SUCCESSION LAW CONFERENCE

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Recent Developments in Proprietary Estoppel

The Honourable Justice Ian Pike*

Introduction

1 People are encouraged to make a will so as to give themselves the best chance of making sure their assets go where they want them to[1].

2 Like most things in life, however, there are no certainties. There are various ways that a will can be challenged or the intentions of a testator overridden. The principles of proprietary estoppel are often used to seek to disturb the gifts in a will.

3 One problem, not infrequently encountered by practitioners practicing succession law, is where a client contends that a promise was made by the owner of property that they would leave the property to the client in their will.

4 It then emerges, often many years later, on the death of the property owner, that, contrary to the promise, the property has not been left to the client in the will, but to someone else.

5 Quite often the property is a rural farming property.

6 Quite often the promise is only in the presence of the property owner and the client and is allegedly made many years prior to the testator's death.

7 Quite often the recipient of the promise makes life changing decisions in response to it.

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* Justice of the Supreme Court of New South Wales – who thanks his current tipstaff, Marlow Meares, for his invaluable assistance with the research for this paper.

[1] Law Society of New South Wales website

8 Almost invariably, requests were made at the time of the promise to put it in writing, but oral assurances were given that this was not necessary. Requests to see the will are not agreed to and of course, we all know that wills can be changed. The recipient of the promise is none the wiser that the promise will not be kept until told on the death of the promisor that it has not been.

9 What can the client do about the failed promise? Equity seeks to provide a solution through the principles of proprietary estoppel.

10 Of course, the principles of proprietary estoppel have much broader application than in relation to testamentary promises, but thwarted gifts on death make up a fair rump of the cases.

11 The High Court has recently considered the principles of proprietary estoppel in *Kramer v Stone* (2024) 99 ALJR 126; [2024] HCA 48 (***Kramer***), in the circumstances just posited – an oral promise to leave farming land in a will which was not honoured.

12 The purpose of my talk today is to discuss the principles of proprietary estoppel and the recent decision of the High Court in *Kramer v Stone* together with a limited number of other recent decisions.

13 I will also seek to provide some practical tips for practitioners and things to look out for when either bringing or defending a proprietary estoppel claim.

An Overview of Proprietary Estoppel

14 Proprietary estoppel is a form of equitable estoppel as opposed to common law estoppel. It is clearly accepted that, unlike some other forms of estoppel, equitable estoppel can be used as a sword, ie as a cause of action in its own right and not simply as a defence to an action.

15 As the name implies – a necessary element of proprietary estoppel is that the assurances given to the claimant – either expressly or impliedly or, in standing-

by cases, tacitly, should relate to identified property owned (or perhaps, about to be owned) by the defendant (promisor).[2]

16 Although there are earlier cases[3], the origins of the doctrine are generally traced back to two English decisions from the 1860s – *Dillwyn v Llewelyn* (1862) 45 ER 1285 (***Dillwyn***) and *Ramsden v Dyson* (1866) LR 1 HL 129 (***Ramsden***).

17 *Dillwyn* concerned a promise that a father had made to his son that he would leave him a farm. The father signed a memorandum to this effect, but the memorandum was never executed by deed. The son, in reliance of this promise, took possession of the farm and built a dwelling on it. Lord Chancellor Lord Westbury held that the son was entitled to the farm and ordered for the son to be conveyed it on the death of the father.

18 *Ramsden* concerned a grandson, who possessed several pieces of land gifted in his grandfather's will, and a tenant of part of the land gifted. The tenant spent money erecting buildings on the land under the mistaken belief that they had a longer term tenancy than they actually had. The grandson brought a claim of ejectment against the tenant. After being appealed to the House of Lords, the ultimate outcome was that equity could not interfere nor stay the ejectment. The enduring importance of *Ramsden* is the principle stated by Lord Cranworth that:[4]

> If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

[2] *Thorner v Major* [2009] UKHL 18, [61] (Lord Walker).
[3] *Estoppel by Conduct and Election* by Patrick Keane AC KC, 3rd Ed 2023 at 11-001
[4] *Ramsden v Dyson* (1866) LR 1 HL 129, [141].

