[2021] NZLJ 195

Proprietary estoppel

Connor Seddon and Henry Brandts-Giesen, Dentons Kensington Swan, on an emerging cause of action in the law of relationship property, trusts, and estates in New Zealand

Proprietary estoppel is a species of equitable estoppel where, when property is being transferred, an individual can make a claim on that property on the basis that the owner of the property had assured them that they would be granted the property and they had relied on that assurance to their own detriment.

In order to bring a successful claim in proprietary estoppel, the claimant must be able to establish four elements:

a) a representation or assurance has been made to the claimant;
b) the claimant has relied on that representation or assurance;
c) the claimant has suffered a detriment as a result of that reliance; and
d) it would be unconscionable for the respondent to depart from the belief or expectation.

In New Zealand the terms 'proprietary estoppel' and 'equitable estoppel' are used interchangeably by the courts. This is because New Zealand has a unitary approach to estoppel which treats the different species of estoppel as a fundamental doctrine. The above four elements are maintained in the unitary approach to estoppel, as clarified in the case *National Bank of Westminster Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548 (CA).

If those four elements can be satisfied, then the court may provide a remedy. Courts in the United Kingdom and New Zealand have been unclear on how remedy for proprietary estoppel should be calculated, and how a calculation of remedy should factor in expectation and detriment. Historically, as stated in the case *Crabb v Arun District Council* [1976] Ch 179 (CA) the Court emphasised that the calculation of remedy is simply an exercise of the court's discretion. In the more recent case of *Jennings v Rice* [2002] EWCA Civ 159 the Court stated that there could be two categories of remedy:

a) Where there seems to be a mutual understanding or agreement between the parties to the extent that some kind of unofficial "bargain" could be said to have been reached, then the assumption would be that the remedy ought to fulfil the claimant's expectation.
b) Where the expectation of the claimant is extravagant or disproportionate to the detriment suffered in reliance on that expectation then the remedy should not be the whole of the expectation, but rather some more proportionate amount.

In New Zealand the case of *Wilson Parking Ltd v 135 Fanshawe Ltd* [2014] NZCA 407 provides the current New Zealand position on remedy in proprietary estoppel. This case considers the reliance and expectation measures of remedy and the Court states that the purpose of the remedy ought to be to eliminate the unconscionability and satisfy the equity. The Court rejects a prima facie presumption in favour of either the reliance or expectation measures. The Court states that the three elements relevant to the measure of remedy will be (1) the quality of assurance, (2) the nature of the detrimental reliance, and (3) the unconscionability. The expectation measure is to be used when the measure would be proportionate as between the expectation, the detriment and the remedy. In this case the expectation measure was considered the appropriate measure.

HISTORICAL BASIS OF PROPRIETARY ESTOPPEL

The case of *Dillwyn v Llewelyn* [1862] 4 De G F & J 517 is considered to have established the first example of proprietary estoppel. In this case the father had indicated that his land would go to his younger son and thought he had assigned the land to the younger son by memorandum. The memorandum was not a deed and so was imperfect title, though the younger son incurred expense in building a house on the land. The eldest son disputed the younger son's imperfect title on the death of the father. The Court held that there was a right to the property because there was a promise and a financial detriment incurred as a result of that promise.

The case of *Willmott v Barber* [1880] 15 Ch D 96 is considered the case that establishes the elements of proprietary estoppel. The Court in that case held that five elements must be established before proprietary estoppel could operate:

a) the claimant must have made a mistake as to his legal rights;
b) the claimant must have done some act of reliance;
c) the defendant, the possessor of a legal right, must know of the existence of his own right which is inconsistent with the right claimed by the claimant;
d) the defendant must know of the claimant's mistaken belief; and
e) the defendant must have encouraged the claimant in his act of reliance.

These five elements established in *Willmott v Barber* are known collectively as the five probanda approach. This approach has been applied in cases up until the 1990s including *Crabb v Arun* [1976] Ch 179, *Swallow Securities v Isenberg* [1985] 1EGLR 132, and *Matharu v Matharu* [1994] 2 FLR 597.

The case of *Taylors Fashion Ltd v Liverpool Victoria Trustees* [1982] QB 133 is considered responsible for establishing the modern approach to proprietary estoppel. Under the modern approach there are three requirements for establishing an equity in proprietary estoppel:

a) an assurance giving rise to an expectation that the claimant would have an interest in land;
b) the claimant must demonstrate reliance on the assurance; and
c) the claimant must have acted to their detriment as a result of the assurance.

The modern approach was approved in *Habib Bank v Habib Bank AG Zurich* [1981] 1 WLR 1265 and in *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 1306.

