ESTATE LITIGATION ESSENTIALS

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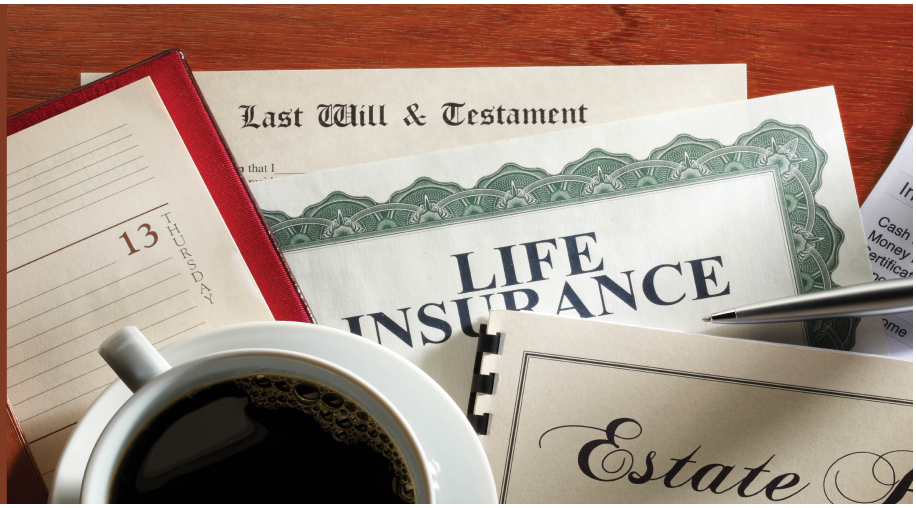

Proprietary and Promissory Estoppel

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I. Introduction

Let's start with a couple of succinct statements of the principles:

> Promissory Estoppel
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> [13] The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.
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> Per Sopinka J. in *Maracle v. Travelers Indemnity Co. of Canada*, 1991 CarswellOnt 450 (SCC).
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> Proprietary Estoppel
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> [15] An equity arises when (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word [citations omitted].
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> Per McLachlin C.J.C. in Cowper-Smith v. Morgan, 2017 SCC 61.

Most of this paper will deal with proprietary estoppel rather than promissory estoppel. Proprietary estoppel arises more frequently in estate litigation and may found a claim in equity to an interest in property. Other estoppels do arise on occasion in the estate litigation context, and in the one case we will look at under the heading of promissory estoppel, the plaintiffs successfully argued that the defendants could not rely on the wills variation limitation period in the circumstances.

There appears to be growing interest in British Columbia in proprietary estoppel claims over the last decade, but proprietary estoppel is not new. In England, proprietary estoppel cases have been more frequently considered for some time, arguably in part because the broad principles Canadian courts apply in unjust enrichment have not been embraced in England. Consequently, those making a claim to an equitable interest in property in England may have to rely on proprietary estoppel.

There are parallels between proprietary estoppel and unjust enrichment. In many cases, but certainly not all, the same facts will give rise to both claims. Proprietary estoppel may give the plaintiff a more powerful remedy if the plaintiff is seeking the whole beneficial interest in property, although it is tempered by the requirement that the court base an award on the minimum equity to do justice. On the other hand, for that reason, the court may find unjust enrichment a fairer balance in the equities as between the plaintiff and defendant. There are also claims in which the facts may give rise to proprietary estoppel, but not unjust enrichment, such as when the plaintiff relies to her detriment on a promise but there is no enrichment.

II. Promissory Estoppel

In *Chan v. Lee*, 2002 BCSC 678, appeal allowed in part on other grounds, 2004 BCCA 644, the defendants were estopped by their conduct from relying on the six-month limitation period in the *Wills Variation Act* (now 180 days from the date of probate under the *Wills, Estates and Succession Act*).

The plaintiffs were two daughters of the will-maker, Peter Lee. They were left $50,000 each in his will. Peter Lee left most of his estate to their three brothers. All of the children had worked hard in the family business, which consisted of grocery stores and a restaurant. The business assets and some real estate were held in a company. Peter Lee and their mother had given shares representing most of the value of the company to their brothers. On his death, Peter Lee's estate was worth approximately $542,000 plus the value of voting shares in the company.

The plaintiffs had complained to their brothers about the unfairness of the gift of shares to the brothers during their father's lifetime, as well as after his death. The brothers as executors did not give proper notice to the plaintiffs of their intent to probate the will, and they gave their sisters the legacies before the six-month period for bringing a wills variation claim expired. Most significantly, Mr. Justice Hood found that:

> even before Mr. Lee died the plaintiffs made it clear to the defendant brothers that they were unsatisfied with the unfairness of the gifting of the company to them, and that they believed that the defendant brothers should address that unfairness by placing them in funds through the company. The defendant brothers agreed that the gifting of the company was unfair to the plaintiffs, and that they would get together with them when it was convenient (although they always had excuses, i.e., the timing wasn't right, the estate had to be settled, the company's latest projects had to be completed and so on) to address it; or, at a minimum, that was the reasonable impression left with the unsophisticated plaintiffs.

