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# PROPRIETARY ESTOPPEL – CONSIDER IT A CLAIM AGAINST THE ASSETS OF AN ESTATE


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### PROPRIETARY ESTOPPEL

The creation of a constructive trust is a method where the courts prevent an improper gain from unconscionable conduct in certain circumstances.[1]

An additional claim that has developed over the years is that of proprietary estoppel. Its foundations are, in some ways, very similar to the *quantum meruit* claim and the constructive trust claim. For example, corroborative evidence is essential and there must be detrimental reliance on the part of the claimant.

The claim of proprietary estoppel is premised on the concept that the courts will award damages to a claimant on the basis that, in the appropriate factual circumstances, it will ignore the provisions of a will, and attribute to the claimant what would reasonably have been expected in respect of the assets of the estate.

In circumstances where proprietary estoppel is applied, the court has found that there is a reasonable expectation of fair and judicious conduct on behalf of the deceased, and attempts are made to preserve and protect property accordingly. In such instances, a court will not insist on strict adherence to legal rights of a party where it would be

[1] Ford & Lee, Principles of the Law of Trusts, (2nd ed.), The Law Book Company Ltd., 1990 at p. 1053/ See also comprehensive review of Unjust Enrichment Claims Against the Estate based on the provisions of services to the deceased by C.D. Freedman [2010] 29 E.T.P.J. 163.

inequitable for that party to do so having regard to the dealings which have taken place between the parties.[2]

The basic requirements of a claim for equitable estoppel are that a legal owner of land makes a representation to a claimant that he or she either has (or will be granted) some interest in land, and the claimant relies on this representation by acting to his or her detriment.[3]

Proprietary estoppel is an extension of modern equity based upon long-established doctrines, notably those of implied, resulting and constructive trusts.[4] The basic idea of estoppel at common law is that of precluding one from denying the existence of a state of affairs which one has previously asserted.[5]

### (a) Proprietary vs. Promissory Estoppel

The two main forms in which the doctrine of equitable estoppel exists have been called "promissory estoppel" and "proprietary estoppel". Proprietary estoppel has been described as distinct from promissory estoppel in that its effect is permanent, whereas the effect of promissory estoppel may only be temporary. Furthermore, promissory estoppel merely provides a defence, while proprietary estoppel sometimes provides a cause of action as well.[6]

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[2] *Jennings v. Rice* (2002),WTLR 367, *Gillett v. Holt* [2001] Ch. 210, WTLR 815 (C.A.), *Jiggins v. Brisley*, [2003] EWHC 841.
[3] Mark Pawlowski, "Property - Proprietary Estoppel" (2002) 146:4 Solicitors Journal 90
[4] Snell's Equity, 13th ed. (London: Sweet & Maxwell, 2000) at 10.
[5] *Ibid* at 631.
[6] *Ibid* at 633.

In its form of proprietary estoppel, equitable estoppel can require an intending donor who has made a representation that another person now has, or will have, an interest in property to which the intending donor holds title, to make good that representation. The method of doing that could either be an order that the interest be conveyed or a declaration of a constructive trust.[7]

An important distinction is made when enforcing the concept of proprietary estoppel. For example, if an owner of property expresses a present intention to make a gift but does not do all that is necessary on his or her part to transfer the interest, the intended gift cannot be carried into effect by equity. However, if the elements of equitable estoppel are present, the donee has an equity which the court will satisfy by making an appropriate order against the donor. Thus, in some cases the court may order that the donor perfect the gift. In others, it may order that the donee be given an irrevocable licence to occupy the property.[8]

### (b) Conditions That Must Be Satisfied

The doctrine of proprietary estoppel has generally concerned, almost exclusively, the acquisition of rights over land; however, it has been extended to other forms of property as well.[9]

The law with respect to proprietary estoppel is well settled, and has recently been again endorsed by the Ontario Court of Appeal in *Schwark v. Cutting.*[10] There, MacFarland, J.A.

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[7] *Supra* note 19 at 1054
[8] *Supra* note 19 at 1054-1055.
[9] *Supra* note 25 at 637-638.
[10] 2010 O.N.C.A. 61 (CanLII) [*Schwark*]

considered the applicability of proprietary estoppel generally, and noted the Court has accepted that *Snell's Equity* properly discloses the elements necessary to establish proprietary estoppel as the following:[11]

1. encouragement of the plaintiffs by the defendant owner;
2. detrimental reliance by the plaintiffs to the knowledge of the defendant owner; and
3. the defendant owner now seeks to take unconscionable advantage of the plaintiffs by reneging on an earlier promise.[12]

In order that the expression of a gift takes effect, there are four conditions that must be satisfied:

(i) detriment;

(ii) expectation or belief;

(iii) encouragement; and

(iv) no bar to the equity.

