HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND KEANE JJ

PRITHVI PAL SINGH SIDHU APPELLANT

AND

LAUREN MARIE VAN DYKE RESPONDENT

Sidhu v Van Dyke
[2014] HCA 19
16 May 2014
S312/2013

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

N C Hutley SC with J C Giles for the appellant (instructed by Henry Davis York Lawyers)

H K Insall SC with D F C Thomas for the respondent (instructed by Hugh and Associates Lawyers)

CATCHWORDS

Sidhu v Van Dyke

Estoppel – Equitable estoppel – Proprietary estoppel – Where promisor made representations to give property to promisee – Whether promisee acted to her detriment in reliance on promisor's representations – Whether onus of proof on promisee to prove reliance on promisor's representations.

Equity – Relief – Whether relief measured by reference to value of representations.

Words and phrases – "presumption of reliance".

1 FRENCH CJ, KIEFEL, BELL AND KEANE JJ. In *The Commonwealth v Verwayen*[1], Mason CJ described estoppel as "a label which covers a complex array of rules spanning various categories." His Honour went on to say of "titles such as promissory estoppel, proprietary estoppel and estoppel by acquiescence" that they are all "intended to serve the same fundamental purpose[2], namely 'protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted'[3]."

2 In *Giumelli v Giumelli*[4], it was said that the category of equitable estoppel that is usually traced back to the decisions in *Dillwyn v Llewelyn*[5] and *Ramsden v Dyson*[6] is now a "well recognised variety of estoppel as understood in equity", which affords relief "found in an assumption as to the future acquisition of ownership of property … induced by representations upon which there had been detrimental reliance by the plaintiff." The questions which arise in this appeal concern the sufficiency of proof of detrimental reliance required to give rise to a sound claim for relief based on that category of estoppel; and the appropriate measure of equitable compensation where an order for the transfer of the property in question to the plaintiff is not made for reasons of hardship to a third party.

Background

3 The factual background is not in dispute. The following summary is drawn from the reasons of the primary judge and the Court of Appeal.

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1 (1990) 170 CLR 394 at 409; [1990] HCA 39.

2 A common "fundamental purpose" does not support a single unifying doctrine of estoppel – the existence of which has been the subject of different views in this Court: *Giumelli v Giumelli* (1999) 196 CLR 101 at 112-113 [7]; [1999] HCA 10.

3 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 419 per Brennan J, see also at 404 per Mason CJ and Wilson J; [1988] HCA 7; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674-675; [1937] HCA 58.

4 (1999) 196 CLR 101 at 112 [6].

5 (1862) 4 De GF & J 517 [45 ER 1285].

6 (1866) LR 1 HL 129. But see also *Dann v Spurrier* (1802) 7 Ves Jun 231 at 235-236 [32 ER 94 at 95-96] for an earlier adumbration of the doctrine.

4 Prior to the events which gave rise to the litigation between the parties, the appellant lived with his wife in the main homestead of a 32-hectare rural property known as Burra Station, located near Queanbeyan in New South Wales[7]. In 1996, the respondent married the brother of the appellant's wife. Later in that year, the respondent and her husband moved into Oaks Cottage, a building located approximately 100 metres away from the main homestead on Burra Station. There they began to raise their newborn child. The respondent and her husband paid rent to the appellant's wife, who managed the financial aspects of the tenancy arrangement[8].

5 Both the main homestead and Oaks Cottage were located on an unsubdivided lot of land described as the Homestead Block, which was owned by the appellant and his wife as joint tenants[9].

6 Towards the end of 1997, the appellant and respondent commenced a sexual relationship[10]. In January 1998, the appellant said to the respondent[11]:

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

7 The respondent's husband learned of the liaison between the respondent and the appellant, and in the middle of 1998 the respondent and her husband separated and later divorced[12].

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7 *Van Dyke v Sidhu* [2012] NSWSC 118 at [2], [17]; *Van Dyke v Sidhu* (2013) 301 ALR 769 at 772 [8].

8 *Van Dyke v Sidhu* [2012] NSWSC 118 at [20].

9 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 772 [8].

10 *Van Dyke v Sidhu* [2012] NSWSC 118 at [22].

11 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 773 [17].

12 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 772 [10].

8 When the respondent told the appellant, who was himself a lawyer, that she needed to find a lawyer to assist her with her divorce and property settlement, the appellant said to her words to the effect, "you have the Oaks you do not need a settlement from him. You can do the divorce yourself, you don't need a lawyer."[13] In the divorce proceedings she did not seek a property settlement.

9 After the departure of the respondent's husband, she continued to live in Oaks Cottage with her young child[14].

10 In about September 1998, the respondent asked the appellant whether she should stop paying rent "now that the Oaks is my property". The appellant replied: "How about you continue to pay what you can as this will help keep things low key with [the appellant's wife]."[15]

11 While the respondent lived in Oaks Cottage, she paid rent to the appellant's wife at a rate which was lower than the market rate[16]. The respondent also carried out unpaid work in relation to the maintenance and renovation of Oaks Cottage and the improvement and maintenance of Burra Station, and an adjoining rural property owned by a company in which the appellant and his wife owned shares. The respondent was also actively involved in the work involved in the subdivision of Burra Station for which the appellant and his wife applied to the local council[17].

12 The respondent was employed part time elsewhere; she did not seek full-time employment during her stay at Burra Station. As a result, over a period of eight and a half years, she lost the opportunity to earn wages which she might have earned as a natural resource catchment officer or a ranger. These disadvantages were not quantified by evidence, but were substantial[18].

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13 *Van Dyke v Sidhu* [2012] NSWSC 118 at [31].

