Fundamental Aspects of Promise-Based Proprietary Estoppel

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***Cheung Lai Mui v Cheung Wai Shing* [2021] HKCFA 19**

Introduction

In a typical scenario giving rise to a proprietary estoppel, A and B will have been parties to a relationship – which might have been a familial one or one of some other close ties or affection – and B is able to establish that A created an expectation, on which B reasonably relied, that B was to have some future right in land belonging to A, and B would suffer a detriment if A were allowed to act inconsistently with that expectation so created. A proprietary estoppel in this scenario is promise based: it arises because the expectation created by A in B amounts to a promise in relation to B's future right in A's land.[1]

It generally becomes necessary for B to seek to establish a proprietary estoppel, because the arrangement relating to B's expected right in A's land was an informal one, in the sense it had not been set out during the currency of the relationship via some effective legal framework or protection. A reason for such informality might be that it was not in the nature of the parties to communicate openly or turn their attention to the legal consequences of their arrangement. This was true of the parties in *Thorner v Major*[2] where B succeeded in a proprietary estoppel claim in circumstances where A was 'a man of few words', 'relatively private', and 'not given to direct talking',[3] but it was nevertheless clear that A had intended that B would inherit A's farm on A's death. The reality of the parties' relationship in that case was that setting out B's future interest within a formal legal structure was likely impractical[4] or perhaps even

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[1] There is an ongoing debate as to whether a promise-based proprietary estoppel claim must relate to a future right in land. The suggestion in *Motivate Publishing FZ LLC v Hello Ltd* [2015] EWHC 1554 (Ch) is that it need not, but this was doubted in *West End Commercial Ltd v London Trocadero (2015) LLP* [2017] EWHC 2175 (Ch) at [35]-[36]. In *Sami v Hamit* [2018] EWHC 1400 (Ch) [40], the judge was of the view that proprietary estoppel could not apply to a promise to pay a sum of money.

[2] [2009] UKHL 18, [2009] 1 WLR 776.

[3] As described at first instance by John Randall QC (sitting as a deputy judge of the High Court): [2007] EWHC 2422 (Ch) [31]-[32].

[4] As explained extra-judicially by one of the Law Lords in *Thorner*, Lord Neuberger: 'The notion that [B] could or should have asked for a commitment in writing, in the context of an informal family relationship, seems somewhat unreal. It would have risked harming the relationship with [A], and the only solicitor he knew would no doubt have been advising [A]…formal contractual rights and obligations were simply not the stuff of the relationship'. See Lord Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' (2009) 68 CLJ 537, 542.

impossible.[5] It is also frequently the case that the informal nature of the arrangement is rooted in the trust placed by the parties in each other. For example, in *Tadrous v Tadrous*,[6] A and B were brothers. Their relationship broke down and B's proprietary estoppel claim (in relation to A's promise to transfer a property as part of a property development project) succeeded. The judge observed that, at the material time, the 'evidence made clear that the brothers had a close relationship, that each trusted the other implicitly and that the social customs and cultural characteristics to which they adhered included a strong ethic of mutual assistance between family members'.[7]

These examples provide an insight into some of the complexities of the relationships behind proprietary estoppel claims. Such complexities mean that, in ascertaining whether B can succeed via proprietary estoppel, a court will usually have to look carefully at the parties' "story", that is, what was said and done, taking into account relevant peculiarities of their relationship and the broader contextual circumstances. This can be challenging, from an evidential perspective, when A has died and the proprietary estoppel claim relates to the distribution of A's assets at that point; especially as a court will typically have to consider such a claim alongside other claims to A's assets brought in the light of the provisions of A's will or the rules of intestacy.

This was the broad task before the Hong Kong Court of Final Appeal (HKCFA) in *Cheung Lai Mui v Cheung Wai Shing*.[8] The judgment in that case provides some interesting points for discussion relating to the principles of promise-based proprietary estoppel; specifically, in relation to the nature of the promise element and the way reliance and detriment are assessed. After setting out the background and facts of *Cheung Lai Mui*, these issues will be considered in this note.