Although the brothers did not make an express promise to the plaintiffs that they would redress the unfairness, their conduct was such that they could not rely on the limitation.

Justice Hood wrote:

> 144 The question I must decide is whether the plaintiffs have established that the circumstances of the conduct and behaviour of the defendant brothers, the executors, are such that it would be wholly inequitable that they should be entitled to succeed on their defence that the plaintiffs' action is statute-barred. The answer, without any doubt, is in the affirmative, for in my opinion a grave injustice would be done to the plaintiffs if the defendants were found to be entitled to succeed.
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> 145 And this is so in the first instance without having to consider or analyze the evidence in detail, particularly that of the defendants, with regard to such matters as knowledge, reliance, detriment, acquiescence or encouragement and so on. Without more the evidence clearly supports a finding that the circumstances of the conduct and behaviour of the three brothers are such that it would be wholly inequitable that they should succeed. Finally, if inducement, reliance and detriment or harm need to be established, either as indicators of inequities, or as essential ingredients of the estoppel, they are overwhelmingly proven by the evidence.

III. Proprietary Estoppel

As the above quote from Cowper-Smith indicates, there are three basic elements that a claimant must prove to be successful:

1. That a representation or assurance is made to the claimant;
2. That the claimant reasonably relied on the representation or assurance;
3. That the claimant acted to her detriment.

In most cases, it is the owner of the property who makes a representation to the claimant that the claimant will someday receive the property. The issue is not the owner's actual intention, but whether in the circumstances the claimant has relied on the representation and whether her reliance is reasonable. She must also show that she acted to her detriment; a bare promise is insufficient.

Below, we will discuss Cowper-Smith, but first, lets travel to England (Covid be damned).

A. English Cases

The principles were largely developed in England. We could choose from a number of cases, but for illustration, here's two.

i. Crabb v. Arun District Council

Crabb v. Arun District Council, [1975], EWCA Civ 7, is one of the seminal cases in England on proprietary estoppel. It deals with a land dispute, and firmly establishes that proprietary estoppel may be the basis as a cause of action. To use the cliché, it may be used as a sword as well as a shield.

Mr. Crabb purchased two acres of land out of Mr. Alford's estate. Mr. Alford's executors later sold 3 and a half acres to the local Rural District Council. When the lands were conveyed, Mr. Crabb was given access through the land sold to the Council at what is described as point A. In negotiations with the Council there was an agreement in principle to allow Mr. Crabb a second access through the Council's land at a second point, point B. There was, however, no formal written agreement or easement. The Council had a fence erected between its property and Mr. Crabb's, but put gates in at both point A and point B. Mr. Crabb, believing he had access at both points, sold the front portion of his land, without reserving an easement over the front portion to access the back portion. Following a disagreement, the Council removed the gate at point B, and fenced the access in, with the result that there Mr. Crabb did not have any access to the back portion. The Council demanded a large sum to grant an easement and negotiations broke down.

Mr. Crabb sued, but was initially unsuccessful. The Judge hearing his claim ruled:

> In the absence of a definite assurance by the representative of the Council, no question of estoppel can arise, and that really concludes the action.

On appeal, the Court of Appeal allowed the appeal, finding that the Council had undertaken to give Mr. Crabb access at point B, which he relied on in selling the front portion of his lands without reserving access over the front portion, allowed his appeal. He did not have a legal right, but it would be unjust for the Council to rely on its strict legal rights by forbidding access. Mr. Crabb was given a right of way to access the back portion at point B, without having to pay the Council.

There may be legal writers who pass up the opportunity to quote Lord Denning M.R., but I am not one of them:

> When Mr. Millett, Q.C., for Mr. Crabb said that he put his case on an estoppel, it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action. We had occasion to consider it a month ago in Moorgate Mercantile v. Twitchings (since reported in 1975 3 W.L.R. 286) where I said that the effect of estoppel on the true owner may be that
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> > "his own title to the property, be it land or goods, had been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct -what he has led the other to believe - even though he never intended it."
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> The new rights and interests, so created by estoppel, in or over land, will be protected by the Courts and in this way give rise to a cause of action

ii. *Thorner v. Majors*

Perhaps what's most interesting about *Thorner v. Majors*, [2009] UKHL 18, is how far the trial judge and ultimately the House of Lords were prepared to go to find that the farm owner made a representation that the claimant would receive his farm.

The plaintiff, David Thorner was a farmer who did substantial work for almost 30 years on his father's cousin's farm. He did so without pay. The farm was in Somerset, a *seemingly* irrelevant fact.