- **Detriment**

There is no doubt that for proprietary estoppel to arise, the person claiming must have incurred an expenditure or otherwise have prejudiced him or herself or acted to his/her detriment.[13]

[11] *Ibid* at 16
[12] For a further review of the UK decision in *Thorner v. Curtis* [2008] see Penelope Reed, "The need for an express promise" (2008) 101 T.E.L. & T.J. 4

The expenditure or detriment itself can involve circumstances where a claimant has spent money on improving the property, done repairs and/or contributed to mortgage payments, and may even consist of the claimant giving up his or her job and staying to assist the deceased.

- **Expectation or Belief**

The claimant must have acted on the expectation that he or she would benefit; but if the claimant has no such belief, he or she has no claim in respect of the expenditure.[14]

A rebuttable presumption of reliance arises when promises have been made and the recipient acts in such a way that inducement can be inferred.[15]

- **Encouragement**

Another important consideration is if the claimant's belief had been actively encouraged by the testator and the testator must have known of the claimant's expenditure.[16]

- **No Bar To The Equity**

No equity will arise if to enforce the right claimed would contravene some statute or performance of a statutory duty.[17] The court will consider that, even though possible, it may be undesirable to give full effect to the assurances relied on.[18] The matter must be

[13] *Supra* note 23 at 638.
[14] *Supra* note 23 at 639.
[15] *Campbell v. Griffin*, [2001] WTLR 981 and see Timothy Sisley, "Proprietary Estoppel - Taking Good Care of Things" (2001) 31 Trusts and Estates Law Journal 17.
[16] *Supra* note 23 at 639-640.
[17] *Supra* note 23 at 640.
[18] *Supra* note 34

looked at generally, and the court will not impose proprietary estoppel without the presence of the overriding requirement of unconscionability. Where the other elements of the doctrine are present, and it would not be unconscionable in the circumstances for the defendant to insist on its strict legal rights, no estoppel arises.[19]

## HISTORICAL CASE LAW DEVELOPMENTS

The principle of proprietary estoppel has been described in broad terms, and in terms of representation (or assurance), reliance and detriment, leading to equity's intervention in order to prevent an unjust (or unconscionable) result. However, the way in which these elements interact, and the range of equity's possible responses, can best be understood by reference to the facts of the decided cases.[20]

Historically, the development of this type of estoppel focused on circumstances where the claimant had incurred substantial expenditure on the land, for the benefit of the owner. For example, in *Dillwyn v. Llewellyn,*[21] the father offered the son a farm in order that the son could build a home on it. The son accepted the offer and the father executed a memorandum gifting the land to the son for the purpose of building a home. The son acted on that gift, took possession and built a home with the knowledge of the father; however, no property was ever conveyed to the son. After the father's death, Lord Westbury L.C. held that the son was the owner of the land based on his expenditures. It was argued that the memorandum was an imperfect gift; Lord Westbury L.C., however, rejected this argument and stated that:

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[19] *Keelwalk Properties Ltd. v. Waller*, [2002] E.W.J. No. 3743, [2002] EWCA Civ. 1076
[20] Lord Walker, "One Day This All Will Be Yours – The Development of Proprietary Estoppel", (2003) 1 Trust Quarterly Review 2.

> "... the equity of the donee in the estate to be claimed by virtue of it depends on the transaction, that is, on the acts done and not on the language of the memorandum."[22]

## RECENT DEVELOPMENTS

Although proprietary estoppel traced its beginnings to the 19th century, apart from some decisions in Australia,[23] the first half of the 20th century saw little progress in the development of proprietary estoppel.

The courts continue to pursue the need for proportionality and the need to determine the appropriate remedy with the benefit of hindsight.[24]

In *Gillett v. Holt,*[25] the claimant had left school early at the request of the testator. Over the years, the claimant received numerous promises that the farm business (the size and shape of which varied over the years) would be his one day. The British Court of Appeal struggled with the important balancing act that must occur in all cases where proprietary estoppel is considered. These are, of course, generally fact-based decisions and, speaking for the majority, Walker L.J. concluded that the inherent irrevocability of testamentary promises on testamentary freedom itself was irrelevant in the face of an assurance of inheritance, where the circumstances made it clear that the assurance was

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[21] (1862) 4 De G. F. & J. 517, 45 E.R. 1285; See also *Duke of Beaufort v. Patrick* (1853) 17 Beav. and Allen, "An Equity to Perfect a Gift" (1963) 79 L.Q.R. 238.
[22] *Ibid* at 522.
[23] *Supra* note 39 at 3.
[24] *Ibid*
[25] [2001] Ch. 210, [2001] WTLR 195 (The British Court of Appeal summarized the significant recent developments in this area)

more than just a mere statement of present, possibly revocable, contention and constituted a firm, irrevocable promise.[26] In coming to its decision, the Court of Appeal felt strongly that the claimant there relied on the deceased's assurances to his detriment, and the claimant and his family had devoted their lives to the testator's wishes.

