Constructive Trusts, Estoppel and Family Provision Claims

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About the author

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About this paper

Contested estate matters often have facts which could ground multiple, and overlapping, equitable claims. There can be a tendency for claims to be bundled together. Cost-benefit decisions need to be made as to the claims advanced in light of an assessment of how the case is likely to pan out at trial.

1. Table of Contents

1. INTRODUCTION

1.1. Within the galaxy of estate litigation, family provision claims are more prevalent than other claims by some distance.

1.2. Other types of estate litigation claims include:

a. claims affecting the validity of a Will including testamentary capacity, suspicious circumstances/knowledge and approval and probate undue influence,

b. applications for declarations for construction or rectification of a Will,

c. claims concerning due execution of a Will, and applications for declarations concerning informal testamentary documents,

d. contested claims for administration of an intestate estate, and

e. claims concerning the administration of an estate, including claims for revocation of the grant of probate.

1.3. The Supreme Court of NSW provisional statistics as at 29 January 2024[1] recorded in 2023 there were 968 family provision claims filed, 414 proceedings commenced in the Probate (Contentious Matters) List, out of 4,054 proceedings commenced in the equity division. Bearing in mind that the Probate (Contentious Matters) List may include contested applications for Probate or Administration, applications to revoke a grant of Probate or Administration, contested applications for orders for the filing and passing of accounts, perhaps applications for statutory Wills and applications for rectification of Wills. The number of family provision and contested probate matters can be compared to the number of uncontested applications for Probate or Administration filed in 2023 which was 30,691.

1.4. General equity claims, including claims in estoppel or for a constructive or resulting trust are increasingly made together with other estate litigation claims particularly family provision but occasionally contested probate applications.

1.5. Usually, every additional issue that is run in proceedings requires additional evidence and, if proceedings do not resolve, additional submissions and hearing days required to conclude the matter. Whilst the inclusion of additional claims can have the effect that, in some circumstances, a higher settlement can be negotiated,

[1] Available for download on the Supreme Court of NSW website (supremecourt.nsw.gov.au/about-us/statistics.html (as-at-29-Jan-2024))

all of this adds additional cost to the conduct of proceedings and increases the risk for the client.

1.6. In this paper I set out the principles that are applicable with respect to these estoppel and constructive trust claims and express my views about the utility of their pursuit in common circumstances.

2. THE INTERSECTION BETWEEN ESTOPPEL AND TRUST CLAIMS AND FAMILY PROVISION CLAIMS

2.1. This part of the paper commences with an introduction to common estoppel, resulting trust and constructive trust claims.

Estoppel

2.2. There have been a number of successful estoppel claims in New South Wales in a deceased estates context:

a. *Stone v Kramer* [2021] NSWSC 1456; *Kramer v Stone* [2023] NSWCA 270.

b. *Wild v Meduri* [2022] NSWSC 113 (Judgment in the appeal is reserved).

c. *Daniel v Athans* [2022] NSWSC 1712.

d. *Robertson v Byrne* [2022] NSWSC 1713.

e. *Horn v GA & RG Horn Pty Ltd* [2022] NSWSC 1519.

f. *Brose v Slade* [2023] NSWSC 1025.

g. *Reeves v Reeves* [2024] NSWSC 134.

2.3. Relevant cases in other states include:

a. *Re Connock (No 3)* [2023] VSC 420 (expectation when wills made in 1996, but not when later wills and other transactions made).

b. *Maher v Kuperholz* [2022] VSC 224 (claims by two brothers both dismissed).

c. *Laird v Vallance* [2021] VSC 352; appeal [2023] VSCA 138 (different claims by two brothers both dismissed).

d. *Brown v Barber* [2020] WASC 84 (proprietary estoppel claim, unconscionable conduct and undue influence claim successful).

e. *McDonald v Dunscombe* [2018] VSC 283 (proprietary estoppel claim failed).

f. *McNab v Graham* [2017] VSCA 352 (appeal from successful proprietary

estoppel claim failed).

g. *Dennis v Dennis* [2016] TASSC 62 (proprietary estoppel claim dismissed).

h. *Nolan v Nolan* [2014] QSC 218 (proprietary estoppel claim failed, common intention constructive trust claim succeeded).

2.4. In *Daniel v Athans* [2022] NSWSC 1712 at [24] and [25], Robb J described proprietary estoppel by encouragement as follows:

[24] "In circumstances where there has been "an assumption as to the future acquisition of ownership of property which had been induced by representations upon which there had been detrimental reliance by the plaintiff", the Court may grant relief to vindicate the assumption in whole or in part: *Giumelli v Giumelli* (1999) 196 CLR 101 at 112; [1999] HCA 10 at [6] (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483 at 488; [2010] NSWCA 84 at [21] (Handley AJA, with whom Allsop P and Giles JA agreed at 485 [1] and 486 [6] respectively); *Sidhu v Van Dyke* (2014) 251 CLR 505 at 511; [2014] HCA 19 at [2] (French CJ, Kiefel, Bell and Keane JJ). This describes the species of equitable estoppel known as proprietary estoppel by encouragement: *Trentelman v The Owners – Strata Plan No 76700* (2021) 106 NSWLR 227 at 257; [2021] NSWCA 242 at [116]-[117] (Bathurst CJ, with whom Bell P and Leeming JA agreed at 267 [170] and 267 [171] respectively).

[25] In *Trentelman v The Owners – Strata Plan No 76700*, Bathurst CJ set out (at 257-8 [117]-[118]) what I respectfully consider to be the contemporary state of the law in respect of what a plaintiff must prove to establish a claim for proprietary estoppel by encouragement. The Chief Justice drew on the authoritative statement of Handley AJA in *Delaforce v Simpson-Cook* at 488 [21] and the observations of Keane J in *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1 at 45-6; [2016] HCA 26 at [147]-[150]. The elements to be proved are that:

1. An owner of property (the representor) has encouraged another (the representee) to alter his or her position in the expectation of obtaining a proprietary interest; and

2. The representee has relied on the expectation created or encouraged by the representor; and

3. The representee has changed his or her position to their detriment; and

4. The detrimental reliance makes it unconscionable for the representor to depart from the promise or representation."

2.5. A promise based proprietary estoppel claim was described in B McFarlane, *The Law of Proprietary Estoppel, Second Edition*, Oxford University Press, 2020, at [1.15], as applicable where "*A makes a promise that B has or will acquire a right in relation to A's property and B, reasonably believing that A's promise was seriously intended as a promise on which B could rely, adopts a particular course of conduct in reasonable reliance on A's promise*".

