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PROPRIETARY ESTOPPEL AND COMMON INTENTION CONSTRUCTIVE TRUSTS: IS IT TIME TO ABANDON THE DISTINCTION?

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> "When a person acts in an unconscionable way towards another, how should a court, in seeking to achieve 'practical justice', balance and reconcile values of certainty, consistency arising from precedent, overall coherence in the structure of the law, deference to Parliament on policy issues, and the provision of a remedy appropriate to reverse or prevent harm to the innocent party?"[1]

I. INTRODUCTION

This article considers the above question in the context of informal family arrangements regarding land. Sometimes promises are made as inducements to keep land in the family, especially when farming businesses are concerned.[2] Other times, they reflect arrangements for care and accommodation of elderly relatives who have assets, but want to avoid institutional aged care.[3] The latter are arising with increasing frequency in Australia due to an ageing population, and take many forms. They may involve an older relative who transfers rights to a home to a younger family member in exchange for care. Alternatively, the older relative may sell his or her own home and finance the cost of an extension or granny flat on his or her child's property.[4]

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1 Sir Terence Etherton, "Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle" (2009) 73 The Conveyancer and Property Lawyer 104 at 104 [Etherton, "Constructive Trusts"].

2 *Giumelli v. Giumelli* (1999) 196 C.L.R. 101 (H.C.A.) [*Giumelli*]; *Flinn v. Flinn* [1999] 3 V.R. 712 (Vic.C.A.); W*addell v. Waddell* (2012) 292 A.L.R. 788 (N.S.W.C.A.); *Consolaro v. Consolaro* [2009] W.A.S.C. 240; *Byrnes v. Byrnes* [2012] N.S.W.S.C. 1600; *Thorner v. Major* [2009] 3 F.C.R. 123 (H.L.) [*Thorner*].

3 *Estephan v. Estephan* [2012] N.S.W.S.C. 52 [*Estephan*]; *Ronowska v. Kus* [2012] N.S.W.S.C. 280 [*Ronowska*].

4 *Morris v. Morris* [1982] 1 N.S.W.L.R. 61 (N.S.W.S.C.); *Malsbury v. Malsbury* [1982] 1 N.S.W.L.R. 226. *Menka Tasevska v. Vlado (Larry) Tasevski* [2011] N.S.W.S.C. 174 involved parents providing funds towards the construction of a house for the parents and their adult child and his wife. See also *Doris Irene Taylor v. Marian Streicher* [2007] N.S.W.S.C. 1006; *Krajovska v. Krajovska* [2011] N.S.W.S.C. 903 [*Krajovska*] and *Langford v. Reddy* [2012] N.S.W.S.C. 289. To the extent that some of these arrangements create expectations that an older relative will receive care and accommodation but not an interest in property, that is beyond the scope of this article.

Other scenarios may involve the older relative retaining title and making promises to a younger relative that rights to property will be obtained if the younger relative looks after the older one.[5]

However, these agreements are rarely recorded in writing, and frequently the parties do not discuss what is to happen if the arrangement needs to be undone, or the promises are not fulfilled. In fact, typically, the promises are made, or arrangements entered into, because the parties are on good terms with each other and do not conceive of the possibility of their relations deteriorating.[6] Unfortunately, some of these relationships do break down and the parties are unable to reach agreement on the distribution of property.

If the situation sours to the point of litigation, the plaintiff may seek a constructive trust over the disputed property. This can be achieved through a variety of avenues, including a common intention constructive trust or a constructive trust imposed remedially consequent on a finding of estoppel.[7] This paper examines recent Australian and English case law on these two doctrines. The comparison demonstrates that in Australia, the distinctions between these two categories of informally created trusts are breaking down. It is argued that while there may be a continuing role for common intention constructive trusts in England, the time has come to discard the common intention constructive trust in Australia.[8]

II. Common Intention and Proprietary Estoppel

A. *The Doctrines*

The relationship between the doctrines of common intention trusts and proprietary estoppel has been problematic for some time, and continues to cause difficulty. Because the elements for the two doctrines overlap substantially, this has raised questions as to whether both doctrines should continue to exist. The elements for each doctrine are briefly set out below.

The common intention trust requires three elements:[9]

(1) A common intention for the property to be held on trust;
(2) Detrimental reliance by the plaintiff; and
(3) It would be a fraud by the owner to deny the interest.

