IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S312 of 2013

BETWEEN:

PRITHVI PAL SINGH SIDHU
Appellant

AND

LAUREN MARIE VAN DYKE
Respondent

RESPONDENT'S SUBMISSIONS

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PART I: CERTIFICATION

1. The respondent certifies that this submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. Three issues arise on the appeal:

   (a) *first*, did the Court of Appeal err in presuming, in the absence of evidence to the contrary from the appellant, that promises which were calculated to induce, and had a natural tendency to operate as inducements, were relied upon by the respondent;

   (b) *secondly*, irrespective of the answer to (a), did the appellant discharge the evidentiary onus which rested upon him to demonstrate why an inference should not have been drawn that the respondent relied upon the appellant's promises;

   (c) *thirdly*, did the Court of Appeal err, in the exercise of its discretion, in awarding relief calculated by reference to the expectation induced by the promises made by the appellant, rather than the detriment suffered by the respondent as a result of the appellant's repudiation of those promises. Did the Court of Appeal further err in failing to treat the promises as subject to conditions that had not yet been fulfilled.

3. The appellant misstates the first issue: see AS [2]. On no reading of the Court of Appeal's reasons did their Honours hold that the defendant, in every claim for proprietary estoppel arising from an unperformed promise, bears the onus of disproving that the plaintiff acted to his or her detriment in reliance on the unperformed promise.

4. The appellant ignores the second issue.

PART III: JUDICIARY ACT

5. The respondent certifies that she has considered whether notice is required under s 78B of the Judiciary Act 1903 and has concluded that notice is not required.

PART IV: FACTS

6. The summary of the facts at AS [7] – [19] and the summary of the legal findings made by the primary judge and Court of Appeal at AS [20] – [23] are accurate, so far as they go, but should be read with [7] - [9] and [12] – [14] below.

7. The trial judge's central findings were that the appellant had made

representations and promises to the respondent, knowing and intending her to rely upon them, as follows:

(a) January 1998: "I love you and can tell you love me too. I want you to have a home here with me. I am planning to subdivide Burra Station. As soon as this is done, I will make sure the Oaks is put into your name ... Using my Indian family money to buy this place means I can make my own decisions as to what I do with it, and I want you to have it because I love you. You need a home of your own to raise [the respondent's child] in. I can provide it": CA [17];

(b) Mid-1998: (In response to a statement by the respondent that she needed to find a lawyer to assist her with her divorce and property settlement) "Lauren, you have the Oaks, you do not need a settlement from him [the respondent's husband]. You can do the divorce yourself. You don't need a lawyer": CA [17];

(c) About September 1998: In response to the respondent's question "Beat, do I stop paying rent now that the Oaks is my property?", the appellant said: "How about you continue to pay what you can as this will keep things low key with [appellant's wife]": CA [17];

(d) In 2004, the appellant represented that "her Oaks property" would be of expanded size: J [60], [63].

8. The Court of Appeal held, and it is not challenged by the appellant, that it was objectively reasonable for the respondent to rely on the appellant's promises despite the preconditions to fulfilment: CA [69].

9. The Court of Appeal found that the respondent acted to her detriment in reliance on the representations by foregoing the opportunity to seek a property settlement with her former husband, by foregoing the opportunity to obtain work as a natural resource catchment officer or ranger earning up to $400,000 over a period of eight and a half years, by foregoing the opportunity to acquire another home and by carrying out maintenance and improvement work on the property estimated at $112,400: CA [103], [104]. The details of the work performed by the respondent, and evidence that she relied upon the representations in doing so, is set out in her affidavits.[1] The appellant did not provide evidence to the contrary. The work included maintaining, renovating, and extending the Oaks Cottage, as well as work on the appellant's property, maintaining the appellant's livestock, assisting in the appellant's business and work on the appellant's subdivision of the back block. The trial judge held that the respondent performed "not insignificant" work on the subdivision: J[59].

