UNIVERSITY OF SOUTHERN QUEENSLAND LAW SOCIETY

USQLS Championship Moot Question 2024

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The Moot Question

Summary

The moot involves proceedings in the Court of Appeal of the Supreme Court of Queensland. The Respondent, Malcolm Barlow initially filed proceedings in the Supreme Court of Queensland in the hopes he could obtain title to the farm which the moot centres around. There are two materials:

1. The material facts
2. The Affidavit of Malcolm Barlow filed on 2 August 2023 for the original proceedings

There are two broad issues:

Issue 1 – Proprietary estoppel – Can Malcolm obtain a constructive trust over the farm through proprietary estoppel?[1]

There is an action of proprietary estoppel for the property that the moot centres around. Competitors will need to consider the elements of proprietary estoppel, which use the principles set out in *Waltons Stores (Interstate) Ltd v Maher*[2] as a starting point – but note that proprietary estoppel has some differences. Competitors should also consider the availability of a constructive trust as a remedy.

Issue 2 – Statutory interpretation - Can Aboriginal customary law apply to the definition of child under section 41 of the *Succession Act 1981* (Qld)?[3]

The proceedings include a family provision application under s 41 of the *Succession Act 1981* (Qld). **The elements of a family provision application will not need to be considered by competitors.** Section 41 only allows a 'child' to file a family provision application. Unless a formal adoption process is undertaken, an adopted child will not fall under the definition of 'child'. In some circumstances, Aboriginal customary law provides that a non-biological child will be the child of their parents. A formal adoption process may not be sought in this circumstance. So, the issue is whether Aboriginal customary law can extend the definition of 'child' to apply in this circumstance – especially now that Aboriginal customary law must be considered in statutory interpretation pursuant to the *Human Rights Act 2019* (Qld). A reading of Bowskill CJ's speech at the WA Lee Equity Lecture may be helpful for this issue.[4]

[1] Grounds of appeal (1), (2), and (3).
[2] (1988) 164 CLR 387, 428–9.
[3] Ground of appeal (4).
[4] Chief Justice Bowskill, 'The Interaction of Aboriginal and Torres Strait Islander Customary Law with Some Aspects of the Law of Equity — Is the View any Different Through the Lens of the Human Rights Act?' (WA Lee Equity Lecture, Supreme Court of Queensland, 2 November 2023).

COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

CA NUMBER:

NUMBER: 151/12

Appellant:	**BRAYDON BARLOW as executor of the Estate of the late DOREEN BARLOW**
	AND
Respondent:	**MALCOLM BARLOW**

MATERIAL FACTS

[1] The Appletree Homestead, a farm situated 30 minutes by car from Toowoomba, Queensland ('**the farm**'), is central to these proceedings. The farm is well known for its rich scenery and history. It is so well known that the road it is on was named Appletree Road after it. Since its creation, the farm has been used for charitable purposes, one of these being providing temporary accommodation for the disadvantaged. The Barlow family have been the caretakers of the farm since it was created and have been the main contributors to the good work undertaken. They are part of the ZA Group, the traditional owners for the land the farm is on. The family includes Timothy Randy Barlow (father), Doreen Barlow (mother), Malcolm and Braydon Barlow (sons).

[2] The land the farm is situated on was originally set aside for the ZA Group under the *Aboriginal Land Act 1991* (Qld). The ZA Group granted the Barlow family a 99-year lease over the land in 1992. The Barlow family put significant work into the land. They maintained it and renovated a large 8-bedroom house present on the property. The house was then repurposed to provide temporary accommodation to the disadvantaged. Following changes to the landholding system on 1 January 2015, Doreen became the freehold owner of the farm through a freehold instrument on 27 January 2018.

[3] Malcolm Barlow, the oldest son, never knew his biological parents and came into the care of the Barlow family at a young age. Under the customary law of the ZA people, Malcolm is considered to be the child of Doreen and Timothy Randy Barlow.[5]

[4] Timothy Randy died unexpectedly in an accident on the farm in March 2005. As Malcolm and Braydon were quite young, Doreen struggled to maintain the farm. The farm eventually fell into disrepair which meant that the charitable actions of the farm were not able to be performed.

[5] As per the Affidavit of Malcolm Barlow affirmed on 2 August 2023 ('Malcolm Barlow Affidavit').