14 *Van Dyke v Sidhu* [2012] NSWSC 118 at [27].

15 *Van Dyke v Sidhu* [2012] NSWSC 118 at [34].

16 *Van Dyke v Sidhu* [2012] NSWSC 118 at [34]-[35].

17 *Van Dyke v Sidhu* [2012] NSWSC 118 at [36].

18 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 790 [103]-[104].

13 In 2000, the appellant, in response to expressions of concern by the respondent as to the security of her position, gave her a signed note in which he confirmed that "[d]uring the years 1996 to 2000" he had "expressed to [the respondent] that [he] was willing to gift [her] the house in which she resided at the time (Oaks Cottage, … Burra NSW)"[19].

14 There were concurrent findings of fact by the primary judge and the Court of Appeal that the promises made by the appellant were, in substance, promises to give Oaks Cottage to the respondent once the Oaks Cottage site existed in subdivided form[20].

15 In mid-2005, the respondent again pressed the appellant for some confirmation of his "continued promise that the house would be [her] own"[21]. This pressure elicited an email which proposed terms for a transfer of the property "at a price based on valuation by agent[s]" but with the appellant and his wife agreeing to bear the financial burden of defraying that price[22].

16 In October 2005, the local council gave conditional approval to a subdivision of the Homestead Block into three lots[23]. Completion of the subdivision was conditional upon the construction of roads enabling access to the lots. In a practical sense, the subdivision also depended on the consent of the appellant's wife and the availability of adequate finance.

17 One of the proposed lots ("the Oaks Property") was 7.3-7.4 hectares in size[24]. It was identified by reference to the local council survey plan of Burra Station, and included the land on which Oaks Cottage then stood.

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19 *Van Dyke v Sidhu* [2012] NSWSC 118 at [51].

20 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 780 [54].

21 *Van Dyke v Sidhu* [2012] NSWSC 118 at [66].

22 *Van Dyke v Sidhu* [2012] NSWSC 118 at [68]-[76].

23 *Van Dyke v Sidhu* [2012] NSWSC 118 at [77].

24 *Van Dyke v Sidhu* [2012] NSWSC 118 at [18]; *Van Dyke v Sidhu* (2013) 301 ALR 769 at 794 [126].

18 In February 2006, Oaks Cottage burnt down and the respondent and her child moved into a vacant relocatable cottage on the Homestead Block[25].

19 During May 2006, the appellant and the respondent discussed arrangements concerning the respondent's long-term accommodation at Burra Station. During the course of those discussions the appellant gave the respondent a handwritten statement dated 7 May 2006 in which he said that his wife "agrees [that] when the house which burned in an accident in mid-February is rebuilt and as soon as it is possible to transfer the property on which the house is rebuilt, it will be done"[26].

20 On or about 5 July 2006, the respondent offered to purchase the relocatable cottage from the appellant and his wife, but on 21 July 2006 the appellant and his wife rejected that offer, saying they could not sell it because they did not own it[27]. On that day, the respondent left Burra Station and the relationship between the respondent and the appellant came to an end[28].

21 The appellant and his wife refused to convey the Oaks Property to the respondent.

22 Notwithstanding the conditional approval given by the council to the proposed subdivision, that subdivision, which was a necessary condition of the appellant's ability to transfer Oaks Cottage as a separate property to the respondent, did not proceed. Conditions of the approval as to the construction of roads were not satisfied by the appellant[29].

The proceedings

Supreme Court of New South Wales

23 The respondent commenced proceedings in the Equity Division of the Supreme Court of New South Wales. Her claim was that the appellant (who was

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25 *Van Dyke v Sidhu* [2012] NSWSC 118 at [78].

26 *Van Dyke v Sidhu* [2012] NSWSC 118 at [80]-[94].

27 *Van Dyke v Sidhu* [2012] NSWSC 118 at [94].

28 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 772-773 [15].

29 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 773 [16].

the sole defendant) made clear and unambiguous representations to her that he would transfer (or procure the transfer of) the Oaks Property to her, and that she acted in a number of ways in reliance on those representations to her detriment[30].

24 At trial, the respondent gave evidence, but neither the appellant nor his wife gave evidence.

25 The primary judge (Ward J) found[31] that the appellant made two promises to the respondent. The first promise, made in 1998, was to the effect that the appellant would transfer Oaks Cottage to the respondent by way of gift. The second promise, made in May 2006, was to the effect that the appellant would transfer the Oaks Property to the respondent by way of gift.

26 Her Honour found[32] that both promises were conditional on the subdivision of the Homestead Block, which was conditional on the construction of road access to the lots and required the consent of the appellant's wife and the availability of adequate finance.

27 The primary judge found that it was not unreasonable for the respondent subjectively to have relied on the promises[33], and inferred that the appellant knew or intended that the respondent would rely on his promises[34]. But her Honour held that the respondent had not established that she did, in fact, rely to her detriment on the appellant's promises, otherwise than in giving up the opportunity to seek a property settlement from her former husband after their divorce in 1999[35].

28 The primary judge accepted that the work which the respondent carried out on Oaks Cottage and on Burra Station generally, and the giving up of opportunities for gainful employment, were activities "of a kind that may be

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30 *Van Dyke v Sidhu* [2012] NSWSC 118 at [4]; *Van Dyke v Sidhu* (2013) 301 ALR 769 at 771 [4].

31 *Van Dyke v Sidhu* [2012] NSWSC 118 at [182].

32 *Van Dyke v Sidhu* [2012] NSWSC 118 at [182].

33 *Van Dyke v Sidhu* [2012] NSWSC 118 at [188].

34 *Van Dyke v Sidhu* [2012] NSWSC 118 at [209].