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5 *Quinn v. Bryant* [2012] N.S.W.C.A. 377 [*Quinn*]; *Estephan*, *supra* note 3; *Ronowska*, *supra* note 3.

6 Legal advice regarding the consequences of transfer of rights does not prevent the transferor from trusting that the family relationship will not break down: see *e.g.*, *Krajovska*, *supra* note 4.

7 A third category in Australia is a constructive trust imposed to prevent unconscionable behaviour following the breakdown of a family-based joint venture, following *Baumgartner v. Baumgartner* (1987) 164 C.L.R. 137 (H.C.A.) [*Baumgartner*]. The overlap with that doctrine will not be discussed in this piece.

8 In Singapore, the common intention constructive trust is not widely used, as the resulting trust is used to resolve disputes over the family home: see *Lau Siew Kim v. Yeo Guan Chye Terence* [2008] 2 S.L.R.(R.) 108 (C.A.) [*Lau Siew Kim*]. Recently in *See Fong Mun v. Chan Yuen Lan* [2013] 3 S.L.R. 685 (H.C.), Choo J. noted that the English courts have now ruled that the common intention trust is to be preferred in this context. Choo J. also noted a number of issues regarding the interaction of these two forms of trusts which were not resolved by the *Lau Siew Kim* decision.

9 *Hohol v. Hohol* [1981] V.R. 221 (Vic.S.C.); *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685 (N.S.W.C.A.) [*Allen*].

Proprietary estoppel requires:[10]

(1) An expectation by the plaintiff regarding rights to land which has been induced by the defendant;
(2) Action or inaction in reliance on the expectation;
(3) The plaintiff will suffer detriment if the promisor is allowed to resile from the expectation.

Despite the similarity of the substantive elements, issues of remedy have traditionally been distinct. The common intention trust was traditionally regarded as an 'institutional' constructive trust. The classic outcome from a finding of common intention constructive trust is that the plaintiff will be declared to have a beneficial interest in the property, arising from the time of the relevant intention.[11] Under the institutional view, the court is only declaring the right that has already arisen.[12] Initially, the relevant time was viewed as the time of acquisition of the property.[13] In both Australia and England, subsequent developments have added flexibility in relation to the formation of the common intention. In Australia, it is now the case that the parties' intention may have been formed after acquisition and may change over time.[14] Additionally, it is not necessary for the parties to explicitly state the proportion of beneficial interest which is intended to be held by the relying party.[15] In England, it is also accepted that the parties' intention may change over time, and if the parties have an intention for joint beneficial ownership, but their intentions regarding the proportions for such ownership cannot be determined, the court will impute an intention to the parties.[16]

However, a constructive trust is not an automatic remedy upon a successful claim for proprietary estoppel, although it is one possible outcome. Where the plaintiff has successfully proved a case in proprietary estoppel, an 'equity' is raised, and the court will then decide how to satisfy that equity. The likelihood of a plaintiff obtaining a proprietary remedy, and particularly a declaration of constructive trust, will be affected by the approach taken to remedy. Broadly speaking, this is a question of whether the remedy for estoppel will be the 'minimum equity', or whether the assumption will be enforced. It will be demonstrated below that, in relation to estoppel, there is currently some divergence between the approaches taken in the two jurisdictions.

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[10] *Giumelli*, *supra* note 2. This describes the most common form of proprietary estoppel, which is estoppel by encouragement. Estoppel by standing by also exists: *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129. For a discussion of the latter, see K.R. Handley, *Estoppel by Conduct and Election* (London: Sweet & Maxwell, 2006) at paras. 11.002 and 11.006-11.010 [Handley, *Estoppel by Conduct and Election*].

[11] See *e.g.*, Etherton, "Constructive Trusts", *supra* note 1 at 105: "The institutional constructive trust is a property institution, which will have arisen before the date of the court's judgment, and whose existence the court declares as a subsisting private right".

[12] *Allen*, *supra* note 9. Glass J.A. preferred to characterise the common intention trust as an express trust. See also the discussion in *Parsons v. McBain* (2001) 192 A.L.R. 772 (F.C.A.).

[13] *Gissing v. Gissing* [1971] A.C. 886 (H.L.).

