HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27D – Respondent's submissions

Note: see rule 44.03.3.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

HILARY LORRAINE KRAMER
First Appellant

JAIME FERRAR
Second Appellant

and

DAVID LINDSAY STONE
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. Should special leave be revoked?

3. In a proprietary estoppel by encouragement case, is it necessary for the plaintiff to show that, after the defendant made their promise, the defendant knew that the plaintiff was acting in reliance upon that promise?

PART III: NOTICE OF CONSTITUTIONAL MATTER

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

PART IV: MATERIAL FACTS

5. The statement of material facts in the appellants' submissions filed 30 May 2024 (**AS**) is inaccurate and tendentious. There are four matters of particular significance. The first three flow into the reasons special leave should be revoked.

6. *First*, contrary to **AS [8]**, the primary judge did not find that Dame Leonie[1] had forgotten about her promise to David. At **PJ [241]**, the primary judge said: "The probability of [this] is likely in the light of Dame Leonie's diagnosis of dementia". But at **PJ [242]**, his Honour immediately canvassed the alternative possibility of "Dame Leonie having recalled the third representation but having decided that she would not accept any risk that the Farm would end up in Maureen's hands", and observed that the evidence "is consistent with Dame Leonie either not having a present recollection of having made the third representation to David, or of having decided not to implement it even though she was aware of it". The primary judge did not need to, and did not, make a finding on this point.[2]

7. For this reason, the appellants' repeated references to Dame Leonie having forgot her promise to David (**AS [8], [11], [21], [26], [36]**) do not reflect the findings made by the primary judge. As is evident from the AS pinpoints just given, those references permeate the appellants' submissions concerning the disposition of this case.

8. *Secondly*, the appellants' submissions do not confront the Court of Appeal's conclusion at **CA [193]** that the primary judge must have inferred that, at the time she made her promise, Dame Leonie knew that it would be relied upon by David. They assert in a footnote (**AS [11] fn 4**) that this was a *dictum* which wrongly characterised the primary judge's findings. That characterisation is itself wrong.

9. In the first place, it formed part of the reasoning by Ward P (with which the other members of the Court of Appeal agreed) concerning the state of the factual findings on the basis of which the question of law raised by the appellants should be answered.

10. In the second place, Ward P's view of the primary judge's reasons was correct. As Ward P referenced, the primary judge reasoned at **PJ [244]** that it was unlikely Dr Harry or Dame Leonie would have stated to David only that there was a mere possibility he

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[1] Without any disrespect intended, these submissions use the first names adopted by the primary judge.

[2] Insofar as **AS [8]** refers to Dame Leonie's draft wills, the primary judge did not give them great weight (**PJ [247]–[248]**). In 1989, the year after Dame Leonie made the promise to David, David commenced a relationship with Maureen, which lasted until 1996. The evidence before the primary judge disclosed that Dame Leonie had a great antipathy for Maureen and concern that she not be able to make a claim on the property if it were left to David, though not the reason for this, and that this antipathy might well have been fundamental to Dame Leonie's decision not to leave the property to David (**PJ [115]–[118], [134], [204]–[206], [242]**). All versions of Dame Leonie's wills in evidence were drafted after David's relationship with Maureen had ended in 1996.

would inherit the farm, because that "would have been cruel, and I consider that it would have been out of character for both of them". It could only have been cruel if (relevantly) Dame Leonie knew that David would rely on such a statement. Further, part of the primary judge's reasons for concluding that the promise was made was the desire of Dr Harry and Dame Leonie for someone like David to continue working the farm (**PJ [199]**) while at the same time they were aware that the income from the farm was insufficient for David to support himself and that David's father had terminated the earlier share farming agreement because he could not support his family with the level of income it generated (**PJ [226]**). The premise of that reasoning is that (relevantly) Dame Leonie made her promise knowing that David would rely upon it. In any event, it is fanciful to think that someone in Dame Leonie's position could say to someone in David's position "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" without knowing that this would be, for David, a significant promise which he would believe.

11. For this reason, the issues the appellants seek to raise (see **AS [2]**) do not arise: here, there was more than an "element of encouragement, coupled with reasonable and detrimental reliance"; there was still more than "constructive knowledge of the respondent's detrimental reliance". There was actual knowledge on the part of the promisor, at the time of making the promise, that it would be relied upon by the promisee. Again, this mischaracterisation of the facts permeates the appellants' submissions (see particularly **AS [34]–[39]**). The case is different from one of a donor who merely makes an incomplete gift (*cf* **AS [19]**). The case is not fairly described as one which seeks to make "Dame Leonie strictly liable for acts of reasonable and detrimental reliance by David which she did not intend to occur, and about which she was ignorant" (*cf* **AS [21]**, see also **[26]**). The knowledge of the promisor at the time of making the promise may plainly be relevant to whether there is "equitable fraud" (*cf* **AS [22]–[23]**).

12. *Thirdly*, the primary judge undoubtedly found that Dame Leonie ought reasonably to have known that David was relying on her promise in continuing to work the property. At **PJ [234]**, his Honour said: "as a matter of fact, the income earned by David from the farming operation was consistently so irregular and meagre compared to the amount of arduous work that was required that, if it is accepted that Dame Leonie made the

third representation to David, she ought reasonably to have assumed that part of his motivation for continuing was the expectation that he would inherit the Farm." At **PJ [251]**, the primary judge confirmed: "Dame Leonie ought to have known that part of David's motivation for continuing was the expectation that he would inherit the Colo Property".

