

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, GLEESON AND BEECH-JONES JJ

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HILARY LORRAINE KRAMER & ANOR

APPELLANTS

AND

DAVID LINDSAY STONE

RESPONDENT

*Kramer v Stone*

[2024] HCA 48

*Date of Hearing: 11 September 2024*

*Date of Judgment: 11 December 2024*

S53/2024

## ORDER

*Appeal dismissed with costs.*

On appeal from the Supreme Court of New South Wales

### Representation

N C Hutley SC with S H Hartford Davis and M O Pulsford for the appellants  
(instructed by Walker & White)

P D Herzfeld SC with H Bennett and S D D Puttick for the respondent  
(instructed by Lane Associates : Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Kramer v Stone**

Estoppel – Equitable estoppel – Proprietary estoppel – Proprietary estoppel by encouragement – Where promisor made promise to bequeath property to promisee – Where promisor did not further encourage promisee to rely on promise after making promise – Where promisee acted to his detriment in reliance on promise – Where promisor did not bequeath property to promisee – Whether promisee required to prove promisor undertook subsequent acts of encouragement after initial promise – Whether promisee required to prove promisor had actual knowledge that promisee would act or had acted in reliance on promise to promisee's detriment.

Words and phrases – "actual knowledge", "clear and unequivocal promise", "constructive knowledge", "detriment", "detrimental reliance", "encouragement", "encouragement from a promise", "equitable estoppel", "estoppel", "estoppel by acquiescence", "estoppel by encouragement", "estoppel by encouragement from a promise", "imperfect gift", "proprietary estoppel", "proprietary estoppel by encouragement", "reliance", "subsequent encouragement", "unconscionable".



GAGELER CJ, GORDON, EDELMAN AND BEECH-JONES JJ.

## **Introduction**

1           The respondent is a farm worker who earned an irregular and meagre income working on a farm as a "share farmer", sharing some of the costs and income derived from the farm. The farm worker was made a promise by the owner of the farm that he would inherit the farm on the owner's death. Without that promise, the farm worker would have terminated the share farming agreement, obtained employment that returned a much higher level of income, and enjoyed a new lifestyle free from some of the hardships endured on the farm. Instead, as the owner reasonably expected would occur, the farm worker relied upon the promise by continuing to live and work on the farm for another 23 years. But the owner did not leave the farm to the farm worker in her will, so when the owner died, the farm worker did not inherit the farm.

2           The trial judge in the Supreme Court of New South Wales (Robb J) concluded that these circumstances gave rise to an estoppel against the estate of the owner, requiring title to the farm to be held on trust for the farm worker. An appeal was dismissed by the Court of Appeal (Ward P, Leeming and Kirk JJA). The questions on this appeal are whether the owner's liability arising from the estoppel required that: (i) after the promise, the owner perform some act of further encouragement of the farm worker to continue to share farm; or (ii) the owner have actual knowledge that the farm worker was relying on the promise which would be to his detriment if the promise were not fulfilled. The answers are that neither of those matters was required to establish liability arising from the estoppel. The appeal must be dismissed.

## **The factual background and findings**

### *The parties and the approach to facts in this Court*

3           For the purpose of clarity only, and consistently with the approach taken by the trial judge and counsel in this Court, these reasons refer to the people involved in this matter by first names and titles. The property which is the subject of this appeal ("the Farm") was owned by Dame Leonie and her husband, Dr Harry, as joint tenants. Dame Leonie and Dr Harry had two daughters, Hilary and Jocelyn. The first appellant, Hilary, is one of the executors of Dame Leonie's estate. The second appellant is the other executor of Dame Leonie's estate. The respondent, David, was a share farmer of the Farm for almost 40 years from 1975.

4           At trial and in the Court of Appeal there was substantial dispute between David and the appellants about some of the facts described below. In this Court,

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with only one exception, the parties properly did not seek to challenge the concurrent factual holdings. The only factual dispute in this Court concerned the interpretation of the scope of those holdings. In particular, the dispute concerned whether Dame Leonie had an expectation that David would rely upon an assurance that the Farm would be left to him in Dame Leonie's will by continuing, to his detriment, to share farm on the Farm. That dispute is resolved in the course of the narration of the facts below.

*The farming arrangements*

5           The Farm that was owned by Dame Leonie and Dr Harry is a 100-acre property that lies on the Colo River in Upper Colo, New South Wales. Prior to the acquisition of the Farm by Dame Leonie and Dr Harry, the previous owner entered a share farming agreement in 1965 with David's father by which David's father, as the farmer, shared the risks and the profits of the farming operation with the land owner. After Dame Leonie and Dr Harry acquired the Farm in 1969, David's father continued to work on the Farm, entering a formal share farming agreement with Dame Leonie and Dr Harry in 1970.

6           In 1974, David's father left the Farm. David's father had been unable to make a sufficient living to support his wife and children and his wife wanted to live a more suburban life. In 1975, at about the age of 22, David began share farming on the Farm. David was "intelligent ... articulate [and] knowledgeable about farming matters". It is likely that David learned farming practices and techniques from his father while he was a schoolboy by helping out on the Farm and during a period of time when he had pursued an Agricultural Science course at university.

