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# Recent developments in property law

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This paper provides an update on some recent developments in property law. It focuses on two decisions at an appellate level, each representing a unique development in the law.

The first, a decision of the New South Wales Court of Appeal in *Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd*,<sup>1</sup> involves an exercise in contractual interpretation in the context of a sale of land and, in particular, the operation of the typical ‘nominee’ clause permitting nomination of a party to take title. The case also concerns novation of contracts, a matter having clear ramifications for parties to a sale of land transaction.

The second case, that of the Victorian Court of Appeal in *McNab v Graham*,<sup>2</sup> involves the interaction between equitable doctrine — specifically, constructive trusts — and the intention of parties regarding ownership of property.

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\* This paper was presented to members of the Eastern Solicitors Law Association at Box Hill on 18 June 2019. This paper is intended to be of a general nature only and does not constitute advice. The law evolves, and the material discussed in this paper may be subject to change.

<sup>1</sup> [2018] NSWCA 282.

<sup>2</sup> (2017) 53 VR 311.

Both cases provide, it is hoped, a refresher on their respective areas of law as well as some practical pointers should readers encounter a similar legal or factual challenge of their own.

## **Getting in on the deal: purchaser nominees and novation of contracts**

In the context of a contract for the sale of land, it is quite common to see a clause permitting the purchaser to nominate a person or entity to which title is to be transferred. Less common (one would hope) are issues arising from this, including whether a right to nominate has been validly exercised and whether the contract of sale ultimately has been novated. Such issues recently arose for consideration in *Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd*.

### The dispute

In March 2016, Park Cho Pty Ltd as vendor and Mr Zhang as purchaser entered into a contract for the sale of commercial property. Mr Zhang paid a ten percent deposit and, the following month, the vendor's solicitors emailed Mr Zhang's solicitors to enquire whether Mr Zhang would agree to the release of the deposit. The email also reminded Mr Zhang of his ability to 'change the purchasing entity's details on the front page' of the sale contract.

In a reply email, Mr Zhang's solicitors did not consent to the release of the deposit. They did, however, request a change to the 'purchaser's name' and requested confirmation from the vendor that this was acceptable. Mr Zhang had sought to change the name of the purchaser to 'Fu Tian Fortune Pty Ltd' (**Fortune**), a corporate trustee of which he was sole director. The vendor's solicitors acknowledged Mr Zhang's request in a reply email.

As it turned out, the agreed change was never formalised and there was no further communication regarding it. Moreover, the contract did not end up describing the purchaser in the expected fashion, that is, as Mr Zhang 'or nominee'. For all appearances, then, the desired change had not proceeded.

The contract was due to be completed at the end of April. The due date for completion came and went. The vendor served a notice to complete on Mr Zhang's solicitors. Interestingly, the notice was addressed to Fortune and not to Mr Zhang. When there was no response the vendor served a notice of termination in the same fashion — that is, addressed to Fortune rather than to Mr Zhang.

In May 2017, Fortune commenced proceedings seeking a declaration that the sale contract was still on foot and seeking orders for specific performance. Fortune was the sole plaintiff at that point. Mr Zhang later added himself as a plaintiff and the nature of the case changed; the case was put that Mr Zhang was the true purchaser and alternative orders were sought for the recovery of his deposit.

The trial judge held that the sale contract had been novated and Fortune had been substituted as purchaser for Mr Zhang. The trial judge regarded the email correspondence between the parties' solicitors and the parties' subsequent conduct as evidence of their understanding that a legitimate novation had occurred. That being the case, the vendor's actions in purporting to terminate the contract were valid and there was no basis on which Fortune could seek to enforce it.

Fortune sought leave to appeal the trial judge's decision. The sole issue on appeal was whether the trial judge had erred in finding that the contract had been novated.

#### Nominee clauses and novation of contracts

The ability for a purchaser to nominate another to take title under a sale of land contract represents something akin to an assignment of rights. The nominated party takes the benefit of the transaction — the acceptance of title — without any of the nominating purchaser's obligations. It is not quite an assignment, however, since 'the purchaser's nominee does not become a contracting party; the vendor and the purchaser continue to be the sole contracting parties, the nominee being the person who takes title by the conveyance or transfer'.<sup>3</sup>

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<sup>3</sup> *Meehan v Jones* (1982) 149 CLR 571, 594.

There might be circumstances where the parties wish to fully relieve the nominating purchaser from the contract. Nomination cannot of itself achieve this goal, and nor can an assignment. A deed of novation might be appropriate instead, being a separate, tripartite agreement entered into by the original purchaser, the vendor, and the new substitute purchaser. The effect of a deed of novation would be such that any 'nominee' would acquire not only the rights of the purchaser but also the obligations.