[5] As Mee observed: 'It is not clear…how a contract could have been drafted which would have addressed the various possible contingencies, eg whereby [A] might become ill and need to fund nursing home care or [B] might decide to get married and move away from the farm after a dozen years of work. The parties might have felt that, if policed by a contract, they could not have successfully shared the difficult life on the farm. Perhaps an arrangement depending on trust, without the possibility of legal sanctions against either party, represented the most appropriate way of allowing these people to achieve what they wanted'. See John Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' in Susan Bright (ed), *Modern Studies in Property Law* (Hart 2011) vol 6, 196.

[6] [2010] NSWSC 1388 (conclusion on proprietary estoppel affirmed [2012] NSWCA 16).

[7] *Ibid* [4]. Trust was also of clear importance to the parties in *Thorner* (n 2), discussed in Mee (n 5) 195.

[8] [2021] HKCFA 19 (decided by a joint judgment of Mr Justice Ribeiro PJ and Mr Justice Gummow NPJ, with which Chief Justice Cheung, Mr Justice Fok PJ, and Mr Justice Bokhary NPJ agreed).

Facts and decision

Cheung Lai Mui concerned a dispute relating to a piece of land in the New Territories of Hong Kong (the 'Disputed Land'). The original owner of the Disputed Land, Cheung Tak Ming, died in 1934. Upon his death, his three sons, Wan, Kau, and Fuk, became registered co-owners of the Disputed Land (each holding a one-third share). Cheung Lai Mui was the daughter of Kau and the plaintiff in the proceedings. Wan had a son and a daughter; and they were, respectively, the first defendant (D1) and second defendant (D2) in the proceedings. The son of D1 was the third defendant (D3).[9]

Fuk died between September 1991 and May 1992; Kau died in 1997; and Wan died in 1999. The plaintiff was the beneficiary of Kau's estate and executrix of his will. The plaintiff also became administratrix of Fuk's estate (following a grant made in 2006). On his death, Wan's share in the Disputed Land passed to his son and daughter (D1 and D2) who, therefore, became registered co-owners of one-third of the Disputed Land.

D3 and his family had lived on the Disputed Land since 1974. Central to the dispute was an alleged understanding (referred to as the 'Common Understanding') between Wan, Kau, and Fuk, which had existed since the 1970s, that D3 would be permitted to use and own the Disputed Land as his home and build a house on it when he turned 18 years old. During the 1980s and 1990s, D3 carried out substantial building and maintenance work to the Disputed Land and structures on it, including building stone walls, installing electricity cables, and maintaining trees on the property. Notably (for reasons we will turn to), this work was carried out before the last survivor of the three brothers (Wan) died in 1999. D3 also constructed an additional two buildings on the Disputed Land in the early 2000s.

The plaintiff sought an order for sale of the Disputed Land and wished to restrain D3 from constructing any other buildings on it. D3 sought to rely on proprietary estoppel to establish that he was the sole beneficial owner of the Disputed Land. At trial, D3 succeeded on that basis.[10] On appeal, the Court of Appeal[11] remitted certain issues; including whether it had been reasonable for D3 to continue to rely on the Common Understanding after the death of the three

[9] The principal involvement of D1 and D2 in the appeal concerned a claim seeking an account, payment of rental income, and payment of mesne profits relating to another property. These matters were separate to the proprietary estoppel issue and are not considered in this note.
[10] [2017] HKCFI 630. D3 also succeeded on the basis of a constructive trust.
[11] [2020] HKCA 148.

brothers. On appeal to the HKCFA, D3 succeeded on the ground of proprietary estoppel, with the plaintiff ordered to transfer the remaining two-thirds of the Disputed Land to D3.

The focus of this note is on the nature of D3's proprietary estoppel claim. The main issue before the HKCFA related to whether D3 could meet the requirements of reliance and detriment necessary to succeed via proprietary estoppel. Prior to considering that, however, we will first address how the facts of *Cheung Lai Mui* should be understood in the context of the general doctrine of proprietary estoppel.

