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EVALUATION OF A PROPRIETARY ESTOPPEL CLAIM TO A FAMILY FARM: Text, Context and Purpose

by

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Equity Division, Supreme Court of NSW

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INTRODUCTION

1 The provisional title to this paper, selected by STEP Queensland, was: "Young MacDonald Wants the Farm – Constructive Trusts, Proprietary Estoppel and Farming Cases".

2 The title ultimately chosen for the paper reflects the guidance given by STEP for the audience of STEP members to be addressed (with emphasis added):

> "Our members would value an overview of the applicable legal principles, but *what would be invaluable would be an insight into what evidence judges look for and how they evaluate it when they come to apply those principles in the context of the typical family farming constructive trust/proprietary estoppel case*, where usually fairly general oral representations have been made over very many years and where the plaintiff may have difficulty identifying and proving specific acts of detrimental reliance apart from, 'I worked on the farm my whole life for little wages because I thought I would receive the farm'."

3 At my request STEP identified the following cases as illustrative of the type of case in contemplation for the paper:

(a) *Laird v Laird* [2021] VSC 352 (McMillan J).

(b) *Laird v Vallance* [2023] VSCA 138 (Beach and Osborn JJA).

(c) *Horn v GA & RG Horn Pty Ltd* [2022] NSWSC 1519 (Meek J).

(d) *Bassett v Cameron* [2021] NSWSC 207 (Ward CJ in Eq).

(e) *Bassett v Bassett* [2021] NSWCA 320 (Bell P, Leeming and Payne JJA).

(f) *Harris v Harris* [2020] VSC 256 (John Dixon J).

(g) *Harris v Harris* [2021] VSCA 138 (Beach, Niall and Kennedy JJA).

(h) *Browne v Browne (No 2)* [2017] WASC 375 (Smith AJ).

(i) *Priestley v Priestley* [2017] NSWCA 155 (McColl, Macfarlan JJA and Emmett AJA).

(j) *Wantagong Farms Pty Ltd as Trustee for the Bulle Family Trust v Bulle* [2015] NSWSC 1603 (Ball J).

4 Against the possibility that I am bound to expose a judgment of my own to criticism, I add to this list of cases my recent judgment published as *Brose v Slade* [2023] NSWSC 1025.

5 The type of estoppel claim under consideration in this paper is generally known by the label "proprietary estoppel *by encouragement*" in contrast to a closely related form of "proprietary estoppel *by acquiescence*". Both are forms of *equitable* estoppel. The difference between them (if there is any difference in substance) is that an estoppel "by encouragement" generally involves an expectation induced by an agreement, promise or representation made by a land owner whereas an estoppel "by acquiescence" generally involves a land owner standing by without objection while, to his or her knowledge, a person acts to his or her detriment (for example, by constructing a building on the owner's land) in expectation of the acquisition of an ownership interest in the land: Meagher, Gummow and Lehane, *Equity: Doctrines & Remedies* (LexisNexis Butterworths, Australia, 5th ed, 2015), paragraphs [17-090] - [17-100]; *Priestley v Priestley* [2017] NSWCA 155 at [7]-[15].

6 In this paper I use the word "agreement" in the expression "agreement, promise or representation" in a broad sense falling short of a contract and taking colour from the words "promise" and "representation", all of which may be found in the ideas, central to estoppel by encouragement, of an "understanding" or "assumption" formed under "encouragement" and relied upon as giving rise to an "expectation" of benefit.

7 A promise or representation on one side and action upon it on the other side, to the knowledge of the promisor or representor (or an assumption or an understanding on the one side and knowledge of the assumption or

understanding on the other side) come very close to an agreement in substance.

8 For the purpose of this paper a generic use of the word “agreement” is deployed even at the risk of blurring distinctions between principles governing proprietary estoppel by encouragement and those governing a common purpose trust. Those two sets of principles may occupy overlapping territory on the facts of a particular case. Both serve a common purpose of identifying a ground upon which equitable relief might be granted to provide a remedy against unconscionable conduct of a similar type. For some lawyers, more than others, technical distinctions between particular concepts are important, which is why they are noticed in this paper. However, in addressing “how people think”, this paper paints with a broader brush.

9 The purpose of the paper is not to delve into particular findings of fact in particular cases or to dwell at length on variant formulations of applicable principles. The object of the paper is to address the decision-making processes (of a first instance judge) in the evaluation of a proprietary estoppel claim to a family farm.

10 That object could be achieved in large measure simply by adopting the judgments of the NSW Court of Appeal in *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483; [2010] NSWCA 483 (dealing with principles governing the grant of relief in an estoppel by encouragement claim) and the judgment of Hallen J in *Wild v Meduri* [2023] NSWSC 113 at [309]-[346], dealing with problems associated with evidence about events long ago and conversations with persons long since dead.

11 Helpful though these cases are, I understand my brief to require a broader focus than that available in law reports or textbooks. Can the veil of formality that may obscure the reasoning processes of a judge in published reasons for judgment be lifted?

12 If it can be done at all, the law is perhaps best understood in action as well as in repose – by reference to the course, and cross currents, of court proceedings as well as static statements of theoretical law.

13 Mostly, we see what there is to be seen in a judgment. Nevertheless a fresh understanding of both the substantive law and adjectival law can be had by juxtaposing them rather than treating them as separate fields of discussion. Many a case is won or lost by attention to detail at the intersection of substantive and adjectival law.

14 In addressing the decision-making *processes* of judges I hesitate to speak for judges other than myself. I suspect that members of the legal profession who regularly appear before a range of judges are likely to have a better insight into how "judges" think than does any single judge accustomed to sitting alone.

15 What this paper offers is a reflective account of the experience of one "equity judge" in dealing with the paradigm case of a proprietary estoppel claim to a family farm. It endeavours, without indecent exposure, to lift the veil of formal legal process. Hopefully it offers a framework that takes into account court practice and procedure as well as substantive legal principles and offers practical guidance for practitioners in the conduct of a proprietary estoppel claim and other equity cases.

16 I proceed on the basis that the best means of exposure of "what evidence judges look for" and "how they evaluate it" may be an examination of the processes that necessarily inform the thinking of a judge.

17 At the beginning and end of an examination of those processes, emphasis is placed upon the importance of a focus upon the **text** of the law, the **context** in which it is to be applied, and the **purpose** served by an application of the law to the facts of each particular case.

18 Hopefully, this focus enables treatment of our topic to rise above the parochialism that necessarily attends an exposition of legal practice presented

by an interstate practitioner to an audience whose experience of legal practice may be subtly different. All law is after all, in a sense, "local" even in a nation that boasts a single "common law".

DIFFERENT WAYS OF THINKING: The Influence of Purpose (Function), Remedies, Procedure, Ideas that Inform and Language

19 A consideration of "what evidence judges look for and how they evaluate it when they come to apply" principles governing proprietary estoppel by encouragement in the context of a family farm requires an appreciation of nuances not immediately apparent in a formal statement of the elements of a proprietary estoppel claim. The purpose (or function) of an exercise of equitable jurisdiction, the availability of equitable remedies, procedures for the determination of a claim, an accumulation of ideas that inform decision-making and the language used in analysis of a case all have a role to play.

20 Of prime importance in the identification of evidence as "material" to decision-making and evaluation of the evidence is **the governing purpose** of an exercise of equity jurisdiction: a perceived need to address conduct characterised as "unconscionable". It permeates all reasoning on a proprietary estoppel claim.

21 Upon an exercise of equity jurisdiction any "entitlement" (let it not be called a "right") a party may have to **a remedy that restrains or compels conduct** must be recognised as **dependent upon an exercise of discretion** governed by principles recognised as justifying an intervention by a court in the affairs of parties affected by a court order.

22 **Procedures which govern decision-making** can profoundly affect the substantive law applied in decision-making. A fundamental contrast in a common law system of law (as distinct from a civil law system) is between procedures for the determination of competing claims of right (characteristic of a common law jury trial involving a binary choice of outcomes) and procedures for the determination of a claim for relief (characteristic of an exercise of equity

jurisdiction) in the form of a discretionary remedy dependent upon a consideration of all the circumstances of a case at the time of decision.

23 **Nuances in the use of language** are important even though often overlooked. The way a lawyer thinks about problems and their solutions can be revealed by an appreciation of how scrupulously some dictates of language are applied. To an equity purist, one speaks about common law "rules" and equitable "principles"; a common law "action" and an equity "suit"; a common law "cause of action" and an "equity" justifying a grant of "relief" for which a plaintiff "prays" rather than merely "claims"; and a common law "verdict" or "judgment" rather than an equitable remedy available in the form of a "declaration", "decree" or "order".

24 Nuances associated with purpose, remedies, procedures and language can be observed across jurisdictional boundaries other than those that characterise distinctions between common law and equity thinking. It is not necessary in this paper to dwell upon them save to say that, in an analysis of succession planning for a family farm, the principles governing proprietary estoppel by encouragement have much in common with principles applied upon an exercise by a court of protective, probate or family provision jurisdiction, each of which involve an element of "evaluative" reasoning.

25 Amongst the nuances affecting jurisprudential thought are **ideas that "inform" decision-making** even though they do not find reflection in any formal statement of the elements of a cause of action or an equitable claim. A prime example of that is found in the recognition of "maxims" of equity, including the maxim that "those who seek equity must do equity".

26 Equitable principles and remedies can appear arbitrary in their operation to a mind (characteristic of a common law mentality) focused on the determination of **competing claims of right** (with an optimistic expectation of certainty in the vindication of an asserted right) rather than on the **management of disputes** (a mindset characteristic of an equity mentality and, increasingly, across the board in a case management system of court administration). This needs to be

borne in mind in searching for "an insight into what evidence judges look for and how they evaluate it" in the application of equitable principles governing proprietary estoppel by encouragement in the resolution of a dispute about beneficial ownership of a family farm.

THE NATURE OF EVALUATIVE REASONING

27 The determination of a proprietary estoppel case (particularly in the context of a family farm), upon an exercise of equity jurisdiction, requires an "evaluative" mode of thinking, open to an empathetic assessment of complex evidence about personal relationships (past, present and future) and subjective states of mind. This can be profoundly different from a process of thinking (such as might be encountered in a contract case or some other distinctively common law case) ostensibly confined to logical deductions from objectively agreed, established or verifiable "facts".

28 A deep consideration of differences of methodology and jurisprudence between "the common law" and "equity" can be found in the recently published book of Leeming JA: Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, Sydney, 2023), particularly sections 1.1, and 1.2, 2.2, 2.7, 2.8 and 7.6. For my part, I would add to his Honour's analysis an emphasis on the purposive nature of any exercise of jurisdiction by a court, constantly calling to mind the question: "Why are we doing this?".

29 For those who follow the teachings of neuroscience (drawn to my attention by informed members of the legal profession as noted in papers published on the Supreme Court of New South Wales website on 21 March and 19 April 2023) an evaluative process of thinking requires us to use both sides of our brain: the left hemisphere for logical thought; the right hemisphere for empathy. Recommended reading on this topic is Iain McGilchrist's *The Master and His Emissary: The Divided Brain and the Making of the Western World* (Yale University Press, Expanded edition, 2019).

30 Unaided by the broader vision and imagination of the right hemisphere, left hemisphere thinking is introverted and narrow. Unaided by the analytical

capability of the left hemisphere, right hemisphere thinking lacks structure and coherence. The function of the right hemisphere is to allow us to see what surrounds us. The function of the left hemisphere is to analyse what we see. We cannot optimally process what we don't see.

31 In the determination "according to law" of a dispute that requires insightful management of people, property and relationships at points of intersection between law, society and economics (if not also other disciplines of thought) all participants in the decision-making process (not merely a judge) must consciously strive to see things as others see them.

32 Critical reasoning in a process of evaluation of evidence bearing upon a proprietary estoppel case relating to a family farm requires a studied adoption of an attitude of mind open to seeing "facts" both as they may be and as they may appear from a "counter factual" perspective. It may be necessary to ask of any given encounter between parties "what was in it for each party, and what could or would they otherwise have done?". Sometimes people tell us more by what they don't say than what they do say. And so, in the assessment of each party's case, or the evidence of a particular witness, it may be necessary to reflect on what is not said as well as what is said, allowing a fair opportunity for what is not said to be said.

33 The "evaluative" reasoning required upon an exercise of equitable jurisdiction in the determination of a proprietary estoppel claim relating to a family farm generally shares something in common with the evaluative reasoning processes required upon an exercise of protective jurisdiction (in management of the affairs of a person unable to manage his or her own affairs), upon an exercise of probate jurisdiction (in a search for a deceased person's testamentary intentions) and upon an exercise of family provision jurisdiction (in weighing up what the Court, pretending to be a wise and just testator in the position of a deceased person, "ought" to do in management of his or her estate).

34 In each type of case, the court is often, if not always, confronted by a need to assess evidence about informal dealings involving a central personality who is absent from the courtroom: upon an exercise of protective jurisdiction, an incapable person; upon an exercise of probate or family provision jurisdiction, a deceased person. Of course, not all proprietary estoppel cases concerning a family farm have to deal with a farmer who is mentally incapacitated or dead, but many do. A sudden arrival of incapacity or death provides a fertile field for a dispute about succession to property.