Representation / promise

2.6. In *Thorner v Major* [2009] 1 WLR 776, Lord Walker of Gestingthorpe said at [794]:

> [56] (citing Hoffmann LJ in *Walton v Walton* [1994] CA Transcript No 479) "… in many cases of promises made in a family or social context, there is no intention to create an immediately binding contract. There are several reasons why the law is reluctant to assume that there was. One which is relevant to this case is that such promises are often subject to unspoken and ill-defined qualifications…
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> But a contract, subject to the narrow doctrine of frustration, must be performed come what may. That is why Mr Jackson, who appeared for the plaintiff, has always accepted that Mrs Walton's promise could not have been intended to become a contract.
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> But none of this reasoning applies to equitable estoppel, because it does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept".
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> …
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> [58] … "The commercial, social or family background against which a document or spoken words have to be interpreted depends on findings of fact".

2.7. The representation must be proven to have been intended to be relied on, or known to have been relied upon. In *Kramer v Stone* [2023] NSWCA 270, Leeming JA described the difference between (proprietary) estoppel by encouragement and (proprietary) estoppel by acquiescence as follows:

> "…But just as the existence of twilight does not erode the distinction between day and night, so too there is a sensible distinction between cases where a defendant's active conduct causes a plaintiff to hold an assumption, and cases where the defendant does nothing to bring about the plaintiff's wrong assumption, but nonetheless knows that the plaintiff is labouring under a misconception."

2.8. As to the factors which are relevant to establishing whether a representation was intended to be relied upon, in *Brown v Barber* [2020] WASC 83, Smith J referred to the following at [224], citing B McFarlane, *The Law of Proprietary Estoppel*:

a. If the statement was made, or conduct occurred, on occasions when the promisor [A] sought to influence the acts of [B].

b. The required promise is more likely to be found if A's statement is made with particular clarity or seriousness, as where, for example, it is made in writing following the parties' decision to clarify their actual or expected rights in property, or where it is made in circumstances which suggest it is unusually significant.

c. If B has embarked on a course of conduct which would, in the absence of any commitment from A, be difficult to explain.

Reliance

2.9. In *Gillett v Holt* [2001] Ch 210 at 227*,* Walker LJ approved the comment of Mr Swadling:

> "[T]he whole point of estoppel claims [by encouragement] is that they concern certain promises which, since they are unsupported by consideration, are initially revocable. What later makes them binding, and therefore irrevocable is the promisee's detrimental reliance on them. Once that occurs there is simply no question of the promisor changing his mind".
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> [T]he inherent revocability of testamentary dispositions… is irrelevant to

a promise or assurance that 'all this will be yours'. Even when the promise or assurance is in terms linked to the making of a will … the circumstances may make clear that the assurance is more than a mere statement of present (revocable) intention and is tantamount to a promise".

2.10. In *Priestley v Priestley* [2017] NSWCA 155, Emmett JA (with whom McColl JA and Macfarlan JA agreed) said at [135] – [137]:

[135] "It is conduct of a promisee or representee that is induced by reliance on a promise or representation by a promisor or representor that is the foundation for equitable intervention. Reliance is a fact to be found. It is actual reliance by the promisee or representee on the state of affairs so created, that gives rise to an equitable estoppel, by dispensing with the need for consideration, if a promise or representation is to be enforceable as a contract. It is not the breach of a promise or non- fulfilment of a representation but the responsibility of the promisor or representor for the detrimental reliance by the promisee or representee that makes it unconscionable for the promisor or representor to resile from her or his promise or representation.

[136] The question is not whether the promisee or representee acted, or desisted from acting, solely in reliance on the promise or representation of the other party. Rather, the question is whether the conduct of the representee or promisee was so influenced by the promise or representation that it would be unconscionable for the promisor or representor thereafter to enforce her or his strict legal rights. It is sufficient for the promisee or representee to show that the promise or representation was a significant factor taken into account by the promisee or representee when deciding whether to act or not to act. If the belief of the promisee or representee is a contributing cause of the conduct of the promisee or representee, that will be a sufficient connection between the assumption induced by the belief and the detriment. The question is whether the promisee or representee would have committed to and continued in particular conduct that had a

> detrimental effect on the promisee or representee if the relevant promise or representation had not been given to the promisee or representee by the promisor or representor.
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> [137] A promisee or representee has the onus of establishing that she or he believed the promise or representation made by the promisor or representor and of establishing that, on the faith of that belief, the promisor or representee took a course of action or inaction that would turn out to be to her or his detriment, were the promisor or representor to be permitted to depart from the promise or representation. The promisee or representee does not need to establish that the belief to which she or he was induced by the promise or representation was the sole or predominant cause of the course of action or inaction engaged in by her or him. It is only necessary to establish that the belief was a contributing cause.

2.11. However, in *Priestley v Priestley* [2017] NSWCA 155, Macfarlan JA said at [16], "… On my reasoning, it is unnecessary for [the promisee] to show that his belief (that the promisee would inherit a property known as Salt Glen) was reasonable (although I agree with Emmett AJA that it was). It is sufficient that [the promisee] held the belief, that he was known by [the promisor] to have held it, that he acted upon the basis of it, and that [the promisor] continued to accept the benefit of [the promisee's] assistance".

2.12. The question of detrimental reliance can be determined by posing a counterfactual based upon knowledge of the true state of affairs – what would have happened if the promise had not been made (*Priestley v Priestley* at [124]; *Sidhu v Van Dyke* at [77]).

2.13. The question of reliance is to be determined from the whole of the evidence, on the balance of probabilities: *Moore v Aubusson* [2020] NSWSC 1466 at 402.

Detriment

2.14. In *Gillett v Holt* (above), Robert Walker LJ said at 232:

> "The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad enquiry as to whether repudiation of an assurance is or is not unconscionable in all of the circumstances".