19 From each of these two seminal cases there emerged two slightly different strands of proprietary estoppel. As the decision in *Kramer* makes clear, there are subtle differences in some principles applicable to each.

20 The first type of proprietary estoppel is estoppel by encouragement. This is where there is some positive conduct, generally a promise (sometimes described as a representation) or assurance given to the claimant, which encourages the claimant to act.

21 The second type is estoppel by acquiescence and is where there is no positive assurance made to the claimant, but rather the property owner stands by, or acquiesces, in conduct of the claimant.

22 In *Kramer v Stone* in the New South Wales Court of Appeal[5], Leeming JA stated at [292]:

> I do not accept, as seemed implicit in some of the appellants' submissions, that the test is the same for estoppel by encouragement and estoppel by acquiescence. There is similarity and overlap between the species of proprietary estoppel commonly known as estoppel by encouragement and estoppel by acquiescence, which is to say the principles associated with *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285 and *Ramsden v Dyson* (1866) LR 1 HL 129 respectively. There will be cases where the defendant has both encouraged and acquiesced in the plaintiff's incorrect assumption. There will also be cases where the defendant's encouragement of the plaintiff is so marginal that it may be debated whether the plaintiff's claim is in estoppel by encouragement or estoppel by acquiescence. But just as the existence of twilight does not erode the distinction between day and night, so too there is a sensible distinction between cases where a defendant's active conduct causes a plaintiff to hold an assumption, and cases where the defendant does nothing to bring about the plaintiff's wrong assumption, but nonetheless knows that the plaintiff is labouring under a misconception.

23 In *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387 (***Waltons Stores***), Brennan J set out the principles common to all equitable estoppels in the following terms:[6]

> To establish an equitable estoppel is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship

[5] (2023) 112 NSWLR 564
[6] *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387, 428-9.

> would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.

24 The High Court in *Kramer v Stone* at [36] accepted that these requirements were expressed at a level of generality sufficient to include both strands of proprietary estoppel, but refinement was necessary when the focus is on a particular strand.

25 In *Carter v Brine* [2015] SASC 204 (***Carter***), Blue J set out the following summary of the matters to be satisfied in a claim for proprietary estoppel by encouragement:[7]

> The elements of estoppel by encouragement are:
>
> (1) a representation by the defendant to the plaintiff that the plaintiff has or will have a proprietary interest in property owned wholly or partly by the defendant (***representation***);
>
> (2) the plaintiff forms an assumption that he or she has or will have a proprietary interest in that property (***assumption***);
>
> (3) the conduct of the defendant in making the representation causes or materially contributes to the formation of that assumption by the plaintiff (***reliance***);

[7] *Carter v Brine* [2015] SASC 204, [326] ('*Carter*').

(4) the plaintiff takes action in change of his or her position in reliance on that assumption (***inducement***);

(5) the plaintiff would suffer detriment if the defendant were permitted to depart from the assumption (***detriment***);

(6) it would be unjust or unconscionable for the defendant to depart from the assumption (***unconscionability***).

26 In *Kramer v Stone* the High Court expressed the elements in four propositions to the same effect as Blue J's six matters. I set the four elements out below.

27 It must be appreciated, however, that these elements should not be applied in a mechanical fashion, but rather provide a useful check.[8]

28 In *Carter*, Blue J set out the elements of proprietary estoppel by acquiescence in the following terms:[9]

(1) the plaintiff forms an assumption that he or she has or will have a proprietary interest in property owned wholly or partly by the defendant (***assumption***);

(2) the defendant knows that the plaintiff has formed that assumption, it is erroneous and the plaintiff is acting on it but remains silent when the defendant has a duty to inform the plaintiff that the assumption is erroneous (***representation by silence***);

(3) the conduct of the defendant in remaining silent in that knowledge and in breach of that duty causes or materially contributes to the continuation of that assumption by the plaintiff (***reliance***);

[8] *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247, [166] (Gleeson JA, Beazley P and Leeming JA agreeing).
[9] *Carter* (n 7) [327].

(4) the defendant takes action in change of his or her position in reliance of that assumption (***inducement***);

(5) the plaintiff would suffer detriment if the defendant were permitted to depart from the assumption (***detriment***);

(6) it would in all the circumstances be unconscionable for the defendant to depart from the assumption (***unconscionability***).

