SUPREME COURT OF QUEENSLAND

CITATION:	*Nendy v Armstrong & Ors* [2020] QSC 380
PARTIES:	**PHILIP YEWIM NENDY** (applicant) **v** **FRANCIS ARMSTRONG AS ADMINISTRATOR FOR THE ESTATE OF THE LATE TERENCE KENNETH BRIDGES** (first defendant) **SHARON ANN WATSON, GAIL MAREE GERRISH, DEBRA LEE LAMB, SUZANNE BUCHMEULLER, JACQUELINE HUMPHREYS, JANET KATHLEEN ROSS AND SCOTT ANDREW HUMPHREYS** (second defendants)
FILE NO:	BS 14192 of 2019
DIVISION:	Trial Division
DELIVERED ON:	18 December 2020
DELIVERED AT:	Brisbane
HEARING DATE:	22 and 23 October 2020
JUDGE:	Holmes CJ
ORDERS:	**1. The second defendants' counterclaim is dismissed.** **2. The property at 37 Pine Street Hamilton is declared to be held on trust for the applicant, with the orders giving effect to that trust to be determined after submissions.**
CATCHWORDS:	ESTOPPEL – ESTOPPEL BY CONDUCT – EQUITABLE ESTOPPEL GENERALLY – where a property at Hamilton ("the Property") is registered in the name of Mr Terence Bridges, the deceased – where the applicant seeks a declaration that the Property is held on trust for him, and an order for transfer of its title to him – where the applicant claims an equitable estoppel in respect of the Property on the basis that he financially and materially supported the deceased over a 20 year period in reliance on the deceased's verbal promise that he would leave the Property to the applicant – where the second defendants contend that s 59 of the *Property Law Act* 1974 precludes an equitable estoppel from arising because the promise was not in writing – whether the applicant has established a right to relief based on proprietary estoppel LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – LAND – ADVERSE POSSESSION – WHAT AMOUNTS TO ADVERSE POSSESSION – GENERALLY – where the second

defendants assert a right to the Property on the basis that their grandmother, Mrs Humphreys, acquired the Property by adverse possession and left it by will to their father, who in turn left it to them – where Mrs Humphreys occupied the Property with the permission of the deceased for a period spanning over 20 years, beginning in about June 1974 – where the second defendants contend that this arrangement should be characterised as a tenancy at will which was determined at the expiration of one year, such that the deceased's title to the Property was extinguished in about June 1987 by virtue of ss 13 and 24(1) of the *Limitation of Actions Act* 1974 – where the applicant contends that Mrs Humphreys lived at the property with the consent of the deceased, so that time could not begin to run for the purposes of s 13 of the *Limitations of Actions Act* 1974 – where the applicant contends that any right Mrs Humphreys had arising out of adverse possession was a personal right which entitled her only to make an application to be registered – whether Mrs Humphreys was a licensee or a tenant at will – whether Mrs Humphreys, and consequently the second defendants, acquired the Property through adverse possession

Land Title Act 1994 (Qld), s 4, s 102, s 184, s 185
Limitation of Actions Act 1974 (Qld), s 13, s 18, s 19, s 24(1)
Property Law Act 1974 (Qld), s 59
Uniform Civil Procedure Rules 1999 (Qld), r 166

Ben-Pelech v Royle [2020] WASCA 168, cited
Campbell v Turner & Ors [2008] QCA 126, applied
Delaforce v Simpson-Cook (2010) 7 ASTLR 65; [2010] NSWCA 84, cited
Giumelli v Giumelli (1999) 196 CLR 101; [1999] HCA 10, applied
Hogan v Hand (1860) 2 Legge 1244, distinguished
McNab v Graham (2017) 53 VR 311, applied
Maddison v Alderson (1883) 8 App Cas 467, applied
Miscamble v Phillips [1936] St R Qd 136, cited
Mulcahy v Curramore [1974] 2 NSWLR 464, cited
O'Neil v Hart & Anor [1905] VLR 107, considered
Pipikos v Trayans (2018) 265 CLR 522; [2018] HCA 39, considered
Powercell Pty Ltd v Cuzeno Pty Ltd (2004) 11 BPR 21,429; [2004] NSWCA 51, considered
Radaich v Smith (1959) 101 CLR 209; [1959] HCA 45, cited
Ramnarace v Lutchman [2001] 1 WLR 1651, considered
Re Johnson [2000] 2 Qd R 502; [1999] QSC 197, cited
Riches v Hogben [1985] 2 Qd R 292; [1985] QSCFC 117, considered
Riches v Hogben [1986] 1 Qd R 315, considered
Rogers v Rogers [2001] VSC 141, considered

Sidhu v Van Dyke (2014) 251 CLR 505; [2014] HCA 19, cited
Tipperary Developments Pty Ltd v Western Australia (2009) 258 ALR 124; [2009] WASCA 126, considered
Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387; [1988] HCA 7, considered

COUNSEL: N H Ferrett QC, with J P Morris, for the applicant
No appearance for the first defendant
D W Marks QC, with M R Bland, for the second defendants

SOLICITORS: Platinum Lawyers for the applicant
No appearance for the first defendant
QBM Lawyers for the second defendant

[1] Mr Nendy, the applicant, seeks a declaration that a property at 37 Pine Street, Hamilton is held on trust for him, and an order for transfer of its title to him. The property in question is registered in the name of Terence Bridges, having been inherited by him on the death of his mother, Gladys Bridges, in 1974. Mr Bridges died intestate in 2007 and his estate has never been administered. Mr Nendy claims an equitable estoppel in respect of the property on the basis that he financially and materially supported Mr Bridges over a period of about 20 years in reliance on the latter's promise to give him a property which he owned in Australia. (It is common ground that the Hamilton property was the only one which Mr Bridges owned.) In the alternative, Mr Nendy seeks equitable damages.

[2] The first defendant was appointed by the court as administrator ad litem of Mr Bridges' estate and has taken no active part in the trial. The order appointing him directed him, inter alia, to advertise in newspapers throughout Australia to establish whether Mr Bridges had any living relatives or whether there were any parties interested in his estate. No evidence of any responses having been placed before me, I infer that there were none. The second defendants ("the Humphreys heirs") are seven individuals who resist Mr Nendy's claim and by counterclaim assert a right to the property on the basis that their grandmother, Mrs Rosina Humphreys, acquired it by adverse possession and left it by will to their father, who in turn, left it to them.

[3] The case is an unusual one: neither side is in a position to contradict the evidence on which the other relies. The trial proceeded on affidavits without cross-examination of any of the deponents. The exercise, then, is one of drawing inferences from, and applying the law to, facts which, although not agreed, are undisputed.

The factual background to the adverse possession claim

[4] The Humphreys heirs' side of the story is this: Mrs Gladys Bridges lived in her property at Pine Street until her death in June 1974. Before her death, during a period of illness, her neighbour, Mrs Humphreys, came to live with her, in order to look after her and help with the housekeeping. Mrs Bridges' son, Terence Bridges, was living in Papua New Guinea when his mother died and he inherited the property. With Mr Bridges' agreement, Mrs Humphreys stayed on in the house to look after it on the

basis that she would pay the rates and the utilities bills, which she did. Her husband lived in the house with her for a period leading up to his death in 1978. In 1989, Mrs Humphreys' son moved into the property to live with her and remained there after her death in 2000 until his own death in 2017. Mrs Humphreys left her entire estate to her son, who in turn left his estate to his seven children (the Humphreys heirs) in equal shares. One of those children, Ms Buchmueller, has sworn an affidavit in which she speaks of her grandmother's looking after the property as if it were her own and holding family gatherings there.

