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# MALLEABILITY OF A DOCTRINE

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# Malleability of a doctrine

The vitality of the principle of proprietary estoppel is illustrated by recent High Court and Victorian Court of Appeal cases. **By Philip Barton**

Proprietary estoppel is a venerable equitable doctrine applied to assist those making assumptions about acquisition of ownership of property induced by representations by owners upon which they have relied to their detriment.

The doctrine of proprietary estoppel is based on two mid-Victorian cases. In 1853 Llewelyn Dillwyn of Sketty Hall in Wales offered his son Lewis his farm "Hendrefoilan" on which to build a house, which Lewis accepted. They executed a memorandum recording the presentation of the land for this purpose, which however was not an effective conveyance. With Llewelyn's assent and approbation, Lewis spent £14,000 chiefly on building a residence. Lewis was held entitled to the fee simple in Hendrefoilan, Lord Westbury LC stating:

"A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift . . . But the subsequent acts of the donor may give the donee that right or ground of claim . . . So if A puts B in possession of a piece of land, and tells him, 'I give it to you that you may build a house on it', and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made . . . The equity of the donee and the estate to be claimed by virtue of it depend on the transaction, that is, on the acts done, and not on the language of [a] . . . memorandum, except as that shows the purpose and intent of the gift. The estate was given as the site of a dwelling-house to be erected by the son. The ownership of the dwelling-house and the ownership of the estate must be considered as intended to be co-extensive and co-equal. No one builds a house for his own life only . . ."[1]

Four years later in *Ramsden v Dyson & Thornton* a tenant at will who had erected houses on land in Yorkshire alleged that he had done so after being encouraged to believe that he could have a 60 year lease. He failed on the facts but Lord Wensleydale LC stated:

"If a stranger built on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit."[2]

These cases founded a category of equitable, commonly called proprietary estoppel which affords relief "found in an assumption as to the future acquisition of ownership of property . . . induced by representations upon which there had been detrimental reliance by the plaintiff".[3] The underlying principle is that conduct of a promisor in engaging a complainant to change position to his or her detriment on the footing that the promised property will be theirs, when acted upon by the complainant, creates an equity binding the promisor to make good the expectation.[4] The purpose of this article is to examine this doctrine (which often arises on facts also attracting a constructive trust argument but nonetheless has a distinct historical pedigree) mainly by reference to the two most recent High Court cases, *Giumelli v Giumelli*[5] and *Sidhu v Van Dyke*,[6] and the main Victorian case of *Donis v Donis*,[7] followed by brief reference to recent, largely Victorian, cases.

## Giumelli v Giumelli

Mr and Mrs Giumelli (the parents) conducted a partnership business on a property. They subsequently admitted their sons, Robert and Steven, as partners. The parents purchased another property (Dwellingup) outside the partnership, which family members including Robert improved at partnership expense. The parents agreed to Robert building a house on Dwellingup and promised that it and the segment of land (the Promised Lot) on which it stood, including an orchard, would be his. In reliance thereon he expended money and labour constructing a house. Following his marriage, his parents promised to subdivide Dwellingup to create a lot for Robert including the house and orchard if he did not work elsewhere. He rejected this

offer because his wife would not live on the property. They subsequently separated and he returned to the property, being then reassured that on his divorce the Promised Lot would be transferred to him. In reliance on this promise he stayed and planted the new orchard. Meanwhile, Steven married and lived with his family in a transportable house on, and improved, the Promised Lot. The family relationship subsequently broke down and Robert commenced a partnership proceeding. Before its final hearing he commenced a proceeding alleging proprietary estoppel.

The trial judge held that: the parents induced Robert to adopt the expectations in the promises; as they intended, he acted in reliance on them; he had suffered detriment from the earlier promise by expenditure of money and labour on the house without acquisition of title; but because he had continued in the partnership the later promise had not caused him detriment; and a monetary payment would satisfy his expectation created by the earlier promise.

The Western Australia Full Court disagreed, holding that Robert had suffered detriment from the later promise by losing the property which he had improved and for which he had abandoned a different career opportunity, and, because the partnership lacked security of tenure and did not own the land. It held that his expectation created by both promises required, in substance, that the Promised Lot be conveyed to him.

