IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY
ON APPEAL FROM THE NEW SOUTH WALES COURT OF APPEAL

No S312 of 2013

Between

PRITHVI PAL SINGH SIDHU

Appellant

and

LAUREN MARIE VAN DYKE

Respondent

APPELLANT'S SUBMISSIONS IN REPLY

Part I: Certification

1. The appellant (**Mr Sidhu**) certifies that these reply submissions are suitable for publication on the internet.

Part II: Appellant's argument in reply

Presumption of reliance

2. The findings of the Court of Appeal referred to in the respondent's submissions (**RS**) [9] and [26(e)] are the findings which Mr Sidhu challenges. CA[103]-[104] are in issue. Ward J found, with one exception, that the respondent did not rely to her detriment on Mr Sidhu's promises: J[196]-[204], [217]. The exception is that the respondent did rely on Mr Sidhu's promise in not seeking a property settlement from her husband: J[219], but whether that reliance resulted in detriment was not established at trial: J[250].

3. There is a tension between the respondent's submission (a) that the Court of Appeal did not reverse the onus of proof by deploying the "*presumption of reliance*" (RS[11(a)], [15]-[25]) and (b) that Mr Sidhu did not discharge the evidentiary onus that he carried at trial (RS[11(b)], [26]-[35]).

4. The respondent's first proposition, that the Court of Appeal's reasoning is consistent with *Gould v Vaggelas* (1985) 157 CLR 215 at 236-239, is erroneous. At CA[78] the Court of Appeal held that the "*presumption of reliance*" had the consequence that the respondent did not need to prove that "*but for*" the promises she would have acted differently and avoided detriment: also CA[93]. In the third sentence of CA[82] the Court of Appeal posed a test which directs attention to the

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character of the promise, not the respondent's acts or omissions in reliance on that promise. The Court of Appeal deployed that test to reverse Ward J's finding of fact: CA[82], first sentence, last sentence. In CA[83] the Court of Appeal expressly reversed the onus of proof, and held that Mr Sidhu was required to "*rebut that presumption and establish that the* [respondent] *did not rely at all on the promises in acting or refraining from acting to her detriment*". That language is inconsistent with the submission in RS[21] to the effect that the Court of Appeal merely drew an inference. The Court of Appeal then identified how Mr Sidhu might discharge the onus of proof imposed on him, but limited the weight to be placed on answers in given cross examination: CA[94]-[95]. CA[103]-[104] contain a finding of detrimental reliance based on the proposition that Mr Sidhu did not disprove reliance. Consistent with the Court of Appeal having reversed the onus of proof, the detriment identified in CA[104] was not the subject of evidence proving the identified foregone opportunities.

5. The Court of Appeal's reasoning is inconsistent with *Gould v Vaggelas*. The onus to prove reliance always remains on the plaintiff asserting a cause of action in respect of which reliance is a necessary element: *Gould* at 237-8. Although an inference of reliance may be drawn from the character and circumstances of a promise or representation, the only onus on a defendant is to "*draw attention to*" circumstances which tend to disrupt the drawing of the inference: *Gould* at 238. Once all of the evidence is adduced, the trial judge must determine whether he or she is satisfied that the plaintiff has established detrimental reliance: *Gould* at 238-9, as Ward J did. The Court of Appeal's reasoning is inconsistent with *Gould*. *Gould* does not support the Court of Appeal's proposition that Mr Sidhu carried an onus to disprove reliance or that the respondent did not need to satisfy Ward J that "*but for*" the promises she would have acted differently and avoided detriment. The respondent's first proposition should not be accepted.

6. The respondent's submission that difficulties of proof mean that a defendant ought carry the onus to disprove reliance (RS[26], [33]) also should not be accepted. *First*, the respondent's submission is contrary to well established principle that a plaintiff must prove each element of his or her cause of action. *Second*, the respondent's contention that proof of reliance will usually be difficult ought not be accepted. Reliance is regularly litigated and often proven. Objective facts and circumstances often inform findings about whether a litigant did or did not rely on a representation or promise. Whether there are difficulties of proof will vary from case to case. *Third*, accepting that proof of reliance sometimes will be difficult, proving absence of reliance often will be difficult as the person alleging reliance knows why he or she acted. No reason is identified for imposing on a defendant the risk of difficulty in proof. *Fourth*, the respondent's submission does not engage with the lacunas in her detrimental reliance case. As more fully identified in Mr Sidhu's submissions (**AS**) [66], the respondent did not prove that she could have found more favourable accommodation or a different job paying greater remuneration or any overall detriment in the assistance she gave Mr Sidhu around the property.