35 *Van Dyke v Sidhu* [2012] NSWSC 118 at [15].

sufficient to amount to detrimental reliance for the purpose of an equitable estoppel."[36] Her Honour concluded, however, that the respondent "may very well have done all or most of those things in any event."[37]

29 Her Honour's conclusion was based on answers given by the respondent in the course of cross-examination[38]. The primary judge regarded the respondent's answers, as to whether she would have remained at Burra Station and contributed to its maintenance had the appellant's promises not been made, as "equivocal in that [the respondent] could not discount the possibility that she would have remained on the property and (at least in most respects) done what she had done in any event."[39] Her Honour held that[40]:

> "it [was] entirely possible that [the respondent] would have remained living on the property, carrying out tasks on the property (even if not to the extent of the work she in fact carried out) and working part-time, whether or not the promises had been made. That seems to me to make impossible a finding that she 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 [the respondent] would or is likely to have done those things in any event." (emphasis in original)

30 Given the importance of this evidence to the primary judge's conclusion, it is necessary to set that evidence out at some length. The respondent accepted that she had been very happy at Burra Station, that she loved the appellant, and that she believed that their relationship would last forever. The evidence[41] went on:

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36 *Van Dyke v Sidhu* [2012] NSWSC 118 at [217].

37 *Van Dyke v Sidhu* [2012] NSWSC 118 at [217].

38 *Van Dyke v Sidhu* [2012] NSWSC 118 at [197]-[199].

39 *Van Dyke v Sidhu* [2012] NSWSC 118 at [202].

40 *Van Dyke v Sidhu* [2012] NSWSC 118 at [204].

41 *Van Dyke v Sidhu* [2012] NSWSC 118 at [197]-[198].

"Q. Isn't this the case, you would have stayed living at The Oaks cottage for the 8 or 9 years that you lived there regardless of any promise that [the appellant] made to you, wouldn't you?

A. Not necessarily.

Q. What does 'not necessarily' mean?

A. Well, because I believed I was in a long-term relationship and that I would have a home transferred to me and I believed that the, that there was a continuation of that and if I had not been told certain things, those things by the [appellant], I may have been, I may have looked at other options for myself and my son.

…

Q. You naturally suspected that for so long as [the appellant] lived on Burra Station that he would allow you to continue to live at The Oaks cottage, correct[?]

A. Well, he had promised to transfer the property into my name and he told me it was my home, so yes.

Q. Now, would you answer the question. You expected that for as long as he lived there, you would live there didn't you?

A. I may have made other decisions if I did not have.

...

Q. Regardless of the promise, because you were so in love with him you would have stayed living at The Oaks property whilst ever he loved [sic] on Burra Station for as long as you could, couldn't you?

A. It is hard, it is hard to dissect that.

...

Q. Because of those expectations [that their love and the relationship would last forever], you would have stayed living there regardless of the promises? Wouldn't you?

A. Not necessarily.

Q. What does not necessarily mean?

A. I may have made other decisions too, if the [appellant] hadn't made representations to me that the Oaks property was my home, I may have thought about making decisions to develop some security for me and my son.

Q. You might have?

A. I might have[.]

Q. But you might not have?

A. It is hard to say."

31 The respondent also accepted that she had begun doing work on the properties before the appellant's promises were made. In response to a question suggesting that she would probably have continued doing the work she did on Oaks Cottage and about Burra Station, without the appellant's promises, the respondent answered:

"A. I would have helped [keeping the property in tip top condition] but I think the work I did do after the representation was made to me was way above what I would have done if I were just a tenant on the property.

Q. That is not the other scenario, is it, you would have still been having an affair with [the appellant] and living on a property that you loved and that he loved, that is the other universe we have to think about, isn't it?

A. I agree with what you are saying, that the relationship, it is very hard for me to dissect what I would have done had I not had the representation made to me, however I believe that I did the work that I did because I felt I had a future security in the home or I had security at the time but I also had future security that could have gone on for 20 plus years and so my work on the property was in that I was grateful for that security."

32 We pause here to observe that this last passage from the respondent's evidence was distinctly to the effect that the extent of her involvement in maintaining Oaks Cottage and Burra Station was induced by the appellant's promise of a secure home.

33 The primary judge held[42] that the respondent's decision not to seek a property settlement from her former husband was induced by the appellant's promises, but that it was not "objectively reasonable" for her to rely on a promise of a transfer of the Oaks Cottage given that the performance of the promise was "necessarily dependent on the ultimate subdivision of the land (and either the consent of [the appellant's wife] or circumstances arising where such consent was not necessary), when deciding not to seek a property settlement from her former husband."

Court of Appeal

34 The respondent appealed to the Court of Appeal of the Supreme Court of New South Wales. In her notice of appeal, the respondent contended, among other things, that the primary judge erred:

(a) in finding that it was "objectively unreasonable" for the respondent to rely on the representations made by the appellant; and

(b) in finding that the respondent's reliance on the appellant's representations was only in not seeking a property settlement from her husband on the basis of "equivocal answers ... in cross-examination."

35 The Court of Appeal upheld the respondent's contention that the primary judge erred in holding that it was "objectively unreasonable" for the respondent to rely upon the appellant's representations[43]. In this Court, the appellant disavowed any challenge to the Court of Appeal's conclusion in that regard.

36 As to the second of the respondent's contentions, the Court of Appeal upheld the respondent's challenge, but reasoned to its conclusion on a basis which was not advanced by the respondent or addressed by the appellant. In this regard, Barrett JA (Basten JA and Tobias AJA agreeing) relied upon a line of English decisions[44] which suggest that in some circumstances the onus of proof in relation to the issue of detrimental reliance shifts from the plaintiff to the party said to be estopped. His Honour held[45] that the primary judge erred in

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42 *Van Dyke v Sidhu* [2012] NSWSC 118 at [220].