The High Court disagreed with the Full Court but only on relief, which it held should not exceed that required for conscientious conduct or do injustice to others. Accordingly, before deciding whether the land should be conveyed, a court was obliged to consider all circumstances, including: the pending partnership action; improvements to the lot by other family members; the breakdown in family relationships; and that Steven's family lived on the Promised Lot. It accordingly held that Robert should receive the present value of the Promised Lot adjusted by taking into account all considerations necessary to do equity, charged upon Dwellingup, with interest.

## Donis v Donis

Mr and Mrs Donis (the Donis) owned 40, largely agricultural, acres on Melbourne's outskirts improved by two houses each on adjacent fenced-off sections. Their son Steven lived in one house. He married Susie in 1997. The Donis in effect told her that she and Steven would be or were registered as owners of the house and half the land. In reliance on this she agreed to marry, have a child, move into the house and spend money and effort improving it. After the marriage foundered the Donis stripped the house bare and sold the entire property in 2002 for $3.97 million. Susie commenced proceedings alleging proprietary estoppel.

Hansen J found substantial detriment by her reliance on the Donis' statements, particularly being: she and her husband would otherwise have purchased their own home and spent their money on it, or even saved it, thereby providing an asset; she would have been much better off financially and generally if she had delayed having children and pursued her career; and the stripping eliminated any recompense for improvements. She was held *prima facie* entitled to have the promise fulfilled, ie to receive 25 per cent of the sale proceeds, but because of various equitable considerations Hansen J reduced this to $600,000, being the mid-point between one quarter of the property's value at the date of separation with interest and of its sale value.

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*The concept of detriment required something substantial but was not limited to monetary expenditure or other quantifiable financial disadvantage.*

The Court of Appeal dismissed an appeal, holding:

(a) *Giumelli* had established that, where the expectation encouraged was the acquisition of an interest in property, prima facie the equitable obligation was to be fulfilled by the estopped party making this good; ie assuming the promise, reliance and detriment, the promisor was *prima facie* held to the promise and, unlike other forms of estoppel, the relief was not limited to that required to avoid detriment;

(b) However, as in *Giumelli*, the relief ought not exceed that required for conscientious conduct or create injustice and accordingly the *prima facie* position yielded to individual circumstances. Thus, although substantial correspondence between expectation and the monetary value of the detriment suffered, or which but for the relief to be accorded would be suffered, was unnecessary, where a claimant's expectation or assumption was uncertain, extravagant or totally disproportionate to the detriment, the claimant's equity may be better satisfied in another and possibly more limited way. The concept of detriment required something substantial but was not limited to monetary expenditure or other quantifiable financial disadvantage.

(c) The detriment suffered by Susie involved life-changing decisions with irreversible consequences of a profoundly personal nature beyond the measure of money and accordingly required substantial fulfilment of the assumption which had motivated her.

## Sidhu v Van Dyke

Mr and Mrs Sidhu were joint owners of Burra Station. Its Homestead Block was improved by their homestead and a nearby cottage. Mr and Mrs Van Dyke and their child moved into the cottage. Mr Sidhu and Mrs Van Dyke commenced a sexual relationship and in 1998 he said that he loved her, wanted her to have a home there with him, and was planning to subdivide to create a separate property on which the cottage stood (the cottage lot) to enable it to be put into her name. When the Van Dykes subsequently separated she took the advice of Mr Sidhu, who was a lawyer, not to obtain a property settlement as she had the cottage. She also did unpaid work on the cottage, on other property in which the Sidhus were interested through a company, and on the subdivision application. She suffered substantial disadvantage by losing the opportunity to earn wages for more than eight and a half years. In 2005 the subdivision, one lot of which was the cottage lot, received council approval conditional upon road construction. The cottage subsequently burnt down but in 2006 Mr Sidhu promised to give the cottage lot to her. Soon afterwards their relationship ended and the subdivision stalled because the roads were not constructed.

