IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S312 of 2013

BETWEEN

PRITHVI PAL SINGH SIDHU

Appellant

and

LAUREN MARIE VAN DYKE

Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. The appellant certifies that these submissions are suitable for publication on the Internet.

Part II: Issues

2. In a claim for proprietary estoppel arising from an unperformed promise, whether the defendant carries the onus of disproving that the plaintiff acted to his or her detriment in reliance on the unperformed promise.

3. Is putting the plaintiff in the position as if the promise had been performed the proper measure of equitable compensation in a claim for proprietary estoppel arising from an unperformed conditional promise, in circumstances where the conditions to the promise have not been fulfilled, the measure does not approximate the detriment suffered and proprietary relief is not available?

Part III: s.78B *Judiciary Act 1903* (Cth)

4. No notice is required under s.78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations

5. The reasons of the trial judge (J) in *Van Dyke v Sidhu* [2012] NSWSC 118 have not been reported.

Filed on behalf of the Appellant

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6. The reasons of the Court of Appeal (**CA**) in *Van Dyke v Sidhu* [2013] NSWCA 198 are reported (2013) 301 ALR 769; [2013] ANZ ConvR 13-019; [2013] NSW ConvR 56-318; [2013] V ConvR 54-837; [2013] Q ConvR 54-804.

Part V: Relevant Facts

7. In 1995 the respondent (**Ms Van Dyke**) and her then husband commenced living in a house, known as the "*Oaks Cottage*", on "*Burra Station*", which is a rural property near Queanbeyan: J[17]. The applicant (**Mr Sidhu**) and his wife (**Mrs Sidhu**) bought Burra Station in 1996 (J[17]). Mr and Mrs Sidhu, with their son, from during 1996 lived in a house on Burra Station which was a few hundred metres from the Oaks Cottage.

10 8. Both houses were on the "*Homestead Block*", which was part of Burra Station and which was a single lot Mr and Mrs Sidhu owned as joint tenants: CA[8]. Ms Van Dyke and her husband paid rent for the Oaks Cottage to Mr and Mrs Sidhu: CA[9].

9. A child was born to Ms Van Dyke and her husband soon after they had taken up residence at Oaks Cottage: CA[9]. At the time Ms Van Dyke was a part-time university student: J[33].

10. In mid to late 1997 a romantic and sexual relationship commenced between Mr Sidhu and Ms Van Dyke: CA[11].

11. During 1998 Mr Sidhu made promises or representations to Ms Van Dyke to the effect that he was planning to sub-divide the Homestead Block and, once that sub-division occurred, he would give Ms Van Dyke the Oaks Cottage: CA[17]. Over time other statements were made, but the
20 trial judge (Ward J) did not see those as operative representations, other than the representation referred to in para 14 of these submissions: CA[18]. The promises were conditional, and understood by Ms Van Dyke to be conditional, relevantly on the sub-division of the Homestead Block being completed and on Mrs Sidhu's consent to the transfer of the Oaks Cottage to Ms Van Dyke: CA[20].

12. Ms Van Dyke's husband learned of the relationship between Mr Sidhu and Ms Van Dyke and, in mid-1998, they separated. They were later divorced. Ms Van Dyke did not seek a property settlement: CA[10]. The promises or representations made by Mr Sidhu during 1998 included a statement that Ms Van Dyke did not need to seek a property settlement with her husband because she had the Oaks Cottage: CA[17].

30 13. After separating from her husband Ms Van Dyke continued living at the Oaks Cottage with her son. She continued to pay rent to Mr and Mrs Sidhu, but at a rate less than market rent: CA[11]. Ms Van Dyke also received free agistment for her horses and alpacas on the property: J[215]. Ms Van Dyke rendered assistance of various kinds on Burra Station, including, in and after 2001, in relation to subdivision and development of the part of Burra Station which was adjacent to the Homestead Block and was known as the "*Back Block*". The Back Block was owned by a company

of which Mr and Mrs Sidhu, Mr Sidhu's brother and sister-in-law were the shareholders. Mrs Van Dyke had no ownership interest in the company or the Back Block: CA[12].

14. In 2005 Mr Sidhu promised to transfer to Ms Van Dyke the Oaks Cottage together with a surrounding area of 7.3 or 7.4 hectares: CA[126]-[127].