13. This finding was challenged by the appellants in the Court of Appeal but that challenge failed. The appellants did not seek to challenge it in any grounds of appeal proposed in their application for special leave. No ground in their notice of appeal is directed to this finding. Yet **AS [35]–[37]** appear again to be an attempt, in submissions, to qualify, confuse and ultimately disturb this finding. That attempt should not be entertained.

14. *Fourthly*, throughout, the appellants' summary takes aspects of the facts entirely out of the context given to them by the primary judge.

15. Over the years, David formed a warm and trusting relationship with both Dr Harry and Dame Leonie (**PJ [41], [114], [208], [226]**). The depth of the relationship was such that the issue of David being left the property by Dr Harry, and later Dame Leonie, was "in the foreground of discussions" over the years, including with Dr Harry, Dame Leonie, Dame Leonie's lawyers, the Kramers' daughters Hilary and Jocelyn, and with David himself (**PJ [115]–[118], [134], [204]–[206], [242]**). The primary judge explained the benefits which the Kramers had enjoyed from the share farming arrangement with David: they could have a farming property in reasonable proximity to their home in Vaucluse, which they could enjoy at their leisure and which presented as an operating farm, even though they realised it was not a viable economic proposition for conducting a conventional share farming operation (**PJ [70]–[71]**; *cf* **AS [10]**).

16. Contrary to what is apparently implied by **AS [6]**, the primary judge explained why, in a context where it must have been obvious to Dr Harry and Dame Leonie that David's income from the farm was "irregular and meagre", it was of no moment that the promises were "impromptu" rather than in response to specific complaints by David (**PJ [224]–[226]**). The primary judge explained why it was unsurprising Dame Leonie's promise was never repeated by her to David or anyone else (**PJ [213]–[218]**) and why David never raised it with her again (**PJ [221]–[222]**).

17. **AS [9]** seeks to minimise the primary judge's finding of David's reliance. The finding, which is not now challenged, is that David reasonably relied on Dame Leonie's promise to his considerable detriment by continuing the farming operation for over 25 years, which he would not have done absent Dame Leonie's promise (**PJ [87]–[90], [92]–[93], [156]–[157], [250]–[251]; CA [234]–[237], [252]**). The anodyne description at **AS [10]** of David living "rent-free in a four-bedroom house on the property" is belied by the description of that property recorded at **PJ [328]**. He continued in a "financially grim position" (**PJ [225]**) engaging in "arduous work" (**PJ [234]**), despite otherwise having "good prospects of obtaining reasonably remunerative, long-term alternative employment" (**PJ [81]**), because of his belief that he would inherit the property.

PART V: ARGUMENT

Special leave should be revoked

18. The matters at paragraphs 5–13 above mean that this case is an inappropriate vehicle in which to consider the issues stated at **AS [2]**. They do not arise. Further, they are raised by the appellants on the basis of mischaracterisations of and veiled challenges to the primary judge's findings of fact. None of these matters was exposed in the application for special leave. No proposed ground of appeal was addressed to the Court of Appeal's conclusion at **CA [193]** or the primary judge's findings of "constructive knowledge". No ground of appeal is now addressed to either point. The challenges are, unsatisfactorily, made only in submissions, in the case of the former in a footnote. Special leave should be revoked.

19. Against the possibility that special leave is not revoked, David makes the following submissions.

The Court of Appeal's reasons

20. The Court of Appeal's conclusion — that it was unnecessary for David to show that, after making her promise, Dame Leonie actually knew David was acting in reliance upon it — was correct, for the reasons it gave. The key steps in the Court of Appeal's reasons may be summarised as follows: (1) no authority of this Court required such knowledge; (2) in principle, such knowledge should not be required in a case of proprietary estoppel by encouragement, though it may be in a case of proprietary

estoppel by acquiescence; and (3) the weight of authority favoured that conclusion. Each step was correct.

(1) No authority of this Court supports the appellants

21. Contrary to **AS [15]–[17]**, neither *Olsson v Dyson*[3] nor any other authority of this Court holds that in a case of proprietary estoppel by encouragement the defendant must be shown to have knowledge of the plaintiff's acts of reliance upon the promise. *Olsson* concerned a debt of £2,000 owing to the deceased which, before his death, he told his wife would be hers. As an assignment of the debt, the gift was incomplete, both in law and equity.[4] It was argued, among other things, that the deceased was estopped from denying the wife's entitlement to the debt. The reason the argument failed was explained by Kitto J (with whom Menzies and Owen JJ agreed) by reference to *Dillwyn v Llewelyn*.[5] Kitto J said that the reasons in that case contained two lines of reasoning. One was based on notions of "part performance". Kitto J continued:[6]

> The other line of reasoning was that the father's conduct amounted to a promise that if the son should build the house the land should be the son's, and that the son, by building the house, accepted the offer and so concluded a binding contract. The only signed memorandum in the case, however, was insufficient to enable this contract to be specifically enforced, and for that reason the ultimate basis of the decision must again have been that the father's subsequent conduct in encouraging the son to build the house on the footing that the land would be his, when acted upon by the son, created an equity which bound the father to make good the son's expectation. Thus in a case of this kind what gives rise to an equity which the attempted making of the gift did not by itself create is the conduct of the intending donor after the act of incomplete gift …

22. Applying this to the facts, Kitto J reasoned:[7]

> It seems to me impossible to apply the principle to the present case, for there is not the slightest evidence that after the making of the purported gift the deceased ever adverted to the question whether his purported gift might be treated by his wife as a reason for abstaining from making a testator's family maintenance application after his death or acting in any other way to her prejudice. He intended to make her a gift; he went some distance towards doing so and assumed that he had done so completely; no doubt he realized that she too

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3 (1969) 120 CLR 365.