35 Each case commonly involves evidence about informal dealings not easily tested (because it relates to events long ago or unverifiable by a living witness) without collateral inquiries in search of corroboration.

36 Even if fought by competing interests as an adversarial contest about "rights" they claim personally or in a representative capacity, the task for the court in each type of case commonly calls for a prudential management decision, an exercise of practical wisdom, in the management of persons, property and relationships. In making such a "management decision" a court may be required to take into account not only the welfare and interests of persons who are formally and actively parties to proceedings before the court but also the welfare and interests of persons who are not formally or actively before the court: typically, close family members of the parties directly engaged in the proceedings.

37 In protective proceedings a decision made by a court about management of the person or the estate of an incapable person necessarily involves an element of "risk management" because it is directed towards the future. In family provision proceedings a decision about adequacy of testamentary provision may also involve an element of risk assessment because of a need to take contingencies into account. So too upon an exercise of equity jurisdiction in the determination of a proprietary estoppel claim to a family farm. Typically, a proprietary estoppel claim to a family farm is made not only at the expense of a landowner but also, prospectively, at the expense of others who may have a claim on the bounty of the landowner.

38 The identification and evaluation of evidence in cases of this sort is no less logical than the decision-making processes involved in the determination of a common law dispute about competing rights, arising from past events, litigated by parties present before the court and both capable and motivated to protect and advance their own interests as they perceive them to be. No less logical, but often required to take into account a broader range of factors.

39 Those factors include the incidence of benefits and burdens associated with informal dealings and competing expectations arising from what has been done or not done.

40 In the determination of a proprietary estoppel claim (not limited to a claim to a family farm) by reference to the text of the law (established equitable principles) the Court looks, holistically, to:

(a) a primary focus on the existence or otherwise of an agreement, promise or representation about property falling short of a contract or going beyond a contract;

(b) secondary, but critical, concepts (such as what may be reasonable, substantial, disproportionate or unconscionable) that filter the agreements, promises and representations which the law privileges by enforcement;

(c) the availability of a remedy (such as a declaration of trust, an order for the transfer of property, an order for the payment of compensation or an order charging property with an obligation to pay compensation) that can be moulded to do practical justice between the parties before the Court; and

(d) what might be required of a claimant as the price of a grant of a remedy according to the maxim “Those who seek equity must do equity”: Meagher, Gummow and Lehane, *Equity: Doctrines &*

Remedies (LexisNexis Butterworths, Australia, 5th ed, 2015, paragraphs [3-050]-[3-080]).

41 Civil society, order and good government favour holding people to their agreements, promises and representations but the law accommodates that preference in different ways and with different ways of thinking about law.

42 At a high level of abstraction, this can be seen in a contrast between rules governing the common law concept of a contract and equitable principles governing proprietary estoppel. Each area of the law serves a different purpose through a different set of precepts, rules or principles (a text that guides decision-making) applied in a different field of operation (context).

43 The law of contract has its origins in the common law having evolved as a species of trespass on the case known as *assumpsit* until rebadged in the 19th century as "contract": Lindsay, "Understanding Contract Law Through Australian Legal History: Whatever Happened to *Assumpsit* in NSW?" (2012) 86 ALJ 589; A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford University Press, 1975; Paperback edition, 1987); S.J. Stoljar, *History of Contract at Common Law* (ANU Press, Canberra, 1975). Equity's engagement with contract law is perhaps most visible in its preparedness to grant an injunction to restrain a breach of contract or to order that a contract be specifically performed, thus repudiating an idea associated with Lord Coke and OW Holmes Jnr that a promisor can elect to perform its obligations under a contract or to pay damages: *Zhu v Treasurer of NSW* (2004) 218 CLR 530 at 574-575; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13].

44 A primary purpose served by the law of contract is generally to facilitate the ordinary course of business of life (not necessarily limited to commercial dealings) by enforcement of bargains made by parties in agreement about the supply of goods or services, a transfer of property or the conduct of their affairs generally. The essential feature of a contract is an agreement, whether express or implied. Evidence about promises or representations may be relevant to an

assessment whether an agreement was made, its terms or its enforcement but the particular focus for attention is upon the parties' bargain and the time at which a contract is said to have been made.

45 Not every agreement is enforced as a contract. The law provides a framework within which disputes about the existence, terms or enforcement of an agreement can be determined. In the abstract, a party who seeks to enforce a contract must prove a number of elements: principally, an agreement (whether formed by offer and acceptance or otherwise), an intention to create legal relations, privity, consideration in support of a promise, and certainty of terms. Although the law imagines that contracting parties are *ad idem,* of the same mind, it applies an objective theory of contract in its assessment of the parties' contractual intent. The existence or otherwise of a contractual intent is assessed by reference to the perspective of a reasonable bystander rather than the actual, subjective intent of each party.

46 Substantive law rules such as these are legal constructs which find reflection in adjectival law about evidence, practice and procedure. The parol evidence rule is one illustration of this. Another is the limitation upon the "admissibility" of evidence about pre-contractual negotiations or subsequent conduct in the construction of a contract.

47 The rules which embody the law of contract are permeated throughout by an idea that the conduct of parties is to be assessed by a standard of reasonableness. This can be seen not only upon an application of the objective theory of contract but also in the rule governing remoteness of damages: that, upon breach of a contract, the party innocent of any breach has an entitlement to damages (notionally, to put it in the same position as it would have been had there been no breach) limited by reference to what may have been reasonably foreseeable at the time the contract was made.

48 The purposive character of the law of contract is perhaps best revealed by two terms readily implied in any contract. The first is a term that each contracting party will co-operate with the other in the doing of acts which are necessary for

the performance of the contract: *Secured Income Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd* (1979) 144 CLR 596. The other is a term that a promisor will not hinder or prevent the fulfilment of the purpose of a contractual promise: *Service Station Association v Berg Bennett* (1993) 45 FCR 84 at 92-94, citing Dixon J in *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359. These terms are, perhaps, as close as the common law ever really needs to go to cater for obligations of good faith commonly associated with equity's maintenance of standards by its provision of remedies to redress conduct against good conscience.

49 The purpose served by equitable principles governing a claim for proprietary estoppel by encouragement is to provide a means of redress for a party who would suffer detriment if another party unconscionably seeks to dishonour an agreement, promise or representation upon which the first party has relied (in expectation of performance of the agreement, promise or representation) in circumstances in which the parties' relationship is not governed by a contract.

50 In pursuit of that purpose, a court can have regard to the subjective intentions of a party and each party's state of knowledge about the other party's intentions. The objective theory of contract does not, in terms, apply. Nor does the standard of certainty required of a contract apply to an assessment of an agreement, promise or representation sought to be enforced in equity.

51 In contrast to a contract action (in which parties contest competing claims in terms of rights and obligations) a grant of equitable relief is discretionary and, accordingly, the decision of a court to grant or withhold relief is made, not merely by reference to the time at which an agreement, promise or representation was made or to the time of "breach" of an obligation, but in all the circumstances of the case as known to the court at the time its decision is made. That paradigm allows consideration of any evidence that might rationally bear upon not only the existence or otherwise of an agreement, promise or representation but also upon whether a departure from performance of the agreement, promise or representation would be unconscionable.

52 Although equity has a broader field of operation than contract law, not all agreements, promises or representations are enforced on a claim for proprietary estoppel by encouragement.

53 And although the standard of "conscionability" applied on an equity claim can be stricter in the standards it applies than the common law's standard of "reasonableness", equitable principles embody guidelines which (as legal constructs) limit the enforceability of agreements, promises and representations by reference to a variety of factors not unknown to the common law:

(a) whether an agreement, promise or representation has been *reasonably* relied upon; and

(b) whether any expectation arising from that reliance has been *reasonable*.

(c) whether a grant of equitable relief to a claimant would *disproportionately* burden the respondent; and

(d) whether a claimant who seeks equity from a respondent should be required to *do equity* in favour of the respondent.

54 These factors filter the agreements, promises and representations in respect of which an equitable remedy may be available. They accommodate an objective assessment of both the availability and the terms of a grant of equitable relief despite equity's openness to consider subjective states of mind.

55 Coupled with the maxim "Those who seek equity must do equity", the Court's ability to mould equitable relief to achieve practical justice between parties tends in the same direction: *Vadasz v Pioneer Concrete* (SA) Pty Ltd (1995) 184 CLR 102 at 111-115; *Bridgewater v Leahy* (1994) 194 CLR 457 at 494 [126]-[128]. These types of decision have a managerial flavour not characteristic of a binary choice between competing claims of right.

THE IMPORTANCE OF TEXT, CONTEXT AND PURPOSE

56 The determination of a proprietary estoppel claim requires an appreciation of the "**text**" of the law to be applied (the equitable principles governing proprietary estoppel), the "**context**" within which the law must be applied, and "the **purpose**" of an exercise of equity jurisdiction responsive to the facts of the particular case.

57 **The text of the law** is important because without knowledge of it a judge cannot know "what evidence to look for" or "how to evaluate the evidence".

58 **Context** is critically important in a case (such as the paradigm for this paper) where "fairly general oral representations have been made over very many years and where the plaintiff may have difficulty identifying and proving specific acts of detrimental reliance apart from, 'I worked on the farm my whole life for little wages because I thought I would receive the farm'."

59 An appreciation of a need to take into account "context" in looking for, and evaluating, evidence points in the direction of a need to search for objective collateral evidence that may bear upon the likelihood or otherwise of an agreement, promise or representation about land ownership having been made or relied upon and the reasonableness of any such reliance. A search for objective collateral evidence not uncommonly leads an inquiring mind towards identification of competing interests and the incidence of benefits and burdens, competing expectations and reciprocity in the distribution of benefits and burdens, in the engagement of parties likely to be affected by orders of the Court.

60 Factors such as these are perhaps best viewed as "ideas that inform" the Court's consideration of "context" in the application of "the text of the law". They may influence a Court's application of "the text" in opening the eyes of a judge to the true nature of relationships or dealings between parties or they may affect a judge's perception of the credit worthiness of a party or witness. They find reflection in the principles governing a proprietary estoppel claim but they cannot be taken as anything but subordinate to those principles.

61 A need to take context into account also presents a reminder of the importance of social relationships within a "family" (however defined) and a need to measure the reasonableness of expectations of future benefit against competing claims on the bounty of a land owner.

62 An understanding of "context" requires, further, an appreciation of the institutional framework within which a judge is called upon, and empowered, to "look for" and to "evaluate" evidence bearing upon an application of principles governing a proprietary estoppel claim.

63 An application of the "text" involving a focus on "context" alone can expose a judge to an overly narrow or rigid view of the justice of a case if a judge is not open to an appreciation of social context. A focus on the **purpose** of an exercise of equity jurisdiction provides a corrective against such thinking. It can be seen, for example, in a need to exercise caution in subjecting a landowner to an obligation to acknowledge "rights" of a proprietary estoppel claimant which are disproportionate when measured against the dictates of a good conscience.

THE IDIOSYNCRATIC NATURE OF A PROPRIETARY ESTOPPEL CLAIM TO A FAMILY FARM

64 The principles to be applied in evaluation of a proprietary estoppel claim to a family farm (the "text" of the law) are no different to those applicable to a proprietary estoppel claim to a family home in an urban environment, another commonly encountered type of equity suit. The text of the law is the same. However, the "context" in which the law is to be applied can be profoundly different.

65 In the setting of a "family farm", the property the subject of a proprietary estoppel claim is generally a parcel of land upon which a farming business has been long conducted within an extended "family" with (typically rural) conventions of its own. It is often viewed through different prisms by those interested persons who want to continue farming operations on "family" land (and, so, minimise the importance of the capital value of the land) and those who want the land to be

sold (so that its capital value can be realised and wealth can be distributed to a wider group of persons than contemplated by continuing farming operations).

66 In a particular case, a judge may need instruction as to the meaning of the foundational concepts of "family" and a "family farm" to the parties before the court. Uninstructed, common assumptions about the meaning of those concepts might lead to a perverse outcome of a claim to a "family farm" based upon a proprietary estoppel by encouragement.

67 The concept of "family" might once have been viewed uncritically by a court through the prism of a formal marriage sanctified by church and state. That is no longer the case. Depending on the purpose for which a finding of "family" must be made, no greater formality may be required by the law than two people (of whatever gender) living together for a defined period or bearing, adopting or having responsibility for the care of a child together. The concept of family in today's society is fluid but based, principally, upon community as a fact of everyday life rather than legal formalism.

