



Claims in Equity – unjust enrichment and estoppel

The High Court decision in *Hamilton v Kirwin & anor* [2020] NZHC 2149 (24 August 2020 per Woolford J) provides an illustration of the unique power of equitable causes of action, in this case proprietary estoppel, to effect justice.

The plaintiff contested a lack of sufficient provision for her in the will of her late father and her exclusion as a beneficiary of the trust he had set up on the same day as making the will. The key asset in the claim involved the father's 59 hectare block of rural land upon which there were several houses; a bach used by the father and a home and several cabins built and lived in by the plaintiff and her family.

The plaintiff maintained that she only expended money to build the house and cabins on assurances from her father that he would leave her a share in the property when he died. Coincidentally, the father's penultimate will of September 2015 directed that after his death the property was to be transferred to the plaintiff Hamilton and her two brothers as tenants in common in equal shares.

Eight months later, in May 2016, the father settled the trust, under which the plaintiff's two brothers (but not the plaintiff) were beneficiaries. The father then transferred the property to the trust thereby taking it out of his estate. The father died seven months later.

The plaintiff claimed via the following causes of action:

- Proprietary estoppel
- Constructive trust
- Undue influence,
- Family Protection Act 1955; and
- Law Reform (Testamentary Promises) Act 1949

The Court listed four elements to establish equitable estoppel:

- (a) A belief or expectation by the claimant created or encouraged by words or conduct of the respondent;
- (b) To the extent an express representation is relied upon, it is clearly and unequivocally expressed;
- (c) The claimant reasonably relied to his or her detriment on the representation; and
- (d) It would be unconscionable for the respondent to depart from the belief or expectation.

Unsurprisingly perhaps, the Court readily found that the father had created a belief or expectation by the plaintiff that she would in due course receive a share of the property sufficient to provide some form of security for her plans to build a dwelling house and cabins on the property.

Unconscionability flowed from the fact that the plaintiff had established a life for herself and her family on the property along with the structural improvements she had effected such that it would be unconscionable for the father to have departed from the belief or expectation he had created on her part. As the Court said, if he were allowed to resile from the

expectations created, then all the plaintiff's work and expenditure over the years would be wasted.

Not all the plaintiff's arguments persuaded. The plaintiff argued that the trust received the property subject to an "antecedent equitable interest" in favour of the plaintiff. The Court rejected this on the basis that the eventual trustee had no knowledge of such an interest. The Court saw no need to trace an interest into the trust to effect justice. Instead, it simply declared the property transfer to the trust to be "null and void" (para [48]). The effect of which was to return the property to the estate where the will directed that, as residuary, it passed equally to the three children.

The remaining heads of claim were rendered otiose, but are mentioned for completeness and to highlight the particular challenges they encountered. The constructive trust claim was based on contributions by the plaintiff to the property, but was held to be ineffectual because such contributions as were made were compensated for by the fact that the plaintiff and her family had lived rent free on the property for 23 years (para.s [52] & [53]).

The undue influence claim failed because the evidence surrounding the making of the final will and transfer of the property to a trust, which effectively excluded the plaintiff, was insufficient to turn mere 'suspicion' into proof that one or other of the brothers had exerted undue influence over the father to bring these actions about.

The Family Protection Act 1955 claim failed because, among other reasons, the plaintiff received an equal share with her brothers in what was a modest estate.

Finally, the Law Reform (Testamentary Promises) Act 1949 claim also failed because the 'services' involved work on the property which was done by the plaintiff for the immediate benefit of herself and her family, rather than her father.

The basis for the Court's decision - proprietary estoppel

It is apposite to explore the successful claim in proprietary estoppel more closely. While it shares with the constructive trust claim an underlying protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to such change were deserted, it does not require valuable contributions to have been made to evoke it.

The focus is on what is necessary in all the circumstances to satisfy the equity arising from a departure from the expectation engendered by the relevant assurance, promise or conduct on the part of the defendant.

The Court of Appeal in *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548 (CA) at 549 (per Tipping J), described the rationale of the doctrine this way:

The decisions of this Court in *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1984] 1 NZLR 641 and *Gillies v Keogh* [1989] 2 NZLR 327 have emphasised the element of unconscionability which runs through all manifestations of estoppel. The broad rationale of estoppel, and this is not a test in itself, is to prevent a party from going back on his word (whether express or implied) when it would be unconscionable to do so.

Gillies v Keogh is extensively referred to and applied in *Lankow v Rose* [1995] 1 NZLR 277 (CA) the oft quoted flag-bearer case for contribution based constructive trust claims most notably in de facto relationship and 'constructive trust on an express trust' cases.