15. In October 2005 the local council approved a subdivision of the Homestead Block into three lots, one of which included the Oaks Cottage. The approval was conditional, including conditions requiring road construction and other works: CA[13].

16. In February 2006 the Oaks Cottage was destroyed by fire, and Mr and Mrs Sidhu received insurance proceeds of $175,000. Ms Van Dyke and her son later moved into a relocatable cottage which was installed on the Homestead Block: CA[14].

17. In the period May to July 2006 Mr Sidhu and Ms Van Dyke discussed and corresponded about longer-term accommodation for Ms Van Dyke following the destruction of the Oaks Cottage: CA[15]. Their relationship was then under strain: CA[116]. The discussions and correspondence led to no consensus and, on 21 July 2006, Ms Van Dyke left Burra Station. At around that time Mr Sidhu said that he would not give the Oaks Cottage (implicitly the land on which it had stood, and the surrounding area) to Ms Van Dyke. Following disclosure of the relationship between Mr Sidhu and Ms Van Dyke, Mrs Sidhu made a statement consistent with Mr Sidhu being unable to give the land to Ms Van Dyke: CA[15].

18. The relationship between Mr Sidhu and Ms Van Dyke ended in mid-2006: CA[15]. By the end of July 2006 Mr Sidhu expressly disowned or repudiated the promises he had earlier made: CA[120].

19. At the time of the trial the Homestead Block had not been subdivided. Sub-division was necessary to enable a transfer of Oaks Cottage as a separate property: CA[16]. Further, as Mrs Sidhu was a joint tenant of the Homestead Block her consent was necessary to transferring the Oaks Cottage to Ms Van Dyke. That consent was also not given.

20. Ward J found that, with one exception, Ms Van Dyke had not relied on Mr Sidhu's promises: CA[25]; J[204]-[205]. The exception was that Ms Van Dyke did rely on Mr Sidhu's promises in not seeking a property settlement from her former husband: CA[25]. In the absence of evidence as to her former husband's financial means, Ward J found there "*may have been some equity*" in a property he owned from which Ms Van Dyke "*might*" have received some provision (J[33]) and recorded that Ms Van Dyke asserted that she believed the loss at between $35,000 and $60,000: J[5] (recording evidence which was admitted at trial as evidence of Ms Van Dyke's belief only, not of the fact). Ward J was strongly inclined to order a reference of the question of the provision likely to have been made and to have ordered compensation in that amount: J[15(3)]. Ward J did not make that order as her Honour dismissed the proceedings on the basis that reliance by Ms Van Dyke on the promises was not objectively reasonable. The Court of Appeal held reliance to be reasonable, a finding not in issue in this appeal.

21. Ward J also found, in the context a possible alternative case of "*unconscionable*" conduct, that the contributions made by Ms Van Dyke around Burra Station broadly matched the benefits she received from Mr and Mrs Sidhu: J[260].

22. The Court of Appeal allowed Ms Van Dyke's appeal. In finding detrimental reliance the Court of Appeal held that Ward J erred in failing to give effect to a presumption which the Court of Appeal described as the "*presumption of reliance*": CA[78], [83]. The Court of Appeal held that the answers given by Ms Van Dyke in cross-examination were not sufficient to displace the "*presumption of reliance*": CA[101]. On the basis of that reasoning the Court of Appeal found that the promises made by Mr Sidhu to Ms Van Dyke concerning the Oaks Cottage were at least part of the reason for Ms Van Dyke's decision to refrain from seeking alternative accommodation, a property settlement or a full-time job and part of the reason for the work Ms Van Dyke performed on the farm and on the subdivision of the Back Block: CA[103]. It also found that Ms Van Dyke suffered "*material*" detriment: CA[104].

23. The Court of Appeal (as Ward J had, on the hypothesis that her Honour's primary conclusion that Ms Van Dyke's claim should be dismissed was wrong) held that proprietary relief was not available or appropriate: CA[138]. The Court of Appeal held that equitable compensation was appropriate: CA[139]. The equitable compensation ordered was not measured by reference to the detriment suffered by Ms Van Dyke through reliance on the promises made by Mr Sidhu, but the loss Ms Van Dyke suffered because, contrary to the expectation Mr Sidhu's promises created, the Oaks Cottage and surrounding land was not given to her: CA[139], CA[142].