The nature of the proprietary estoppel claim in *Cheung Lai Mui*

In *Cheung Lai Mui*, the court said: 'Put shortly, the requirements of equity to recognise and give relief based on proprietary estoppel are (a) a representation or assurance made to the claimant (b) reliance thereon by the claimant and (c) detriment to the claimant in the consequence of that reliance'.[12] This was based on what had been said by Lord Walker in *Thorner v Major*.[13] There, Lord Walker had prefaced his statement of the elements of proprietary estoppel with the observation that 'most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms'.[14]

Before we consider how these requirements were applied in *Cheung Lai Mui*, it is helpful to recognise some important developments since *Thorner* as regards the conceptual bases of proprietary estoppel claims. In *Smyth-Tyrrell v Bowden*,[15] HHJ Paul Matthews adopted a classification of proprietary estoppel that recognises the doctrine's existence in three distinct forms.[16]

(i) The first form is representation-based proprietary estoppel. This occurs, '[f]or example, if X tells Y about an existing property right (or its absence). Y relies on that representation to his detriment. X is estopped from asserting differently: he cannot resile from his representation'.[17]

(ii) The second form is acquiescence-based proprietary estoppel. This occurs where 'X is aware that Y is acting under what X knows to be the mistaken belief that there is

[12] *Cheung Lai Mui* (n 8) [23].
[13] *Thorner* (n 2).
[14] *Ibid* [29].
[15] [2018] EWHC 106 (Ch).
[16] This classification of proprietary estoppel was developed by Mee (n 5). It has subsequently been developed in detail in Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) and in the second edition of that work (Oxford University Press 2020).
[17] *Smyth-Tyrrell* (n 15) [65].

(or is not) an existing property right. In that case X has a duty in equity to speak. If X does not disabuse Y, and Y relies on his belief to his detriment, X cannot (in equity) assert the inconsistent right'.[18]

(iii) The third form is promise-based proprietary estoppel. This is 'the *promissory* form of proprietary estoppel. This is an equitable doctrine focusing on a property owner's *promise* to or *expectation created in* another person by the act of the former which was intended to be relied on by the latter, has been relied on by the latter to his or her detriment, such that it would be unconscionable for the property owner not to give effect to the promise or expectation'.[19]

The distinction between these three forms of proprietary estoppel is important in practice, because it is clear that each differs in terms of its grounding principle and the broad factual situation with which it is concerned.

As with *Thorner*, *Cheung Lai Mui* was concerned with promise-based proprietary estoppel. This was because D3's claim was, in essence, that the Common Understanding amongst the relevant family members (especially the brothers) amounted to a promise that D3 would in the future be entitled to use and own the Disputed Land, and he had acted in reasonable reliance on that promise. That this was the appropriate form of proprietary estoppel was recognised most clearly by Hon Lam VP in the Court of Appeal.[20]

If we accept the threefold classification of proprietary estoppel set out in *Smyth-Tyrrell v Bowden* and accept that *Cheung Lai Mui* was concerned with promise-based proprietary estoppel, however, it follows that some caution is required in applying the earlier-cited requirement in *Cheung Lai Mui* of 'a representation or assurance made to' B. A representation is not a promise.[21] In relation to proprietary estoppel, this distinction matters because, as we have seen, representation-based and promise-based proprietary estoppel are two distinct forms of the general doctrine. It is probable that in *Cheung Lai Mui*, as in *Thorner*, 'assurance' was

[18] *Ibid* [65].
[19] *Ibid* [66].
[20] Hon Lam VP observed that 'proprietary estoppel arising from promise or assurance…seem[ed]…to be the applicable strand of estoppel' on the facts (*Cheung Lai Mui* (n 11) 1.13); before, at 1.35, characterising D3's claim as 'based on proprietary estoppel by virtue of promise'.
[21] In *Equititrust Ltd v Franks* [2009] NSWCA 128 [72], Handley AJA said of the word representation: 'its core meaning, derived from its Latin origins, is another presentation, generally in words, of something, and since that something is presented again it must already have occurred or exist. On the other hand a promise need not present anything again, but it puts forward (promittere) something that was not there before'.

intended as a synonym for 'promise'.[22] Indeed, it might be thought that 'promise' is usefully avoided in this context in order to sidestep any unnecessary confusion between proprietary estoppel and the distinct doctrine of promissory estoppel.[23] Nevertheless, there ought to be a preference for the explicit use of 'promise' for this type of proprietary estoppel. This not only makes for greater accuracy in relation to the type of estoppel, it also ensures it is distinguished properly from the distinct form of representation-based proprietary estoppel.