[5] Apart from Ms Buchmueller's account, the evidence as to the arrangement with Mrs Humphreys is documentary. The Public Curator, whose file is in evidence, administered Mrs Bridges' estate. An official from the Public Curator's office wrote to her son, Mr Bridges, asking him to complete a "General Report". He did so; the report is dated 6 August 1974. The following questions and answers are of particular interest here:

56.	a) Who is occupying ~~or in charge of deceased's~~ property? b) Is any expense being incurred on this account?	a) Mrs R Humphreys b) No
57.	a) Is deceased's property rented or leased? If so, advise the names of the tenants, the property which they occupy, the amount of rental and the date to which the rent is paid. If necessary, attached a statement. b) Is there a lease or agreement for lease? (If so, please forward to the Public Curator.)	a) No rent, Mrs Humphreys is occupying house and at her request is paying all service charges, and a letter of authority to enable her to claim pensioners rebate on rates would be appreciated. b) No

The words "or in charge of deceased's" in the question "Who is occupying or in charge of deceased's property?" are struck through, so that the question is simply as to who is occupying the property. Mr Bridges' answer and his response to the following question, suggest that he had already had a conversation with Mrs Humphreys about her continued occupation of the property.

[6] A further question in the General Report asks in whose custody

> "Title Deeds, leases, bank books, share certificates, life and fire insurance policies and other securities"

are held, and the answer is

> "Believe a bank, if not Mrs R Humphreys should be able to obtain".

The form also asked for a contact number regarding arrangements for valuation of the property, and Mrs Humphreys' phone number was given.

[7] In his letter returning the report, Mr Bridges said that any further information could be obtained from Mrs Humphreys. He also asked the Public Curator to give a letter of authority to Mrs Humphreys to enable her to obtain a pensioner's rebate on council rates. The Public Curator's file contains another letter under Mr Bridges' hand, which may have accompanied the General Report. It certifies that Mrs Humphreys "is

entitled to occupy the premises"; as he is residing overseas, it would be appreciated if she could obtain any benefits to which an aged pensioner might be entitled.

[8] The Public Curator's office responded in February 1975, noting that Mr Bridges has

> "…arrange[d] for Mrs R Humphries [sic] to occupy your mother's premises".

It asks who is to take responsibility for electricity, gas and rates accounts, and notes that if it is to be Mrs Humphreys, arrangements will be made to transfer the services into her name. However, Mr Bridges is informed that the pensioner's rebate on rates will not be available unless the property is transferred into her name. Subsequent letters in July and November 1975 to Mr Bridges (which, like the February letter, went unanswered) ask again whether the accounts are to be transferred into his name and inform him that Mrs Humphreys has advised the office that she cannot receive a pensioner's discount unless the rates notices are transferred into her name.

[9] In March 1976, a note on the Public Curator's file records that the "property is occupied by Mrs R Humphreys" and says that confirmation should be sought that the electricity, gas and telephone accounts are in her name. A letter was duly written to Mrs Humphreys, making that enquiry. She responded by saying:

> "We had the phone cut off when we took the house over as Mrs Gladys E. D. Bridges passed away in June 1974 and on the 8 July 1974 we had the Electricity, Gas and Rates put in my name and have been paying them all as was asked of me."

(Receipts confirm that as early as July 1974, Mrs Humphreys was paying for electricity and continued to meet accounts for utilities and the provision of other services to the property. In October that year as "the occupier of the premises", she requested and paid for the Council's cleaning of a sewer drain.) The Public Curator then advised Telecom, as it then was, that Mrs Humphreys, by whom "the property is presently occupied" would arrange to allow its technicians to disconnect the telephone service.

[10] It does not appear that Mrs Humphreys ever succeeded in obtaining a discount on the rates. In June 1981, she wrote to an official, probably in the Valuer-General's office, asking for correction of the rates notices and saying that on the death of Mrs Bridges

> "…the place was passed over to me to look after [and] pay the rates which I had changed to my name then with the permission of the only living relation and he lives in New Guinea and won't be coming back to Australia so that leaves me entirely in charge of everything this way…"

She asks for a pensioner discount and for the name "Humphreys" to appear on the rate notice. She seems to have had a partial success, because the rates notices in evidence from 1985 are directed to

> "EST GLADYS E BRIDGES DECD C/- MRS R J HUMPHREYS 37 PINE STREET HAMILTON".

But the last available record on the Public Curator's file is a 1993 memorandum recording that Mrs Humphreys has lived in the house since 1973 and has maintained

the property, in particular, painting it and paying rates and outgoings, but is having difficulty in continuing to paying the rates without a rebate. It is noted that the Council will not give a rebate because she is not the owner, and Mr Bridges cannot be located.

The pleadings concerning the claim to adverse possession

[11] On the question of adverse possession, the Humphreys heirs plead in their defence and counterclaim as follows:

> "13. In about June 1974, Terence Bridges gave exclusive possession of the land to Rosina Jane Humphreys for an indefinite period.
>
> Particulars
>
> (i) Terence Bridges allowed Rosina Humphreys the full use of the land;
> (ii) Terence Bridges asked Rosina Humphreys to pay all rates and other outgoings on the land;
> (iii) Terence Bridges asked Rosina Humphreys to look after the land and the house situated thereon;
> (iv) Terence Bridges otherwise left Rosina Humphreys in charge of the land.
>
> 14. In the premises, Rosina Humphreys became a tenant at will of the land."

[12] The pleading continues by asserting that by virtue of s 18(1) of the *Limitation of Actions Act* 1974, the tenancy at will was determined in about June 1975, when Mr Bridges' right of action to recover the property accrued, so that thereafter Mrs Humphreys was in adverse possession of the land for the purposes of s 19(1) of the Act. It is pleaded that Mrs Humphreys lived in the house and used the property as if she were the owner, paid the rates and outgoings and maintained the house and land in good condition. Mr Bridges not having brought any action to recover possession, it is alleged that his title was extinguished in about June 1987 by virtue of ss 13 and 24(1) of the Act, so that Mrs Humphreys acquired title at that time. She died in June 2000, leaving her estate to her son, who died in 2017, in turn leaving his estate to his children.

[13] In his reply, Mr Nendy originally admitted the allegations in paragraph 13 of the defence and counterclaim "in so far as" Mr Bridges had given Mrs Humphreys a right to exclusive possession of the property for an indefinite period in return for her maintaining and looking after it and making payment of all outgoings. He also admitted, rather obscurely, "that in respect of any tenancy which arose", Mrs Humphreys was a tenant and any tenancy was at will. He was given leave to amend that pleading so as to remove references to exclusive possession and admit instead that Mr Bridges gave Mrs Humphreys a right to occupy the property, and to withdraw the admissions that she was a tenant and that any tenancy was at will.

[14] Mrs Humphreys, Mr Nendy pleads, was not in adverse possession, because she possessed the property with the consent and permission of Mr Bridges, pursuant to the agreement that she occupy it on the basis of maintaining it and paying the outgoings, and she had complied with that agreement. He further pleads that any right

Mrs Humphreys had was a personal right, simply entitling her to make an application to be registered. That right was not exercised, and it was not capable of forming part of her estate or her son's.

Legislative provisions relevant to adverse possession

[15] The limitation period for actions to recover land is set out in s 13 of the *Limitation of Actions Act*:

> **13 Actions to recover land**
>
> An action shall not be brought by a person to recover land after the expiration of 12 years from the date on which the right of action accrued to the person or, if it first accrued to some person through whom the person claims, to that person.

Section 24(1) of the Act provides for the extinguishment of title in the person entitled to bring an action upon the expiration of the limitation period.

[16] Section 18 of the *Limitation of Actions Act* deals, in relation to particular forms of tenancy, with the accrual of a right of action in a person entitled to land:

> **18 Accrual of right of action in cases of certain tenancies**
>
> (1) A tenancy at will shall, for the purposes of this Act, be deemed to be determined at the expiration of a period of 1 year from the commencement thereof unless it has previously been determined and accordingly the right of action of the person entitled to land subject to the tenancy shall be deemed to have accrued on the date of its determination.
>
> (2) A tenancy from year to year or other period without a lease in writing shall, for the purposes of this Act, be deemed to be determined at the expiration of the first year or other period and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued on the date of its determination.
>
> (2A) Where rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued on the date the rent was last received.