7           From 1975, David had a close personal collaboration with Dame Leonie and Dr Harry. His share farming agreement with Dr Harry was oral and contained the following terms:

1.     David would grow crops and maintain the Farm.
2.     Dr Harry would pay all operating costs except fuel, which would be a cost shared equally between Dr Harry and David.
3.     David would live rent-free in a house on the Farm.
4.     David would receive a quarterly retainer of \$600 and half of the gross proceeds from the sale of produce and cattle.

8           The amount of David's quarterly retainer (also described as a quarterly "bonus") increased over time and the proportion of the liability for fuel costs was

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amended in 1980 so that Dr Harry became liable for two-thirds of the fuel costs. But the agreement remained informal and terminable at will by either party.

*The first two promises*

9           The first promise was made by Dr Harry to David in the early 1980s. It was to the effect that Dr Harry would give David a life interest in the Farm so that David could work the Farm as his own for his life, provided that Dr Harry's family would retain the use of a cottage on the Farm.

10          The second promise was also made in the 1980s but after Dr Harry had been diagnosed with cancer. The second promise was that Dr Harry would leave the Farm to Dame Leonie in his will but that Dame Leonie would leave the Farm to David in her will and that David would "be free to do whatever you like with it". Again, a condition of the bequest to David would be that Dame Leonie and Dr Harry's two children would have the use of the cottage.

*Dr Harry's death and the promise by Dame Leonie*

11          In 1988, Dr Harry died. Shortly after Dr Harry died, Dame Leonie made a promise to David. In remarks that David accepted were made "out of the blue" and not in response to any complaint by David or any agreement by David to continue working pursuant to the share farming agreement, Dame Leonie told David that Dr Harry had always admired David's honesty and that Dr Harry and Dame Leonie had agreed that the Farm would pass to David upon Dame Leonie's death together with a sum of money. David replied by thanking Dame Leonie.

*David's detrimental reliance on Dame Leonie's promise*

12          As the trial judge held, in reliance upon the third promise David acted "to his detriment by continuing the farming operation on the [Farm] for about 23 years thereafter in the belief that he would inherit that property under Dame Leonie's will". In the absence of that belief, "David would have decided that the farming operation was too hard going and would have terminated the share farming agreement and successfully pursued a more remunerative occupation".<sup>1</sup>

13          Part of the detriment that David suffered was therefore financial. The Farm was a small and commercially unviable operation. Between 1976 and 2003, David's annual income from the Farm fluctuated, being \$4,037 in 1976 and \$19,145 in 2003, with the largest annual income in this period being \$26,464 in

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1     *Stone v Kramer* [2021] NSWSC 1456 at [250]-[251].

1997. David was frequently in debt to Dame Leonie and Dr Harry because his living expenses meant that he was often unable to pay Dame Leonie and Dr Harry their share of the proceeds from the sale of produce until he enjoyed a more remunerative quarter. The "irregular and meagre" income that David received from the share farming agreement, which was roughly a third of the average annual male income, was found by the trial judge to be "a mere fraction of what he could have earned if he had terminated the share farming agreement shortly after Dr Harry's death [in 1988] and pursued some alternative employment that returned an average level of income".<sup>2</sup>

14 Expert evidence was led at trial by the appellants to show that the Farm could have operated more profitably. But such profits were predicated on David's ability to apply resources that he did not have and could not have afforded. The trial judge held that Dame Leonie and Dr Harry were aware David could not apply such resources to the Farm and was therefore not able to generate a reasonable income from the Farm.<sup>3</sup>

15 The detriment suffered by David when he did not inherit the Farm was not limited to financial detriment. David gave evidence that, following Dame Leonie's promise, he did not make efforts to plan for his future, for example by "pursu[ing] any other employment", "develop[ing] any new employment skills" as his siblings had done, "attempt[ing] to build a superannuation fund" or "purchasing [his] own home". David's evidence was that he did not feel he needed to take these steps because Dame Leonie had promised that he would inherit the Farm.<sup>4</sup>

16 Further, David gave evidence that he "restricted [his] personal and domestic life to stay living on the [Farm]"<sup>5</sup> and unchallenged affidavit evidence adduced from David's former de facto partner described a number of hardships involved in David's continued occupation of his residence at the Farm, described by Ward P as "substandard accommodation",<sup>6</sup> including: (i) there was no fresh water to wash clothes; (ii) there were no insect screens to protect from the "multitude of insects" that would enter the house; (iii) the house was not insulated and had no ceiling fans

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2 *Stone v Kramer* [2021] NSWSC 1456 at [154], [225].

3 *Stone v Kramer* [2021] NSWSC 1456 at [324]-[325].

4 *Stone v Kramer* [2021] NSWSC 1456 at [92]; *Kramer v Stone* (2023) 112 NSWLR 564 at 570-571 [25].

5 *Stone v Kramer* [2021] NSWSC 1456 at [92].

6 *Kramer v Stone* (2023) 112 NSWLR 564 at 602 [186].