With promise-based proprietary estoppel, the promise is not typically to be traced to a single point in time at which it can be said that A had committed, by way of a promise, to B's having some future right in A's land. Rather, the promise is found on a more general analysis of the *relationship* that developed between A and B; the nature of that relationship being such that B had over time developed an *expectation* relating to B's future right (as evidenced by B's reliance). This is reflected in the language of HHJ Paul Matthews in his earlier-cited explanation of promise-based proprietary estoppel in *Smyth-Tyrrell v Bowden*.[24] It also appears in the following observation of the same judge in *James v James*[25] in recording that:

> '[B] was unable to give evidence of any *particular* promise or act creating an expectation, intended to be relied upon, that the testator would leave any particular property to him, let alone the whole of it. That is not fatal to his claim...The court must look at the totality of the evidence of what passed between the parties and form a view as to whether it was intended, or whether a reasonable man would have taken it to have been intended, to amount to such an assurance'.[26]

Indeed, *Cheung Lai Mui* demonstrates the broad nature of the promise element of a claim of this type. In the judgment at first instance, as part of a review of the evidence, little was made of what had actually been communicated to D3 directly and the time at which he would become the owner of the Disputed Land. The Common Understanding was explained in terms that D3

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[22] See McFarlane (2nd edn) (n 16) 2.86-2.87. Indeed, in *Thorner* (n 2) [2], Lord Hoffmann did refer to the need for B to establish a 'promise or assurance'; and in the Court of Appeal in *Thorner*, Lloyd LJ had referred to the need for 'a representation which can be categorised as a promise or assurance': [2008] EWCA Civ 732 [54]. Furthermore, in *Cheung Lai Mui* (n 8) [31] and [33], reference was made to 'promise or assurance'; although, at [33], both 'promise or assurance' and 'promise or representation' were used.

[23] A point made in McFarlane (2nd edn) (n 16) 2.87. There was a hint of such confusion in *Cheung Lai Mui*, where it had been part of D3's case at first instance that the plaintiff was estopped on the basis of promissory, as well as proprietary, estoppel; although there was no subsequent analysis of how promissory estoppel might be relevant on the facts, presumably, because it was clear that promise-based proprietary estoppel was the applicable doctrine.

[24] Set out in the text to n 19.

[25] [2018] EWHC 43 (Ch).

[26] *Ibid* [22].

'could use and own the Disputed Land as his home, and he could build a small house there when he became an adult'.[27] In explaining how this gave rise to a promise, emphasis was placed on the nature and conduct of the parties in creating and evidencing the Common Understanding. This included the nature of the family relationship,[28] especially the importance of trust;[29] the fact the members of the family were of a relatively low education level and not sophisticated commercial people;[30] relevant documentary evidence;[31] and the significance of discussions during certain family occasions.[32] It was also clearly the case that the brothers, as owners of the Disputed Land at the relevant time, had been aware that D3 was acting in a way consistent with his having an expectation as to ownership, and they had not taken any steps to correct that expectation.[33] It followed, and it was held, that there did exist a Common Understanding – and, hence, for the purpose of proprietary estoppel, a promise – on which D3 had been entitled to rely.

The assessment of reliance and detriment

In the HKCFA, the plaintiff offered no direct challenge to the position on the promise element of the proprietary estoppel claim. Rather, the focus was on whether D3 had properly established the reliance and detriment elements of the estoppel. These aspects had received little attention at first instance; but, before the HKCFA, the plaintiff asserted that D3 had not satisfied the requirements of these elements, so there could be no proprietary estoppel on the facts. The basis on which this was advanced was that there had been no sufficient reliance at all prior to the point at which the last to survive of the three brothers, Wan, had died. It was argued that this point (the death of Wan) was the 'cut-off' point by which any reliance by D3 must have occurred, because, after this point, the promise had, in effect, lapsed; and, furthermore, that no such reliance had occurred by this time. Accordingly, even if the construction of the additional two buildings on the Disputed Land in the early 2000s did amount to sufficient reliance, this was too late (being after the death of Wan and, hence, after the cut-off point).