Novation effectively substitutes an entirely new contract for the old one. The differences between assignment and novation, and the potential consequences of not properly effecting one or the other (as the case may be) mean that drafting appropriate terms is imperative.

#### On appeal

On appeal, Fortune argued that there was no novation in circumstances where there was no rescission, nor any consideration for any rescission, of the original contract. Fortune raised the fact that no subsequent contract between the vendor and the new purchaser had been drawn up. Fortune also argued that the correspondence between the parties' solicitors merely reflected Mr Zhang's exercise of a 'right to nominate' rather than a request to novate the contract in favour of Fortune *per se*.

Barrett AJA, with whom Macfarlan and Gleeson JJA agreed, gave the Court of Appeal's judgment on the question of novation. The Court went on to dismiss the appeal and addressed the key issues as follows.

#### *Had there been a valid nomination?*

The contract of sale did not include the usual 'nominee' provision. Fortune argued that a nomination could occur in the absence of such. The Court of Appeal accepted Fortune's argument, if only as an 'abstract proposition'; the Court noted the existence of a common law right of nomination in the absence of the typical 'purchaser or nominee' expression in a

contract of sale.<sup>4</sup> The Court cited the decision in *Lord v Trippe*,<sup>5</sup> in which Aickin J held:<sup>6</sup>

[A] purchaser under a contract of sale which contains no such express provision may, in the absence of special circumstances, require the vendor to transfer to some third party nominated by him. As Jessell MR said in *Egmont v Smith* (1877) 6 Ch D 469 at p 474, ‘*An ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct.*’

Notwithstanding the availability of a common law right to nominate, the Court noted that the sale contract permitted Mr Zhang as purchaser to tender a form of transfer naming a transferee other than himself. The relevant clauses in the contract required Mr Zhang to sign that form and serve it on the vendor at least 14 days prior to the date of completion. The impact of those provisions in the contract was to *modify* the common law right to nominate. The Court of Appeal held that ‘[t]he express terms of the contract stipulated a particular and exclusive method of exercising the right of nomination’.<sup>7</sup> On the facts, the clauses setting out the means by which a valid nomination was to occur had not been complied with; Fortune had not exercised the right properly.

In circumstances where Fortune had not validly exercised its right to nominate, the question remained whether the sale contract had in fact been novated. The trial judge found that it had. If it had been novated, the original sale contract — and the one for which Fortune sought specific performance in the proceeding — would be redundant.

*Had the contract been novated?*

The Court of Appeal articulated the issue as follows:<sup>8</sup>

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<sup>4</sup> *Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd* [2018] NSWCA 282, [23]–[24].

<sup>5</sup> (1977) 51 ALJR 574.

<sup>6</sup> *Ibid* 582 (emphasis added).

<sup>7</sup> *Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd* [2018] NSWCA 282, [28].

<sup>8</sup> *Ibid* [34].

[I]f it is found that [the vendor] had, with Mr Zhang's acquiescence, agreed to accept the promise of Fortune to perform in place of Mr Zhang, so that an obligation to [the vendor] inconsistent with Mr Zhang's came into existence by agreement, that finding will be sufficient to ground a further finding that [the vendor] released Mr Zhang.

Key to the question of whether a new obligation has arisen which is 'inconsistent' with a former obligation is the parties' intentions on that point. Barrett AJA considered the evidence and held that the correspondence between the parties' solicitors in April 2016 — where Mr Zhang's solicitors requested a change in the name of the purchaser in the contract and the vendor's solicitors assured this would be done — demonstrated certain intentions and gave rise to the first kind of *Masters v Cameron* agreement,<sup>9</sup> namely one where<sup>10</sup>

the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, while at the same time proposing to have the terms restated in a fuller and more precise way which is not different in effect. In such a case, the agreement is immediately binding.

The evidence also showed, in the Court's view, the parties' acquiescence to this state of affairs despite their failure to formalise things. Such evidence included:

- further correspondence from Mr Zhang's solicitors which consistently identified Fortune as the purchaser; and
- the vendor's notice to complete and notice to terminate having been addressed to Fortune rather than to Mr Zhang.

The Court's consideration of evidence of the parties' conduct is consistent with the view expounded in *Pavlovic v Universal Music Australia*.<sup>11</sup> There, the Court held:<sup>12</sup>

[T]he question whether, in circumstances of this kind, an immediately binding contract has been formed is to be determined by reference to what each party by words and

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<sup>9</sup> (1954) 91 CLR 353.