Part VI: Appellant's Argument

Introduction

24. At trial Ms Van Dyke advanced a claim for relief based on a proprietary estoppel, more precisely an estoppel by encouragement. Ms Van Dyke claimed the proprietary estoppel conferred on her a constructive trust over the Oaks Cottage and the surrounding land which was part of the Homestead Block, or equitable compensation. Imposition of a constructive trust was inappropriate, as held by both Ward J and the Court of Appeal. That was *inter alia* because the land had not been sub-divided and because Mrs Sidhu was a joint tenant of the Homestead Block and (a) had not made and did not know of the promises and (b) was not a party to the litigation.

25. The first issue in this appeal is the Court of Appeal's approach to proof of reliance. To establish a proprietary estoppel Ms Van Dyke had to establish the relevant equity. In an estoppel by encouragement the equity arises from an assumption as to the, usually future, acquisition of a proprietary interest, usually in real property, which had been induced by promises or representations upon which there had been detrimental reliance by the promisee: *Giumelli v*

Giumelli[1]. Detrimental reliance on a representation or a voluntary promise is "*an essential condition*" to a proprietary estoppel: *Grundt v Great Boulder Proprietary Gold Mines Limited*[2] at 674 per Dixon J. Thus, "[i]*t is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation which it gives rise to*": *Riches v Hogben*[3] at 300-1 per McPherson J, a passage approved in *Giumelli v Giumelli* at [35].

26. Ward J held that Ms Van Dyke had not established reliance and consequently that there was no equity[4]. The Court of Appeal erroneously reversed Ward J's finding by reversing the onus of proof, requiring that Mr Sidhu disprove reliance. The Court of Appeal's reasoning in relation to the onus of proof of reliance gives rise to the first issue in the appeal.

10 27. The Court of Appeal's reasoning resulted in or led to a second error, which is the second issue in this appeal. A plaintiff who establishes a proprietary estoppel has a *prima facie* entitlement to performance of the promise however, "*qualification* [is] *necessary both to avoid injustice to others… and to avoid relief which* [goes] *beyond what* [is] *required for conscientious conduct by* [the defendant]": *Giumelli* at [50].

28. Once the Court of Appeal held that reliance had been established by application of the "*presumption of reliance*", both reliance and detriment were in effect at large and there was no touchstone, other than the promise, to determine what was necessary for Mr Sidhu to do to act conscientiously. The relief granted by the Court of Appeal was equitable compensation assessed as "*a sum equal to the value* [Ms Van Dyke] *would now have had the promise been fulfilled*": CA[140]. The
20 consequence of the Court of Appeal's reasoning, in effect assuming reliance and detriment, was that the relief granted was to enforce the conditional promise as if the conditions had been performed. The relief, which is analogous to damages for breach of contract, should not have been granted.

<u>First Issue - Reliance and Detriment</u>

29. Ward J found that the evidence at trial (subject to the exception identified) "*make impossible a finding that* [Ms Van Dyke] *did those things (and refrained from seeking or taking up other opportunities that may have been available to her) acting in reliance on the promises* to her detriment. *No detriment can have been suffered if Ms Van Dyke would or is likely to have done those things in any event*" (emphasis in original): J[204].

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[1] [1999] HCA 10 (1999) 196 CLR 101 at [6] per Gleeson CJ, McHugh, Gummow and Callinan JJ; similarly McGhee "*Snell's Equity*" (32nd Edition) at [12-017].

[2] (1937) 59 CLR 641, a conventional estoppel case but frequently applied to a proprietary estoppel.

[3] [1985] 2 Qd R 292.

[4] With the exception of not seeking a property settlement with her former husband, although on the evidence at trial no detriment was established because there was no reliable evidence that there were assets which could be subject of a property settlement. That can be put to one side as Ward J was inclined to order a reference and equitable compensation equal to the amount lost, and it is no longer suggested that any other remedy was appropriate.

30. The evidence at trial, on which Ward J made that finding, included objective facts, certain subjective considerations and concessions made by Ms Van Dyke in cross examination.