In New Zealand the early case law on proprietary estoppel emphasised unconscionability. In *National Westminster Finance v National Bank of New Zealand*, the Court described equitable estoppel as a "broad rationale … to stop a party from going back on his word … when it would be unconscionable to do so" (at 549).

In particular, New Zealand courts have traditionally had a broad and flexible approach to their discretion to grant relief. In *Stratulatos v Stratulatos* [1988] 2 NZLR 424 (HC) the Court stated that it preferred to avoid cluttering the available remedies with arbitrary rules. This was echoed in *Dale v Trustbank Waikato Limited* 18/12/92, Penlington J, HC Hamilton CP 54/86 where the Court stated that the most appropriate remedy would depend on the facts of a given case. The current New Zealand position is stated in the *Wilson Parking Ltd v 135 Fanshawe Ltd* case.

APPLICATION OF PROPRIETARY ESTOPPEL IN GENERAL CASE LAW

As noted above, *Taylors Fashion Ltd v Liverpool Victoria Trustees*, as affirmed by *Habib Bank v Habib Bank v AG Zurich* and *Lim Teng Huan v Ang Swee Chuan*, established the modern approach and its three requirements for establishing proprietary estoppel.

The assurance element

An assurance may be active or passive. An active assurance can be by words or conduct. Examples of express active assurance can be seen in the cases *Pascoe v Turner* [1979] 1 WLR 431, *Griffiths v Williams* [1977] 248 EG 947, *Re Basham* [1986] 1 WLR 498, and *Gillet v Holt* [2000] 2 All ER 289. An example of active assurance by conduct can be seen in *Inwards v Baker* [1965] 2 QB 29.

A passive assurance is where the claimant is mistaken in his expectation and the owner stands by and does nothing to change that belief. An example of this can be seen in the case of *Scottish and Newcastle Plc v Lancashire Mortgage Corp Ltd* [2007] EWCA Civ 684.

The case of *Yeoman's Row Management v Cobbe* [2008] EWHC 2810 states that the assurance must be clear and unambiguous.

The cases of *Taylor v Dickens* [1998] 3 FCR 455, *Gillet v Holt, and Lloyd v Sutcliffe* [2007] EWCA Civ 153 provide commentary and discussion on whether the assurance should be irrevocable.

The case of *Layton v Martin* [1986] 2 FLR 227 states that the assurance must relate to an interest in property.

The case of *Murphy v Rayner* [2011] EWHC 1 states that the assurance must not be obtained dishonestly.

The case of *Qayyum v Hameed* [2009] EWCA Civ 352 states that an innocent misrepresentation may be used as an assurance, but the innocence of the owner will be relevant in assessing the equities between the parties.

In *Thorner v Major* [2009] UKHL 18 the Court relaxed the criteria for representations requiring representations to be 'clear enough in the context'. In this case it was enough to commit the claimant to a life of hard and unrelenting physical work.

In the case of *Habberfield v Habberfield* [2019] EWCA Civ 890 the Court stated that the relevant assurance must simply be clear enough in the context. Although the representations were in themselves ambiguous, the judge concluded that taken together and in context, they were sufficiently clear to convey the idea that there would be a transfer of freehold property.

In *James v James* [2018] EWHC 43 (Ch) the claimant was unable to present clear and reliable evidence of an assurance that he would inherit the farm. The judge distinguished between a "statement of current intentions as to future conduct" and "a promise of that conduct". There was a strong emphasis on saying that it is your intention is not the same thing as promising it.

The reliance element

The claimant must show that they had relied on the assurance and that will generally be shown through changing their conduct, as stated in *Attorney General of Hong Kong v Humphrey's Estate* [1987] AC 114.

The case of *Evans v HSBC Trust* [2005] WTLR 1289 states that the assurance need not be the only reason that the claimant acted to their detriment.

As articulated in the cases of *Greasley v Cooke* [1980] 1 WLR 113, *Lim Teng Huan v Ang Swee Chuan*, and *Evans v HSBC Trust*, in most instances it is relatively easy to establish reliance and the courts have come close to adopting a presumption of reliance where there exists a representation.

Despite the ease of establishing reliance, the case of *Coombes v Smith* [1986] 1 WLR 808 states that where there has been no causal connection between the change of conduct and the assurance the courts have found that there is no reliance.

The detriment element

In order to fulfil the detriment element the claimant must show that they have acted to their detriment or significantly changed their position, as stated in *Re Basham*, *Gillet v Holt*, and *Suggitt v Suggitt* [2012] EWCA Civ 1140.

In the cases of *Voyce v Voyce* [1991] 62 P & CR 290 and *Inwards v Baker* the Courts held that the expenditure of money to improve land is a sufficient example of a detrimental change in position. Likewise, *Inwards v Baker* states that work undertaken to improve the land will be considered detrimental reliance.