43 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 780-783 [57]-[69].

44 *Greasley v Cooke* [1980] 1 WLR 1306 at 1311; [1980] 3 All ER 710 at 713; *Grant v Edwards* [1986] Ch 638 at 657; *Wayling v Jones* (1995) 69 P & CR 170 at 173.

45 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 785 [77]-[78].

approaching the issue of detrimental reliance in a way which denied the respondent the benefit of the "presumption of reliance".

37 Barrett JA said that[46]:

> "Where inducement by the promise may be inferred from the claimant's conduct, as is the case here, the onus or burden of proof shifts to the defendant to establish that the claimant did not rely on the promise. It was therefore for the [appellant] to rebut that presumption and establish that the [respondent] did not rely at all on the promises in acting or refraining from acting to her detriment."

38 Applying the "presumption of reliance" to the evidence in the present case, Barrett JA said that[47]:

> "the equivocal or inconclusive answers given by the [respondent] in cross-examination were an insufficient basis on which to regard the presumption of reliance as displaced."

39 His Honour went on to hold[48] that the maintenance and improvement work carried out by the respondent on Burra Station, and the loss of opportunities to obtain a property settlement and higher earnings in full-time employment, meant that the respondent's reliance upon the appellant's promises involved "material detriment".

40 His Honour, having concluded that the respondent was entitled to equitable relief to preclude departure by the appellant from his promises to the respondent, declined to make an order that the appellant take all necessary steps to cause the Oaks Property to be transferred to her. His Honour took this course having regard to the adverse effect that such an order would have upon the interests of the appellant's wife as co-owner of the property[49].

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46 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 786 [83].

47 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 790 [101].

48 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 790 [104].

49 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 795 [137]-[138].

41 On that basis, Barrett JA said that[50]:

> "The [respondent's] equitable claim was a claim to prevent departure by the [appellant] from his promises and thus to have the benefit of all action necessary to bring about a transfer of the relevant property to the [respondent]. The [respondent] should therefore have a sum equal to the value she would now have had the promises been fulfilled."

42 His Honour concluded that, although an award of equitable compensation measured by reference to the value of the respondent's disappointed expectation was the appropriate form of relief, the Court of Appeal was not in a position to assess that sum, given that the assessment should proceed by reference to the value of the property at the date of judgment[51].

43 Accordingly, the Court of Appeal allowed the appeal and ordered that the appellant in this Court pay the respondent by way of equitable compensation a sum to be determined in accordance with the decision of the Court of Appeal. The matter was remitted to the Equity Division of the Supreme Court for determination of the quantum of equitable compensation[52].

The appeal to this Court

44 The appellant appealed to this Court pursuant to a grant of special leave made by French CJ and Bell J on 13 December 2013.

Appellant's submissions

45 The appellant made two broad submissions. The first was that the Court of Appeal reversed the onus of proof in relation to whether the respondent relied on the appellant's promises. The adoption and application of the "presumption of reliance" by the Court of Appeal was said to be contrary to the decision of this Court in *Gould v Vaggelas*[53].

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50 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 795 [140].

51 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 795-796 [141]-[143].

52 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 797 [147].

53 (1984) 157 CLR 215; [1984] HCA 68.

46 The appellant's second broad submission was that the Court of Appeal erred in ordering the payment of equitable compensation measured by reference to the value of the appellant's promises. The appellant argued that his assurances were conditional upon the subdivision of the property and the consent of his wife, and contended that the Court of Appeal should have limited the relief granted to the respondent to what was necessary to compensate the respondent for the loss she suffered by relying on his promises.

Respondent's submissions

47 The respondent submitted that the "presumption of reliance" applied by the Court of Appeal is consistent with the approach in *Gould v Vaggelas*, applied by the Victorian Court of Appeal in *Flinn v Flinn*[54], in that both approaches have the same effect, namely, to give rise to an evidentiary onus to rebut an inference that arises where a promise is made and the natural tendency of the promise is to induce relevant conduct in the promisee.

48 The respondent sought and was given leave to file a notice of contention whereby she sought to sustain the decision of the Court of Appeal on the footing that the appellant did not discharge the evidentiary onus which was upon him to rebut the inference of reliance which naturally arose from the respondent's conduct following the appellant's promises.

49 The respondent submitted that the measure of relief granted by the Court of Appeal was correct in that a party setting up an equitable estoppel relating to an unperformed promise is prima facie entitled to enforcement of the promise unless there are special circumstances warranting different relief, and there were no such circumstances present here.

Reliance: onus of proof and inference

50 The respondent sought to neutralise the appellant's first submission by arguing that, in this case, the Court of Appeal did no more than apply what Brooking JA described in *Flinn v Flinn*[55] as a "commonsense and rebuttable presumption of fact that may arise from the natural tendency of a promise". This argument must be rejected. The observations by Brooking JA in *Flinn v Flinn* do not support the proposition accepted by Barrett JA[56] that "[w]here inducement by

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54 [1999] 3 VR 712 at 749 [117].

55 [1999] 3 VR 712 at 749 [117].

56 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 786 [83].

the promise may be inferred from the claimant's conduct … the onus or burden of proof shifts to the defendant to establish that the claimant did not rely on the promise."