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or air conditioning and, as such, was "very hot" during summer months and "very cold" during winter months; (iv) there was no oven; (v) there were holes in the rainwater tank (being David's supply of drinking water); (vi) there was no window in David's bedroom; (vii) the ceiling sagged in places; (viii) the front veranda was "dilapidated", unsightly and unsafe to walk on; (ix) the house was vermin-infested and surfaces were frequently covered in mouse-droppings; and (x) mosquito larvae infected the water supply.<sup>7</sup>

*Dame Leonie's knowledge about David's reliance*

17 In this Court, the parties described their factual dispute about whether Dame Leonie believed, at the time of her promise, that David would rely upon the promise as a dispute about her "knowledge" at the time. The trial judge and Court of Appeal also referred to Dame Leonie's beliefs as to David's future reliance as her "knowledge". Senior counsel for the appellants denied that any finding had been made by the trial judge, or accepted by the Court of Appeal, to the effect that Dame Leonie knew that David would rely upon the third promise to his detriment. Senior counsel for the appellants submitted that the Court of Appeal had concluded only that Dame Leonie knew that David would rely on the third promise but in some unspecified way. And, it was further submitted, even this limited conclusion was not a correct "deduction" from the reasoning of the trial judge.

18 The trial judge made an express finding that "Dame Leonie ought to have known that part of David's motivation for continuing [to share farm on the Farm] was the expectation that he would inherit the [Farm]".<sup>8</sup> That finding was essential for his Honour's conclusion. But, contrary to the submissions by senior counsel for the appellants and consistently with the reasoning of the Court of Appeal, the trial judge also implicitly concluded that Dame Leonie actually knew that the third promise would motivate David to continue to share farm in the belief that he would inherit the Farm.

19 The trial judge addressed a submission that Dame Leonie had only encouraged in David "a hope and not an expectation that he would receive the [F]arm".<sup>9</sup> The trial judge found that the three promises were not merely "reasonably capable of conveying to a person in David's position that it was

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7 *Stone v Kramer* [2021] NSWSC 1456 at [328].

8 *Stone v Kramer* [2021] NSWSC 1456 at [251].

9 *Stone v Kramer* [2021] NSWSC 1456 at [243].

*possible* that the Farm would be left to him when Dame Leonie died".<sup>10</sup> They were positive assurances that the Farm *would* be left to David. The trial judge concluded that it "would have been cruel" and "out of character" for Dame Leonie or Dr Harry to have told David that there was only "a mere possibility that he would inherit the Farm".<sup>11</sup> The only reason that it could have been cruel for Dame Leonie to offer a mere possibility of inheritance was that she knew that David would rely upon her assurance by continuing to share farm to his detriment.

20 In the Court of Appeal, Ward P (with whom Leeming and Kirk JJA agreed) correctly described this reasoning of the trial judge as involving an inference that Dame Leonie "knew that the promise of inheritance would be relied upon by [David]".<sup>12</sup> The reference by Ward P to Dame Leonie's knowledge about David's future reliance could only have been a reference to a belief that David would continue to share farm. There was no evidence of any other way that David might have relied on the promise. Her Honour's assessment of the trial judge's reasons in this respect is also supported by the trial judge's finding that David's "financially grim position would have been obvious" to Dame Leonie.<sup>13</sup>

21 That conclusion about the nature of Dame Leonie's belief is not inconsistent with Ward P's further reasoning concerning Dame Leonie's intention. Her Honour separated the "question of knowledge" from the "question of intention".<sup>14</sup> The two are different concepts. The former concerned the belief that Dame Leonie had concerning David's likely reaction to the third promise. The latter concerned the purpose or intention that Dame Leonie had in making the third promise. Ward P concluded that Dame Leonie did not intend that the promise be relied upon, either generally or by David choosing to remain on the Farm. This was particularly the case because the promise was not "made in the context of any discussion as to [David's] future plans in relation to the [Farm] or the share farming agreement".<sup>15</sup>

22 In short, Ward P's assessment of the trial judge's findings was that Dame Leonie knew that David would rely upon the third promise by continuing to

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10 *Stone v Kramer* [2021] NSWSC 1456 at [244] (emphasis added).

11 *Stone v Kramer* [2021] NSWSC 1456 at [244].

12 *Kramer v Stone* (2023) 112 NSWLR 564 at 603 [193].

13 *Stone v Kramer* [2021] NSWSC 1456 at [225].

14 *Kramer v Stone* (2023) 112 NSWLR 564 at 603 [193], [194].

15 *Kramer v Stone* (2023) 112 NSWLR 564 at 603 [195].

share farm but that Dame Leonie did not make the promise with that purpose or intention.

*Dame Leonie's will*

23 In 1996 and 1999, around 8 and 11 years after the third promise, incomplete and unexecuted draft wills were prepared for Dame Leonie. Dame Leonie then executed wills in 2000, 2003, 2006, and 2011. All unexecuted and executed wills contemplated or provided for David to receive a legacy only. The incomplete will in 1996 did not mention the Farm. But from the time of the unexecuted will in 1999, the Farm was to be bequeathed to Hilary and Jocelyn and later to Hilary only. The trial judge concluded that it was likely that Dame Leonie had forgotten about her promise to David.<sup>16</sup> In 2010, Dame Leonie was diagnosed with dementia.