If the claimant does not seek alternative employment then the Court in *Gillet v Holt* states that this can be used to show that the claimant relied on the assurance to their detriment.

Coombes v Smith states that with regard to non-financial detriment it can be more difficult to establish an equity. However, non-financial detriment has been recognised as giving rise to an equity in a number of cases, including *Re Basham, Jones v Jones* [1977] 1 WLR 113, *Greasley v Cooke*, and *Campbell v Griffin* [2001] EWCA Civ 990.

Finally, when assessing the detriment the courts will take into account any benefits that have been received when it

conducts a 'weighing the ledger' exercise in determining the degree of detriment, as stated in *Watts v Story* [1984] 134 NLJ 631 and *Powell v Benney* [2007] EWCA Civ 1283.

Satisfying the equity

As noted above, the courts have been unclear on how the remedy for proprietary estoppel ought to be calculated. In the United Kingdom the *Jennings v Rice* decision establishes the two categories of remedy. In New Zealand, in the *Wilson Parking Ltd v 135 Fanshawe Ltd* decision the Court retained a broad degree of discretion while setting out elements that will be relevant in choosing between an expectation measure or a reliance measure of remedy.

A range of different remedy approaches has been used. *Gillet v Holt* used conveyance of freehold as the remedy. In *Yaxley v Gotts* [2000] Ch 162 the Courts employed the use of a lease as a remedy. The transfer of equitable ownership was used in *Lim Teng Huan v Ang Swee Chuan*. An occupational right was used in *Inwards v Baker* and *Greasley v Cooke*. *ER Ives Investment v High* [1967] 2 QB 379 employed the use of an easement. Finally, *Campbell v Griffin* and *Powell v Benney* used compensation as the remedy.

APPLICATION IN A RELATIONSHIP PROPERTY CONTEXT

In the case of *Hollands v Sorensen* [2020] NZHC 103 the ex-husband of Sorensen unsuccessfully tried to claim the family home, which was in the Sorensen trust, under the doctrine of proprietary estoppel. The claim was on the basis that the Sorensen family had provided reasonable assurance that the house would be considered relationship property through providing the couple with a home, and that they had relied on that assurance to their detriment, both through the expenditure on the home and through the decision not to purchase their own home. The Court found that the Sorensens had not encouraged any belief or expectation that the couple would share in the property. Additionally, the Court found that the couple had not suffered any detriment. They were never in a position to buy a property, they received benefits from the trust, and the only reliance pointed to was regular maintenance of the property, some of which was subsidised by the trust.

In the case of *McCarthy v McManamon* [2021] NZHC 294 the claimant unsuccessfully claimed proprietary estoppel over a house held in trust and sought a half share of the house. There were two trusts during the marriage, one for McManamon containing the house and one for McCarthy containing money. The Court held that in the circumstances there was nothing in McManamon's conduct that would create an expectation that McCarthy would share in the assets of the McManamon trust. There was also a Heads of Agreement which McCarthy breached but McManamon did not, so it would not be unconscionable to depart from McCarthy's expectations, even if they were reasonable and well-founded.

APPLICATION IN A FAMILY PROTECTION CONTEXT

In the case of *Carroll v Bates* [2018] NZHC 2463 the doctrine of proprietary estoppel is successfully used by the daughter to claim property which would otherwise have passed by will to another family member. The property was a family home which the mother had given the daughter the keys to and told her that she would be left it when her mother and father died. The family treated the home as if the daughter owned it and the daughter invested considerably in the property. The Court found that there had been clear representations to the daughter as well as the rest of the family. Those representations had been enough to cause the daughter to rely on them to her detriment in the amount she invested. The Court granted the daughter the transfer of the whole property.

The case of *Thomas v Mathias* [2021] NZHC 461 is a little different in that it deals with equitable estoppel and not specifically with proprietary estoppel. That being said, the Court identified the same assurance, reliance and detriment elements that proprietary estoppel is based on. In this case the executors of a will were unsuccessful in applying to strike out a claim on the basis that it discloses no cause of action. The god-daughter of the deceased applied for compensation on the basis that she was led to believe that the deceased was financially not well off and as a result contributed uncompensated services to the deceased above and beyond what would reasonably be expected of a god-daughter. The deceased was actually very well off and the claimant received only a modest bequest under the will. The Court found that there was enough to make a case where the claimant could show that there was a reasonable belief that the deceased could not compensate for the services, she acted in reliance upon that belief, and she suffered the detriment of providing services without reward where she could have sought reward.