51 In *Newbon v City Mutual Life Assurance Society Ltd*[57], Rich, Dixon and Evatt JJ, speaking of a case where the party setting up the estoppel asserted a failure to take action in reliance upon an assumption allegedly induced by the conduct of the defendant, said:

> "Where inaction is the natural consequence of the assumption, the prima facie inference may be drawn in favour of the causal connection … Any general presumptive connection between inaction and a belief in a state of facts must depend upon probabilities which arise from the common course of affairs, and accordingly must be governed by circumstances."

52 In *Gould v Vaggelas*[58], Wilson J, with whom Gibbs and Dawson JJ agreed, speaking of an action in deceit, said:

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

53 It is apparent that in the passage cited from the plurality judgment in *Newbon v City Mutual Life Assurance Society Ltd*, their Honours were speaking of a "presumptive connection" as the equivalent of the "fair inference" of which Wilson J spoke.

54 In *Gould v Vaggelas*[59], Brennan J said:

> "An inference of inducement may be drawn when a party enters into a contract after a material representation has been made to him, but it is no more than an inference of fact and it is settled law that such an inference may be rebutted by the facts of the case".

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57 (1935) 52 CLR 723 at 735; [1935] HCA 33.

58 (1984) 157 CLR 215 at 236.

59 (1984) 157 CLR 215 at 250.

55 Nothing in the judgments in *Gould v Vaggelas* suggests that the onus of proof in relation to detrimental reliance shifts to the defendant in any circumstances[60].

56 The line of English authority on which Barrett JA relied was founded on the statement by Lord Denning MR in *Greasley v Cooke*[61] that "[t]here [was] no need for [the promisee] to prove that she acted to her detriment or to her prejudice." In the present case, this statement was treated as involving a shift in the burden of proof on the issue of detrimental reliance.

57 Lord Denning's view is contrary to observations of high authority in *Smith v Chadwick*[62] by Lord Blackburn, with whom the Earl of Selborne LC and Lord Watson agreed. Lord Blackburn spoke of the circumstances in which a fair inference of fact might be drawn in terms substantially repeated by Wilson J in the passage from *Gould v Vaggelas* set out above; but his Lordship expressly rejected the suggestion that a defendant might be obliged to disprove inducement once the making of a material representation had been proved.

58 In point of principle, to speak of deploying a presumption of reliance in the context of equitable estoppel is to fail to recognise that it is the conduct of the representee induced by the representor which is the very foundation for equitable intervention. Reliance is a fact to be found; it is not to be imputed on the basis of evidence which falls short of proof of the fact. It is actual reliance by the promisee, and the state of affairs so created, which answers the concern that equitable estoppel not be allowed to outflank *Jorden v Money*[63] by dispensing with the need for consideration if a promise is to be enforceable as a contract[64]. 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 *Giumelli v Giumelli*[65], Gleeson CJ,

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60 See also *Redgrave v Hurd* (1881) 20 Ch D 1 at 21; *Smith v Chadwick* (1882) 20 Ch D 27 at 44; affd (1884) 9 App Cas 187 at 196; *Arnison v Smith* (1889) 41 Ch D 348 at 369; *Holmes v Jones* (1907) 4 CLR 1692 at 1707, 1711; [1907] HCA 35.

61 [1980] 1 WLR 1306 at 1311-1312; [1980] 3 All ER 710 at 713.

62 (1884) 9 App Cas 187 at 196.

63 (1854) 5 HLC 185 at 210, 212-213 [10 ER 868 at 880-881].

64 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 410, 416.

65 (1999) 196 CLR 101 at 121 [35].

McHugh, Gummow and Callinan JJ approved the statement of McPherson J in *Riches v Hogben*[66] that:

> "It 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 to which it gives rise."

59 It may be that Lord Denning's view will no longer be understood in England in the way it seems to have been understood by the Court of Appeal in this case. In *Steria Ltd v Hutchison*[67], Neuberger LJ said:

> "I very much doubt whether it could be right to hold that in every case where a representation is established, the onus must always be on the representor to show that it was not acted on. As a matter of normal principle it seems to me that, as a matter of law, the onus must be on the person alleging the estoppel to establish unconscionability or, to put it another way, to establish, in the case of estoppel by representation, the three essential ingredients of representation, reliance and detriment.
>
> In many cases, and I think that the *Greasley* case was one of them, it can fairly be said that, once it is established that the representation was made, the representation together with all the other facts of the case enables the claimant to say that, unless the defendant can elicit some further evidence to the contrary, the claimant will have discharged the onus. I am inclined to think that the *Greasley* case went no further than that."

60 It may also be that the application of Lord Denning's view would not lead to an outcome in the present case different from that which follows from the application of the orthodox approach.

61 Be that as it may, this aspect of the appellant's submission must be accepted. The approach suggested by Lord Denning should not be applied in Australia. The legal burden of proof borne by a plaintiff did not shift[68]. To speak of a shifting onus of proof is both wrong in principle and contrary to

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66 [1985] 2 Qd R 292 at 301.

67 [2007] ICR 445 at 467 [129]-[130].

68 *Holmes v Jones* (1907) 4 CLR 1692 at 1706, 1710; *Gould v Vaggelas* (1984) 157 CLR 215 at 238-239.

authority. The respondent at all times bore the legal burden of proving that she had been induced to rely upon the appellant's promises.

The respondent's notice of contention

62 The respondent's notice of contention raised the argument that the appellant did not discharge the evidentiary onus to displace the inference of reliance which fairly arose from the respondent's conduct in response to the appellant's promises.

63 It may be said immediately that to speak of an evidentiary onus upon the appellant is to create a risk of distraction from the required analysis. To speak of the evidentiary onus in its strict legal connotation is to speak of the burden of adducing or pointing to sufficient evidence to raise an issue for determination by the court[69]. In the present case, there can be no doubt that the issue as to the respondent's reliance upon the appellant's promises was a live issue.