4 (1969) 120 CLR 365 at 375–6 (Kitto J; Menzies and Owen JJ agreeing).

5 (1862) 4 De G F & J 517; 45 ER 1285.

6 (1969) 120 CLR 365 at 378–9.

7 (1969) 120 CLR 365 at 379.

> assumed he had completely done so; but there the matter ended, without his thereafter offering her any encouragement or inducement to adopt a course prejudicial to herself, and without his doing anything else that can be held to have bound him in conscience to perfect the imperfect gift.

23. His Honour thus disposed of the claim, not on the basis of a want of *knowledge* by the donor of reliance by the donee, but on the basis that there had been no requisite *conduct* by the donor — "without his thereafter offering any encouragement" — inducing any reliance by the donee. That is what his Honour was referring to by his Honour's reference to the donor not "advert[ing] to the question whether his purported gift might be treated by his wife as a reason for abstaining". No issue of knowledge was involved in Kitto J's reasoning. His Honour did not even use the word or its derivatives; nor, for that matter, did any of the other member of the Court in the course of their reasoning.[8]

24. *Olsson* stands for the proposition that a mere incomplete gift does not, of itself, constitute an encouragement on the part of the donor enforceable in equity. But as Brennan J recognised in *Waltons Stores (Interstate) Ltd v Maher*,[9] that kind of case is distinct from one such as the present. In the present case, there is no missing element of encouragement by the owner of the property. The difference between a mere incomplete gift ("I give you property X") and a case such as the present ("I will, in the future, give you property X") is that, unlike a mere incomplete gift, a promise to give property in the future has ongoing force. The continuation of the promise is "conduct of the defendant after the representation in encouraging the plaintiff to act upon it".[10]

25. In any event, none of this has anything to do with the point sought to be made by the appellants. *Olsson* has been cited by this Court on ten subsequent occasions.[11] Few of

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[8] The word appears once in the reasons of Windeyer J, in the correspondence between solicitors for the executors and the respondent, which his Honour excerpted at 383.

[9] (1988) 164 CLR 387 at 420: "the familiar categories serve to identify the characteristics of the circumstances which have been held to give rise to an equity in the party raising the estoppel. … In cases of proprietary estoppel, the equity binds the owner of property who induces another to expect that an interest in the property will be conferred on him … In cases where there has been an imperfect gift of property the equity binds the donor of the property when, after the making of the imperfect gift, he does something to induce the donee to act on the assumption that the imperfect gift is effective or on the expectation that it will be made effective".

[10] *Giumelli v Giumelli* (1999) 196 CLR 101 at [35] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

[11] *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 2)* (1987) 162 CLR 153 at 164–5 (Brennan, Deane, Dawson and Toohey JJ); *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 407 (Mason CJ and Wilson J), 419–20 (Brennan J); *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 117 (Mason CJ and Wilson J), 129 (Brennan J), 142 (Deane J), 157, 162 (Dawson J), 165, 167, 169, 171 (Toohey J), 173 (Gaudron J); *Corin v Patton* (1990) 169 CLR 540 at 554–5, 557 (Mason CJ and McHugh J), 563, 570 (Brennan J), 583 (Deane J); *Giumelli v Giumelli* (1999) 196 CLR 101 at [36] (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Barns v Barns* (2003) 214 CLR 169 at [75] fn

those occasions even concern estoppel. In none has *Olsson* been cited as authority for the proposition upon which the appellants' success in this case depends. The appellants are wrong to contend this appeal must succeed unless *Olsson* is overruled.

26. Nor is there any other authority of this Court which supports the appellants. In particular, and contrary to **AS [44]–[45]**, the reasons of Brennan J in *Waltons Stores* do not do so. In addition to the further points concerning *Waltons Stores* at paragraphs 46–47 below, the short point is that appellants read Brennan J's third and fourth "elements" — "(3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so"[12] — out of the context of his Honour's reasons as a whole.[13] Earlier in his Honour's analysis, Brennan J said:[14]

> It is essential to the existence of an equity created by estoppel that the party who induces the adoption of the assumption or expectation knows or intends that the party who adopts it will act or abstain from acting in reliance on the assumption or expectation … The unconscionable conduct which it is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation …

27. It is plain that Brennan J's references to knowledge and intention were to the knowledge or intention of the promisor at the time of making the promise, not later knowledge of or intention directed to the plaintiff's acts of reliance. As explained in paragraph 10 above, the Court of Appeal correctly understood the primary judge to have found Dame Leonie knew at the time of her promise that David would rely upon it.