The cousin, Peter Thorner, did not ever expressly say he would leave David Thorner the farm. There was, rather, some indirect statements and conduct that led the plaintiff to believe he would inherit the farm. In 1990, for example, Peter handed over an insurance policy bonus notice to David, and said "that's for my death duties." There were other oblique statements implying that Peter would leave David the farm.

Peter did not leave David the farm, but died intestate.

The trial judge found that Peter was "a man of few words." He also "was not given to direct talking. The simplest example…is that when Peter said 'What are you doing tomorrow?' he generally meant 'Would you come and help me tomorrow.'"

In awarding to David the land, buildings, live stock and other farm assets, the judge found that David had established the elements of proprietary estoppel. As quoted by Lord Walker of Gestingthorpe at paragraph 47, the judge wrote:

> With regard to all that David did at Steart Farm, and in looking after Peter, for the further fifteen or so years up to his death, there is again no need for me here to repeat the various relevant findings I have already made earlier in my judgment. David's contribution was not only unremunerated, but also far in excess of that made by any of the others who helped at Steart Farm, whose roles I have reviewed in paras 74-80 above. He was encouraged to continue with his considerable and unremunerated commitment to this work by what was said and done by

> Peter on the various occasions I have already identified. There is a clear and sufficient link between that encouragement from Peter and what David did for him and on his farm.

The Court of Appeal reversed primarily on the grounds that Peter's assurances were insufficiently clear and unambiguous to be reasonably relied upon. They were consistent with Peter expressing a current intention to leave David the farm, rather than as an assurance that he would leave the farm.

In the House of Lords, there are five separate judgments restoring the trial judge's decision. The nub of the reasons in the House of Lords is that the trial judge considered the circumstances of Peter's words and conduct, and the decision is entitled to deference. The trial judge considered Peter's words and conduct in the context of the relationship between him and David and also in the context of the community in which they lived. Lord Walker of Gestingthorpe wrote:

> 59. In this case the context, or surrounding circumstances, must be regarded as quite unusual. The deputy judge heard a lot of evidence about two countrymen leading lives that it may be difficult for many city-dwellers to imagine—taciturn and undemonstrative men committed to a life of hard and unrelenting physical work, by day and sometimes by night, largely unrelieved by recreation or female company. The deputy judge seems to have listened carefully to this evidence and to have been sensitive to the unusual circumstances of the case.

B. British Columbia Cases

i. *Cowper-Smith v. Morgan*

A significant issue in *Cowper-Smith v. Morgan*, 2017 SCC 61, was whether proprietary estoppel may be applied if the person making a promise upon which the claimant relies did not own the property when she made the promise.

Elizabeth Flora Cowper-Smith died in 2010. She had three children: Gloria Morgan, Max Cowper-Smith and Nathan Cowper-Smith. In her will, she named her daughter as her executor and she provided that after payment of debts, her estate would be divided equally among her three children. She had investments and her family home in Victoria, British Columbia.

In 2005, Max Cowper-Smith visited Victoria from England, where he had been living and working as a lawyer. Gloria told Max that their mother could no longer care for herself in her own home. Gloria and Max agreed that he would leave England and move in with their mother, and care for her and the family home, after Gloria agreed that he would be able to live in the home permanently, and that he would be able to acquire Gloria's one-third interest after their mother's death. On the basis of his sister's promises, Max moved back to Victoria, into the family home, and cared for his mother.

Elizabeth Cowper-Smith transferred title to her home as well as investments into jointures with Gloria. There was also a trust declaration, pursuant to which Gloria held the home and investments as a bare trustee during Elizabeth's lifetime, but would be entitled to the assets on death absolutely by right of survivorship.

After her mother's death, Gloria claimed the house by right-of-survivorship and said she was going to put the house on the market.

Nathan and Max sued.

Madam Justice Brown found that Gloria held the home and investments on a resulting trust for her mother's estate, finding that the presumption of undue influence applied to the declaration of trust and that Gloria had not rebutted the presumption.

On finding that the family home was part of Elizabeth's estate, the trial judge, Madam Justice Brown considered Max's claim to the right to purchase Gloria's interest in the home from Gloria on the basis of proprietary estoppel. In her reasons reported at 2015 BCSC 1170, she summarized the law as follows:

> [116] The claim for proprietary estoppel begins with an assurance or representation in relation to an interest in land. The assurance can be made through words or conduct and does not have to be as precise as it would need to be in order to give rise to a binding contract. The claimant's belief in the assurance must be reasonable. A finding of reliance does not necessarily lead to a finding of detriment and the court must be satisfied that there has been detriment because this is what gives rise to an unfairness. Reliance is a change in a person's conduct as a result of the assurance. Detriment does not flow automatically from reliance and detriment must be assessed on a holistic basis, looking at the overall benefits gained and losses suffered by the claimant. Once inequity has been established, the court must determine the extent of the inequity and the relief needed to satisfy it.