The remedies available to the Court in equity is not only reflective of the traditional contractual and tortious measure of relief, but is much more flexible and arguably goes much further.

In breach of contract, the general principle is that the purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if their rights had been observed. This secures the benefit expected under the contract and, typically, is represented by the difference between the value contracted for and the value obtained (*Marlborough District Council v Altimarloch Joint Venture Limited* [2102] NZSC 11 para [23] and [27]).

In tort, the general principle is that the purpose of damages for negligent mis-statements (not inducing a contract) involve an assessment of the value of the actual damage caused/suffered by the defendant (*Davys Burton v Thom* [2008] NZSC 65).

In proprietary estoppel, the court may approach relief as a reliance-based remedy or as an expectation-based relief. The former being aimed at putting the plaintiff in the position he or she would have been in if the representation had not been made and relied upon. While the latter is designed to fulfil the expectation relied upon.

The Court of Appeal in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 at para [78] approved the following judicial descriptions (constraints) of the test for the remedy: “the minimum equity to do justice”; “that which is necessary to cure the unconscionable conduct: nothing more, nothing less”; and as requiring proportionality between the remedy, the expectation and the detriment.

The similarity with breach of contract remedies can be misleading however, as McPherson J in *Riches v Hogben* [1985] 2 QR 292 (QSC) at 300–301 explained:

What distinguishes the equitable principle from the enforcement of contractual obligations is, in the first place, that there is no legally binding promise. If there is such a promise, then the plaintiff must resort to the law of contract in order to enforce it, it being the function of equity to supplement the law not to replace it. The second distinguishing feature is that what attracts the principle is not the promise itself but the expectation which it creates ... Finally, the equitable principle has no application where the transaction remains wholly executory on the plaintiff's part. 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.

On the other hand, equitable relief may require the taking of active steps by the defendant including the performance of the promise and the performance of the expectation generated by it (by equitable damages or injunctive relief). But where a claimant had been induced to make a relatively small, readily quantifiable monetary outlay on the fate of the estopped party's assurances, it might not be unconscionable for the estopped party to resile from promises made, on the condition that the claimant be reimbursed for the outlay. This is the flexibility of the equitable approach to relief (*Wilson Parking* at para [97]).

The Court in *Wilson Parking* stated in respect to the alternatives by way of relief at para [119]:

In choosing between reliance or expectation-based remedies, there is some support for the proposition that, subject to proportionality between the expectation and the detriment suffered, it will often be just to make an order to fulfil the expectation, but we do not consider it is appropriate to adopt a presumptive or prima facie approach

one way or the other. That would not be consistent with the flexible approach to equitable remedies consistently emphasised in the cases.

Avondale Printers v Haggie [1979] 2 NZLR 124 provides an example where proprietary estoppel failed, but an estoppel arising from a shared common intention falling short of a contract (page 156 line 17) succeeded.

Mahon J's Judgment is a wonderful exposition of the jurisprudential underpinnings of estoppel and the rejection of a general cause of action founded simply on unjust enrichment per se. The proprietary estoppel claim failed because the plaintiff did not expend moneys on the property he was intending to purchase in the expectation, encouraged by the defendant, that he would secure a beneficial interest in it (see page 144 line 1).

But after finding that there existed a common intention between the parties that the defendant had abandoned his rights to purchase the property in favour of the plaintiff (see page 157 line 48), it was held that the defendant held the property as a constructive trustee for the plaintiff on the basis that the subsequent denial of the common intention was a form of equitable fraud giving rise to a constructive trust in relation to the property (page 164 line 22). The Court ordered conveyance of the property on payment by the plaintiff of its purchase price (page 164 line 42).

It was noted earlier the constructive trust claim in *Hamilton v Kirwin* based on contributions by the plaintiff to the property was rejected by the Court because the contributions were effectively compensated for by the fact that the plaintiff lived rent free on the property. I suggest that the outcome was nevertheless equally explicable by application of the principles discussed by Mahon J in *Avondale Printers*

The result in *Hamilton v Kirwin*

Woolford J approached relief by applying the 'minimum equity to do justice', that is, to void and nullify the transfer of the land of the trust. Once that was done, the circumstances of the case, that is, the terms of will, looked after 'justice' in terms of the practical outcome.

In summary, when a client's circumstances involve broken promises or assurances made to them, whether in a contractual context or where there is no contract at all, and those promises or assurances prompted detrimental reliance or responses on their part, then consideration should be given to equitable estoppel in its various forms because when other forms of relief may fail, the flexibility offered in equity may well succeed.



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