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' REPLY

## PART I: CERTIFICATION

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

## PART II: REPLY

2. ***A failure to join issue***. The issue to be determined in this appeal is not, as the Respondent suggests, whether actual knowledge is necessary in every encouragement case: **RS[3], [20]-[54]**. As evident from the Notice of Appeal (**CAB 303**), the appeal rests upon a narrower syllogism. The major premise (sub-ground 1(a)) is that, in every encouragement case, there must be "*conduct of the donor after making the [initial] voluntary promise*". The minor premise (sub-ground 1(b)) is that constructive knowledge of detrimental reliance, being the only conduct of Dame Leonie after the promise (**AS[7], [11]**), is insufficient by itself to constitute unconscionable conduct.

3. ***RS [5]-[17]***. A failure to appreciate the logical structure of the Appellants' case may explain why a quarter of the Respondent's submission agitates adjectival factual matters that are not dispositive of the appeal and could not justify revocation of special leave: cf **RS[18], [23]**. If sub-ground 1(a) is upheld, it would not matter whether Dame Leonie knew at the time of making the Statement that it would be relied upon (cf **RS[11])** nor if she had forgotten about the Statement (cf **RS[7]**). What would matter is that there is no conduct of Dame Leonie "*after making the [initial] voluntary promise*" except constructive knowledge of detrimental reliance.[1] As for sub-ground 1(b), its express predicate is that the PJ did make a constructive knowledge finding: cf **RS[12]-[13], [52]**. The Appellants do not seek to "qualify, confuse and ultimately disturb" that finding: cf **RS[13], [52]**. The submissions at **AS[35]-[37]** merely seek to expose the substratum and import of that finding of fact, given that it was variously expressed by the PJ. See further at [10]-[11] below.

4. ***Olsson is not distinguishable***. The Respondent wrongly attempts to distinguish *Olsson v Dyson* (1969) 120 CLR 365 (***Olsson***) by confining it to cases of incomplete gifts, which are then said to exclude a promise to give property in the future: **RS[11], [21]-[24], [38]**.[2] *Olsson* was not decided on this basis. Kitto J, like Lord Westbury in

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1 See **AJ[168]**, holding that the Respondent "*cannot now maintain a case of acquiescence or standing by, not having run such a case at first instance and not having filed a notice of contention*." Accordingly, this appeal must be approached as a case in which the only element of encouragement was the "*making of the [Statement] by itself*": see **AJ[166]**.

2 As plain from **AS[41]**, the further suggestion at RS [23] that "[n]o issue of knowledge was involved in Kitto J's reasoning" is wrong. The requirement for actual knowledge is addressed at **AS[40]** ff.

*Dillwyn v Llewelyn* (1862) 45 ER 1285 (***Dillwyn***), treated incomplete gifts and unperformed promises interchangeably.[3] In *Giumelli v Giumelli* (1999) 196 CLR 101 (***Giumelli***), this Court quoted with approval the observation in *Riches v Hogben* [1985] 2 Qd R 292 (***Riches***) that "*there is of course a sense in which all … promises given without consideration are imperfect gifts of the benefits they purport to confer*".[4]

5. There is no authority or reason in principle to distinguish between incomplete gifts and promises to give property in the future, which are said by the Respondent (without authority) to have "ongoing force": cf **RS [24]**. What was dispositive in *Olsson* was the absence of any conduct of the intending donor after the act of incomplete gift, and *Olsson* is specifically referred to in *Estoppel by Conduct and Election* when dealing with testamentary promises.[5] To attribute greater "ongoing force" to promises to give property in the future would also be inconsistent with the traditional hostility of equity to the enforcement of "promises *de futuro*", of which *Jorden v Money* (1854) 5 HLC 185 held that: "*if binding at all, [they] must be binding as contracts*".[6]

6. This Court has not departed from *Olsson*: cf **RS [25]-[28], [46]-[49]**.[7] In *Giumelli*, at [35], this Court referred with approval to the statement of McPherson J in *Riches*, for which *Olsson* was cited as the relevant authority, that the "*critical element is the conduct of the defendant after the representation in encouraging the plaintiff to act upon it*".[8] In each of the proprietary estoppel cases considered in recent times by this Court, there was unquestionably conduct after the representation.[9] Brennan J in *Waltons Stores* cannot be read as departing from *Olsson* (cf **RS[26]-[27]**) because he cited it with evident approval:[10] see also **AS[44]**. Furthermore, to conclude that Brennan J's references to "knowledge and intention" were limited to the point in time