28. In any event, no other member of the Court agreed with Brennan J's summary. As explained further below, both principle and authority support the proposition that a

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116 (Gummow and Hayne JJ); *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue* (2012) 245 CLR 338 at [12] fn 16, [26]–[27], [31], [36] fn 36 (French CJ, Crennan, Kiefel and Bell JJ); *Blank v Commissioner of Taxation* (2016) 258 CLR 439 at [35] fn 45 (French CJ, Kiefel, Gageler, Keane and Gordon JJ); *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at [188] fn 350 (Gordon J); *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5; (2022) 399 ALR 214 at [124] fn 196 (Edelman and Steward JJ).

12 (1988) 164 CLR 387 at 429.

13 This Court has repeatedly emphasised that reasons for judgment must be read as a whole: see, eg, *Comcare v PVYW* (2013) 250 CLR 246 at [16] (French CJ, Hayne, Crennan and Kiefel JJ).

14 (1988) 164 CLR 387 at 423.

proprietary estoppel by encouragement can arise even if the promisor does not know, at the time of making their promise, that the promisee will rely upon it.

(2) Principle

29. As Leeming JA said (**CA [293]**), proprietary estoppel confers "an entitlement in equity to relief, consequent upon the detriment occasioned to the plaintiff in acting pursuant to an assumption *brought about by the defendant*" (emphasis added). His Honour had earlier (**CA [285]**) drawn attention to Dixon J's classic reasons in *Thompson v Palmer*,[15] in which Dixon J said: "Whether a departure by a party from the assumption should be considered unjust and inadmissible *depends on the part taken by him in occasioning its adoption by the other party*" (emphasis added).

30. The centrality to estoppel, including proprietary estoppel, of the part taken by the defendant in bringing about the plaintiff's assumption has been emphasised by this Court in more recent cases. In *Sidhu v Van Dyke*,[16] French CJ, Kiefel, Bell and Keane JJ said: "It is not the breach of promise, but the promisor's responsibility for the detrimental reliance by the promisee, which makes it unconscionable for the promisor to resile from his or her promise." In *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*,[17] French CJ, Kiefel and Bell JJ said: "the basal purpose of the doctrine of estoppel … is to avoid a detriment by compelling the party who has created an assumption, or expectation, on which the innocent party has acted, to adhere to it". Keane J said: "It is because the 'opposite party' is responsible for creating the assumption on which the party asserting the estoppel acted that the estoppel comes into play to prevent that party suffering a detriment."[18] Of proprietary estoppel, his Honour said: "In proprietary estoppel, it is necessary to consider both the subjective reliance of the representee and the extent to which the representor can, in good conscience, be held to be responsible for the representee's actions."[19] Nettle J said: "The foundational principle on which equitable estoppel in all its forms is grounded is that equity will not permit an unjust or unconscionable departure by a party from an assumption or

[15] (1933) 49 CLR 507 at 547.
[16] (2014) 251 CLR 505 at [58].
[17] (2016) 260 CLR 1 at [39].
[18] (2016) 260 CLR 1 at [141].
[19] (2016) 260 CLR 1 at [146].

expectation of fact or law, present or future, which that party has caused another party to adopt for the purpose of their legal relations".[20]

31. None of these statements of basic principle point to any requirement that the defendant know that the plaintiff is, subsequently, acting in reliance upon the assumption the defendant is responsible for inducing. Indeed, they are inconsistent with any such requirement. Equity acts because of the defendant's responsibility for the plaintiff's detrimental reliance, not because of the defendant's knowledge that it has occurred. If it were otherwise, a promisor, at the very time of making the promise, could have knowledge that the promisee would rely upon it; yet if, thereafter, they never turn their mind to the issue again, they would escape any responsibility for the detrimental reliance that they knew, earlier, would eventuate.

32. In *Crown Melbourne*, Keane J went on to say that "it may be accepted that the separate categories of promissory and proprietary estoppel allow for different approaches to the determination of whether the 'opposite party' is responsible for creating that assumption".[21] The same point may be made about proprietary estoppel by encouragement and proprietary estoppel by acquiescence. As both Ward P (**CA [199]**) and Leeming JA (**CA [286]–[287], [294]**) correctly recognised, in considering whether a defendant is responsible for an assumption made by the plaintiff, there is a conceptual difference between the two kinds of case.

33. In cases of encouragement, as here, it is not difficult to identify the defendant's responsibility for the plaintiff's assumption: it flows directly from the fact that the defendant made a promise upon which the plaintiff reasonably relied. If it is necessary that the defendant knew or intended that the plaintiff would so rely, then that is established here in the case of Dame Leonie. But even if the defendant did not know or intend this to be so, the defendant's responsibility arises from making a promise upon which not only the plaintiff relied but upon which it was *reasonable* for the plaintiff to rely. The defendant is as much responsible for the detriment which the plaintiff would suffer if the promise were unfulfilled as would be so if the defendant knew or intended it to result.

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[20] (2016) 260 CLR 1 at [217].

[21] (2016) 260 CLR 1 at [141].