[1] See eg affidavit of the respondent sworn 8 April 2010 at [26], [29]-[33], [71]-[75].

PART V: CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

10. None.

PART VI: ARGUMENT

SUMMARY

11. In summary, the respondent contends:

(a) the "presumption of reliance" referred to by Barrett JA mirrors the inference of reliance identified in *Gould v Vaggelas*[2] ("***Gould***"). Both share the same features and both involve a shifting in the evidentiary onus, rather than ultimate onus, to the defendant where a promise is made and the natural tendency of the promise is to induce relevant conduct in a claimant. The appellant's submissions misstate the effect of the Court of Appeal's reasons and erroneously imply that the Court of Appeal has introduced a new principle into Australian law;

(b) the appellant did not discharge the evidentiary onus which, even under *Gould*, rested upon him at trial. The cross-examination of the respondent as to her hypothetical conduct if the appellant had not made the applicable promises was insufficient to meet that burden. The Court of Appeal was correct in observing that cross-examination along such lines must be approached with significant caution;

(c) the Court of Appeal did not err in granting relief. As this court recognised in *Giumelli v Giumelli*[3] ("***Giumelli***"), a claimant for proprietary estoppel is *prima facie* entitled to relief equivalent to the promise or expectation foregone, rather than the detriment suffered. There were no special circumstances in the present case that warranted a different approach. The Court of Appeal did not impermissibly treat the appellant's promises as unconditional in nature. The Court of Appeal granted relief on the basis that the reliance by the respondent on the promises was objectively reasonable despite the pre-conditions and that the appellant's repudiation of the promises prior to the date on which the conditions were satisfied was unconscionable.

CONTEXT IN WHICH ISSUES ON APPEAL ARISE

12. In considering the three issues identified at [2] above, it is important to appreciate the legal and factual context in which the issues arise for consideration.

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[2] (1985) 157 CLR 215.
[3] (1999) 196 CLR 101.

13. The appellant's only challenges to the decision of the Court of Appeal are that the Court of Appeal applied a "presumption of reliance" and erred in its grant of relief.[4] The following matters of fact and law are therefore common ground for the purposes of the appeal:

    (a) the appellant made clear and unequivocal promises to the respondent that he would transfer the Oaks Cottage, and an expanded area of land surrounding it, to the respondent by way of gift once the Oaks Cottage site existed in subdivided form: CA [54], read with CA [45];

    (b) the need for the consent or concurrence of the appellant's wife was not an explicit part of the promises (CA [54]). The appellant represented to the respondent that he had the ability to deal with the Oaks Cottage as he chose: CA [67], [132];

    (c) it was objectively reasonable for the respondent to rely on the appellant's promises: CA [69];

    (d) the promises were of such a nature as to induce reliance in the recipient of the promises: CA [82];

    (e) the appellant knew intended the respondent to rely on his promises: CA [26];

    (f) the appellant repudiated his promises after the applicable council had granted conditional approval to a suitable subdivision: CA [122]; and

    (g) the appellant had the necessary financial capacity to satisfy the conditions for subdivision. The appellant was also able to procure the consent of his wife to approve the subdivision and any transfer of the Oaks Cottage site to the respondent: CA [122], [123].

14. In addition, the appellant makes no challenge to Barrett JA's holding that a finding of reliance is open even though the defendant's promises are not the sole inducement for the relevant conduct: CA [102]. That holding is consistent with prior authority.[5]

FIRST ISSUE – "PRESUMPTION" OF RELIANCE

15. The appellant misstates the effect of the reasons of the Court of Appeal. The Court did not introduce a new, let alone radical, approach to the question of reliance. Rather, the Court of Appeal approached the issue in a manner consistent with prior authority, including authority of this Court.