[17] Mr Nendy had pleaded, in reliance on s 18(2A), that if there were a tenancy, Mr Bridges' right of action had not accrued so long as Mrs Humphreys continued to pay rent (in the form of maintaining the property and paying outgoings), which she did until June 2000. However, it does not, in fact, appear that ss 18(2A) qualifies s 18(1), as opposed to s 18(2). The provision as it appeared in the Act as enacted was in the following form:

> **18. Accrual of right of action in cases of certain tenancies. [Cf. 9 Eliz. 2 No. 7, s. 16; U.K. 1939, s. 9; Vic. 1958, s. 13].**
>
> (1) A tenancy at will shall, for the purposes of this Act, be deemed to be determined at the expiration of a period of one year from the

commencement thereof unless it has previously been determined and accordingly the right of action of the person entitled to land subject to the tenancy shall be deemed to have accrued on the date of its determination.

(2) A tenancy from year to year or other period without a lease in writing shall, for the purposes of this Act, be deemed to be determined at the expiration of the first year or other period and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued on the date of its determination.

Where rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued on the date the rent was last received.

The existence of s-s 18(2A) in the current legislation, it is clear, is no more than the result of a re-numbering, and does not reflect any legislative intent to change its effect. It follows that it is applicable only to periodic tenancies (those dealt with in s 18(2)) where there is no lease in writing.

[18] Section 19(1) of the *Limitation of Actions Act* provides as follows:

19 Right of action not to accrue or continue unless there is adverse possession

(1) A right of action to recover land shall be deemed not to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (adverse possession) and where under the provisions of this Act such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall be deemed not to accrue unless and until adverse possession is taken of the land.

[19] Also relevant are some provisions of the *Land Title Act* 1994. In s 4, the definition section of that Act, "adverse possessor" of a lot is defined as meaning a person "…

(a) against whom the time for bringing an action to recover the lot has expired under the *Limitation of Actions Act* 1974; and

(b) who, apart from this Act, is entitled to remain in possession of the lot…"

Part 6, div 5 of the Act provides for an application by an "adverse possessor" for registration as owner of a property. In particular, s 102 provides that the Registrar is to refuse to undertake that registration if he or she

"…is not satisfied that the information and documents in support of the application establish that the applicant is an adverse possessor".

Section 184 of the Act provides that a registered proprietor holds the interest in a lot free from all but registered interests, but s 185 creates some exceptions, relevantly as follows:

185 exceptions to s 184

1. A registered proprietor of a lot does not obtain the benefit of s 184 for the following interests in relation to the lot –

…

(d) The interest of a person who on application would be entitled to be registered as owner of the lot because the person is an adverse possessor…"

Adverse possession if Mrs Humphreys held as a tenant at will

[20] The competing positions of the parties were, for the Humphreys heirs, that Mrs Humphreys occupied the property pursuant to a tenancy at will, while Mr Nendy contended that she had no more than a licence to occupy. But Mr Nendy says that even if it were a tenancy at will, s 19(1) of the *Limitation of Actions Act* had the effect that Mr Bridges' right of action did not accrue unless and until Mrs Humphreys was in adverse possession. It was necessary for a person seeking title by adverse possession to establish both that the limitation period had expired and that the common law requirements in relation to adverse possession were met; that was the consequence of the definition of "adverse possessor" in the dictionary to the *Land Title Act*, as was recognised in *Re Johnson*.[1] Any relevant possession must be

"…adverse, not by consent of the true owner";

a principle stated in *Mulcahy v Curramore Pty Ltd*[2] and adopted more recently by the Western Australian Court of Appeal in *Ben-Pelech v Royle*.[3] Mrs Humphrey's possession was not at any time adverse because she had Mr Bridges' consent to her occupation, so that the limitation period never began to run against him and his title was never extinguished.

[21] In any event, in Mr Nendy's contention, all that Mrs Humphreys had, at the highest, was a right to apply for registration as the title-holder. In 1936, the Full Court had held, in *Miscamble v Phillips*,[4] that adverse possession could not be acquired as against the registered proprietor of land under the Torrens system. The legislature had altered that position with the enactment of s 50 of the *Real Property Acts Amendment Act* of 1952. Part III of that Act dealt with titles by possession. Section 46 contained a general prohibition on obtaining

"…title by possession to any land under the Acts or any interest therein"

except in accordance with the Act. Section 50 enabled any person

"…who would have obtained a title by possession to any land under the [Real Property] Acts if that land had not been under the Act"

to apply for a certificate of title. The mechanism for such an application was set out in ss 51-56 of the Act and s 57 permitted the issue of a certificate of title where the registrar was satisfied that the applicant's possession would have given him or her a title by possession but for the land being Torrens system.

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1 [2000] 2 Qd R 502 at 505.
2 [1974] 2 NSWLR 464 at 475.
3 [2020] WASCA 168 at [54].
4 [1936] St R Qd 136.

[22] That remained the case, it was argued for Mr Nendy, under the *Land Title Act*: pt 6 div 5 of the Act provided a similar mechanism for application for registration, which entailed satisfying the Registrar that the applicant was an "adverse possessor".[5] Mrs Humphreys had no more than a right to apply, which was not an interest capable of transmission to her heirs.

[23] There are, it seems to me, some flaws in these arguments. If the arrangement with Mr Bridges were such that Mrs Humphreys held the property on a tenancy at will, for the purposes of the *Limitation of Actions Act*, that tenancy was deemed determined in mid-1975 by virtue of s 18(1). The period of limitation for recovery of the property would then commence to run from mid-1975 in Mrs Humphreys' favour. Section 19(1) of the Act contemplates by "adverse possession" no more than that the land be

> "…in the possession of some person in whose favour the period of limitation [could] run";

which would be the case if this were a tenancy at will.

[24] Importantly, the cases to which Mr Nendy's counsel referred, *Re Johnson*, *Mulcahy v Curramore* and *Ben-Pelech v Royle* were not tenancy cases. The principle enunciated in *Mulcahy v Curramore*, set out in full, is as follows:

> "Possession *which will cause time to run under the Act* is possession which is open, not secret; peaceful, not by force; and adverse, not by consent of the true owner".[6] (Italics added)

Ben-Pelech makes it clear why in circumstances which do not involve a tenancy it is necessary to establish the absence of consent to possession:

> "The right of adverse possession arises because, and when, the owner's right to bring an action to eject the party in possession has been barred by the expiry of the applicable limitation period.[7]
>
> …
>
> The owner's consent to possession by a claimant defeats a claim founded on adverse possession because it means that time did not start to run against the owner – a person who consents to another occupying or possessing land they own has no claim to eject the other, unless and until they withdraw the consent."[8]

[25] But a tenant at will is in a different situation because time begins to run by force of the statute, whether or not the owner is consenting. Assuming a tenancy at will, by virtue of ss 13, 18(1) and 24(1) of the Act, 12 years later, in 1987, Mr Bridges' title to the land was extinguished. In that event, Mrs Humphreys would meet the definition of "adverse possessor" in the *Land Title Act*: she would be a person against whom the time for an action to recover the property had expired and who, apart from the *Land Title Act*, was entitled to remain in possession of the property. That conclusion is

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5 Section 102.
6 [1974] 2 NSWLR 464 at 475.
7 (2020) WASCA 168 at [53].
8 At [56].

consistent with the analysis of the Privy Council in *Ramnarace v Lutchman*[9] of provisions identical in effect to s 13 and s 18(1) (although the relevant limitation period was 16 years, rather than 12):

> "The effect of [the relevant provisions] taken together is that if no action is taken by the true owner his title is extinguished after the expiration of 17 years from the commencement of the tenancy even though the possession of the occupier is permissive throughout… It was the deliberate policy of the legislature that the title of owners who allowed others to remain in possession of their land for many years with their consent but without paying rent or acknowledging their title should eventually be extinguished."[10]

[26] As to what right Mrs Humphreys had if she were indeed an "adverse possessor" on that basis, there is a critical difference between the *Real Property Acts Amendment Act* of 1952 and the *Land Title Act.* The former, in s 46, precluded the holding of an interest as adverse possessor except through the process of application for title; while s 50 made it clear that except through that statutory process, title through adverse possession could not be obtained to land held under the *Real Property Acts*. There exists no similar barrier to the acquisition of an interest by adverse possession in the *Land Title Act*. To the contrary, s 185(1)(d) recognises the interest of an adverse possessor prior to an application for registration as an exception to the registered proprietor's entitlement to hold his or her interest free of unregistered interests. An adverse possessor holds, then, not merely a right to apply for registration, but an interest effective against the registered proprietor and capable of transmission.