Madam Justice Brown found that Max had established the necessary evidence to support his claim. She wrote at paragraph 118 and 119,

> [118] I am satisfied that Max acted to his detriment in moving from England to Victoria, giving up employment income, the long-term lease of a cottage, his contacts with his children, and his social life to look after his aged dementing mother. He did so relying on Gloria's agreement to his conditions for the move. In doing so, he acted reasonably. His discussions with Gloria were not done in a moment, they covered several months.
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> [119] The relief that Max seeks is the right to purchase Gloria's one-third interest in the house. I consider the relief sought by Max to be the minimum required to satisfy the equity. In a sense it will cost Gloria nothing. That Gloria now would rather not sell to Max for personal reasons has no bearing on the equity, or the reasonableness, of the relief sought.

Gloria appealed. In the British Columbia Court of Appeal, reported at 2016 BCCA 200, the majority held that because Gloria did not own an interest in the family home when she made the promises to Max, and it was uncertain whether she would receive an interest in the family home, Max could not rely on Gloria's promises to assert a claim based on proprietary estoppel. Mr. Justice Willcock for the majority (Madam Justice D. Smith dissented on this issue) wrote at paragraphs 106 though 108,

> [106] Even assuming there to be some basis for the view that proprietary estoppel might arise as a result of an assurance given by one about to be the owner of property, I would not expand that class of persons so far as to include a potential beneficiary who gives an assurance to another, years before the death of a testator, with respect to what she will do with an inheritance that she merely anticipates receiving, if the person receiving the assurance acts as requested in the meantime. Not only is there uncertainty, in such a case, with respect to the promisor's ability to deliver a proprietary interest to the promisee at the time the assurance is given, the uncertainty is not resolved when the promisee acts in reliance upon the promise.

> [107] Leaving aside, for the moment, the question whether Gloria was in a position to exert undue influence upon her mother, there was uncertainty with respect to the property interest Max was being promised. First, there was uncertainty whether Gloria would inherit anything from her mother. She might have predeceased her mother. Her mother might have changed her will and left Gloria more or less than a one-third interest in the property. Her mother might have sold the house and moved into accommodation more suited to her declining health. Simply by liquidating her property Elizabeth Cowper-Smith would have precluded Max from asserting a right to buy anything from Gloria. Certainly it is not suggested that Elizabeth was in any way restricted in her dealings with the property simply because her daughter made assurances to Max about what she would do on Elizabeth's death.
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> [108] Without exerting undue influence upon her mother, Gloria was not in a position to determine what property interest Max would receive in exchange for his move to Victoria. The fulfilment of Gloria's promise was entirely conditional on her mother's actions, which were outside her control.

Max appealed to the Supreme Court of Canada.

Writing for the majority, Chief Justice McLachlin held that Max was entitled to require Gloria to sell him her interest in their mother's home based on the principles of proprietary estoppel. She rejected the majority's reasoning in the Court of Appeal. Although Max could not have enforced the promise if Gloria had not acquired an interest in the property, it can be enforced if she later does receive an interest in the home. After summarizing the majority decision in the Court of Appeal, the Chief Justice wrote at paragraphs 35 and 36:

> [35] I cannot agree. With respect, the conclusion reached by the Court of Appeal majority conflates proprietary estoppel with the equity to which it gives effect. That Gloria did not own an interest in her mother's property at the time of Max's reliance is not dispositive in itself: see MacDougall, at p. 456; see also Thorner, at para. 61, per Lord Walker; Re Basham (deceased), [1987] 1 All E.R. 405 (Ch.), at p. 415. An equity arises when the claimant reasonably relies to his detriment on the expectation that he will enjoy a right or benefit over property, whether or not the party responsible for that expectation owns an interest in the property at the time of the claimant's reliance. Proprietary estoppel may not protect that equity immediately. It may not protect the equity until considerable time has passed. If the party responsible for the expectation never acquires a sufficient interest in the property, proprietary estoppel may not arise at all; where there is proprietary estoppel, there must be an equity, but not vice versa. When the party responsible for the expectation has or acquires a sufficient interest in the property, however, proprietary estoppel attaches to that interest and protects the equity: see MacDougall, at p. 458; Wilken and Ghaly, at pp. 265-66; see also Watson v. Goldsbrough, [1986] 1 E.G.L.R. 265 (C.A.), at p. 267. Ownership at the time the representation or assurance was relied on is not a requirement of a proprietary estoppel claim.
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> [36] An equity arose in Max's favour when he reasonably relied to his detriment on the expectation that he would be able to acquire Gloria's one-third interest in their mother's house. That equity could not have been protected by proprietary estoppel at the time it arose, because

> Gloria did not then own an interest in the property. But that does not mean that proprietary estoppel cannot attach to Gloria's share of the house once she receives it. I conclude that it can.