16. Five matters may be noted.

17. *First*, Barrett JA's reference to a "presumption of reliance" must be considered

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[4] Notice of Appeal, paragraphs 2 and 3.
[5] CA [102]; see eg *Amalgamated Property Co v Texas Bank* [1982] QB 84 at 104-5; *Flinn v Flinn* (1999) 3 VR 712 at [117]; cf *San Sebastian Pty Ltd v Minister* (1986) 162 CLR 340 at 366 (Brennan J: "The representation must be a real inducement or one of the real inducements to engage in the conduct which occasions the loss").

in context and with due regard to the content given by his Honour to that expression. His Honour was well aware that a claimant had to establish that he or she had acted in reliance on the defendant's promise: CA [40], [72]. But he held that it was relevant to consider whether the promise in question was "of such a nature" as to be part of the inducement to do the acts relied on: CA [82]. Where the promise was of such a kind, a "commonsense and rebuttable presumption of fact" may arise "from the natural tendency of the promise" and inducement by the promise may thereby be inferred from the claimant's conduct: CA [83]. However, it remains open to a defendant to "rebut that presumption" and establish that the claimant did not rely at all on the promises in acting or refraining from acting to her detriment: CA [83].

18. Barrett JA's analysis was orthodox. His Honour's description of the presumption of reliance as a "commonsense and rebuttable presumption of fact" (CA [83]) was extracted from the decision of Brooking JA in *Flinn v Flinn* (1999) 3 VR 712. *Flinn* in turn cited *Gould*, among other authorities, in support of the existence of the rebuttable presumption. The appellant himself has accepted that *Flinn v Flinn* is a "wholly conventional" application of the High Court decision.[6]

19. *Secondly*, recognition of a rebuttable presumption of fact is consistent with the reasoning in *Gould* itself (bearing in mind that *Gould* was not an estoppel case and did not bind the Court of Appeal in the present case). Wilson J (with whom Gibbs CJ and Dawson J agreed[7]) identified four principles applicable to fraudulent misrepresentations (at 236). Those principles included the proposition that:

> "2. If a material representation is made which is calculated to induce the representee to enter into a contract and that person in fact enters into the contract there arises a fair inference of fact that he was induced to do so by the representation."

20. The "inference" identified by Wilson J was rebuttable in nature (at 236), was an "inference of fact" (at 239) and reflected "common sense" (at 238). The inference arises where, *inter alia*, false statements are made with the intention of inducing the addressee and those statements are of "such a nature" as would be likely to provide such inducement (at 238). According to Wilson J, it was "entirely accurate" to speak of an evidentiary "onus" resting on the defendant in such circumstances (at 238). It was equally accurate to speak of the onus (or "evidentiary burden") "shifting" to the defendant (at 239). Brennan J adopted a similar analysis at 250 – 251.

21. There is no relevant distinction between the approach set out by Wilson J and the approach adopted by Barrett JA, save that Wilson J spoke of an

[6] [2013] HCA Trans 213 at page 3.
[7] At 219 and 262 respectively.

"inference" and Barrett JA spoke of a "presumption". Both are common sense and rebuttable presumptions (or inferences) of fact that arise from the natural tendency of the promise made by the applicable defendant and operate to shift the evidentiary onus to the defendant. It is commonplace to use the words "presumption" and "inference" interchangeably.[8]

22. *Thirdly*, Barrett JA's consideration of English authority does not alter the above analysis. At CA [90], Barrett JA identified the "presumption of reliance" by reference to the third principle in *Wayling v Jones*:[9]

> "(3) Once it has been established that promises were made, and that there has been conduct by the plaintiff of such a nature that inducement may be inferred then the burden of proof shifts to the defendants to establish that he did not rely on the promise".

23. It is inevitable in a common law system that different judges will describe the same legal principle in slightly different language. However, as the appellant himself recognises, the statement of principle from *Wayling* arguably goes no further than Wilson J's analysis in *Gould*.[10] Barrett JA's quotation of the statement can therefore hardly amount to error. The fact that Barrett JA relied upon a statement of principle which speaks of a rebuttable "inference" rather than a rebuttable "presumption" further demonstrates that the criticisms made by the appellant in his written submissions are semantic in nature.