68 In our introductory essay to *Australian Jurists and Christianity* (Federation Press, Sydney, 2021), at pages 13-14, my co-editor Professor Wayne Hudson joined me in making the following observations (with editorial adaptation):

> "The concept of 'family' is often an expression, if not a function, of community. In his seminal work, *Ancient Law* (1861), Henry Maine placed central importance on evolution of the family, particularly the gradual dissolution of family dependency and, in its place, the growth of individual obligation by agreement between individuals. [Maine's idea that the movement in a 'progressive' society is from status to contract has not remained unchallenged. In his short biography of Maine in AWB Simpson (ed), *Biographical Dictionary of the Common Law* (London, Butterworths, 1984), PG Stein records that 'the movement back towards status in the last century has been irrepressible'].
>
> The civil law concept of community of ownership arising from marriage, or 'family property', has no place in Anglo-Australian law. It is been rejected by the courts: *Hepworth v Hepworth* (1963) 110 CLR 309, 317-318; *Bryson v Bryant* (1992) 29 NSWLR 188 at 195-196. Academic commentary has accepted that there is no legal concept of 'family property' as such in Australian Law: R. Atherton (Croucher) in D. Kirkby (ed), *Sex, Power and Justice: Historical Perspectives of Law in Australia* (Melbourne, Oxford University Press, 1995), Chapter 11. The Australian Law Reform Commission has recommended against the introduction of such a regime in Australia, preferring to maintain (with statutory modifications, embracing discretionary powers,

> where required) the system of 'separate property during marriage' characteristic of English law: ALRC *Matrimonial Property*, Report No 39 (1987), Recommendation 24 and paragraphs 53 and 508 *et seq*. With an emphasis on individual autonomy the tendency of Australian law is towards *transactional* rather than *relational* analysis of the rights and obligations of marriage partners."

69 Despite a shift in focus towards transactional analyses of rights and obligations, and perhaps because of it, courts have been increasingly entrusted with discretionary powers to adjudicate disputes between an ever enlarging community of people who claim the status of the family "entitled" to share in what is perceived to be common property. A classic example of this is the now dominant type of application for family provision relief in which *adult sons and daughters* seek a grant of relief from the deceased estate of a much older parent so as to provide for their own care in retirement. A jurisdiction with origins in a concern for *widows and children* has moved far beyond those categories of claimant.

70 Social relationships and expectations have profoundly changed. Once upon a time, a prosperous farmer was expected to leave the family farm, or to acquire a farm, for a son and to provide a house in town, a good marriage and possibly an education for a daughter, funded if necessary by a charge on a son's farm. Times have changed, if not within the contemplation of rural communities then certainly in the attitude of judges to a grant of family provision relief. Without fanfare, the expectations of earlier days have given way to a more ostensibly equal treatment of sons and daughters. It is not necessary, here, to explore the impact of universal education, the effect of technology on agricultural science or changes in agricultural economics to notice that social changes have had an impact on how families engage in succession planning and how they view a family farm as an object of inheritance.

71 To an outsider accustomed to linear thought and consistency in communications, personal relationships within a family might appear to be incomprehensible. A judge adjudicating a claim to a family farm based on a proprietary estoppel by encouragement may need to navigate the stormy waters of chaotic patterns of thought in inconsistencies of word and deed. It is

not altogether surprising that “Young McDonald” might exaggerate a claim in pursuit of self-interest. What is more surprising, until it becomes familiar across a range of cases, is the tendency of “Old McDonald” in some cases to make inconsistent promises or representations to different members of family. This may be done to curry favour with an expectant family member or to buy peace from the clamour of family members subtly in competition with each other.

72 The existence of a contractual relationship between a representor landowner and a representee farmworker is a common feature of a proprietary estoppel claim to a family farm, even allowing for the reluctance of courts to attribute to intra-family arrangements an intention to create legal relations of the type necessary to support a finding of a contract. Classically, a person who makes a claim of proprietary estoppel by encouragement complains that he or she has been encouraged to work on a farm for low wages, or none at all, in reliance upon a promise or representation of future benefit.

73 The existence of a contractual relationship between a representor and representee is not necessarily inconsistent with an estoppel claim, but it directs attention to a need to assess the terms of any contract and to compare those terms both with what employment or other opportunities the representee may have given up to work for the landowner, what alternatives may have been open to the representee and the terms of any agreement, promise or representation said to support an estoppel.

74 In the nature of a farming case, a farmworker’s remuneration is unlikely to be substantial but, if it is found to be substantial, that could bear heavily:

(a) on a proprietary estoppel claimant’s claim to *reasonable* detrimental reliance or *reasonable* expectations arising from an informal agreement, promise or representation made to him or her by the landowner; or

(b) on an assessment of the *proportionality* of a grant of equitable relief vis-à-vis the burden of such relief to be borne by the landowner.

75 In the nature of a farming case the lead time to conflict that results in litigation is commonly a long time; the personal relationships between interested persons are commonly informal in nature; documentation evidencing their dealings is scarce; and the evidence of central witnesses of fact may be coloured by common assumptions or opinions about conclusions reserved for a judge's determination; critical witnesses to an alleged agreement, promise or representation about land ownership may have died; and, in common with many country people in whom still waters run deep, witnesses are often taciturn but profoundly engaged emotionally.

76 In disputes about beneficial entitlements to a family farm marriage, or "marriage like", relationships can be important because farming is generally a collective effort. In-laws can change the dynamic of family relationships generally, and gender roles may obscure the dynamic. A husband, wife or partner might, as an outsider, play an important role in family politics without being to the fore of any discussion.

77 In the social context in which a farming case must be determined the concept of a "family" is not limited to blood relations. It may include neighbours with long standing close relationships.

78 Family members not directly engaged in a disputed farming case might nevertheless occupy an important position in the determination of that case. That is because, any claim they might have on the "bounty" of the landowner (to allude to the standard definition of testamentary capacity in *Banks v Goodfellow (*1870) LR 5 QB 549 at 565) or upon the landowner as a presumptive "wise and just" testator (to allude to a standard applied in family provision cases by reference to *Scales Case* (1962) 107 CLR 9 at 20) might operate as a limitation on a finding that a proprietary estoppel claimant "reasonably" relied upon an agreement, promise or representation of future

benefit or harboured expectations of securing a benefit that were reasonable and not a disproportionate burden on the landowner or other affected interests.

79 The context of a farming case differs from that of a proprietary estoppel claim to an urban residence typically occupied by a family member, a "friend" or a "carer", who claims a right to own or occupy the residence of a home owner under the care of the claimant in his or her twilight years. The dynamic of such a case is very different from a dispute about succession to a family farm.

80 The "context" of a disputed case, critical to its determination, requires a critical, but empathetic, assessment of the perspective of each interested person. The same is true with the evidence of those witnesses of fact who are called and those who (by reason of death, incapacity or otherwise) are not called. A judge needs a listening ear, recognising that in a case of deep significance to a family at war everyone is likely to have their own story to tell.

81 Ideally, any assessment of a proprietary estoppel claim to a family farm will be conducted with the benefit of:

(a) evidence identifying and describing disputed property;

(b) evidence about the history of the property's acquisition and any dealings with it by interested persons;

(c) evidence of the relationships between competing claimants to the property within the family and their personal circumstances;

(d) evidence about the existence or otherwise of any agreement, promise or representation bearing upon past, present or prospective ownership or disposition of the property;

(e) evidence of the states of mind of competing claimants, including any knowledge each may have had about the state of mind of other claimants bearing upon ownership and enjoyment of the property.

82 An application of equitable principles governing a proprietary estoppel claim (the text of the law), in the context of the particular case, is governed by "the purpose" for which the Court's jurisdiction exists: essentially, in most cases, to provide a remedy against unconscionable conduct in dealing with property in a manner inconsistent with an agreement, promise or representation reasonably relied upon as a foundation for an expectation which, if not made good, would cause substantial detriment to the expectant promisee or representee.

THE "TEXT" OF A CLAIM FOR PROPRIETARY ESTOPPEL BY ENCOURAGEMENT

83 As presented in the reasons for judgment of appellate courts, the principles governing proprietary estoppel by encouragement are generally explained in a narrative form that privileges the citation of authorities. That form of judgment is a function of the work appellate judges perform in exposition and development of legal principles.

84 It stands in contrast to the form of reasons for judgment more often adopted by a judge at first instance charged with identifying the elements of a claim requiring proof and finding facts by reference to those elements. That form of judgment tends, as can be seen in the judgment of Robb J in *Daniel v Athans* [2022] NSWSC 1712 at [25] extracted below, to reduce salient points into point form.

85 Examples of an appellate court adopting that form of judgment in an effort to explain to the legal profession developments in the law of estoppel can be found in a classic judgment of Priestley JA in *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 at 472 and his Honour's updated summary of the law in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 604, 610-612.

86 An appreciation of both types of judgment is necessary for "an insight into what evidence judges look for and how they evaluate it when they come to apply" principles governing a claim for proprietary estoppel by encouragement.

87 A convenient exposition of the principles currently governing proprietary estoppel by encouragement, presented in a narrative form, can be found in the judgment of Bathurst CJ in *Trentelman v The Owners - Strata Plan No 76700* (2021) 106 CLR 227; [2021] NSWCA 242 at [116]-[125] (in which Bell P and Leeming JA concurred):

> "[116] In *Giumelli v Giumelli* (1999) 196 CLR 101; [1999] HCA 10, the plurality stated at [6] that the equity which founded the relief claimed in such cases as *Dillwyn v Llewelyn* (1862) 4 De GF & J 517 at 523 was founded on the assumption of future ownership of property which had been induced by representations upon which there had been detrimental reliance by the plaintiff. That reasoning was adopted by the plurality in *Sidhu v Van Dyke* at [2], see also *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247; [2016] NSWCA 105 at [131]-[136].
>
> [117] In *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483; [2010] NSWCA 84, Handley AJA, in dealing with a claim of proprietary estoppel by encouragement, summarised the circumstances in which such an estoppel came into existence in the following terms (at [21]):
>
> > '[21] The proprietary estoppel upheld by the judge was an estoppel by encouragement. Such an estoppel comes into existence when an owner of property has encouraged another to alter his or her position in the expectation of obtaining a proprietary interest and that other, in reliance on the expectation created or encouraged by the property owner, has changed his or her position to their detriment. If these matters are established equity may compel the owner to give effect to that expectation in whole or in part. The general principles governing this form of estoppel were not in dispute, here or below."
>
> [118] What needs to be added to that summary is that it must be shown that the detrimental reliance makes it unconscionable for the promisor or representor to depart from the promise or representation: see *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1; [2016] HCA 26 at [147]-[150].
>
> [119] As can be seen from the submissions of the appellant to which I have referred, the first basis on which she seeks to challenge the conclusion of the primary judge is that the representation was incapable of creating an expectation in the Owners Corporation that the lot owners would have the use of the pool. In that context, there are a number of matters which may be noted at the outset.
>
> [120] First, notwithstanding the requirement that there must be certainty in the promise to give rise to the requisite expectation, an equitable estoppel can be established notwithstanding the expectation is based on a promise or representation that would not be sufficiently certain to amount to a valid contract, or is formed on the basis of vague

assurances: *DHJPM Pty Ltd v Blackthorn Resources Ltd* at [54]; *Evans v Evans* at [121]-[125]; *Flinn v Flinn* at [80]-[81].

[121] Second, and allied to the first point, as Hodgson JA pointed out in *Sullivan v Sullivan* [2006] NSWCA 312 at [85], a promise or representation will generally be sufficiently clear to support an estoppel if it was reasonable for the representee to interpret the promise in a particular way and to act in reliance on that assumption: see also *Doueihi v Construction Technologies Australia Pty Ltd* at [197]; *Evans v Evans* at [124].

[122] Third, depending on the particular context, a proprietary estoppel may be established where the promise or representation relied upon did not define the interest the party was expected to receive: see *Sullivan v Sullivan* at [16] and the cases there cited, in particular *Flinn v Flinn* at [80]. In *Cobbe*, Lord Walker summarised the position in the following terms (at [68]):

> '[68] It is unprofitable to trawl through the authorities on domestic arrangements in order to compare the forms of words used by judges to describe the claimants' expectations in cases where this issue (hope or something more?) was not squarely raised. But the fact that the issue is seldom raised is not, I think, coincidental. In the commercial context, the claimant is typically a business person with access to legal advice and what he or she is expecting to get is a contract. In the domestic or family context, the typical claimant is not a business person and is not receiving legal advice. What he or she wants and expects to get is an interest in immovable property, often for long-term occupation as a home. The focus is not on intangible legal rights but on the tangible property which he or she expects to get. The typical domestic claimant does not stop to reflect (until disappointed expectations lead to litigation) whether some further legal transaction (such as a grant by deed, or the making of a will or codicil) is necessary to complete the promised title.'

[123] Thus, in *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776 proprietary estoppel was said to arise in circumstances where the representation by the claimant's deceased father gave rise to an expectation that he would inherit a farm. Lord Rodger emphasised the importance of considering the effect of the statement on the representee. His Lordship made the following comments (at [26]):

> '[26] Even though clear and unequivocal statements played little or no part in communications between the two men, they were well able to understand one another. So, however clear and unequivocal his intention to assure David that he was to have the farm after his death, Peter was always likely to have expressed it in oblique language. Against that background, respectfully adopting Lord Walker's formulation, I would hold that it is sufficient if what Peter said was 'clear enough'. To whom? Perhaps not to an outsider. What matters, however, is that what Peter said should have been clear enough for David, whom he was addressing and who had years of experience in interpreting what he said and did, to form a reasonable view that

Peter was giving him an assurance that he was to inherit the farm and that he could rely on it.'

