COURT OF APPEAL FOR ONTARIO

CITATION: Metske v. Metske, 2025 ONCA 418
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Lauwers, Zarnett and Pomerance JJ.A.

BETWEEN

Tim Metske and Amanda Herlick

Plaintiffs (Respondents/
Appellants by way of cross-appeal)

and

Martin Metske and Roseanne Leona Metske

Defendants (Appellants/
Respondents by way of cross-appeal)

Dagmara Wozniak and Jim Virtue, for the appellants/respondents by way of cross-appeal

Robert Scriven and G. Edward Oldfield, for the respondents/appellants by way of cross-appeal

Heard: September 16, 2024

On appeal from the judgment of Justice Roger Chown of the Superior Court of Justice, dated February 10, 2023, with reasons reported at 2023 ONSC 1032.

Pomerance J.A.:

INTRODUCTION

[1] Some businesses remain in the family. Others do not. Business owners might muse about succession within the family unit. However, musings do not always give rise to enforceable promises.

[2] This case concerns a family farming business. The central question is whether comments made about future ownership gave rise to an assurance or representation that is enforceable through the equitable doctrine of proprietary estoppel.

[3] Martin and Roseanne Metske (the appellants) built and ran a farming business for many years. In early 2012, Martin and Roseanne decided to sell their cows and dairy quota. They met with their estranged son, Tim, and his partner Amanda Herlick (the respondents) to discuss the possibility of Tim and Amanda acquiring the dairy farm in stages. At the first stage, Tim and Amanda purchased the dairy herd, having obtained a $90,000 bank loan with Martin as co-signer. The parties had some discussion of subsequent steps, but as the trial judge acknowledged, the terms of the transfer remained “hazy”.

[4] Tim and Amanda left their jobs and took over the dairy operation, while Martin and Roseanne continued to work the rest of the farm. The relationship between the parties, tense to begin with, became increasingly acrimonious. Martin and Roseanne were unhappy with Tim and Amanda’s work, and this contributed

to the conflict. Between 2013 and 2017, the parties had no further discussions about succession. Amanda sought financing to purchase the dairy quota but was unsuccessful. The trial judge found that she and Tim could not afford to purchase the business. The farm was first rented and then eventually sold to others.

[5] Tim and Amanda left the farm and moved their equipment out of the barn at the end of May 2018. Forced to sell their herd and their equipment, they did not fare well financially.

[6] Tim and Amanda brought an action against Martin and Roseanne, claiming $1,300,000 for unjust enrichment based on the improvements and repairs that they made to the farm. The trial judge dismissed that claim, save for some limited exceptions. He went on, however, to raise the issue of proprietary estoppel on his own motion. He directed submissions on the issue and ultimately awarded damages on that basis. The trial judge found that Martin and Roseanne had promised the farm to Tim and Amanda on favourable but undefined terms; that Tim and Amanda had relied on that promise to their detriment; and that Martin and Roseanne had broken it. He also rejected Martin and Roseanne's claim to reduce amounts they were found to owe to Tim and Amanda under the doctrine of equitable set-off.

[7] I would allow the appeal in part. I agree with Martin and Roseanne that the trial judge erred in awarding damages on the basis of proprietary estoppel. On the

evidence, there was no promise, no promise broken, and no basis on which Tim and Amanda could reasonably expect to acquire ownership of the business.

[8] I would dismiss the appeal relating to equitable set-off and the cross-appeal by which Tim and Amanda seek to increase the amounts awarded to them for unjust enrichment.

[9] Because of the common last name, I will use first names to refer to the parties. I do so for ease of reference and mean no disrespect.

I. FACTS

(1) Background

[10] The respondents, Tim and Amanda, are the son and daughter-in-law of the appellants, Martin and Roseanne.

[11] Martin and Roseanne had been farmers since 1993. They maintained a mixed farming operation including dairy, beef, cash crop, and chickens. They owned a 152-acre home farm (the property at issue in these proceedings) with a barn where they operated a dairy. They owned other farm properties similarly located on the same span of acreage, including Langside farm.

[12] Between 2003 and 2011, Tim worked on Langside farm. During this time, Martin told Tim on more than one occasion that the farm would be his someday. However, this was not a consistent or well-defined promise, and Tim did not forgo

other options in reliance on it. In 2011, after an argument with Martin, Tim moved out and started living with Amanda in Stratford, where they purchased a house.

(2) Discussions leading to an arrangement

[13] In early 2012, Tim and Amanda learned that Martin and Roseanne were planning to sell their cows and dairy quota. Martin and Roseanne intended to carry on farming only cash crops. Tim and Amanda went to visit Martin and Roseanne in February 2012, who confirmed their plan to sell the cows and quota. The parties all met again in March 2012 to discuss an arrangement whereby Tim and Amanda would acquire the dairy farm in stages.