34. In cases where the defendant's conduct consists only of silence while the plaintiff acts to their detriment, at least often it will be necessary for the defendant to have knowledge of the plaintiff's conduct in order to be responsible for it. As Ward P put it "it is the knowledge and standing by that engages the conscience of the party sought to be estopped" (**CA [199]**).[22] This was the context for the statement of Fry J from *Willmott v Barber*[23] quoted at **AS [22]** that, absent knowledge of the plaintiff's detrimental reliance, "there is nothing which calls upon him to assert his own rights". Another way of looking at it is that the defendant's standing by *with knowledge* constitutes an implied promise to the plaintiff. As Lord Walker put in in *Thorner v Major*:[24] "the landowner's conduct in standing by in silence serves as the element of assurance". This is rather the point made by the primary judge, quoting the Court of Appeal's reasons in *Q v E Co*,[25] at **PJ [228]**: " [a] promise 'may be implied wholly or partly from conduct or inferred from silence or inaction'". At **AS [25]**, the appellants even quote his Honour's observation, and seemingly embrace it. It reflects Dixon J's reference in *Thompson v Palmer*,[26] quoted by Leeming JA at **CA [285]**, to a person being estopped "because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so". It also reflects Brennan J's statement in *Waltons Stores*,[27] quoted by Leeming JA at **CA [294]**, that "[s]ilence will support an equitable estoppel only if it would be inequitable thereafter to assert a legal relationship different from the one which, to the knowledge of the silent party, the other party assumed or expected". A person's silence cannot readily convey a representation about their attitude to a particular state of affairs if they have no knowledge of that state of affairs. This is not because of any difference in doctrine between proprietary estoppel by encouragement and acquiescence (*cf* **AS [25]**). It is because of the different extent to which silence may "speak".

35. It is not necessary in this case to determine whether, in cases of proprietary estoppel by acquiescence, it is always necessary to show that the defendant knew of the acts of

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22 See also *Brand v Chris Building Co Pty Ltd* [1957] VR 625 at 629 (Hudson J); Robertson, "Knowledge and Unconscionability in a Unified Estoppel" (1998) 24 *Monash University Law Review* 115, 127, 140–1.

23 (1880) 15 Ch D 96 at 105–6.

24 *Thorner v Major* [2009] 1 WLR 776 at [55].

25 [2020] NSWCA 220; 383 ALR 469 at [15] (Meagher JA, with whom Leeming JA and Payne JA agreed).

26 (1933) 49 CLR 507 at 547.

27 (1988) 164 CLR 387 at 426.

detrimental reliance. Nor is it necessary to determine whether such cases are to be approached by asking whether the defendant's silence carried with it an implied representation.[28] It is sufficient to conclude that, even if it is ordinarily necessary in cases of proprietary estoppel by acquiescence to show that the defendant knew of the plaintiff's acts of detrimental reliance in order for the defendant to be responsible for those acts, it is not necessary in cases of proprietary estoppel by encouragement.

36. As Leeming JA explained at **CA [292]**, none of this is to deny the similarities and overlap between the species of proprietary estoppel or to deny that there may be marginal cases where it is unclear which applies. But as his Honour correctly observed: "just as the existence of twilight does not erode the distinction between day and night, so too there is a sensible distinction between cases where a defendant's active conduct causes a plaintiff to hold an assumption, and cases where the defendant does nothing to bring about the plaintiff's wrong assumption, but nonetheless knows that the plaintiff is labouring under a misconception" (*cf* **AS [25], [27]**). Conversely, as explained above the distinction does not depend on rejection of the proposition that "[t]here is but one doctrine of proprietary estoppel" (**AS [25]**).

37. The appellants are wrong to argue that the Court of Appeal's approach means that, in a marginal case, retention of property rights may depend upon whether the claim is properly characterised as one of encouragement or acquiescence (*cf* **AS [24]–[25]**). This inverts the analysis: the issue is always how and why the putative plaintiff was induced detrimentally to rely; and how and why the defendant is said to be responsible for this. This does not turn on a mere labelling of a case as involving one species of estoppel or the other.

38. At base, it is the defendant's responsibility for the plaintiff's detrimental change of position which justifies equitable intervention. It is the defendant's responsibility which distinguishes the estoppel from a case of mere incomplete gift or a voluntary promise (*cf* **AS [18], [21], [23]**). It is the act of reasonable reliance on the assumption causing detriment, and the defendant's responsibility for this, which limits the defendant's freedom of action later to reconsider how to dispose of property (*cf* **AS [18], [21]**). It is the act of reasonable reliance causing detriment, and the

[28] See generally, e.g., McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press, Second Edition, 2020) at [2.45]–[2.47]; Keane, *Estoppel by Conduct and Election* (3rd ed, 2023) at [11-012].

defendant's responsibility for this, that means the estoppel does not outflank the doctrine of consideration[29] (*cf* **AS [18], [21]**).

39. It is those factors which answers the appellants' epithet of "equitable fraud" (*cf* **AS [22])**, albeit an epithet not used by a single member of this Court in any of *Waltons Stores*,[30] *Commonwealth v Verwayen*,[31] *Giumelli v Giumelli*,[32] *Sidhu v Van Dyke*[33] or *Crown Melbourne*.[34] As is well known, that is a notion of considerable breadth.[35] As explained further below, *Meagher, Gummow and Lehane* does not support any requirement that, in proprietary estoppel by encouragement (*cf* **AS [22] fn 25**), the defendant must know of the plaintiff's acts of detrimental reliance — yet has no difficulty in saying "the defendant's fraud is of the essence".[36]

40. For the same reasons, the conclusion of the Court of Appeal does not make a defendant in a case of proprietary estoppel by encouragement "strictly liable" (*cf* **AS [21]**). There is "fault" in a defendant's making a promise upon which a plaintiff reasonably relies to their detriment — here, indeed, with knowledge at the time of the promise that the plaintiff (David) would do so.