[14] *Green v. Green* (1989) 17 N.S.W.L.R. 343 (N.S.W.C.A.) [*Green*]; *Austin v. Keele* (1987) 10 N.S.W.L.R. 283 (P.C.) [*Keele*].

[15] *Green*, *ibid*.

[16] *Jones v. Kernott* [2012] 1 A.C. 776 (S.C.).

B. *Treatment of the Overlap*

The similarity between these two doctrines has been noted in both England and Australia,[17] and there was a period where assimilation seemed likely. For example, in *Austin v. Keele*, Lord Oliver of Aylmerton in the Privy Council stated that a common intention trust is an "application" of proprietary estoppel.[18] In *Yaxley v. Gotts*, Lord Walker noted the overlap of the concepts.[19] By 2007 though, in *Stack v. Dowden*, his Lordship was "rather less enthusiastic" about the idea that assimilation between the doctrines was possible or desirable.[20]

In Australia, the commonality of the doctrines is often noted, and the doctrines are frequently pleaded in the alternative.[21]

Commentators in both jurisdictions have suggested that we could do away with the distinction. In England, calls have been made for courts not to "bother with the illusory distinction" between the two types of claims.[22] In Australia, Dal Pont has suggested that we can use estoppel to do the work of the common intention constructive trust,[23] and Handley treats common intention trusts as having converged with estoppel.[24]

C. *How the Overlap is Dealt With in the Cases*

Nonetheless, for the time being, the doctrines continue to be distinct, at least in theory. The following section demonstrates that in practice, it can be difficult for a trial judge to know what to do when both doctrines are available on the facts.

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[17] See *e.g.*, *Thorner*, *supra* note 2 at 128: Lord Scott of Foscote stated: "One of the features of the type of cases of which the present case is an example is the extent to which proprietary estoppel and constructive trust have been treated as providing alternative and overlapping remedies…". Note however that he was referring to a remedial constructive trust.

[18] *Keele*, *supra* note 14 at 290.

[19] [2000] Ch. 162 at 177 (C.A.). He referred to the statement of Browne-Wilkinson V.C. in *Grant v. Edwards* [1986] Ch. 638 at 656 (C.A.) [*Edwards*] that "[t]he two principles have been developed separately without cross-fertilisation between them: but they rest on the same foundation and have on all other matters reached the same conclusions".

[20] [2007] 2 A.C. 432 at 448 (H.L.) [*Stack*].

[21] In *Joseph Duic v. Emil Duic* [2012] N.S.W.S.C. 76 at para. 86 [*Duic*], Einstein J. referred to the English authorities and noted the overlap between the doctrines. The point was not discussed on appeal: *Duic v. Duic* [2013] N.S.W.C.A. 42. In *Saliba v. Tarmo* [2009] N.S.W.S.C. 581 at para. 38., Nicholas J. said: "In many cases, and this is one of them, claims of a constructive trust and of equitable estoppel may be indistinguishable". This case concerned a successful claim by the promisor's neighbours, who had provided substantial care to the promisor in reliance on her promise that she would leave them half her property in her will. Also, in *Pain v. Pain* [2006] Q.S.C. 335, Lyons J. regarded common intention as part of estoppel. See also *Australian Building and Technical Solutions Pty Ltd v. Boumelhem* [2009] N.S.W.S.C. 460 [*Boumelhem*].

[22] David Hayton, "Equitable Rights of Cohabitees" (1990) The Conveyancer and Property Lawyer 370 at 380; but see Patricia Ferguson, "Constructive trusts—a note of caution" (1993) 109 Law Q. Rev. 114 for a contrary view.

[23] Gino Dal Pont, "Equity's Chameleon—Unmasking the Constructive Trust" (1997) 16 Austl. Bar Rev. 46 [Dal Pont, "Equity's Chameleon"]. For a contrary view, see Darryn Jensen, "Rehabilitating the Common Intention Trust" (2004) 23 U.Q.L.J. 54 [Jensen, "Common Intention Trust"], although this is premised on the argument that estoppel has a compensatory function only.

[24] Handley, *Estoppel by Conduct and Election,* supra note 10 at paras. 11.020-11.021.