[14] The day before the meeting, Martin told Tim that the purchase price would be $1 million for the quota and $1 million for the land. Tim later told Amanda about these figures. Although the figures were not discussed at the family meeting the next day, Martin again mentioned the $2 million price when Amanda wrote a $90,000 cheque to purchase Martin and Roseanne's dairy herd. When Tim commented that the cheque was the largest Amanda had ever written, Martin replied that it would not be the biggest cheque she would ever write, as she would have to write a $2 million cheque when Tim and Amanda purchased the farm and quota. Although Martin twice mentioned the $2 million figure, it did not rise to the level of a solid commitment.

[15] At the meeting, the parties discussed a framework for transitioning the dairy farm to Tim and Amanda. The purpose of the meeting was succession planning.

Tim's uncle, who had experience with succession planning in his own family, attended to discuss different ways a young couple could take over a dairy farm. One option was for the couple to notionally lease the dairy and quota, making monthly payments eventually leading to the acquisition of the farm and quota at market value.

[16] After the meeting, the parties expected to work toward the transition of the dairy farm to Tim and Amanda. Tim and Amanda would first purchase Martin and Roseanne's dairy herd, and then the quota and land at market value. The purchase of the land would not occur for five years. Amanda acknowledged in cross-examination that she and Tim were to pay fair market value for the farm and quota, although this would require the input of a succession planner and depend on Martin's position as "they have to make it so that it works for both of us".

[17] The parties did not discuss the land price at the meeting as the land purchase would not occur for five years. They did, however, discuss getting a succession planner when Tim and Amanda were ready to buy the quota.

(3) Details of the arrangement

[18] After the meeting, Tim and Amanda obtained a $90,000 bank loan to finance their purchase of Martin and Roseanne's dairy herd. Martin co-signed for the loan. As part of the loan application, Amanda prepared a business plan which reflected the parties' goals and expectations. The business plan stated that (i) in April 2012, Tim and Amanda would lease 46 kg of quota from Martin and Roseanne; (ii) in

April 2013, Tim and Amanda would buy 44 kg of quota from Martin and Roseanne for a total of $1.12 million (a price which reflected a 2% premium above the then-prevailing exchange rate); and (iii) in 2018, Tim and Amanda would buy “Martin Metske’s dairy barn”.

[19] The trial judge noted that the reference to “Martin Metske’s dairy barn” in the business plan “reflected uncertainty among the parties regarding important details about how succession would work”. There was no evidence that the barn could be sold separately from the rest of the farm, or that severing the home farm was possible, or that the parties considered this. Martin agreed that 150 acres was necessary for the dairy operation, however. Amanda and Tim never expected Martin and Roseanne to leave the house at the home farm if they wanted to stay. All told, as the trial judge put it, “[i]n terms of the transfer of land, precisely what succession would entail was hazy”.

[20] The trial judge found that the parties’ understanding in April 2012 was that Tim and Amanda would buy the quota in one year, and in 2018 would purchase the farm or “otherwise come to an arrangement for succession of the dairy that involved the use of the barn”.

[21] The trial judge found that the arrangement between the parties had both rental elements “and a wider understanding for succession” which included “the purchase of the dairy herd” and an “agreement to agree” or “an understanding that

the parties would negotiate terms for succession of the dairy". The rental arrangements included renting the barn, quota, and the house at Langside farm.

(4) Implementation of the arrangement

[22] In April 2012, Tim and Amanda left their jobs and moved into the house at Langside farm. For the first few weeks of April, they milked the cows for hourly wages.

[23] In May 2012, Tim and Amanda took over the dairy operation, while Martin and Roseanne continued to operate the rest of the farming operation. The same month, after receiving the bank loan, Tim and Amanda completed the purchase of the dairy herd. Each month, Amanda provided Roseanne with two lists showing amounts for (i) rent for the barn, hydro, farmhouse, and dairy quota; and (ii) feed supplied by Martin and Roseanne. Roseanne would then issue a cheque to Tim for the milk revenue from the dairy, less the rent and feed amounts.

[24] The annual rent for the quota represented 5% of its value. Although Martin and Roseanne could have obtained a 7.25% rate of return through a 10-year loan to a co-operative, Martin decided to give Tim and Amanda a break.

[25] The parties initially disagreed over who would pay the costs of miscellaneous repairs. Tim and Amanda eventually agreed to pay, accepting Martin and Roseanne's argument that they should pay because they would be taking over the farm.

[26] In June 2012, at Tim and Amanda's wedding, Roseanne stated in her wedding speech that "some of the family was not happy with our decision" but that "we could do with the farm what we wanted". The trial judge found that the most likely explanation for Roseanne's remarks was that all the parties expected Martin and Roseanne to eventually transfer the dairy to Tim and Amanda. The trial judge considered this "important evidence" of the parties' expectations and of a "further assurance that [Tim and Amanda] were on a path to succession".