[124] Lord Walker at [56] stated that what amounted to sufficient clarity for the purpose of a representation was usually dependant on context. His Lordship emphasised that the representation must relate to identified property, stating the position as follows (at [61]):

'[61] In my opinion it is a necessary element of proprietary estoppel that the assurances given to the claimant (expressly or impliedly, or, in standing-by cases, tacitly) should relate to identified property owned (or, perhaps, about to be owned) by the defendant. That is one of the main distinguishing features between the two varieties of equitable estoppel, that is promissory estoppel and proprietary estoppel. The former must be based on an existing legal relationship (usually a contract, but not necessarily a contract relating to land). The latter need not be based on an existing legal *relationship*, but it must relate to identified property (usually land) owned (or, perhaps, about to be owned) by the defendant. It is the relation to identified land of the defendant that has enabled proprietary estoppel to develop as a sword, and not merely a shield: see Lord Denning MR in *Crabb v Arun DC* [1976] Ch 179, 187.'

[125] Lord Neuberger at [84] also emphasised that the effect of the words or actions must be assessed in their context. His Lordship stated that it was the context that distinguished the case from *Cobbe*, making the following remarks (at [93]-[98]):

'[93] In the context of a case such as *Cobbe* [2008] 1 WLR 1752, it is readily understandable why Lord Scott considered the question of certainty was so significant. The parties had intentionally not entered into any legally binding arrangement while Mr Cobbe sought to obtain planning permission: they had left matters on a speculative basis, each knowing full well that neither was legally bound – see [2008] 1 WLR 1752, para 27. There was not even an agreement to agree (which would have been unenforceable), but, as Lord Scott pointed out, merely an expectation that there would be negotiations. And, as he said, at [2008] 1 WLR 1752, para 18, an 'expectation dependent upon the conclusion of a successful negotiation is not an expectation of an interest having [sufficient] certainty'.

[94] There are two fundamental differences between that case and this case. First, the nature of the uncertainty in the two cases is entirely different. It is well encapsulated by Lord Walker's distinction between 'intangible legal rights' and 'the tangible property which he or she expects to get', in *Cobbe* [2008] 1 WLR 1752, para 68. In that case, there was no doubt about the physical identity of the property. However, there was total uncertainty as to the nature or terms of any benefit (property interest, contractual right, or money), and, if a property interest, as to the nature of that interest (freehold, leasehold, or charge), to be accorded to Mr Cobbe.

[95] In this case, the extent of the farm might change, but, on the Deputy Judge's analysis, there is, as I see it, no doubt as to what was the subject of the assurance, namely the farm as it existed from time to time. Accordingly, the nature of the interest to be received by David was clear: it was the farm as it existed on Peter's death. As in the case of a very different equitable concept, namely a floating charge, the property the subject of the equity could be conceptually identified from the moment the equity came into existence, but its precise extent fell to be determined when the equity crystallised, namely on Peter's death.

[96] Secondly, the analysis of the law in *Cobbe* [2008] 1 WLR 1752 was against the background of very different facts. The relationship between the parties in that case was entirely arm's length and commercial, and the person raising the estoppel was a highly experienced businessman. The circumstances were such that the parties could well have been expected to enter into a contract, however, although they discussed contractual terms, they had consciously chosen not to do so. They had intentionally left their legal relationship to be negotiated, and each of them knew that neither of them was legally bound. What Mr Cobbe then relied on was 'an unformulated estoppel ... asserted in order to protect [his] interest under an oral agreement for the purchase of land that lacked both the requisite statutory formalities … and was, in a contractual sense, incomplete' - [2008] 1 WLR 1752, para 18.

[97] In this case, by contrast, the relationship between Peter and David was familial and personal, and neither of them, least of all David, had much commercial experience. Further, at no time had either of them even started to contemplate entering into a formal contract as to the ownership of the farm after Peter's death. Nor could such a contract have been reasonably expected even to be discussed between them. On the Deputy Judge's findings, it was a relatively straightforward case: Peter made what were, in the circumstances, clear and unambiguous assurances that he would leave his farm to David, and David reasonably relied on, and reasonably acted to his detriment on the basis of, those assurances, over a long period.

[98] In these circumstances, I see nothing in the reasoning of Lord Scott in *Cobbe* [2008] 1 WLR 1752 which assists the respondents in this case. It would represent a regrettable and substantial emasculation of the beneficial principle of proprietary estoppel if it were artificially fettered so as to require the precise extent of the property the subject of the alleged estoppel to be strictly defined in every case. Concentrating on the perceived morality of the parties' behaviour can lead to an unacceptable degree of uncertainty of outcome, and hence I welcome the decision in *Cobbe* [2008] 1 WLR 1752. However, it is equally true that focussing on technicalities can lead to a degree of strictness inconsistent with the fundamental aims of equity."

A PURPOSEFUL INTERROGATION OF TEXT AND CONTEXT

88 The paradigm case for this paper is a claim to a family farm based upon an allegation of proprietary estoppel by encouragement often discussed by reference to cases such as *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387 at 404, *Commonwealth v Verwayen* (1990) 170 CLR 394 at 443 and 445, *Giumelli v Giumelli* (1999) 196 CLR 101 at 123, *Donis v Donis* (2007) 19 VR 577 and *Sidhu v Van Dyke* (2014) 251 CLR 505, perhaps reaching back to historical origins that invoke *Dillwyn v Llewelyn* (1862) 45 ER 1285 (said to be the seminal case for estoppel by encouragement) *and Ramsden v Dyson* (1866) LR 1 HL 129 (said to be the seminal case for estoppel by acquiescence).

89 Nevertheless, in marking out the territory occupied by principles governing proprietary estoppel by encouragement the case advanced by a claimant to "the family farm" might sometimes usefully be interrogated by considering whether the claimant's case could fall within another recognised pattern relied upon from time to time by claimants to a family farm and, if not, why not.

90 Those recognised patterns are commonly known as principles governing:

(a) A contract to make a will (and not revoke it): GE Dal Pont, *Law of Succession* (Lexis Nexis, Australia, 3rd ed, 2021), paragraphs [1.29]-[1.39]; *Delaforce v Simpson-Cook*; (2010) 78 NSWLR 483, [2010] NSWCA 84 at [31]-[34].

(b) A common intention trust, based upon an actual intention that property be held on trust: *Clayton v Clayton* [2023] NSWSC 399 at [529]-[543].

(c) A proprietary estoppel by acquiescence: Meagher, Gummow and Lehane, *Equity: Doctrines & Remedies* (LexisNexis Butterworths, Australia, 5th ed, 2015), paragraphs [17.065]-[17.130].

(d) A joint endeavour trust based upon a division of property the subject of a joint endeavour which is failed without attributable

fault: *Baumgartner v Baumgartner* (1988) 164 CLR 137; *Clayton v Clayton* [2023] NSWSC 399 at [544]-[561].

91 A proprietary estoppel claim by encouragement is governed not only by equitable principles but also by a system of "fact pleading" accompanied by a convention that proceedings are determined by a judgment based upon a consideration of all the facts and circumstances known to the court at the time of judgment. These features of a case are characteristic of an exercise of equity jurisdiction. Taken together, they encourage parties to plead a case "in the alternative" taking advantage of the possibility that as evidence unfolds a case may more comfortably fit in one or more of the patterns recognised as giving rise to an "equity" justifying a grant of relief. It is for that reason, if no other, that parties should be familiar with equitable principles that live in close association with those governing proprietary estoppel by encouragement.

IDEAS THAT INFORM DECISION-MAKING: BENEFITS, BURDENS AND EXPECTATIONS

92 As earlier noticed, the incidence of benefits and burdens, reciprocity of benefits and burdens, and competing expectations connected with relationships and dealings of parties can inform the thinking of a judge (and other participants in proceedings to be adjudicated by the judge) dealing with a claim for proprietary estoppel by encouragement.

93 **Fuller and Perdue**. A classic treatment of that topic (here adapted for the purpose of this paper) can be found in the analysis of LL Fuller and WR Perdue in "The Reliance Interest in Contract Damages" (1936) 46 *Yale Law Journal* 52 and 373 (to which the High Court of Australia made passing reference in C*ommonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 134 and *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 502).

94 Adapting the work of Fuller and Perdue, attention is drawn to three reasons commonly underlying a grant of civil remedies by a court:

(a) **The Reliance Reason**: Where a party has, to its detriment, acted or refrained from acting in reliance upon the conduct of another, the fact of *detrimental reliance* may call for the second party to perform duties or to compensate the first for its *losses*.

(b) **The Restitution Reason**: Where a party has *conferred a benefit* on another in circumstances in which the other party would, if able to retain the benefit *without reciprocation*, be unjustly enriched, the conferral of that benefit may call for the second party to perform duties in favour of the first.

(c) **The Expectation Reason**: *Where the recipient of a promise* (the promisee) *expects to gain* from the performance of the promise for which it has bargained, the fact of that expectation may call for compensation if the giver of the promise (the promisor) does not perform it.

95 What is here described as a "reason" for the grant of a remedy Fuller and Perdue treated as an "interest" the protection of which may furnish the basis for judicial intervention, motivating a Court (in service of a purpose of the law) to grant legal sanctions against a party who has broken a promise.

96 In the second part of their two part article (focusing upon contract law but engaging in a broader discussion) Fuller and Perdue made some observations about "Liability for Misrepresentation" (including *estoppel in pais,* "estoppel by conduct") which bear repetition, following upon their introductory observations in the first part of their article, here extracted (with emphasis added):

> "*The proposition that legal rules can be understood only with reference to the purposes they serve would today scarcely be regarded as an exciting truth. The notion that law exists as a means to an end has been commonplace for at least half a century. There is, however, no justification for assuming, because this attitude has now achieved respectability, and even triteness, that it enjoys a pervasive application in practice*. Certainly there are even today, few legal treatises of which it may be said that the author has throughout clearly defined the purposes which his definitions and distinctions serve. *We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simple inquiry: toward what end*

> *is this activity directed?* Nietzsche's observation, that the most common stupidity consists in forgetting what one is trying to do, retains a discomfiting relevance to legal science.
>
> In no field is this more true than in that of damages. In the assessment of damages *the law tends to be conceived, not as a purposive ordering of human affairs, but as a kind of juristic mensuration. The language of the decisions sounds in terms not of command but of discovery*. We *measure* the *extent* of the injury; we *determine* whether it was *caused* by the defendant's act; we *ascertain* whether the plaintiff has included the *same item* of damage twice in his complaint. One unfamiliar with the understated premises which language of this sort conceals might almost be led to suppose that Rochester produces some ingenious instrument by which these calculations are accomplished.
>
> It is, as a matter of fact, clear that *the things which the law* of damages *purports to 'measure' and 'determine*' - the 'injuries', 'items of damage', 'causal connections', etc - *are inconsiderable part its own creations, and that the processes of 'measuring' and 'determining' them is really a part of the process of creating them.* This is obvious when courts work on the periphery of existing doctrine, but it is no less true of fundamental and established principles. …"

97 In dealing with *estoppel in pais* under the heading of "Liability for Misrepresentation" in the second part of their article Fuller and Perdue wrote the following (with footnotes omitted and emphasis added):

> "Does the liability which results from an estoppel *in pais* extend to the expectation interest, or is it confined to the reliance interest? *If the estoppel mechanism be taken at its face value, it leads to a recovery measured by the representee's expectation. There is, furthermore, a strong judicial impulse to take the mechanism at its face value*. To adopt a measure of recovery inconsistent with the 'theory' of the liability would tend to undermine faith in the doctrine of estoppel itself, and might place the court under the embarrassment of having to find a new explanation for the liability. [Writers] have generally assumed without discussion that the liability extends to the expectation interest.
>
> *On the other hand, an inquiry into the purposes underlying the mechanism reveals no reason why the liability should not, in a proper case, be restricted to the reliance interest*, and in a substantial number of decisions the relief granted has been so limited. It is probable, however, that in most of the cases where an estoppel is applied the representor has been compelled to make good the expectancy created by his assertion. The factors which should influence the choice between the two measures probably do not differ radically from those discussed in the section on deceit [extracted below] …"

98 The section on "deceit" includes the following observations (with footnotes omitted and emphasis added):

> [The] hierarchic order of the three interests … is nowhere more clearly exemplified than in the deceit cases. The restitution interest is, of course, the most liberally protected, restitution being granted even where the

> misrepresentation was innocent. The principle of hierarchic division is carried a step farther in California; in that jurisdiction the quality of the fraud involved may determine whether the defrauder is held for the expectancy or only to reimburse losses through reliance. Probably other jurisdictions will come to this view in the course of time as 'hard' cases, in both directions, arise to test their established standards. As in other fields of the law, various factors may properly influence the choice between the two interests: the degree of fault involved in the misrepresentation; considerations of administrative convenience; the extent to which the representations were made in 'the course of business' and hence are subject to the considerations of policy surrounding business bargains; whether the representations were express or implied."