24. *Fourthly*, once it is accepted that the Court of Appeal below was not intending to introduce, and did not introduce, a new concept into Australian law, there is no utility in embarking upon an examination of whether the statement of principle in *Wayling* reflected earlier English authority: *contra* AS [49] – [50], [53]. Nor is it helpful to scan English decisions in order to determine whether they speak of a rebuttable "presumption" or a rebuttable "inference" as to a claimant's reliance on statements that, of their nature, are likely to result in an inducement: cf AS [52], [53] [54]. Put simply, whether the principle is described as a "presumption" or an "inference" is a distinction without difference once the parameters in which the principle operate, as set out by Barrett JA below and this Court in *Gould*, are understood.

25. In any event, the appellant's submissions as to what was actually intended by the English authorities are oblique and appear to conclude that the English position – as set out in *Wayling v Jones*,[11] *Campbell v Griffin*,[12] and *Austin v*

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[8] See eg *Purkess v Crittenden* (1965) 114 CLR 164 at 171 (Windeyer J: "Whether one calls such a conclusion an inference, a presumption of fact or a *presumptio hominis* matters not."); see also *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 at 735.
[9] (1993) 69 P&CR 170 at 173 (Balcombe LJ, with whom Hoffmann LJ agreed).
[10] AS [51]. It is clear that Barrett JA viewed "burden" and "onus" as interchangeable words in this context and that both referred to the evidentiary onus, rather than the ultimate legal onus which remained with the claimant: see CA [83] ("onus or burden of proof shifts to the defendant"), read with CA [40(e) (the claimant "had to establish" reliance on the defendant's promise to her detriment).
[11] (1993) 69 P & CR 170
[12] [2001] EWCA Civ 990; (2001) 82 P & CR D43.

Keele[13] - is consistent with the approach in *Gould*: AS [51] – [54]. So much may be accepted, but that fact only reinforces the unlikelihood that Barrett JA intended to introduce a principle into Australian law that materially differed from the approach in *Gould*.

26. *Fifthly*, the drawing of a rebuttable inference (or the making of a rebuttable presumption) is sensible from a policy perspective in cases such as the present. Where, as here, it has been established that:

    (a) the representor made a clear and unequivocal promise;

    (b) it was objectively reasonable for the representee to rely upon the promise;

    (c) the representor knew and intended that the representee would rely upon the promise;

    (d) the natural tendency of the promise was to induce the representee to undertake acts of a particular type or refrain from acting in a particular way; and

    (e) the representee undertook such acts and refrained from acting in that way;

    it is appropriate that the representor should bear an onus of showing that the representee did not rely upon his promises. The objective circumstances constituted by the natural tendency of a promise to induce acts or omissions of a particular kind, and consequential acts or omissions of that kind, are in themselves probative of reliance and inevitably the most reliable evidence of reliance. It can never be established with confidence what the representee would have done in a hypothetical state of affairs which did not occur: see further at [29] below. The opportunity for the representee to consider how to act in other circumstances is forever lost. It should be a matter, in those circumstances, for the defendant to establish absence of reliance, albeit only at the level of an evidentiary burden.

27. *Sixthly*, the presumption/inference of reliance does not cease to operate where all evidence has been heard: *contra* AS [56]. It is only *after* the admission and review of "all of the evidence" that it is ever possible to determine whether an evidentiary onus has been, or has not been, discharged.[14] There is no suggestion in *Gould* that the principles there described by Wilson J have no relevance once all the evidence is in. His Honour expressly approved reasoning of the trial judge in that case which relied upon the evidentiary onus after a review of all the evidence (at 239). To suggest that an evidentiary onus has no relevance once evidence has been adduced denudes the onus of any meaning.

28. For the above reasons, the Court of Appeal did not err in relying upon a

[13] (1987) 10 NSWLR 283.
[14] *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 351.