24 In April 2016, Dame Leonie died. In her final will, made on 11 November 2011, Dame Leonie left the Farm to Hilary. The Farm was valued at the time of the grant of probate in December 2016 at \$1.5 million. David was left a gift of \$200,000.

**The reasoning and conclusions of the trial judge and Court of Appeal**

*The trial judge*

25 The trial judge found that the first promise had been superseded by the second and that the second promise, which was made by Dr Harry, could not have legal effect against Dame Leonie.<sup>17</sup> That reasoning was not challenged. Instead, the focus of the reasoning of the trial judge and the Court of Appeal was on the legal effect of Dame Leonie's promise and David's detrimental reliance upon it.

26 The trial judge held that an estoppel arose which entitled David "to appropriate equitable relief to relieve him of the effect of Dame Leonie's unconscionable conduct".<sup>18</sup> The required elements of the estoppel that were held by the trial judge to be satisfied were: (i) a representation, in the form of an encouragement, had been made by Dame Leonie to David that she would leave the Farm to him; (ii) it was reasonable for David to rely on that representation; (iii) David had relied upon that encouragement to his detriment by continuing to share farm on the Farm for about 23 years and abstaining from terminating the

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16 *Stone v Kramer* [2021] NSWSC 1456 at [241].

17 *Stone v Kramer* [2021] NSWSC 1456 at [161]-[162].

18 *Stone v Kramer* [2021] NSWSC 1456 at [252].

agreement and pursuing a more remunerative occupation; and (iv) Dame Leonie had "constructive knowledge" of David's reliance in that Dame Leonie ought to have known that part of David's motivation for continuing to share farm was David's expectation that he would inherit the Farm.<sup>19</sup>

27 The trial judge referred to evidence that had been given by Jocelyn that Dame Leonie had told Jocelyn that she did not propose to leave the Farm to David and would leave him \$75,000 instead and that Jocelyn had urged Dame Leonie to increase that amount. The trial judge held that it would not be equitable for the court to order that the Farm be transferred to David in addition to him being entitled to keep the gift of \$200,000. The trial judge declared that in lieu of the provision of \$200,000 for David in Dame Leonie's will, the Farm was held on trust for David by the executors of the estate of Dame Leonie.

### *The Court of Appeal*

28 The appellants, the executors of the estate of Dame Leonie, appealed to the Court of Appeal on eight grounds including, relevantly, ground 4, which was that the trial judge erred by concluding that it was sufficient for estoppel by encouragement that Dame Leonie ought reasonably to have assumed that part of David's motivation for continuing to share farm was an expectation that he would inherit the Farm. On this ground, the appellants submitted that an estoppel by encouragement required Dame Leonie to have had "subjective knowledge" that David had acted to his detriment.

29 The fourth ground of appeal, at least as it was described in the appeal to this Court, had two aspects. First, that an element of estoppel by encouragement was some encouragement or actual knowledge of detrimental reliance by Dame Leonie. Secondly, that the encouragement or actual knowledge of detrimental reliance be subsequent to Dame Leonie making the third promise.

30 The Court of Appeal unanimously dismissed this and all other grounds of appeal. As explained above, Ward P (with whom Leeming and Kirk JJA agreed) held that Dame Leonie knew that David would rely upon the third promise by continuing to share farm. But this would not have satisfied the requirements of estoppel by encouragement according to the fourth ground of appeal. As her Honour explained, the fourth ground of appeal involved an assertion that Dame Leonie needed to have had "actual knowledge of the acts undertaken in

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19 *Stone v Kramer* [2021] NSWSC 1456 at [228], [234], [249]-[252].

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(detrimental) reliance on the representation, that is, knowledge of the acts (or abstention of acts) of reliance 'after' the making of the representation".<sup>20</sup>

31 The Court of Appeal held that knowledge of acts in reliance on a representation or an assumed state of affairs is a necessary element for estoppel by acquiescence but is not a necessary element for estoppel by encouragement.<sup>21</sup>

### **The appeal to this Court**

32 An estoppel arising from a promise upon which a plaintiff claims an entitlement to new property rights, such as a conveyance of land or "trust",<sup>22</sup> has been described as promissory estoppel,<sup>23</sup> proprietary estoppel<sup>24</sup> or, more generally, as estoppel by conduct<sup>25</sup> and equitable estoppel.<sup>26</sup> As in *Giumelli v Giumelli*,<sup>27</sup> there is no occasion in this appeal to consider whether there is any difference between these descriptions or if there is any "single overarching doctrine" of estoppel. In the appeal to this Court, the parties were agreed that the category of estoppel in issue should be described as "proprietary estoppel by encouragement". That agreed nomenclature can be accepted provided that "proprietary estoppel by encouragement" is understood to refer to an estoppel which affords relief in equity "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

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20 *Kramer v Stone* (2023) 112 NSWLR 564 at 603 [197].

21 *Kramer v Stone* (2023) 112 NSWLR 564 at 603-604 [199]-[200].

22 *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 [5].

23 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 403; *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 611; *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1 at 67 [215].