99 Despite their antiquity, their provenance and their primary focus on contract law, these observations are not so far removed from contemporary Australian law that they do not provide assistance in understanding "what evidence judges look for" and "how they evaluate" evidence in support of a proprietary estoppel claim to a family farm.

100 Fuller and Perdue are not the only academics to have focused attention on the analytical significance of factors such as benefits, burdens, expectations, detrimental reliance and restitution. A wave of lawyers have imagined that the law of "contract" settled in the 19th century around the concept of a bargain (Warren Swain, *The Law of Contract 1670-1870*, Cambridge UP, 2015) was an aberration between earlier legal thinking based upon an assessment of benefits and burdens and a return in the 20th century to that "fairer" world of old.

101 Between 1961-1995 P.S. Atiyah published five editions of *An Introduction to the Law of Contract* (Clarendon Press, Oxford) which privileged a discussion of contract law in terms of expectation, reliance and restitutionary claims.

102 Grant Gilmore's *The Death of Contract* (Ohio State University Press, Columbus, Ohio, 1974) and Atiyah's *The Rise and Fall of Freedom of Contract* (Oxford University Press, Oxford, 1979) were in that tradition.

103 The work of both Gilmore and Atiyah (both of whom promoted the idea that modern law must be studied in its social context) was critiqued in a sceptical paper by the renowned legal historian A.W.B. Simpson entitled "Contract: The Twitching Corpse" (1981) 1 Oxford Journal of Legal Studies 265, reproduced

as Chapter 13 in Simpson's *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, London, 1987).

104 Simpson summarised the thesis of Atiyah's *The Rise and Fall of Freedom of Contract* in the following terms:

> "It is essentially an essay in the history of ideas, and is divided into three parts. The first sets the scene as it were for the opening of the story in 1770. The second chronicles what is called 'The Age of Freedom of Contract' which is located in the period 1770-1870. Here in particular Atiyah sets out to trace the provenance of the contractual ideas expressed in legal decisions, and to assess the extent to which notions derive from the classical economists and utilitarians were reflected in court decisions and legislation. The third section traces the decline and fall of freedom of contract in the following century up to 1970, a period during which, it is argued, the importance attached to the enforcement of freely negotiated contracts was progressively reduced, leaving us today with a fossilised body of contractual doctrine which is no longer in tune with contemporaneously held values. We end with a clarion call for a new theoretical structure, based upon 'the three basic pillars of the law of obligations, the idea of recompense for benefit, of protection of reasonable reliance, and the voluntary creation and extinction of legal liabilities'…
>
> Atiyah's book and the growth of interest in the historical and contextual study of contract law (particularly the economic analysis of law associated with the Chicago School) presents the modern treaties writer with a problem. He can attempt to widen the range of material with which he is concerned so as to include a discussion of the relevant ideas and literature, or he can continue to confine attention to a circumscribed range of 'legal' materials and conceptions. The first course will, if carried far, produce a very different type of book with little chance of acquiring authoritative status, and other writers will no doubt fill the gap by producing traditional texts. The latter course runs the risk of isolating the treatise writer from the mainstream of legal scholarship. But what counts as a legal argument is not inevitably fixed … and if the treatise writers of today widen their approach to the law, the lawyers will eventually fall into line. We shall have to wait and see. …
>
> Traditional texts, by doggedly maintaining the continued central significance of the freely negotiated agreement, help to keep alive a world in which lawyers start from the assumption that a man's word is his bond."

105 In the battle of ideas, the lawyers' assumption that a man's word is his bond has yet to be displaced. It remains alive in the realm of proprietary estoppel by encouragement.

106 Simpson's "Historical Introduction" to the Law of Contract remains at the core of Chapter 27, and to some extent Chapter 28, of the recently published

"Twelfth Australian edition" of *Cheshire and Fifoot's Law of Contract* (LexisNexis, Australia, 2023).

107 **A Reimagined "Law of Obligations"?** In the 1980s and 1990s there was in Australia a contest of ideas about the role of agreements, promises, benefits and burdens, detrimental reliance, expectations, contract law and estoppel in a reimagined "law of obligations". It took the form of debate about the role of "consideration" in contract law; the role of "unjust enrichment" in the "law of restitution"; and the existence or otherwise of a unified doctrine of estoppel.

108 **Contract Law Consideration.** In *Beaton v McDivitt* (1985) 13 NSWLR 134 at 150-151 (having reviewed several cases including *Dillwyn v Llewelyn* (1862) 45 ER 1285 and *Ramsden v Dyson* (1866) LR 1 HL 129) Young J made the following observations:

> "It is quite clear that it is an inadequate explanation of the line of cases which I have been discussing to say that unless one can find a contract express or implied, the principles known as proprietary estoppel cannot be applied; clearly the principle is wider than this. For instance, the principle applies in cases where there is a contract, in cases where there is a contract which is unenforceable because of the Statute of Frauds and in cases where there is no contract but the parties have supposed there is a contract through not realising that one of the contracting parties is incompetent to contract. … However, some parts of the principle now called proprietary estoppel are simply contract, it being realised that parts of the old rules as to consideration that, detrimental reliance have remained are so that *ex post facto* consideration is nonetheless consideration notwithstanding that it does not conform to the normal rules for consideration which are applicable to contracts under the modern doctrine of consideration."

109 On appeal the Court of Appeal (constituted by Kirby P, Mahoney and McHugh JJA), in *Beaten v McDivitt* (1987) 13 NSWLR 162, held that for a contract to be enforceable at law consideration must be found in the form of a price in return for the exchange of the relevant promise or a *quid pro quo*, following *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424.

110 McHugh JA specifically (at 182) rejected the proposition that proprietary estoppel (as illustrated by *Dillwyn v Llewelyn* and *Ramsden v Dyson)* is "contract based" and made the following observations:

> "The jurisprudential basis of cases such as *Dillwyn v Llewelyn,* in my opinion, is that Equity will not allow a person to insist upon his strict rights when it is unconscionable to do so. *In Ward v Kirkland* [1967] CH 194 at 235, Underwood-Thomas J said that the foundation of the principle was 'the recognition by the Court that it would be unconscionable in the circumstances for a legal owner fully to exercise his legal rights'. This passage was approved by Kitto J in *Olsson v Dyson* (1969) 120 CLR 365 at 379. In *Ward v Kirkland* the principle was expressed in terms of the exercise of legal rights. However, it is more appropriate to define it in terms of insistence upon rights; for the distinction see Finn 'Equitable Estoppel' in *Essays in Equity* (1985) at 73. …"

111 **A Law of Restitution.** At about the same time as "contract law" was being sorted out the law of restitution provided another vehicle for debate about the role of benefits and burdens in a reimagining of "*quasi* contract" (formerly based on the legal technique of implied promises) now described by the label "restitution" and based more broadly on the prevention of unjust enrichment: *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 227, 256-257 and 263-264.

112 As worked out through a series of subsequent decisions culminating in *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at [86]-[89] the High Court determined that Australian law does not recognise an independent principle of unjust enrichment, an invocation of which permits or requires a grant of relief by the courts. The concept of unjust enrichment is, rather, a means of comparing and contrasting established categories of liability or testing legal reasoning in new or developing categories of case. It is an idea that may inform legal analysis but it does not, of itself, displace established rules or principles.

113 **Estoppel.** Atiyah's view of the world may not have persuaded practising lawyers in Australia, but his work coincided with an expansive view of the role of estoppel in the enforcement of civil obligations, commencing perhaps with *Legione v Hateley* (1983) 152 CLR 406 and culminating in *Commonwealth v Verwayen* (1990) 170 CLR 394 before settling into an established pattern with *Giumelli v Giumelli* (1999) 196 CLR 101. An expansive view of the equity jurisdiction, perhaps inspired by Sir William Deane and Mason CJ on the High Court of Australia, was moderated during the tenure of Gleeson CJ, who presided over the High Court in *Giumelli v Giumelli*.

114 For all that, the Australian "law of estoppel" as developed since the 1980s still harks back to the reasoning of Dixon J in *Thompson v Palmer* (1933) 49 CLR 507, *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 and *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 as explained in his classic article "Concerning Judicial Method" (1956) 29 ALJ 468, reproduced in *Jesting Pilate* (Law Book Co, 1965), pages 152-165. Continuity and change are everywhere to be seen.

115 **Overview.** A process of reasoning that looks to the existence or otherwise of an element of detrimental reliance and loss; an element of unreciprocated benefit; or an element of expectation arising from an agreement, a promise or representation may inform a process of evaluation of a proprietary estoppel claim to a family farm. A court is generally called upon to notice each of these elements in one guise or another, including any benefits that may have accrued to a claimant who seeks a remedy against having to bear the burden of an unsatisfied expectation. There may be a correlation between one party's enjoyment of a benefit and another having to bear the burden of an arrangement or vice versa.

116 However, a process of reasoning that privileges an analysis in terms of detrimental reliance and loss, benefits and burdens, and expectations cannot of itself explain the principles governing a proprietary estoppel claim which must be governed, ultimately, by a consideration of unconscionability arising from inconsistent conduct on the part of a landowner.

117 It is important here to emphasise that (although analyses of benefits, burdens, expectations and subjective states of mind might be examined) the focus of a judge adjudicating a proprietary estoppel claim must be upon discernible *conduct* (be it an act or an omission), not things imperceptible, and moreover conduct *inconsistent* with earlier conduct upon which reliance was placed.

JUDICIAL DECISION-MAKING IN AN ADVERSARIAL SYSTEM OF ADJUDICATION

118 A proprietary estoppel claim is generally conducted, and determined, by a judge presiding over adversarial proceedings in which parties advance competing claims upon an assumption that each party has the capacity and will to advance his or her own interests. That assumption places a limit upon the extent to which a judge can go beyond issues identified by the parties or adopt an inquisitorial approach. Perhaps the primary limitation on a judge is a need to afford procedural fairness to each party. Provided principles of procedural fairness are observed a judge can, and often does, engage in a conversation with contending parties about "the real issues" in dispute and what evidence might be needed to address those issues.

119 One example of an engagement between bench and bar routinely occurs during opening submissions when a judge might seek clarification of the jurisprudential foundations of each party's case and each party's underlying case theory. Another, more mundane example is when a judge inquires whether the evidence to be tendered includes an up-to-date title search of disputed property and copies of caveats and land dealings bearing registered dealing numbers, not merely office copies of documentation. Surprisingly, a need for such evidence is often overlooked.

120 Any assumption that each party before the Court has the capacity and will to advance his or her own interests requires qualification in cases in which a party to proceedings, or a significant personality in evidence to be adduced on a proprietary estoppel claim, is incapacitated or dead, necessitating representation of his or her estate by a financial manager and tutor (in the case of an incapacitated living person) or (in the case of a deceased person whose interests require representation in the proceedings as a party) a duly appointed executor or administrator of the deceased estate.

121 An "absent party" can be accommodated by representative orders of one description or another, whether upon an exercise of the Court's protective or probate jurisdictions or a more general jurisdiction to make "representative

orders" designed to ensure that all interests affected by the proceedings have an opportunity to be heard.

122 A larger problem often occurs in the assessment of evidence relating to acts alleged to have been done and statements alleged to have been made by a person or persons not available to give evidence. Caution is required in the assessment of this evidence because, unless corroborated by other evidence, an objective assessment of it may be beyond reach: *Plunkett v Bull* (1915) 19 CLR 544 at 548-549; *Watson v Foxman* (1995) 49 NSWLR 315 at 319.

123 As earlier noted, a useful discussion of principles governing evidence of events that occurred long ago, with absent witnesses to those events, can be found in the judgment of Hallen J in *Wild v Meduri* [2023] NSWSC 113 at [309]-[346].

124 A judge needs, generally, to maintain a critical attitude towards all available evidence in circumstances in which advocates, albeit in a manner consistent with the obligation of candour they owe to the Court, are advancing a case theory that serves the interests of their respective clients.

125 A capable advocate will have a "case theory" that informs each step of his or her case preparation and presentation, directed to a purpose of persuading a judge to make, or to refrain from making, particular orders. Ultimately, any determination by a judge must culminate in orders dispositive of the proceedings before him or her.

126 A capable advocate prepares his or her case "backwards" (with ultimate orders firmly in view in case preparation) so as to facilitate the presentation "forwards" of a coherent case, intending thereby to persuade a judge that the evidence before the Court and considerations of justice all point to the desired outcome.

127 With this *modus operandi* in mind, a capable advocate will generally endeavour to collate all available documentation bearing upon a case before committing his or her witnesses to verifying an affidavit that might be required, in cross examination, to withstand critical analysis by reference to contemporaneous

documentation. If a document presents an inconvenient truth an advocate may face a forensic decision about whether it is better explained in chief or in cross examination.

128 A judge hearing a proprietary estoppel claim needs to understand that the evidence presented to the Court may have been refined in this way by a host of forensic decisions never likely to be exposed to the light of day.