31. The facts included the following.

32. Ms Van Dyke loved living on Burra Station and loved her part time employment with a prominent Federal politician: J[199]. Ms Van Dyke considered the time she spent on Burra Station the happiest period of her life: J[198]. Ms Van Dyke loved Mr Sidhu and believed that their relationship would continue forever: J[198]. Before mid-2006, when Mr Sidhu's and Ms Van Dyke's relationship broke down and when she left the property, those were powerful reasons for Ms Van Dyke to stay living on the property

33. Ms Van Dyke paid less than market rent to continue living in the Oaks Cottage: CA[11]. She also received free agistment for her horses and alpacas: J[215]. Objectively those are reasons why Ms Van Dyke would not have moved elsewhere. There is also no evidence that available alternative accommodation would have been economically or qualitatively more favourable to Ms Van Dyke.

34. Ms Van Dyke commenced performing work on Burra Station before the promises were made by Mr Sidhu (J199). That work was in part to her benefit through performing maintenance on the house she lived in and maintaining the paddocks in which her horses and alpacas were kept.

35. In the period from 1997 to 2006 Ms Van Dyke received from Mr and Mrs Sidhu assistance which was broadly matched to the work Ms Van Dyke carried out around Burra Station: J[260]. During that period Ms Van Dyke cared for her young child while working part time and, for part of that time, was also a part time university student: J[33], and the assistance given by Mr and Mrs Sidhu included help around Ms Van Dyke's house and looking after Ms Van Dyke's son while she worked and studied.

36. Those facts constitute reasons why Ms Van Dyke may well, or was likely, have acted in the same way if the promises not been made.

37. Ms Van Dyke was cross examined in relation to reliance. It was squarely put to Ms Van Dyke that, in the circumstances, she would have stayed living at the Oaks Cottage whether or not the promise was made by Mr Sidhu. Ms Van Dyke's answer was, in effect, that she might have made other decisions, but that she could not say what she might have done: J[197]-[199], CA[74]-[75]. In contrast with the English judgments referred to by the Court of Appeal, *Wayling v Jones*[5] (CA[84]-[92]) and *Campbell v Griffin*[6] (CA[96]-[99]), that cross examination squarely put to Ms Van Dyke that she did not act in reliance on the promises. The cross examiner went on to invite Ms Van Dyke to explain her answers. The answers given by Ms Van Dyke were in effect inconsistent with a reliance case. That cross examination also provides a sound basis for Ward J's finding.

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[5] (1993) 69 P&CR 170.
[6] [2001] EWCA Civ 990 [2001] WTLR 981.

38. In light of the facts recited and the evidence given in cross examination Ward J's finding that reliance had not been established by Ms Van Dyke was correct, and was a finding that could not be interfered with by the Court of Appeal in accordance with well established authority[7]. There was no principled basis on which to reverse Ward J's finding or fact.

39. The Court of Appeal held that Ward J erred in failing to apply a "*presumption of reliance*": CA[78]. In doing so the Court of Appeal did not draw an inference. The Court of Appeal expressly held that the "*presumption of reliance*" reversed the onus of proof, requiring Mr Sidhu to disprove reliance. The content of the presumption is demonstrated by CA[78], [83] and [94].

40. The Court of Appeal erred in reversing the onus of proof. To reverse the onus of proof is wrong in principle, for the following reasons.

41. *First*, to reverse the onus of proof of reliance is inconsistent with authority of this Court, albeit in relation to the tort of deceit. A plaintiff who sues on a fraudulent misstatement must prove reliance on the fraudulent statement. *A fortiori* a plaintiff seeking relief on the basis of a non-fraudulent representation or a promise which has not been performed. The Court of Appeal's reasons create a lack of coherency in the law, and have the improbable consequence that a defendant who has not engaged in fraudulent conduct is placed in a forensically disadvantageous position in comparison to a defendant who has made a fraudulent misrepresentation.

42. In *Gould v Vaggelas*[8] at 236-239 Wilson J, Gibbs CJ and Dawson J agreeing on this issue[9], held that an inference of reliance may be drawn from the making of a representation which is calculated to induce the person to whom it is made to act in a particular way, if the person does so act. That is because the natural inference of fact is that the misrepresentation played a part in the subsequent conduct, as the maker of the misrepresentation intended. However, "*it is open to the defendant to obstruct the drawing of that natural inference of fact by showing that there were other relevant circumstances*": *Gould* at 238.