[5] On becoming a teenager, Malcolm saw the extent of the farm's dilapidation and knew he would need to take responsibility for maintenance of the farm.[6] After years of hard work, the farm was restored to its former glory. Doreen was overjoyed and would express this frequently.[7]

[6] In addition to working on the farm, Malcolm was a bright student and excelled academically. After graduating from secondary school, he went on to study law and business full-time at the University of Southern Queensland in 2017. Malcolm excelled in his studies and graduated as valedictorian, while also maintaining the farm. Although he initially wanted to return to the farm following graduation, Malcolm was encouraged by his professors to pursue study abroad. After consulting with Doreen and Braydon, he decided that this would be best.[8]

[7] Malcolm began study for two years abroad. He excelled again in all aspects of his study. He excelled so significantly, that he was offered a scholarship to stay abroad for an extra year. Malcolm knew how important this opportunity was, so he decided that he would stay for an extra year.

[8] Since the commencement of his study abroad, Malcolm would come to visit the farm during Christmas breaks. He would notice that the farm was slowly falling into a worse condition each time he would visit. He raised these concerns with Braydon, but Braydon would assure him each time that he had everything under control.[9]

[9] Under Braydon's management, the farm once again fell into disarray. Braydon was struggling to keep up with the farm's maintenance but did not inform Malcolm, so not to distract him from his studies. Doreen and Braydon had discussions on the future of the farm, including the notion of selling as Doreen had recently obtained freehold title.[10] Doreen was particularly worried that the farm would become in a permanently dilapidated state. They both felt that Malcolm would end up pursuing another career, considering the various accolades he had received abroad. As a result, Doreen drafted a will that left the farm to Braydon so he could decide how to continue with the farm. Malcolm was not informed.

[10] In December 2022, Doreen fell ill. In February 2023, Malcolm returned to visit Doreen, but as he arrived, Doreen became critically ill and had to be placed in emergency care at hospital. Malcolm was only able to speak to Doreen briefly before she died. They did not speak about any matters pertaining to who would have an interest in her estate.

[11] Upon Doreen's death, Braydon became the executor of the estate pursuant to the will. Braydon communicated his intentions to sell the farm to Malcolm, who protested passionately against this idea. Braydon reasoned that it would help them both fund their separate lives. Braydon explained that he was not able to support his family of three children when all his time was spent on the farm. He then told Malcolm he had found a buyer who promised there would not be any developments on the land and that it would still serve its original purpose.

[12] Malcolm is unhappy with the way in which the will was drafted. He put his study abroad on hold and moved back to Toowoomba in the hopes of convincing Braydon to keep the

[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Refer to [2].

farm. Braydon did not budge, so Malcolm initiated legal action in the Supreme Court of Queensland.

The Supreme Court proceedings

[13] Malcolm commenced proceedings against Braydon (as executor of the Barlow estate) in August 2023 in the Supreme Court of Queensland. Following the pleadings and disclosure process, two issues were identified:

(1) Can Malcolm obtain a constructive trust over the farm through proprietary estoppel?

(2) Is Malcolm entitled to further and better provision from the estate under s 41 of the *Succession Act 1981* (Qld)?

Black J was the judge and found as follows:

Proprietary estoppel

[14] Mr Nake (counsel for Malcolm) argued that there was an action for proprietary estoppel, entitling Malcolm to a constructive trust over the farm. Black J held that an action for proprietary estoppel was made out but did not order a constructive trust as a remedy; rather, an award of monetary compensation was given.

[15] Black J considered the elements laid down by Brennan J in *Waltons Stores (Interstate) Ltd v Maher* as a starting point.[11] Her Honour then considered the elements typical for proprietary estoppel claims. It was held that these elements were made out. Despite there not being a direct statement from Doreen that the farm would be Malcolm's, Her Honour considered that her conduct was enough to amount to both encouragement and acquiescence. Her Honour also considered that it would be impossible that the amount of work Malcolm did on the farm could have been done for anything other than an interest in the farm.

[16] Despite Black J finding that the elements of proprietary estoppel were met, Malcolm was found to be not entitled to a constructive trust. Her Honour felt the High Court decision of *Giumelli v Giumelli*[12] binding due to there being a third party (Braydon) having an interest in the farm. For this reason, monetary compensation was awarded to Malcolm.

Family provision application

[17] Black J dismissed this point before considering the elements of a family provision application.[13] The shortfall in Her Honour's view was that Malcolm did not meet the definition of 'child', which was a requirement to make a family provision application, as:

- Malcolm was not the biological child of Timothy Randy and Doreen Barlow; and
- there had been no formal adoption process undertaken under the *Adoption Act 2009.*

[11] (1988) 164 CLR 387, 428–9.
[12] (1999) 196 CLR 101. See also *Sidhu v Van Dyke* (2014) 251 CLR 505, [77].
[13] *Succession Act 1981* (Qld) s 41.

[18] In reaching this finding, Her Honour noted the similarities with the unanimous Court of Appeal decision of *Eatts v Gundy*.[14] Her Honour considered that *Eatts* was binding, and that the facts were not distinguishable.