(5) Friction between the parties

[27] Between May 2012 and May 2018, Amanda and Tim continued running the dairy farm. During this time, two sources of friction emerged between the parties. First, as mentioned, the parties disagreed about who should pay the cost of barn and equipment repairs. Martin and Roseanne insisted that Tim and Amanda should pay, and eventually had their way. Second, Martin and Roseanne were sharply critical of how Tim and Amanda ran the dairy. Over time, the parties' relationship deteriorated. Things were contentious enough that in 2015, Tim and Amanda ran an ad seeking a different farm to lease after Martin threatened to terminate their agreement, but nothing came of this.

(6) Attempt in 2013 to secure financing to purchase the quota

[28] In 2013, Tim and Amanda purchased the maximum amount of quota they could afford, at Martin's encouragement. They purchased 0.51 kg of quota at a

cost of $12,266.95, maxing out their line of credit. The quota was added to Martin's Dairy Farmers Ontario ("DFO") licence.[1]

[29] That same year, Amanda met with a bank representative to discuss obtaining a bank loan to finance the purchase of Martin and Roseanne's dairy quota. However, the bank wanted a 10-year amortization period and Amanda realized that this would not be feasible. The trial judge inferred that the cash flow from the dairy farm would not support a loan with a 10-year amortization period. There was no evidence that Tim and Amanda reviewed this information with Martin and Roseanne.

(7) No further attempts to secure financing

[30] Tim acknowledged in cross-examination that at no point did he or Amanda obtain a valuation of the farm or arrange financing for a purchase. In Tim's view a succession plan was a necessary first step.

[31] Between 2013 and 2017, the parties had no further significant discussion regarding succession. They never determined the price Tim and Amanda would have to pay for the dairy. The trial judge found that had a price been determined, Tim and Amanda could not have financed it.

[1] Martin and Roseanne reimbursed this amount to Tim and Amanda after May 2018.

(8) Final breakdown of the relationship

[32] In April 2018, the parties had a serious disagreement, leading Roseanne to ask Tim and Amanda to leave Langside farm by the end of May 2018. They did.

[33] When they moved out, Tim and Amanda had to immediately sell their cows because they no longer had any dairy quota. Their herd of 96 cows fetched just over $90,000, around the same price they had paid in May 2012 for only 60 cows of lesser quality. They left behind some of the equipment they had purchased and sold some other items at a reduced price.

[34] Some time after they left, Tim and Amanda brought this unjust enrichment action against Martin and Roseanne for the increase in value of the dairy farm between 2012 and 2018.

II. ISSUES

[35] This appeal and cross-appeal raise three issues:

1. Whether the trial judge erred in awarding Tim and Amanda $405,000 in damages on the basis of proprietary estoppel;
2. Whether the trial judge erred in dismissing most of Tim and Amanda's unjust enrichment claim; and
3. Whether the trial judge erred in dismissing Martin and Roseanne's claim for equitable set-off.

[36] As I explained at the outset of these reasons, I would allow the appeal in part. The trial judge found that Martin and Roseanne represented that they would transfer the farm to Tim and Amanda on “favourable terms”. That finding reflects palpable and overriding error, moreover the parties never defined the essential terms that would determine whether the farm would be transferred—they did no more than agree to engage in future discussions, and Tim and Amanda were incapable of fulfilling any of the few terms that were contemplated. Accordingly, the award based on proprietary estoppel cannot stand. However, because the trial judge's conclusions regarding equitable set-off and unjust enrichment are free of reversible error, I would dismiss the balance of the appeal and the cross-appeal.

III. ANALYSIS

(1) Proprietary estoppel

(a) The trial judge’s reasons

[37] The trial judge found that Martin and Roseanne made representations or assurances that led Tim and Amanda to expect to enjoy “some right or benefit over property”. The assurance specifically included “Martin Metske’s dairy barn”, which meant an understanding that the barn and some farmland would be transferred to Tim and Amanda. Without the farm, the purchase of quota did not make sense.

[38] The trial judge also found that Tim and Amanda reasonably relied on the expectation that they would take over the farm: they invested their time, money, and effort in their pursuit of succession, and this redounded to their detriment.

[39] As for remedy, the trial judge held that it would be “wrong, not to mention impossible and impractical” to force a sale of the dairy farm to Tim and Amanda. First, the parties never defined the price Tim and Amanda would have to pay. Second, “[e]ven if an appropriate price could be determined, [Tim and Amanda] could not finance it”. Third, forcing a sale to Tim and Amanda would not be proportionate. Fourth, a sale of the dairy farm was no longer possible because the quota had been sold.

[40] The trial judge considered as analogous the remedy awarded in a case in which the plaintiff was compensated for the difference in wages he could have earned had he not left his higher-paying job to work on a ranch, based on a promise that he would receive a proprietary interest for some never-determined payment: *Kennett v. Diarco Farms Ltd.*, 2020 SKQB 124, at paras. 29, 147-49.

[41] Citing the remedy in *Kennett*, the trial judge awarded Tim and Amanda $400,000 to compensate them for: (i) the additional amounts they could have earned elsewhere between 2012 and 2018, which he estimated at between $221,000 and $500,000; (ii) their $38,000 loss on the forced sale of the dairy herd; and (iii) the investments they had made in the dairy operation.