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[27] *Cheung Lai Mui* (n 10) [6]. As the HKCFA pointed out ((n 8) at [13]): 'The Common Understanding did not include an assurance that by way of testamentary disposition the three brothers would bequeath the Disputed Land to D3'.
[28] *Cheung Lai Mui* (n 10) [79]-[80].
[29] *Ibid* [95].
[30] *Ibid* [97].
[31] *Ibid* [82]-[84].
[32] *Ibid* [99].
[33] Moreover, after the death of the three brothers, both D1 and D2 (described as the 'paper owners') had accepted D3's right to the Disputed Land in the light of the Common Understanding: *Ibid* [87].

Before we turn to consider this argument, it is first worth clarifying what is meant by reliance and detriment in the context of promise-based proprietary estoppel. The gist of a relationship that gives rise to a proprietary estoppel is that B has undertaken (or declined to undertake) some performance or course of conduct in reliance on what B claims to have been a promise made by A, and B will suffer a detriment if A is allowed to act inconsistently with the promise. Accordingly, the relevance of reliance is in what B has done differently because of the promise. The relevance of detriment is in the consequences that B will suffer, as a result of B's reliance, should A be permitted to act inconsistently with the promise. The point at which B will seek to prove these elements of reliance and detriment will be through a court action, because A has acted inconsistently with what B alleges was the relevant promise. Here, it will be necessary for a court at that point to look back, in the round, at the things that have been said and done that are alleged by B to amount to a promise by A and reasonable reliance on that promise by B.

The essence of this was captured in an unreported judgment of Hoffmann LJ (as he then was) in *Walton v Walton*.[34] That judgment for some time received little attention but has now risen to prominence following its approval in *Thorner v Major*.[35] According to Hoffmann LJ, proprietary estoppel 'does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept'.[36] From this, the following points can be made.

First, the reference by Hoffmann LJ to the need to assess whether it would be 'unconscionable' should not be taken too literally, in the sense it should not be understood to mean that the courts' approach is one of broad discretion alone without at least some basis in principle.[37] A promise-based proprietary estoppel claim can be understood according to a two-stage process.[38] At the first stage, B's task – as we have seen – is to establish that an equity has arisen as a result of A's promise and B's reasonable reliance on that promise. During the

[34] *Walton v Walton* (Court of Appeal, 14 April 1994).
[35] *Thorner* (n 2) [56]-[57].
[36] That observation of Hoffmann LJ was cited by the Court of Appeal in *Cheung Lai Mui* (n 11) 1.11.
[37] *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P & CR 10 [38].
[38] In *Cheung Lai Mui* (n 8) [27], it was said: 'It may be confusing to use the term "cause of action" in this context. Rather there are two steps involved. First, once the elements of the proprietary estoppel are established an equity arises; secondly the court then must decide the most appropriate form of relief, and may have regard to the circumstances as they then exist'. See also the discussion in *Guest v Guest* [2020] EWCA Civ 387, [2020] 1 WLR 3480 [68]-[75] (appeal to the UK Supreme Court due).

currency of the parties' relationship, the equity will be 'inchoate'.[39] In *Thorner*, the position with proprietary estoppel in this sense was likened to that of a floating charge.[40] B's ability to establish the equity at the first stage is the key that unlocks the door to the second stage. At the second stage, it falls to the court to decide how that equity is to be satisfied. Here, the court enjoys some discretion in considering the circumstances at the relevant time. Such circumstances include the detriment B will suffer having relied on A's promise assessed against any countervailing benefits enjoyed by B in consequence of that reliance.[41] They also include any claims of other interested parties,[42] including the possibility of competing equities,[43] to the asset in question. Furthermore, it might be that a court is required to address the significance of the reason for A's having acted inconsistently with the promise. For example, in *Thorner v Major*, Lord Scott contemplated the hypothetical scenario of A's having a need to sell the farm to fund full-time nursing care; and expressed 'doubt' that B's equity in the farm would have been held by a court to bar A's selling the farm in such a situation.[44] And, in *Milling v Hardie*,[45] it was pointed out that the court 'looks backwards rather than forwards [and] may therefore take account of a supervening circumstance, such as [A's] unexpected financial reverse, which might justify departure from a promise'.[46]