Admission of exclusive possession?

[27] The submissions for the Humphreys heirs began with the proposition that because Mr Nendy's amended reply had admitted the allegations in paragraph 13 of the defence and counterclaim "in so far as" Mr Bridges gave Mrs Humphreys a right to occupy the property, and had not actually denied the allegation that he gave her exclusive possession, he was taken, by virtue of r 166(1)(a) of the *Uniform Civil Procedure Rules* 1999, to have admitted that allegation, which was one of fact.

[28] However, paragraph 13 seems to me to plead a mixed allegation of fact and law: the facts in relation to the nature of the possession granted are pleaded as particulars, and the assertion of exclusive possession represents the contended-for inference from those facts, that such was the legal right thereby conferred. In any event, it remains for a party to plead the facts to support an asserted conclusion; r 166 cannot assist if the material facts necessary to support that conclusion are not pleaded or are not proved. [11] In this case, the question is whether the particulars pleaded at 13(i) – (iv) justify the pleaded conclusion, that exclusive possession was granted. I do not think, then, that r 166 applies, or that Mr Nendy is bound by what may have been an oversight in his amendment of the pleading. The question remains as to what legal conclusion is to be drawn from the particulars pleaded in paragraph 13.

Tenancy at will or licence?

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9 [2001] 1 WLR 1651.

10 At 1655 [12].

11 *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship /Traineeship Scheme Ltd* [2008] QCA 100 at [35].

[29] The essential feature of a tenancy distinguishing it from a licence is, as the Humphreys heirs submit, that it grants exclusive possession to the tenant. They relied on this passage from the judgment of Windeyer J in *Radaich v Smith*:

> "What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a *legal right of exclusive possession* of the land for a term or from year to year or for a life or lives. If he was, he is a tenant." [12]

Citing this passage with approval, the Privy Council in *Ramnarace v Lutchman*[13] observed that a tenancy at will, although of indefinite duration, in all other respects shared the characteristics of a tenancy. Their Lordships noted, however, that although an occupier could not be a tenant without exclusive possession, it did not follow that an occupier who had exclusive possession was necessarily a tenant.[14] The Humphreys heirs' pleading that Mrs Humphreys became a tenant at will on the premise that she had been given exclusive possession of the land is, accordingly, not necessarily sound.

[30] To support their contention that the relevant arrangement was a tenancy, the Humphreys heirs pointed to the following features. In the questions and answers at 57(a) and 57(b) of the General Report which Mr Bridges had completed, he had responded to the question as to whether the property was rented by giving the details of the arrangement with Mrs Humphreys. The agreement was that the utilities would be moved into her name to enable her to occupy the property as her own. It was to be expected that a caretaker would not have to pay anything, whereas Mrs Humphreys had met the outgoings. The fact that she took responsibility for the rates was characteristic of someone who was more than a licensee. The property was left in Mrs Humphreys' charge for her own benefit to enjoy as her own home. That must have included a right to exclude others from entering it and occupying it. There was no suggestion that Mr Bridges had any intention of jointly occupying the property with her. In fact, Mrs Humphreys had permitted her husband to occupy the property with her, which was inconsistent with a licence.

[31] This was not, the Humphreys heirs contended, a caretaking arrangement in which a person was left in occupation for the benefit of a title-holder. The Privy Council had drawn the relevant distinction in *Hogan v Hand.*[15] There, an American resident sought to recover land which his father had in 1796 (60 years earlier) left in the possession of two of his servants before he left the colony of New South Wales. The two former servants were said to have taken possession of the land either as caretakers and bailiffs or pursuant to a promise that they should retain it either for their lives or until the return of the owner. According to the New South Wales Supreme Court, sitting on appeal from the trial judge (also a member of the appellate bench), the evidence "preponderated very considerably" in favour of the promise that they could retain the property. The two men stayed on the property, paying no rent and indeed refusing an

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12 (1959) 101 CLR 209 at 222.
13 [2001] 1 WLR 1651.
14 At [16].
15 (1860) 2 Legge 1244.

approach from the owner's agents for the payment of rent on the ground that they had his permission to occupy it rent-free; however, they made a gift to him of some pigs as acknowledgement of their tenancy. The question was whether the son's claim was statute-barred; the court considered that it was.

[32] On appeal, the Privy Council observed that it made no practical difference whether the former servants were caretakers or tenants at will. (That was because there was no statutory determination of a tenancy at will by the effluxion of time, such as now exists in s 18 of the *Limitation of Actions Act*; so that, whatever the arrangement, it was up to the parties when it ended.) However, their Lordships accepted, the evidence leaving "no reasonable doubt", that the two men's possession of the land was not as servants but for their own benefit, as tenants at will of the owner. The death of the father determined the "will" which underlay the tenancy; his son then acquired a right of entry as his heir; and the period which had lapsed since that event was not such as to bar his right of action. The point made by the Humphreys heirs was that Mrs Humphreys, like the two former servants in that case, was in possession of the property for her own benefit, and she was similarly to be regarded as holding it as a tenant at will.

[33] Mr Nendy contended that if the arrangement with Mr Bridges amounted to his granting Mrs Humphreys a licence to occupy for an indefinite period, her possession could not be adverse. Time did not start to run against Mr Bridges because there was no basis on which he could eject her without withdrawing his consent to occupation. In *Hughes v Griffin and Anor*,[16] the English Court of Appeal held that time could not run in favour of a licensee, so that he or she could not acquire title by adverse possession. The documentary evidence, in the form of letters from Mr Bridges and notes on the Public Curator's file, referred to the property being "occupied" by Mrs Humphreys, not to any possession as a tenant. Nor did what was known of the arrangement between Mr Bridges and Mrs Humphreys suggest that she was to have a possession which would enable her to exclude him from the property.

Conclusions on the adverse possession claim

[34] I do not think the decision in *Hogan v Hand* is of great assistance in this case, because it seems to turn very much on the promise made by the land-owner that the two men could retain the property at least until he returned; without, apparently, any conditions as to their looking after it on his behalf. The owner's agents clearly regarded the two as tenants; as they regarded themselves, albeit without any obligation to pay rent.

[35] The distinction between possession as a caretaker and possession as a tenant was also considered in *O'Neil v Hart and Anor*,[17] a decision of Madden CJ in the Supreme Court of Victoria. This was a contest between siblings. The plaintiff claimed that by her father's will she was entitled to an interest in one half of the property. Her brother, however, maintained that their father had contracted to give him possession of the property so that he was at the least a tenant at will, or, alternatively that he obtained title to it by virtue of his possession of it for many years. The rate assessment notices were in his name and he had paid them over the years. The limitation period for the testator to recover the property having expired before the latter's death, he was entitled to the property.

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16 [1969] 1 WLR 23.

17 [1905] VLR 107.

[36] Madden CJ articulated the question in this way

> "Was the possession his own? A person may be in actual possession and yet his possession be that of somebody else. That is always the case where, for instance, a man goes to England for a more or less extended visit, leaving his servants in occupation of his house; then the occupation is that of the servants, but the possession is that of the master. So the question here is – Was the occupation of the son that of a bailiff or caretaker? If so, then his possession was that of his father, and not his own, and the Statute [of Limitations] never was running in his favour."[18]

The Chief Justice observed that it was an easy thing for a trespasser to show that his occupation of a property represented his own possession; but where someone went into occupation of a property as exercising the possession of another person, it was up to him when to show that occupation began to be for himself. Notwithstanding that the payment of rates supported some inference in the son's favour that he was the owner, in fact, his possession was that of his father.

[37] There are indications either way in relation to Mrs Humphreys' possession of the property. As the Humphreys heirs point out, Mr Bridges in the General Report explained her position in response to a question as to whether the property was rented or leased, and her occupation very much resembled that of an owner, including her payment of rates.