129 This needs to be taken into account by a judge so that, so far as may be practicable, the judge can, if need be, look beyond procedural forms in an endeavour to assess the evidence of each material witness.

130 The Court's decision-making processes are more often than not assisted by professionally crafted affidavits but a judge has to be alive to the possibility that the process of preparation of an affidavit by a lawyer might, at times, reveal too much of the lawyer's state of mind rather than that of the witness. A cross examiner, no less than a judge, must be alert to this in testing evidence presented in the form of an affidavit rather than via a process of oral examination and cross-examination.

JUDICIAL DECISION-MAKING IN CONTEXT: ADJECTIVAL LAW

131 An insight into "what evidence a judge looks for", and how a judge "evaluates the evidence", bearing upon a proprietary estoppel claim requires consideration of prevailing modes of procedure ("adjectival law") governing the conduct of proceedings as well as current formulations of "substantive law" principles.

132 That, in turn, invites a digression into discussion of court practice, procedure and legal history so as to make explicit different tendencies of mind attributed to those responsible for the administration of common law rules and equitable principles. How lawyers perceive "substantive" law may be influenced, if not governed, by procedures which they are bound to follow or which follow a conventional mode.

133 Proceedings in which a proprietary estoppel claim features are ordinarily conducted, in the Supreme Court of NSW, on pleadings, supplemented by written submissions (incorporating a chronology and accompanied by written notice of intended objections to evidence), on affidavit evidence, with subpoenaed and other documents to be tendered as evidence, reproduced in a court book (paginated, indexed and tabbed), which provides the foundation for the cross examination of witnesses given notice to attend for cross examination.

134 Procedurally, such proceedings are **paper-driven** and front-end loaded with preparatory work (including pre-trial discovery procedures) that constrain the course of a final hearing and opportunities for evidence to be tested through personal engagement between bench, bar and witnesses.

135 In a final hearing "on affidavits" oral evidence-in-chief is generally permitted only with the leave of the Court and limited to supplementing a deponent's affidavit evidence. For better or worse, each witness's evidence is presented to the Court in a pre-digested form more often than not prepared with the benefit of one or more lawyers entrusted with the task of converting raw instructions into an admissible form of evidence.

136 That fact can present challenges to advocates on both sides of a case as well as a judge. By the time a case reaches a final hearing a witness might have changed his or her recollection of events (particularly if prompted by reading the affidavits of an opponent or required to restate his or her evidence in a series of affidavits prepared for interlocutory hearings) and supplementary evidence-in-chief might be considered forensically desirable even if it exposes the witness to criticism. On the other side of the bar table cross-examining counsel may face a formidable challenge in seeking to displace evidence prepared by a deponent at leisure and with professional assistance.

137 For a judge, the challenge may be to see enough of a witness in the witness box to get his or her measure as a person so as not to become trapped by words on the page of an affidavit. A witness whose affidavit is expressed in

terms more refined, sophisticated and articulate than the witness presents in person may not be credible.

138 In a judge alone "final hearing" of civil proceedings (which is, generally, to say a "trial without a jury") the "rules of evidence" currently applied are far less technical than they once were. This is particularly so in a community (such as Australia) in which a liberal attitude is taken to the admission into evidence of contemporaneous documentation, not limited to "business records".

139 In practice, in civil proceedings (as distinct from criminal proceedings) there are essentially only two fundamental "rules" governing the admission of evidence. The first is whether the evidence in question is *relevant* to a fact in issue. The second is whether the evidence is *probative* of a fact in issue.

140 Both rules are based upon an assumption that the participants in a hearing have an understanding about what "facts" are "in issue". Traditionally, issues are defined by pleadings but, in a system of court administration informed by a case management philosophy, pleadings might be refined by written submissions and supplemented by formal orders and notations made in management of the proceedings.

141 The two identified "rules" of evidence assume, it must be said, an understanding of the concept of "hearsay" evidence but, in practice, the "rule against hearsay" essentially requires an understanding that "hearsay evidence" may not be probative of a fact in issue if tendered as evidence of the truth of "a fact stated" rather than limited in the purpose for which it may be used. Thus, a statement out of court by a person who is not called as a witness may not be admissible as evidence of the truth of facts stated, but it might be admissible as evidence bearing upon the state of mind of a party to whom the statement (right or wrong) was made.

142 The modern approach to the reception of evidence (embodied, for the Supreme Court of NSW, in the *Evidence Act* 1995 NSW) is the product of changes to court procedures which are commonly traced back to 19th century English

developments, including enactment of the *Judicature Acts* of 1873 and 1875 (the scheme of which was adopted at different times throughout Australia, culminating in commencement of the *Supreme Court Act* 1970 NSW on 1 July 1972).

143 At the time of its inception the explicit purpose of a *Judicature Act* system of court administration was to enable the several jurisdictions of a Supreme Court or its equivalent to be administered by a single judge in the one set of proceedings.

144 Discussions of a *Judicature Act* system often focus attention upon the "fusing" of the common law and equity jurisdictions (or, more accurately, the administration of those jurisdictions) without conscious consideration of other heads of jurisdiction (such as the protective and probate jurisdictions) which involve inquisitorial procedures rather than the adversarial procedures historically associated with a common law trial by jury and accommodated upon an exercise of equity jurisdiction.

145 Suffice to say, for present purposes, a feature of a *Judicature Act* system at the time of its adoption was the general adoption of a system of narrative "fact" pleading based upon traditional equity practice rather than the "issue" pleading characteristic of a common law jury proceeding.

146 The difference between "fact" pleading and "issue" pleading reflects the historically different types of adjudication following upon such pleadings. Equity proceedings were, in substance, commenced by a statement of claim that set out a narrative record of facts alleged to be material to a "prayer" (claim) for relief upon the exercise by the Court of a discretionary jurisdiction. The plaintiff's prayers for relief were ultimately determined by a judge sitting alone, taking into account all the facts and circumstances of the case at the time of the hearing, pronouncing orders of a discretionary nature moulded to achieve practical justice in the particular case, supported by reasons for judgment.

147 Common law issue pleadings were designed to identify a cause of action, upon a claim of right (not a prayer for discretionary relief), upon which a jury could pronounce a binary verdict (verdict for the plaintiff or verdict for the defendant, guilty or not guilty) generally without overtly stated reasons. A common law pleading alleged (and, after 19th century reforms, particularised) a cause (form) of action which could be denied by a pleading of the "general issue" (without descending to a denial of particular factual allegations) which was sufficient to submit the case to a jury.

148 With the adoption of a *Judicature Act* system of "fact" pleading, rules of court were introduced to prevent a defendant from pleading "the general issue" designed to avoid engagement with the plaintiff's allegations of fact in a statement of claim. Equity pleadings triumphed over those of the Common Law, at least in theory and for a time.

149 Historically, an equity suit lent itself to paper-driven decision-making with a problem solving, managerial flavour; a common law action lent itself to an adversarial, oral presentation of competing claims of right.

150 The introduction and development of a *Judicature Act* system of court administration has generally been associated with the practical abolition of trial by jury in civil cases and increasing reliance upon judge alone "trials". This, in turn, has focused greater attention on the reasons for judgment of a judge and shifted the focus of a judge's formal expression of his or her reasoning from procedural determinations (relating, for example, to a pleading dispute, the formulation of questions for determination by a jury or instructions or directions to be given to a jury) to reasoned analyses of fact and substantive law predicated upon an allocation of responsibility for decision-making to a judge sitting alone and a need to hold the judge accountable for his or her decisions. The need of a judge to prepare and publish formal reasons for judgment acts as a brake on idiosyncratic, intuitive decision-making.

151 The old concept of a "trial", which focused upon a hearing on a fixed day, with a jury summoned for that day, with a view to a decision being made that day,

has been largely lost to modern experience. A judge sitting alone, without the constraints of a jury, is better able to manage proceedings and, subject to questions of costs and convenience, to adjourn a hearing from time to time as required in order to do justice between contending parties.

152 This, in itself, operates to discourage opportunistic objections to evidence because, if evidence is not presently available but could be, an adjournment of a hearing (on terms as to costs or otherwise) is a practical possibility. It may also require a judge to focus particular attention on the substantive justice of a case, unencumbered by a narrow focus on presently available evidence which, absent case management, could leave one party or another with a defective case and no practical remedy.

153 No sooner had a *Judicature Act* system of court administration been assimilated in the thinking of lawyers throughout the country than Australia's Supreme Courts embraced a "case management" philosophy of court administration which privileges the management of particular cases by a judge empowered to compel parties to comply with the court's requirements for case preparation, depriving parties of the greater autonomy they previously exercised in preparing a case for adjudication. In a case management system the courts commonly give directions which control the course of pleadings, the availability of discovery and interrogatory procedures and the use of subpoenas, as well as an armoury of orders for "alternative dispute resolution" procedures such as a compulsory mediation.

154 A case management system of court administration calls for different norms of advocacy than an old-fashioned "trial by ambush". Advocates generally have to work constructively with a judge, and be seen to work constructively with the judge, in the identification of problems and potential solutions. An advocate who adopts a confrontational style of advocacy may persuade everybody but the judge of the strength of his or her case, sadly leaving the judge without assistance that could have benefited the advocate's cause.

THE PROCEDURAL CONTEXT OF A PROPRIETARY ESTOPPEL CLAIM

155 The case management world in which civil proceedings are presently conducted privileges the use of documents at all stages of the proceedings, from the time of commencement of proceedings until their final determination. For this reason, all participants in civil proceedings (including proceedings which involve a proprietary estoppel claim) have as a practical imperative a need to "**master the documents**".

156 From the perspective of a judge mastery of the documents presented to the Court generally requires an insistence that parties, at an early stage of a final hearing, identify documents of central significance.

157 Experience teaches that, although parties might encumber the evidence with reams of documents (courtesy of facilities for photocopying and electronic files), most cases call for close attention to a comparatively small number of documents; perhaps as few as two or three.

158 Not uncommonly, contending parties agree upon the identity of critical documents. Those documents might evidence direct dealings between parties (eg, in the form of a disputed deed of family arrangement) or collateral facts (for example, statements made by a party in an application for finance) bearing upon the probabilities of a fact in issue. Even if the identity of critical documents is not agreed at the commencement of a hearing a pattern of significant documents generally emerges from the course of cross-examination, each cross examiner under a forensic duty to confront an opponent's witnesses with a case sought to be made.

159 In a proprietary estoppel claim to a family farm, in the context of a family given to informal discussions of succession planning, particular significance might attach to a pattern of will-making, particularly if the terms of wills from time to time made are "public knowledge" within the family. In such a case the process of will-making might have a direct bearing upon the probability that agreements, promises or representations have been made, or expectations have been exposed to view, in one form or another. A process of will-making may

crystallise a dispute even if it does not yield definitive answers for or against the operation of a proprietary estoppel.

160 A feature of modern practice, perhaps drawing on both equity's tradition of "fact" pleading and the common law's tradition of "issue" pleading, is that statements of claim commonly now plead not only a narrative of facts but also allegations presented as pleading the "elements" of a claim to relief set out under topic headings that identify a set of equitable principles which sometimes, in substance, appear similar to an old style common law "issue" pleading. So it is that a statement of claim might plead a series of associated contentions (expressed to be "further and in the alternative") under descriptive headings such as "Common Intention Trust", "Proprietary Estoppel by Encouragement" and "Joint Endeavour Trust".

161 This may have significance in the way modern lawyers (including judges) approach an exercise of equity jurisdiction. In particular, a proprietary estoppel claim can be, and often is, pleaded in substance not so much by reference to a narrative statement of facts but by reference to the conventional elements of an "equitable cause of action" (to a purist, a misnomer) supported by particulars.

162 Experienced equity judges operating at first instance, entrusted with primary responsibility for finding facts and locating them within a legal framework, have a tendency, no less than those who appear before them, to crystallise the essence of a proprietary estoppel claim in a summary of "elements to be proved".

163 A good example of that appears in Robb J's judgment in *Daniel v Athans* [2022] NSWSC 1712 at [25] (which, in this extract, does not address the question of "relief" to be granted upon proof of a proprietary estoppel case):

> [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."

164 The way lawyers think about an exercise of equity jurisdiction is perhaps moving closer to thinking in terms of common law jurisprudence (centred upon the existence or otherwise of a "cause of action") in which it becomes acceptable to speak of an "equitable cause of action" instead of the traditional approach of identifying an "equity" sufficient to justify, in the name of equity, an intervention by the Court in the conduct of human affairs.

165 An antidote to this mode of thinking is to keep in the view of all participants in court proceedings the discretionary nature of equitable relief and the touchstone of an exercise of equitable jurisdiction in the provision of a remedy to address conduct "against good conscience".

166 The precedential reasoning processes required of an equity judge in a common law system of law, and parties who (in the old language) "pray" to a judge for "relief" in modern litigation privileges: (a) a search for common patterns of problems requiring a solution; and (b) commonly accepted ("established") patterns of dealing with those problems, and in moulding solutions to provide practical justice on the facts of the particular case.