2.15. In *Sidhu v Van Dyke* [2014] HCA 19; (2014) 251 CLR 505 at 529, French CJ, Kiefel, Bell and Keane JJ said:

> "… If the respondent had been induced to make a relatively small, readily quantifiable monetary outlay on the faith of the appellant's assurances, then it might not be unconscionable for the appellant to resile from his promises to the respondent on condition that he reimburse her for her outlay. But this case is one to which the observations of Nettle JA in *Donis v Donis* (2007) 19 VR 577 at 588-589 [34] are apposite:
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> > "[H]ere, the detriment is of a kind and extent that involves life-changing decisions with irreversible consequences of a profoundly personal nature… beyond the measure of money and such that the equity raised by the promisor's conduct can only be accounted for by substantial fulfilment of the assumption upon which the respondent's actions were based".

2.16. In *AFSL v Hills Industries* [2014] HCA 14; (2014] 253 CLR 560 at 622-3 (a case concerning a change of position defence to a claim in restitution for return of a mistaken payment), Gaegler J said:

> "The foundation of an estoppel lying in a change of position to the prejudice of the party asserting the estoppel, the burden of proof lies with that party. The "real detriment or harm" which that party must prove to ground an estoppel can be any "material disadvantage" which would arise from permitting departure from the assumption on the faith of which that party acted or refrained from acting. Material

disadvantage must be substantial, but need not be quantifiable in the same way as an award of damages. Material disadvantage can lie in the loss of a legal remedy, or of a "fair chance" of obtaining a commercial or other benefit which "might have [been] obtained by ordinary diligence".

Time where equitable interest arises

2.17. The date on which an equitable interest arises in a proprietary estoppel claim is the date on which the detrimental reliance renders it unconscionable to depart from the promise: *McNab v Graham* [2017] VSCA 352.

Provision of care and assistance as detriment

2.18. A number of first instance decisions in New South Wales have recognised that the provision of care services and assistance may be sufficient detriment to establish an estoppel: *Daniel v Athans* [2022] NSWSC 1712; *Moore v Aubusson* [2020] NSWSC 1466; *Zupicic v Paino* [2018] NSWSC 692; *Sedgwick v Varzonek* [2015] NSWSC 1275; *Saliba v Tarmo* [2009] NSWSC 581; *Vukic v Grbin* [2006] NSWSC 41.

Relief

2.19. The principles relevant to the fashioning of a remedy were set out in *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483; [2010] NSWCA 84, by Handley AJA at [53] – [78], cited and summarised in *Lewis v Stewart* [2018] NSWSC 1186 at [219]. Omitting citations, those principles may be stated as follows:

a. The expectation basis of the equity favours the view that the *prima facie* entitlement is to satisfaction of the relevant expectation.

b. The quality of the assurances which gave rise to the claimant's expectations is an important factor.

c. *Giumelli* [1999] HCA 10; 196 CLR at 101, 120 and 125 established that the relief in these cases is not limited to reversing the detriment suffered by the party establishing the estoppel, but rather by fulfilling the expectation.

d. Relief very much depends on the facts such that the Court must look at the circumstances in each case to decide in what way the equity can be satisfied.

e. Subsequent events may reduce or enlarge the plaintiff's equity.

f. Relief may be limited where enforcement of the plaintiff's expectation would be out of all proportion to the detriment.

g. The Court should, *prima facie*, enforce a reasonable expectation which the party bound created or encouraged.

"[64] In *Giumelli* (above) the joint judgment at 123 quoted with approval this statement of Deane J in *Verwayen* [1990] HCA 39, 170 CLR at 443:

> 'Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of that assumed state of affairs would be inequitably harsh, that some lesser form of relief should be awarded.'

[65] The joint judgment continued:

> 'The prima facie entitlement to which his Honour had referred would be qualified if that relief "would exceed what could be justified by the requirements of conscientious conduct and would be unjust to the estopped party"'.

2.20. The measure of relief usually reflects the value of the promise: *Priestley v Priestley* [2017] NSWCA 155 at [160]; [164].

<u>Promissory estoppel distinguished</u>

2.21. In order to establish a promissory estoppel a plaintiff must establish that he or she assumed that a particular legal relationship existed between the parties or expected that a particular legal relationship existed between them. It is originally concerned with the exercise of rights arising from or said to arise from presently subsisting contractual (or legal) relations between the parties. It entails restraint upon the enforcement of existing legal rights which are inconsistent with a promise: *Skymko v Lach* [2022] NSWSC 1095 at [551] –[556]; citing *Meagher Gummow & Lehane's Equity Doctrine & Remedies 5th Edition*, 2014, Lexisnexis at 519, 532.

2.22. The Hon P Keane AC KC, *Estoppel by Conduct & Election, Third Edition*, Sweet & Maxwell 2023 and B McFarlane, *The Law of Proprietary Estoppel* 2nd Edition, Oxford University Press, 2020, are useful resources when considering the various types of estoppel claims and their utility.

Resulting Trust

2.23. A resulting trust is said to arise where:

a. one person pays the purchase price of a property but is not recorded on title; or

b. two or more persons advance the purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the property upon resulting trust in favour of those who provided the purchase price in the shares in which they provided it: *Calverley v Green* (1984) 155 CLR 242; [1984] HCA 81 at 266-267 per Deane J.

2.24. However, the presumption of resulting trust is a presumption, which may be rebutted by either evidence of actual intention, or by the presumption of advancement.

2.25. The following principles apply:

a. Prima facie the beneficial ownership of the land is with the legal title (reflected per registration).

b. In some situations this position is displaced by a presumption of a resulting trust (where one party provides a disproportionately greater contribution to the purchase price).

c. In other situations the presumption of advancement operates (where the person contributing the larger proportion of the purchase price is in a particular relationship with the other party so that the law presumes it was intended to provide the larger contribution by way of advancement) A presumption of advancement applies where a mother or father purchases or contributes to property for their children, or where a husband contributes to his wife's property.

d. The presumptions are common fact situations which permit the Court to make presumptions as to the intentions of the parties at the time the transactions were entered into. Evidence of actual intention can defeat the presumptions.

e. Evidence of acts and declarations of the parties to the transaction before or at the time of the transaction or so close in time to be considered part of the

transaction, are relevant. Admissions by the plaintiff at any time are also relevant.