43. *Gould* is authority that a common sense inference of reliance on a misrepresentation can (not must) be drawn. It is also authority that, although that inference is available, the onus of proving reliance is always carried by the plaintiff alleging a case based on a representation. Wilson J, referring to earlier authority in this Court, held that the ultimate onus of proving inducement always rests on the plaintiff seeking relief in respect of a fraudulent misstatement: *Gould* at 237. Wilson J also held that the only obligation on a defendant is to point to the existence of circumstances which tend to rebut the drawing of the inference, and that the onus "*rests at all times on the plaintiff*": *Gould* at 238-9. Wilson J's reasoning accords with the "*general rule*"[10] that the

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[7] *Fox v Percy* [2003] HCA 22 (2003) 214 CLR 118 at [26]-[29] per Gleeson CJ, Gummow and Kirby JJ.
[8] (1985) 157 CLR 215.
[9] At 219 and 262 respectively.
[10] Byrne and Heydon "*Cross on Evidence*" (Australian edition) (looseleaf service) at [7060]-[7065].

burden of proof of an essential element of a cause of action lies on the plaintiff[11]. As held in *Grundt*, reliance is an "*essential condition*" to an estoppel which must be proved by a plaintiff.

44. Ward J's reasoning accords with *Gould*. Reliance, in the sense of detrimental reliance, is an essential element of the cause of action asserted by Ms Van Dyke. Ward J considered the circumstances which Mr Sidhu pointed to at trial, recited in paras 32 to 37 of these submissions, and held that reliance was not established. Her Honour's reasoning was conventional and correct, and the Court of Appeal was wrong to reverse the onus of proof. There is no other basis to interfere in Ward J's finding of fact.

45. *Second*, the introduction of a "*presumption of reliance*" is inapposite, as a matter of principle, in a claim for a proprietary estoppel by encouragement. As identified by McPherson J in *Riches v Hogben* at 300-301, approved in *Giumelli* at [35], the reason reliance is an "*essential condition*" to a proprietary estoppel by encouragement is that it is not the unperformed promise but the conduct of the plaintiff in relying to his or her detriment on the promise which invites the intervention of equity. Equity does not enforce a voluntary promise absent detriment[12], and it is the existence of detriment which in part defines what needs be done by a defendant to act conscionably. The plaintiff must prove detriment[13].

46. To apply a "*presumption of reliance*" is inconsistent with principle for two reasons. The first reason, the party setting out to prove a case must prove all of the essential elements of the case, has already been identified. The second is that absent proof of reliance by a plaintiff, at least generally, attention is directed to the voluntary promise and relief becomes detached from actual as distinct from possible detriment. That is demonstrated by the facts of this case.

47. The Court of Appeal held that Mr Sidhu had not disproved that the promises were, on the balance of probabilities, a reason Ms Van Dyke did not seek alternative accommodation and a full time job, and a reason she performed work around the property: CA[103]. That Mr Sidhu did not disprove that Ms Van Dyke so relied was held to establish detriment: CA[103]-[104]. Detriment was held to be sufficient to justify the relief granted because, *inter alia*, Mr Sidhu did not disprove that Ms Van Dyke might have obtained alternative employment (CA[104]). Yet at trial (a) there was evidence demonstrating why Ms Van Dyke may well not have sought alternative employment, (b) Ward J was not satisfied that the promises had any part in Ms Van Dyke's decision not to seek alternative employment and (c) there was no evidence at trial that the postulated alternative employment was available. The other examples in CA[104] are of the same quality. The detriment was then defined by the Court of Appeal in terms of possibilities (in distinction to probabilities). Once detriment was so defined the relief granted inevitably was to enforce the promise, because the possible detriment was in effect at large.

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[11] *Currie v Dempsey* (1967) 69 SR(NSW) 116 at 125 per Walsh JA, cited Cross on Evidence at [7065].
[12] *Giumelli* at [6] and [35], similarly *Gillett v Holt* [2001] Ch 210 at 232A-E per Robert Walker LJ, Beldam and Waller LJJ agreeing.
[13] *Sullivan v Sullivan* [2006] NSWCA 312 (2006) 13 BPR 24,755 at [91] per Hodgson JA, McColl JA agreeing.

48. Thus both the integers of the cause of action other than the voluntary promise and the condition for relief followed from that application of the "*presumption of reliance*". The consequence is that the Court of Appeal enforced a voluntary promise because Mr Sidhu did not disprove reliance. That is unprincipled and erroneous.

