Proprietary estoppel

Michael LP Lower
Proprietary estoppel

Introduction

The law of proprietary estoppel plays an important part in Hong Kong’s land law system as well as that of other jurisdictions. The relevant principles were established in a set of important cases in the nineteenth century.¹ Megarry & Wade describe proprietary estoppel as ‘the equitable jurisdiction by which a court may interfere in cases where the assertion of strict legal rights is found to be unconscionable.’²

Lord Kingsdown provided a classic explanation of proprietary estoppel in his dissenting judgment in *Ramsden v Dyson*:

> ‘If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation.’³

The essential elements of a proprietary estoppel claim are:

1. a representation or assurance given by A to B that B will acquire A’s interest in land (or some right over that land);  
2. reasonable reliance by B an expectation created by that representation or assurance;  
3. some detriment to B caused by that reliance which makes it unconscionable for A to be allowed to simply fail to give effect to B’s expectation.

¹ *Dillwyn v Llewellyn* (1864) 4 De G.F. & J. 517, 45 E.R. 1285, HL; *Ramsden v Dyson* (1866) L.R. 1 H.L. 129, HL; and *Plimmer v Wellington* (1883 – 84) L.R. 9 App. Cas. 699, PC.  
³ *Ramsden*, 170.
A must have encouraged or allowed B to entertain a belief to B’s detriment so that it would be unconscionable for A to be allowed to deny the truth of that belief. It does not matter that in so acting A was mistaken as to his own rights in the matter (though this may affect the question of unconscionability). B must be acting in reliance on A’s action (or inaction). Unconscionability is the central theme of proprietary estoppel and, in *Gillett v Holt*, the English Court of Appeal emphasized that:

‘[I]t is important to note at the outset that the doctrine of proprietary estoppel cannot be treated as sub-divided into three or four watertight compartments … it repeatedly became apparent that the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined, and that whether there is a distinct need for a “mutual understanding” may depend on how the other elements are formulated and understood. Moreover, the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.’

The representation
The starting point for a proprietary estoppel claim is a representation or assurance. Where this cannot be shown, there is no prospect of a successful claim. The evidence concerning the fact of the representation or assurance needs to be sufficient to persuade the court on the balance of probabilities that it was made; it need not be overwhelming. The assurance must be ‘clear enough’. In Lord Hoffman’s words, ‘It was enough that the meaning he conveyed would reasonably have been understood as intended to be taken seriously as an assurance which could be relied upon.’

---

4 *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133.
5 [2000] 3 WLR 815, CA (Eng) at 225 per Sir Robert Walker LJ.
8 *Thorner v Major* [2009] UK HL 18.
9 *Thorner*. 
Where the representation is made to a company director in his personal capacity, then it is the director, and not the company, that must suffer the detriment in reliance on it.10

The representation may take the form of passive encouragement. Simply standing by and allowing the claimant to spend money on the property in reliance on the understanding that the claimant had, or would acquire, an interest in it can amount to a representation.11

It was established in *Ramsden v Dyson*12 that where; (i) A allows B to build on A’s land, (ii) B does so because of a mistaken belief that B has an interest in the land; and (iii) A knows of B’s mistaken belief then A has a duty to correct the mistaken belief. Thus, a donor can be bound by an assurance that land has been given when the donee, with the donor’s knowledge, spends a substantial sum of money on the land.13 The mere failure to point out that the claimant is mistaken in its belief that it will acquire an interest in land is not an assurance that can be relied upon where the landowner has not contributed to or encouraged the claimant’s ignorance.14

Proprietary estoppel depends on an assurance that some kind of interest in property will pass (though, clearly, that interest need not be quantified).15 While there must be certainty as to the relevant property, the degree of certainty required is not to be overstated:

'In this case, the extent of the farm might change but .. there is, as I see it, no doubt as to what was the subject matter of the assurance, namely the farm as it existed from time to time .. As in the case of a very different equitable concept, namely the floating charge, the property the subject of the equity could be conceptually identified from the moment the equity came into existence, but its precise extent fell to be determined when the equity crystallised, namely on Peter's death.'16