[38] But significantly, no document authored by Mr Bridges, Mrs Humphreys herself or the staff of the Public Curator's office ever referred to Mrs Humphreys as a tenant. The correspondence, from both Mr Bridges and Mrs Humphreys, is not consistent with a landlord-tenant relationship. Mrs Humphreys never described herself as a tenant; even when she was endeavouring to have the rates notice transferred into her name, she did not suggest that she had that status. Mr Bridges speaks of her as being "entitled to occupy" the property in his 1974 letter. It is true that Mrs Humphreys met the outgoings, but according to the General Report, that was because she asked to do so, not because it was asked of her by Mr Bridges.

[39] In that report, Mr Bridges appears to have struck out the words "in charge of", which suggests he did not regard her as having any authority in relation to the property. In contrast, she in her 1981 letter describes the property as "passed over to [her] to look after"; she is "entirely in charge of everything" in Mr Bridges' absence. Even that language suggests a delegated responsibility from the owner, not occupation by somebody with the rights of a tenant. It is consistent with the position of someone who has been asked to live in and maintain the property: a caretaker's position.

[40] Although she evidently came to consider the house her home over the years, there is no evidence that Mrs Bridges ever regarded herself as having any acquired any form of interest in it. Neither her will nor her son's refers to the property as part of the estate being devised.[19] Nothing about the arrangement suggests the exclusive possession typical of tenancy, with Mrs Humphreys able to insist on its enjoyment without intrusion from Mr Bridges. Her position seems to me akin to that of the son

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18 At 117.

19 Neither will, though, contains any particulars of the property forming part of the relevant estate and the evidence is silent as to whether either testator held other real property.

in *O'Neil v Hart and Anor*:[20] her possession of the property was certainly for her benefit, but it was also for the benefit of the owner; so that her possession was that of Mr Bridges. Mr Bridges' reference to Mrs Humphreys' being "entitled to occupy" the property, paying "all service charges" at her own request, is consistent with his having granted her a licence to occupy it.

[41] I conclude, on the evidence, that Mrs Humphreys was a mere licensee, and having Mr Bridges' consent, never revoked, to occupy the property under that licence, did not acquire any interest in the property through adverse possession.[21] The Humphreys heirs' counterclaim must be dismissed. Indeed, it also follows that they have no standing to mount a defence to Mr Nendy's claim, although their arguments are helpful, in the absence of any other contradictor.

The factual background to the equitable estoppel claim

[42] The evidence for Mr Nendy consists of his own affidavit and affidavits from his wife and a Mr Edward Kuylie. The account which emerges from them is as follows. Mr Bridges, as has already been mentioned, was resident in Papua New Guinea at the time of his mother's death. It seems that he remained there but fell on hard times. In 1982, Mr Kuylie, then living in Lae, took him in, giving him accommodation in exchange for help with household chores and childminding. That remained the situation for the next five years; but in 1987, Mr Kuylie lost his job in Lae and had no option but to move his family back to the village and land (the "Family Land") occupied by his larger clan, consisting of three families which were related to him. They lived in a communal arrangement; their leader and the customary title holder was the plaintiff, Mr Phillip Nendy. It was up to him to make decisions about the Family Land and who could live there.

[43] Mr Bridges told Mr Kuylie that he wanted to move with him to the Family Land, something which Mr Kuylie initially rejected as impossible. However, at Mr Bridges' request, he arranged a meeting with Mr Nendy at which Mr Bridges said that he owned a large property in Australia worth a lot of money. He would give it to Mr Nendy if he let him join his clan living on the Family Land and provided him with food, accommodation and other living needs. After some consideration of the benefit to the families in his community if he received the property and was enabled to make improvements on the Family Land, Mr Nendy agreed, and they shook hands on the deal. Mr Nendy says that he believed that Mr Bridges had a property in Australia and that he meant to give it to him, Mr Nendy, if he looked after him.

[44] Mr Nendy drove Mr Bridges to the Family Land where he and his wife looked after him. They gave him sleeping quarters, provided him with meals and gave him money for personal items. There was no formal arrangement, but Mr Nendy gave Mr Bridges an allowance of approximately $160.00 per fortnight and sometimes provided additional money for clothing or medical care. Occasionally the topic of their agreement came up in conversation. In around 1987 or 1988, Mr Bridges disclosed that the property which Mr Nendy was to receive was in Queensland. Occasionally at Christmas, Mr Bridges would allude to the gift, in the form of his property, that Mr Nendy would receive when he, Mr Bridges, left the Family Land.

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20 [1905] VLR 107.

21 *Hughes v Griffin and Anor* [1969] 1 WLR 23; *Ben-Pelech v Royle* [2020] WASCA 168 at [54].

[45] In 1990, Mr Bridges, tired of living in communal quarters, asked Mr Nendy to build him a house of his own, reminding him of their agreement and assuring him that his property was worth a good deal of money. He was built a house at a cost of about $A12,100.00 and lived in it until his death in 2007. Over that period he was provided with food, clothing, money and medical care. In late 2007, as his health declined, Mr Bridges informed Mr Nendy that "important people" would look for him, and when they came to the Family Land, he would be rewarded for what he had done.

[46] Mr Bridges died on Christmas Day 2007 and was buried on the Family Land. (A photograph of his gravestone is included as an exhibit to Mr Nendy's affidavit.) Mr Nendy could not find any documents in the house Mr Bridges had occupied to shed any light on where his property was. He waited for the "important people" from Queensland to contact him, without result. In 2016, however, Mr Nendy was made aware of a newspaper advertisement asking for information as to Mr Bridges' whereabouts. In 2018, he was able to retain solicitors in Queensland to bring the present claim.

[47] Mr Nendy says that he would not have allowed Mr Bridges to live on the Family Land, or provided him with what he needed, if it were not for the latter's promise to give him or leave him his property. From the time he reached the agreement with Mr Bridges he believed that if he fulfilled his part of the bargain, Mr Bridges would give him his property in Queensland upon his dying or leaving the Family Land.

The pleading as to the equitable estoppel claim

[48] The pleaded agreement is that Mr Bridges said he would give the property to Mr Nendy, with subsequent affirmations of his promise to the effect that Mr Nendy would receive the property when he left the Family Land. The promise seems to involve alternative contingencies: that Mr Bridges would make an *inter vivos* transfer of his property to him if he left the Family Land or would leave it by will to him so that he would receive it in the event that he, Mr Bridges, died there. Mr Nendy pleads he believed that Mr Bridges would "leave" the property to him "upon his leaving the Family Land" if Mr Nendy fulfilled his promise to allow him to live there and to provide him with food and accommodation and his other needs.

[49] Mr Nendy further pleads that he provided his care and assistance to Mr Bridges in reliance on the latter's representations, which were made with the intention and knowledge that he would rely on them; and but for them, as Mr Bridges knew, would not have allowed Mr Bridges to live on the family land or given him the pleaded help. The provision of that assistance constituted a detriment to Mr Nendy. In circumstances where Mr Bridges obtained the benefit of Mr Nendy's fulfilment of his promise, it was unconscionable for him not to have taken steps for the transfer of the property to Mr Nendy, and an equitable estoppel, proprietary or promissory, arose in the latter's favour, so that the property was held on trust for him.

[50] The Humphreys heirs plead that the claimed agreement is unenforceable for want of writing, because s 59 of the *Property Law Act* 1974 precludes the bringing of an action on any contract for the disposition of land unless the contract in question or some note of it is in writing and signed by the necessary party.

The s 59 argument

[51] The Humphreys heirs contended that since Mr Nendy relied on a legally binding promise made by Mr Bridges, he was obliged to sue in contract, rather than relying on equitable estoppel. For that proposition, they pointed to this passage from the judgment of McPherson J in *Riches v Hogben*:[22]

> "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."[23]

Significantly, the Humphreys heirs say, McPherson J used the expression "legally binding" as distinct from "enforceable". That passage had been cited with approval by the majority in the High Court in *Giumelli v Giumelli*[24] and by the Court of Appeal in *Campbell v Turner & Ors*.[25] Since Mr Nendy's affidavit indicated that Mr Bridges had made a legally binding promise to him, his cause of action lay in contract, not equity. But the contract was not enforceable, because of the effect of s 59 of the *Property Law Act*, which was premised on the existence of a contract, but prevented action being taken on it.