[19] Mr Nake made submissions that the law had changed since *Eatts*. Mr Nake particularly submitted that ss 48(1)–(2) of the *Human Rights Act 2019* (Qld) ('*HRA*') required Aboriginal customary law to be included into statutory interpretation of the word 'child', as it was a human right under s 28 of the *HRA*.[15] Mr Nake also made the submission that Aboriginal customary law had been included as a consideration in other decisions (though in different areas of law) in *Smith v Tamworth City Council*[16] and *Yumbulul v Reserve Bank of Australia*.[17] These submissions were rejected.

The grounds of appeal

[20] This is a cross-appeal as both parties have filed appeals. Braydon Barlow (executor of the estate), the first to file an appeal, is the appellant. The respondent, Malcolm, has also filed an appeal on other grounds.

[21] Braydon has appealed on the following grounds relating to proprietary estoppel:

(1) That the learned trial judge erred in finding that Doreen Barlow's statements or conduct was enough to give rise to a proprietary estoppel.

(2) That the learned trial judge erred in finding that Malcolm Barlow acted on an assumption that he would be granted an interest in the farm and was induced to do the work based on this assumption.

[22] Malcolm has appealed on the following grounds:

(3) That the learned trial judge should have ordered a constructive trust rather than monetary compensation as the remedy arising out of proprietary estoppel.

(4) That the learned trial judge did not place sufficient importance on the customary laws of the ZA people when interpreting the meaning of 'child' under s 41 of the *Succession Act 1981* Qld).

[14] [2015] 2 Qd R 559.
[15] *Human Rights Act 2019* (Qld) s 28.
[16] (1997) 41 NSWLR 680.
[17] (1991) 21 IPR 481.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 151/12

Plaintiff: **MALCOLM BARLOW**

AND

Defendant: **BRAYDON BARLOW as executor of the Estate of the late DOREEN BARLOW**

AFFIDAVIT OF MALCOLM BARLOW

AFFIRMED ON 2 AUGUST 2023

Malcolm Barlow of 124 Appletree Rd, Toowoomba in the State of Queensland affirm:

1. I am the plaintiff in these proceedings.

2. The purpose of this affidavit is to outline my relationship with my parents, Timothy Randy Barlow and Doreen Barlow and my history at the Appletree Homestead (‘**the farm’**) located at 524 Appletree Road, Toowoomba, Queensland 4305.

About me

3. I am an Aboriginal man. I am part of the ZA people, who are the traditional owners of the land the farm is situated on.

4. I do not know nor do I have any recollections of my biological parents. I was three years old when Timothy Randy and Doreen started caring for me. They knew me back then as their nephew. This transition was not difficult for me, as I had spent a substantial period of my life so far on the farm.

5. Under the ZA people’s customary laws, I am the son of my parents. There is no distinction made between adopted children and biological children. I have always referred to my parents as ‘mum’ and ‘dad’. They have always referred to me as ‘son’. This is accepted practice in my culture.

6. No formal adoption process under the *Adoption Act 2009* (Qld) was sought as it was not needed. Our cultural practices were enough to solidify our relationship.

The farm

7. I have lived on the farm for the majority of my life. It is all I knew throughout my childhood. It holds great importance to me, given its historical and cultural value. The farm is 500 acres, so it requires a large amount of labour to keep it maintained. The farm has a large 8-bedroom house, which has been used as temporary accommodation for the disadvantaged ('**main house**'). My family has always stayed in a smaller cabin on the farm ('**family cabin**'), so the main house could be used predominantly for these purposes.

8. From a young age, my parents would teach me skills on how to maintain the farm. I inherited various responsibilities, which took up the majority of my time.

9. My father died from an accident on the farm in March 2005. I was eight years old at the time. This came as a shock to myself and my family. We did not know what to do. We lacked the manpower and direction to properly maintain the farm, which eventually led to it falling into disarray.

10. The main house became uninhabitable. Initially, we would notice that the leaks from the roof were getting worse in the rain. Upon inspection, it was revealed that the roof beams were severely rotted and could be subject to a collapse at any second. Unfortunately, this meant that it could no longer serve its purpose. The main house was abandoned, and foliage grew around it.

11. At this point in time, my mother would sometimes talk about transferring the lease of the farm to someone else, but she could never do it due to the farm's history and importance to us.

12. Once I reached the age of 13, I began to take responsibility for the maintenance of the farm. It was hard work. I had a few skills that were taught to me by my parents, but I also had to learn a lot on my own. One example of where I had to teach myself new skills was when the farm four-wheel drive had mechanical issues. I rode my push bike to Toowoomba Central to buy parts, and asked questions of the local mechanics to diagnose the issues. After many instances of trial and error, I was finally able to fix it.