---

10 *Lloyd v Dugdale* [2001] EWCA Civ. 1754, CA (Eng).
11 *Pascoe v Turner* [1979] 1 WLR 431, CA (Eng)
12 (1886) L.R. 1 HL 129.
13 *Dilwyn*.
15 *James v Thomas* [2007] EWCA Civ 1212, CA (Eng).
16 *Thorner*, per Lord Neuberger of Abbotsbury.
Representations made during contractual negotiations

Provided it is clear that it is intended to be relied upon, a statement made in the course of contractual negotiations can be a representation for the purposes of proprietary estoppel. Where, however, it is clear that the parties are still negotiating then there is no basis for a proprietary estoppel claim. This is because, the representation must be such as to engender a confident expectation arising out of the common understanding of the parties (rather than a mere hope) of obtaining a proprietary interest in land. Or it may be that negotiations have concluded but it is the clear common understanding of the parties that the parties are not bound until contracts have been formally exchanged. Even where negotiations have concluded, there may be statutory formalities to be complied with and the need to do so may prevent even the firmest assurance from being a representation that can be relied upon.

In *Crabb v Arun District Council*, an assurance that a landowner would be granted a right of access onto the neighbouring road owned by the Council was effective despite the parties' awareness that the agreement in principle would need to be made firmer (by agreeing on details such as payment) and would need to be incorporated in a deed or contract. Subsequent conduct (building a gate in the agreed position and watching while Crabb sold part of his land leaving the retained land reliant on the access agreed upon) both illustrated that the parties' thought that there was a firm agreement and amounted to a representation in its own right.

*Yaxley v Gotts* is an example of equity intervening to give effect to a contract where the agreement was obviously intended to be binding without any need for compliance with formalities. Mr Yaxley was a builder. He agreed with Mr Gotts that he would convert a house into flats in return for the ownership of the ground floor flat. The property was actually (unknown to Mr Yaxley) bought by Mr Gotts' son. Mr Yaxley carried out the

---

17 *Attorney-General v Humphreys Estate (Queen’s Gardens) Ltd* [1987] HKLR 427, PC.
18 *Cobble v Yeoman’s Row Management Ltd* [2008] UKHL 55 per Lord Walker of Gestingthorpe.
19 [1976] Ch. 179, CA (Eng).
20 [2000] Ch 162.
building works but the son refused to honour the agreement even though he knew of it and had allowed Mr Yaxley to go ahead and carry out the substantial work needed at the property. At first instance, Mr. Yaxley succeeded on the basis of proprietary estoppel. In the English Court of Appeal he succeeded again but this time on the basis of a constructive trust. The judgments show the very strong overlap between proprietary estoppel and constructive trust. It may be that constructive trust is more appropriate here given the similarity with the common intention constructive trust.

In *Kinane v Alimamy Mackie-Conteh*21 Arden LJ expressed the view that a proprietary estoppel could arise in cases where there is an agreement that did not comply with the formalities to be observed in the creation of a contract concerning land. In the ordinary case, the fact that the parties have not yet satisfied the formalities or have used the ‘subject to contract’ label is an indication that they do not intend to be bound. But there can be other cases where the promissor not only promises to create or transfer an interest in land but gives a ‘double assurance’ that he will not rely on the failure to comply with statutory formalities.22 Arden LJ stressed that it is the landowner’s representation that the agreement is valid and binding that gives rise to the estoppel.

**Proprietary estoppel and future rights**

*Re Basham*23 made it clear that proprietary estoppel could apply where the relevant expectation was that rights would be acquired in the future (under a will, for example). In *Gillett v Holt*24 repeated assurances given by a landowner to an employee that the land would be left to him in the owner’s will, accompanied by appropriate detrimental reliance, gave rise to a successful proprietary estoppel claim. A will can, of course, be altered at any time during the testator’s life and is, in any event, subject to the usual formalities. Nevertheless, a clear representation that property will be left to the claimant in the owner’s will can give rise to detrimental reliance.