[42] Because the remedy for proprietary estoppel covered the amounts for unjust enrichment (apart from the $5,000 for the furnace at Langside house), the trial judge awarded $405,000 to Tim and Amanda. The trial judge also awarded $2,000 to Martin and Roseanne for damage to Langside house.

(b) The governing principles

[43] The doctrine of proprietary estoppel applies when the following conditions are present (*Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754, at para. 15):

1. a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property;
2. the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all of the circumstances; and
3. the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word and insist on her strict legal rights.

[44] Like all estoppels, proprietary estoppel protects against the "inequity of allowing the other party to resile from his statement where it has been relied upon to the detriment of the person to whom it was directed": *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47, [2021] 3 SCR 490, at para. 16, quoting *Fort Frances v. Boise Cascade Canada Ltd.*, [1983] 1 S.C.R. 171, at p. 202.

(c) The principles applied

(i) Representation or assurance

[45] The first element of proprietary estoppel requires the claimant to show that the defendant made them a representation or assurance regarding an interest in property. This is the lynchpin of the analysis. If there is no representation or assurance, there can be no detrimental reliance, and the claim must fail.

[46] The representation or assurance can be express or implied, but it must be clear, unambiguous, and intended to be taken seriously: *Cowper-Smith*, at para. 26. The question is whether the meaning conveyed "would reasonably have been understood as intended to be taken seriously as an assurance which could be relied upon": *Cowper-Smith*, at para. 26, quoting *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776, at para. 5 (internal quotation marks omitted)

[47] The trial judge found that Martin and Roseanne offered assurances that the farm would be transferred to Tim and Amanda on "favourable, but undefined, terms". With respect, the evidence does not support this conclusion. To be sure, in the early days, Martin and Roseanne spoke of the farm eventually belonging to Tim and Amanda. The parties discussed an arrangement that would have Tim and Amanda purchase the business for fair market value. However, these tentative discussions never crystallized into a concrete plan. The parties recognized that a plan would require further discussion and negotiation. But that never occurred due

to rising tension and acrimony. In the result, there was no clear representation or assurance about the transfer of the farm to Tim and Amanda.

[48] Nor was there any evidence that such a transfer would occur on terms favourable to Tim and Amanda. The plan, such as it was, contemplated that Tim and Amanda would purchase the farm. However, without financing, they could not do so. By the time the farm was sold, there was no prospect that Tim and Amanda would take over the business. Tim and Amanda themselves looked for other farming opportunities and ran an advertisement to that end.

No evidence of donative intent

[49] The trial judge correctly found that there was no evidence that Martin and Roseanne intended to gift the farm to Tim and Amanda. However, he also found that Martin and Roseanne had assured Tim and Amanda that any transfer would be on “favourable terms”, and that they were motivated by “donative intent”. This was a palpable and overriding error.

[50] The trial judge relied upon the following factors in support of his conclusion as to “donative intent”:

- When Tim was younger, Martin had remarked to him that Langside farm would one day be his.
- Martin co-signed the $90,000 loan that Tim and Amanda obtained to purchase the dairy herd.

- Martin testified that they could have sold the quota and invested the funds rather than leasing it to Tim and Amanda, but chose to give them a break.
- Roseanne's wedding speech suggested that they would sell the farm to Tim and Amanda, and that other family members were unhappy with their decision.
- Martin and Roseanne invited Roseanne's brother to attend their meeting because he had succession planning experience, and his perspective was that succession requires the older generation to support the younger one financially.
- The cultural norm among farmers in that region favoured family farming and succession within farm families.
- Martin and Roseanne had financially assisted their other children.
- Tim was Martin and Roseanne's last child to leave the farm, and had been the only child living there for years.

[51] These factors do not, taken individually or cumulatively, support a finding of donative intent.

[52] First, the "culture" of succession in family farming businesses is a purely contextual consideration. What is traditionally done might be of some relevance but does not speak to what was contemplated within this family, as between these parties. Nor can one infer donative intent from Martin and Roseanne's financial assistance of their other children, with whom they apparently did not share the

same fractious relationship. Martin and Roseanne did assist Tim and Amanda in the early days by co-signing on a loan and renting the quota at a lower rate. However, these early gestures did not bind Martin and Roseanne, particularly as it related to the transfer of the business. Nor could anyone perceive that to be the case. Martin and Roseanne consistently maintained that any transfer of the farm would involve a purchase for fair market value.

[53] Indeed, this was how Tim and Amanda perceived the situation. Amanda acknowledged in cross-examination that she and Tim would pay fair market value for the farm and quota, although this would require the input of a succession planner. The business plan they submitted to the bank in the spring of 2012 stated that Tim and Amanda would eventually purchase the 44 kg of quota at a price totalling about $1.12 million, which represented a $500 per kg (or 2%) premium above the prevailing exchange price. Before they submitted that business plan, Martin mentioned to Tim and Amanda at least twice that the price for the quota and the land would be $2 million.