7. The respondent's second proposition, that Mr Sidhu did not discharge the evidentiary onus he carried, is wrong for a number of reasons.

8. *First*, for the reasons already identified the onus asserted by the respondent is inconsistent with *Gould*. The evidentiary onus carried by Mr Sidhu was only to identify facts or circumstances that obstructed drawing an inference, which Mr Sidhu did: AS[32]-[37].

9. *Second*, Ward J carefully reviewed all of the evidence (as the Court of Appeal accepted, CA[25]) and held that the respondent did not relevantly rely on the promise: J[196]-[204]. There was no basis for the Court of Appeal to reverse that finding of fact. Ward J had the well-known advantage of a trial judge, and performed the task referred to in *Gould* at 238-9. There was no error in Ward J's fact finding. No issue arises as to whether the promise need be the sole or only a reason for the respondent's actions as Ward J found that the respondent did not relevantly rely on the promises: RS[34] is not directed to the relevant issue.

10. *Third*, the Court of Appeal erroneously held that limited weight should be given to the evidence elicited from the respondent in cross examination: CA[95], [103] and RS[31]-[35]. That reasoning is wrong. *First*, it fails to engage with the other objective facts and circumstances which Mr Sidhu pointed to which support the finding that the respondent did not rely on Mr Sidhu's promises. Ward J's fact finding was based on the objective facts and circumstances and on the respondent's evidence in cross examination. *Second*, Ward J observed the cross examination and was best placed to assess the weight to be given to that evidence. The Court of Appeal should not have interfered with that finding: for example, in relation to causation, *Rosenberg v Percival* [2001] HCA 18 (2001) 205 CLR 434 at [26]-[27], [92]. *Third*, the Court of Appeal's reasoning and the respondent's submissions (eg RS[32]) have the improbable and wrong consequence that assertions of reliance made by a plaintiff in chief, evidence which is likely influenced by hindsight and is notoriously unreliable (*Rosenberg* at [16], [26], [109], [221]), is to be given greater weight than admissions made in cross examination. There is no *a priori* rule that a trial judge should give limited weight to answers in cross-examination.

11. *Fourth*, that Mr Sidhu did not give evidence at trial does not inform the relevant question of fact. Reliance is a fact within the respondent's knowledge. Mr Sidhu was not in a position to give admissible evidence about the respondent's reasons for acting or not acting in a particular way, and no inference favourable to the respondent's case ought be drawn from the fact he did not give evidence: *Australian Securities and Investment Commission v Hellicar* [2012] HCA 17 (2012) 247 CLR 346 at [165]-[170], [263], [266].

Remedy

Introduction

12. The respondent's submission asserting "*common ground*" between the parties is in part wrong.

13. *First*, it is not common ground that Mr Sidhu acted unconscionably, contrary to RS[38], [47] and [51]; and the existence of detriment is in issue contrary to RS[44]. Whether Mr Sidhu acted unconscionably depends on the respondent having suffered detriment in acting in reliance on the

promise Mr Sidhu made, and on an adequate identification of detriment. The correct resolution of the first ground of appeal informs the characterisation of Mr Sidhu's conduct, and the remedy.

14. *Second*, the relevant content of the promise to transfer the Oaks cottage to the respondent is more complicated than identified in RS[13(b)]. The promise was and was understood to be implicitly conditional on Mrs Sidhu's consent: J[158], CA[59]. When Mr Sidhu resiled from the promise by the end of July 2006 (CA[120]) the occasion for Mrs Sidhu's consent had not arrived because the property was not sub-divided. On 22 July 2006 the respondent informed Mrs Sidhu of the affair between Mr Sidhu and the respondent: J[95], and Mrs Sidhu made statements consistent with the fact that she would not consent to the gift: CA[15]. Ward J found that Mrs Sidhu, at the time of trial, was not prepared to consent to the transfer of the Oaks cottage: J[100].