24 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 404, 420, 426, 458; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 437, 500-501.

25 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 453; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 412, 444.

26 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 405, 420, 426; *Sidhu v Van Dyke* (2014) 251 CLR 505 at 511 [2].

27 (1999) 196 CLR 101 at 112 [7].

plaintiff"<sup>28</sup> and which arises in the circumstances of this case solely by reason of detrimental reliance on a promise of a future conferral of a proprietary interest in land. This case does not call for consideration of whether, or when, any doctrine exists which might permit the creation of rights through any broader form of "estoppel by encouragement".<sup>29</sup>

33 The ground of appeal relied upon in this Court by the appellants was a developed version of ground 4 that had been relied upon in the Court of Appeal. The appellants asserted that the Court of Appeal had erred in two respects in its approach to estoppel by encouragement from Dame Leonie's promise: (i) in failing to recognise that, as Mason CJ and McHugh J held in *Corin v Patton*,<sup>30</sup> the equity in such cases "arises ... from the conduct of the donor after the making of the voluntary promise"; and (ii) in failing to recognise that "constructive knowledge of detrimental reliance is insufficient to establish unconscionability, at least where (as in this case) knowledge is the only matter which would support an unconscionability finding".

34 For the reasons below, neither aspect of that ground of appeal should be accepted. As to the first aspect: if a promise contains encouragement to a promisee, in the sense that a reasonable person in the promisor's position would expect that the promisee might rely upon the promise by some action or omission, as was the case with Dame Leonie's promise to David, there is no requirement for any further subsequent encouragement or actual knowledge of the acts of the promisee taken in reliance on the promise. Contrary to the submission of senior counsel for the appellants, there is no need for further "encouragement after the communication".

35 The second aspect of the ground of appeal fails because it is sufficient for the estoppel to arise that either (i) a reasonable person in the position of the promisor would have expected, or (ii) the promisor actually expected, that the promise would be relied upon by the promisee in the general (detrimental) manner in which it was relied upon. Either (i) or (ii) is sufficient. The findings of fact in this case established both.

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28 *Sidhu v Van Dyke* (2014) 251 CLR 505 at 511 [2], quoting *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 [6].

29 cf McFarlane, *The Law of Proprietary Estoppel*, 2nd ed (2020) at 49 [2.80].

30 (1990) 169 CLR 540 at 557.

## The requirements of equitable estoppel and their application

### *The requirements of equitable estoppel*

36 In *Waltons Stores (Interstate) Ltd v Maher*,<sup>31</sup> Brennan J set out six requirements for an equitable estoppel which, as senior counsel for David submitted and as explained below, were formulated at a level of generality sufficient to include an equitable estoppel which arises by reason of encouragement by the making of a promise as well as an equitable estoppel which arises by reason of acquiescence. When the focus is only upon an equitable estoppel which arises by reason of encouragement from a promise, the elements that must be satisfied can be refined as follows.

37 First, as with the requirement for representations in estoppels by representation generally,<sup>32</sup> there must be a "clear and unequivocal" promise made by the party estopped (the promisor) to the party who relies upon the promise (the promisee).<sup>33</sup> Of its nature, the clear and unequivocal promise will generally concern some representation about future conduct.<sup>34</sup>

38 Secondly, a reasonable person in the promisor's position must have expected or intended (or the promisor actually did expect or intend) that the promisee would rely upon the promise by some action, omission or course of conduct.<sup>35</sup> This is what is meant by references, including throughout this appeal, to the promise being an "encouragement" for the promisee to act.

39 Thirdly, the promisee must have relied upon the promise by acting or omitting to act in the general manner that would have been expected. In order to

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31 (1988) 164 CLR 387 at 428-429.

32 *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529 at 540.

33 *Legione v Hateley* (1983) 152 CLR 406 at 440. See also at 435-437, 439 and *Foran v Wight* (1989) 168 CLR 385 at 410-411, 435-436.

34 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 399, 446-447; *Foran v Wight* (1989) 168 CLR 385 at 411.

35 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 406; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 445; *Thorner v Major* [2009] 1 WLR 776 at 779 [5], 782-783 [17], 799 [78]; [2009] 3 All ER 945 at 950, 953, 969-970.

establish reliance, it is ordinarily necessary for the promisee to show not merely that the promise was one factor taken into account in motivating the promisee's action or omission but that the promisee would not have acted or omitted to act in the absence of the promise.<sup>36</sup> In other words, it must usually be shown that the promisee's reliance "made a difference to [the promisee] taking the course of action or inaction".<sup>37</sup>

40 Fourthly, the consequence of the promisee's reliance must be that the promisee will suffer detriment if the promise is not fulfilled, in the sense that the promisee will be left in a worse position, as a consequence of reliance upon the promise, than if the promise had not been made. Unlike the recognition of a gift, or the enforcement of a testamentary promise under a valid will, or the enforcement of a contractual promise, it is the existence of detriment arising from reasonable reliance upon an unfulfilled promise that completes the recognition of the estoppel and moulds the remedial response. As this Court has repeatedly held, "[i]t is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation to which it gives rise".<sup>38</sup> Hence, the relief is "moulded accordingly to prevent th[e] detriment".<sup>39</sup> In cases where the detriment suffered by a plaintiff is "a relatively small, readily quantifiable monetary outlay on the faith of the [defendant's] assurances" then, apart from interest, the likely equitable relief ordered will be compensation in the amount of the monetary outlay.<sup>40</sup> By contrast, where the detriment suffered "involves life-changing decisions with irreversible consequences of a profoundly personal nature", the likely equitable relief will be to require fulfilment of the

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36 *Sidhu v Van Dyke* (2014) 251 CLR 505 at 527 [76], 531 [91]-[93].