[54] Finally, as the trial judge noted from Tim's uncle's testimony, a common approach for the succession of a dairy farm is for the successors to notionally lease the dairy, making "monthly payments leading to acquisition of the farm and quota at market values at the time the acquisition is determined" (emphasis added).

[55] Because there was no evidence to support the finding of donative intent, the finding that the farm would be transferred on favourable terms must be set aside

as reflecting palpable and overriding error. The error is palpable because “it is plainly seen and … all the evidence need not be reconsidered in order to identify it”, and it is overriding because it affected the result by causing the trial judge to mischaracterize the nature of the representations that Martin and Roseanne made to Tim and Amanda: *Hydro-Québec v. Matta*, 2020 SCC 37, [2020] 3 S.C.R. 595, at para. 33.

Essential terms remained undefined

[56] It also bears noting that the terms of the transfer were never clarified or quantified beyond the notion of sale for fair market value. There was no specificity as to how fair market value was to be determined, nor was there any specificity about the terms on which the purchase price would be paid. The lack of detail is apparent from the trial judge’s summary of his findings, which include the following:

- In the spring of 2012, the parties reached an understanding that the plaintiffs would acquire the dairy from the defendants. The acquisition would take place over time. The initial phase would involve the plaintiffs purchasing the defendants’ dairy herd. The plaintiffs would rent the barn, the quota, and Langside house.
- The business plan that Amanda submitted to the bank indicated that the plaintiffs would buy the quota in 2013 and “Martin Metske’s dairy barn” in 2018. This reflected the parties’ goal, <u>but may not have been realistic without a financing guarantee from the defendants.</u>

- The parties never agreed on a price for the quota or “barn”.
- All parties expected that further succession planning would be undertaken in good faith.
- The family connection and the desire to keep the dairy in the family was a factor that motivated all parties to believe that they would work in good faith towards succession, and to believe that the defendants would transfer the quota and “barn” to the plaintiffs on favourable terms. [Emphases added].

[57] These findings establish that the viability of succession hinged on further discussion and negotiation between the parties. As the trial judge found, there was no specific purchase price; future negotiations were necessary; and the goal of succession “may not have been realistic absent a financing guarantee” from Martin and Roseanne. These were not just details about how succession would occur; these were details about whether succession would occur. It follows that there was no clear representation or assurance about the transfer of the business.

[58] The trial judge relied on *Cowper-Smith* for the proposition that an estoppel can arise even when important details are missing. He compared the facts of *Cowper-Smith* to those in this case, and described them as follows:

> - The arrangement between the parties was somewhat ill-defined. No price for the house had been discussed.
> - There was an assurance given but no agreement that reached the level of a contract.

- The claimant acted on the assurance to his detriment.

[59] While *Cowper-Smith* shares some features with this case, it is also fundamentally different. In *Cowper-Smith*, the claimant's sister expressly promised the claimant that he would acquire her interest in their mother's property (which they reasonably expected her to inherit) if he moved back to Canada from the United Kingdom to look after their mother. The precise details of the arrangement were "somewhat ill-defined", "no price for the house had been discussed", and there was no contract between the parties. However, the claimant's sister offered an undeniable, express *quid pro quo*, and the claimant relied on it. As the court observed, at para. 24:

> There is no question that Gloria assured Max that, if he moved back to Victoria to care for their mother, he would be able to acquire her eventual interest in the house. Nor is it disputed that, as a result of his reliance on that assurance, Max has suffered a detriment. The trial judge determined, and all now agree, that "Max acted to his detriment in moving from England to Victoria, giving up employment income, the long-term lease of a cottage, his contacts with his children, and his social life to look after his aged dementing mother" and that "[h]e did so relying on Gloria's agreement to his conditions for the move".

[60] Moreover, although the parties did not discuss the price at which the claimant would acquire his sister's interest, the remedy necessary to satisfy the equity in the claimant's favour could readily be determined—an order entitling him to purchase his sister's interest at its fair market value at the time he should have been able to acquire it: at para. 55. In other words, the uncertainties present in this

case—the terms, method, and timing of any purchase, as well as the known inability of the claimants to finance a purchase at any contemplated price—were not present in *Cowper-Smith.*

[61] This is not to say a representation or assurance must be express, or that it must tie every loose thread. A representation might be implied, and it might be less than comprehensive as to detail. An example of an implied promise is found in *Thorner*, also relied upon by the trial judge (and cited in *Cowper-Smith*). In that case, the House of Lords concluded that the claimant reasonably understood the defendant's words and conduct to convey an assurance that the claimant would inherit a farm.[2] As Lord Hoffman put it, "a representation was never made expressly but was a matter of implication and inference from indirect statements and conduct": *Thorner*, at para. 2 (internal quotation marks omitted). Despite the implicit character of the assurances, the two men "were well able to understand one another", so in the circumstances, "standing by in silence serve[d] as the element of assurance": *Thorner*, at para. 26, *per* Lord Rodger of Earlsferry, and at para. 55, *per* Lord Walker of Gestingthorpe.