There were a couple of other important issues remaining. First, Elizabeth Cowper-Smith did not give her children the family home in the will. Rather she gave her children a one-third interest in the residue of the estate. Gloria would only acquire an interest in the home if she distributed the home itself to the three beneficiaries, rather than selling it and distributing the proceeds. As an executor she had discretion to sell the house.

In this case, the Chief Justice held that Gloria had a conflict of interest as executor, on the one hand, and as a beneficiary. The court could order her to distribute the home in order to allow Max to be able to purchase Gloria's interest in the home, and the majority of the Supreme Court of Canada did just that.

Secondly, the question arose as to when Gloria's interest would be valued. Elizabeth Cowper-Smith had died in 2010 and this decision came out seven years later. The value of the home has likely increased significantly, given the changes in the Victoria real estate market. Chief Justice McLachlin held that the appropriate time for determining the purchase price was the time Max may have reasonably have expected to have purchased Gloria's interest. The majority used an appraisal as of February 2, 2011. The Chief Justice wrote at paragraphs 52 through 54,

> [53] Neither Max nor Gloria could reasonably have expected to wait the better part of a decade to exchange Max's cash for Gloria's interest in the property. It is safe to assume that, had Gloria not sought to escape her promise, Max's equity would have been satisfied and Gloria's share of the house sold to him not long after February 2, 2011, which is when, in the course of administering their mother's estate, the property was in fact appraised for $670,000.00. Rather than sell her interest in the house to Max at that point — that is, roughly when both she and he originally contemplated she would — Gloria took the position that she was under no obligation to do so at all. This litigation was the result. In the years since, Max has had the benefit of the money he would have had to pay Gloria in 2011 for her share of the house, Elizabeth's estate has incurred expenses associated with the upkeep of the property, and the property, the parties agree, has increased in value.
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> [54] February 2, 2011 is a reasonable approximation of when Max expected to be able to purchase Gloria's one-third interest in the property. That expectation reflects the defined right that Gloria promised Max in exchange for his returning to Victoria to care for their mother. In these circumstances, the claimant's expectation must be the court's guide in exercising its remedial discretion. This is because, as Walker L.J. put it in Jennings, at para. 45:
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> > . . . the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate.

The majority also recognized that because of the delay Max has had the benefit of the use of the funds he would have used to purchase Gloria's interest in 2011, and that estate assets were used to maintain the property. Accordingly, Max was required to pay Gloria interest on the purchase price at post-

judgement interest rates from February 2, 2011, and also to account to the estate for any expenses paid out of estate funds to maintain the property since February 2, 2011.

ii. *Linde v. Linde*

In *Linde v. Linde*, 2019 BCSC 1586, the plaintiffs, Howard Linde and Beatrix Linde, were successful in their claim to a ranch near Williams Lake against Howard Linde's father, Kenneth Linde. Howard Linde had worked on the ranch for about 50 years, and his wife, Beatrix Linde, worked on the ranch since 1996. They received little or no pay. The ranch had been owned by Howard Linde's parents, who had promised over the years that he would inherit the ranch. His mother died in 2008, and his only sibling had died in 1982. The ranch was comprised of four lots, water and other licenses as well as machinery and equipment.

After his wife's death, Kenneth Linde transferred title to the ranch lands into a joint tenancy with Howard Linde, who signed a declaration that he was on title to the lands as a bare trustee for his father. Howard Linde did not receive any advice on the declaration of trust, and his evidence was that he understood it was required as part of his father's estate plan that he would inherit the ranch.

Later father and son had a falling out after the plaintiffs had taken some money out of a joint account and gold out of a joint safety deposit box. In June 2016, Kenneth Linde filed a petition seeking a declaration that Howard Linde held his interest in trust for him, and announced that he was going to gift the ranch to the Esk'etemc First Nations. Howard and Beatrix, in turn, filed a notice of civil claim in November 2016 claiming the ranch on the basis of proprietary estoppel, or in the alternative, unjust enrichment. They caused certificates of pending litigation to filed against the titles. Then on April 27, 2017, Kenneth Linde signed Form A transfers of the lands to Charlene Belleau in trust for the Esk'etemc First Nations.

In finding that the plaintiffs had made out their case in proprietary estoppel, Mr. Justice G.P. Weatherill applied the principles as articulated in Cowper-Smith. The defendant and his late wife had made assurances to Howard Linde that he would inherit the ranch, and both plaintiffs relied on those assurances to their detriment, by working for little pay and foregoing other opportunities.