41. Nor does this analysis treat any differently — "more strictly" — the inheritance cases from any other type of case; the analysis is exactly the same whether the assumption concerns testamentary intentions or otherwise (*cf* **AS [21]**). Neither do these circumstances — without any knowledge requirement after the making of the promise, as contended for by the appellants — obscure the basis for equitable intervention (*cf* **AS [22]**). Indeed, beyond this bald statement, the appellants do not identify the obscurity. The submissions above explain the basis upon which equity intervenes.

42. Finally, none of the above turns on any "unification" of estoppels (*cf* **AS [30]**). Nor is there any impermissible embrace of "top-down reasoning" (*cf* **AS [31]**). There is simply an analysis proceeding from fundamental principle, supported by decisions of

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[29] *Sidhu v Van Dyke* (2014) 251 CLR 505 at [58] (French CJ, Kiefel, Bell and Keane JJ).
[30] (1988) 164 CLR 387.
[31] (1990) 170 CLR 394.
[32] (1999) 196 CLR 101.
[33] (2014) 251 CLR 505.
[34] (2016) 260 CLR 1.
[35] Heydon, Leeming and Turner, *Equity: Doctrines and Remedies* (5th ed, 2015) at Ch 12.
[36] Heydon, Leeming and Turner, *Equity: Doctrines and Remedies* (5th ed, 2015) at [17-065].

this Court, concerning proprietary estoppel. In any event, as explained immediately below, this analysis accords with the weight of authority.

(3) The weight of authority

43. Having regard to the submissions above, the Court of Appeal was correct (**CA [103]**) in its treatment of cases involving proprietary estoppel by acquiescence in which it has been held that knowledge on the part of the defendant of the plaintiff's acts of reliance was required. Thus, the appellants' reliance upon *Ramsden v Dyson*[37] (**AS [42]**) is misplaced: it is perhaps the classic decision on proprietary estoppel by acquiescence. The same is so of *Willmott v Barber*[38] (**AS [42]**). Earlier still, as to *Dillwyn v Lleweyln*,[39] as Lord Leggatt (with whom Lord Stephens agreed) observed in *Guest v Guest*:[40] "Neither the language nor the reasoning of estoppel was used."

44. That the requirement of knowledge in these cases of proprietary estoppel by acquiescence is not required in cases of proprietary estoppel by encouragement has been recognised in the authorities. Thus, in *Hopgood v Brown*,[41] Evershed MR said of Fry J's formulation in *Wilmott v Barber*: "In my judgment, that formulation was addressed to and limited to cases where the party is alleged to be estopped by acquiescence". Similarly, in *Taylor Fashions Ltd v Liverpool Trustees Co Ltd*,[42] Oliver J explained that, if the correct analysis is that estoppel by acquiescence rests upon an implied representation, "in a case of mere passivity, it is readily intelligible that there must be shown a duty to speak, protest or interfere which cannot normally arise in the absence of knowledge or at least a suspicion of the true position". But Oliver J went on to explain why that would not be so where there is more than "mere passivity".[43]

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37 (1866) LR 1 HL 129.

38 (1880) 15 Ch D 96 (Ch).

39 (1862) 4 De G F & J 517; 45 ER 1285.

40 [2022] UKSC 27; [2022] 3 WLR 911. And see also Lord Briggs (with whom Lady Arden and Lady Rose agreed) at [20]: "The same single-minded determination to satisfy an equitable claim by reference to expectation rather than detriment is found in *Dillwyn v Llewelyn* (1862) 4 De G F & J 517, a case now widely regarded as an early precursor of proprietary estoppel, but treated by Lord Westbury LC as analogous to part-performance of an ineffective contract".

41 [1955] 1 WLR 213 at 223.

42 [1982] 1 QB 133 at 147.

43 See also *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 104 (Robert Goff J); *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at [58] (Lord Walker).

45. The difference is likewise supported by *Ward v Kirkland*,[44] which Kitto J said in *Olsson* correctly explained the previous cases. There, Ungoed-Thomas J said in the passage quoted at **AS [27]**: "The fundamental principle of the equity is unconscionable behaviour, and unconscionable behaviour can arise where there is knowledge by the legal owner of the circumstances in which the claimant is incurring the expenditure *as much as if* he was himself requesting or inciting that expenditure."[45] The former category of case is one of acquiescence, and knowledge is required. The latter category of case, where the expenditure is "requested" or "incited" — that is, a case of encouragement — is not said to involve any element of knowledge. The cases are equated: both involve the requisite unconscionable conduct. Far from supporting the appellants' contention in this Court, this passage approved in *Olsson* undermines it.

46. Indeed, this was a passage approved by Brennan J in *Waltons Stores*.[46] Earlier, after quoting from Dixon J's reasons in *Thompson v Palmer*, Brennan J said:[47]

> The same observations hold good, mutatis mutandis, with respect to the adoption of an assumption or expectation which founds an equitable estoppel. Clearly an assumption or expectation may be adopted not only as the result of a promise but also in certain circumstances as the result of encouragement to adhere to an assumption or expectation already formed or as the result of a party's failure to object to the assumption or expectation on which the other party is known to be conducting his affairs.