In *Gillett v. Holt,* the Court of Appeal pointed out that the detriment is to be judged at the time when the testator (or his estate) goes back on his promise.[27] In fact, Walker, L.J. said at 233:

> If in a situation like that in *Inwards v. Baker* [1965] 2 QB 29, a man is encouraged to build a bungalow on his father's land and does so, the question of detriment is, so long as no dispute arises, equivocal. Viewed from one angle (which ignores the assurance implicit in the encouragement) the son suffers the detriment of spending his own money in improving land which he does not own. But, if viewed from another angle (which takes account of the assurance), he is getting the benefit of a free building plot. If and when the father (or his personal representative) decides to go back on the assurance and assert an adverse claim then, as Dixon J. put it in the passage just quoted from *Grundt v. Great Boulder pty Gold Mines Ltd.,* "if [the assertion] is allowed, his own original change of position will operate as a detriment".

As a result of *Gillett v. Holt*, the Court of Appeal made it clear that the detriment in the context of proprietary estoppel was not a narrow or technical concept – it did not have to

[26] *Supra* note 22

consist of the expenditure of money or other quantifiable financial detriment, so long as it was something substantial.[28]

In the decision of *Jennings v. Rice,*[29] the issue of testamentary promises was further considered. There, a promise was made by an elderly widow, to her unpaid gardener, that she would leave her property to him on her death. On numerous occasions, the gardener asked the widow for money and she said that he need not worry about money as she would see to it that he would be all right. She would also say from time to time that "this will all be yours one day", although nothing was put in writing. During this time, the claimant and his wife were anxious to move closer to their daughter. However, the deceased became more and more dependant on the claimant and the claimant reluctantly agreed to stay with her.

While the equitable estoppel was established, the question left for the British Court of Appeal was to what extent should the equity be satisfied?

In this case, many inconsistent promises were made and, while the deceased lived in a small one-room home, she also had valuable investments. A fundamental question for the court in *Rice v. Jennings* was what were the claimant's expectations in these circumstances? Ultimately, the court found that the claimant certainly had no understanding of the nature and extent of the testator's wealth beyond the one-room home.

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[27] *Supra* note 39 at 3.
[28] *Supra* note 22.
[29] *Jennings v. Rice* (2002), WTLR 367

The Court of Appeal, faced with this problem, considered the need for proportionality.

In awarding the claimant only the home that he knew the deceased owned and not the investments, the court exercised its wide judgment and discretion proportionally and judiciously:

> "The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result, and a disproportionate remedy cannot be the right way of going about that. Cases on interim injunctive relief have recognized the importance of proportionality in the granting of equitable remedies ... Where the court is granting final relief after investigating all the facts proportionality is even more important."[30]

In another case where the Court of Appeal considered the concept of proprietary estoppel, it also applied its discretion in a proportional fashion. In *Campbell v. Griffin,*[31] an elderly couple were looked after by the claimant and the Court of Appeal ultimately awarded a fixed amount against the couple's property to satisfy the claim of proprietary estoppel.

In *Campbell v. Griffin,* the claimant, Mr. Campbell, lived with Mr. & Mrs. Ascough. He was 30 and they were in their late 70s. Over the years, the couple's expectations and dependency grew and Mr. Campbell accepted the burden of looking after them. Mr. & Mrs. Ascough repeatedly assured the claimant that he would have a home for life. The claimant soon stopped paying rent as a lodger.

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[30] *Ibid* at 56.
[31] [2001] WTLR 981.

As to the extent of the claimant's equity, the court followed the approach in *Jennings v. Rice* and held that, although his rent-free status did not eliminate his equity, based on the principle of proportionality, a life interest was inappropriate and therefore a fixed sum was charged against the property. The Court of Appeal held that it could take judicial notice that a live-in caregiver, looking after a frail couple, would expect a substantial wage in addition to free board and lodging.[32]

## PROPRIETARY ESTOPPEL AND THE ONTARIO EXPERIENCE

In *Depew v. Wilkes,*[33] the Ontario Court of Appeal considered the concept of proprietary estoppel generally and, in particular, the necessary elements for establishing an easement by way of the doctrine.

In *Depew v. Wilkes,* the appellants and the respondents owned cottage properties on Lake Erie. The respondents owned Lot 13, upon which there was a lane known as Willow Beach Lane. Lot 13 was subject to two rights-of-way that provided access to and from the appellants' cottages. Over the years, the appellants parked their cars on Lot 13 and claimed that they had acquired possessory title to parts of Lot 13 based on adverse possession. At trial, the claim was dismissed; however, the trial judge found that the appellants had prescriptive easements and also easements based on the doctrine of equitable proprietary estoppel. The parties appealed and cross-appealed and the Court of Appeal considered the single issue of whether, having found the appellants had made a

[32] Supra note 34.
[33] (2002) 60 O.R. (3d) 499 (Ont. C.A.).

prescriptive easement with respect to the use of parts of Lot 13, the trial judge erred in considering the equitable claim.