2.26. The various presumptions, the interaction between them and the nature of the evidence required to shift the burden, was summarised by Campbell J in *Black Uhlans Inc v New South Wales Crime Commission & Ors* (2002) 12 BPR 22,421 at 22,423; [2002] NSWSC 1060 [para 128-141], extracted as follows:

> [128] Judicial findings about who holds the beneficial interest in land are made with the assistance of presumptions. The first is "... that prima facie the beneficial ownership of real property is commensurate with the legal title": Currie v Hamilton [1984] 1 NSWLR 687 at 690 per McLelland J. In some situations this first presumption is displaced by a presumption of a resulting trust, while in other factual situations a presumption of advancement operates. The fundamental nature of the presumption that the beneficial interest is the same as the legal interest is illustrated in the explanation of Deane J in Calverley v Green (1984) 155 CLR 242 at 267; 56 ALR 483 at 501 of how the presumption of advancement operates:
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> > The third "presumption", usually called the "presumption of advancement", is not, if viewed in isolation, strictly a presumption at all. It is simply that there are certain relationships in which equity infers that any benefit which was provided for one party at the cost of the other has been so provided by way of "advancement" with the result that the prima facie position remains that the equitable interest is presumed to follow the legal estate and to be at home with the legal title or, in the words of Dixon CJ, McTiernan, Fullagar and Windeyer JJ in Martin v Martin (1959) 110 CLR 297 at 303, that there is an "absence of any reason for assuming that a trust arose". "The child or wife has the legal title. The fact of his being a child or wife of the purchaser prevents any equitable presumption from arising" (1959) 110 CLR at 304 (quoting W Ashburner and D Browne, Ashburner's Principles of Equity, 2nd ed, Legal Books, Sydney, 1983, p 110n).

See also Nelson v Nelson (1995) 184 CLR 538 at 547; 132 ALR 33 at 140 per Deane and Gummow JJ, CLR 584; ALR 169 per Toohey J.

…

[133] Bogert, op cit, p 249 explains the juristic nature of this type of trust: This resulting trust depends for its existence on the actual intent of the creator, expressed in acts other than writing or the spoken word. The conduct of the payor with reference to the price and deed lead the court to infer an intent to have a trust for himself. The theory of enforcement is that of carrying out the intent of the settlor, just as truly as if he had reduced his trust to writing and inserted it in the deed. Resulting trusts are "intent enforcing" just as much as are the usual express trusts. They bear little or no relationship to constructive trusts, which do not arise out of intent but depend for their existence on the wrongful conduct of the defendant which induces a court to adjudge him a trustee.

[134] This account of the nature of the resulting trust arising from payment of the purchase price accords with the law in Australia. In Napier v Public Trustee (Western Australia) (1980) 32 ALR 153 Aickin J (with whom Gibbs ACJ, Mason, Murphy and Wilson JJ agreed) said, at 158:

> "The law with respect to resulting trusts is not in doubt. Where property is transferred by one person into the name of another without consideration, and where a purchaser pays the vendor and directs him to transfer the property into the name of another person without consideration passing from that person, there is a presumption that the transferee holds the property upon trust for the transferor or the purchaser as the case may be. This proposition is subject to the exception that in the case of transfers to a wife or a child (including someone in respect to whom the transferor or purchaser stands in loco parentis) there is a presumption of advancement so that the beneficial as well as the legal interest will pass. Each of the presumptions may be rebutted by evidence."

[135] In Napier at 158–9 Aickin J quoted with approval the following passage from the judgment of Jordan CJ in Re Kerrigan; Ex parte Jones (1946) 47 SR (NSW) 76 at 82–3. In my opinion in every case of the present type, where there are facts which, unaided by evidence of actual intention, would give rise either to a presumption of resulting trust or such a presumption in collision with a presumption of advancement, the question of how far either trust prevails, and to what extent, depends upon the intention of the parties as gathered from all available relevant facts, due consideration being given to the relevant weight of the two presumptions when they collide.

[136] That the presumption of resulting trust, and presumption of advancement, are the starting point of a factual enquiry about with what intention A provided the purchase price for a purchase of property in B's name is stated by Deane and Gummow JJ in Nelson v Nelson (1995) 184 CLR 538 at 547; 132 ALR 133 at 140: The presumptions operate to place the burden of proof, if there be a paucity of evidence upon such a relevant matter as the intention of the party who provided the funds for the purchase.

[137] The sort of evidence which can rebut a presumption of advancement was considered, in Charles Marshall Pty Ltd v Grimsley (1956) 95 CLR 353 at 365: The presumption can be rebutted or qualified by evidence which manifests an intention to the contrary. Apart from admissions the only evidence that is relevant and admissible comprises the acts and declarations of the parties before or at the time of the purchase ... or so immediately thereafter as to constitute a part of the transaction. If that evidence is insufficient to rebut the presumption the beneficial gift, absolute or subject only to qualifications imposed upon it at the time, is complete and no subsequent changes of mind or dealings with the property inconsistent with the trust by the donor can as between himself and the donees alter the beneficial interest. In Calverley v Green (1984) 155 CLR 242 at 262; 56 ALR 483 at 496 Mason and Brennan JJ (in a portion of the judgment which Deane J agreed in at CLR 271; ALR 503) applied this principle to identify the evidence which can rebut a presumption of resulting trust.

[138] In deciding whether a presumption of resulting trust had been rebutted, it would be necessary for the court to take into account not only evidence going to the intention of the provider of the money which tended to cut down the presumption of resulting trust, but also any evidence which tended to strengthen the finding about intention which that presumption dictates. Only by taking into account both evidence which tends to cut down the presumption, and evidence which tends to strengthen the finding about intention which the presumption dictates can the court reach a conclusion about whether, on the whole of the evidence, the presumption has been rebutted. The sort of conduct which could possibly be taken into account in this way could include who took occupation and control of the property, who made improvements to it and in what circumstances, who paid periodical outgoings on the property, who received any rent from the property, and who paid income tax on any rent received from the property. To the extent that any of these types of transaction occurred at a time which was not "so immediately thereafter as to constitute a part of the transaction", they could be taken into account only to the extent that they were admissions.

[139] The admissions which can be taken into account in deciding whether a resulting trust exists would include admissions by a predecessor in title: Falcon v Famous Players Film Co [1926] 2 KB 474 at 488–9 per Bankes LJ, 498 per Atkin LJ (Scrutton LJ at 494 not deciding); Nowell v Palmer (1993) 32 NSWLR 574 at 578 per Mahoney JA (with whom Meagher and Hanley JJA agreed); Sir R Cross and J D Heydon, Cross on Evidence, 5th Aust ed, Butterworths, Sydney, 1996, [33530]; S L Phipson, R May and J Buzzard, Phipson on Evidence, 12th ed, Sweet & Maxwell, London, 1980, [705]–[714]. In the present case, if there were any admissions made by Mr Reardon, during the time he was still the owner of the land, those admissions would be admissible against his successor in title, the Public Trustee.