29 Central to both strands are detriment and unconscionability. I deal with the question of detriment below in the context of what was said by the High Court in *Kramer*.

30 The element of unconscionability currently involves a more wholistic approach encapsulated by Allsop P in *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483:[10]

> Equity will look at all the relevant circumstances that touch upon the conscionability (or not) of resiling from the encouragement or representation previously made, including the nature and character of the detriment, how it can be cured, its proportionality to the terms and character of the encouragement or representation and the conformity with good conscience of keeping a party to any relevant representation or promise made, even if not contractual in character. Equity has always had a place in keeping parties to representations or promises: see for example, Burrowes v Lock (1805) 10 Ves Jr 470; 32 ER 927; Horn v Cole 51 NH 287; 12 Am Rep 111 (1868); S W Symons (ed), J N Pomeroy, A Treatise on Equity Jurisprudence 5th ed, Vol 3 (1941) San Francisco, Bancrof-Whitney at 179–188 [802]–[803]; R Meagher, J Heydon and M Leeming, Meagher, Gummow and Lehane's Equity: Doctrine and Remedies 4th ed (2002) Sydney, Butterworth LexisNexis at 556–560 [17–065]–[17–070] and 567–568 [17–110].

Examples of Proprietary Estoppel Cases

31 For a trial judge, proprietary estoppel cases are always very interesting – they provide fascinating insights into the lives of normal people.

[10] *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483, [3].

32 This has been my experience. In my 15 or so months on the bench, I have had to deal with two proprietary estoppel cases, both estoppel by encouragement cases.

33 The first was *Van Rensburg v Adilinis*; *Van Rensburg v Raft* [2024] NSWSC 1146. Like many proprietary estoppel cases, the facts could well be turned into an interesting screenplay.

34 Lola Raft and John Adilinis were brother and sister. Since about 1950 they, together with Lola's husband, Dennis, operated a café/milk bar on the Central Coast of New South Wales known as the Golden Gate Café. At the rear of the café building was a residence in which Lola and John lived.

35 The café was extremely successful enabling Lola and John to build up a not insignificant property portfolio. Over the years, trade declined significantly such that during the period 2012 to 2021, there was a significant decline and the café only ever made modest profits. John and Lola were extremely attached to the café and operating it ceased to become an economic proposition but more provided each of them with something to do and social interaction, in their declining years.

36 Mr Van Rensburg was, on his own admission, a bit of a loner. He was first acquainted with the Golden Gate Café in the 1980s with his then girlfriend. He returned to live in the area in about February 2013 when he reconnected with John and Lola. He was not working at the time, apparently still getting over the death of his father and mother who had recently died in 2010 and 2012 respectively. He was on a Newstart allowance at the time and either had received, or was about to receive, an inheritance from his parents' estate.

37 Mr Van Rensburg commenced doing some tasks in and around the café. Over time, the work that he did increased, and included some care to both John and Lola. The extent of the care he provided was a significant factual issue in the proceedings.

38 It was not in dispute that Mr Van Rensburg lived in a room at the residence at the back of the café, from about September 2017 until August 2021. He contended that he moved in much earlier, from about late 2014. At the save time he was living in the residence he continued to maintain rented accommodation nearby which he contended he used only for storage.

39 Mr Van Rensburg's case was that each of John and Lola made a number of assurances to him – of increasing magnitude – from early 2014. The highwater mark of these assurances was that in return for Mr Van Rensburg staying at the residence and continuing to help John and Lola they would look after him financially and that he would always have a home for the rest of his life. Mr Van Rensburg contended that he relied upon these representations in remaining at the residence, continuing to perform work and care for John and Lola, and increasing the work and care that he provided. The essence of the relief sought by Mr Van Rensburg was an entitlement to reside in the residence or another suitable property for the remainder of his life.

40 Mr Van Rensburg's claim ultimately failed. This was, in effect, because I was not satisfied that the relevant representations had in fact been made. They were, for the most part, uncorroborated and inconsistent with a number of objective matters.