49. *Third*, the foundation in the English authorities for the "*presumption of reliance*" is slight, and based on the problematic judgment of the Court of Appeal in *Greasley v Cooke*[14]. *Greasley v Cooke* was decided on an unsatisfactory evidentiary basis because the trial "*took a most unusual course*" and was "*very exceptional*"[15]. Insofar as Lord Denning MR held, in *Greasley v Cooke*, that detriment was not required to establish a proprietary estoppel, that part of the judgment is not good law in England: *Gillett v Holt* at 232.

50. In *Greasley v Cooke* Lord Denning MR applied his earlier judgment in *Brikom Investments Limited v Carr*[16] in which he held that reliance on a misrepresentation is presumed and that the maker of the representation could not say that the other party would have entered into the transaction regardless of the representation. That reasoning is squarely inconsistent with *Gould*, and *Greasley v Cooke* is not the law of Australia. Dunn LJ agreed with Lord Denning MR, but later explained the judgment in terms departing from at least Lord Denning MR's suggestion that detriment need not be established[17]. Waller LJ agreed, but his judgment at 1313C-G is in language consistent with an inference being drawn and not with the onus of proof being reversed.

51. In *Wayling v Jones* at 173 Balcombe LJ (Leggatt and Hoffmann LJJ agreeing) referred to the burden of proof shifting once (a) the promise was proven and (b) there was conduct by the plaintiff of such a nature that inducement may be inferred (similarly at 175). That passage does not establish a presumption, and may go no further than *Gould* if the reference to burden of proof is to a practical need to identify a fact or facts sufficient to obstruct the drawing of the inference. Contributing to the ambiguity, as authority for that proposition Balcombe LJ cited *Greasley v Cooke* (without a page reference) and *Grant v Edwards*[18] at 657 where Sir Nicolas Browne-Wilkinson VC[19] held "*in the absence of evidence to the contrary, the right inference is that the claimant acted in reliance on such holding out and the burden lies on the legal owner to show that she did not do so*", citing *Greasley v Cooke*. That passage does not support a reversal of the onus of proof and, shorn of the reference to burden, is consistent with *Gould*.

52. In *Campbell v Griffin*[20] Robert Walker LJ (Butler-Sloss P and Thorpe LJ agreeing) used the phrase "*presumption of reliance*", but in doing so was applying *Wayling v Jones*[21] which did not use that

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[14] [1980] 1 WLR 1306.
[15] At 1309 per Lord Denning MR and at 1313 per Dunn LJ respectively.
[16] [1979] QB 467 at 482-3, although agreeing in the result Roskill and Cumming-Bruce LJJ disagreed with Lord Denning MR's reasons, expressly holding at 485 and 490 that they did not decide the case on the basis of a promissory estoppel.
[17] See the extract from *Watts v Story* (14 July 1984 unreported) reproduced in *Gillett v Holt* at 232B-D.
[18] [1986] Ch 638.
[19] In a concurring judgment in the Court of Appeal.
[20] At WTLR 992C-D.
[21] Robert Walker LJ had earlier, in *Gillett v Holt* [2001] Ch 210 at 228F held "*in any event reliance would be presumed*" referring to *Greasley v Cooke*, without a page reference.

phrase. If by that phrase he intended to go further than identify an inference, which is not clear, then the proposition is not consistent with the better view of the earlier authorities and is wrong, or at least not the law of Australia.

53. The English cases following *Greasley v Cooke* are ambiguous, generally using language of both inference and burden of proof. The Privy Council, on an appeal from New South Wales, treated the *Greasley v Cooke* line as authority for the availability of an inference and no more[22]. The Court of Appeal identified those judgments as supporting a "*presumption of reliance*". It is not clear that the judgments stand for that proposition, but to the extent the judgments do those judgments do not accord with Australian law.