The case of *Australian Building and Technical Solutions Pty Ltd v. Boumelhem*[25] provides a good recent example. In this case, Mr. and Mrs. Boumelhem provided funds to their son (John) for him to develop a block of land which was held in his name. Funds were provided by mortgaging their own property.[26] The parents understood that the property would have two duplexes built on it, and on completion, the block would be subdivided and one of the duplexes would be transferred to them. They provided part of the purchase price, and further funds were spent during the construction of the duplexes.

John charged the property as security for guarantees which he had signed to secure advances to his business, and suppliers lodged caveats over the property. His companies ended up in financial difficulties, and John advised his parents to lodge caveats. Finally, John became bankrupt. The development was not complete and subdivision had not occurred. The mortgagee stepped in, obtained a judgment, and was proposing to sell the property. Actions by the suppliers and parents were heard together. The parents asserted a resulting trust and constructive trusts arising from estoppel and pooling under a joint venture. The treatment of the overlap of common intention trust and estoppel will be considered here.

In relation to the estoppel claim, Ward J. noted that it was "akin" to common intention constructive trust cases.[27] Further, in assessing whether the estoppel claim was satisfied, her Honour cited cases on "common intention" trusts, or authorities which assimilated estoppel and common intention trusts.[28] Her Honour considered whether the parents had an intention to obtain an interest in the property, and whether they had acted to their detriment. Her Honour concluded that the parents had "made out the proprietary estoppel or (if there be any sensible difference) a *prima facie* entitlement to a 'common intention' constructive trust."[29]

The convergence of the two doctrines on this set of facts was further compounded by her Honour's treatment of the remedy. The classic view of the common intention trust is that the plaintiff obtains the expected interest. However, her Honour treated the remedy as discretionary, without considering if the finding of a common intention trust affected the result. She stated that:[30]

> Again, whether the satisfaction of the equity arising in the Boumelhem's favour requires the imposition of a constructive trust is a matter for consideration in light of the full circumstances of the case. Those circumstances include whether there is an appropriate equitable remedy falling short of the imposition of a trust.

This treatment of remedy fails to ask whether, under a common intention trust, the parents were automatically entitled to the anticipated interest.[31]

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[25] *Boumelhem*, *supra* note 21.
[26] John fraudulently increased the mortgage over his parents' property.
[27] *Boumelhem*, *supra* note 21 at para. 112.
[28] *Green*, *supra* note 14; *Grant*, *supra* note 19; *Keele*, *supra* note 14.
[29] *Boumelhem*, *supra* note 21 at para. 118.
[30] *Ibid*.
[31] See also *Austin v. Hornby* [2011] N.S.W.S.C. 1059 [*Hornby*].

The questions of whether a constructive trust should be granted, and the timing of any constructive trust if one were to be granted, were both significant issues.[32] The suppliers to John's companies had charges which were subordinate to the interest of the mortgagee, but they asserted priority over the interest of the parents.

After reviewing the authorities, Ward J. noted the lack of "authoritative guidance" on how to determine priority issues between creditors and the constructive trust claimants.[33] Although it did not appear that the creditors had conducted title searches, such searches would not have identified any interests, as the parents had not caveated their interests.[34]

Her Honour stated the issue to be:[35]

> [W]hether there would in this case be an appropriate or available remedy 'to quell the controversy' (adopting their Honours' terminology in *Bathurst*) before me, short of the imposition of a constructive trust and (if not) whether any constructive trust so imposed should be moulded to avoid or minimise prejudice to [creditors]…

Her Honour determined that a remedy short of a constructive trust would be appropriate, and granted a lien over the property for the parents' monetary contributions (which were additional to their contributions to the purchase price) to the amount of $129,000. This had effect from the date of contributions.[36] Accordingly, priority depended upon whether the parents' contributions predated the equitable charges held by the suppliers. So, not only did the parents not obtain the beneficial ownership they expected, they obtained an interest which took effect at a later point in time.

III. Should the Doctrines be Collapsed into One?

In Australia, the authors of *Principles of the Law of Trusts* have noted the differences between estoppel and common intention trusts as the law currently stands.[37] However, they assert that the "common intention" is no different from the assumption generated by an estoppel,[38] and that "where claims to interests in… property are concerned it would be rational to consider integrating the doctrines".[39]

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[32] A resulting trust was granted as to 18% for the parents' contribution to the initial purchase price. However, this did not cover the money spent after purchase, and the constructive trust was argued in relation to those more substantial further financial contributions.

