention constructive trust. This has the advantage of avoiding the issue of whether section 2(5) of the 1989 Act can apply to claims based on proprietary estoppel as distinct from constructive trust."[48]

---

[42] [2005] EWCA Civ 45, [46]
[43] [2005] EWCA Civ 45.
[44] [2010] EWCA Civ 1095.
[45] [2010] EWCA Civ 1095.
[46] [2010] EWCA Civ 1095 [57].
[47] [2016] EWCA Civ 1233; [2017] 1 WLR 749.
[48] [2016] EWCA Civ 1233; [2017] 1 WLR 749, [28].

Indeed, the trial judge commented: 'Accordingly, the Claimants are entitled in equity to the entire meadow, based on proprietary estoppel and constructive trust. It matters not which label is applied, as there is an overlap in this case.'[49] Dixon commented, 'Arguably, a better ground for these cases, and for the decision in Matchmove itself, is a straightforward proprietary estoppel analysis, leaving out constructive trusts altogether.'[50] Dixon also puts forward the compelling argument that 'proprietary estoppel does not side-step the formality rules by allowing unwritten bargains to be enforced. It prevents unconscionability and so s.2 (1) is not relevant.'[51] Such cases add further misunderstanding to an already confused debate.

Thomson argued that the constructive trust and proprietary estoppel should not be regarded as a fused concept. Thompson opined that although there are similarities between the two doctrines, he emphasised that they are separate doctrines. Firstly, the constructive trust is established on an agreement to share the beneficial ownership of property. Whereas when dealing with estoppel, the expectation may be to have some lesser right, for example the right of occupation. Secondly, Thomson set out that the two doctrines have a different rationale. The theoretical basis of the constructive trust is to prevent unjust enrichment. The rationale for estoppel is to prevent unconscionability, this being a wider concept than unjust enrichment. Finally, Thomson distinguishes the doctrines based on the role they play. He sets out that the role of the constructive trust is to give effect to an agreement that has been reached, whereas in an estoppel case the court has discretion to tailor a remedy to satisfy the equity which has a risen and meet justice in the case.[52]

Thompson also offers an example to underline the difficulties of assimilating the doctrines. He questions, 'It is difficult on orthodox trust principles to see how the expectation of the acquisition of an easement can be achieved through the medium of a constructive trust.'[53] It is evident that the two doctrines are not always interchangeable to provide justice in any case, thus putting further distance between the two.

[49] [2016] EWCA Civ 1233; [2017] 1 WLR 749, [24] (Cited in the Court of Appeal's judgement).
[50] M Dixon, 'More moves in constructive trusts and estoppel' Conv. 2017, 2, 89-92
[51] M Dixon, 'More moves in constructive trusts and estoppel' Conv. 2017, 2, 89-92
[52] M Thompson and M George, *Thompson's Modern Land Law* (6th ed Oxford, 2017) 588-599.
[53] M Thompson and M George, *Thompson's Modern Land Law* (6th ed Oxford, 2017) 588-589.

A counter argument was provided by Hayton who has argued that: '[I]t is time that the English courts accepted that the apparent distinction between common intention constructive trusts and equitable estoppel claims is illusory.'[54] However, in direct response, Ferguson comments: '…the case law on the subject of constructive trusts and proprietary estoppel does not unambiguously correspond to Hayton's picture of an "illusory distinction," particularly given the clear difference between the rights and remedies available once the relevant requirements of each concept have been satisfied.'[55] Indeed, Thomson acknowledged that there are similarities between the two doctrines, but he suggested that it was preferable to view them as 'separate but related reactions by equity to the question of how interests in land can be acquired informally.'[56] This approach was adopted by the House of Lords in *Stack v Dowden,*[57] where Lady Hale set out that it was unnecessary to discuss proprietary estoppel:

> A constructive trust does not only arise from an express or implied agreement or understanding. It can also arise in a number of circumstances in which it can be said that the conscience of the legal owner is affected. For instance, it may well be that facts which justified a proprietary estoppel against one of the parties in favour of the other would give rise to a constructive trust. However, in agreement with Lord Walker, I do not consider it necessary or appropriate to discuss proprietary estoppel further in this case.[58]