Second, it follows that the reference by Hoffmann LJ in *Walton* to the need to assess the position 'when the promise falls due to be performed' is to be taken as a reference to the second

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[39] Nicholas Hopkins, 'Proprietary Estoppel: A Functional Analysis' (2010) 4 J Eq 201, 203.

[40] *Thorner* (n 2) [95] where Lord Neuberger observed: 'In this case, the extent of the farm might change, but, on the deputy judge's analysis, there is, as I see it, no doubt as to what was the subject of the assurance, namely the farm as it existed from time to time. Accordingly, the nature of the interest to be received by [B] was clear: it was the farm as it existed on [A's] death. As in the case of a very different equitable concept, namely a floating charge, the property the subject of the equity could be conceptually identified from the moment the equity came into existence, but its precise extent fell to be determined when the equity crystallised, namely on [A's] death'. Similarly, Lord Walker recognised, at [62], that '[A] and [B] knew that the extent of the farm was liable to fluctuate (as development opportunities arose, and tenancies came and went). There is no reason to doubt that their common understanding was that [A's] assurance related to whatever the farm consisted of at [A's] death'.

[41] *Davies* (n 37) [38].

[42] As pointed out at first instance in *Guest v Guest* [2019] EWHC 869 (Ch) [165], in exercising its discretion in relation to how the equity is to be satisfied, a court might also need to consider the need to do justice to A (as promisor) and '[t]hat may involve taking account of [A]'s continuing interest in the property (particularly when [B]'s expectation was to inherit only after his death) and the interests of others, aside from [B], whose occupation may derive from that interest or who may have their own claims or expectations in relation to it'.

[43] On which see Mark Pawlowski and James Brown, 'Proprietary Estoppel and Competing Equities' (2018) 2 Conv 145.

[44] *Thorner* (n 2) [19].

[45] [2014] NSWCA 163.

[46] *Ibid* [55]. In *Sobey v Sobey* [2014] VSC 373 [97], it was recognised that '[t]he vicissitudes of life may make it difficult for [A] to satisfy [B's] expectations….Something could happen to [B's siblings] which might result in a greater or lesser proportion of family assets being used to provide for one or either of them. [B] might never resume working on the farm such that adequate provision for his proper maintenance and support may be satisfied in a different way'. See also *Flinn v Flinn* [1999] VSCA 109 [128] ('in moulding an order, we should deal with the situation, including detriment suffered, as it exists today, in the light of events since the trial').

stage of the two-stage process, that is, once the equity has been established. This must be so because it presupposes that a promise has in fact been made. In addition, in some proprietary estoppel cases, B has succeeded in circumstances where A has acted inconsistently with the terms of the promise at some point prior to that at which actual performance, according to the terms of the promise, has fallen due; as, for example, where the promise is of B's inheritance, but A, while still alive, reneges on that promise, and there is a risk that the asset will be disposed of.[47] Accordingly, in such a case, it is not necessary for B at the first stage to establish that the promise has fallen due to be performed in accordance with its terms; B might establish the equity once 'the person who has given the assurances seeks to go back on them'.[48]

This analysis of these fundamental aspects of promise-based proprietary estoppel assists our understanding of the key issue in *Cheung Lai Mui*, namely the extent to which A is free to revoke – ie act inconsistently with – the promise and, in turn, the cut-off point by which B's reliance must have occurred. If A has made a promise to B, but A subsequently communicates a revocation of that promise prior to any reliance on that promise by B, a subsequent attempt by B to rely on the original promise will not be reasonable. This means B's proprietary estoppel claim will not succeed; because, at the first stage, B is unable to establish any equity in B's favour.[49] Likewise, if A makes an inheritance-based promise to B, but A dies without B's having any claim to the property under A's will, there will, in effect, be a revocation of the original promise. B can meet this with a proprietary estoppel claim only if B can demonstrate reasonable reliance prior to the point at which A died. Hence, correctly, the court in *Cheung Lai Mui* accepted the submission of the plaintiff that:

> '…where there is not the necessary reliance by the promisee prior to the death of the promisor, the promise or assurance by the promisor must be taken to have lapsed. The executor or administrator of the promisor otherwise, if it were sufficient that the detriment occurred after the death of the promisor, would be giving precedence to an

[47] See, eg, *Guest* (n 42) and *Gillett v Holt* [2001] Ch 210.
[48] This was the language adopted by Birss J in *Habberfield v Habberfield* [2018] EWHC 317 (Ch) [207] (approved [2019] EWCA Civ 890 [68]-[69] where Lewison LJ referred to the need to look back 'from the moment when assurances are repudiated').
[49] A loose analogy might be drawn with the revocation of a unilateral contractual offer. In that context, the offeror is generally free to revoke its offer until the point that performance of the act requested by terms of the offer has commenced: *Errington v Errington and Woods* [1952] 1 KB 290, 295; *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch 231, 239.

interest which only accrued after the interests of the testamentary beneficiaries or of the next of kin (under the Intestates' Estates Ordinance, Cap 73) had taken effect'.[50]

A difficulty in *Cheung Lai Mui* was that the Common Understanding amounting to a promise was made jointly by the three brothers (as co-owners of the Disputed Land at the relevant time). This raised a question as to the point at which D3's reliance must have occurred. It was held that in such a situation of joint-promisors, the cut-off point by which reliance must have occurred is the point at which the last survivor dies.[51] On the facts, therefore, the cut-off point was the death of Wan in 1999; and it was held that D3 had demonstrated reliance prior to the cut-off point. Accordingly, the equity had arisen in D3's favour by that point.

Critically, this meant that subsequent acts of reliance by D3 after the death of the last of the surviving brothers could be reasonable and relevant to the court's exercising its discretion in relation to D3's remedy. On the facts, such reliance was in the form of the construction of the two buildings on the Disputed Land in the early 2000s. In this respect, the court acknowledged, correctly, that 'the state of affairs subsequent to the "cut-off" point may be relevant at the stage where the Court is considering the appropriate remedy to be awarded',[52] that is, as part of the second stage when the court is satisfied that a promise has fallen due to be performed.

On the facts, it followed that D3 had established that a promise had been made and reasonably relied on. The detriment which D3 would otherwise suffer was avoided by an order that the plaintiff must transfer the remaining two-thirds of the Disputed Land to D3.

Conclusion

The facts of *Cheung Lai Mui* possessed two complicating factors. First, the Common Understanding giving rise to the promise was equivocal in the sense that the exact point at which D3 was to become the owner of the Disputed Land had not been made clear, and no steps had been taken to transfer the land to D3 during the lifetime of the three brothers nor after the death of the last survivor. Second, a significant period of time had passed between the death of the last survivor and the point at which D3 sought to rely on proprietary estoppel, within which D3 had continued to act on his assumption as to his right in the land. In relation to the first point, the willingness in *Cheung Lai Mui* to focus on the substance of the parties' relationship and give effect to the outcome that was ultimately intended is entirely consistent

[50] *Cheung Lai Mui* (n 8) [31].
[51] *Ibid* [33], adopting the observation of Cheung JA in the Court of Appeal: *Cheung Lai Mui* (n 11) 6.35.
[52] *Cheung Lai Mui* (n 8) [32]; and see also at [39].

with the fundamental purpose of proprietary estoppel. In relation to the second point, it must be correct that, in applying the backwards-looking approach to proprietary estoppel recognised by Hoffmann LJ in *Walton v Walton* and endorsed in *Thorner v Major*,[53] and the two-stage approach we have explained, all reasonable acts of reliance by the promisee should be taken into account for the purpose of satisfying the equity once it is established that such an equity has arisen.

[53] See text to nn 34-36.