[140] It has been repeatedly reiterated that the presumption of resulting trust is one which "should not ... give way to slight circumstances": Shepherd v Cartwright [1954] 3 All ER 649 at 652; [1955] AC 431 at

445; Charles Marshall Pty Ltd v Grimsley (1956) 95 CLR 353 at 365; Brown v Brown (1993) 31 NSWLR 582 at 596.

[141] The extent of the beneficial interest of the parties, arising by reason of a resulting trust, must be determined at the time when the property was purchased and the trust created: Calverley v Green (1984) 155 CLR 242 at 252; 56 ALR 483 at 496 per Gibbs CJ, CLR 262; ALR 489–90 per Mason and Brennan JJ (a portion of the judgment with which Deane J at CLR 271; ALR 503 agreed).

2.27. Authorities relevant to resulting trust claims include *Nelson v Nelson* (1995) 184 CLR 538; *Calverley v Green* (1984) 155 CLR 242 and *Russell v Scott* (1936) 55 CLR 440.

Common Intention Constructive Trust

2.28. Other trust claims which sometimes arise are the common intention constructive trust and the joint endeavour constructive trust.

2.29. In order to succeed in a common intention constructive trust claim the following must be established:

a. The existence of a common intention at the time of purchase of the property.

b. The applicant acted in reliance on the common intention to his or her detriment.

c. The quantum of the interest which the parties agreed or intended. The maxim equity is equality will apply in the absence of evidence of actual intention as to the way in which the property was to be held.

d. Failure of the common intention would be unconscionable.

2.30. The principles relevant to a common intention constructive trust were considered in *Shepherd v Doolan & Ors, Shepherd v Doolan & Anor; Est. Doolan* [2005] NSWSC 42 at paras 31, 34, 41 and 42:

[31] One class of case where equity will intervene to prevent the unconscientious denial by the legal owner of another party's rights, is where the parties agreed, or it was their common intention, that the claimant should have an interest in the property owned by the other, and the claimant acted to his or her detriment on the basis of that agreement or common intention. (e.g Grant v Edwards [1986] Ch 638;

Green v Green (1989) 17 NSWLR 343; Maharaj v Chand [1986] AC 898 at 907).

…

[34] Where a constructive trust is imposed, based upon the parties' common intention as to the ownership of property upon which the claimant has acted to his or her detriment, the inquiry is as to the actual intention of the parties. The law does not impute a presumed intention to the parties based upon what the Court considers fair and reasonable persons in the position of the parties would have intended had they turned their minds to the issue. (Pettitt v Pettitt [1970] AC 777 at 804, 810, 816-817; Gissing v Gissing [1971] AC 886 at 900, 902, 905-909; Allen v Snyder [1977] 2 NSWLR 685 at 690, 698, 701).

…

[41] The quantum of the claimant's beneficial interest will be that which the parties agreed upon or intended, if that can be established. In Green v Green and in Parianos v Melluish it was held that although the parties did not turn their minds to the particular form of title which they intended the claimant to have, the conclusion which best gave effect to the intentions of the parties was that they were beneficially entitled to the property as joint tenants, so that upon the death of the respondent, the claimant became the absolute beneficial owner by survivorship.

[42] If the evidence does not permit of a finding as to the precise size, nature and extent of the beneficial interest the parties intended the claimant to have, one starts with the maxim that equality is equity. (Green v Green at 355). But that standard can and should be departed from where the parties make disproportionate contributions to the acquisition of the property. In Baumgartner v Baumgartner, Mason CJ, Wilson and Deane JJ said (at 149-150):

> "Equity favours equality and, in circumstances where the parties have lived together for years and have pooled their resources and their efforts to create a joint home, there is much to be said for the view that they should share the beneficial ownership equally as tenants-in-common, subject to adjustment to avoid any injustice which would result if

account were not taken of the disparity between the worth of their individual contributions either financially or in kind."

2.31. Authorities on a common intention constructive trust include *Muschinski v Dodds* (1985) 160 CLR 583; *Green v Green* (1989) NSWLR 343 and *Bryson v Bryant* (1992) 29 NSWLR 188; *Bonaventura v Bonaventura* [2005] QSC 270.

Joint Endeavour Constructive Trust

2.32. The elements of a joint endeavour constructive trust were described by Ward CJ in Eq (as her Honour then was) in *Galati v Deans* [2021] NSWSC 1094 at [913] as follows:

a. "…first there must be both a joint relationship or endeavour, in which expenditure is shared for the common benefit in the course of and for the purposes of which an asset has been acquired;

b. second, the substratum of that joint relationship or endeavour must have been removed or the joint endeavour prematurely terminated "without attributable blame"; and

c. third, it must be unconscionable for the benefit of those monetary and non-monetary contributions to be retained by the other party to the joint endeavour".

(paragraph spacing added).

2.33. Authorities relevant to a joint endeavour constructive trust include *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Cetojevic v Cetojevic* [2007] NSWCA 33 and *Bryson v Bryant* (1992) 29 NSWLR 188; *Nolan v Nolan* [2014] QSC 218.

3. HOW ESTOPPEL CLAIMS MAY OPERATE WITHIN THE FACTS OF A FAMILY PROVISION CLAIM, INCLUDING WHEN ESTOPPEL IS RUN AS A DEFENCE TO A FAMILY PROVISION CLAIM

3.1. In order to advance a family provision claim an applicant must establish:

a. Eligibility to make a claim (s 57 *Succession Act* 2006 (NSW));

b. Where necessary, factors warranting the making of the application;

c. The application was filed within the prescribed period, or the legal personal representative of the estate consents to the application being made out of time, or there is sufficient cause for the Court to extend time;

d. The applicant has been left without adequate and proper provision and the Court should make an order for provision for the applicant.

3.2. Under the *Family Provision Act* 1982 (NSW), the Court applied a "two-stage" process as described in *Singer v Berghouse* [1994] HCA 40; 181 CLR 201 at 208-211 per Mason CJ, Deane and McHugh JJ:

> "The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. [**the jurisdictional question**]
>
> The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. **[the discretionary question**]".