[33] *Boumelhem*, *supra* note 21 at para. 165. At para. 145, her Honour stated: "As a general statement of principle, a constructive trust will be treated as coming into existence at the time of the conduct which gives rise to the trust". See also her Honour's discussion in *Varma v. Varma* [2010] N.S.W.S.C. 786.

[34] It was possible, although not clear, that the suppliers may have provided goods that were used in the development, as the son's business was plasterboarding.

[35] *Boumelhem*, *supra* note 21 at para. 169.

[36] As opposed to the beginning of the venture between the parties.

[37] H.A.J. Ford *et al.*, *Principles of the Law of Trusts*, 4th ed., loose-leaf (Australia: Thomson Reuters, 2010) [Ford, *Principles of the Law of Trusts*] states at para. 22.4020: "The principles upon which relief is awarded are broader in estoppel than under a constructive trust based on the 'common intention' doctrine. An estoppel may sometimes lead to no more than a monetary award whereas a 'common intention' constructive trust identifies the true beneficial owners, and the size of their beneficial interests".

[38] Saying "there is… no practical difference": *ibid.* at para. 22.4350.

[39] *Ibid.*

How would this integration be achieved? Will the common intention trust become a subset of proprietary estoppel, or will the doctrine simply melt away? What does this mean for remedy?

In order to understand if there is any continuing role for both doctrines, it is necessary to examine the approach to remedy in each jurisdiction. This section will illustrate that the distinctions as to remedy are collapsing in Australia, but are still significant in England.[40]

A. *The Australian Approach to Remedy*

As the authors of *Principles of the Law of Trusts* state, the technical position under "a 'common intention' constructive trust is that it identifies the true beneficial owners, and the size of their beneficial interests."[41] Thus, the common intention trust, historically, fulfilled expectations.[42]

However, in practice, the classic treatment of the common intention trust as institutional has been impacted by High Court pronouncements on constructive trusts in other contexts where the High Court has stated that constructive trusts should not be imposed if other remedies are available.[43]

In the absence of specific guidance from the High Court, trial judges apply the High Court's statements on constructive trusts from other contexts to common intention trusts as well. For example, in *Parianos v. Melluish*,[44] Jacobson J. treated the timing of a common intention trust as the same as a *Baumgartner*[45] remedial constructive trust, and regarded both as raising a "personal equity".[46]

Boumelhem is another example of this approach. In *Boumelhem*, the parents expected to receive one of the duplexes on completion of construction. If the case had been addressed squarely as a common intention constructive trust, the parents may have been in a stronger position to assert half ownership of the property, as that was the intention of the parties when the project began. In giving a remedy for estoppel, the remedy was measured by their contributions (*i.e.* financial detriment) only.[47]

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[40] In Singapore, there continues to be a clear remedial divide between constructive trusts and proprietary estoppel, as the remedy for proprietary estoppel is the minimum necessary relief. Although a possible outcome is a proprietary order, the court will only grant the remedy that is necessary to reverse the unconscionability of the defendant's conduct. See *Low Heng Leon Andy v. Low Kian Beng Lawrence* [2013] 3 S.L.R. 710 (H.C.); *Lim Chin San Contractors Pte Ltd v. Shiok Kim Seng* [2013] 2 S.L.R. 279 (C.A.) (which affirmed a requirement of proportionality); *Neo Hui Ling v. Ang Ah Sew* [2012] 2 S.L.R. 831 (H.C.); *Hong Leong Singapore Finance Ltd v. United Overseas Bank Ltd* [2007] 1 S.L.R.(R.) 292 (H.C.).

[41] Ford, *Principles of the Law of Trusts*, *supra* note 37 at para. 22.4020. The intention can be inferred from the evidence: *Green*, *supra* note 14. Financial contributions are useful indicators.

[42] See Jensen, "Common Intention Trust", *supra* note 23 at 77 where it is argued that the common intention trust is perfectionary and "*always* operates to confer beneficial title on the claimant" [emphasis in original].

[43] See *John Alexander's Clubs Pty Ltd v. White City Tennis Club Ltd* (2010) 241 C.L.R. 1 (H.C.A.); *Giumelli*, *supra* note 2; *Bathurst City Council v. PWC Properties Pty Ltd* (1998) 195 C.L.R. 566 (H.C.A.).

