



## Précis Paper

### Equitable Estoppel and Estates

A discussion of the recent decision of *Lorena Zupicic v Angela La Camera Paino as Trustee for the Estate of the Late Mario Novick* [2018] NSWSC 692.

#### Discussion Includes

- Key Facts
- Cause of action
- Promises made
- The estoppel claim
- Actions of the defendant
- Browne v Dunn rule
- The potential for an appeal
- Takeaways for Practitioners

## Précis Paper

### Equitable Estoppel and Estates

1. In this edition of BenchTV, David Palmer (Barrister – Hobart/Sydney: contact [dpalmer@chambers.net.au](mailto:dpalmer@chambers.net.au), ph.: 0414 731 127) and Peter Matthews (Associate – AR Conolly and Company) discuss the recent decision of *Lorena Zupicic v Angela La Camera Paino as Trustee for the Estate of the Late Mario Novick* [2018] NSWSC 692.

#### Key Facts

2. The plaintiff was the second cousin of the deceased and had known Mr Novick since 1994. She was not named as a beneficiary under the will.
3. The defendant was executor and sole beneficiary of the Estate of the deceased.
4. The plaintiff claimed that for approximately 18 years the deceased had made various promises to her to the effect that if she assisted him with care, attention, errands and other domestic assistance he would leave all of his estate to her.

#### Cause of action

5. The cause of action was based upon a constructive trust so it was an equitable estoppel claim.
6. This was because a Family Provision claim pursuant to Chapter 3 of the *Succession Act 2006* (NSW) was not available as the plaintiff was not an eligible claimant, as the deceased was, at all relevant times, a single man without children.
7. The plaintiff ran an alternative claim of breach of contract, the contract being to make and to not revoke a will leaving her as the sole beneficiary of his estate.
8. However, this claim was ultimately not successful.

#### Promises made

9. In 1994, Mr Novick encouraged the plaintiff to immigrate to Australia.
10. She then began to assist him on a daily basis with his day-to-day living.
11. In 1998 the first representation was made in which Mr Novick said to the plaintiff words to the effect of 'I require more and more assistance, can you please wash my clothes, clean and do the shopping and errands as I simply can't.'
12. This was soon followed by another representation in which he said words to the effect of 'I want to repay you and your family for all of the work you have done and for all of the work which you are going to do for me in the future. Instead of paying you I will leave you everything in my will.'

13. The plaintiff contended that this representation was repeated every 3-4 months over the period of 1998 – 2016.

#### The Estoppel claim

14. There are three elements to an estoppel claim seeking a constructive trust
  - a. The plaintiff needs to prove that the representations were made;
  - b. The plaintiff needs to prove that they were relied upon;
  - c. The plaintiff needs to prove detriment
15. The making of the representations and the evidence of it was by recounted conversations by the plaintiff, under oath about what the deceased told her.
16. There was also corroborative evidence by other witnesses in the social circle of the plaintiff and the deceased.
17. The deceased repeatedly told these witnesses that he had left everything in the will to the plaintiff due to all that she had done for him.
18. The Court accepted the plaintiff's evidence that she relied on the representations and that she would not have performed any of the work unless they had been made to her.
19. In regard to detriment, the Court found that the work that the plaintiff did of and by itself was a form of detriment.
20. The Court held that the other detriment which the plaintiff suffered was that she did not progress up the ladder in her employment.
21. This was due to the fact that she had refused to take a position which was offered to her so that she could maintain flexibility in assisting with the deceased.

#### Actions of the defendant

22. These representations and the plaintiff's reliance on them were probably not known to the defendant as the defendant had only come onto the scene in 2013 when the deceased became ill.
23. Therefore, it is unlikely that the defendant had known what occurred between the plaintiff and the deceased prior to 2013.
24. A member of the social circle of the plaintiff and the deceased had been attending to Mr Novick whilst the plaintiff had gone overseas for a month.
25. The member of the social circle was then replaced by the defendant who then held a social relationship with the deceased from that time.
26. The plaintiff claimed and the Court found that since that time there was a process of alienation which was implemented by the defendant.
27. In particular, His Honour found that;
  - d. the deceased became infatuated with the defendant;
  - e. the deceased in his own mind was in a relationship with the defendant;
  - f. over time the defendant pandered to the deceased for her own financial gain and

- g. she placed herself as a wedge between Mr Novick and his family and close friends.
28. His Honour also found that the defendant's control over Mr Novick had caused Mr Novick to become disaffected from his family and friends.
29. Ultimately, His Honour held that the intermeddling of the defendant resulted in the deceased diverting from the promises made to the plaintiff and leaving a last will and testament with the defendant sole beneficiary.
30. One of the difficulties faced by the Court in matters such as these is that it must place reliance on verbal representations and conversations of a deceased person as well as reliance on the plaintiff recounting it.
31. In this case, it was fortunate for the plaintiff that she had corroborative independent witnesses.
32. A notice of intention to appeal has been filed however no grounds of appeal have been filed or served as yet.

### Browne v Dunn rule

33. The rule from *Browne v Dunn* (1893) 6 R 67 (HL) was important in this case.
34. This is because the plaintiff's evidence in relation to the making of the representations and her reliance on them, was not seriously challenged under cross-examination.
35. Therefore, in accordance with the Browne v Dunn rule, if the plaintiff is not tested on these grounds and if she is a believable witness, the Judge trying the matter can just accept the evidence.

### The potential for an appeal

36. A possible appeal point is that there is no real detriment or that the detriment is not enough.
37. This is both a factual and a legal argument.
38. His Honour could not put a monetary value on what the plaintiff gave up and what she did and therefore he held that compensation by an award of money would not remedy the detriment.
39. The only way the detriment could be remedied was by holding the deceased to his promises.
40. The costs judgement in this matter has not yet been heard and the decision from the costs judgement may effect whether an appeal will be brought or not.
41. The plaintiff wants the defendant to pay costs and be personally liable.
42. However, often in deceased estate matters the executor is able to get an indemnity for legal costs from the estate.
43. That is to say that in probate litigation provided an executor acts properly, they usually get their costs out of the estate.

- 44. The argument in the current matter is that the plaintiff ran an equity claim which is not probate litigation.
- 45. The defendant may argue that by analogy the same principle that applies in probate litigation should apply in this matter.
- 46. The concern is that if this occurs, it puts the plaintiff at a disadvantage, as the money will be coming out of the fund over which a constructive trust has been declared in her favour.

#### Takeaways for practitioners

- 47. When dealing with deceased estates always consider a Family Provision claim.
- 48. If you have an applicant who is ineligible under the Succession Act there are other options available such as a constructive trust claim.
- 49. However, such cases are very difficult to win because of the problems with proof and in cases like this, it may become an all or nothing claim.
- 50. Therefore for the litigant, the stakes are high.

## **BIOGRAPHY**

### David Palmer

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David was called to the NSW Bar in 2016. Prior to this, he was the principal solicitor of his firm Bundock/Palmer Lawyers. His primary areas of practice include probate/family provision/equity, commercial law, crime, employment law, insolvency, and construction law. David has conducted litigation in the High Court of Australia.

### Peter Matthews

Associate – AR Conolly and Company

Peter Matthews is an associate at AR Conolly and Company and holds a Bachelor of Law and a Bachelor of Science.

## **BIBLIOGRAPHY**

### Focus Case

*Lorena Zupicic v Angela La Camera Paino as Trustee for the Estate of the Late Mario Novick* [2018] NSWSC 692.

### Cases

*Browne v Dunn* (1893) 6 R 67 (HL)

### Legislation

*Succession Act 2006* (NSW)