41 The second case was *Christopherson v Wright; Christopherson v Wright* [2024] NSWSC 1144. This involved a farming family dispute. The main claims in the case were competing family provision claims by two sons of the late Ralph Christopherson (***Ralph***)– Shane and Craig. Craig's de-facto, Pamela Burn brought a proprietary estoppel claim – contending that the executor of Ralph's estate held the remaining one half of a property owned by Ralph – The Vale Homestead – on constructive trust for Pamela and subject to an equitable lien or charge in favour of Pamela.

42 Ralph had borrowed against The Vale Homestead and fell into financial trouble in 2015, such that the lender was about to foreclose on The Vale Homestead block if $320,000 was not paid to them. Ralph had apparently sought to

refinance the loan, but this had not been successful because of his age. Pamela agreed to pay out the lender and in return received a half share in The Vale Homestead. Pamela was recorded on title as a one half owner of The Vale Homestead. Pamela took out a loan secured against her house in Sydney in order to pay the lender out.

43 After purchasing the one half share, Pamela was apparently concerned about what would happen to the other half of The Vale Homestead after Ralph died and asked Ralph about this. In response to which he apparently said: "You will be well looked after for having allowed me to stay in my home". In 2017, Ralph apparently adamantly assured Pamela that she was inheriting the other half of the homestead saying to her "You're always getting it". Pamela contended that Ralph made certain representations to her to the effect that she would be getting the other half of The Vale Homestead and that she relied upon those representations such that she should now receive the other half.

44 Pamela's proprietary estoppel claim did not succeed. Again, this was for want of proof.

45 I was not satisfied that the statements which she contends were made to her were in fact made, and even if they were made, they did not assist Pamela to make out the alleged estoppel. Statements to Pamela to the effect that she would be "well looked after" fell well short, in my view, of reasonably leading Pamela to believe that she would receive the other half of The Vale Homestead. Pamela was in fact left a legacy of $100,000 in Ralph's will which was equally consistent with her being "well looked after". Nothing was said to Pamela about her receiving any proprietary interest. Taken at their highest, the statements made by Ralph to Pamela were no more than general statements by Ralph that he would do something later in his life for Pamela as a thank you for helping him out.

46 In relation to the 2017 alleged representation, there was nothing to corroborate it, and the terms of the will were inconsistent with it.

47 Pamela's conduct, in seeking to buy the other half of The Vale Homestead on Ralph's death, was also fundamentally inconsistent with the representation having earlier been made or in her having any expectation that she would receive the other half on Ralph's death.

48 I was also not satisfied that even representations had been made, Pamela acted in reliance on them or would suffer any detriment if such a representation was departed from.

49 The two cases that I have heard are paradigm examples of the problems that exist in proving proprietary estoppel claims. I discuss some of these issues below.

Kramer v Stone

50 *Kramer v Stone* concerned a promise regarding a 100-acre farm in Upper Colo, New South Wales (the ***Farm***).

51 In 1965, the then owner of the farm entered into a share farming arrangement with the respondent's father, David Stone (***David***).

52 In 1969, Dame Leonie Kramer and her husband Dr Harry Kramer bought the farm. Dame Leonie may be well known to older members of the audience. In 1968, Dame Leonie was appointed as the first female professor at the University of Sydney, and went on to become the first female chair of the Australian Broadcasting Corporation and the first female chancellor of the University of Sydney.[11]

53 In 1975, David took over his father's work on the farm at the age of 22. He had a close relationship with Dame Leonie and Dr Harry. The share farming agreement was oral and contained the following terms:

[11] University of Sydney, 'Vale Dame Leonie Kramer' (Blog, 21 April 2016 - https://www.sydney.edu.au/news-opinion/news/2016/04/21/vale-dame-leonie-kramer.html).

(1) “David would grow crops and maintain the Farm.

(2) Dr Harry would pay all operating costs except fuel, which would be a cost shared equally between Dr Harry and David.

(3) David would live rent-free in a house on the Farm.