[62] It will generally be more difficult to prove an implicit than an explicit assurance. Such determinations are inherently case-specific and fact-dependent. Yet even where a promise is said to be implied, it must be sufficiently clear to ground a common understanding between the parties. In this case, the common

[2] At the time of trial, the would-be defendant had died, so the litigation was between the claimant and his estate.

understanding, as found by the trial judge, was that there would be further discussions about the possibility of succession; that there was an agreement to pursue agreement in the future. That was not an assurance that could, in this case, properly ground a finding of proprietary estoppel.

Agreement to agree

[63] In 2011, the parties had a common intention to work toward succession of the farm. However, there was still much work to be done before any succession plan could crystallize. The trial judge acknowledged as much. As he put it in summarizing his findings:

> The arrangement between the parties should be characterized as having rental elements and a wider understanding for succession. The wider understanding for succession included the purchase of the dairy herd (which was completed) and an "agreement to agree" or an understanding that the parties would negotiate terms for succession of the dairy. The rental elements of the arrangement included rental of the barn, the quota, and Langside house.

The trial judge concluded that the "agreement to agree" could ground a finding of proprietary estoppel. I disagree, for reasons similar to those expressed in *Hawes v. Dave Weinrauch and Sons Trucking Ltd.*, 2017 BCCA 114, at paras. 33-38, where the British Columbia Court of Appeal held that an expression of willingness to negotiate a sale of land did not, for equitable purposes, amount to an enforceable promise. See also Bruce MacDougall, *Estoppel*, 2nd ed. (Toronto: LexisNexis Canada, 2019), at §6.119.

[64] In *Hawes*, the plaintiffs rented houses from the defendant company. The company told the plaintiffs that it was prepared to sell the houses to them if an agreement could be reached regarding the terms of sale. However, no agreement was ever reached. The company later decided against selling the property. Years later, another company purchased the property and sought to evict the plaintiffs. The plaintiffs brought a claim for proprietary estoppel.

[65] The British Columbia Court of Appeal held that the representation "amounted to no more than [the previous owner] expressing a willingness to negotiate with the appellants in regard to their purchasing the houses" and did not support an equitable claim: *Hawes*, at para. 36.

[66] This reasoning applies with force here. Martin and Roseanne offered no assurance that the farm would be transferred to Tim and Amanda. As in *Hawes*, they expressed a willingness to negotiate the sale of the farm later. A promise to negotiate is, by its nature, inchoate. It might or might not result in a meeting of the minds. Unless and until it does, there is no agreement upon which a party can reasonably rely.

[67] These facts exemplify the uncertain and inchoate nature of an "agreement to agree". In this case, any assurance of future negotiations fell by the wayside. As of 2013, the parties stopped discussing the issue. This was a function of two factors. The first was the deterioration of their relationship. The relationship between the parties was relatively amicable when Tim and Amanda first took over

the dairy operation. It was during that period that the parties spoke about Tim and Amanda purchasing the business. Things changed when the relationship soured. Tim and Amanda left the farm and began seeking other opportunities. Martin and Roseanne looked to others to run the farm. As early as 2013, the plan discussed in 2011 was, for all intents and purposes, abandoned.

[68] The second factor was Tim and Amanda's inability to secure financing. However one might characterize the discussions between the parties, the transfer of the farm contemplated a purchase for fair market value. Tim and Amanda knew early on that this was beyond their means when they were denied a long-term amortization on a loan to buy the quota. They did not share this information with Martin and Roseanne, but nor did the parties engage in any further discussions after this event. The stark reality, as the trial judge found, is that Tim and Amanda could not afford to purchase the farm, even on so-called favourable terms. It was therefore not reasonable for Tim and Amanda to expect that they would or could acquire the farm. I will turn to that issue now.

(ii) Reasonable reliance

[69] The trial judge found that Tim and Amanda reasonably relied on the expectation that they would take over the farm: they invested their time, money, and effort in their pursuit of succession. In his view, that reliance redounded to their detriment, "such that it would be unfair or unjust for the party responsible for the assurance to go back on its word or on the assumptions the parties have operated

under". The trial judge considered the following factors in concluding that Tim and Amanda relied on the assurance to their detriment:

- They "lived on minimal net income" when they could have earned significantly more elsewhere.
- They gave up the opportunity to pursue a succession with Amanda's family farm.
- They invested in Martin and Roseanne's herd and later had to sell the descendant herd in a forced sale.
- They invested in equipment and improvements they could not take with them.