"presumption of reliance" – in the terms explained by Barrett JA – when determining whether the respondentrelied upon the appellant's promises to her detriment.

SECOND ISSUE – THE APPELLANT DID NOT DISCHARGE HIS EVIDENTIARY ONUS

29. AS [58] assumes that the appeal must be allowed if this Court concludes that the Court of Appeal erred in relying upon a presumption of reliance, in the sense contended for by the appellant. That assumption is incorrect. Even if regard is had solely to the principles in *Gould* (which the appellant accepts as correct: AS [41] – [42]), it was necessary for the appellant to discharge an evidentiary onus that rested upon him.

30. The appellant did not discharge the evidentiary onus. The appellant did not give evidence at trial. So far as the question of reliance was concerned, he placed weight on the respondent's answers to questions in cross-examination as to her hypothetical conduct if the relevant promises had not been made by the respondent: see CA [100]; J [196]. The relevant parts of the cross-examination are set out at CA [74]. For the reasons set out below, the appellant's reliance on those answers was misplaced.

31. *First*, the content of the cross-examination provided no basis for discharging the appellant's evidentiary onus. The respondent had given sworn testimony in chief that she relied on the appellant's promises.[15] The respondent made no concession to the contrary in cross-examination. Contrary to AS [37], the cross-examination extracted at CA [74] does not squarely put to the respondent that she did not act in reliance on the promises.

32. The answers given by her were, at their highest, equivocal or inconclusive - as Barrett JA recognised at CA [101]. This is unsurprising. The appellant was being asked to give evidence as to her hypothetical conduct if the appellant's promises had not been made – an "other universe"[16] in the words of the cross-examiner. The respondent, understandably enough, had difficulty in answering such questions. She honestly indicated it was "very hard for me to dissect what I would have done had I not had the representation made to me".[17] However, she said that if the promises had not been made, she would "not necessarily"[18] have stayed at the Oaks and that she "may"[19] have made other decisions to develop her security for her and her son. In addition, she stated that the work she carried out on the property was "way above" that which she would have carried out in the absence of the appellant's promises.[20]

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[15] See eg affidavit of the respondent sworn 8 April 2010 at [26], [29]-[33], [71]-[75] and affidavit sworn 26 September 2010 at [167].
[16] T79.40.
[17] T79.42.
[18] T39.29.
[19] T39.32.
[20] T79.35.

She also stated that she carried out work on the property "because" of the security she believed she would receive via the transfer of Oaks cottage to her.[21] To the extent that weight can be placed on such answers, they tend in favour of reliance, not against it.

33. *Secondly,* the Court of Appeal was correct in holding that significant caution must be exercised before relying upon cross-examination of this type as evidence of an absence of reliance: CA [95]. Such cross-examination is not directed to the witness's actual observations or recollection of facts, but is in the nature of an intellectual debate between counsel and the witness, often an uneven one. The observations of Robert Walker LJ in *Campbell v Griffin*[22] at [28] are apposite: whilst it may be inevitable in cases of this sort "that claimants should be asked hypothetical questions of the 'what if' variety", the court is "not bound to attach great importance to the answers to such hypothetical questions". This cautious approach reflects human experience – few, if any, people can say with authority how they would have acted if certain historical events did not occur.

34. *Thirdly*, the weight placed by the appellant on the respondent's answers in cross-examination is inconsistent with the principle that a claimant need not show that the relevant promise or representation was the sole inducement for the relevant conduct[23] – a principle not challenged by the appellant in this appeal. Answers by a claimant in cross-examination along the lines that she loved the defendant and/or the property on which she was staying do not demonstrate an absence of reliance on other circumstances – namely, the promises made by the appellant.

35. *Finally*, there is nothing in *Gould* which suggests that a cross-examination along the lines of that undertaken in the present case is sufficient to discharge the evidentiary onus resting on a defendant. The defendant in *Gould* put before the trial judge substantially stronger material[24] than that proffered by the appellant in this case but nevertheless failed to persuade the trial judge that the inference of reliance ought not be drawn. Wilson J found no error in the trial judge's approach (at 239).