3.3. In *Vigolo v Bostin* (2005) 213 ALR 692 at 722 Callinan and Heydon JJ said:

> "We do not therefore think that the questions which the Court has to answer in assessing a claim under the Act necessarily always divide neatly into two. Adequacy of the provision that has been made is not to be decided in a vacuum, or by looking simply to the question whether the applicant has enough upon which to survive or live comfortably. Adequacy or otherwise will depend upon all of the relevant circumstances, which include any promise which the testator made to the applicant, the circumstances in which it was made, and, as here, changes in the arrangements between the parties after it was made. These matters however will never be conclusive. The age, capacities, means, and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors."

3.4. Since it was suggested by Basten JA in *Andrew v Andrew* [2012] NSWCA 308; (2012) 81 NSWLR 656 that the two stage test is no longer apparent in the structure of ss 59 and 60 of the *Succession Act* 2006 (NSW), family provision discourse has trended against emphasis on a two stage process, even if *Singer v Berghouse* continues to apply until the High Court of Australia determines otherwise. It undoubtedly remains the case that an applicant must satisfy the Court that they have been left without adequate provision before an order can be made.

3.5. The *Succession Act* 2006 (NSW) introduced, at section 60(2), a list of matters which the Court may take into account in determining claims, the last of which is "any other matter which the court considers relevant". Some of these matters were drawn from section 9(3) of the *Family Provision Act* 1982 (NSW). As cited in judgments by Hallen J (including for example, *Hinderry v Hinderry* (2016) NSWSC 780 at [241], the s60(2) matters have been described by Basten JA in *Andrew v Andrew* [2012] NSWCA 308; (2012) 81 NSWLR 656 at [37], as "a multifactorial list", and by Lindsay J in *Verzar v Verzar* [2012] NSWSC 1380 at [123], as "a valuable prompt".

3.6. The matters in section 60(2) *Succession Act* 2006 (NSW) include:

a. S 60(2)(h) – any contribution, (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received by the applicant.

b. S 60(2)(j) – any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.

c. S 60(2)(m) – the character and conduct of the applicant before and after the date of the death of the deceased person.

d. S 60(2)(n) – the conduct of any other person before and after the date of the death of the deceased person.

3.7. And, although section s 60(2)(h) *Succession Act* 2006 (NSW) refers to contributions by the applicant for which adequate consideration was not received, there is no doubt that contributions by competing beneficiaries should be taken into account when evaluating there competing moral claims: see the statement of principle in *Sammut v Kleemann* [2012] NSWSC 1030 at [138] – [139].

3.8. The matters in sections 60(2)(h), (j), (m) and (n) overlap with most if not all of the elements which would need to be proven in an estoppel, resulting trust, common intention constructive trust and joint endeavour constructive trust claims. Most if not all of the evidence relevant to those type of equity claims will be relevant to advancing or defending a family provision claim.

3.9. The main differences between advancing an equity claim and leading evidence of the same factual matters in a family provision claim are:

a. In an estoppel or constructive trust claim, all the elements must be established, whereas in a family provision claim, not all of the elements of the equity claim (including reliance) need to be established.

b. In a family provision claim the applicant must establish eligibility, if necessary factors warranting and file the application within the prescribed period or obtain an extension of time.

c. If all of the elements of an estoppel claim are made out in an estoppel or constructive trust claim, the remedy is usually substantial fulfilment of the promise unless the remedy would be disproportionate, whereas in a family provision claim relief is more discretionary and is affected by other matters listed in s 60(2) Succession Act 2006 (NSW) including the financial circumstances of the applicant and the competing beneficiaries.

3.10. There are different views as to whether a defendant should advance a cross claim seeking estoppel or constructive trust relief in defence of a family provision matter where gifts made in a Will were made for estoppel or constructive trust type reasons.

3.11. On one view the result of a successful estoppel or constructive trust claim would be to take the property the subject of the claim outside of the estate, and, if the elements constituting the estoppel or trust claim arose more than three years before the deceased's death, the property cannot be notional estate.

3.12. In my view, an estoppel or constructive trust cross claim will be rarely worthwhile for the following reasons.

3.13. Firstly, there is a conceptual difficulty as a person may not be, at the same time, sole trustee and sole beneficiary of a trust over property: *Commissioner of Stamp Duties (NSW) v ISPT Pty Ltd* (1998) 45 NSWLR 639 at 648 per Mason P, cited in *Clayton v Clayton* [2023] NSWSC 399 at [71].

3.14. Secondly, I do not see why a common intention or joint endeavour constructive trust should be any different to the constructive trust arising from a mutual wills agreement, which does not result in the trust property being taken outside of an estate for the purpose of a family provision claim: *Barns v Barns* (2003) 214 CLR

169.

3.15. Thirdly, in the case of an estoppel claim, if the deceased promisor made a will in the terms which had been represented to the promisee, there is no resilement or departure from the promise: *Sidhu v Van Dyke* (2014) 251 CLR 505 at [77] per French CJ, Kiefel, Bell and Keane JJ; *Clayton v Clayton* [2023] NSWSC 399 at [574]. It could also not be said that the deceased promisor had acted unconscionably.

3.16. Fourthly, there will be additional costs and potentially additional parties in pleading, and conducting, an estoppel or constructive trust claim.

4. HOW CONSTRUCTIVE TRUST AND ESTOPPEL CLAIMS IN A FAMILY PROVISION CASE PLAYED OUT IN *CLAYTON V CLAYTON* [2023] NSWSC 399

4.1. *Clayton v Clayton* was a family provision claim by Ryan James Clayton in respect of the estate of his late mother, Deborah May Camilleri who died on 13 May 2021.

4.2. The assets of her estate consisted of a property at Murwillumbah (estimated value $650,000 at the date of death and $850,000 at the date of hearing), funds held with Westpac of about $34,000 but subject to a mortgage over the Murwillumbah property with a balance of $301,138.27 at date of the death.

4.3. In addition, the deceased had a MLC Life Insurance Policy with a value of $360,136 of which the nominated beneficiaries were the defendant as to 90% and the plaintiff as to 10%.

4.4. Pursuant to her Will dated 24 September 2020, the deceased gave the residue of her estate to her daughter Rebecca Jane Clayton.