167 An exercise of equity jurisdiction generally exhibits a managerial flavour that stands in contrast to an exercise of common law jurisdiction, which remains focused on the adjudication of competing claims of right. Loose talk of an

"equitable cause of action" does not justify a re-imagining of equity principles into common law rules.

A JUDGE'S FIRST IMPRESSIONS OF A PROPRIETARY ESTOPPEL CASE

168 There was a time when the judge appointed to hear a contested claim for relief such as that involving an allegation of proprietary estoppel was expected to come to the commencement of a hearing without much knowledge of the case unless he or she had presided over the determination of an interlocutory dispute. In some judges the better part of virtue was to learn for the first time about a case upon reading the pleadings in open court and attending to opening submissions of counsel.

169 Those days, if they ever really existed, have long gone. The paper-driven processes of case managed proceedings mean that before a judge appears in court he or she may confidently be expected, at least, to have perused the pleadings (for the purpose of noticing the nature of the relief claimed) and to have read the parties' "opening" written submissions.

170 An object of perusing the pleadings is generally: (a) to note the claims for relief in the plaintiff's statement of claim and the counter claims made in any statement of cross claim filed on behalf of a defendant; and (b) if the pleadings lend themselves to a casual review, to glimpse the nature of competing allegations of fact and law.

171 The nature of claims made in a statement of claim and in a statement of cross claim depends on which party commenced the proceedings by filing a statement of claim (or, perhaps, a summons before any order made for the proceedings to proceed by way of pleadings). A summons is typically filed if urgent interlocutory relief is sought: for example to sustain a caveat or to have it removed. A statement of claim is required if disputes of fact are anticipated, as in most estoppel cases they are.

172 The party asserting a proprietary estoppel claim can be expected generally to seek: (a) a declaration that he or she is beneficially entitled to an estate or

interest in a property registered in the name of the contradictor land owner; (b) an order that the landowner convey legal title to the claimant or submit to a vesting order in favour of the claimant; (c) an injunction to restrain the landowner dealing with the property in a manner inconsistent with the claimant's interests; and (d) equitable compensation or damages under "Lord Cairns' Act" (*Supreme Court Act* 1970 NSW, section 68).

173 A landowner resisting a proprietary estoppel claim can be expected generally to seek: (a) a declaration that the claimant has no right, title or interest in the disputed property; (b) an order that any caveat lodged by the claimant against the title of the property be withdrawn; (c) an order for possession of the property and leave to issue a writ of possession (common law remedies) or an order for the delivery up of possession by the claimant (an equitable remedy); and (d) compensation, whether damages at law, equitable compensation or damages under "Lord Cairns' Act".

174 Sometimes one or another, or both, of competing parties will apply to the Court for the appointment of a receiver and manager of property in dispute or for orders that the property be sold under the direction of the Court. This is not a preferred course for family members intent upon retaining a farm "in the family"; but a remedy that carries the potential for all disputed property to be sold at auction (reserving to all interested parties liberty to bid at an auction) represents a natural tendency of mind for an experienced equity judge.

175 The parties to a dispute about beneficial ownership of a family farm sometimes engage in Herculean efforts devoted to the formulation of proposals for a compromise designed to keep title to the farm in the family and to provide compensation for family members required to live or work elsewhere. This may mean that a plaintiff who claims a farm based on an allegation of proprietary estoppel may have to be satisfied with a grant of equitable compensation or may be required, as the price of acquiring a legal title to land, to make a payment to the land owner, or submit to other adjustments, designed to "do equity" as the price for obtaining equity.

176 If, as sometimes happens in a dispute about beneficial ownership of a farming property, the parties have been conducting a farming business on the property in partnership that may add a layer of complication depending, in part, whether there is agreement that the farming property was, or was not, partnership property. For the purposes of this paper, I assume that there is no such complication in the paradigm case.

177 A judge's perusal of the pleadings before the commencement of a final hearing may be accompanied by closer attention to a reading of the parties' "opening" written submissions.

178 Ideally, those submissions, with brevity, identify the parties, the pleadings, the substance of competing claims for relief, the property the subject of those claims, the nature of each "cause of action" relied upon and the principal witnesses. The submissions should contain a short narrative statement of facts relied upon and, when read as a whole, they should reveal each party's case theory including, if an opponent's case theory is known, a refutation of any competing case theory.

179 Ideally, a judge should be armed with enough information to engage with each advocate at the commencement of a hearing about the real issues in dispute.

OPENING SUBMISSIONS IN A CASE MANAGED FINAL HEARING

180 In strict theory the parties to an equity suit traditionally have no "right" to make an opening statement at the beginning of a final hearing or before adducing evidence in support of their case. The practice of a court in the conduct of a trial of a common law action was different because of a need to manage the timing, and order, of submissions made to a jury by adversarial parties.

181 As a matter of practice it is common for a judge sitting alone to invite each party to make an oral opening statement supplementing any written "opening" submissions. Whether or not that invitation is taken up may depend upon interchanges between bench and bar before any formal opening submissions are called for.

182 In practice, the hearing of an equity suit may start with what might properly be characterised as a *de facto* directions hearing designed to ensure that everybody participating in the hearing is on the same wavelength.

183 Such a "directions hearing" normally focuses upon identifying the parties' opening written submissions, the court books, the pleadings, and (by reference to the index to the court book) witnesses required on each side of the record to attend the Court for cross examination on their affidavits. An inquiry might also be made as to the existence of any subsisting interlocutory orders that may need to be taken into account in the conduct of the final hearing or upon the final determination of the proceedings.

184 Parties often overlook a need to anticipate an order for the withdrawal of a caveat over disputed land if a proprietary estoppel claim affecting the land is dismissed. This can be dealt with either by a formal amendment of pleadings or by a formal notation by the judge that an order for withdrawal of the caveat may be made as consequential relief if the proprietary estoppel claim fails.

185 In seeking confirmation of the real issues in dispute the judge might interrogate each advocate about his or her case theory and the principal authorities relied upon in support of, or in opposition to, a case theory. This process can be important to ensure, not only that everybody is on the same wave length, but that there is no hidden dispute about the availability of each party's case on the pleadings.

186 An opening statement is not usually an occasion for more than a passing reference to authority, but a reference to a few seminal cases can crystalise everybody's understanding of the case at hand. In a proprietary estoppel case "signpost" authorities in the NSW Supreme Court currently are *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 [6], *Donis v Donis* (2007) 19 VR 577, *Delaforce v Simpson-Cook* [2010] NSWCA 84; 78 NSWLR 483 at 488 [21] and *Sidhu v Van Dyke* (2014) 251 CLR 505 at 511 [2]. A few examples of the application of principles informing cases might be alluded to as available, but not treated in detail.

187 In a proprietary estoppel case relating to a family farm clarification of the real issues in dispute might require interrogation of advocates about the nature of the estoppel relied upon and whether any reliance is placed upon alternative forms of "an equitable cause of action" approximating an estoppel claim. Where a claim is made against the estate of a deceased landowner a question might also be raised as to whether a family provision claim is pending or likely to be commenced. Experience teaches that a party's "proprietary estoppel claim" might be defined not only by what is alleged but also by what is not alleged. Advocates can be relied upon, wherever they can, to reserve opportunities for themselves to reimagine their case during the course of a hearing, as the wind blows. Prudence attaches to an early discussion in Court of the parameters of the case at hand.

188 In the Supreme Court of NSW the hearing of a proprietary estoppel claim *on affidavit evidence* normally proceeds by each party formally reading his or her affidavits in the sense that, subject to rulings on admissibility in response to objections, each affidavit is individually, but formally, noted as having been "taken as read". Few affidavits are these days read aloud, verbatim, in open Court, as was once the practice in more leisurely times.

189 In the process of formally reading affidavits, a judge will need to entertain objections to the admissibility of each affidavit. The practice of some judges is to issue at the outset provisional rulings on admissibility based upon notices of objection filed with the parties' written submissions and considered by the judge in chambers preparation. That entails a greater engagement with the affidavits in chambers than may be necessary.

190 My practice is not to engage in any systematic reading of affidavits before the commencement of a final hearing or to publish to the parties provisional rulings on admissibility. For ease of dealing with objections in open court I do, however, assign to my tipstaff the task of "noting up" affidavits with foreshadowed objections so that rulings on objections in open court can be facilitated. This is a common practice.

191 My experience, not unique, is that the process of receiving and ruling upon objections to affidavits is often a waste of time and energy. Not all objections are pressed. Many are unfounded. Many objections, if successful, are neutralised by the course of oral evidence.

192 Perhaps the only real utility in a process of ruling upon objections to affidavits is that it enables the parties, without appearing to do so, to articulate their respective cases and to satisfy themselves that the judge understands the cases they are respectively seeking to make. In my experience, when advocates are satisfied that they are on the same wave length as the judge their objections quickly fall away.

193 In the process of dealing with a case management directions hearing, opening submissions or objections, it is common for a judge in a proprietary estoppel case relating to a family farm to ask for an early acquaintance with documents or evidence of central concern. For my part, I seek the following:

(a) Up-to-date title searches relating to disputed land, including (from the records of the Registrar-General) the certificate of title to each parcel of land the subject of dispute; an historical search of each parcel of land showing the dates upon which any material dealings have been registered; each caveat on the title to disputed land; and material dealings, such as memoranda of transfers of land, memoranda of mortgages and discharges of mortgages affecting the land. An office copy from the file of a solicitor is not as reliable as a copy of a “registered dealing”.

(b) A location map depicting each parcel of land in dispute, its acreage and its relationship with other parcels in dispute and, if material, the location of buildings, fences and water sources.

(c) A family tree diagram showing the dates of birth, deaths and marriages of each member of the family who features in the

evidence or whose interests might be affected by any determination of the proceedings.

(d) A note (or perhaps a bundle) of the main documents to be referred to in the evidence and submissions.

(e) A note of the whereabouts in affidavits of the main contested conversations.

194 Generally, this material, and any misunderstandings or differences of opinion as to the nature of the real issues in dispute, should be exposed to view before any witness (or, at least, any critical witness) is called for cross-examined on his or her affidavits. Otherwise a complaint of procedural unfairness might emerge unexpectedly towards the end of a hearing, when procedural adjustments to the way a case is to be conducted or decided are more likely to be problematical.

195 Although a court book might contain documents tendered in evidence at the commencement of a hearing, and although each party might separately prepare a "cross examination bundle" of documents they propose to put to witnesses in cross examination, a judge does not normally, at the commencement of a case, explore the wide range of "collateral documents" which might have a decisive bearing upon whether or not particular facts are established or the evidence of particular witnesses is accepted.

196 Those documents will generally have come to the attention of the parties through a process of what passes these days for "discovery" by the utilisation of subpoenas for the production of documents and notices to produce directed to an opponent. Formal "discovery" by means of a verified list of documents or the administration of interrogatories (once the province of an exercise of equity jurisdiction but now governed by rules of court of general application) is now exceptional, not routine. In a proprietary estoppel farming case sought - after documents often include wills and other testamentary instruments; applications

for finance or for a government licence or assistance; regulatory returns to government; tax returns; personal or business diaries; and emails.

197 Experience teaches that those types of documents may contain unguarded statements that challenge evidence carefully crafted for a contest not in view at the time the documents were created. Like other "contemporaneous" evidence, though, care needs to be taken to appreciate the circumstances in which a collateral document came into existence - and the purpose of its creation - before taking it too literally.

198 It might be helpful to a judge's understanding of a case for him or her to be given a general description of the nature of farming operations in the region of the disputed property and any views the parties may have about the "acreage" of land thought to be necessary for a viable farm. It is not necessary for this information to be led from an expert witness if, as is generally the case, what is being explored is the state(s) of mind of family members engaged in disputation.

THE COURSE OF A HEARING

199 The course of a hearing of a claim of proprietary estoppel generally proceeds as do other equity cases. All affidavits having been formally read, and documentary tenders of evidence having been dealt with, a plaintiff's witnesses are generally presented for cross examination, followed by those of the defendant. Expert witnesses are commonly taken out of turn if their evidence is not dependent upon an updated knowledge by them of all lay evidence.

200 Whatever the precise order of witnesses, substantial progress towards a determination of the proceedings is generally not made until the main players (at least on the plaintiff's side of the record) have been cross-examined. An opportunity for meaningful settlement discussions sometimes arises at the conclusion of the plaintiff's evidence and before the defendant is required to submit to cross examination. If the parties do not take that opportunity to settle their differences, the next time when a similar opportunity arises might not be until after cross examination of the defendant.

201 For the most part, the task of the judge is to be a patient listener, intervening only to deal with objections to evidence or unduly repetitive or unfair questioning; to clarify the intent of a cross examiner or a witness where there appears to have been a miscommunication between them, and (mindful of the so-called rule in *Browne v Dunn*) to facilitate a process in which each party's case is fairly put to the other party's witnesses. Provided it is done with discretion, and without procedural unfairness, a judge can ask questions of his or her own to clarify evidence or to draw attention to an issue of concern.

202 Much of the work of a "trial judge" involves "keeping shop", making sure that documents shown to a witness or referred to by counsel are marked as exhibits (if admitted into evidence) or for identification (if not) and that the parties have an opportunity to propose corrections to a transcript of the Court's proceedings.