[44] [2003] F.C.A. 190 [*Parianos*].

[45] *Baumgartner*, *supra* note 7.

[46] *Parianos*, *supra* note 44 at para. 60. See also *Hornby*, *supra* note 31 at para. 186, where Ward J. said that "if it were that a case to support a common intention constructive trust could be identified, it would not necessarily mean that such a trust should be imposed if lesser relief would be available".

[47] See Dal Pont, "Equity's Chameleon", *supra* note 23 at 70. Dal Pont's view that estoppel can do the work of the common intention constructive trust was influenced by his view that unity of all estoppels

B. *The English Approach*

English law tends to support the classic institutional view of the common intention trust. The relationship between estoppel and the common intention trust continues to be the subject of some discussion in England, since the decisions of *Stack v. Dowden*[48] (constructive trust) and *Thorner v. Major*[49] (estoppel). The common intention constructive trust has continued to have a greater role in England, due to the absence of statute providing for the division of assets upon breakdown of *de facto* relationships. Despite a brief flirtation with the notion of assimilation of common intention trusts and estoppel, it now appears that English courts have turned away from this concept.

Lord Walker in *Stack* highlights the difference between the two doctrines, being the equity from estoppel as opposed to the identification of a beneficial owner arising from a common intention trust.[50] This suggests that the court has no discretion to award a monetary remedy instead of a proprietary interest when using the constructive trust doctrine.

The institutional nature of the common intention trust has also been used by commentators to justify its difference from estoppel. Randall, (looking at the English authorities) argues that the common intention constructive trust is distinct due to the fact that it creates a vested interest in the property, unlimited by proportionality or the notion of minimum equity.[51]

Perceived differences between remedies led to differences of opinion in the House of Lords decision of *Thorner v. Major.*[52] This case dealt with an assumption that a property would be left to the plaintiff on the death of his cousin. The majority held that an estoppel was made out and that the remedy of a constructive trust was appropriate. Lord Scott of Foscote instead used a remedial constructive trust.[53]

This reasoning has been criticised, extra-judicially, by Lord Neuberger saying that:[54]

> [Lord Scott] considered that cases where the claimant relied on a promise he would be left property on the owner's death could not conveniently [be] treated

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was "impending" and that the consequence of proving proprietary estoppel was that the estoppel would enforce assumptions: "A is estopped from denying the equity which B now has".

[48] *Supra* note 20.

[49] *Supra* note 2.

[50] *Stack*, *supra* note 20 at 448-449:

> The claim is a 'mere equity'. It is to be satisfied by the minimum award necessary to do justice… which may sometimes lead to no more than a monetary award. A 'common intention' constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests. [citations omitted]

Note however that Lord Etherton, extra-curially, argues that the constructive trust imposed in *Stack* is a remedial constructive trust rather than an institutional one: Sir Terence Etherton, "Constructive Trusts: A New Model for Equity and Unjust Enrichment" (2008) 67 Cambridge L.J. 265 at 283.

[51] John Randall, "Proprietary estoppel and the common intention constructive trust—Strange bedfellows or a match in the making?" (2010) 4 Journal of Equity 171. See also Elizabeth Cooke, "Estoppel, discretion and the nature of the estoppel equity" in Michael Bryan, ed., *Private Law in Theory and Practice* (New York: Routledge-Cavendish, 2007) 181 at 190, who highlights that merger of the two would result in the loss of a "highly prized" remedial discretion.

[52] *Supra* note 2.

[53] *Ibid.* at 128 and 133.

[54] Lord Neuberger of Abbotsbury, "The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity" (2009) 68 Cambridge L.J. 537 at 549.

> as estoppel cases because circumstances might make it inequitable for the estoppel to be satisfied at all or at least fully… There is, however, real force in the notion that those observations overestimate the flexibility of the constructive trust concept, and, indeed, that they fail to appreciate the flexibility of the remedies available in proprietary estoppel…

This tends to confirm that, in England at least, the constructive trust offers less flexibility in terms of remedy. Lord Neuberger is not the first judge to indicate that he prefers estoppel for its remedial flexibility.[55]

C. *An Ongoing Role for Common Intention Trusts in England*

A couple of observations can be made as to why the continued existence of an institutional constructive trust may be more important in England than in Australia.