[70] The original arrangement contemplated that Tim and Amanda would buy the dairy quota in 2013 and the farm, including the land, in 2018. Amanda discussed obtaining a loan with a banking representative but could not obtain proper financing. She and Tim did not share this information with Martin and Roseanne. The trial judge found that "there was no significant discussion between the parties about succession between 2013 and 2017". Whatever the tenor of the earlier discussions, it was overtaken by the subsequent breakdown in the parties' relationship.

[71] The trial judge adverted to these changes in the relationship, holding that "it is wrong to say that to support a claim for proprietary estoppel, the promise and the reliance … must be objectively, unambiguously, and consistently maintained

over time". However, this presupposes that there was a clear assurance made in the first place.

[72] One can presume that, during the early period, Tim and Amanda subjectively hoped to acquire the business. They invested time and money into it, and declined other opportunities—most notably, the succession of Amanda's family farm—to do so. Martin and Roseanne supported the role that Tim and Amanda played in the business, at least until they became dissatisfied with their performance. One can infer that, in 2012, all parties hoped that one day the farm would belong to Tim and Amanda. But hope alone is an unstable foundation for equitable relief, particularly when it is of a transient nature. In this case, any hope of succession was effectively dashed when the parties' relationship deteriorated, and financing was denied to Tim and Amanda. They could no longer reasonably expect or hope to acquire the business.

[73] In short, being unable to buy the business, Tim and Amanda were not entitled to damages for Martin and Roseanne's failure to sell it to them. Succession plans failed not because Martin and Roseanne broke a promise, but rather because Tim and Amanda could not buy the business, even on the "favourable" terms contemplated by the trial judge.

(iii) Detriment

[74] Given the absence of a clear promise, representation or assurance, the analysis need not reach the third question, which asks whether the claimant relied

on the representation or assurance to his or her detriment. Suffice it to say that if, as here, the reliance was not reasonable, any detriment flowing from the reliance is not actionable. I note, additionally, that the trial judge's findings about lost opportunities and lost income were largely speculative. There was no evidence that Tim and Amanda would have had more success working for Amanda's family, or that they would have ever been in a position to purchase a different farming business.

(iv) Conclusion on proprietary estoppel

[75] For all of these reasons, the trial judge's finding of proprietary estoppel must be set aside, along with the damages awarded to Tim and Amanda in the amount of $405,000.

(2) Unjust enrichment

(a) The trial judge's reasons

[76] Tim and Amanda claimed Martin and Roseanne had been unjustly enriched by the following amounts:[3]

1. $200,000 for the premium the quota could have fetched if sold together with the farm.
2. $345,000 for the increase in value of Martin and Roseanne's home farm between May 2012 and May 2018.

[3] Tim and Amanda raised other claims sounding in unjust enrichment. They too were dismissed by the trial judge. Tim and Amanda do not appeal those aspects of his decision.

3. $189,247 for the increase in the value of the dairy buildings.

[77] The trial judge concluded that Tim and Amanda had established their claims of unjust enrichment for the following amounts, which Martin and Roseanne have not appealed:

- $5,000 for the installation of a new furnace in the home on Langside farm; and
- $28,700 for permanent improvements Tim and Amanda made to the property that contributed to a lasting increase in value.

[78] However, the trial judge dismissed the balance of Tim and Amanda's unjust enrichment claims. He found that these were not readily realizable gains, because they could only be realized if Martin and Roseanne sold the quota and home farm together. But compelling such a sale would ignore Martin and Roseanne's autonomy and freedom of choice to remain on the home farm where they had resided for two decades. Martin and Roseanne were also not enriched by these amounts because they had sold the quota in 2022 and so would never be able to realize the putative gains.

[79] Tim and Amanda cross-appeal that conclusion.

(b) No error below

[80] The trial judge gave careful and extensive reasons in support of his conclusions on this issue. Tim and Amanda have failed to show any basis for appellate intervention.

[81] The doctrine of unjust enrichment requires proof of three conditions: that Martin and Roseanne were enriched; that Tim and Amanda suffered a corresponding deprivation; and that there was no juristic reason justifying the benefit or the deprivation: *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 37.

[82] It was open to the trial judge to conclude that Martin and Roseanne were not enriched by the increase in value to the operation because those gains could only be realized if Martin and Roseanne sold the quota and home farm together. Instead, Martin and Roseanne opted to remain on the home farm where they had resided for two decades. Indeed, they did sell the quota separately in 2022, making it practically impossible for them to benefit from the value of selling the home farm together with the quota.

[83] Tim and Amanda argue on appeal that Martin and Roseanne sold the milk quota separately from the farm only after the claim for unjust enrichment was commenced, thus frustrating the claim. However, the evidence established that the DFO rules required Martin and Roseanne to sell the quota because it was not

being used. The evidence also established that Martin and Roseanne legitimately wished to remain on the home farm where they had lived for several years. There was no basis to conclude that they sold the quota separately from the farm for the purpose of frustrating Tim and Amanda's claim.