[52] Mr Nendy had not pleaded part performance, but his acts were not unequivocally referable to an agreement of the kind alleged, to transfer property to him: the test for part performance enunciated in *Maddison v Alderson.*[26] Relevantly, the Humphreys heirs submitted, the High Court in *Pipikos v Trayans*[27] had rejected an argument that consistently with "liberalising trends" in the law of equitable estoppel, a more relaxed approach should be adopted to the availability of part performance where a party had been induced to rely to his or her detriment on a contract unenforceable by virtue of the *Statute of Frauds*. The High Court's insistence on the stringency of the test for part performance would be subverted, it was submitted, if a plaintiff unable to meet that test could evade the effects of s 59 simply by resorting to an alternative remedy in equitable estoppel. Mr Nendy was obliged to sue in contract, and because he could not demonstrate compliance with s 59, should have his case dismissed.

Estoppel, Riches v Hogben and the Statute of Frauds

[53] The logical extension of the Humphreys heirs' argument would seem to be that a verbal agreement which was not sufficiently certain in its terms to give rise to a contract might yet be the subject of equitable intervention,[28] but a verbal agreement with the merit of certainty would fail as a contract caught by the *Statute of Frauds*; an odd result. But I think, firstly, that the distinction between a legally binding contract and an enforceable one, which the Humphreys heirs claim is implicit in McPherson J's statement in *Riches v Hogben*, is an elusive one in this context. It is rather difficult to regard a promisor as bound in law by a promise which cannot be enforced against him by legal action. Secondly, I doubt that his Honour had any

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22 [1985] 2 Qd R 292.
23 At 301.
24 (1999) 196 CLR 101 at 121.
25 [2008] QCA 126 at 40.
26 (1883) 8 App Cas 467 at 479.
27 (2018) 265 CLR 522.
28 As for example in *Flinn v Flinn* [1999] VSCA 109 at [95]; *Tadrous v Tadrous* [2012] NSWCA 16 at [39].

intention of saying that the existence of a valid but unenforceable contract would always preclude the availability of estoppel; let alone the wider proposition advanced here, that equity would not intervene wherever a promise was caught by the *Statute of Frauds*.

[54] There is ample authority to support the view that at least in cases of proprietary estoppel (the position is less clear for promissory estoppel) the court will intervene notwithstanding that the relevant promise is undocumented, because the action is to enforce the equities arising from the conduct and expectations of the promisor and promisee, rather than the contract itself. Mr Nendy relies on proprietary estoppel in the form of an estoppel by encouragement, of the kind which finds its roots in *Dillwyn v Llewelyn*,[29] which

> "…comes into existence when an owner of property has encouraged another to alter his or her position in the expectation of obtaining a proprietary interest and that other, in reliance on the expectation created or encouraged by the property owner, has changed his or her position to his or her detriment."[30]

[55] The facts and reasoning in *Riches v Hogben* bear some setting out. In that case, a mother (the defendant) had agreed with her son (the plaintiff) that in consideration of his agreeing to move with her from England to Australia and reside with and look after her, she would buy a house to be put into his name. The defendant raised section 59 of the *Property Law Act* as rendering the agreement unenforceable. McPherson J did not consider that the plaintiff's acts in giving up his home and possessions in England, moving to Australia and helping his mother find a house were sufficiently referable to the kind of agreement alleged to amount to part performance. However, he held that because the agreement was to acquire the land in the future, it was not a contract for the sale or other disposition of land to which s 59 applied.

[56] McPherson J then went on to consider the position if he were "wrong about the enforceability of the agreement".[31] The same result could be reached on the basis of an equity of expectation: the form of equitable estoppel which arose where the defendant by representations led the plaintiff to expect that he or she would be given an interest in the defendant's property and encouraged the plaintiff to act to his or her detriment on that representation. Many of the cases involved improvements to land, but the principle was not confined to acts done on the defendant's property. The critical element was the defendant's conduct after the representation in encouraging the plaintiff to act on it.

[57] His Honour next discussed the implications of giving effect to such an estoppel. It was in that context that he embarked on the explication recorded with apparent approval by the High Court in *Giumelli*, the entirety of which is as follows:

> "A consequence of applying the principle may be to complete an otherwise imperfect gift, as in *Dillwyn v Llewelyn*, or to give effect to an agreement that, for want of certainty of consideration or of some other essential element, falls short of constituting an enforceable contract. Many of the reported cases are

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29 (1862) 4 De GF & J 517; 45 ER 1285.

30 *Delaforce v Simpson-Cook* (2010) 7 ASTLR 65 at 72 per Handley AJA.

31 [1985] 2 Qd R 292 at 300.

> concerned with imperfect gifts; but there is of course a sense in which all agreements made or promises given without consideration are imperfect gifts of the benefits they purport to confer. 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. In that respect it represents the precise converse of what was said by Jessel MR in *Ungley v Ungley* to be the basis for enforcing the contract in that case. 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. That is why in *Dillwyn v Llewelyn*, where the son built on land promised but not effectively conveyed to him by a memorandum signed by his father, Lord Westbury LC said that the only inquiry was 'whether the son's expenditure, on the faith of the memorandum, supplied a valuable consideration, and created a binding obligation'." (Citations omitted.) [32]

[58] There are three points to be made here. Firstly, the entire passage, including the statement on which the Humphreys heirs place such emphasis, forms part of his Honour's discussion of the position if, contrary to his conclusion, the agreement between the parties was not enforceable. Secondly, when his Honour speaks of the position where there is a legally binding promise, he refers to resort to contract law "in order to enforce" it; which implies that the promise he contemplates is enforceable as well as binding. And thirdly, his Honour speaks of applying the principle to give effect to an agreement which for lack of some essential element falls short of constituting an enforceable contract; which would suggest a use of "enforceable" synonymous with "legally binding".

[59] Notably, having found a contract which was unaffected by the *Statute of Frauds*, which the plaintiff was entitled to have specifically performed, his Honour instead granted equitable relief in the form of a constructive trust, declaring that the defendant held her interest on trust for the plaintiff and requiring her to transfer the land to him. That was evidently on the basis of the proprietary estoppel his Honour found to arise from her encouragement of her son to believe he would receive an interest in the property and his acting in reliance on that expectation.

[60] If McPherson J were advancing the proposition for which the Humphreys heirs contend, the Full Court on appeal from his judgment[33] seems to have been oblivious to it, and to have reached a result entirely inconsistent with it. Contrary to McPherson J's conclusion, the Full Court held that the *Statute of Frauds*, in the form of s 59, did apply to contracts for the future acquisition of an interest in land, and thus applied to the agreement in that case. Nonetheless, the plaintiff was still entitled to succeed on the basis of equitable estoppel, having acted, to his mother's knowledge, to his detriment on the faith of the arrangement. Williams J observed that the principles of equity were

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32 [1985] 2 Qd R 292 at 300-331; reproduced in *Giumelli v Giumelli* (1999) 196 CLR 101 at 121.

33 *Riches v Hogben* [1986] 1 Qd R 315.

> "…applicable where the parties did reach agreement, but, for some reason, that agreement is not enforceable at law".[34]

If the *Statute of Frauds* applied to an agreement, but there was no sufficient memorandum in writing, in the first instance, recourse to equity would involve demonstrating part performance so to enable a decree of specific performance to be made. But where an equity based on part performance could not be established because the acts relied on were not unequivocally referable to an agreement of the kind alleged, there was no reason why the plaintiff ought not to be able to rely on an equity arising from the defendant's conduct subsequent to the contract. If the owner of land encouraged an expectation in another that he or she would give that person an equity in the land, it did not matter that the conduct was not directly related to the land.[35]

[61] The Full Court's approach in *Riches v Hogben* seems consistent with observations by members of the High Court, particularly Brennan J, in *Walton Stores (Interstate) Ltd v Maher*.[36] This was a case of promissory, not proprietary, estoppel. The owner of land had negotiated with a company to lease a building which the owner was to construct, after demolishing an existing building. The owner was given to understand that an executed lease was forthcoming and the company was aware that the owner had demolition of the existing building under way. It was not until the owner had already commenced work on the new building that the company indicated that it would not proceed with the lease. The company relied on the *Statute of Frauds* provision on the basis that there was no written lease. The High Court held, however, that the company was estopped from denying that it was bound. The assumption identified as underlying the estoppel varied: Mason CJ, Wilson and Brennan JJ considered that it was that the steps necessary to create the lease (an exchange of contracts) would take place; Gaudron J, that those steps had taken place; and Deane J, that there was a binding agreement between the company and the owner.