<sup>10</sup> *Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd* [2018] NSWCA 282, [40].

<sup>11</sup> (2015) 90 NSWLR 605.

<sup>12</sup> *Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd* [2018] NSWCA 282, [43].

conduct would have led a reasonable person in the position of the other party to believe with regard to the commercial context and surrounding circumstances of the parties' dealings. The court will pay attention to the parties' subsequent actions in answering that question. The inference that an immediately binding contract has been formed will be drawn with particular confidence if the parties have conducted themselves in a way that, on balance, must be referable to the existence of a binding contract of the type alleged.

Also relevant to the question of novation was the way the proceeding had been brought and what this signified about the parties' understanding vis-à-vis the contract of sale. Barrett AJA noted:<sup>13</sup>

It is significant that the proceedings were commenced by Fortune alone ... [and] [t]he statement of claim adding Mr Zhang as plaintiff and propounding the thesis that he was in truth the purchaser was not filed until more than two months later.

His Honour concluded:<sup>14</sup>

From at least mid-April 2016, all actions of Park Cho, Mr Zhang and Fortune were entirely consistent with Fortune's having become subject to the purchase obligation and Park Cho having, with Mr Zhang's acquiescence, agreed to accept the promise of performance by Fortune. *An obligation inconsistent with Mr Zhang's came, by agreement, to supersede Mr Zhang's.* That, for reasons discussed, is sufficient to ground a finding that Park Cho released Mr Zhang and that Fortune became bound (and entitled) as sole purchaser in his place.

### Comment

The Court of Appeal's decision in *Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd* illustrates a few key points in the context of a sale of land. First, it highlights the interface between common law and contractual rights to nominate. The Court's decision demonstrates the importance of complying with the specific requirements of a contractual right of nomination where it supersedes the common law right.

Secondly, the Court's decision shows that, in the context of an alleged novation of a contract, the parties' words and conduct after the purported novation can evidence whether the contract has in truth been novated. This can have consequences for a party seeking to enforce a

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<sup>13</sup> Ibid [37].

<sup>14</sup> Ibid [44] (emphasis added).

contract of sale, for when the contract has been superseded such efforts probably will be in vain.

### **Actions for recovery of land: the Court of Appeal on constructive trusts and limitation periods**

Where seeking to recover land on the basis of a constructive trust arising from proprietary estoppel, when does that constructive trust arise? Does it arise when a court makes a declaration to its effect, or when the relevant cause of action accrues? If the latter, when does the cause of action actually 'accrue'? And should a court consider a lesser remedy instead of declaring a trust? The Court of Appeal in *McNab v Graham* answers those questions.

#### The facts

The applicants on appeal were the executors and trustees of the estate of Colin Wilbur Turner and the defendants in a County Court proceeding. Mr Turner passed away in November 1997. Pursuant to his Will executed in May 1994 he granted a life interest in property he owned to the Grahams, the respondents. The Grahams claimed this was contrary to representations which Mr Turner made while living; they expected to take title to the property on the basis they claimed he had represented that on his death he would leave the property to them.

In September 2015, the Grahams commenced proceedings in the County Court seeking a declaration that the executors held the property on trust for them. Relevant to that proceeding, section 8 of the *Limitation of Actions Act 1958* (Vic) (the **Act**) provides that no action to recover land can be brought after the expiration of 15 years from the time the cause of action accrues. Section 22 of the Act provides that no action can be brought in respect of any claim to the personal estate, or any share thereof, of a deceased person after the expiration of 15 years from the date when the right giving rise to that claim accrues.

Section 21(1)(b) provides an exception to those limits. There, the Act provides that no limitation period under the Act applies to an action by a beneficiary under a trust for the



recovery of ‘trust property’ from the trustee. Given the Grahams’ situation, unless the County Court proceeding were considered an action for recovery of ‘trust property’ then either of the 15 year limitation periods would apply to bar their County Court action.

At trial in the County Court, the judge held that no period of limitation applied to the Grahams’ proceeding by reason of section 21(1)(b) of the Act. Being satisfied that the requirements for proprietary estoppel had been made out, the judge declared that the land was held for the Grahams’ benefit pursuant to a constructive trust and ordered that steps be taken for its transfer. The executors sought leave to appeal that decision to the Court of Appeal.

### Constructive trusts and timing

The concept of a constructive trust involves two notions: one, the constructive trust as a proprietary right or state of affairs and the other, an equitable remedy. In other words, a constructive trust can arise due to the parties’ conduct relating to acquisition of property and, in a slightly different sense, a constructive trust can arise where a court declares it so.