(4) David would receive a quarterly retainer of $600 and half of the gross proceeds from the sale of produce and cattle.”[12]

54 In the early 1980s, Dr Harry made two promises to David:

(1) That David would have a life interest in the Farm provided that “Dr Harry’s family would retain the use of a cottage on the Farm”.[13]

(2) Dr Harry would leave the Farm to Dame Leonie in his will and Dame Leonie would leave the Farm to David in her will and that David would “be free to do whatever you like with it”.[14]

55 In 1988, Dr Harry died, and Dame Leonie made another promise to David shortly after that. Dame Leonie told David that Dr Harry and Dame Leonie had agreed that the Farm would pass to David upon Dame Leonie’s death together with a sum of money.

56 In reliance upon this third promise, David acted “to his detriment by continuing the farming operation on the [Farm] for about 23 years thereafter in the belief that he would inherit that property under Dame Leonie’s will”.[15]

57 In 1996 and 1999, Dame Leonie prepared incomplete and unexecuted draft wills. In 2000, 2003, 2006 and 2011, Dame Leonie executed wills. All

[12] *Kramer v Stone* (2024) 99 ALJR 126, [7] 130 (Gageler CJ, Gordon, Edelman and Beech-Jones JJ) (‘*Kramer*’).
[13] Ibid [9] 131.
[14] Ibid [10] 131.
[15] Ibid [12] 131 quoting *Stone v Kramer* [2021] NSWSC 1456, [250] (Robb J).

unexecuted and executed wills only contemplated or provided for David to receive a legacy, not the farm.

58 In 2016, Dame Leonie died. Under her will, the farm passed to Dame Leonie's daughter, Hillary Kramer, and David was left with a gift of $200,000.

59 David commenced proceedings in the Supreme Court of New South Wales against Hillary Kramer and the executor of the Dame Leonie's estate. The trial judge, Justice Robb, held that an estoppel arose against the estate which entitled David to equitable relief of the Farm being held on trust for David in lieu of the gift of $200,000.

60 The executors of the estate appealed to the Court of Appeal on eight grounds. The fourth ground of appeal contended that an element of an estoppel by encouragement is the requirement for there to be actual knowledge of detrimental reliance subsequent to the making of the promise, and that constructive knowledge of detrimental reliance is not sufficient.

61 The Court of Appeal unanimously dismissed all grounds of appeal. The Court of Appeal held that knowledge of acts in reliance on a representation or an assumed state of affairs is a necessary element for estoppel by acquiescence but is not a necessary element for estoppel by encouragement.

62 The appellants appealed to the High Court on a ground of appeal developed from the fourth ground of appeal in the Court of Appeal. The appellants asserted that the Court of Appeal had erred in two respects in its approach to estoppel by encouragement from Dame Leonie's promise: (i) in failing to recognise that, as Mason CJ and McHugh J held in *Corin v Patton*, the equity in such cases "arises ... from the conduct of the donor after the making of the voluntary promise"; and (ii) in failing to recognise that "constructive knowledge of detrimental reliance is insufficient to establish unconscionability, at least where (as in this case) knowledge is the only matter which would support an unconscionability finding".

63 The High Court by a majority dismissed the appeal, Gageler CJ, Gordon, Edelman and Beech-Jones JJ, with Gleeson J dissenting.

64 Of particular note from the majority's judgment is the further refining of Brennan J's six elements of an equitable estoppel in *Waltons Stores* discussed earlier. While the *Waltons Stores* elements apply to both equitable estoppel by encouragement and acquiescence, the majority in *Kramer v Stone* refined the elements for equitable estoppel by encouragement to the following four elements:[16]

(1) There must be a clear and unequivocal promise made by the promisor to the promisee, which will generally concern future conduct;

(2) A reasonable person in the promisor's position must have expected or intended, or actually did expect or intend, that the promisee would rely upon the promise by some action, omission or course of conduct – the promise being an encouragement for the promise to act;

(3) The promisee must have relied upon the promise by acting or omitting to act in a manner that is generally to have been expected, and the promise must not just be one factor in the promisee acting in such a way, rather that "the promisee would not have acted or omitted to act in the absence of the promise";[17]

(4) As a result of their reliance on the promise, the promisee must suffer or will suffer a detriment if the promise is not fulfilled, in the sense that the promisee will be left in a worse position, as a consequence of reliance upon the promise, than if the promise had not been made.