First, the certainty offered by an institutional constructive trust is comparatively more significant in England, as it is the primary vehicle for the distribution of assets on the break down of *de facto* relationships. This continued institutional/remedial dichotomy, and consequent inflexibility of remedy, may render the constructive trust the preferred vehicle for *de facto* plaintiffs. In Australia, as this role is performed by statute, the common intention trust has much less work to do. Secondly, in Australia, the prevailing view regarding remedy for proprietary estoppel currently appears to be that *prima facie*, the court should be prepared to enforce the expectation,[56] whereas that does not appear to be the position in England.

Although *Waltons Stores (Interstate) Ltd v. Maher*[57] espoused a single doctrine of equitable estoppel using the minimum equity rationale for relief, the law has been gradually moving away from that position since *Giumelli v. Giumelli*.[58] In that case, the Court failed to endorse the "minimum equity" approach and said, instead, that a court should consider if a lesser remedy will suffice, before granting a constructive trust.[59] The Court also indicated that the effect of a proprietary remedy on third parties will be a consideration to be taken into account.[60]

In *Donis v. Donis*[61] and *Delaforce v. Simpson-Cook*,[62] the Victorian and New South Wales Courts of Appeal interpreted *Giumelli* to have abandoned the minimum equity approach. Instead, these decisions preferred the view that the *prima facie* remedy in a proprietary estoppel case should be enforcement of the assumption. Following these cases, there is now a series of decisions at the appellate level in

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[55] See also Etherton, "Constructive Trusts", *supra* note 1 at 125: "The attractiveness of proprietary estoppel is not undermined, but rather is enhanced, by the wide discretion of the court as to the choice of actual remedy (proprietary or personal), which makes it a particularly appropriate and sensitive tool for achieving justice".

[56] Michael Bryan, "Almost 25 years on: some reflections on *Waltons v Maher*" (2012) 6 Journal of Equity 131 at 133 [Bryan, "Some reflections on *Waltons v Maher*"].

[57] (1988) 164 C.L.R. 387 (H.C.A.).

[58] *Supra* note 2.

[59] *Ibid.* at 113.

[60] *Ibid.* at 125.

[61] (2007) 19 V.R. 577 (Vic.C.A.) [*Donis*].

[62] (2010) 78 N.S.W.L.R. 4 (N.S.W.C.A.) [*Delaforce*].

Victoria and New South Wales endorsing the view that relief in a proprietary estoppel case should be *prima facie* to enforce the assumption.[63]

In England, the role of remedy for estoppel is less clear. Neither *Thorner,* nor the other recent House of Lords decision on estoppel in *Cobbe v. Yeoman's Row Management Ltd*,[64] addressed the question of whether estoppel enforces expectations or reverses reliance detriment. Some statements in *Cobbe* seem to approve the notion that the role of estoppel is to enforce expectations.[65] However, Lord Etherton, extra-judicially, has framed the relief as the "minimum necessary to do justice".[66]

This distinction is important when we consider the future of the common intention constructive trust. In Australia, the common intention trust operates in a smaller sphere and any common intention trust can be fitted within proprietary estoppel, although the converse does not hold true.[67] The true impact of calling these cases 'estoppel' rather than 'common intention trust' relates to remedy.

Fundamentally, we are left with the question whether the common intention trust does anything that estoppel does not. In England, there is still a valid argument that the common intention trust provides more certainty (although less flexibility) than estoppel, and that this certainty may be valuable.

In Australia, the common intention trust is not only less significant, but the remedial distinction is rapidly disappearing. The strong institutional/remedial distinction which still persists in the English cases has substantially weakened in Australia. Accordingly, where it is acknowledged that estoppel will enforce expectations,[68]

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[63] *Donis*, *supra* note 61; *Delaforce*, *ibid*.; *Harrison v. Harrison* [2013] V.S.C.A. 170; *Duic*, *supra* note 21; *Van Dyke v. Sidhu* [2013] N.S.W.C.A. 198 at para. 139 [*Van Dyke*]; *Walsh v. Walsh* [2012] N.S.W.C.A. 57. The High Court has heard an appeal from *Van Dyke*: *Prithvi Pal Singh Sidhu v. Lauren Marie Van Dyke* [2014] H.C.A.Trans. 68. Bant and Bryan note the discrepancy between this approach to estoppel, and the approach in other contexts that a constructive trust should not be granted if other relief is appropriate, stating that "[i]t is of concern that the cases disclose inverse starting points": Elise Bant & Michael Bryan, eds., *Principles of Proprietary Remedies* (Sydney: Thomson Reuters, 2013) at 208. For an argument that *Giumelli* did not alter the law on remedy, and that these decisions should be reconsidered, see Joseph Charles Campbell, "*Waltons v Maher*: History, unconscientiousness and remedy—the 'minimum equity'" (2013) 7 Journal of Equity 171.