203 The necessity for this is, in large measure, to arm an appellate court with materials necessary to review a judgment of the primary judge on appeal.

204 This mundane life is relieved by a judge's need to remain always attentive to proceedings in real time: to supervise a fair hearing, to be responsive to objections that require rulings and to remain alive to the possibility that, the gift of a settlement absent from reality, preparations need to be made to publish a reasoned judgment at the end of the day.

205 With that in mind, and conscious of a need to "master the documents" in preparation of a formal judgment, my practice is to place a coloured "post it note" on each page of a Court Book the subject of oral evidence (with different colours for principal documents and, sometimes, different parties) and to note on each page the identity of the party who examined or cross examined on the document and the parts of the document the subject of consideration, sometimes with a note of points made in the course of examination.

206 The tedium of a court hearing can be relieved, not only for the judge but for other participants in the process, by a continuous process of "reading the room". In the course of a hearing, that involves imagining oneself in the role of each

participant in the process: each advocate, each witness, each party. This generally serves to keep the judicial mind open to different views of the case at hand. I ask my audience to contemplate involvement in a contested hearing each of you asking yourself: If I were in the position of that person, what would I be thinking? What would be my reaction to this, that or the other thing? What would my next step be? What would be my case theory? What would be my answer to the other side's case theory?

207 The tendency of a judge to "read the room" in this way calls to mind the natural tendency of any lawyer to think of a contrarian response to any statement, express or implied, and to challenge statements or assumptions of others. This can be a particularly marked tendency of mind in judges and advocates. That fact counsels caution against a form of advocacy that is too heavy laden, lacking the subtlety that permits a judge to imagine a proper response for himself or herself.

208 An advocate who rigidly adheres to primary submissions without advancing secondary submissions which entertain alternative scenarios may lose an opportunity to mould the thinking of a judge from whose perspective the parties' cases do not appear to be open and shut and who, in any event, has to give reasons for accepting or rejecting particular submissions.

209 At the close of evidence on both sides of the record a judge generally receives "final" submissions. If delivered orally, the usual order of addresses in equity proceedings is to allow an opportunity, first, to the plaintiff, then to the defendant and finally to the plaintiff in reply. However, there need be no rigidity in this procedure. Commonly, what emerges from interchanges between bench and bar is a discussion that defies any established, formal order of submissions.

210 Oral submissions generally take the form of a discussion between bench and bar, not a series of speeches. Sometimes a judge may take this opportunity to put to counsel a provisional case theory, or competing case theories, of his or her own so as to draw out criticism that can be taken into account in the preparation of a judgment. Even at this late stage, as at the outset of a hearing,

the process of decision making can be constructively inter-active, not hidden from view.

211 Oral submissions at the end of the evidence in a “final” hearing are commonly supplemented by written submissions prepared by counsel during the course of the hearing. The most helpful of those submissions build on the opening written submissions without repetition. The least helpful are lengthy submissions that cannot be digested during the course of oral submissions.

212 For better or worse, advocates commonly assume (often correctly, sometimes wrongly) that they will be given an opportunity, with a timetable, to submit further written submissions after they have had an opportunity to check transcript references to the evidence and to review their legal arguments in light of an opponent’s submissions or comments from the Bench.

213 There are cases in which this can be helpful to a judge, but it is generally not encouraged. Parties commonly get a second wind after the conclusion of a hearing, expecting the judge in chambers to bear the burden of their enthusiasm.

WRITING A JUDGMENT

214 The bane of the life of a judge is writing a reserved judgment. If a judgment can be delivered *ex tempore*, so much the better; but many equity cases do not lend themselves to this because of a need, inherent upon an exercise of equity jurisdiction, to take into account all the circumstances of a case.

215 There is wisdom in the adage that the object of reasons for judgment is to explain to a losing party why he or she has lost.

216 This is not quite enough though in a case (characteristically, an equity case) in which there is no clear winner because relief can be moulded by the court in a way not contemplated specifically by any party.

217 The object of reasons is, more broadly, to explain the judge's reasoning to the parties and, in the modern technological age, to the many people who read judgments online.

218 In the interests of the parties a first instance judge must also be mindful of the prospect of an appeal (whatever decision is made) and the need for an appellate court to have a judgment in a reviewable form, with clear findings of fact and a rational path between those findings and the judge's orders .

219 There is a sense in which reasons for judgment form part of a conversation between the judge, affected parties and an appellate court.

220 A first instance judge engages in such conversation by endeavouring to ensure that his or her analysis is informed by a consideration of recent appellate authority.

221 In many cases a judge's "last impression" of a case formed during a hearing, or at the time a judgment is reserved, may change, and change several times, during the course of preparation of written reasons for judgment.

222 Sometimes a judge may work backwards from an intuitive idea of what orders should be made in disposition of proceedings. More often than not, the decision-making process works in the other direction, from analysis of facts and law to the formulation of draft orders which in turn, invite a review of the structure of draft reasons in support of the orders. This can be done in an orderly way because of familiarity with the parameters of the case acquired during the hearing.

223 There is no fixed pattern of how best to prepare reasons for judgment. Ideas do not flow in a linear pattern. Insights come when they do. A settled appreciation of problems to be solved, and potential solutions, may take time and reflection to emerge. A reserved judgment generally takes form through several drafts before publication.

224 I do not routinely ask myself: what is the text of the law I am required to apply? What is the context in which I have to apply the law? What is the purpose of the jurisdiction I am required to exercise? Nevertheless, these questions are never far from mind.

225 I more routinely ask myself: what am I being asked to do (what orders are sought)? Upon what basis is it suggested I can do anything like that (what is my jurisdiction)? On what materials am I being asked to do something (what is the evidence upon which I must make a decision)? Why should I do anything like I have been asked to (what are the parties' submissions)?. What is the point of all this anyway (what is the purpose of any decision I might make)?

226 Ordinarily, I begin the process of writing a judgment with an initial review of the parties' written submissions (in light of oral submissions recorded in transcript), the pleadings, principal documents (by this stage marked up during the course of oral evidence), principal authorities and any legislation to which reference must be made.

227 The next task is to formulate "introductory paragraphs" of a draft judgment designed to mark out the parameters of what follows. This can be important because in those paragraphs my intention is to explain to myself the essential nature of the parties' contest, an understanding of which may inform reasoning up to and including a conclusion intended to be responsive to an introductory statement of the nature of the dispute to be resolved.

228 The structure of a judgment between introductory paragraphs and a conclusion that culminates in draft orders for the disposition of proceedings varies. Commonly, attention is given in turn to identification of parties and their relationships; the nature of each party's contentions; identification of property in dispute; reflections on the credit worthiness and reliability of evidence, not limited to the credit of particular witnesses; an outline of principal documents in evidence; and a narrative statement of facts (based on a review of affidavits, documents and transcripts of evidence) leading to a heading such as "Consideration" or "Analysis" that precedes a "Conclusion" and draft orders.

229 My preference is to identify at the end of reasons for judgment a draft of orders to be made (for the reasons elaborated in the judgment), allowing the parties an opportunity to reflect on the published reasons and the precise form of orders to be made. In an equity case, which can be attended by complexity, prudence dictates against simply publishing reasons and making orders without extending to the parties an invitation to consider the way forward. To publish reasons for judgment is not to make orders. Depending on the terms of orders to be made, to make "final orders" is to limit opportunities to make corrections which, with a more orderly process, could usefully be made.

230 In reasoning towards a "conclusion" and draft orders in a proprietary estoppel claim I would ordinarily focus, holistically but in an orderly way, on:

(a) the existence or otherwise of an agreement, promise or representation about property;

(b) the concepts that filter the agreements, promises and representations which the law privileges by enforcement, attending to questions:

(i) whether "detrimental reliance" has been established and shown to be substantial;

(ii) whether conduct and expectations have been demonstrably reasonable;

(iii) whether the relief sought by a claimant is disproportionate to the burden that might have to be borne by a respondent landowner;

(iv) whether a departure by the landowner from an agreement, promise or representation could properly be characterised as against good conscience; and

(c) whether, in formulating orders to provide practical justice for both parties, a party seeking equity should do anything (and, if so, what) to "do equity" towards his or her opponent.

231 A consideration of these topics inherently involves reflections on the state of mind of each party, his or her knowledge or understanding of the other party's state of mind, and the incidence of benefits and burdens arising from the parties' dealings. On the facts of a particular case, the competing wants or needs of family members (on and off the farm), ostensibly known to all members of family, may operate as the most significant constraint upon the prospects of success of a proprietary estoppel claim to "the family farm".

232 A touchstone of unconscionability in the context of a propriety estoppel claim to a family farm is inconsistency of conduct on the part of the landowner in circumstances in which he or she was reasonably relied upon and knew or ought to have known that he or she was being relied upon to do something, or to refrain from doing something, substantial.

DRAFTING ORDERS: A SEARCH FOR PRACTICAL JUSTICE

233 An inquiry as to what is required of the court in a search for practical justice in the determination of a claim to a family farm based upon the principles governing proprietary estoppel by encouragement is best directed to an assessment of competing claims to the property within the family, working within the parameters of the principles that have given rise to a finding of estoppel.

234 In *Bridgewater v Leahy* (1998) 194 CLR 457 at 494 [127]-[128] Gaudron, Gummow and Kirby JJ wrote the following:

> "[127] Once a court has determined upon the existence of a necessary equity to attract relief, the framing, or, as it is often expressed, the moulding, of relief may produce a final result not exactly representing what either side would have wished. However, that is a consequence of the balancing of competing interests to which, in the particular circumstances, weight is to be given.

> [128] Further, the implementation of that relief may require additional factual enquiries. Leave to adduce evidence in that respect may be appropriate. When the point arises in an appellate court, the orders may be so drawn as to give liberty to apply and to provide for pursuit of such a course in the court of first instance. …"

235 The concept of unconscionability works in two ways in working out the maxim that "those who seek equity must do equity". The court must look at what is practically just for both parties, not merely the party who invokes the equity jurisdiction: *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 114 and 115.

236 It is at this point of reasoning, if not earlier, that assistance might be obtained from an examination of comparable cases.

CONCLUSION

237 A claim to property based on proprietary estoppel by encouragement cannot properly be reduced to a series of formulas even though for ease of analysis, it might be convenient to do so.

238 Leaving the lawyers aside, should we not ask whether there is a "pub test" that encapsulates how a layperson might view a proprietary estoppel claim to a family farm?

239 Perhaps this would be the result: If the owner of a family farm objectively comes to an agreement (meaning nothing more formal than an understanding of one form or another) with a member of family (however defined) about succession to the farm or promises or represents to that family member that he or she will "inherent" the farm, and the family member objectively and reasonably acts in a serious way on that agreement, promise or representation, then, all else being equal, the owner should be held to the agreement, promise or representation, or be required to pay reasonable compensation, unless there is a reasonable excuse not to do so; and a reasonable excuse might be found in the owner's need to cater for the welfare of himself, herself or another family member.

240 The concepts of “family” and “family property” may be vague but they come into sharp relief if it is a “stranger” rather than a member of family who claims the farm and if the stranger has no social connection with the farm.

241 The most basic limit on a proprietary estoppel claim to a farm by a family member might ultimately be found in (a) a competing need of the farm owner to provide for his or her own welfare; or (b) competing claims of other family members and a perceived obligation in the farm owner to cater for them. Young McDonald may want (or even need) the family farm but so too may everybody else.

242 The arbiter of the “pub test” is more likely to be “the reasonable bystander” of common law renown than a “keeper of the King’s conscience”, the classic equity judge, charged with responsibility for enforcement of standards of honesty and good faith. Be that as it may, our system of justice requires both to remain in conversation one with the other.

243 A characterisation of conduct as “unconscionable”, backed by equitable remedies, generally trumps a characterisation of conduct as “reasonable”, not merely because of a convention that equitable principles prevail over common law rules, but because a function of an exercise of equity jurisdiction by a court is, in service of community, to maintain standards of honesty and good faith in dealings between individuals.

244 The only safe way for a judge to deal with a proprietary estoppel claim to a family farm is to work within established guidelines, having regard to text, context and purpose in an empathetic evaluation of competing interests and in management of disputes.

POSTSCRIPT

245 A claim for proprietary estoppel by encouragement at least brings a family dispute to the notice of a court, without hidden deceit, at a time when disputed property is within reach of court orders. The larger challenge for Australian society might be “elder abuse” associated with misuse of enduring powers of

attorney. In those cases a court depends upon an oppressed land owner, or (after incapacity or death) a representative of his or her estate, to invoke the court's jurisdiction, often alleging a breach of fiduciary obligations, unconscionable conduct or undue influence only after property has been dissipated or otherwise put beyond the reach of the court (eg, by a transfer or the grant of a mortgage to a *bona fide* purchaser for value without notice of misconduct). Recent experience suggests that Young McDonald sometimes *takes* the family farm and dares the land owner, or the estate of the landowner, to take it back, human nature being what it is.

GCL
4/10/23