Mr. Justice Weatherill decided that the trust declaration did not preclude the plaintiffs from establishing their proprietary estoppel claim. He considered the surrounding circumstances of the declaration including that Howard Linde did not receive any independent legal advice, but he also held that Kenneth Linde could not rely on any strict legal rights in view of the equities. He wrote at paragraph 35:

> I conclude that the Trust Declaration was intended as part and parcel of the overall estate planning process that was intended to ensure the Ranch was transferred to Howard on Kenneth's death. Indeed, the words of the trust deed itself confirm the point. It was drawn simply to protect Kenneth in the future if he needed protection. It was not intended that Howard was giving up any equitable claim he may have had to the Ranch. Howard was not given legal advice about the Trust Declaration or what legal effect it may have. It was not sent out for independent legal advice. He was not informed of what other options there might have been to signing the Trust Declaration. It was not signed with his full, free and informed thought or consent (*Bostrom v. Bigford*, 2019 BCSC 79 (B.C. S.C.) at paras. 117-119). In any event, and regardless of the Trust Declaration, given the equities in this case Kenneth cannot rely on his

strict legal rights. The Trust Declaration is not sufficient to trump Howard and Beatrix's proprietary equitable estoppel claim.

Mr. Justice Weatherill set aside the transfers to the Charlene Belleau as trustee for the Esk'etemc First Nations, and ordered that the ranch lands be transferred to Howard Linde, to be held in trust. The terms of the trust provided that the lands would be held in trust for Kenneth Linde during his life, with one-half of the net profits paid to him, and on his death for Howard and Beatrix Linde, or the survivor.

This case reminds us of the importance of filing a certificate of pending litigation against the title of disputed property. Had the certificates not been registered before Kenneth Linde transferred title, it would have been necessary to add the Esk'etemc First Nations as defendants.

iii. *Anderson v. Anderson*

Not every promise or assertion of intention will support a successful claim in proprietary estoppel. *Anderson v. Anderson*, 2010 BCSC 911, illustrates this point. The dispute was over a cabin and land at Sheridan Lake in the Cariboo, and pitted two of Jerry Anderson's surviving children against his spouse (their step-mother), Shirley Anderson. The property had been in the family for many years, and the children had a strong attachment to it. A little over a year before his death on October 13, 2000, Jerry Anderson transferred the Sheridan Lake property to his wife.

Following his death, all agreed to inter Jerry Anderson's ashes and create a memorial on the property. Shirley Anderson told his children that she was leaving the property to them in her will. The children and their families continued to use the cabin with her consent. She also discussed giving them the property during her lifetime if they agreed on how they would manage co-ownership.

It was after Shirley Anderson advised that she was going to sell the property that the plaintiffs sued. They unsuccessfully alleged that she held the property on a secret trust for them and their brother. Their alternative claims were in estoppel. Although they alleged that they had expended money on the cabin in reliance of her representations that she would leave them the property, they were unable to establish they expended any funds.

Madam Justice Dardi found that Shirley Anderson's statement that she planned to leave the property to the children in her will, "did not create any binding obligation on her part. It was no more than a mere description of an existing state of affairs and a gratuitous statement which could not reasonably lead to a mistaken belief that she was bound to benefit the plaintiffs in her will." Similarly, when she spoke of transferring the property to them, she did not make any irrevocable promises to them, and "none of her statements of intention reasonably created an expectation on the part of the plaintiffs that they had any legal enforceable right to the Property."

Nor did the interment of his ashes or erection of a memorial on the property provide grounds for an estoppel. "The evidence does not establish that the defendant told the plaintiffs that the memorial should be placed on the Property because they would eventually own the Property or that they relied on any such representation." She had the right as the executor of Jerry Anderson's will to decide what to do with his ashes.

Madam Justice Dardi concluded:

> [197] Applying the broader approach enunciated in the authorities, I find on the facts of this case that it would not be unconscionable for the defendant to be permitted to sell the Property. She paid for the upkeep and maintenance since the deceased's death. She is the sole owner of the Property and is entitled to do as she wishes with the Property including selling it. At the time the memorial was erected, she did not contemplate that she would ever want to sell the Property. I accept that after the death of her husband, she believed that his children should continue to enjoy the Property for some time to come, and she accommodated their use of the Property for several years. However, the circumstances of her life have changed and her wishes changed in January 2006. Her change of heart cannot translate into an actionable claim by the plaintiffs.

C. Proprietary Estoppel and Unjust Enrichment

In its skeletal form, the elements of a claimant in unjust enrichment must prove:

> a. an enrichment;
> b. a corresponding deprivation; and
> c. the absence of a juristic reason for the enrichment.
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> (See *Kerr v. Baranow*, 2011 SCC 10).

In an unjust enrichment case, the court has a fair amount of flexibility to fashion the remedy. The starting point is that a court may award a monetary award, based on either the value received (quantum meruit) or the value survived. If there is a strong connection between the claimant's contributions and specific property, or if a monetary award is an insufficient remedy, the court may give the claimant an interest in property through a remedial constructive trust. (See *Kerr* at paragraphs 47 through 53.) The court may fine tune the remedy to reflect contributions by deciding the amount of a monetary award or the extent of the claimant's interest in property.