Consistently with points made above, and as observed by Leeming JA (**CA [287]**), Brennan J's reference to the defendant's knowledge of the manner in which the plaintiff is conducting their affairs was made only in the context of an assumption adopted as a result of a failure to object. That is, acquiescence.

47. And, of course, this is only the reasons of Brennan J. None of the other Justices indicated that, in a case of encouragement, there is any requirement of knowledge after the act of encouragement. It is true that Mason CJ and Wilson J — speaking of "promissory estoppel" — referred to "the creation or encouragement by the party estopped in the other party of an assumption that ... a promise will be performed and

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[44] [1967] Ch 194.
[45] [1967] Ch 194 at 239 (emphasis added).
[46] (1988) 164 CLR 387 at 428.
[47] (1988) 164 CLR 387 at 427.

that the other party relied on that assumption to his detriment *to the knowledge of the first party*".[48] But their Honours also contemplated as sufficient "a reasonable expectation on the part of the promisor that his promise will induce action or forbearance by the promise, the promise inducing such action or forbearance in circumstances where injustice arising from unconscionable conduct can only be avoided by holding the promisor to his promise".[49] That involves no requirement of knowledge of the detrimental reliance. Gaudron J reasoned that, even in a case of acquiescence, actual knowledge of detrimental reliance was not required:[50]

> There was no evidence of the actual knowledge or belief of the appellant or its officers concerning the state of mind of the respondents. The evidence … is not, in my view, capable of supporting an inference that the appellant knew or believed that the respondents mistakenly believed that exchange had taken place.

Yet, her Honour concluded:[51]

> Whatever the actual knowledge or belief of the appellant as to the state of mind of the respondents once it came to the appellant's knowledge that demolition work had commenced it ought then to have been aware that there was a real possibility or likelihood that the respondents had commenced work in the reasonable expectation that exchange would take place. That being so, the appellant came under a duty to inform …

48. As to *Verwayen*, Mason CJ found no estoppel and (in dissent) would have allowed the appeal. In so doing, his Honour reasoned, dispositively, that there was no evidence that Mr Verwayen had commenced his action *on the basis of* an express or implied representation.[52] Yet, in his Honour's proceeding reasoning, there is no suggestion that it was necessary for Mr Verwayen *also* to show that the Commonwealth *knew* that he had relied on its conduct in assuming that the Commonwealth had decided not to plead the defences.[53] Brennan J also dissented and would have allowed the appeal. However, unlike Mason CJ, this was on the basis that to hold the Commonwealth to its promise to admit liability would go beyond the minimum equity which had inhered in

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48 (1988) 164 CLR 387 at 406 (emphasis added).
49 (1988) 164 CLR 387 at 406.
50 (1988) 164 CLR 387 at 461.
51 (1988) 164 CLR 387 at 462.
52 (1990) 170 CLR 394 at 417.
53 See particularly (1990) 170 CLR 394 at 414–6.

Mr Verwayen.[54] His Honour would therefore have remitted the matter to the trial judge to ascertain the extent of detriment suffered by Mr Verwayen in continuing with the action until the defence had been amended and for assessment of compensation for that detriment. In so reasoning, his Honour did not articulate any knowledge requirement, much less dispose of the appeal on the basis of the same. Deane J (in the majority) specifically reasoned that there was *not* a specific, independent requirement of knowledge.[55] True it is that his Honour observed that "a critical consideration will *commonly be* that the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt";[56] but that is quite another thing to such knowledge being an essential element of a claim and much less knowledge *after* the act of promise.[57] Dawson J, also in the majority, found an estoppel and would have dismissed the appeal. His Honour's finding that the Commonwealth's departure was unconscionable was based on, and only on, the *conduct* of the Commonwealth in inducing Mr Verwayen's assumption.[58] Once again, no knowledge analysis was undertaken, even across some four pages of analysis.[59] McHugh J also dissented. His Honour indicated that an estoppel could have inhered to the same extent as that found by Brennan J — that is, to remediate wasted costs, expenses and his additional worry and stress[60] — but would have dismissed the appeal on the basis that Mr Verwayen had not run that more limited relief and adduced evidence of that detriment. McHugh J earlier in his reasons did indicate a requirement of knowledge by the defendant. Importantly, however, only that the defendant must *know that the other party would act or refrain* from acting on that assumption.[61] His Honour in so reasoning did *not* indicate a requirement that the Commonwealth also have knowledge of Mr Verwayen's detrimental reliance *after* its encouragement.[62]

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[54] See particularly (1990) 170 CLR 394 at 430.

[55] (1990) 170 CLR 394 at 444 (emphasis added).

[56] (1990) 170 CLR 394 at 445 (emphasis added).

[57] See particularly (1990) 170 CLR 394 at 446.

[58] (1990) 170 CLR 394 at 460.

[59] See (1990) 170 CLR 394 at 460–3.

[60] See particularly (1990) 170 CLR 394 at 504.

[61] (1990) 170 CLR 394 at 500.

[62] Toohey J and Gaudron J (each also in the majority) disposed of the appeal on the basis of waiver and did not relevantly consider the estoppel.

49. As noted in paragraphs 30–31 above, in neither *Crown Melbourne* nor *Sidhu v Van Dyke* is there any suggestion that, in a case of proprietary estoppel by encouragement, it is necessary that the promisor know of the promisee's acts of detrimental reliance (or, indeed, that the promisor know at the time of their promise that the promisee will rely). The same may be said of *Giumelli v Giumelli*.