The trial judge held that, although Mr Sidhu had promised in 1998 to give the cottage, and in 2006 to transfer the cottage lot, to Mrs Van Dyke, her case failed on two grounds. First, although she had relied to her detriment on the first promise by not seeking a property settlement, this was not "objectively reasonable" because performance of the promise depended on subdivision and on Mrs Sidhu's consent or on circumstances arising where such consent was unnecessary. Second, although her work and abandonment of employment opportunities may in some circumstances constitute detrimental reliance, this was not so here because she may very well have done all or most of those things anyway.

The judge's findings on detriment were overturned by the New South Wales Court of Appeal, and the High Court dismissed Mr Sidhu's appeal. The High Court held that although Mrs Van Dyke at all times bore the legal burden of proof on the balance of probabilities that the promises causally contributed to her conduct (even if they were not its sole inducement) she had compellingly established detrimental reliance. And good conscience required that Mr Sidhu be held to his promises; because he had given categorical assurance that the subdivision would occur and his wife would consent to the transfer of the cottage lot he could not argue that performance of his promises was conditional on the subdivision and consent. However, because of its adverse effect upon the interests of Mrs Sidhu as co-owner, the appropriate relief was not a conveyance of the cottage property but payment of its value.

## Conclusion

Three Victorian cases show the malleability of the doctrine of proprietary estoppel. In *Mainieri & Anor v Cirillo*[8] in 2014 the Court of Appeal applied the doctrine to the commonplace facts of a mother who, in return for paying $240,000 to reduce their mortgage, was permitted to live with her son and his domestic partner indefinitely in their home with them caring for her. She was accorded

a lien or charge over the property to secure the repayment of the money with interest. *Flinn v Flinn*[9] represents an earlier more novel application of the doctrine to prevent a personal representative resiling from a testator's promise that he and his wife would amend their wills to leave their nephew and his wife an interest in their farm. And a unique application of the doctrine occurred in 2011 in *Harrison v Harrison*[10] where, in reliance on an executor's representations that he would provide for them from their parent's estate, his sisters did not seek an extension of time to commence testator's family maintenance proceedings (under Part IV of the *Administration and Probate Act*) and then were barred by final distribution of the estate. Kaye J held that the sisters had suffered detriment through the executor resiling from the promises, namely loss of entitlements under Part IV, and that the appropriate relief was what the provision under Part IV would have been.

Recent cases also demonstrate that proprietary estoppel claims may fail at basic factual points. Thus, recent unsuccessful plaintiffs include cases where:

- the defendant did not know of the plaintiff's expenditure on the land;[11]
- erection of boatsheds on public land was not induced by conduct creating a reasonable expectation of permanent tenure, which tenure would also be inconsistent with legislation limiting the council's powers to deal with municipal land;[12]
- the assumption by a tenant in common that he was a joint tenant (and so took by survivorship) was not induced by the defendant;[13]
- the only expression of intention by his parents to a son, who claimed that he worked on the family farm because he was allegedly induced to believe that he would receive an interest in it on his parents' retirement, was that he would receive an interest not on their retirement but on their death and they had not resiled from this intention.[14]

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**1**. *Dillwyn v Llewelyn* (1862) 4 De GF & J 517 at 521–522, 45 ER 1285 at 1286-7.
**2**. (1866) LR 1 HL 129 at 168.
**3**. *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 per Gleeson CJ, McHugh, Gummow and Callinan JJ.
**4**. *Donis v Donis* 19 VR 577 at 589 per Nettle JA.
**5**. Note 3 above.
**6**. [2014] HCA 19.
**7**. Note 4 above.
**8**. [2014] VSCA 227.
**9**. [1999] 3 VR 712.
**10**. [2011] VSC 459. Unsuccessfully appealed: *Harrison v Harrison* [2013] VSCA 170.
**11**. *Portland Downs Pastoral Company Pty Ltd v Great Northern Developments Pty Ltd* [2012] QCA 18.
**12**. *Hobsons Bay City Council v Gibbon* 32 VR 168.
**13**. *Sandri v O'Driscoll* [2014] VSCA 88 at [58].
**14**. *Sobey v Sobey* [2014] VSC 373.