36. Thus, the appellant has failed to make out any error of principle in the approach of the Court of Appeal to the determination of liability.

THIRD ISSUE - RELIEF

37. The appellant criticises the relief granted by the Court of Appeal on two bases, both of which should be rejected.

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[21] T79.43.
[22] [2001] EWCA Civ 990; (2001) 82 P & CR 43.
[23] CA [102]; see at [14] above.
[24] Nb the reference to "the presence of powerful considerations which would go to negative any reliance by the Goulds on the representations": *Gould v Vaggelas* (1985) 157 CLR 215 at 236.

38. In considering these criticisms, it is, again, important to appreciate the legal and factual matters which are common ground in this appeal,[25] including the fact that the appellant's conduct in repudiating his promises was unconscionable: CA [124].

Measure of compensation

39. The appellant's first criticism is that the Court of Appeal applied the wrong "measure" of equitable compensation: AS [3], [59], [62] – [67]. According to the appellant, the correct measure in cases such as the present is the detriment suffered by the claimant as a result of the defendant's repudiation of his promises, rather than an amount necessary to preclude departure from those promises.

40. The appellant's contention does not accord with authority. In *Giumelli*, this Court rejected an argument that the appropriate relief in a case of proprietary estoppel should be limited to the reversal of detriment.[26] The Court instead quoted with approval Deane J's earlier observations that "[p]rima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs;"[27] it was only where relief framed on the basis of that assumed state of affairs would be "inequitably harsh" that some lesser form of relief should be awarded.[28] The approach adopted by the Court is one of long-standing;[29] "[t]here is no other principled starting-point."[30]

41. As the appellant fairly concedes, the result of *Giumelli* is that the "minimum equity" rule adopted in several English decisions[31] is not the law in Australia.[32] The appellant does not expressly challenge *Giumelli* in his submissions but instead contends for a judicial approach to the determination of what is necessary for the "promisor to act conscientiously" that is said to require the same result – namely, an award confined to the detriment suffered by the claimant. That course should not be permitted.

42. The Court in *Giumelli* also rejected an argument that the measure of equitable relief must be limited "lest the requirement for consideration to support a contractual promise be outflanked and direct enforcement be given to promises which did not give rise to legal rights".[33] The appellant's invocation of that argument in this case should also be rejected: see AS [60].

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[25] See paragraphs [12]-[14 above.
[26] At [33], [48], [51].
[27] At [42], quoting *The Commonwealth v Verwayen* (1990) 170 CLR 394 ("*Verwayen*") at 443 (Deane J).
[28] *Verwayen* (1990) 170 CLR 394 at 443 (Deane J), quoted in *Giumelli* at [42].
[29] *Ramsden v Dyson* (1866) LR 1 HL 129, 170: "If a man ... under an expectation created or encouraged by the landlord that he shall have a certain interest [acts to his detriment] upon the faith of such expectation ... a Court of equity will compel the landlord to give effect to such ... expectation" (Lord Kingsdown); *Chalmers v Pardoe* [1963] 1 WLR 677 (PC) at 681-2: "a court of equity will prima facie require the owner ... to fulfill his obligation".
[30] *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483; [2010] NSWCA 84 at [92].
[31] See eg *Crabb v Arun DC* [1976] Ch 179 at 198-9.
[32] AS [62].
[33] At [34].