The same facts may often give rise to both a claim in proprietary estoppel and an unjust enrichment claim. For example, the facts in *Thorner* would in Canada support an unjust enrichment claim, and in *Linde*, Mr. Justice Weatherill found that the plaintiff had also made out a claim in unjust enrichment.

Although there is overlap, the claims are by no means identical. In proprietary estoppel, the claimant must establish some form of words or conduct constituting a representation or assurance on which the claimant relies. In unjust enrichment such a representation or assurance will often be relevant to the analysis of whether there is a juristic reason for an enrichment, but it is not an essential ingredient for a successful claim. Conversely, it is not essential to a proprietary estoppel claim to prove that the defendant (or deceased person) was enriched. Nevertheless, in many cases the facts will support both claims.

In practice, it is often wise to plead both.

Sabey v. Beardsley, 2013 BCSC 642, appeal allowed, 2014 BCCA 360, application for leave to appeal to SCC dismissed 2015 CarswellBC 840, illustrates the relationship and distinctions between proprietary estoppel and unjust enrichment. Before discussing the judgments at trial and appeal, lets get something out of the way for those readers who are as equine-challenged as the writer: dressage is sometimes

referred to as horse ballet. It does appear that the horses are dancing. It involves a high level of horse training, and a high level of skill by the dressage rider and trainer.

i. Trial Decision

Jesse Sabey became interested in dressage riding at a young age. He began riding at 12. He met Kim and Dietrich von Hopffgarten, prominent dressage riders and trainers, a couple of years later after seeing them at a horse show. He lived in Washington State, and they lived across the border in British Columbia. He asked them to give him dressage riding lessons, and they did. After he graduated from high school, the von Hopffgartens assisted in arranging for him to get a student position in a dressage facility in Germany.

In 2001, Mr. Sabey moved to the von Hopffgartens' horse farm, Sansoucci, in Langley, B.C. He worked for them, while taking riding lessons, but also commuting to Washington State to study accounting, eventually becoming a Certified Public Accountant. He had told the von Hopffgartens that he wanted to become a professional dressage rider, but Mr. von Hopffgarten encouraged him in his studies to become an accountant. He moved to Washington State in 2005, but continued to return to work on the farm, usually on Saturdays. They had become very close over the years.

Although the von Hopffgartens paid Mr. Sabey while he was a working student on the farm, they often paid him less than the other working students they employed. Mr. von Hopffgarten told him on three occasions that the farm would someday be Mr. Sabey's. Mrs. von Hopffgarten was present on at least one of those occasions. He made further comments that were less explicit, but implied that Mr. Sabey would one day get the farm.

Mr. von Hopffgarten died in 2006, and the farm became Mrs. von Hopffgarten's as the surviving joint tenant. She told Mr. Sabey that it had been their plan that if anything happened to Dietrich von Hopffgarten, the farm would be Mr. Sabey's. She asked him to come back and take it then, but because of his job and concern about immigration issues, he continued to live and work in Washington State, returning to the farm on weekends.

Mrs. von Hopffgarten died in May 2011.

Both Dietrich and Kim von Hopffgarten made codicils to their wills leaving Mr. Sabey the farm. Unfortunately, they made the codicils on their own, and each only had one witness to the codicil. Because Mrs. Hopffgarten died before the *Wills, Estates and Succession Act* came into force on March 31, 2014, Mr. Sabey could not apply under section 58 to give effect to her codicil.

At trial, Mr. Justice Myers awarded Jesse Sabey the farm on the basis of proprietary estoppel.

He found that Mr. Sabey's evidence of what Mr. and Mrs. von Hopffgarten told him was credible, consistent with the relationship, and his credibility had not been challenged at trial. The assurances they gave him that the farm would be his were sufficiently clear to convey to him that he would someday receive the farm.

Mr. Justice Myers found that Jesse Sabey relied on the von Hopffgarten's statements to him to his detriment in choosing a career as an accountant instead of pursing a career as a professional dressage rider. With respect to the argument advanced on behalf of the beneficiary of the farm under Mrs. von

Hopffgarten's will that Mr. Sabey did not suffer financially from his decision to become an accountant, Mr. Justice Myers wrote at paragraph 63:

> A financial loss is certainly one type of detriment, but I do not think it is the only type or a necessary element of detriment. Jesse gave up something he wanted, to become a professional dressage rider. Whether he would have made more or less money doing that is beside the point. Further, Jesse oriented his accounting career so that he would not have to travel and so he could work as close as possible (within the United States) to the farm. I do not think it is incumbent on him to prove a resulting financial loss. As stated above, reliance and detriment are often one and the same.

ii. Court of Appeal Decision

Unfortunately for Mr. Sabey, the majority of the Court of Appeal overturned the trial judge's decision to award Jesse Sabey the horse farm.

