

## **The Supreme Court affirms its position regarding proprietary estoppel by encouragement**

On 16 February 2017, judgment was delivered in *Perpetual Trustee Company Limited v Corbett*<sup>i</sup>. In his judgment, Robb J determined the question whether a proprietary estoppel arose by applying Emmett AJA's statement of the principles in *Priestley v Priestley*<sup>ii</sup>, thereby affirming that judgment as a comprehensive statement of the current law on this sometimes conceptually difficult legal issue.

### Facts

John Corbett was one of 8 children of Keith and Valerie Corbett, who owned various rural and industrial land holdings outside Sydney in New South Wales. Both Keith and John operated businesses that purchased and developed properties. One of the properties purchased by Keith was located in Maldon, NSW.

In 2002, Keith informed John that if John continued to develop the various properties that Keith and Valerie had purchased, John could "have Maldon"<sup>iii</sup>. Relying on this representation, John carried out substantial works developing and improving 7 properties owned by Keith for no reward and developed the Maldon property by constructing and renovating work buildings on it. He also received rent from leasing part of the Maldon property. In 2004, Keith informed John that the Maldon property was his, although the property remained in Keith's name.

In April 2010, Keith died intestate. Perpetual Trustee Company Ltd obtained letters of administration in Keith's estate and later commenced proceedings seeking a declaration that John had no interest in the Maldon property and orders that John vacate the property and repay all rental income earned since Keith's death. John defended the claim on the basis that the Maldon property belonged to him.

### Judgment

The issue in the case was whether John had established a proprietary estoppel, which is a form of equitable estoppel applying specifically to land. The doctrine concerns representations (either express or implied, through silence or other forms of passive encouragement) that leads a person to assume they will acquire an interest in land, and that person relying upon the representations in such a way that the person would suffer detriment if the representations were resiled from. Where the estoppel is established, equity will intervene to compel the representor to adhere to the promise, or provide some other form of equitable compensation as appropriate.

There are 2 distinct types of proprietary estoppel: estoppel by encouragement (where a person relies upon express promises or representations that they will obtain an interest in land) and estoppel by acquiescence (where a person improves land in the mistaken assumption that they have an interest in the land, and the owner of the land is aware of the mistake and does nothing to undeceive the person).

In *Perpetual*, the type of proprietary estoppel in issue was estoppel by encouragement. In considering whether John had established an estoppel, Justice Robb followed<sup>iv</sup> the statements of principle applicable to equitable estoppel by encouragement set out in Emmett AJA's leading judgment in *Priestley*. In summary, those principles are:

- The fundamental purpose of equitable estoppel is to protect a person from acting to their detriment by preventing the promisor from resiling from their promise or representation;
- A party may rely on a promise or representation by acting or refraining from acting;
- Reliance on the promise or representation need not be the sole reason for the promisee acting or abstaining from acting; it is sufficient if reliance is a contributing cause;
- The foundation for equitable intervention is the conduct by the promisee that is induced by reliance on a promise or representation by a promisor; it is not breach of promise or non-fulfilment of the representation;
- The question is whether the conduct of the promisee is so influenced by the promise or representation that it would be unconscionable for the promisor to enforce their strict legal rights;
- The onus is on the promisee to establish that they believed the promise or representation and that, on the faith of that belief, they took a course or action or inaction that will be to their detriment if the promisor is permitted to depart from their promise or representation;
- The promisee's detriment is not a narrow or technical concept and need not be a quantifiable financial detriment so long as it is something substantial;
- Where the promisee will suffer a substantial detriment, the proper measure of relief is performance of the promise or representation;
- Only when proprietary relief would be out of all proportion with the detriment might the relief be something less than fulfilment of the promise or representation.

Applying these principles, Robb J found that John Corbett had established that his father Keith made the relevant representations and that John was influenced by those representations “in a significant or material way”<sup>v</sup>, such that they were a contributing cause to him carrying out on the substantial works on the properties owned by his parents and the Maldon property for no fee. His Honour found that in the circumstances it would be unconscionable for the trustee to resile from Keith's promises, as it would cause John to suffer a substantial detriment, both quantifiable in terms of money he spent improving the properties, and unquantifiable in terms of the assistance John provided to his father over many years in relation to the development of the properties<sup>vi</sup>. His Honour concluded that John was entitled to the full beneficial ownership of the Maldon property.

### Application

The doctrine of proprietary estoppel has developed in Australia and England slowly since the mid 19<sup>th</sup> century. As a general observation, cases considering the applicability of the doctrine have tended to traverse the many disparate authorities that had established or developed each of its elements.

With *Perpetual*, the Supreme Court has eschewed consideration of these authorities, including those of the High Court<sup>vii</sup>, in favour of following the concise statement of principles set out by the Court of Appeal in *Priestley*.

While it is of course true to say that each case turns on their own facts, and that individual authorities may have particular applicability to a specific factual scenario,

it seems that practitioners considering the issue of proprietary estoppel by encouragement may now refer with more confidence to the principles elucidated in *Priestley* as being a correct statement of the principles. At the very least, this case may be seen as a helpful starting point when considering whether the estoppel arises.

---

<sup>i</sup> [2018] NSWSC 126

<sup>ii</sup> [2017] NSWCA 155

<sup>iii</sup> At [36]

<sup>iv</sup> At [155], [167] and [189]

<sup>v</sup> At [159]

<sup>vi</sup> At [187]

<sup>vii</sup> *Giumelli v Giumelli* (1999) 196 CLR 10; *Sidhu v Van Dyke* (2014) 251 CLR 505