10 54. *Fourth*, the status of the "*presumption of reliance*", if any, in English authority is doubtful. In *Thorner v Major*[23] Lord Walker of Gestingthorpe (as Robert Walker LJ had become) pointed to the need for trial judges hearing proprietary estoppel cases to subject the evidence of, *inter alia*, reliance to "*careful, and sometimes sceptical, scrutiny*". That approach is not consistent with a "*presumption of reliance*". Further, the Court of Appeal in *Cook v Thomas*[24] recently held *Greasley v Cooke* was a case which turned on its unusual facts. The current edition of *Snell's Equity*[25] treats the line of cases commencing with *Greasley v Cooke* as (a) drawing a distinction between reliance and detriment and (b) leading only to an inference of detriment, which is how *Greasley v Cooke* was explained in *Coombes v Smith*[26]. As reliance is the causal connection to detriment no distinction between the two should be drawn[27].

20 55. The English law provides no persuasive support for the Court of Appeal's approach.

56. *Fifth*, to the extent there is a "*presumption*" it has no application where all evidence has been heard: *Cook v Thomas*[28]. That conclusion accords with common sense. Once evidence is led and the plaintiff cross examined there will rarely be any reason to apply a "*presumption*". The trial judge will, as occurred in this case, be able to form a judgment based on the evidence and cross examination as to whether the plaintiff did rely on the promise or representation.

57. *Conclusion*: The law of Australia does not require that, in a proprietary estoppel case, the defendant disprove reliance. The onus is carried by the plaintiff to prove the necessary elements of the plaintiff's case. In a practical sense a defendant may be required to point to facts which

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[22] *Austin v Keele* (1987) 10 NSWLR 283 at 292 per Lord Oliver of Aylmerton. The case was a resulting trust case said to arise from a common endeavour, as was *Grant v Edwards*.
[23] [2009] UKHL 18 [2009] 1 WLR 776 at [60].
[24] [2010] EWCA Civ 227 at [77] per Lloyd LJ, Laws and Sullivan LJJ agreeing.
[25] At [12-020].
[26] [1986] 1 WLR 808 at 821 per Jonathon Parker QC sitting as a deputy judge; also *Gillett v Holt* at 232A-E explaining *Greasley v Cooke* at 1311 insofar as it speaks to detriment.
[27] Meagher, Heydon and Leeming "*Meagher, Gummow and Lehane's Equity Doctrines and Remedies*" (4th edn) at [17-105] treat *Greasley v Cooke* as a case about inferring reliance, and as having been rejected in relation to detriment.
[28] [2010] EWCA Civ 227 at [77] per Lloyd LJ, Laws and Sullivan LJJ agreeing.

obstruct the drawing of an inference of reliance, but the onus always remains on the plaintiff to prove reliance.

58. Ward J's reasoning was correct, and the Court of Appeal was wrong to hold Ward J erred in failing to reverse the onus of proof and apply the "*presumption of reliance*". Applying usual principles, no error was demonstrated in Ward J's finding of fact and the Court of Appeal was wrong to interfere in Ward J's finding of fact. The orders set out in Part VIII of these submissions should be made.

Second Issue - relief

59. The Court of Appeal's reasons in relation to relief are CA[137]-[142]. The Court of Appeal (and Ward J) was correct to hold that proprietary relief was not available because of the position of Mrs Sidhu, and that the property has not been sub-divided. However, the Court of Appeal erred in framing relief as it did at CA[139]-[142]. The Court of Appeal held that the appropriate relief was equitable compensation, in effect measured (a) on the assumption the conditions to the promise were satisfied and (b) to put Ms Van Dyke in the position she would have been in had the promise had been performed.

60. A surprising and erroneous consequence of that relief is that Ms Van Dyke was or may be put in a better position than if the promise had been contractual. That is because Ms Van Dyke has not had to prove loss and, although there was no promise to procure the sub-division or Mrs Sidhu's consent to the transfer of the property and neither had occurred, equitable compensation was ordered to be assessed on the basis the conditions had been satisfied.

61. The Court of Appeal erred in granting that relief for the following reasons.

62. *First*, the effect of *Giumelli* at [33] is that the English "*minimum equity*" rule is not part of the law of Australia. Instead the appropriate remedy is determined by what is necessary for the promisor to act conscientiously (*Giumelli* at [50][29]), recognising that in this field of discourse breach of a voluntary promise is not of itself unconscionable[30]. That involves an assessment, *inter alia*, of the detriment suffered[31]. Once the Court has identified what is necessary to act conscientiously "*the Court must look at the circumstances in each case to decide in what way the equity can be satisfied*"[32].