4.5. The costs of the parties on the indemnity basis were, for the plaintiff $108,410 (he had paid disbursements of $13,410.35 but his solicitors were acting on a contingency basis) and for the defendant $100,000.

4.6. The plaintiff was 45 years old at the time of hearing. His affidavit evidence indicated that he owned a motorcycle (estimated value $18,000), household and personal effects (estimated value $30,000), jewellery (estimated value $1,000) and savings held with Westpac ($80,000) together with $36,600 held with superannuation. On the first day of the hearing, the plaintiff gave additional evidence that he held other bank accounts containing approximately $10,500. Bank statements produced on subpoena indicated that the total balance of his Westpac accounts was about $90,075 rather than $80,000.

4.7. Between 2002 and 2018 the plaintiff worked as a subcontractor installing shower screens. Later he established a handy man business Coastal Abundance. He received a Newstart allowance from Centrelink for a period of time and had been employed by Ausdrill from July 2022 until a short time prior to hearing.

4.8. At the hearing, the plaintiff gave further supplementary evidence to the effect that the business Coastal Abundance owned a Toyota Hiace Van (estimated value $10,000 - $12,000) and cash of $6,000 - $8,000. The plaintiff's evidence was that he had ceased operating Coastal Abundance but that the business still paid some of his expenses.

4.9. In his affidavit evidence, the plaintiff gave evidence that he was single. The Court found that the plaintiff was in a de facto relationship with his then partner Tanya until December 2022 and he had commenced a dating relationship with another woman, Amanda, in February or March 2023. The Court found that there was no evidence of cohabitation with Amanda.

4.10. The plaintiff gave evidence that he suffered from back pain, joint injuries, depression and insomnia. The defendant tendered some pictures of the plaintiff travelling around the world on holidays over the preceding 10 years and participating in activities including bungee jumping, which the plaintiff had posted on Facebook.

4.11. The defendant had lived with and assisted the deceased for 20 years prior to her death. In February or March 2003 the deceased and her then partner, Ron, purchased a property at Currumbin Waters, Queensland for $215,000. Each of the deceased and the defendant paid an inheritance of $25,000 towards reducing the mortgage debt secured over the Currumbin Waters property.

4.12. In 2006 the deceased sold the Currumbin Waters property and purchased a duplex at Pottsville for $323,000. In 2009, the deceased sold the Pottsville duplex and in 2010 purchased a villa in Campbelltown for $286,000. In 2015 the deceased sold the Campbelltown villa for $505,000. The deceased and the defendant rented in Campbelltown for a few years before the deceased purchased a block of land in the Murwillumbah in 2016.

4.13. In 2017 a house was built on the Murwillumbah property and in December 2017 the deceased and the defendant moved in. From that time, the defendant gave evidence that they continued to improve the property by hiring tradesmen to carry

out landscaping, instal air conditioning, exhaust fans, additional power points and lights, a CCTV system, fences, security doors and screens as well as thermal insulation in the garage.

4.14. The defendant had suffered from chronic fatigue syndrome and various other medical conditions which affected her ability to work. She had received the Newstart allowance and later the disability support pension from Centrelink for many years.

4.15. The plaintiff's counsel conceded that there was insufficient in the estate for the Court to award provision to the plaintiff for accommodation. The ultimate submissions that were put by the plaintiff were that the plaintiff should receive provision of $264,000 to put him within striking distance of being able to purchase a unit with a loan. The Court viewed this claim as, in effect, a claim for contingencies.

4.16. The defendant had filed a cross-claim seeking declaration that the Murwillumbah property was held on trust for her benefit absolutely. The trust claim was pleaded as follows (extracted from paragraph [73] of the Judgment):

(1) In or about 2003, the deceased orally represented to the defendant that in the event that the defendant paid all her income to the deceased and they shared their expenses the deceased would leave to the defendant all her real property on her death (**Representation**);

(2) In reliance upon the agreement the defendant paid to the deceased effectively all of her income until the deceased's death which income the deceased used to pay her mortgage and other liabilities;

(3) In about 2003, the deceased orally represented to the defendant that if she paid the sum of $25,000 being the inheritance the defendant received from the estate of her great-uncle Kevin the deceased would leave her real estate to the defendant upon her death (**Continued Representation**);

(4) The defendant paid the $25,000 inheritance to the deceased's Westpac mortgage account;

(5) From 2003 until the deceased's death, the deceased and the defendant equally shared all their expenses including mortgage repayments on each of the properties owned by the deceased up to the time of her death and the

defendant continued to grant the deceased free access to all of the defendant's bank accounts which money the deceased used as her own;

(6) In reliance upon the representations from about 2010 to 2015 the defendant assisted the deceased to substantially renovate the Campbelltown villa (see below) and the defendant shared with the deceased the costs of such work and provided personal exertions in carrying out such works; and

(7) In 2016, defendant provided "equal input" into the layout, design and decor of the Murwillumbah property which was built.

4.17. The Court set out the legal principles applicable to claims in estoppel (at paragraphs [529] – [533]), common intention constructive trust (at paragraphs [534] – [543]) and joint endeavour constructive trust (at paragraphs [544] – [561]).

4.18. The Court said that the representations and continued representations as pleaded had not been made out on the evidence. Further, the fact that the effect of the Will was that Murwillumbah property was to pass to the plaintiff meant that it was unnecessary for the Court to make a declaration that the property was held on trust for the plaintiff. The Court said that no trust should be imposed (even if the representations had been made out) because the deceased had done exactly what she had promised to do. There had been no resilement by the deceased in the relevant sense (*Sidhu v Van Dyke* (2014) 251 CLR 505 at [77] per French CJ, Kiefel, Bell and Keane JJ).

4.19. In respect of the common intention constructive trust claim, the Court said that the statement "this is your home" was equivocal; that the defendant did not state that she understood the statement to be a gift of a beneficial interest in the Campbelltown villa, that the deceased's letters (admitted to evidence) did not refer to any promise, and that terms of various Wills made by the deceased were not entirely consistent with such promises.

4.20. In respect of the joint endeavour constructive trust claim the Court found that the scope of the joint relationship or endeavour had not been defined, that the defendant had not established that the relationship or endeavour had prematurely terminated without attributable blame and that the defendant had not made out the requirement of unconscionability.

4.21. The defendant had given evidence in her administrator's affidavit that she had contributed $250,000 on account of mortgage repayments, construction, maintenance, renovation and repairs to various properties owned by the deceased

over 20 years. The Court found that the defendant had not provided any basis upon which that estimate had been calculated.