[64] [2008] 1 W.L.R. 1752 (H.L.) [*Cobbe*].

[65] Mee argues that Lord Scott's discussion of the role of estoppel illustrates the enforcement of expectations: John Mee, "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" in Martin Dixon, ed., *Modern Studies in Property Law*, vol. 5 (Oxford: Hart Publishing, 2009) 389. This seems consistent with Handley A.J.A.'s interpretation in *Delaforce*, *supra* note 62. Mee says that the English law on estoppel is "arguably in a state of transition (or, perhaps, in a state of confusion)": *ibid*. at 389. Compare the views of Nicholas Hopkins, "Proprietary Estoppel: A Functional Analysis" (2010) 4 Journal of Equity 201.

[66] Michael Bryan asserts that English cases disclose no single remedial objective: Bryan, "Some reflections on *Waltons v Maher*", *supra* note 56 at 133. In 2008, Lord Walker commented, extra-judicially, that "there is a considerable body of English authority which appears to treat the vindication of the claimant's expectation interest as the natural and normal remedy": Robert Walker, "Which Side 'Ought To Win'?—Discretion and Certainty in Property Law" [2008] Sing. J.L.S. 229 at 238.

[67] See also Elizabeth Cooke, "Estoppel and the protection of expectations" (1997) 17 L.S. 258 at 281, where she asserts that in a number of successful estoppel cases, the plaintiffs were in fact unable to frame their claims in constructive trust and needed estoppel to receive their expectations, and therefore submits that "the point of using estoppel is to fulfil expectations".

[68] See also *Quinn*, *supra* note 5, where a granddaughter relied on promises by her grandmother that if she cared for the grandmother, she would have a right to live at the property for life and half of her grandmother's estate would be left to her in her grandmother's will. The care arrangement did not work, but the granddaughter had irretrievably given up secure rental arrangements. The property was going to

the common intention trust is unnecessary, as it duplicates estoppel, but lacks the flexibility of discretionary relief framed to meet the circumstances. Overall coherence of the law, and the ability of the courts to provide tailored justice would be achieved by a clear statement from the High Court that in relation to promises for the acquisition of rights to land, the common intention trust should disappear. However, this requires a clear corresponding statement that the remedy for proprietary estoppel is *prima facie* to enforce the expectation.[69]

IV. Conclusion

In Australia, the common intention constructive trust has been overtaken by proprietary estoppel. Recent judicial pronouncements that the *prima facie* remedy in proprietary estoppel is to enforce the expectation, coupled with the ability of the court to use its discretion to provide a tailored remedy, make estoppel the preferred doctrine for these disputes. If this approach to estoppel is confirmed in the High Court, there will be no need for a separate doctrine of common intention trusts, as estoppel will truly be able to do the work.

The certainty offered by a common intention trust is however, more desirable in England for several reasons. Given the continued reliance on the common intention trust to determine property disputes on the breakdown of *de facto* relationships, the certainty offered by an institutional view of the common intention trust is more desirable. Furthermore, the English view on the role of proprietary estoppel is currently very unclear. If proprietary estoppel does not enforce expectations, then the common intention trust continues to be significant in appropriate cases.

be sold. She was awarded compensation substantially in the expectation amount (there was a reduction to allow for the acceleration of the testamentary promise).

[69] Aitken argues that *Delaforce* stated the matter too broadly, and that the domestic-commercial distinction is important in Australia, as well as in England. He asserts that in commercial cases, the "minimum equity" principle is still applicable: Lee Aitken, "The future of the 'minimum equity', and the appropriate 'fault line' in promissory and proprietary estoppel" (2010) 33 Austl. Bar Rev. 212. This may not be a complete picture, as the commercial case discussed does not deal with land.