Courts tend to avoid granting equitable relief beyond whatever is necessary or just in a given case. A court might declare the existence of a constructive trust where, in the circumstances, it would be unconscionable for a person holding property to deny another person’s interest in that property.<sup>15</sup> Such unconscionability can arise, for example, where a fiduciary has inappropriately profited from its position or where there was some communicated intention to transfer property but the transaction did not proceed and the beneficiary suffered loss in reliance on the trust. The latter was the Grahams’ situation.

### The decision on appeal

The Court of Appeal granted leave to appeal but dismissed the appeal. In doing so, aside from issues about whether or not the primary judge made inconsistent findings (the Court found that the judge had not), the Court responded to the two key issues on appeal. Those were:

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<sup>15</sup> *Stepherson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536, 552.

- Whether the exception in section 21(1)(b) for the recovery of trust property applies to a proceeding where that claim seeks a constructive trust arising from proprietary estoppel.
- Whether the primary judge, before declaring a constructive trust, was obliged to consider whether a lesser remedy would have sufficed.

Tate JA, with Santamaria JA and Keogh AJA agreeing, gave the Court's reasons.

*Was the action exempt from any statutory limitation period?*

Tate JA addressed the limitation period issue and, necessarily, the question of the timing of creation of the constructive trust. Her Honour held that at least in circumstances of proprietary estoppel a constructive trust arises when the cause of action accrues, that is, when the facts which give rise to it occur rather than when a court declares the trust. Referring to the decision of Ward J in *Varma v Varma*,<sup>16</sup> Tate JA stated:<sup>17</sup>

In my view, a constructive trust based upon the principles of proprietary estoppel arises independently of any declaration of a court; it is 'treated as coming into existence at the time of the conduct which gives rise to the trust'. Applying that principle to the circumstances of this case, *the relevant property was impressed with a constructive trust from the time when there was reliance upon the promise which rendered it unconscionable for the owner of the land to resile from that promise.*

This meant that, in the Grahams' case, the constructive trust arose before the County Court proceeding commenced. That being the case, the County Court proceeding was a proceeding for the recovery of trust property — the property already constituting 'trust property' when the proceeding commenced — to which no period of limitation should pursuant to section 21(1)(b) of the Act.

Tate JA noted that for the purposes of section 21(1)(b) the terms 'trust' and 'trustee' are defined in section 3(1) of the Act as having 'the same meaning respectively as in the Trustee Act 1958' so as to include implied and constructive trusts. Section 3(1) of the *Trustee Act*

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<sup>16</sup> (2010) 6 ASTLR 152, 259 [507] (NSW Supreme Court (Equity)).

<sup>17</sup> *McNab v Graham* (2017) 53 VR 311, 314 [6] (emphasis added).

1958 (Vic) provides that ‘the expressions “trust” and “trustee” extend to implied and constructive trusts and to cases where the trustee has a beneficial interest in the trust property ...’.

In reaching a view on the timing of creation of a constructive trust, Tate JA discussed at some length the jurisprudence regarding constructive trusts. This included the apparent distinction between the constructive trust in an ‘institutional’ sense (that is, where a constructive trust responds to an interest in land created by virtue of estoppel and the type relevant to the *Grahams*’ case), and in the ‘remedial’ sense (being where a constructive trust is granted by a court in response to personal, fault-based liability, such as where there is a breach of fiduciary duty). While the Court’s decision in *McNab v Graham* settles the law in relation to the timing of creation of a constructive trust in the former circumstance, it arguably leaves that question unanswered in the latter.

Recently in the New South Wales decision in *E Co [a pseudonym] v Q [a pseudonym] (No 4)*,<sup>18</sup> Ward CJ in Eq grappled with the question of the timing of creation of a constructive trust. That proceeding involved a dispute amongst family regarding the operation of a family business. Issues arose as to whether certain parties were entitled to a declaration of a constructive trust on the basis of joint endeavours.

In that case, Ward CJ in Eq distinguished the timing of creation of a constructive trust from<sup>19</sup>

the time at which it can be said that it became unconscientious or unconscionable for the promisor to resile from the promise (by reason of the reliance on that promise, that reliance necessarily occurring, as the plaintiffs accept, at an earlier time, though it may well continue through to the time of disappointment of the promise).

In citing with approval the decision in *McNab v Graham*, her Honour concluded:<sup>20</sup>

[T]he date upon which a constructive trust is taken to have come into existence in a case such as the present is when the conduct which gave rise to it occurred, that is, *when the*

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<sup>18</sup> [2019] NSWSC 429.

<sup>19</sup> *Ibid* [614].