[62] The judgments involved a good deal of discussion of the interaction of contract and estoppel in relation to the enforcement of promises, and in particular, the dual concerns that a voluntary promise should not be capable of enforcement through the application of equitable estoppel, and that promissory estoppel might render the doctrine of part performance superfluous. Mason CJ and Wilson J explained that such concerns were unfounded. Equitable estoppel, unlike part performance, was not concerned with overcoming

> "…non-compliance with the formal requirements for the making of contracts".[37]

But "something more" was required than mere reliance on a executory promise which caused the promisee to suffer detriment in order to raise promissory estoppel; which might be the creation by the promisor of an assumption that a contract would come into existence, or that the promise would be performed, on which the promisee, to the promisor's knowledge, relied to his detriment.[38]

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34 At 340.
35 At 341 – 342.
36 (1988) 164 CLR 387.
37 At 405.
38 At 406.

[63] Brennan J considered that if the induced assumption were that the necessary steps would be taken to create the lease, to give that assumption the same force as a promise would be contrary to the *Statute of Frauds* provision. Equity was to be satisfied by avoiding the detriment suffered in reliance on the assumption, not by its direct enforcement. His Honour elaborated:

> "The *Statute of Frauds* and similar provisions prescribing formalities affecting proof of contracts have never stood in the way of a decree to enforce a proprietary estoppel... and, in principle, there is no reason why such provisions should apply when any other equity is created by estoppel. The action to enforce an equity created by estoppel is not brought "upon any contract", for the equity arises out of the circumstances. This is not to say that there is an equity which precludes the application of the statute. It is to say that the statute has no application to the equity."[39] (Citation omitted)

[64] Deane J considered that there was no scope for the operation of the *Statute of Frauds* in that case, because the estoppel precluding denial of a binding agreement also precluded the assertion of its unenforceability

> "…in that the word 'binding' is used in the sense of valid and enforceable".[40]

Gaudron J found that the relevant assumption was that the steps for the lease had taken place and that it was duly executed, so that any question of compliance with the *Statute of Frauds* became irrelevant.[41] Mason CJ and Wilson J found that there was no substance in the argument based on the *Statute of Frauds* "as the other judgments demonstrate[d]",[42] but it is not clear whose analysis they preferred.

[65] The Humphreys heirs emphasised the High Court's approval in *Giumelli* of the statement by McPherson J concerning the need to enforce legally binding promises through contract rather than equity. But, of course, that statement was only part of the much longer passage already set out; which was cited in *Giumelli* in the context of considering the appropriate measure of relief, that being what was necessary to avoid the detriment suffered. In that case, the respondent had worked for his parents without wages on a promise that he would receive a lot carved out of their property. The Full Court having declared that the parents held their whole property on trust to convey the promised lot, the appellants argued that such an approach amounted to subverting the need for consideration to support a contractual promise, and enforcing a promise not giving rise to legal rights.

[66] In considering that argument, the majority in *Giumelli* referred to McPherson J's statement that the defendant's encouragement of the plaintiff after the making of the representation was critical. In setting out the relevant passage from his judgment, the court made no comment about his Honour's reference to the primacy of contract law. Rather, it focused on his Honour's statement that it was not the existence of an unperformed promise which attracted equity's intervention, but the plaintiff's conduct in acting on the expectation to which it gave rise. *Giumelli* confirms that the relief given in proprietary estoppel cases is based on the equity arising from

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39 At 433.
40 At 446.
41 At 464.
42 At

representations as to future acquisition of property giving rise to an assumption on which the plaintiff relies to his or her detriment.[43]

[67] The other decision to which the Humphreys heirs referred as endorsing McPherson J's observations was a decision of the Court of Appeal in *Campbell v Turner & Ors*.[44] In that case, the plaintiffs and the defendants had entered a deed recording an agreement that a lot in a proposed industrial subdivision, on which the plaintiffs hoped to establish a bus depot, would be transferred to them immediately the relevant certificate of title became available. They paid $30,000 as consideration and proceeded to spend money improving the proposed lot. A provision of the *Land Sales Act* 1984 had the effect of rendering void any agreement to buy land, the subdivision of which had not been formally approved under seal by the relevant local authority. The defendants argued that because the deed was void and could not be specifically performed, no equitable interest could arise from it.

[68] The Court of Appeal rejected that argument, Fraser JA delivering the leading judgment. The deed was, his Honour noted, only one of a number of sources giving rise to the plaintiffs' expectation that they would acquire title. They relied also on other statements and conduct by the defendants. *Giumelli* established that where a plaintiff had altered his or her position on an expectation encouraged by the defendant that the former would acquire a legal interest in the latter's property, the appropriate remedial response could extend to the imposition of a constructive trust of the property and orders for its conveyance. Those orders would not depend on any agreement to convey being specifically enforceable. Fraser JA continued:

> "To the contrary, enforcement of the equity is premised upon the **absence** of any enforceable contractual obligation."

He then set out part of the passage from *Riches v Hogben* quoted in *Giumelli*.

[69] Although Fraser JA premised the availability of equitable intervention on the absence of an enforceable agreement, the Humphreys heirs sought to distinguish the case from the present on the basis that the court was there dealing with a void contract, not an unenforceable one. Again, it would seem an odd result if an agreement which was invalidated by statute could give rise to an equity but one which fell foul of no statute except for a lack of writing, could not. On the issue of when statute would operate to preclude the existence of an equity, in *Campbell v Turner* the court referred to, but regarded as inapplicable, the principle described by Viscount Radcliffe in *Kok Hoong v Leong Cheong Kweng Mines Ltd*,[45] that in most cases, no estoppel arose to prevent a defendant from setting up the statutory invalidity of a contract. Notably, for present purposes, in considering that principle, the Privy Council observed that there were, however, some statutes

> "…which, though declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory and so do not preclude estoppels. One example of these is the *Statute of Frauds*…"[46]

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43 At 112.
44 [2008] QCA 126.
45 [1964] AC 993 at 1015-6.
46 At 1016.

[70] *Campbell v Turner* reinforces the availability of equitable intervention where a plaintiff relies not merely on a promise which cannot, by force of statute, be given legal effect, but on other acts and statements by a defendant. There the relevant deed was only one of a number of sources of the expectation in question; just as here, Mr Bridges' conduct in encouraging Mr Nendy's reliance went well beyond the initial promise.

[71] The Humphreys heirs relied on *Pipikos v Trayans* as indicating that equitable estoppel could not overcome the need to meet the requirements of the *Statute of Frauds*. I do not think that the case indicates anything of the kind. In *Pipikos v Trayans*, the appellant sought to enforce an oral agreement for his acquisition of a half interest in an existing property owned by the respondent, the consideration for which was his funding her and her husband's purchase of another property. The issue was whether the relevant test for the appellant to meet in establishing part performance was that enunciated by Lord Selborne in *Maddison v Alderson*:[47] whether the acts he relied on were "unequivocally referable" to an agreement of the kind alleged.