64 The real question was as to the appropriate inference to be drawn from the whole of the evidence, including the answers elicited from the respondent in the course of cross-examination. In that regard, as was said by Gummow, Hayne, Heydon and Kiefel JJ in *Campbell v Backoffice Investments Pty Ltd*[70], consideration of the application of the process of reasoning adumbrated by Wilson J in *Gould v Vaggelas* "must always attend closely to all of the evidence that is adduced that bears upon the question being examined."

65 One should not be deflected by considerations of terminology from dealing with the substance of the argument raised by the respondent's notice of contention. It is sufficiently clear that the notion of evidentiary onus is not being used in its strict legal sense. Insofar as the notice of contention speaks of an evidentiary onus upon the appellant to rebut the inference which would otherwise be drawn, it reflects the language used in *Gould v Vaggelas* by Wilson J at different points in his reasons[71]. While Wilson J expressed himself in this way, he also made it clear that he gave no countenance to the notion that the onus might shift to the defendant to disprove detrimental reliance. The same view may fairly be taken of the notice of contention.

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69 *Purkess v Crittenden* (1965) 114 CLR 164 at 167-168; [1965] HCA 34; *Cross on Evidence*, 9th Aust ed (2013) at 290 [7200]-[7205].

70 (2009) 238 CLR 304 at 351 [143]; [2009] HCA 25.

71 (1984) 157 CLR 215 at 238-239.

66 It may, therefore, be accepted that the respondent's notice of contention sufficiently raises the question, to adapt the words of Wilson J in *Gould v Vaggelas*[72], whether, when all the facts are in, the court is satisfied on the balance of probabilities that the promises in question contributed to the respondent's conduct in deciding to commit to her relationship with the appellant and adhering to that relationship (with all that that entailed) for eight and a half years. We now turn to a consideration of that question.

67 Counsel for the appellant argued that the respondent's answers in the course of cross-examination as to what she would have done had the appellant's promises not been made to her were so equivocal that the primary judge was right to conclude that the respondent had not discharged the onus of proving that she would not have "remained on the property and … done what she had done in any event."[73] That argument should be rejected. To reject that argument, it is not necessary to rely upon any shifting of the onus of proof. A review of the whole of the evidence shows that the respondent had made out a compelling case of detrimental reliance. There are four broad reasons why that is so.

68 First, there is the evidence-in-chief of the respondent. It may be noted that the primary judge considered the respondent to be a truthful witness[74]. In the respondent's evidence-in-chief she had said that:

> "As a result of the [appellant's] repeated promise of the Oaks Property to me … I did not seek or engage in any full time paid work in the 8.5 years between January 1998 and July 2006 … [I]n the belief that I had a home in the Oaks Property, I chose instead to improve the Oaks and to repay the [appellant] in every way that I could using all the time and energy that I had for what I believed was his generous gift to me … I also lost the opportunity to obtain a property settlement from my divorce … [and] the opportunity to purchase a property for my son and me from money from my divorce settlement and salary from a full-time job."

69 That evidence was likely, as a matter of the probabilities of human behaviour, to be true. Indeed, it would be remarkable if the appellant's promises did not have some influence upon the respondent's decision to stay on and work at Burra Station. Upon the breakdown of the respondent's marriage, she was

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72 (1984) 157 CLR 215 at 238-239.

73 *Van Dyke v Sidhu* [2012] NSWSC 118 at [202]-[204].

74 *Van Dyke v Sidhu* [2012] NSWSC 118 at [112], [114], [156].

confronted with difficult decisions relating to the course of her life and the care and maintenance of her child. The appellant's promises were objectively likely to have had a significant effect upon the decision-making of a person in the respondent's position. The appellant's assurances were integral to his proposal to the respondent to put their relationship on a firm long-term footing. It is unlikely that she would have thrown in her lot with the appellant and exerted herself as she did over a period of eight and a half years if he had not made the promises which he in fact made. To the contrary, it is likely that she would have sought to maximise her own income for the benefit of herself and her infant son by seeking the most gainful form of employment.

70 Secondly, the primary judge said[75]:

> "I have no doubt that [the respondent] placed faith in [the appellant] and in the promises he made her and that this played a part in her willingness to spend time and effort in the maintenance and improvement of The Oaks Cottage and assisted [sic] on the Burra Station property".

71 Her Honour's finding that the appellant's promises "played a part in her willingness to spend time and effort in the maintenance and improvement of The Oaks Cottage and assisted on the Burra Station property" warranted the conclusion that the respondent had discharged the onus she bore on the basis that to establish estoppel by encouragement it is not necessary that the conduct of the party estopped should be the sole inducement operating on the mind of the party setting up the estoppel[76]. Counsel for the appellant disputed this proposition but did not cite any authority in support of their position. The respondent's position is amply supported by authority.

72 In *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd*[77], Robert Goff J said that:

> "the question is not whether the representee acted, or desisted from acting, solely in reliance on the encouragement or representation of the other party; the question is rather whether his conduct was so *influenced* by the encouragement or representation … that it would be unconscionable for

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75 *Van Dyke v Sidhu* [2012] NSWSC 118 at [203].

76 Handley, *Estoppel by Conduct and Election*, (2006) at 170 [11-011].

77 [1982] QB 84 at 104-105. See also *Gillett v Holt* [2001] Ch 210 at 226-227.

the representor thereafter to enforce his strict legal rights." (emphasis in original)

73 Similarly, in *Steria Ltd v Hutchison*[78], Neuberger LJ said that it is sufficient for the representee to show that "the representation was a significant factor which he took into account when deciding whether to [act as he did]." This approach conforms to that taken by the High Court as long ago as *Newbon v City Mutual Life Assurance Society Ltd*[79], where it was said that the "supposed belief" of the representee as "a contributing cause" of the representee's conduct was a "sufficient connection between the assumption and the position of detriment". It is the view which continued to prevail in *Gould v Vaggelas*[80].