The Court of Appeal ultimately dismissed the appeal and the cross-appeal, and found that the trial judge misdirected himself on the application of the doctrine of equitable proprietary estoppel. The Court went on to find that the doctrine itself requires that the assertion of strict legal rights be unconscionable. The Court of Appeal was critical of the trial judge for having made no such finding, that his approach was based on nothing more than a sense of justice or fairness and, if the Court of Appeal adopted this approach, it would make the law of easements unpredictable.

While the decision in *Depew v. Wilkes* deals more specifically with real property issues in the context of easements, it is important to note the fact that the Ontario Court of Appeal has referred to, and essentially embraced, the concept of proprietary estoppel in the application of the equitable doctrine.

Recently, the Ontario Court of Appeal in *Schwark v. Cutting* dealt with an appeal from the decision of Hambly, J. of November 13, 2008, wherein he declared that the respondents, the Schwarks, had the right to enter upon the property owned by the appellants, the Cuttings, and granted the relief on the basis of proprietary estoppel.[34]

On appeal, the Court held that the judge at first instance erred in law in granting the relief on the ground of proprietary estoppel. In short, the Court was of the view that none of the

[34] *Supra* note 29

elements necessary to establish proprietary estoppel had been made out in the case before it.

The decision in *Schwark* was based on a long history of property ownership where the use of cottage properties was in dispute. In analyzing the issue of proprietary estoppel, MacFarland, J.A., on behalf of the Court, set out its foundations in part through her references to the seminal case on proprietary estoppel - the English Court of Appeal decision in *Crabb v. Arun District Council.*[35] There, Lord Denning explained the basis for the claim as follows:

> The basis of this proprietary estoppel – as indeed of promissory estoppels – is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as "estoppels". They spoke of it as "raising an equity". If I may expand what Lord Cairns L.C. said in *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439, 448:
>
> > 'it is the first principle upon which all courts of equity proceed,'
>
> that it will prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.

[35] [1976] 1 Ch.183 [*Crabb*].

> What then are the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his promise. Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights – then, even though that promise may be unenforceable in point of law for want of consideration or want of writing – then if he makes the promise knowing or intending that the other will act upon it, and he does act upon it, then again a court of equity will not allow him to go back on that promise (citations omitted). Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights – knowing or intending that the other will act on that belief – and he does so act – that again will raise an equity in favour of the other.[36]

The Ontario Court of Appeal in *Schwark* then went on to identify the test for proprietary estoppel, as it was set out in its earlier decision of *Eberts v. Carleton Condominium No. 396 et al.*:[37]

> Proprietary estoppel is a form of promissory estoppel. It is commonly supposed that estoppel cannot give rise to a cause of action, but proprietary estoppel appears to be an exception to that rule: see Lord Denning in *Crabb v. Arun District Council* (1975), 1 Ch. 179 (Eng. C.A.) at 187-188. But there must be an estoppel. The basic tenets of proprietary estoppel are described in McGee, Snell's Equity, 13 ed. (2000) at pp. 727-28:

[36] *Ibid at 187.*

Without attempting to provide a precise or comprehensive definition, it is possible to summarize the essential elements of proprietary estoppel as follows:

(i) An equity arises where:

(a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O's property;

(b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and

(c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.[38]

In ultimately concluding that the legal concept of proprietary estoppel was not properly applied by the trial judge, the Appeal Court in *Schwark* noted that the facts established in this case fell far short of what is required to establish proprietary estoppel. Consequently, the appeal was allowed.

[37] [2000] O.J. No. 3773 (Ont. C.A.) at 23.
[38] *Supra* note 29 at 34

## CONCLUSION

While the doctrine of proprietary estoppel has deep roots in the British courts, the recent developments in the context of estates seem to point to a new and effective remedy available to claimants in the context of estate litigation. It will be interesting to see how the courts continue to use and apply this equitable remedy.

As to the use and application of this claim, it seems that the doctrine of proprietary estoppel and the claim itself should be seriously considered at the outset of civil litigation proceedings. Specifically, in cases where constructive trust and *quantum meruit* claims are being pursued, it may be a useful and strategic tactic to add the issue of proprietary estoppel. For example, one could include in an Order Giving Directions that the claimant affirms and the estate trustee denies that she has a claim based on constructive trust, *quantum meruit* and proprietary estoppel. The claim could further be pursued in the same manner by way of Statement of Claim.

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