HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **HILARY LORRAINE KRAMER**

First Appellant

JAIME FERRAR

Second Appellant

and

DAVID LINDSAY STONE

Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. This oral outline is in a form suitable for publication on the internet.

PART II: OUTLINE OF ARGUMENT

FACTUAL CONTEXT & APPROACH TO UNCONSCIONABILITY

2. ***The statement (AS [6], [10])*** David had been share farming the property, under an oral share farming agreement, since 1975. Dame Leonie was found to have said to David, shortly after Dr Harry's death in 1988: "*Harry always admired your honesty. Harry and I did agree the farm will pass to you upon my death and I want you to know there will also be a sum of money*": see **PJ [91], [249]; AJ [47]; AS [6]**.

3. ***The unique factual context (AS [6]-[7], [9], [20]).*** The facts are unique amongst the "inheritance cases"[1]: **(a)** the statement was not in response to a complaint that David could not make ends meet (**PJ[93]**); **(b)** the statement "came completely out of the blue" (**PJ[93]**); **(c)** it was not "linked to [David] continuing to remain as a share-farmer on the Property" (**AJ [150]**); **(d)** David never told Dame Leonie, at any later time, that he was only staying on the farm because of the statement (**PJ[93]**); **(e)** David did not discuss the statement or anything arising from Dame Leonie's estate again with her (**PJ [92], [220]**); **(f)** David "never considered leaving" the farm (**PJ[93]**); **(g)** David often told people that he enjoyed living and working on the farm (**PJ[93]**).

4. ***PJ's Approach to Unconscionability (AS [11]-[12]).*** The primary judge held that knowledge of detrimental reliance was essential to proprietary estoppel by encouragement (**PJ[231]**). There is no finding that Dame Leonie *actually* knew of David's detrimental reliance by not terminating the share farming agreement. The dipositive reasoning of the primary judge was that: (a) constructive knowledge of detrimental reliance is sufficient in encouragement cases (**PJ[231], [241], [245]**); and (b) Dame Leonie "ought reasonably to have assumed" detrimental reliance (**PJ[234]**), on the basis that it must have been obvious to Dr Harry and Dame Leonie (**PJ [197], [201]**) that David's income under the share farming agreement was irregular from quarter to quarter and only a fraction of the average annual male income **(PJ [234], [196], [156]-[157]**).

5. ***NSWCA's Approach to Unconscionability (AS [7], [12]).*** In rejecting Ground 3, the NSWCA held that, in proprietary estoppel by encouragement cases, it is not necessary

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[1] Eg *Walton v Walton* (unreported, 14 April 1994, Court of Appeal (Civil Division), Glidewell, Kennedy and Hoffman LJ) [1994] Lexis Citation 3926) – **JBA, Vol. 3, Tab 35**; *In re Basham* [1986] 1 WLR 1498 – **JBA, Vol. 3, Tab 30;** *Gillett v Holt* [2001] CH 210 – **JBA, Vol. 3, Tab 20**; *Thorner v Majors* [2009] UKHL 18 – **JBA, Vol. 3, Tab 34**; *Guest v Guest* [2022] UKSC 27– **JBA, Vol. 3, Tab 21**.

that there be conduct after the voluntary promise – "the making of the representation itself" may be the requisite encouragement: **AJ[166]-[167];** cf ***Olsson*** *v Dyson* (1969) 120 CLR 365. In rejecting Ground 4, the NSWCA held that, where coupled with reasonable and detrimental reliance, the element of "encouragement on the part of the representor in making the representation appears to be sufficient to satisfy the requirement of unconscionable conduct": **AJ[200]** (Ward P), **[287]** (Leeming JA).

GROUND 1(A)

6. Unchallenged authority of this Court establishes that, for an equity to arise in cases of proprietary estoppel by encouragement, there must be conduct of the donor encouraging detrimental reliance after the making of the voluntary promise (**AS [14]-[17], [29]-[31]; AR [6]; cf RS [21]-[23], [25]-[28], [43]-[51]**):

   a. The early cases involved failed gifts: *Dillwyn v Llewelyn* (1862) 45 ER 1285 **JBA, Vol 3, Tab 19**; *Ramsden v Dyson* (1866) LR 1 HL 129 **JBA, Vol 3, Tab 29**. The principle from these cases was adopted by this Court in another failed gift case: *Olsson* **JBA, Vol 1, Tab 10**;

   b. The principle was recognised as extending to voluntary promises in ***Riches*** *v Hogben* [1985] 2 Qd R 292 **JBA, Vol 3, Tab 31**. The analysis in *Riches* has been adopted by this Court as authoritative: ***Sidhu*** *v Van Dyke* (2014) 251 CLR 505 **JBA, Vol 2, Tab 12**, [82] and fn 114 (**JBA p 568**); *Giumelli v Giumelli* (1999) 196 CLR 101 **JBA, Vol 1, Tab 8**, [5]-[6], [34]-[35] (**JBA pp 381, 389-390)**.