13. I would often work 15-hour days. This just had to be done because of the work involved – although this number would decrease as I became more experienced. After I had a handle on the maintenance tasks required for our horticultural farm, I felt confident enough to make the needed repairs to the main house as well as extensions to the family cabin. The work on the family cabin was important because my aging mother needed to live more comfortably.

14. Repairing the beams of the main house was the most daunting task I ever had to do. Each beam had to be carefully removed without compromising the structural integrity of the main house. I then lifted the new beams to the roof using a makeshift crane made from rope and scrap wood. Following this, I fastened each beam together, and redid the tin roofing. Annexed to this affidavit and marked

"**MD1**" are photos taken of the rotten roof beams of the main house, and it in the process of repair.

15. I was not able to secure any form of employment while I was working on the farm. The farm demanded too many hours.

16. It was all worth it to see the farm regain and even exceed the image of what it once was to the community and most importantly to my mother. While I would carry out work, she would often watch me from the porch of the family cabin and would regularly provide me with refreshments.

17. I would enlist the help of my younger brother, Braydon, with the maintenance of the farm. He was critical for some of the jobs that required two people to do them.

18. My work on the farm led to many injuries – some more serious than others. I remember visiting the emergency room at the hospital for serious injuries on five occasions. I now suffer from chronic knee and back pain, which I believe was from my work on the farm.

19. However, despite the difficulties I faced rebuilding the farm, I have no regrets. A piece of myself remains at the farm.

20. Finally, after years of hard work, the farm was starting to return to its original glory. The jobs transitioned from restoration to maintenance work. My mother was overjoyed when she saw the progress on the farm. She would often tell me that she was proud to see me continuing the family traditions and would often tell me that she was excited to pass the farm down the family line. I recall on one occasion, she told me, "… you remind me more of your father more everyday", after I fixed the main house hot water system.

21. I began tertiary education at the University of Southern Queensland in 2019. My goal of study was to learn about the business side of things so I could be able to manage the farm more effectively. I graduated as valedictorian for both degrees: law and business (majoring in finance). Following my results, I was encouraged by professors and other university staff to pursue study abroad.

22. I was reluctant to study abroad. It would mean that I would forego my responsibilities at the farm for two years. I talked to my mother and Braydon at length. I recall Braydon telling me how proud he was, and that I should pursue the "once in a lifetime opportunity for the family". My mother also agreed with Braydon. After I raised my concerns about the high workload associated with the farm, I recall Braydon and my mother reassuring me that "we have made it this far, why not another two years to pursue your dreams – we will make do".

23. It was always my intent that I would come back and resume my role at the farm.

24. I performed well during my 2 years abroad. After I completed the 2 years of study, I was invited by a publisher to write a book about my thesis. It would require an extra year abroad. I saw this as important work, and decided it was best to pursue this for the extra year.

25. During my time abroad, I would visit the farm annually and talk with Braydon through video calls regularly. My mother was not technically versed, so most video calls were done through Braydon. On my visits to the farm, I would notice that the farm was in worse condition each time. I also noticed that Braydon appeared burnt out, presumably from the workload of the farm. My mother's health also deteriorated over the years. However, whenever I would raise these issues, my mother and Braydon would dismiss them and say that they were fine.

26. Upon my mother's death, I learned that she had named Braydon as the executor of her Estate and left the farm to him. I am not sure how this happened. I was not informed by Braydon or my mother of this at any time. This is very odd to me, especially considering the role I played at the farm.

27. The farm has priceless value in my eyes due to its history in my family and the charitable purposes it had taken on until my father died. I believe the only way this can be done is by commencing proceedings to prevent it from being sold.

28. All the facts and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of my affidavit.

The contents of this affidavit are true, except where they are stated on the basis of information and belief, in which case they are true to the best of my knowledge.

I understand that a person who provides a false matter in an affidavit commits an offence.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 151/12

Plaintiff: **MALCOLM BARLOW**

AND

Defendant: **BRAYDON BARLOW as executor of the Estate of the late DOREEN BARLOW**

CERTIFICATE OF EXHIBIT

Exhibit ~~MD1~~ MB1 to the affidavit of Malcolm Barlow affirmed 2 August 2023.

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Deponent

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Witness

Frank Kabalu – Solicitor and Accredited Mediator

CERTIFICATE OF EXHIBIT
Filed on Behalf of the Plaintiff

Form 47, Version 3 – approved on 25 August 2022
Uniform Civil Procedure Rules 1999
Rule 435

Name: Malcolm Barlow
Address: 124 Appletree Rd,
Toowoomba, Queensland, "4350"

~~MD 1~~
~~MB 1~~
"MB1"

'rotten roof beams on the main house roof'

"MB1"

'main house roof during repair'