[72] Lord Selborne explained in *Maddison v Alderson*, in relation to the law of part performance, that the suit was based

> "…upon the equities resulting from the acts done in execution of the contract, and not…upon the contract itself".[48]

His Lordship expanded:

> "…it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting in res gestae subsequent to and arising out of the contract…"[49]

The doctrine was confined by the test (of unequivocal referability) in order to prevent the mischief which the *Statute of Frauds* was designed to prevent.[50]

[73] The appellant in *Pipikos v Trayans* argued that the *Maddison v Alderson* test was wrong in law and ought not be applied. Considering that argument, the High Court focused its attention on the basis for part performance: whether it was an evidentiary requirement concerned with proving a parol contract, or whether it was concerned with the enforcement of the equities arising from the part performance of obligations. It preferred the latter view.[51] To enforce a contract would be contrary to the *Statute of Frauds*; but instead, the equity to have the transaction completed arose because what was done was consistent only with the partial performance of a transaction of the same kind as that of which the plaintiff sought specific performance.[52]

[74] The High Court's reasoning is based on the features peculiar to part performance which, the majority was at pains to point out, were different from those of equitable

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47 (1883) 8 App Cas 467.
48 At 475.
49 At 476.
50 At 478.
51 At 537.
52 At 538-539.

estoppel. Their Honours identified a number of respects in which the doctrine of part performance did not cover the same ground as equitable estoppel. The following passage is important in the present factual situation:

> "…equitable intervention by way of equitable estoppel to prevent a defendant resiling from a promise that is *not enforceable at law* is justified, not by the existence of an unperformed or partially performed promise, but by a concern that the plaintiff should not be left to suffer a detriment by the defendant's so resiling".[53] (Italics added.)

And the measure of relief was variable in equitable estoppel: it might require steps amounting to the completion of the transaction in order to meet the expectations generated, but that would not always be so. In contrast, in relation to part performance it was not even necessary that there be detrimental reliance in order to establish the right to relief; the plaintiff having established part performance was entitled to a degree of specific performance without the need to establish that any lesser order would be inadequate.

[75] The decision of the New South Wales Court of Appeal in *Powercell Pty Ltd v Cuzeno Pty Ltd*,[54] bears mentioning here, because the court had occasion to consider the judgments, both at first instance and on appeal, in *Riches v Hogben*, and because it appears, like the Humphreys heirs, to have regarded McPherson J as saying that he did not think relief on equitable principles was available where there was an unenforceable agreement. In *Powercell*, the owner of land had agreed it would take over responsibility for the sale of some units which the appellant had constructed on its land as part of a failed joint venture agreement. The land-owner did not make good on its promise, and relied on the equivalent of s 59 to contend that the agreement was unenforceable, not being in writing; the appellant contended that it was estopped from reliance on the *Statute of Frauds* provision.

[76] The court rejected the proposition that the making of the agreement itself could found an assumption that it would be performed and concluded that it was not unconscionable for the land-owner to rely on the *Statute of Frauds* provision. Giles JA, delivering the leading judgment, observed that the doctrine of part performance would be superfluous if the plaintiff could rely on an estoppel which was

> "…founded on no more than the making of the contract in question".[55]

Such an approach would render the *Statute of Frauds* provision nugatory. It was different when an interest in land was found to have arisen on the basis of estoppel, because the assumption induced by the defendant was taken to have included that the rights granted were enforceable. That was not the case where the assumption was merely that the contract existed: in that instance, the making of the agreement itself did not found the necessary second assumption that it would be performed.

[77] The appellant in *Powercell* had suggested that McPherson J's judgment in *Riches v Hogben* supported the view that an estoppel could arise purely on the basis of the making of an agreement. Giles JA, having taken McPherson J to say relief was not available where an agreement was unenforceable, noted that the Full Court had

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53 At 540.
54 (2004) 11 BPR 21,429.
55 At [80].

reached a different view. However, Giles JA suggested, the Full Court's conclusion, which was based on McPherson J's findings, may have rested not only on the making of the agreement but on the defendant's further encouragement of her son's expectation that the house would become his; thus representing that she would perform the agreement.

[78] For the reasons I have already given, I do not think that McPherson J was making the statement suggested, so I doubt his view was in fact different from that of the Full Court. And it appears to me that notwithstanding his conclusion that there was a valid and binding contract, his Honour found no difficulty in basing his decision instead on the equity arising from the acts he found; not merely the promise, but the encouragement to act on the promise, on which the plaintiff had placed reliance in acting to his detriment. That might, I suppose, be regarded as entailing the secondary assumption of enforceability which the New South Wales Court of Appeal considered was the explanation for the availability of proprietary estoppel.

[79] In *Tipperary Developments Pty Ltd v Western Australia*,[56] the Western Australian Court of Appeal took a different view from that taken in *Powercell* as to the need to establish a secondary assumption as to performance or enforceability where estoppel is said to arise from an unwritten agreement on which an action cannot be brought in contract because of the *Statute of Frauds*. The issue there was whether the State of Western Australia, having orally agreed with the appellant to guarantee another company's obligations to the latter, was estopped from resiling from the representations which constituted that agreement; or whether the estoppel claim was precluded by the *Statute of Frauds*, which required a contract of guarantee to be in writing in order to be enforceable. Within the court itself there were different views. McLure JA, with whom Newnes JA agreed, referred to the judgment of Brennan J in *Walton Stores*, which she had regarded as having majority support, and the decision of the Full Court in *Riches v Hogben,* in concluding that the *Statute of Frauds* did not stand in the way of enforcing an equitable estoppel claim. Wheeler JA, who considered that the majority support in *Walton Stores* extended to Deane J's judgment, took the view that there could only be an equitable estoppel precluding reliance on the *Statute of Frauds* if the representation included a representation that an enforceable guarantee would be given.[57]

Conclusions on the estoppel claim

[80] Notwithstanding the apparent divergence of views between those courts, there is ample authority to support my conclusion in the present case that the fact that Mr Bridges' agreement with Mr Nendy was not reduced to writing presents no barrier to relief. There are many cases in which Australian courts have found that proprietary estoppel arose in connection with a promise, relating to land, notwithstanding that, not being in writing, the promise itself could not be enforced. Many of those cases concern relatives working on farms having been led to expect that they will inherit or be given the property or parts of it.[58] Other cases, like this one, have involved carers who have been led to believe that they will be rewarded with an interest in property

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56 (2009) 258 ALR 124.

57 At 37.

58 *Giumelli v Giumelli* (1999) 196 CLR 101; *Flinn v Flinn* [1999] VSCA 109; *Priestley v Priestley* [2017] NSWCA 155.

– *Riches v Hogben* itself is such a case[59] – or who have provided funds or forgone rights in reliance on an expectation of the kind.[60]

[81] The relief to which Mr Nendy is entitled is based, not on his agreement with Mr Bridges, but on the equity arising from Mr Bridges' conduct in making the promise, in encouraging Mr Nendy over the years to believe that he would honour it, and in allowing Mr Nendy to act to his own disadvantage in reliance on it; and on that detrimental reliance by Mr Nendy in the belief that the promise would take effect. If it had been necessary to find a secondary assumption, I would have had no difficulty in doing so: Mr Bridges' conduct induced an assumption, not merely that he would make a gift of the property to Mr Nendy but that his promise to do so would be honoured and enforceable; that Mr Nendy would actually receive the property, in circumstances where it seems vanishingly improbable that he had ever heard of the *Statute of Frauds* or had any reason to doubt Mr Bridges' word.

[82] Mr Nendy has established a right to relief based on proprietary estoppel. As to the appropriate measure of relief,

> "…where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise".[61]

There is nothing in the facts of the case which would make it inequitable or unjust to make orders which involve the performance of the expectation generated by Mr Bridges' promise. The property was impressed with a constructive trust from the time Mr Nendy began to act in reliance on Mr Bridges' promise so as to make it unconscionable for the latter to resile from it.[62] The appropriate orders may involve orders for the sale of the property, with Mr Nendy receiving the proceeds after the associated costs and outlays, including those of the administrator ad litem, are met; and it may be necessary to make further directions as the powers to be exercised by the latter. I will hear submissions as to the orders to be made and on costs.

Orders

[83] The second defendants' counterclaim must be dismissed. I will declare that the property at 37 Pine St Hamilton is held on trust for the applicant, with the orders necessary to give effect to that trust to be determined after submissions.

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59 *Moore v Aubusson* [2020] NSWSC 1466 is another.

60 *Tadrous v Tadrous* [2012] NSWCA 16; *Priestley v Priestley* [2017] NSWCA 155; *Delaforce v Simpson-Cook* (2010) 7 ASTLR 65.

61 *Sidhu v Van Dyke* (2014) 251 CLR 505 at 530.

62 *McNab v Graham* (2017) 53 VR 311 at 342.