---

21 [2005] EWCA Civ 45, CA (Eng).
22 *Kinane* at para. 28, per Arden LJ.
24 [2000] 3 WLR 815, CA (Eng).
Detrimental reliance

The claimant must show that he relied on the promise to his detriment. When a representation is made that is intended to influence the mind of the recipient and would have influenced the mind of a reasonable person, there is a presumption that any possible detrimental actions were performed in reliance on the representation. The burden of proof shifts to the defendant to show that there is no causal link between the representation and the alleged detrimental reliance.25 Where there has been conduct from which reliance can be inferred the burden of showing that there has been no reliance shifts to the defendant.26 Where it is clear that the detriment was not the result (wholly or partly) on reliance on the representation or assurance or encouragement then the estoppel claim will fail.

In Gillett v Holt, the English Court of Appeal stated that while the claimant must suffer some detriment, ‘detriment’ is not a narrow or technical concept:

> ‘The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.’27

Thus, the detriment might be expenditure in reliance on the representation, foregoing opportunities (such as employment opportunities) or carrying out work or services for the benefit of the person making the representation. When deciding on whether or not there has been a detriment, the court will assess countervailing benefits (such as the fact that a claimant might have had the benefit of free board and lodgings provided by the landowner).

25 Greasley v Cooke ([1980] 1 WLR 1306, CA (Eng)).
27 Gillett at 232.
Unconscionability

For the claim to succeed, it must be unconscionable for the person who gave the encouragement or assurance to back out of it or to act as if it had never been made. Unconscionability has an objective element.\(^{28}\)

The relief

The court has discretion when it comes to fashioning an appropriate remedy. Equity seeks to do the minimum to prevent an unconscionable outcome. Thus, the court will not always completely satisfy the expectation that has been created. Proprietary estoppel seeks to prevent unconscionable outcomes. There must be some proportion between the expectation and the detriment. Where the expectation greatly exceeds the detriment, it cannot be ignored but it may not be fully satisfied.\(^{29}\) When deciding on how to satisfy the estoppel, it is legitimate to take into account the circumstances of the owner.\(^{30}\) The conduct of the parties is also relevant.\(^{31}\)

The court has a wide discretion to fashion the award that will respond to the unconscionable behaviour. One finds a wide range of remedies awarded by the courts including a requirement to pay money, to grant a licence. In many cases, the award takes the form of the grant of a proprietary interest in the land.\(^{32}\) Where the relief takes the form of a licence, the better view is that this will not bind third parties. As a result, the court may prefer, instead, to grant a proprietary right that offers more certain protection.\(^{33}\)

The behaviour of the landowner can affect the award. In *Crabb v Arun District Council*, the loss and delay caused by D's high-handed actions (that had prevented the land from being put to use in a way that would have benefited not only P but also, perhaps, the local economy) meant that the appropriate award was an easement (rather than a licence) and

\(^{28}\) *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ. 873, CA (Eng).
\(^{29}\) *Jennings v Rice* [2002] EWCA 159, CA (Eng).
\(^{32}\) *Dilwyn*.
\(^{33}\) *Pascoe*. 
an award of damages for the lost opportunity to profit from the land during the time that it was land-locked.

**The equity**

Where the elements of a proprietary estoppel are present, this gives a right to seek relief. The better view is that this is a proprietary right, rather than one that is purely personal. Accordingly, it will bind purchasers who take with notice. The equity created by a proprietary estoppel claim can be binding on third parties but mere notice of the relevant facts and of the claim is not sufficient to affect the buyer’s conscience. Nor is it enough that the third party has agreed to take ‘subject to’ any such claim.

**Proprietary estoppel and formalities: the public policy issue**

There can be no proprietary estoppel where the equity falls outside a statute; that is where it falls foul of a general public law rule. Where the equity claimed would merely result in a failure, for example, to comply with registration or formalities requirements there is less of a problem.