43. At AS [64] – [66], the appellant seeks to give the concept of detriment a role that it has not historically had in proprietary estoppel cases. Detriment operates as a "source of prejudice" justifying Equity's intervention[34] but does not constitute, in any sense, consideration moving to the party bound.[35] Detriment is a unilateral element of the cause of action and "not the price paid for it"[36]: cf AS [63]. As a result, the concept of detriment has developed in a manner unsuited to operate as a measure of relief. Detriment is not a narrow or technical concept. It need not consist of expenditure of money or some other quantifiable financial disadvantage.[37] Rather, it is sufficient that the detriment is something substantial.[38] This approach accords with common experience. It will often be difficult, if not impossible, to accord a monetary value to the detriment relied upon by a successful claimant.[39] The same point was noted in *Giumelli*: "it is only in comparatively rare cases that relief can be granted which neatly reverses the claimant's reliance loss".[40]

44. The difficulties in the appellant's proposed new approach to relief is demonstrated by AS [67]. That paragraph wrongly conflates the Court of Appeal's analysis of the *existence* of detriment (which is not the subject of the appeal) with the relief that should be given once the elements of the cause of action are satisfied. CA [104] was concerned with the former not the latter.[41] Nothing in CA [104] suggests that a claimant is entitled to relief *merely because* the detriment suffered by them is substantial or material. A claimant is entitled to relief because each of the elements of the cause of action is satisfied, of which detriment is but one. To the extent that AS [67] may be read as challenging the existence of detriment itself, it falls outside the scope of this appeal and should not be permitted.[42]

45. Of course, it remains necessary for a court to consider all the circumstances of the case before fixing on particular relief.[43] That consideration may reveal third parties whose interests would be affected by a proprietary remedy (as in *Giumelli* and the present case). In other cases, that consideration may justify a more limited award in order to avoid relief which goes beyond what is required for conscientious conduct and would be unjust to the estopped party

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[34] *Grundt v Great Boulder Pty Ltd Gold Mines Ltd* [1937] 59 CLR 641 at 674.
[35] *Donis v Donis* (2007) 19 VR 577; [2007] VSCA 89 at 583 (Nettle JA).
[36] *Donis v Donis* (2007) 19 VR 577; [2007] VSCA 89 at 583 (Nettle JA); *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483; [2010] NSWCA 84 at [56] (Handley JA).
[37] *Barnes v Alderton* (2008) 13 BPR 25,281; [2008] NSWSC 10 at [42]; see also *Simpson-Cook v Delaforce* [2009] NSWSC 357 at [29].
[38] CA [40]; J[19]; *Thompson v Palmer* (1933) 49 CLR 507 at 547; *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 at 734; *Donis v Donis* (2007) 19 VR 577; [2007] VSCA 89 at [20].
[39] See eg *Commonwealth of Australia v Clark* [1994] 2 VR 333 (anticipated deterioration of claimant's mental health); *Verwayen* (aggravated psychiatric damage); *Gillett v Holt* [2001] Ch 210 (loyalty and devotion to defendant's business interests, social life and personal wishes).
[40] At [33], fn 74.
[41] CA [104] was included under the heading "Conclusion on detrimental reliance".
[42] In any event, as CA [104] makes clear, there was more than sufficient evidence before the Court below to satisfy a finding that the respondent's suffered detriment that was material or substantial in nature.
[43] *Plimmer v Mayor Wellington* (1884) 9 App Cas 699 at 714; *Giumelli* at [49].

(as in *Giumelli*). However, these latter cases will not be common and will only arise where full relief would be "inequitably harsh".[44] If it were otherwise, the principle for which *Giumelli* stands as authority would have no, or little, work to do.

46. Turning to the present case, it follows from all of the above that Barrett JA was correct to observe that "in the ordinary course, the appropriate equitable relief would be such as to preclude departure by the [appellant] from the state of affairs assumed by the [respondent] as a result of the [appellant's] promises": CA [137]. His Honour was also correct in holding that the present case was, like *Giumelli*, one in which the compensation awarded should "represent the value of the equitable claim of the respondent to the promised lot".[45] That finding was only made by Barrett JA after a consideration of the circumstances of the case (as required by *Plimmer* and *Giumelli*) and a recognition by his Honour that those circumstances precluded the grant of a constructive trust: CA [138]. It was neither necessary, nor appropriate, to ensure a correlation between the detriment suffered by the respondent (as valued in monetary form) and the compensation awarded.