74 Thirdly, apart from the respondent's direct testimony in support of her case, the primary judge accepted[81] that the respondent displayed a concern from time to time that the appellant honour his promises. While it is true that this concern was consistent with an understanding on the respondent's part that the appellant's promises were not contractually binding, the fact that the respondent exhibited that concern, and the fact that the appellant sought to allay that concern by giving her written assurances that the property would be transferred to her[82], tend to confirm that the appellant's promises were material to the respondent's willingness to remain living at Oaks Cottage and working on Burra Station as part of maintaining her ongoing relationship with the appellant.

75 Fourthly, the principal argument for the appellant, which was that the cross-examination of the respondent showed that the appellant's promises were not a real inducement which contributed to the respondent's decision to conduct herself as she did over a period of eight and a half years, is not compelling.

76 Counsel for the appellant emphasised the finding of the primary judge that the "contributions" of the appellant and the respondent to their eight-and-a-half-year relationship seemed "to be broadly matched"[83]. But the

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78 [2007] ICR 445 at 465 [117].

79 (1935) 52 CLR 723 at 735.

80 (1984) 157 CLR 215 at 236, 250-251.

81 *Van Dyke v Sidhu* [2012] NSWSC 118 at [191].

82 *Van Dyke v Sidhu* (2013) 301 ALR 769 at 775 [26].

83 *Van Dyke v Sidhu* [2012] NSWSC 118 at [260].

question here is whether the respondent would have committed to, and remained in, the relationship with the appellant, with all that that entailed in terms of the effect upon the material well-being of herself and her son, had she not been given the assurances made by the appellant. In this regard, the answers elicited from the respondent in cross-examination did not accept the proposition that the appellant's promises were immaterial to her. And as has been noted, some of her answers were positively to the effect that the extent of her involvement in maintaining Oaks Cottage and Burra Station was induced by the appellant's assurances of security. That evidence was to the effect that the promises in question were a vital aspect of the security which the appellant plainly understood was of concern to her.

77 This category of equitable estoppel serves to vindicate the expectations of the representee against a party who seeks unconscionably to resile from an expectation he or she has created[84]. The extent to which it is unconscionable of the appellant to seek to resile from the position expressed in his assurances to the respondent may be gauged by reflecting on the likely response of the respondent if the appellant had told her in January 1998: "I am happy for you to remain at Oaks Cottage, but only for so long as it suits me and my wife to have you here; and, while you remain on the property, you must care for it as if you were the owner of the property and do unpaid work on parts of Burra Station other than the property. Until I make the property over to you, you must pay rent sufficient to content my wife. Should you choose to leave, you will leave with nothing in return for the value of your work here."

78 In summary, on all the evidence, it should be found that the respondent was induced to remain at the property and to continue to work for the appellant and his wife by the assurances which he made. It is unconscionable for the appellant now to resile from his assurances.

The measure of relief

79 In *Waltons Stores (Interstate) Ltd v Maher*, Brennan J said[85]:

> "The protection which equity extends is analogous to the protection given by estoppel in pais to which Dixon J referred in *Grundt v Great Boulder*, ie, protection against the detriment which would flow from a party's

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84 *Donis v Donis* (2007) 19 VR 577 at 582-583 [18]-[20].

85 (1988) 164 CLR 387 at 418-419.

change of position if the assumption (or expectation) that led to it were deserted." (footnote omitted)

80 In *Grundt v Great Boulder Pty Gold Mines Ltd*[86], Dixon J, speaking of estoppel in pais, said:

> "[I]t is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice."

81 This statement of principle has been applied in the context of this category of equitable estoppel in Australia[87]. In England, in *Gillett v Holt*[88], Robert Walker LJ also applied the statement by Dixon J to the resolution of the issue of detrimental reliance in a case of equitable estoppel.

82 In *Giumelli v Giumelli*[89], Gleeson CJ, McHugh, Gummow and Callinan JJ held that, because the fundamental purpose of equitable estoppel is to protect the

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86 (1937) 59 CLR 641 at 674-675.

87 *Donis v Donis* (2007) 19 VR 577 at 593-594 [54]; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483 at 491 [42]. See also *Cameron v Murdoch* [1983] WAR 321 at 351-352; *Sullivan v Sullivan* (2006) 13 BPR 24,755.

88 [2001] Ch 210 at 232-233.

89 (1999) 196 CLR 101 at 112 [6], 123-125 [40]-[48].

plaintiff from the detriment which would flow from the defendant's change of position if the defendant were to be permitted to resile from his or her promise, the relief granted may require the taking of active steps by the defendant including the performance of the promise and the performance of the expectation generated by the promise. That holding is supported by the leading decisions to which this category of equitable estoppel is usually traced[90].

83 The requirements of good conscience may mean that in some cases the value of the promise may not be the just measure of relief. In *The Commonwealth v Verwayen*[91], Deane J noted that:

> "There could be circumstances in which the potential damage to an allegedly estopped party was disproportionately greater than any detriment which would be sustained by the other party to an extent that good conscience could not reasonably be seen as precluding a departure from the assumed state of affairs if adequate compensation were made or offered by the allegedly estopped party for any detriment sustained by the other party."