63. Equity does not automatically enforce the promise. The expectation that the promise will be performed is a necessary but not sufficient basis for relief. If an expectation were sufficient equity would enforce voluntary promises *simpliciter*.

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[29] Similarly *Sullivan v Sullivan* [2006] NSWCA 312 (2006) 13 BPR 24,755 at [22] per Handley JA, the difference between Handley JA and Hodgson JA, with whom McColl JA agreed, was as to the relief on the facts which was necessary to prevent the defendants behaving unconscientiously.

[30] *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387 at 404 per Mason CJ and Wilson J.

[31] *DHJPM Pty Limited v Blackthorn Resources Limited* [2011] NSWCA 348 (2011) 83 NSWLR 728 at [86]-[87] per Meagher JA, Macfarlan JA agreeing.

[32] *Plimmer v Mayor, &c, of Wellington* (1884) 9 App Cas 699 at 714.

64. The Court of Appeal did not adequately assess what was necessary for Mr Sidhu to behave conscientiously because of its approach to reliance and detriment. Having presumed reliance, the Court of Appeal then identified possible detriment, although holding that the detriment "*went beyond something that was insubstantial or theoretical*": CA[104]. What is necessary to act conscientiously is not determined by reference to possibilities of detriment.

65. The reasoning disclosed in CA[104] is erroneous in fact and law.

66. In point of fact, CA[104] overlooks the findings made by Ward J that (a) Ms Van Dyke performed work around Burra Station before the promises were made, (b) the benefits that Ms Van Dyke received broadly matched the work she performed and (c) that there was no evidence of a realistic foregone job opportunity (the reference to Ms Van Dyke's affidavit in CA[104] is to a passage admitted only as to her belief and not as proof of the fact) or of an opportunity to live elsewhere on more favourable terms (moving to different rented accommodation, likely at market rent, would be economically detrimental). None of those matters establish detriment which justified the relief granted.

67. The reasoning in CA[104] is erroneous in law. The issue governing relief is not whether detriment is more than "*insubstantial*" or "*theoretical*" or "*material*". *Giumelli* establishes that there need not be a precise correspondence between detriment and relief, but it does not follow that a voluntary promise will be enforced once detriment is more than "*insubstantial*". That detriment is more than "*insubstantial*" informs what is required for a defendant to act conscionably, but in itself does not have the consequence that the promise must be performed or, in effect, damages for breach paid. More must be established in relation to detriment to answer the question of what is required to act conscientiously. Ms Van Dyke did not establish detriment in a tangible sense and, absent tangible detriment, she did not establish a right to relief or to the relief granted.

68. *Second*, the relief granted by the Court of Appeal gave effect to the promise as if it were unconditional, or the conditions had been fulfilled. The sub-division of the property has not occurred and Mrs Sidhu has not consented to the transfer of the sub-divided lot to Ms Van Dyke.

69. Mr Sidhu did not promise to sub-divide the property or obtain Mrs Sidhu's consent, although he did represent that he could obtain the latter. A case was never pleaded or advanced that he owed an implied obligation to do either, an implication which would have been difficult given (a) the voluntary character of the promise and (b) the circumstances of the promise. If he had voluntarily undertaken an obligation in the nature of a best endeavours promise, there is no basis for a conclusion that he did not try to perform his promise. There was evidence at trial of the considerable expense associated with the sub-division and some financial difficulty encountered by Mr and Mrs Sidhu.

70. The consequence is that the Court of Appeal has granted relief which does more than hold Mr Sidhu to his promise. It has done so without detriment being established that allowed an

assessment of what was required for Mr Sidhu to act conscientiously. The relief granted is erroneous, and the appeal should be allowed. On the facts Ms Van Dyke has not established a basis for relief.

Part VII: Constitutional and Statutory Provisions

71. None.

Part VIII: Orders Sought

72. The appeal be allowed with costs.

73. The orders of the Court of Appeal be set aside and the appeal be remitted to that Court to determine:

10 a. whether to make orders remitting the assessment of compensation arising from the respondent foregoing the possibility of a property settlement, and if so whether to remit that question to the Equity Division or to a referee; and

b. costs of the trial and the appeal to that Court.

Part IX: Time Estimate

74. The appellant estimates that he will require 1.5 hours for the presentation of the appeal.

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20

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