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3 See *Dillwyn*, 1286 and *Olsson*, 378.
4 *Riches*, 301 (McPherson J) quoted in *Giumelli*, [35].
5 See P Keane, Estoppel by Conduct and Election (3rd ed, 2023) (**Keane**), [11-030] (fn 158); AS [21].
6 *Maddison v Alderson* (1883) 8 App Cas 467, 473 (Lord Selbourne LC).
7 See also *Corin v Patton* (1990) 169 CLR 540, 557 (Mason CJ and McHugh J), citing *Olsson*, 378-379.
8 *Riches*, 300. This principle was expressly contemplated by McPherson J as applicable to "*representations or assurances as to future conduct*": *Riches*, 300. In *Riches*, the promisor "*continued to encourage [the] expectation*": *Riches*, 301. *Riches* is recognised as a "*leading decision[]*" to which proprietary estoppel is "*usually traced*": *Sidhu v Van Dyke* (2014) 251 CLR 505 (***Sidhu***), fn 114.
9 In *Giumelli*, the promisee was "*reassured that… the property would be transferred*": see *Giumelli*, [21]. In *Sidhu*, the promise, first made in January 1998 was regularly repeated, including in the context of the donee's decision not to seek a property settlement (see *Sidhu,* [6], [8], [13], [16] and [19]). Neither *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1 (see at [38]) nor *Commonwealth v Verwayen* (1990) 170 CLR 394 (***Verwayen***) were proprietary estoppel cases: cf **RS[48]-[49]**.
10 See *Waltons Stores*, 419 and 420. See also 424.

that the promise was made (RS[27]) is to overlook that Brennan J's fourth element ("*the defendant knew or intended him to do so*") was sequenced *after* the third element ("*the plaintiff acts or abstains from acting in reliance*"). As Ward P correctly recognised, the issue raised by his Honour's language "*relates to knowledge or intention of the acts of reliance*" (**AJ [201]**).

7. ***"Responsibility" in equity.*** To recognise that equity intervenes because of the defendant's "*responsibility*" for the plaintiff's detrimental reliance does not assist in explaining when and why a defendant will be regarded as "responsible" in equity: cf **RS[30]-[31], [37]-[38], [40], [42], [54]**. The Respondent's contention that responsibility "flows directly from the fact that the defendant made a promise upon which the plaintiff reasonably relied" (**RS[33]; RS[35], [38]**) is inconsistent with Australian authorities,[11] including this Court's statements about executory promises and the need for "*something more*"[12] (see **AS [28]**). It overlooks that, as in the present case, a promise may not be intended to be relied upon and may not encourage the donee to *do* anything. The contention cannot be sourced in Dixon J's observations in *Thompson v Palmer* (1933) 49 CLR 507 (cf **RS [29], [46]**) which were: (a) applicable only to "*assumption[s] of fact*" (not future promises); and (b) "*recognized grounds of preclusion*" (not the basis for a cause of action – see **AS [32]**).[13] Because of the different considerations applicable to the enforcement of voluntary future promises, equity insists on conduct after the encouragement: see **AS[23]**.

8. This Court has recognised the need to bear in mind *"[t]he need for coherence of legal principle and the effects of overly broad interpretations of … estoppel upon other*

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11 While it reflects English position, where proprietary estoppel has been held to comprise "*three main elements… a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance*" (*Thorner v Major* [2009] 1 WLR 776, [29]), there has long been a "*parting of the ways*" between law of Australia and England on proprietary estoppel: see PD Finn, "Equitable Estoppel", PD Finn, *Essays in Equity* (1985) (**Finn**), 59.

12 See *Waltons Stores*, 406 (Mason CJ and Wilson J) and *Pipikos v Trayans* (2018) 265 CLR 522 (***Pipikos***), [60] (Kiefel CJ, Bell, Gageler and Keane JJ): cf **RS[47]**.

13 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 (***Grundt***), 674 and 676 (Dixon J). Estoppels by representation exclude future promise because enforcing a future promise against a person restricts their liberty and freedom to act, in a way which being held to a representation of fact does not. See, eg, *Maunsell v Hedges* (1854) 4 HLC 1039, 1058–9; 10 ER 769, 777 (Lord Cranworth LC); 4 HLC 1039, 1059–61; 10 ER 769, 777 (Lord St Leonards). As Keane observes at [2-010], "*[i]t is one thing to bind the representor without consideration to an unambiguous statement of an existing fact where he could know or ascertain the truth, or qualify his statement without risk. It is another thing to bind him to the future without consideration, where verification is impossible, circumstances may change, and he bears the risks*".

*doctrines*".[14] The Respondent's submission is pregnant with the potential to outflank the law of contract and the doctrine of consideration. As Stephen J said at first instance in *Maddison v Alderson* (1880) 5 Ex D 293, 303–4, "*every promise on which a person acted, even if there were no consideration, would be binding by way of estoppel, and such a doctrine would alter the present law by giving legal force to that class of representations which at present are only morally binding*". For this reason, an analogous development was arrested in equity jurisprudence over a century ago: the equitable jurisdiction to enforce representations having "suffered virtual extinction as a creative force in Anglo-Australian law through the cumulative effect of *Jorden v Money*, *Maddison v Alderson, Derry v Peek* and *Low v Bouverie*."[15]

9. If the Respondent's submissions were to be accepted, it would also be necessary to confront their impact on the doctrine of part performance, which is "*little different in operation from … Dillwyn v Llewelyn proprietary estoppel*".[16] Plaintiffs in part performance cases must show "*acts of part performance which are inherently and unequivocally referable*" to the parol contract.[17] If "responsibility" in proprietary estoppel cases flows directly from a promise upon which there has been reasonable and detrimental reliance, this would seem to outflank the limitation on part performance (and indeed render the *Statute of Frauds* obsolete).