84 If the respondent had been induced to make a relatively small, readily quantifiable monetary outlay on the faith of the appellant's assurances, then it might not be unconscionable for the appellant to resile from his promises to the respondent on condition that he reimburse her for her outlay. But this case is one to which the observations of Nettle JA in *Donis v Donis*[92] are apposite:

> "[H]ere, the detriment suffered is of a kind and extent that involves life-changing decisions with irreversible consequences of a profoundly personal nature … beyond the measure of money and such that the equity raised by the promisor's conduct can only be accounted for by substantial fulfilment of the assumption upon which the respondent's actions were based."

85 The appellant's argument, rightly, sought no support from the discussion in cases decided before *Giumelli v Giumelli* of the need to mould the remedy to

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90 *Dillwyn v Llewelyn* (1862) 4 De GF & J 517 [45 ER 1285]; *Ramsden v Dyson* (1866) LR 1 HL 129; *Riches v Hogben* [1985] 2 Qd R 292; *The Commonwealth v Verwayen* (1990) 170 CLR 394.

91 (1990) 170 CLR 394 at 441.

92 (2007) 19 VR 577 at 588-589 [34].

reflect the "minimum relief necessary to 'do justice' between the parties"[93]. There may be cases where "[i]t would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption"[94]; but in the circumstances of the present case, as in *Giumelli v Giumelli*, justice between the parties will not be done by a remedy the value of which falls short of holding the appellant to his promises. While it is true to say that "the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct"[95], where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise.

86 In the circumstances of the present case, no reason has been identified by the appellant to conclude that good conscience does not require that the appellant be held to his promises. In particular, it is no answer for the appellant to say that the performance of his promises was conditional on the completion of the subdivision and the consent of his wife to the transfer to the respondent. His assurances to the respondent were expressed categorically so as to leave no room for doubt that he would ensure that the subdivision would proceed and that the consent of the appellant's wife would be forthcoming.

Conclusion and order

87 For the foregoing reasons, the decision of the Court of Appeal was correct.

88 The appeal should be dismissed with costs.

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93 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 416, see also at 429; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 404-405, 419.

94 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 413.

95 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 419.

89 GAGELER J. I agree with the joint reasons and add one observation concerning the second of the four reasons for concluding that the respondent discharged her onus of proof.

90 Paraphrasing Dixon J in *Thompson v Palmer*[96], the respondent bore the onus of establishing that she believed the appellant's representations and that, on the faith of that belief, she took a course of action or inaction which would turn out to be to her detriment were the appellant to be permitted to depart from those representations. The respondent did not need to establish that the belief to which she was induced by the appellant's representations was the sole or predominant cause of the course of action or inaction she took but, in the language of Rich, Dixon and Evatt JJ in *Newbon v City Mutual Life Assurance Society Ltd*[97], she did need to establish that the belief was a "contributing cause".

91 To establish that the belief to which she was induced by the appellant's representations was a contributing cause to the course of action or inaction which she took, the respondent needed to establish more than that she had the belief and took the belief into account when she acted or refrained from acting. She needed to establish that having the belief and taking the belief into account made a difference to her taking the course of action or inaction: that she would not have so acted or refrained from acting if she did not have the belief.

92 The need for the respondent to establish such a difference stems from what Dixon J described in *Grundt v Great Boulder Pty Gold Mines Ltd*[98] as the "indispensable" condition that a party asserting an estoppel "must have so acted or abstained from acting upon the footing of the state of affairs assumed" that the party asserting the estoppel "would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption". That is to say, "the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted". There can be no real detriment if the party asserting the estoppel would have been in the same position in any event.

93 The question of causation is therefore ordinarily appropriately framed, as it was implicitly framed by the primary judge in the present case, as being: "Despite any other contributing factors, would the party seeking to establish the estoppel have adopted a different course (of either action or refraining from

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96 (1933) 49 CLR 507 at 547; [1933] HCA 61.

97 (1935) 52 CLR 723 at 735; [1935] HCA 33.

98 (1937) 59 CLR 641 at 674; [1937] HCA 58.

action) to that which [the party] did had the relevant assumption not been induced?"[99]

94 The only authority of this Court potentially in conflict with that approach is *Lynch v Stiff*[100]. There is a statement in the joint reasons for judgment in that case to the effect that "it is sufficient if [a] party [asserting an estoppel] acts to his prejudice upon a representation made with the intention that it should be so acted upon, though it is not proved that in the absence of the representation he would not have so acted"[101]. That statement, however, does not address what is necessary to establish that a party "acts to his prejudice" in the first place. The statement was made in a context where the plaintiff was found to have acted to his prejudice on the basis that his evidence established that he had extended credit "because he believed" in the representation of the defendant[102].

95 There is no inherent contradiction between the primary judge's conclusion that the respondent had not discharged her onus of proving that she would not have remained on the property and done what she had done in any event, and the primary judge's finding that the respondent's faith in the appellant's representations played a part in her willingness to spend time and effort in maintaining and improving Oaks Cottage and in working on Burra Station. There is no inherent contradiction because it was possible that the respondent would have remained and done what she had done even if she had not believed and taken account of the appellant's representations. The respondent acknowledged that possibility in her cross-examination. The joint reasons for judgment demonstrate, however, that the probability is otherwise. The inference to be drawn from the whole of the evidence is that, were it not for her belief in the appellant's representations, the respondent would not have remained on the property and done what she had done.

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99 Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel*, (1999) at 43. See also *Spencer Bower, The Law Relating to Estoppel by Representation*, 4th ed (2004) at 99-100.

100 (1943) 68 CLR 428; [1943] HCA 38. See Handley, *Estoppel by Conduct and Election*, (2006) at 83 [5-012].

101 (1943) 68 CLR 428 at 435.

102 (1943) 68 CLR 428 at 435.