How the remedy is framed

15. The respondent's analysis of *Giumelli v Giumelli* [1999] HCA 10 (1999) 196 CLR 101 is erroneous.

16. RS[40]-[44] disclose a difference between the respondent and Mr Sidhu as to what this Court held in *Giumelli*. In *Giumelli* at [33] and [48] the plurality held that *The Commonwealth v Verwayen* (1990) 170 CLR 394 did not preclude "*relief which went beyond the reversal of such detriment*". The touchstone for relief, identified in *Giumelli* at [50], is what, in the circumstances, is required for the promisor to act conscientiously: similarly *Plimmer v Mayor &c of Wellington* (1884) 9 App Cas 699 at 713-714. Contrary to RS[45], *Giumelli* is not authority for the proposition that once a proprietary estoppel is established, a voluntary promise is enforced unless it is shown to be "*inequitably harsh*" to enforce the promise.

17. The final two sentences of RS[45] are also not supported by *Giumelli*. The ratio of *Giumelli* is at [49]-[50]. Relief ought not extend beyond what is required for Mr Sidhu to act conscientiously. Assessment of what is required for Mr Sidhu to act conscientiously requires a balancing of detriment, the unfulfilled expectation and the effect on third parties. CA[137] is wrong in stating that the "*ordinary course*" is precluding departure from the assumed state of affairs. CA[137] is to similar effect as Deane J's judgment in *Verwayen* at 443, cited in *Giumelli* at [42], but it is not supported by the other judgments in *Verwayen*, cited in *Giumelli* at [43]-[48], or by *Giumelli* at [50].

18. Absent significant detriment the relief granted by the Court of Appeal was not justified. Detriment is both a necessary element of the cause of action and an important consideration in determining the appropriate relief. Otherwise relief becomes detached from what it is that makes a defendant's conduct unconscionable. The Court of Appeal's reasons demonstrate error in framing relief.

Conditions on the promise

19. The propositions that (a) a proprietary estoppel arises at the time the promisor resiles from the promise (RS[50]) and (b) conditions on a promise are not necessarily a bar to relief (RS[53]) do

not detract from Mr Sidhu's argument. Accepting each proposition, the Court of Appeal erred in framing equitable compensation, in effect, as if Mr Sidhu was in breach of contract (a) in the absence of substantial detriment or (b) when the promises were conditional. Granting relief (a) disconnected from detriment or (b) that put the respondent in a better position than if Mr Sidhu had not resiled from the promise is not justified.

20. To the extent that the Court of Appeal (CA[122]-[123]) inferred that Mrs Sidhu was willing to consent to Mr Sidhu giving the Oaks Cottage to the respondent, two matters are important. *First*, if that inference was appropriately drawn, it does not overcome the absence of substantial detriment. *Second*, the Court of Appeal was wrong to draw the inference that Mrs Sidhu remained willing to consent to the gift. That inference overlooks the findings made by Ward J, referred to in [14] of these submissions, including that Mrs Sidhu would not consent to the gift[1]. The Court of Appeal erred in drawing an inference that Mr Sidhu could, in those circumstances, procure Mrs Sidhu's consent to the gift.

21. The effect of the Court of Appeal's reasons, relied on by the respondent, is to enforce a promise of a different character to that Mr Sidhu made. The relief goes beyond satisfying the expectation reasonably created by the promise. The respondent could not reasonably expect that Mr Sidhu would perform the promise if his wife's consent was not forthcoming. The expectation marks the maximum extent of the relief available: McGhee "*Snell's Equity*" (32nd edition) at [12-024], and it is erroneous to grant relief going beyond that reasonable expectation.

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[1] A finding supported by (a) Mrs Sidhu's email reproduced J[99], which is the basis of the further finding at J[223], to the effect that Mr Sidhu was entitled to give the Oaks Cottage away and that the respondent was not to return to Burra Station, (b) Mrs Sidhu's accusation that the respondent had betrayed her once the respondent told Mrs Sidhu about the affair (J[23]) and (c) that Mrs Sidhu only made offers to sell Ms Van Dyke the Oaks Cottage, although on generous vendor finance terms (J[69], [74]), and only made those offers prior to being informed of the affair.