4.22. The Court said at paragraph [71], that a person may not be, at the same time, sole trustee and sole beneficiary of a trust over a property (referring to *Commissioner of Stamp Duties (NSW) v ISPT Pty Ltd* (1998) 45 NSWLR 639 at 648 per Mason P).

4.23. The Court dismissed the plaintiff's family provision claim as well as the defendant's cross-claim.

5. TIPS FOR DRAFTING YOUR ORDERS SOUGHT, STRUCTURING YOUR ARGUMENTS AND LEADING EVIDENCE WHEN RUNNING MULTIPLE CLAIMS

5.1. E Finnane, C Wood & N Newton, Equity Practice & Precedents 2nd Edition, Thomson Reuters, 2019, Chapter 15 provides a suite of precedents for the relief claimed and pleading in aid of claims in resulting trust, constructive trust and proprietary estoppel.

Orders sought

5.2. Where it is asserted that property is held on a constructive trust, the relief sought should include both a declaration as to the existence of the trust as well as orders to give effect to the trust declared, such as an order that the defendant execute a Transfer of the trust property to the plaintiff, that new trustees be appointed, or that trustees for sale be appointed.

Pleadings and particulars

5.3. Taking full instructions is invaluable prior to drafting pleadings and particulars. This will assist in identifying the nature of the claim and providing the detailed particulars that are required.

5.4. The pleadings should identify the parties, the trust property and each of the material facts said to give rise to the equitable claim [see paragraphs 2.3 (estoppel), 2.24 (common intention constructive trust) and 2.27 (joint endeavour constructive trust) above].

5.5. The pleading should distinguish between actual intention and any presumption of intention said to arise from material facts pleaded.

5.6. If alternative causes of action are pleaded, make sure that the relief claimed reflects the equitable claim.

5.7. Full particulars of important representations should be set out.

5.8. Alternative causes of action should be considered but should not be included just for the sake of it.

Evidence

5.9. The affidavit and documentary evidence should establish the facts as pleaded.

5.10. Evidence of conversations with deceased persons occurring long ago will be carefully scrutinised: *Plunkett v Bull* [1915] HCA 14; (1915) 19 CLR 544 at 548-9.

5.11. In *Watson v Foxman* (1995) 49 NSWLR 315 and 319, McLelland CJ in Eq said:

> "Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances … Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience."

5.12. In *Lake Cumbeline Pty Ltd v Effem Foods Pty Ltd* (trading as Uncle Ben's of Australia) (Federal Court of Australia, Tamberlin J, 29 June 1995, unrep), Tamberlin J said at 122 - 123 (in a passage cited with approval by the High Court when it upheld his Honour's decision: *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* [1999] HCA 15; (1999) 161 ALR 599, at [15]):

> "[Given the lapse of time] between the events and conversations raised in evidence and the hearing of the evidence before me, the only safe course is to place primary emphasis on the objective factual surrounding material and the inherent commercial probabilities, together with the documentation tendered in evidence. In circumstances where the events took place so long ago, it must be an exceptional witness whose undocumented testimony can be

> unreservedly relied on. The witnesses in this case unfortunately did not come within that exceptional class. The discussions referred to in evidence were capable of bearing quite opposed meanings depending on subtle differences of nuance and emphasis, and a proper appreciation of the significance of those matters must necessarily be considerably diminished over such a long period of time.

5.13. In *Hampson v Hampson* [2010] NSWSC 217 at [16], Bryson AJ said (emphasis added):

> "Recurringly claims come before the Equity Division of proprietary estoppel in dwellings arising out of informal arrangements within families. In *Vukic v Luca Grbin; Estate of Zvonko Grbin* [2006] NSWSC 41 Brereton J stated the effect of the more important authorities. Notwithstanding the family context and the informality which comes with that, such claims should be carefully and critically examined, and *the law of proprietary estoppel does not readily ratify keyhold tenure and word-of-mouth conveyancing around the kitchen table*. The present case has characteristics which are fairly often encountered; the arrangements alleged were oral and were made long ago, the terms in which they were made are shown by evidence which could not produce high confidence of its detailed accuracy, and there is poor corroboration, or in the present case no corroboration of the promise. It would be easy for imprecise or casual discussion to pass through the interpretation of an interested person into a recollection of a concrete assurance or promise. There is great wisdom and public interest in the legislation which requires conveyances of interests in land to be evidenced in writing, and it cannot become a matter of course for that wisdom to be circumvented."

5.14. These authorities highlight the importance of corroboration of key conversations and the importance of the credit, usually of the plaintiff, in evaluating the strength or otherwise of these cases. Time and care is needed in preparing admissible affidavit evidence in these cases where each element required to give rise to the equitable relief sought must be proven.

5.15. Apart from establishing the elements of the equitable claim, perspective as to the end result is needed to filter the claims with real prospects from those which are more ambitious. In each case the result depends on being able to satisfy the Court

that the facts as found, absent a remedy, lead to unconscionable consequences.

5.16. The paper by the Hon Justice G Lindsay AM, *Evaluation of a Proprietary Estoppel Claim to a Family Farm: Text, Context and Purpose*, presented for STEP Queensland on 6 October 2023 is a useful resource. His Honour set out at paragraph [81] the matters which ought to be addressed in the evidence in a family farm proprietary estoppel case.

Submissions

5.17. There are different styles of written submissions.

5.18. In many cases in opening I tend to introduce the parties and other witnesses, the trust property, and the elements of each equitable claim, and the important documents to be tendered or marked for identification as aide memoir documents.

5.19. In closing I tend to begin with submissions on credit where relevant, and what the Court should make of the important parts of the oral evidence in chief and cross examination.

5.20. Where there are multiple causes of action, in closing each element of each equitable claim should be addressed separately, although cross referencing can assist where what is needed to be proven is the same for each separate claim.

5.21. A metaphor, if introduced without hyperbole, can be powerful. In *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [8] Lord Hoffman said:

> *"Past events provide context and background for the interpretation of subsequent events and subsequent events throw respective light upon the meaning of past events. The owl of Minerva spreads its wings only with the falling of the dusk. The finding was that [B] reasonably relied upon the assurance from 1990, even if it required later events to confirm that it was reasonable for him to do so".*

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