47. The appellant has not demonstrated any circumstances that show that the relief awarded by the Court of Appeal was inequitably harsh to the appellant. It is common ground that he acted unconscionably in repudiating his promises to transfer the property to the respondent. Conscientious conduct in those circumstances required the appellant to make good the expectation which he created by his promises, on which he intended the respondent to rely. Equitable compensation representing the value of property which he promised to convey was the appropriate relief necessary to achieve conscientious conduct on his part or, at the very least, was open to the Court of Appeal acting within its discretion. There was no lesser form of relief which would have been sufficient for conscientious conduct on the part of the appellant.[46]

48. The facts in this case are certainly no weaker, and are arguably stronger, than those considered by the Court in *Giumelli* to justify analogous relief to that granted by the Court of Appeal. It was open to the appellant to adduce evidence at trial as to prejudice he might have suffered if compensation equal to the value of Oaks Cottage were ordered but he chose not to do so. He should bear the consequences of that forensic decision.

Conditional promise

49. The appellant's *second* argument seeks to fix on the conditional nature of the promises made by the appellant: AS [68] – [69]. This argument was considered by Barrett JA and correctly rejected: CA [110] – [123].

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[44] *Verwayen* (1990) 170 CLR 394 at 443 (Deane J), quoted in *Giumelli* at [42].
[45] *Giumelli* at [51].
[46] *Giumelli* at [50].

50. The cause of action in proprietary estoppel arises at the time the defendant seeks to disappoint the expectation which the claimant has.[47] The time at which an expectation is disappointed will often be the time at which fulfilment of the promise according to its terms is not forthcoming. However, an expectation may be disappointed at an earlier point because the promisor disowns the promise in advance of the time for performance: CA [113].[48] No challenge has been made to these principles by the appellant.

51. The appellant was found to have repudiated his promises by end of July 2006: CA [120]. At that time, conditional approval for the subdivision had been granted although the subdivision had not yet occurred: CA [13]. It is common ground on the appeal that the appellant acted unconscionably in so repudiating his promises: CA [124]. The appellant has conceded that he will not honour his promises *even if* the subdivision occurs at some later date: CA [111]. The appellant did not seek to prove at trial that he lacked the necessary financial capacity to satisfy the conditions on subdivision or that his wife would not provide the necessary consents: CA [123]. Barrett JA was entitled to infer that such evidence as the appellant could have deployed would not have assisted him: CA [123]. In addition, the appellant had repeatedly assured the respondent that his wife would permit the transfer to occur: see eg CA [65] – [66].

52. In these circumstances, the evidence permitted a conclusion that the fulfilment of the appellant's promises was practicable and within his control. It would be curious if his unconscionable decision to repudiate the promises before the conditions were fulfilled precluded the claimant from relief.

53. The fact that the subdivision had not yet occurred was not a bar to relief: AS [62]. The same fact existed in *Giumelli*.[49] So far as Mrs Sidhu's consent was concerned (AS [62]), the finding below, not challenged on this appeal, was that the appellant was able to procure her consent to a transfer: CA [122], [123]. In any event, Mrs Sidhu's interest in the property is protected by the Court's refusal to impose a constructive trust.

54. It follows that no error has been demonstrated in the decision of the Court of Appeal on the question of relief.

PART VII: RESPONDENT'S ARGUMENT ON NOTICE OF CONTENTION

55. The respondent does not press the Notice of Contention.

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[47] Cf *DHJPM Pty Limited v Blackthorn Resources Limited* (2011) 285 ALR 311; [2011] NSWCA 348 at [72]; *Evans v Evans* [2011] NSWCA 92 at [107].
[48] *Clarke v Meadus* [2010] EWHC 3117 (Ch) at [74].
[49] See *Giumelli* at [1].

PART VIII: ESTIMATE OF TIME

56. The respondent estimates that 1.5 hours will be required in oral argument.

Dated: 29 January 2014

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