37 *Sidhu v Van Dyke* (2014) 251 CLR 505 at 531 [91].

38 *Giumelli v Giumelli* (1999) 196 CLR 101 at 121 [35] and *Sidhu v Van Dyke* (2014) 251 CLR 505 at 523 [58], both quoting *Riches v Hogben* [1985] 2 Qd R 292 at 301. See also *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 409; *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1 at 17 [39].

39 *Pipikos v Trayans* (2018) 265 CLR 522 at 541 [61].

40 *Sidhu v Van Dyke* (2014) 251 CLR 505 at 529 [84]. See also *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 441; *Donis v Donis* (2007) 19 VR 577 at 586 [29].



assumption upon which the plaintiff acted, such as by a conveyance of rights, or an assessment of the monetary value of the assumption.<sup>41</sup>

- 41        Once these elements are satisfied, it is commonly said that conscience requires that A redress the detriment suffered by B. As has been repeatedly emphasised by this Court, the description of circumstances as unconscionable "is to characterise the result rather than to identify the reasoning that leads to the application of that description".<sup>42</sup>

*The application of equitable estoppel in this case*

- 42        The elements of equitable estoppel, set out above, were plainly satisfied in this case. Dame Leonie made a clear promise to David that David would inherit the Farm upon Dame Leonie's death. In making that promise, a reasonable person in Dame Leonie's position would have expected, and Dame Leonie did expect, that David would rely upon the promise by abstaining from any other employment. David did rely upon the promise by continuing to share farm on the Farm for about 23 years in the belief that he would inherit the Farm. But for that belief, David would have terminated the share farming agreement and obtained more remunerative employment. And the failure by Dame Leonie to fulfill the promise has the effect that David will suffer detriment in the sense that he is in a worse position than if the promise had not been made. He had given up more remunerative employment, failed to develop new employment skills as his siblings had done, and restricted his social and domestic life.

**The two aspects of the ground of appeal**

- 43        Each of the two aspects of the appellants' ground of appeal in this Court sought to add an additional requirement to an equitable estoppel that arises by encouragement from a promise. The first additional requirement that was proposed was that the promisor must engage in conduct after the promise which further encourages the promisee in the course of conduct, action or omission which was

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41    *Sidhu v Van Dyke* (2014) 251 CLR 505 at 529-530 [84]-[85], quoting *Donis v Donis* (2007) 19 VR 577 at 588-589 [34]. See also *Giumelli v Giumelli* (1999) 196 CLR 101 at 125 [50]-[51].

42    *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 409 [34]; *Thorne v Kennedy* (2017) 263 CLR 85 at 106 [45]. See also *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 73 [43]; *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2024) 98 ALJR 1021 at 1054 [149]; 419 ALR 30 at 70.

adopted in reliance on the promise. The second requirement that was proposed was that the promisor must have actual knowledge that the promisee, in adopting the course of conduct, action or omission, is relying upon the promise.

- 44 The first proposed additional requirement inappropriately transposes the principles concerning the circumstance in which equity is said to perfect an imperfect gift. The second proposed additional requirement erroneously conflates the principles of estoppel by encouragement from a promise with the principles concerning estoppel by acquiescence.

*Separating equitable estoppel from any equity in cases of failed gifts*

- 45 The appellants sought support for the first aspect of their ground of appeal in the most recent decision of this Court in a line of authority that has been described as concerning the perfection of imperfect gifts: *Corin v Patton*.<sup>43</sup> There, a joint tenant of land had executed a transfer of her interest but had died before the transfer was registered. The question for this Court was whether equity would treat the gift as complete, thus severing the joint tenancy before death. The Court unanimously held that the gift was not "complete in equity" but for different reasons.<sup>44</sup>

- 46 It is unnecessary in this case to assess the respective merits of the different approaches taken in *Corin v Patton* to when equity will perfect an imperfect gift because that principle of equity, to the extent to which it operates in Australian law, is a separate and independent doctrine from equitable estoppel. In particular, none of the judgments in *Corin v Patton* suggested that there was any role for reliance or detriment in assessing whether equity should perfect an imperfect gift. Hence, none of the judgments suggested that the focus of equitable relief should be upon the detriment, if any, suffered by the purported recipient of the gift. Conversely, it has never been a requirement for equitable estoppel that a promisor must, subsequent to a promise of a gift, do everything that is necessary to give effect to the promise. The very premise of equitable estoppel in relation to promised gifts is that the promisor has not given effect to the promise.

- 47 It can be accepted that one of the leading early English decisions in this area of estoppel by encouragement from a promise included remarks that expressed a

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43 (1990) 169 CLR 540.