65 The plurality observed at [41] that once these elements are satisfied:

> …it is commonly said that conscience requires that A redress the detriment suffered by B. As has been repeatedly emphasised by this Court, the description of circumstances as unconscionable "is to characterise the result

[16] *Kramer* (n 12) [37]-[40] 135-136.
[17] Ibid [39] 135.

> rather than to identify the reasoning that leads to the application of that description"

66 The plurality rejected the ground of appeal characterising the two aspects of it (as set out above) as seeking to add an additional requirement to an equitable estoppel that arises by encouragement from a promise.

67 In the words of the plurality at [43] and [44]:

> [43] Each of the two aspects of the appellants' ground of appeal in this Court sought to add an additional requirement to an equitable estoppel that arises by encouragement from a promise. The first additional requirement that was proposed was that the promisor must engage in conduct after the promise which further encourages the promisee in the course of conduct, action or omission which was adopted in reliance on the promise. The second requirement that was proposed was that the promisor must have actual knowledge that the promisee, in adopting the course of conduct, action or omission, is relying upon the promise.
>
> [44] The first proposed additional requirement inappropriately transposes the principles concerning the circumstance in which equity is said to perfect an imperfect gift. The second proposed additional requirement erroneously conflates the principles of estoppel by encouragement from a promise with the principles concerning estoppel by acquiescence.

68 The elements of an equitable estoppel were plainly satisfied in the present case because Dame Leonie made a clear promise to David that David would inherit the farm upon Dame Leonie's death. In making that promise, a reasonable person in Dame Leonie's position would have expected, and Dame Leonie did expect, that David would rely upon the promise by continuing to share farm on the farm for about 23 years in the belief that he would inherit the farm. But for that belief, David would have terminated the share farming agreement and obtained more remunerative employment. And the failure by Dame Leonie to fulfill the promise has the effect that David will suffer detriment in the sense that he is in a worse position than if the promise had not been made. He had given up more remunerative employment, failed to develop new employment skills as his siblings had done, and restricted his social and domestic life[18].

[18] *Kramer* at [42]

69 In their reasons, the plurality clearly set out one difference between estoppel by encouragement and estoppel by acquiescence[19].

70 At [59] the plurality stated:

> In assessing whether a person who is subject to an estoppel bears "responsibility for the detrimental reliance" of the other party, there is a significant difference between a person whose promise causes another's detriment and a person who merely omits to act where action could spare the other party from detriment. Any responsibility in the latter case must require the omission to occur with knowledge of that person's rights and of the other's mistake so as to give rise to a duty to speak. By contrast, there is no justification for such a requirement in the former case. As Leeming JA said of estoppel by encouragement in his concurring reasons in the Court of Appeal in this case (with which Kirk JA also agreed):
>
> > "Why should it be necessary not only to know that the defendant has encouraged the plaintiff to labour under a false belief, but also to know that the plaintiff has relied on the encouragement? The distinction is quite artificial. Further, I can see no reason why two landowners, both of whom make the same representation to their neighbours who act upon it, should be in different positions if one is thereafter absent from the country and has no means of knowing what steps have been taken by the neighbour."

71 This is the principal matter to emerge from the decision of the High Court.

Tips going forward

72 I now consider a number of the elements of a proprietary estoppel claim, discussing some of the issues that arise and seek to provide some practical tips.

Clear and unequivocal promise

73 The key aspect of an estoppel by encouragement is often the representation/promise/assurance made in relation to the future proprietary interest.

74 In *Christopherson* at [210] I summarised the law in this regard by reference to what Ward P said in *Kramer v Stone* (2023) 112 NSWLR 564 at [84]-[87]

[19] *Kramer* at [54] ff

(nothing said by the High Court to cast doubt on these observations) in the following terms:

> 210 In considering the nature of the representation and the level of certainty required, I proceed on the basis that the law in this regard is as recently stated by Ward P in Kramer v Stone at [84]-[87]:
>
> (a) the weight of appellate opinion is that there are less stringent certainty requirements for a representation or promise in proprietary estoppel, as distinct from the certainty requirements for estoppel by representation or promissory estoppel;
>
> (b) while an express representation or promise is not necessary, it is necessary to carefully identify the alleged representation or promise and this is to be assessed by reference to the circumstances of each case;
>
> (c) a promise may be definite in the sense that there is a clear promise to do something even though the something promised is not precisely defined;
>
> (d) uncertainty of the kind that would prevent the creation of a contract would not necessarily prevent the intervention of equity;
>
> (e) the representation or promise has been said to be sufficiently clear "if it is reasonable for the representee to have interpreted the representation in a particular way being a meaning which it is clearly capable of bearing and upon which it is reasonable for the representee to rely".