50. The inessentiality of knowledge of detrimental reliance in a case of proprietary estoppel by encouragement — or indeed knowledge that the promisee would so rely — was explained by Lord Hoffmann in *Thorner v Major*:[63]

> [T]he Court of Appeal allowed the appeal on the ground that the judge had not found that the assurance was intended to be relied upon and that there was no material upon which he could have made such a finding. The judge had found that David had relied upon the assurance by not pursuing other opportunities but not, said Lloyd LJ, that Peter had known about these opportunities or intended to discourage David from pursuing them.
>
> At that point, it seems to me, the Court of Appeal departed from their previously objective examination of the meaning which Peter's words and acts would reasonably have conveyed and required proof of his subjective understanding of the effect which those words would have upon David. In my opinion it did not matter whether Peter knew of any specific alternatives which David might be contemplating. It was enough that the meaning he conveyed would reasonably have been understood as intended to be taken seriously as an assurance which could be relied upon. If David did then rely upon it to his detriment, the necessary element of the estoppel is in my opinion established. It is not necessary that Peter should have known or foreseen the particular act of reliance.

51. None of the leading texts suggest that knowledge of the plaintiff's detrimental reliance is required in a case of proprietary estoppel by encouragement. Three works may be noted.

(a) In describing the common elements of proprietary estoppel by encouragement and acquiescence, *Meagher, Gummow and Lehane* states one element as "the acts A performs in reliance on the relevant expectation or belief are *either*

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[63] [2009] 1 WLR 776. See also [17] (Lord Scott); *Crabb v Arun District Council* [1976] Ch 179 at 189 (Lord Denning MR), 197–8 (Scarman LJ).

encouraged by B *or* known to B, who fails to assert title to the property when Act acts adversely thereto".[64]

(b) *The Law of Proprietary Estoppel* explains that knowledge is required in an acquiescence case because "in the absence of such knowledge, it cannot be said that A culpably failed to assert A's right against B".[65] In contrast, in the case of proprietary estoppel by encouragement, "the critical question is whether A's promise was one that B reasonably believed was seriously intended by A as capable of being relied on. As a result, whilst the principle is likely to apply only where A could reasonably have foreseen reliance by B, there is no requirement that A be aware of B's actual reliance."[66]

(c) *Estoppel by Conduct and Election* states of estoppel by encouragement: "It is not necessary that the party estopped should have known of or foreseen the particular act or acts of the promise which made the promises and assurances legally binding."[67]

The relevance of "constructive knowledge"

52. In light of the matters above, the appellants criticisms of the primary judge's finding of "constructive knowledge" on the part of Dame Leonie of David's reliance go nowhere. In any event, those criticisms are unsound. Contrary to **AS [35]–[37]**, the primary judge undoubtedly made such a finding, as explained in paragraph 12 above. Contrary to **AS [35]**, the finding is not "ambiguous". It is curious for the appellants to suggest otherwise, given the findings were at least unambiguous enough to be the subject of two specific grounds of appeal advanced by the appellants in the Court of Appeal (grounds 4 and 5). That these grounds of appeal directly attacked the finding on the basis that it was a finding of "constructive knowledge" is recorded at **CA [28], [165], [170]–[171], [177]–[179], [189], [204]–[208], [217]–[218]**.

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[64] Heydon, Leeming and Turner, *Equity: Doctrines and Remedies* (5th ed, 2015) at [17-095] (emphasis added).

[65] McFarlane, *The Law of Proprietary Estoppel* (2nd ed, 2020) at [2.37].

[66] McFarlane, *The Law of Proprietary Estoppel* (2nd ed, 2020) at [2.38]. See also [2.117].

[67] Keane, *Estoppel by Conduct and Election* (3rd ed, 2023) at [11-005].

53. On the primary judge's finding, Dame Leonie ought reasonably to have known that David was relying on her promise in continuing to work the property.

54. To look at what a reasonable person in a promisor's position ought to have known is not "simply protecting detrimental reliance" (*cf* **AS [39]**). That assertion forgets that the cause of the detrimental reliance is the promisor's promise, upon which the promisee reasonably relied. That a reasonable person in the promisor's position would also have realised that the promisee was relying upon the promise makes it all the more unconscientious for the promisor to depart from it.[68]

Conclusion

10 55. Even apart from authority and principles, all of which support the respondent's case, there is considerable and obvious logic to it. As Leeming JA said (**CA [294]**): "I can see no reason why two landowners, both of whom make the same representation to their neighbours who act upon it, should be in different positions if one is thereafter absent from the country and has no means of knowing what steps have been taken by the neighbour." The appellants' contention (if accepted) would mean that only the landowner who stays home would be estopped. Indeed, the appellants seem tacitly to submit that even a landowner who *simply forgets* about their promise should also not be estopped (**AS [8], [11], [21], [26], [36]**). That is wrong.

PART VI: ESTIMATED TIME

20 56. The Respondent estimates that up to 2 hours will be required for oral argument.

Dated: 27 June 2024

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[68] See also Robertson, "Knowledge and Unconscionability in a Unified Estoppel" (1998) 24 *Monash University Law Review* 115 at 131–2, 142–4.