44 (1990) 169 CLR 540 at 559, 581.

concern to complete an imperfect gift.<sup>45</sup> It may also be that steps have been taken in England towards assimilating the principles concerning when equity will perfect an imperfect gift and the principles of estoppel by encouragement from a promise.<sup>46</sup> But whatever might be, or should be, the state of Australian law concerning whether or when an imperfect gift can be "complete[d] in equity" (an issue upon which no submissions were made on this appeal), the appellants' assumption that this assimilation has occurred in Australia is contrary to the reasons of every member of this Court in *Corin v Patton*. There was no application to reopen any of the reasoning in that decision.

48       The appellants principally relied upon two further decisions in support of transplanting to equitable estoppel a requirement of subsequent encouragement, after a promise, by a donor of a purported gift. Neither decision supports that transplant.

49       The first of those decisions was *Olsson v Dyson*.<sup>47</sup> In that case, a company owed £2,000 to Mr Dyson. Mr Dyson told his wife orally, "You can have the £2,000 that I have loaned to [the company]" and that he would tell the managing director of the company that future payments of interest should be made to her. No document was ever executed by Mr Dyson before he died. No statutory assignment of the loan ever occurred. Kitto J (with whom Barwick CJ, Menzies J and Owen J relevantly agreed<sup>48</sup>) followed the approach of Isaacs J in *Anning v Anning*,<sup>49</sup> reasoning that there was "no equity to perfect an imperfect gift: because of the absence of consideration a purported assignment, if incomplete as a legal assignment, effects nothing in equity". But Kitto J went on to say:<sup>50</sup>

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45   *Dillwyn v Llewelyn* (1862) 4 De G F & J 517 at 521 [45 ER 1285 at 1286].

46   See, eg, *Khan v Mahmood* [2021] WTLR 639 at 653-657 [38]-[45] and *Alam v Alam* [2023] EWHC 1460 (Ch) at [583], explaining *Pennington v Waine* [2002] 1 WLR 2075; [2002] 4 All ER 215. See also McKay, "Share Transfers and the Complete and Perfect Rule" (1976) 40 *Conveyancer and Property Lawyer* 139; Swadling, "Unjust Enrichment: Value, Rights, and Trusts" (2021) 137 *Law Quarterly Review* 56 at 62.

47   (1969) 120 CLR 365.

48   *Olsson v Dyson* (1969) 120 CLR 365 at 368, 380, 394.

49   (1907) 4 CLR 1049 at 1063, 1069.

50   *Olsson v Dyson* (1969) 120 CLR 365 at 376 (emphasis added).

"True it is that some subsequent conduct of the intending donor, encouraging or inducing the intended donee to act to his prejudice on the footing that the property or some interest in it has become his, may make it unconscionable for the donor to withhold the property or interest from the donee, and equity may on that ground hold the donee to be entitled to the property; *but that is another matter, and must be considered separately.*"

50 The separate matter to which Kitto J referred is equitable estoppel that arises by encouragement. Mr Dyson's wife had suffered detriment by abstaining from making an application under the *Testator's Family Maintenance Act 1918* (SA) in reliance upon Mr Dyson's statement that she could have the rights to the £2,000 loan.<sup>51</sup> But her claim, to the extent it was founded on "estoppel properly so called",<sup>52</sup> failed because there was no evidence that Mr Dyson "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".<sup>53</sup> Further, his statement of her entitlement to the rights to the loan was a statement only of an "inten[tion] to make her a gift"; it was not an encouragement for any future course of action.<sup>54</sup> In short, even treating the statement by Mr Dyson as a promise, the second and third elements of an equitable estoppel, as described above, were absent because there was no promise that encouraged any inaction of his wife in the general manner that occurred: nothing in the statement by Mr Dyson would lead a reasonable person to expect that his wife would rely on the statement by abstaining from making an application under the *Testator's Family Maintenance Act*.

51 The second decision upon which the appellants relied for the transplant to equitable estoppel of a requirement of subsequent encouragement, after a promise, by a donor of a purported gift was *Riches v Hogben*.<sup>55</sup> In that case, a son brought a claim against his 88-year-old mother arising from his mother's promise that she would buy him a house and put it in his name if he and his family emigrated to Australia. In reliance upon that promise the son sold his possessions, gave up his house in England and brought his family to Australia "all at considerable loss to

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51 *Olsson v Dyson* (1969) 120 CLR 365 at 377.

52 *Olsson v Dyson* (1969) 120 CLR 365 at 377.

53 *Olsson v Dyson* (1969) 120 CLR 365 at 379.

54 *Olsson v Dyson* (1969) 120 CLR 365 at 379.