75 In *Thorner v Major* [2009] 1 WLR 776; [2009] UKHL 18, Lord Walker of Gestingthorpe stated at [56] that "to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity…is hugely dependent on context." These remarks were referred to with approval by Bathurst CJ (with whom Bell P and Leeming JA agreed) in *Trentelman v Owners of Strata Plan No 76700* (2021) 106 NSWLR 227 at [124].

76 The critical issue that often arises is that the promise was alleged made by a person that is now deceased and thus not available to give evidence at the hearing. In these circumstances the court closely scrutinises the claim and looks for corroboration: see *Dable v Peisley* [2009] NSWSC 772 at [130] – [131] per Ward J.

77 The well known observations of McClelland CJ in Eq in *Watson v Foxman* (1995) 49 NSWLR 315 at 318-9 are also applicable. His Honour emphasised the necessity for spoken words to be proved with a degree of precision and the fallibility of human memory which increases with the passage of time, particularly where disputes or litigation intervene and the processes of memory are overlaid by perceptions of self-interest. McClelland CJ also referred to the need for corroboration.

78 Careful attention therefore needs to be given to what corroborative evidence can be obtained. Are other witnesses available. What do the contemporaneous records say – are they consistent or inconsistent with the alleged promise?

Reliance

79 Another critical issue to prove in a proprietary estoppel case is reliance – how is it to be proved?

80 It is to be remembered that it is not necessary for a plaintiff to prove that the conduct of the party estopped was the sole inducement on the party setting up the estoppel. It is ordinarily necessary for the promisee to show not merely that the promise was one factor taken into account in motivating the promisee's action or omission but that the promisee would not have acted or omitted to act in the absence of the promise[20].

81 Direct evidence of reliance by a plaintiff may be said to be inherently self-serving. In some areas of the law direct evidence of how a plaintiff would have acted is not admissible[21], or at least given little weight because of its self serving nature[22].

82 In other areas – for example the tort of deceit and misleading and deceptive conduct – where material representations are made which are calculated to

[20] Kramer (n 11) at [39]
[21] See section 5D(3)(b) *Civil Liability Act* 2002 (NSW)
[22] See *Australian Executor Trustees (SA) Ltd v Kerr* (2021) 151 ACSR 204 at [290]

induce a representee to enter into a contract and that person in fact enters into the contract there arises an inference of fact that the representee was induced to do so by the representation[23].

83 An issue in an earlier High Court case – *Sidhu v Van Dyke*[24] - was whether any such presumption of reliance arises in relation to proprietary estoppel and who bears the onus of proof.

84 The High Court emphatically held that reliance is a fact to be proved by a plaintiff and found by the Court. At [58] of the judgment of French CJ, Kiefel, Bell and Keane JJ, it was stated:

> In point of principle, to speak of deploying a presumption of reliance in the context of equitable estoppel is to fail to recognise that it is the conduct of the representee induced by the representor which is the very foundation for equitable intervention. Reliance is a fact to be found; it is not to be imputed on the basis of evidence which falls short of proof of the fact. It is actual reliance by the promisee, and the state of affairs so created, which answers the concern that equitable estoppel not be allowed to outflank *Jorden v Money* by dispensing with the need for consideration if a promise is to be enforceable as a contract. 64 It is not the breach of promise, but the promisor's responsibility for the detrimental reliance by the promisee, which makes it unconscionable for the promisor to resile from his or her promise. In *Giumelli v Giumelli*, Gleeson CJ, McHugh, Gummow and Callinan JJ approved the statement of McPherson J in *Riches v Hogben* that:
>
> > "It is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation to which it gives rise."