10. ***The Respondent's alternative argument is not available.*** As a fallback from its extreme position (that responsibility flows "directly" from the promise), the Respondent seeks to place reliance on Ward P's observation at **AJ[193]**, that the PJ "*must have inferred*" that Dame Leonie knew, at the time of making the Statement, that it "*would be relied upon*":[18] eg **RS [11], [27], [40]**. This is misconceived. **AJ[193]** is not in a factual finding – it is nothing more than a (wrong) interpretation of the PJ's

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14 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, [100] (Gummow, Hayne and Kiefel JJ, citation omitted)

15 Finn. p.61-62.

16 *Pipikos*, [96] (Nettle and Gordon JJ). Cf *Pipikos*, [58] (Kiefel CJ, Bell, Gageler and Keane JJ). Foundational proprietary estoppel cases relied on an analogy with part performance: see especially: **(a)** the reference in *Dillwyn*, 1286 to *Foxcroft v Lester* (1700) 1 Colles 108; 1 ER 20; and **(b)** the reference in *Ramsden v Dyson* (1866) LR 1 HL 129, 170–1 (Lord Kingsdown) to *Gregory v Mighell* (1811) 18 Ves Jun 328; 34 ER 341. See also *Pyke v Williams* (1703) 2 Vern 455, 456; 23 ER 891, 892. Part performance is one of the "*concurrent lines of reasoning*" mentioned by Kitto J in *Olsson*, 378–9.

17 *Pipikos,* [52] (Kiefel CJ, Bell, Gageler and Keane JJ). Such acts typically involve conduct by both parties, such as the giving and taking of possession: see *Pipikos*, [39], [79].

18 Given Ward P's conclusions about Dame Leonie's intention, this bare conclusion cannot be read as knowledge that Dame Leonie knew "*that it would be relied upon by the respondent choosing to remain on the Property*" (**AJ[195]**) i.e. the relevant (detrimental) reliance.

reasons. It is wrong because the primary judge did not make such any finding; instead, he relevantly considered that "*[a] bare statement that the maker will do a specified act in the future may be sufficient*" (**PJ[228]**), and found only constructive knowledge of the Respondent's reliance (see **PJ[251]**). In the Court of Appeal, no party actually submitted that Dame Leonie had actual knowledge at the time of making the statement - as such, Ward P's observation at **AJ[193]** was made without the benefit of argument:[19] cf **RS[10]**. In any event, **AJ[193]** was an *obiter dictum*.[20] It formed no part of the reasoning of the Court of Appeal, which held that knowledge was <u>not</u> a required element in cases of proprietary estoppel by encouragement (**AJ [89], [90], [103]-[105], [200], [203], [294]-[295]**). Accordingly, the Respondent's fallback submission would have required a notice of contention that the judgment below should be upheld on two grounds which have not been the subject of decision: (i) that there was actual knowledge at the time the Statement was made; and (ii) that such knowledge is sufficient to constitute responsibility in equity. No such notice was filed.

11. ***Dame Leonie's recollection***. The PJ made various references to the possibility or likelihood that Dame Leonie may not have had the Statement in mind or forgotten it: **PJ[241], [242], [247]**. It is true that the PJ did not positively find that Dame Leonie forgot the Statement: **RS[6]**. But the absence of such a finding only underscores the significance of the PJ's view that he "did not need to" (**RS [6]**) make such a finding, especially in light of the logical relevance of memory to constructive knowledge (**AS [35]-[36]**). On the PJ's "*unconscionability without dishonesty*" approach (**PJ[241]**), "*it is not necessary for the representor to have any intention or subjective appreciation that the representee is acting on the faith of the assurance"* (**PJ[245]**; **[35], [234], [241]-[242**).

Dated: 18 July 2024

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19 Before the Court of Appeal, the Respondent contended only that Dame Leonie "*intended the third representation to be relied on (referring to [228])*" (**AJ[182]**). That argument, rejected at **AJ[195]-[196]**, was unsustainable, particularly given the absence of *any* notice of contention before the Court of Appeal and that "*the intention*" referred to **PJ[228]** is the maker's "*intention to do the act*" (not intention as to the donee's acts of detrimental reliance).

20 Ward P's observation was made in the context of a discussion as the "*temporal nature*" of a requirement of any knowledge or intention (see **AJ[180], [192]**) and her Honour expressly caveated that "*the relevant issue raised by ground 4 … [was] as to whether … it is necessary that the defendant have actual knowledge of the acts undertaken in (detrimental) reliance on the representation*" (**AJ[197], [202]**).