The case of *Christie v Foster* [2019] NZCA 623 is a private international law case answering the question of which jurisdiction is the forum conveniens for trying a claim in proprietary estoppel and constructive trust. As such, the Court in this case did not address the arguments for the claim in proprietary estoppel beyond noting that they existed as a cause of action. The claimant stated that promises were made by her mother and father that she would inherit the New Zealand property. In reliance on those promises she and her husband performed work for her mother and father, including work on the land promised. The claimant argued that the severance of the joint tenancy of the property meant that the property would no longer pass to her and that this was unconscionable.

In the case of *Sutherland v Lane* [2020] NZHC 721 the claimant unsuccessfully sought to claim proprietary estoppel over a property that was bought by her late uncle of which she was given unrestricted use but which was not left to her in the will. She argued that there was a belief or expectation that she would take the property only if she continued the relationship proceedings against her ex-husband and that it would be unconscionable not to fulfil that expectation. The Court found that there was no evidence that she had been told she would take the property if she continued the proceedings so there was no conduct to justify reliance. Additionally, there was no detriment that was unique to the reliance on the expectation of taking the property. She would have continued the proceedings regardless and the use of the house was purely a benefit. The Court stated that unrestricted use is not an assurance of proprietary interest. Nor is disappointment at not receiving a property a detriment.

APPLICATION IN A TRUSTS DISPUTE CONTEXT

In the case of *Hamilton v Kirwan* [2020] NZHC 2149 the

Continued on page 202

There is no professional supervision of advocates, and no restriction on any persons setting themselves up as advocates. The Court has given the green light for them to claim costs on accident compensation appeals as if they were offering professional services.

Access to justice

It may be contended that all the Court has done in *Carey* is to improve access to justice for accident compensation claimants.

The result of the court's decision may be to make representation in accident compensation appeals easier to obtain. Whether that representation will be of great benefit to the claimants is less clear.

Some matters of concern are that Mr Carey was awarded costs for a whole day's hearing. Accident compensation appeals are normally disposed of in under 2 hours. Disbursements of $1,500 were awarded, although it is not clear what these were for. Overall, the award is higher than would have been made to lawyers in many cases. That suggests that something is not right.

It remains to be seen how this new regime will play out in practice. If it provides the impetus for a review of access to justice in accident compensation cases that may be a good thing. If it is retained in the form as set out in *Carey* there is likely to be a host of new issues plaguing accident compensation appeals. ❐

Continued from page 197

doctrine of proprietary estoppel was successfully used to claw back assets which had been, at the time of the claim, fully gifted into trust. The property was a block of rural land which had been lived on and developed by the daughter over the course of her life. The daughter had built a house and business premises on the land. The father gifted the property into a trust for which his sons were beneficiaries but his daughter was not. The Court declared that the transfer of the property to the trust was null and void and ordered the property to be distributed between the sons and daughter as tenants in common in equal shares.

AN EMERGING CAUSE OF ACTION IN NEW ZEALAND?

There are an increasing number of New Zealand cases where a claim under proprietary estoppel is one of the claims being made by the claimant. This could be for a number of reasons:

a) A claim under proprietary estoppel is similar in its elements to one of constructive trust, so where a claimant is bringing a claim under constructive trust, it is cost effective for them to hedge their bets and bring a claim under proprietary estoppel.
b) The law of proprietary estoppel in New Zealand is not well settled, so for some claimants it is worth taking a gamble in bringing a claim of proprietary estoppel.
c) The higher courts of New Zealand have maintained a broad discretionary approach in relation to proprietary estoppel remedies, so for claimants including a claim alongside other claims is low cost but high reward.
d) The courts of New Zealand have shown that they are willing to use proprietary estoppel to take property out of places that claimants would otherwise not have access to, such as trusts.

Proprietary estoppel can be useful in a trusts context because the courts, as shown in the case of *Hamilton v Kirwan*, are willing to declare the transfer of property into a trust as null and void. That gives claimants access to property that the trust would protect from other claims. So, proprietary estoppel should be considered a tool in attacking a trust. Additionally, because the elements of constructive trusts and proprietary estoppel are similar, it is low cost to include both claims when trying to access the property held by a trust.

It is likely if the courts do not provide clarity on proprietary estoppel and its remedies, we will continue to see more claims being brought in relationship property, trusts, and estates cases in New Zealand.

Proprietary estoppel can also be useful in the case of a relationship property dispute. The issue here though is that some kind of expectation or belief must have been fostered to prove proprietary estoppel. In these instances, you are often proving the same thing that you would prove if you are seeking to show that property is relationship property. Given that overlap, proprietary estoppel may be more complex and unnecessary.

It is likely if the courts do not provide clarity on proprietary estoppel and its remedies, we will continue to see more claims being brought in relationship property, trusts, and estates cases in New Zealand. ❐