85 The High Court also made it clear that whilst the principles set out in *Gould v Vaggelas* have application, this did not involve any shifting of an onus – on the defendant to disprove detrimental reliance. The real question for the Court is as to the appropriate inference to be drawn from the whole of the evidence[25].

[23] *Gould v Vaggelas* (1982) 157 CLR 215 at 236
[24] (2014) 251 CLR 505
[25] *Sidhu v Van Dyke* at [64] and [66]

86 The take out is that evidence of reliance should be given by a plaintiff but care should also be taken to identify objective matters that support the contention of reliance.

Detriment and relief

87 One issue that has vexed this area of the law over the years is the relief that should be ordered by the Court if the other elements of a proprietary estoppel are found[26]. Should the Court order that the promise or assumption be made good or some lesser monetary relief – generally referred to as the minimum equity principle?

88 For some years the minimum equity principle had currency whereby the Court moulded the remedy to reflect the minimum relief necessary to do justice between the parties. The High Court's decision in *Commonwealth v Verwayan*[27] is generally regarded as a paragon of the minimum equity approach.

89 In *Sidhu v Van Dyke* at [85] the plurality of French CJ, Keifel, Bell and Keane JJ stated:

> The appellant's argument, rightly, sought no support from the discussion in cases decided before *Giumelli v Giumelli* of the need to mould the remedy to reflect the "minimum relief necessary to 'do justice' between the parties". There may be cases where "[i]t would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption"; but in the circumstances of the present case, as in *Giumelli v Giumelli*, justice between the parties will not be done by a remedy the value of which falls short of holding the appellant to his promises. While it is true to say that "the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct", where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise.

90 Lord Briggs of the United Kingdom Supreme Court noted of the decision of the High Court in *Sidhu v Van Dyke* "thus did the seed of a detriment-based aim of

[26] Betting the farm – *Remedial roulette in proprietary estoppel: Guest v Guest [2022] UKSC 27 (2023)* Journal of Contract Law 7
[27] (1990) CLR 394

the remedy in proprietary estoppel, sown in *Verwayen*, fall on hard Australian ground and wither away."[28]

91 The majority of the High Court in *Kramer v Stone*, in obiter, considered compensation to be an adequate remedy in some circumstances:[29]

> In cases where the detriment suffered by a plaintiff is "a relatively small, readily quantifiable monetary outlay on the faith of the [defendant's] assurances" then, apart from interest, the likely equitable relief ordered will be compensation in the amount of the monetary outlay.

92 In other circumstances, the majority considered compensation to not be an adequate remedy:[30]

> By contrast, where the detriment suffered "involves life-changing decisions with irreversible consequences of a profoundly personal nature", the likely equitable relief will be to require fulfilment of the assumption upon which the plaintiff acted, such as by a conveyance of rights, or an assessment of the monetary value of the assumption.

93 Whilst stated in relatively clear terms, the distinction drawn by the High Court is likely to be productive of some disputation on the facts of any particular case.

94 For example, what is a relatively small, readily quantifiable monetary outlay? All things are relative. A "small" outlay for a person of considerable wealth may be different to a less resourced plaintiff.

95 Further, what amounts to a life-changing decision with irreversible consequences of a profoundly personal nature, is ripe for debate. Whilst some cases – like *Sidhu v Van Dyke* and *Kramer v Stone* – clearly fall on one side of the line, other cases are not so easy.

96 At a practical level, all that can be said is that a plaintiff should seek to give clear evidence of the alternatives available to them at the time of reliance and

[28] *Guest v Guest* [2022] UKSC 27 at [60]
[29] *Kramer* (n 12) [40] 135.
[30] Ibid.

the likely consequence to them had they chosen the alternate path rather than relying on the representation or assumption made.

Can anything be done to minimise the risk?

97 In the testamentary context, short of entering into a binding agreement at the time – formal succession planning - the only advice that I can sensibly offer is for consideration to be given to inter vivos transfer. These transfers face their own risks – primarily seeking to challenge the inter vivos transfer on grounds of unconscionability or capacity[31].

[31] A recent example I had to consider was *La Selva v La Selva* [2025] NSWSC 78.