<sup>20</sup> *Ibid* [615] (emphasis added).

*relevant plaintiffs acted in reliance on the promise or expectation* (such that it later became unconscionable or unconscientious for the maker of the promise or the inducer of the expectation to resile therefrom).

When read together with the decision in *McNab v Graham*, the New South Wales Court of Appeal's comments help to pinpoint the particular moment in time where it arguably can be said that a constructive trust has arisen: the time at which a person has acted in reliance on the relevant representation or promise.

The above should be tempered with a broader consideration of the nature of a constructive trust as an equitable remedy. Being an equitable remedy, its imposition is at a court's discretion and there is a branch of authority that suggests that a court can take into account 'the legitimate claims of third parties'<sup>21</sup> in declaring that the relevant constructive trust has arisen not at the time of reliance but instead at the time of the court's judgment. This deferral of timing arguably might be the case where there are other interests in property the subject of the constructive trust, such that there is a question of about the priority of competing interests.

In my view, this more flexible approach properly can be seen as an exception to the general rule of timing as set out in *McNab v Graham* and *E Co [a pseudonym] v Q [a pseudonym]* (No 4). It also is consistent with the law regarding priority disputes between competing equitable interests and how an interest with *prima facie* priority can be deferred to an equitable interest of a third party with a 'legitimate claim' due to some disentitling conduct.

*Should the trial judge have considered a lesser remedy than a constructive trust?*

In *Giumelli v Giumelli*,<sup>22</sup> the High Court stressed the need for courts 'to consider all the circumstances of the case' in determining an appropriate remedy in an action for proprietary estoppel.<sup>23</sup>

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<sup>21</sup> *Muschinski v Dodds* (1985) 160 CLR 583, 623 (Deane J).

<sup>22</sup> (1999) 196 CLR 101.

<sup>23</sup> *Ibid* 125.

In the present case, Tate JA noted subsequent comments by the High Court in *Sidhu v Van Dyke* which acknowledged that court orders requiring the fulfilment of a promise might in some situations be ‘wholly inequitable and unjust’ if such a measure were disproportionate to the detriment suffered in circumstances where equitable compensation were awarded instead.<sup>24</sup> Nonetheless, Tate JA held that the circumstances of the case did not require the County Court judge to investigate whether a lesser form of relief would satisfy the equity raised. Her Honour considered that the High Court’s comments in *Sidhu v Van Dyke* regarding disproportionate relief ought only apply where there is something ‘so out of the ordinary’ as to warrant a court’s consideration in a given case.<sup>25</sup>

There was nothing so extraordinary, in that sense, in the Grahams’ case. In their case, the remedy of a constructive trust reflected the detriment suffered by the Grahams and the value of the promise made by Mr Turner in his lifetime. The Grahams had moved into the property in 1974 and continued to live there, paying rent (albeit at a modest rate) and looking after Mr Turner and his wife in their later years. Her Honour was of the view that the Grahams, in relying on Mr Turner’s representation, suffered detriment ‘of a kind and extent that involve[d] life-changing decisions ... of a profoundly personal nature ... beyond the measure of money’.<sup>26</sup>

In forming a view about the appropriateness of a constructive trust as a remedy for the Grahams, her Honour also considered the impact on third parties when ordering a constructive trust. On the facts, the Freemasons/Epworth Hospital was a remainderman under Mr Turner’s Will and a mere ‘volunteer’. Her Honour held that whatever beneficial interest the hospital had to Mr Turner’s estate was subject to the constructive trust in favour of the Grahams, that the Hospital was a volunteer to whom equity provided no assistance, and that declaring a constructive trust would not be so harsh on the Hospital as to merit consideration of some other remedy.

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<sup>24</sup> (2014) 251 CLR 505, 530 [85].

<sup>25</sup> *McNab v Graham* (2017) 53 VR 311, 353 [131].

<sup>26</sup> *McNab v Graham* (2017) 53 VR 311, 314 [7], citing *Donis v Donis* (2007) 19 VR 577, 589 [34] (Nettle JA).

Conclusion

For the purposes of determining the application of statutory limitation periods for proprietary actions, the Court of Appeal in *McNab v Graham* has helped to clarify the law on proprietary estoppel and the remedy of a constructive trust. It is clear that, at least in circumstances of proprietary estoppel, a constructive trust arises at the time the cause of action accrues, namely when the innocent party acts in reliance on the relevant representation.

The Court's decision is also authority for the proposition that, in circumstances involving significant detrimental reliance on a property-based promise and where third parties would not be harshly affected, a court in formulating a remedy is not obliged to consider something less than a constructive trust.

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