**Licences coupled with an equity**

It is trite law that licences (including contractual licences) do not bind third parties. Bare licences are revocable at will. Where a licensor creates an expectation in the licensee’s mind that the licence is irrevocable and the licensee relies on that expectation to his detriment then the licence can be treated in equity as being irrevocable. In *Re Sharpe* an elderly lady provided, by way of loan, the bulk of the purchase price of a

34 Megarry & Wade 2008, para. 16-028.
35 Lloyd.
36 Lloyd.
37 Megarry & Wade 2008, para. 16-026.
39 [1916] 2 AC 54, HL.
40 *Plimmer*.
property purchased by her nephew. She made the loan on the condition that she would be able to live in the property for the rest of her life. It was held that this arrangement gave her some form of interest in the property under a constructive trust. This right was binding on her nephew’s trustee in bankruptcy.

Proprietary estoppel and constructive trust

The same facts can give rise to a claim based on proprietary estoppel and to a claim to an interest under a constructive trust.\(^{42}\) There is a clear overlap between the facts that can give rise to a common intention constructive trust and those that can be the basis of a proprietary estoppel claim: the express or implied agreement that can give rise to a common intention constructive trust can also be the representation that is needed for proprietary estoppel. In each case, detrimental reliance makes it unconscionable to depart from the agreement or representation. Thus, it has been suggested that there is no difference between the common intention constructive trust and proprietary estoppel.\(^{43}\)

In *Kinane v Alimamy Mackie-Conteh*\(^{44}\) Arden LJ agreed with Neuberger LJ that a proprietary estoppel claim might also give rise to a constructive trust. Arden LJ thought that the same unconscionability that gives rise to the proprietary estoppel also gave rise to a constructive trust.\(^{45}\) Neuberger LJ thought that there would only be a constructive trust where there was an agreement or common intention as to the existence or intended existence of a proprietary interest.\(^{46}\)

Proprietary estoppel and part performance

There are similarities between the facts that might give rise to a part performance claim and to a claim in proprietary estoppel. A would-be purchaser might rely on either ground to try to enforce the promise to transfer (or create) an interest in land. The acts of part

---

42 See, for example, *Chan Gordon v Lee Wai Hing* [2011] HKEC 300.
43 *Oxley v Hiscock* [2005] Fam 211 CA (Eng) at 247, per Chadwick LJ.
44 [2005] EWCA Civ 45, CA (Eng).
45 *Kinane* at para. 45.
46 *Kinane* at para. 51.
performance might also count as the detrimental reliance needed for proprietary estoppel. Clearly, proprietary estoppel is wider in scope since it can operate outside the contractual context. Even in the contractual setting, part performance makes the contract enforceable while a proprietary estoppel claim leaves the court with a wide discretion as to the remedy to be awarded; the court might not simply give effect to the representation made.

**Promissory estoppel as a sword?**

The orthodox understanding in Hong Kong, as in England, is that promissory estoppel can be used as a shield but not a sword: it can be used as a defence but not as a cause of action. In *Crabb v Arun District Council*, Lord Denning MR said:

‘[I]t is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppel and estoppel. 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.’

In *Bestkey Development Ltd v Incorporated Owners of Fine Mansion* Liu JA remarked that it is helpful to retain this distinction between proprietary and promissory estoppel. It seems, however, that this is not the case in Australia and even in Hong Kong it seems, in effect, that the Court of Final Appeal has allowed promissory estoppel to be used as the basis of a claim to a right to the proceeds of sale of property even while it insisted that promissory estoppel is not to be seen as a cause of action. Lord Scarman thought the distinction unhelpful.

---

47 *Crabb*, at p. 187.
48 [1999] 2 HKLRD 662, CA at 668.
49 *Walton’s Stores (Interstate) Ltd v Maher Ltd* 164 CLR 387.
50 *Luo Xing Juan Angela v Estate of Hui Shui See Willy, Deceased* (2009 12 HKCFAR 1.
51 *Crabb*, at p. 193.