[84] The trial judge explained this carefully:

> Some might consider the decision by the defendants to sell their quota on the exchange as squandering an opportunity to maximize their recovery. If they had sold the home farm together with the quota, they would have made $200,000 more. But that argument would not respect the defendants' freedom of choice and autonomy. Subjective devaluation applies. When they sold the quota, the defendants obviously did not want to move from the home farm, where they have lived since 1998. They were prepared to lose the "premium" they might have recovered by selling it with the quota. Their freedom to make that choice must be respected.

[85] As for the increase in value of the quota, Tim and Amanda's own expert attributed that increase to market forces, not to any contributions made by Tim and Amanda. As owners of the quota, Martin and Roseanne enjoyed the benefit of any increase in value, but also bore the risk of any decrease. For example, in January 2013, DFO issued a rare general decrease in the value of the quota. Tim and Amanda relied on this to pay reduced quota rent. As the trial judge found, "in the plaintiffs' eyes, at that point, the risk of a decrease in the value of the quota was allocated to the defendants. If that is the case, the benefit should also be allocated to the defendants". The rental agreement between the parties provided a juristic

reason for the defendants' enrichment flowing from the increase in the value of the milk quota.

[86] The trial judge did find that the money spent by Tim and Amanda on a new furnace saved Martin and Roseanne an equivalent expense and amounted to an incontrovertible benefit worth $5,000. In addition, the trial judge found that other expenditures that Tim and Amanda assumed resulted in incontrovertible benefits in the amount of $28,700. These amounts are not challenged on appeal and must be reflected in the disposition of the case.

(3) Equitable set-off

(a) The trial judge's reasons

[87] Martin and Roseanne claimed a set-off of $21,155.67 for the additional quota rent they claim Tim and Amanda should have paid over the years based on the quota increases.

[88] In 2012, Tim and Amanda paid a monthly quota rent of $4,822, which reflected 5% of the $1,152,250 worth of quota owned by Martin and Roseanne, divided into 12 monthly payments. In January 2013, DFO reduced the quota amount slightly. To reflect that reduction, Amanda reduced the monthly quota payments by $72 to $4,750. However, when the quota increased again in April 2014, Amanda did not increase the rent payments correspondingly.

[89] The trial judge dismissed Martin and Roseanne's claim for equitable set-off. He found that Martin and Roseanne knew about the quota increases in April 2014 and afterwards, but accepted the payments that were made without protest or complaint. They never suggested that the quota rent should increase. The trial judge inferred that after 2013, the parties were content to maintain the quota rent at $4,740 per month.

(b) No error below

[90] Martin and Roseanne argue that the trial judge erred in so concluding. They say that there was no evidence that they acquiesced to the quota rent underpayments, and that for acquiescence to apply, there must be assent and not just "standing by while a violation of a right is in progress".

[91] I see no error in the trial judge's approach to this issue. It is true that for purposes of equitable set-off, acquiescence requires evidence of something more than "standing by". However, the trial judge found that Martin and Roseanne, by their conduct, effectively assented to the rent being paid during that period. Martin and Roseanne did not merely watch passively as events unfolded. They accepted the lower rental payments for a protracted period without complaint or objection.

[92] As found by the trial judge, Martin and Roseanne were aware of the quota increases beginning in April 2014. Yet they did not, at any point in the ensuing four

years, raise the issue of underpayment or suggest that the rent should have been increased, all the while accepting the payments as made. As the trial judge put it:

> [T]he defendants did know that the amount of quota increased, and yet they never suggested that the lease rate should increase as a result. The proper inference is that after 2013, the parties were content to maintain the quota lease rate at $4,750 per month.

[93] It was open to the trial judge to make this finding. Having led Tim and Amanda to believe that the rental payments were made in amounts that were acceptable, it would not be equitable to allow Martin and Roseanne to resurrect a claim that rent had been underpaid to reduce what they were found to owe Tim and Amanda. I would decline to intervene on this basis.

IV. DISPOSITION

[94] For the reasons set out above, I would set aside the trial judge's finding of proprietary estoppel in favour of Tim and Amanda and the $405,000 award of damages. I would not interfere with the finding that Martin and Roseanne were unjustly enriched in the amounts of $5,000 and $28,700 for a total of $33,700 owing to Tim and Amanda. I would reduce that amount by the $2,000 awarded to Martin and Roseanne in connection with their counterclaim, which was not challenged on the cross-appeal. I would dismiss the appeal from the trial judge's rejection of Martin and Roseanne's claim that they were entitled to an equitable set-off. That

leaves Martin and Roseanne liable to pay damages to Tim and Amanda in the amount of $31,700.

[95] I would order Tim and Amanda to pay the costs of the appeal, which I would fix in the agreed-upon sum of $15,000, all-inclusive. In accordance with the agreement of the parties on appeal, I would remit the determination of costs of the proceedings below to the trial judge, or another judge of the Superior Court of Justice.

Released: June 9, 2025 “P.D.L.”

“R. Pomerance J.A.”
“I agree. P. Lauwers J.A.”
“I agree. B. Zarnett J.A.”