Madam Justice Bennett, writing for the majority, set out the legal test as follows:

> [25] The foundation of a claim in proprietary estoppel is an equitable right arising out of the conduct of the parties. In *Crabb v. Arun District Council*, [1976] Ch. 179 at 192-93, [1975] 3 All E.R. 865 (C.A.), Scarman L.J. stated the test in a claim for a proprietary right on the basis of equity:
>
> 1. Is there an equity established?
> 2. If so, what is the extent of the equity?
> 3. What is the relief appropriate to satisfy the equity?

The majority agreed that Mr. Sabey had proven that the von Hopffgartens had made assurances to him that they would leave him the farm. The also accepted that he relied on those assurances to his detriment by working for them for two and a half years with less than market pay, and for working for Mrs. von Hopffgarten without any pay after her husband's death. But the majority did not agree that he relied on their assurances when he made his career choices, specifically choosing to become an accountant instead of a professional dressage rider, and then choosing a small firm so he could ride at their farm instead of working for a larger firm that would have provided higher pay, but more travel. Nor did the majority accept the argument that in becoming an accountant and working at a small firm Mr. Sabey had acted to his detriment.

Although, Mr. Sabey established an equity, the majority held that the extent of the equity was not sufficiently great to warrant an award of the whole farm to Mr. Sabey. Madam Justice Bennett wrote at paragraph 80:

> [80] In my view, no equity arises as a result of Mr. Sabey deciding not to pursue professional dressage or limiting his employment prospects to firms that were close to the farm. The extent of the equity that arises in this case is Mr. Sabey's two and a half years of underpaid work after the assurances were made and his continued work on the farm without payment after Dietrich's death. If Mr. Sabey had not expected to inherit the farm, then he may not have continued to work on the farm. The trial judge erred in concluding that there were other bases on which an equity arose, and in failing to assess proportionality. As a result, the remedy he crafted is not due deference, and is, with respect, clearly wrong.

Accordingly, the majority ordered that the case be remitted to the trial judge to consider the alternate claims made by Mr. Sabey on the basis of unjust enrichment, and express or implied trust, and to consider the issue of proportionality as it relates to the claim of proprietary estoppel. As there is no further reported decisions, we don't know what Mr. Sabey ultimately received.

Madam Justice MacKenzie dissented. She would have dismissed the appeal on the basis that the trial judge's findings were supported by the evidence and that the decision was within the trial judge's broad discretion.

IV. Final Thoughts

Broadly, estoppel is an equitable tool that prevents a party from insisting on their strict legal rights when doing so would be unjust. It involves words or conduct on the part of defendant, or the deceased. The claimant relies on some form of representation, and changes their position to their detriment. The change in position may involve actions, but may also involve inaction. In *Chan*, the plaintiffs were lulled into inaction, failing to bring a wills variation claim within the limitation, by the defendants' assurances and conduct.

The application of the proprietary estoppel is nuanced. The defendant or deceased makes a representation or assurance, but how express need it be? Perhaps not very in the case of the taciturn and undemonstrative men of Somerset. On the other hand, even a more explicit statement of intention, such as the assertion by the defendant in *Anderson* that she was leaving the cabin and land at Sheridan Lake to her late husband's children in her will, may be insufficient, where it is not reasonably relied upon. Context is everything.

The focus is not on the intention of the person making a representation, but on whether it is reasonably relied on by the claimant to their detriment. It is not necessary to prove that the person making a representation subjectively intended for the claimant to rely on the representation, but if the context is such that it should have been apparent to the claimant was not committed to keeping a promise, then the reliance may not be reasonable. It should be kept in mind that the evidence does not need to rise to the level of an express bargain; if there is a bargain, the law of contract will usually afford a remedy.

Detriment will often involve an economic sacrifice, such as working gratuitously or for less than market value, but it may involve any change in position that is detrimental: foregoing educational or career opportunities, or changing one's lifestyle by moving. The assessment is not always straightforward: at what point does a claim based on foregone opportunities become too speculative?

Then there is the question of remedy. A hallmark of equity is proportionality. The principles of proprietary estoppel are not intended to afford the claimant a windfall. In *Cowper-Smith*, the plaintiff was already entitled to one-third of the residue of his mother's estate under her will. What he was given was a one-third interest in the specific property and the right to purchase his sister's one-third interest in the house for fair market value. He likely did receive a significant financial benefit because of the time it took to resolve the litigation and the changes in the real estate market, but this was balanced to some extent by requiring him to pay interest from the notional purchase date.

Sabey illustrates the minimum equity principle. Promises were made, and Mr. Sabey relied on them, and suffered some detriment. But in the view of the majority of the Court of Appeal, the award of the farm to him was disproportionate to any sacrifice he made by working for less than market wages, and at

times for free. As in *Sabey*, a court may prefer an unjust enrichment analysis that tailors the remedy more closely to the benefits and detriment.