7. There is no distinction of principle, between failed present gifts and promises of future gift, which could justify a stricter standard for the former compared to the latter in proprietary estoppel cases (**AR [4]-[5]; cf RS [11], [21]-[24], [38]**): *Maddison v Alderson* (1883) 8 App Cas 467 (**JBA, Vol 3, Tab 24**), 473 **(JBA p 930**); Halsbury's Laws of England (1934, 2nd ed), Vol 15, [1278]; *Estoppel by Conduct and Election* (**JBA**, **Vol 5, Tab 42**), [2-010] (**JBA p 1526**) and [11-030] (**JBA p 1559**); P Finn, "Equitable Estoppel" (**JBA, Vol 5, Tab 41**), 81-85 (**JBA pp 1482-1484)**.

8. The common purpose of estoppels "does not support a single unifying doctrine of estoppel": *Sidhu*, [1] and fn 26 (**JBA p 550**) (**AS [29]-[32]; AR [7]**). It "may require different approaches in different contexts": ***Crown Melbourne*** *Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1 **JBA, Vol 1, Tab 6**, [139] (Keane J) (**JBA p 243**); *Estoppel by Conduct and Election,* [1-034] (**JBA p 1516)**.

9. In proprietary estoppel, equity intervenes to prevent unconscionable conduct (**AS [22]**): *Sidhu*, [77] **(JBA p 566**); *Crown Melbourne*, [145]-[146] **(JBA p 245)**. Even

where there has been reasonable and detrimental reliance, the failure to fulfil a promise is not unconscionable; "something more would be required" (**AS [21]-[24], [26]-[28]; AR [7]; cf RS [11], [31]-[41], [47]**): ***Waltons Stores*** *(Interstate) Ltd v Maher* (1988) 164 CLR 387 **JBA, Vol. 2, Tab 15**, 406 (Mason CJ and Wilson J) (**JBA p 658**).

10. The requirements of proprietary estoppel are not to be discerned from other kinds of estoppel (**AS [18]-[24], [31]-[32]; AR [7]-[9]; cf AJ [285]-[286]**; **cf RS [29], [31], [34]**). Estoppel *in pais* lacks the salient features of proprietary estoppel: **(a)** it does not extend to "*a statement of something which the party intends or does not intend to do*": *Jorden v Money* (1854) 10 ER 868 **JBA, Vol. 3, Tab 23**, 882 (**JBA p 907**); and **(b)** does not create any rights: *Waltons Stores*, 414 **(JBA p 666**). The bespoke requirement in proprietary estoppel cases of conduct encouraging detrimental reliance after the voluntary promise reflects the salient circumstances that proprietary estoppel: **(a)** is not a mere rule of preclusion, but deprives an owner of property rights; **(b)** restricts testamentary freedom; and **(c)** completes an incomplete gift, contrary to equitable maxims which ensure harmony with the doctrine of consideration.

GROUND 1(B)

11. Where the only conduct after the voluntary promise is knowledge, the donor's conscience is not engaged other than by actual knowledge (**AS [35], [39]; cf RS [54]**). To hold constructive knowledge to be sufficient would be inconsistent with the premise of Ground 1(a). Constructive knowledge ignores the need for "*something more*" to bind the conscience of the defendant. It would erect proprietary estoppel as a measure protecting reasonable reliance, rather than one which reverses unconscionable conduct.

12. There is no authority which supports the sufficiency of constructive knowledge to bind conscience in a proprietary estoppel case (**AS [40]-[42]**). Deane J's judgment in *Commonwealth v Verwayen* (1990) 170 CLR 394 (**JBA, Vol 1, Tab 1**), 445 **(JBA p 61**) does not provide any such support (**AS [43]**). *First,* the relevant state of mind for Deane J was the donor's state of mind at the time of making the representation, looking forward. That is not conduct "after" the promise. *Second*, Deane J's formulation was in pursuit of the unification imperative. By adopting the lowest common denominator, it ignores the salient circumstances of proprietary estoppel: **[10]** above. *Third,* no authority or reasoning is provided by Deane J for the "clearly ought to have known" aspect of the formulation.

11 September 2024

Noel Hutley, Sebastian Hartford-Davis, Myles Pulsford