Lord Walker agreed with this approach: 'I have myself given some encouragement to this approach but I have to say that I am now rather less enthusiastic about the notion that proprietary estoppel and "common interest" constructive trusts can or should be completely assimilated.'[59] Lord Walker acknowledges that this was in contrast to his judgement in *Yaxley v. Gotts*[60] in which he commented: 'The overlap between estoppel and the constructive trust was less fully covered in counsel's submissions but seems to me to be of central importance to the determination of this appeal.'[61] What is clear from this discussion is that the treatment of the constructive trust and proprietary estoppel has been inconsistent and has caused great confusion. As Owen and Rees comment, these are real problems faced by the busy practitioner and these issues add unnecessary cost to litigation.[62] Owen and Rees agreed with Thompson's

[54] D Hayton, 'Equitable rights of cohabitees' [1990] Conv. 370
[55] P Ferguson, 'Constructive trusts - a note of caution' (1993) 109 LQR 114
[56] M Thompson and M George, *Thompson's Modern Land Law* (6th ed Oxford, 2012) 589.
[57] [2007] UKHL 17, [2007] 2 A.C. 432.
[58] *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432, [128].
[59] *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432, [37].
[60] [1999] 3 W.L.R. 1217
[61] *Yaxley v Gotts and Another* [1999] 3 W.L.R. 1217, [177].
[62] G Owen and O Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: a misconceived approach?' Conv. 2011, 6, 495-506.

description of section 2 (5) being 'inapt and unnecessary' and suggested that the section should be amended to include proprietary estoppel or removed from the statute book altogether. [63]

As discussed earlier, Crozier analysed the assimilation of the doctrines by reference to historical analysis, where he comments that the modern law of estoppel is prone to collecting the 'elephant traps' which are found in the law. Regarding section 2 of the 1989 Act specifically, he argues that it is not clear if it should be read as 'a contract for the sale or other disposition of land' or alternatively, 'a contract for the sale of land' and '[an] other [contractual or non-contractual] disposition of land.' Crozier argues that the first construction is correct, that the section is only meant to deal with contracts and not trusts. This interpretation would render the proviso section 2 (5) to be mere 'verbiage'. On that basis, equitable remedies, such as proprietary estoppel, can disengage section 2 (1) without having to rely upon section 2 (5). This adds another perspective which renders the attempts to assimilate the doctrines to be illogical. Dixon also comments on the issue from a historical perspective:

> "If proprietary estoppel can generate property rights without formality – as is patently and *historically* obvious – then it has no need of the shelter of a constructive trust to explain its validity. Its validity is justified because it prevents unconscionability. It is a creature of equity and needs no statute to validate it."[64] (*Emphasis added*)

This new assessment of the leading case on proprietary estoppel adds yet further evidence to our historical understanding that trusts and proprietary estoppel should not be assimilated. Trusts did not provide the solution, yet estoppel did, thus putting even more daylight between the two doctrines.

Conclusion

The case properly takes its place as one of the leading cases on proprietary estoppel. However, it needs to be reassessed in the light of the new evidence discussed in this article. The recent research undertaken by the authors demonstrates that the parties had a cordial relationship, which marks the nature of this case out as different in comparison to the existing body of case law dealing with proprietary estoppel where the parties are at loggerheads. This brings a nuanced understanding on a well-known case. Furthermore, the article has examined the point

[63] G Owen and O Rees, 'Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: a misconceived approach?' Conv. 2011, 6, 495-506
[64] M Dixon, *Modern Land Law* (11th ed OUP, 2018) 404.

that, despite this cordial relationship, the parties in the case were unable to sign a consent order to vary the *uses* (the precursor to the modern trust), but instead they had to embark on expensive litigation to pursue the proprietary estoppel argument in order to reach the desired outcome. The arguments concerning what later came to known as proprietary estoppel were advanced to get over the difficulties in breaking the trust under the terms of the father's will following the decree of the Master of the Rolls. As we have seen, this was due to the fact the will trusts could not be varied, having regard to the prevailing law at the time, and because of the conveyance the elder brother as trustee wished to execute.

The article sheds new light on the leading case concerning proprietary estoppel and demonstrates that even in one of the early modern cases the two doctrines are poles apart. It is indeed surprising that the courts should have veered so much off course over the years by assimilating trusts and proprietary estoppel. The 1989 Act has been discussed as just one example of this misconceived approach. This article offers a different historical perspective to show that seeking an artificial overlap between the constructive trust and proprietary estoppel is a misconceived approach by reassessing one of the oldest cases on proprietary estoppel. The late Professor Thompson did so much in his distinguished career to speak out against this trend. This matter should now be taken more seriously by the courts and by Parliament.