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Cowper-Smith v Morgan: The Supreme Court Renovates Proprietary Estoppel

Lord Denning once said that estoppel is a house with many rooms. In December 2017, in *Cowper-Smith v Morgan*, 2017 SCC 61, the Supreme Court of Canada undertook some significant renovations to an important, but little used, room in that house: proprietary estoppel. And just like your neighbour's renovations to build their monster home can have a real impact on your property, this is a decision that has impacts well beyond the particular facts of that case.

Proprietary estoppel is a powerful remedy because it is one of the only forms of estoppel that can operate as a sword, as opposed to solely being a shield. It protects reliance upon assurances that are made concerning the representee's right to obtain an interest in property. Where reasonable reliance on those assurances can be established, even if they are not made in writing, the representee has an affirmative cause of action.

Cowper-Smith involved an assurance made by a sister to her brother—if the brother moved back home with his ailing mother, the brother would be able to live in the home, and the sister would allow the brother to purchase her interest in it once it came to her under the mother's estate. The need for proprietary estoppel in a case like this is plain: to hold the sister to her promise, the brother, who moved back in with his mother, was doing more than simply preventing his sister from going back on her assurance. He pursued a positive proprietary entitlement from her.

At the time the sister made assurances to her brother, she actually had no interest in the property. This created a significant problem at the Court of Appeal, who allowed an appeal from a judgment in the brother's favour on the basis that proprietary estoppel can only operate where the person making the assurances giving rise to the estoppel actually possesses an interest in the property at the time the assurances are made.

The Supreme Court of Canada reversed this decision, holding that a present interest in property is not a necessary component of the test for proprietary estoppel.

Rather, the Supreme Court held that an "equity" must be

established to give rise to proprietary estoppel when the following requirements are satisfied:

- 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;
- the claimant relies on that expectation by doing or refraining from doing something and his reliance is reasonable in all of the circumstances; and
- 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 and insist on her strict legal rights.

The Court's approach had two significant implications.

Firstly, on this approach, the brother's "equity" arose not at the time when the sister actually received her one third entitlement under the will, but rather at the time the assurances were made—which in this case was before the mother died. This allowed the court to recognize the brother's interest in the property as of the date when the sister would have expected to have taken her interest under the will.

Secondly, a majority of the court broke new ground in directing the sister, in her capacity as estate trustee of her mother's estate, to effect a transfer of the sister's one third interest in the mother's house directly to the brother *in specie*. This ruling was particularly important since the siblings only held an interest in the corpus of the estate, not a specific interest in any asset.

In reaching this result, a majority of the court stressed that once the requirements for proprietary estoppel are satisfied, the court has considerable discretion in fashioning a remedy, refusing to constrain itself by technical requirements—including that the representor actually possess the requisite interest in property at the time the equity, giving rise to the estoppel, comes into existence. The Court went further in *obiter*, suggesting that it is an open question whether proprietary estoppel can attach to an interest in property other than land, which is the circumstance in which it has traditionally been recognized.

Time will tell if this flexibility introduced by the court into the law of proprietary estoppel, both from a substantive and remedial perspective, will trigger an expansion in its scope. It is of particular interest to watch these developments given the unique character of proprietary estoppel as one of the only

forms of estoppel that can found a cause of action.