55 [1985] 2 Qd R 292.

himself".<sup>56</sup> After the son and his family emigrated to Australia, his mother failed to fulfill her promise. In the Supreme Court of Queensland, McPherson J held that the son and mother had a binding agreement but that even if there had not been a binding agreement an "equity of expectation" would have arisen.<sup>57</sup> Although McPherson J recognised that "[m]any of the reported cases are concerned with imperfect gifts", the equitable principle applicable in that case was not concerned with the perfection of an imperfect gift or the performance of a promise, saying that "[i]t is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation to which it gives rise".<sup>58</sup>

52        The appellants, however, focused upon the reference to subsequent encouragement in the statement by McPherson J that the obligation in that case arose "not because of [the mother's acquisition of] ownership of land but because of the expectation that she raised in [her son] and of his detrimental conduct subsequently encouraged by the [mother] in reliance thereon".<sup>59</sup> But his Honour's reference to subsequent encouragement could not have been intended to suggest that it was a requirement of equitable estoppel that the mother perform a second act of encouragement for her son to act to his detriment by moving to Australia in addition to the encouragement provided by her promise. Instead, the reference to subsequent encouragement dispelled any suggestion that the encouragement was not continuing or, in other words, that the very significant acts of the son to his detriment, in reliance on the single promise, were unreasonable.

53        In summary, the principles of equitable estoppel are separate and independent from any equitable doctrine concerned with perfecting imperfect gifts, meaning there is no support in the authorities for an additional requirement of encouragement by the promisor, subsequent to the promise, for the promisee to rely on the promise to their detriment.

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56    *Riches v Hogben* [1985] 2 Qd R 292 at 301.

57    *Riches v Hogben* [1985] 2 Qd R 292 at 300-301.

58    *Riches v Hogben* [1985] 2 Qd R 292 at 301.

59    *Riches v Hogben* [1985] 2 Qd R 292 at 302.

*Separating estoppel by encouragement from estoppel by acquiescence*

54 In *Discount & Finance Ltd v Gehrig's NSW Wines Ltd*,<sup>60</sup> Jordan CJ referred to estoppel by acquiescence as a doctrine "which prevents a person, who has knowingly permitted another to act, through mistake, to his own detriment and to the advantage of the former, from profiting by the other's mistake". When these elements are satisfied, an estoppel by acquiescence can be the source of new rights for the mistaken party.<sup>61</sup>

55 The elements required for B to establish an estoppel by acquiescence against A were reiterated by Hudson J in *Brand v Chris Building Co Pty Ltd*:<sup>62</sup> (1) B must be mistaken as to their legal rights; (2) B must expend money, or do some act, on the faith of their mistaken belief; (3) A must know of their own rights; (4) A must know of B's mistaken belief; and (5) "A must encourage B in [B's] expenditure of money or other act, either directly or by abstaining from asserting [a] legal right". In that case, an estoppel claim was brought by B who had mistakenly built a house on land adjoining his property. The estoppel claim failed because the owner of the adjoining property had no knowledge of B's mistake and had not encouraged B's action.

56 The appellants borrowed from these principles concerning estoppel by acquiescence for their submission that for David to establish an estoppel by encouragement he was required to prove that subsequent to her promise Dame Leonie knew that David was remaining as a share farmer on the Farm in reliance upon her promise. Central to the appellants' submissions was the requirement referred to by Brennan J in *Waltons Stores (Interstate) Ltd v Maher*<sup>63</sup> that the "defendant knew or intended" that the plaintiff would act or omit to act in reliance upon an assumption or expectation. But, as explained above, Brennan J

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60 (1940) 40 SR (NSW) 598 at 603. See also *The New South Wales Trotting Club Ltd v The Council of the Municipality of the Glebe* (1937) 37 SR (NSW) 288 at 308.

61 *Hamilton v Geraghty* (1901) 1 SR (NSW) Eq 81.

62 [1957] VR 625 at 628. See also *Svenson v Payne* (1945) 71 CLR 531 at 541; Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 521-522 [17-080].

63 (1988) 164 CLR 387 at 429 (element 4). See also *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 445.

formulated the elements of equitable estoppel in a manner which included both estoppel by encouragement from a promise and estoppel by acquiescence.

57 An example of the formulation of equitable estoppel by Brennan J extending to both estoppel by encouragement from a promise and estoppel by acquiescence was the second element of an equitable estoppel to which Brennan J referred requiring a defendant to induce the plaintiff to adopt an assumption or expectation. In cases of estoppel by acquiescence, the defendant might not do anything to induce the plaintiff's action because the defendant's "encourage[ment]", in the language of Hudson J, might involve no more than abstaining, with knowledge, from asserting the defendant's legal rights. Therefore, Brennan J explained that in acquiescence cases although the defendant "has not actively induced the plaintiff to adopt an assumption or expectation", the defendant will "be held to have done so".<sup>64</sup>

58 The same care must be taken to disentangle the requirements of the two different equitable estoppels when considering the reference by Brennan J to a requirement that the "defendant knew or intended" that the plaintiff would act or abstain from acting in reliance upon an assumption or expectation. His Honour cannot be taken to have required a promisor to have actual knowledge or intention of the promisee's reliance to establish this second element of equitable estoppel. Indeed, earlier in his reasons in *Waltons Stores (Interstate) Ltd v Maher*, Brennan J had observed that, like common law estoppels described by Dixon J in *Thompson v Palmer*,<sup>65</sup> equitable estoppels could arise from "encouragement to adhere to an assumption or expectation already formed" or from acquiescence which is "the result of a party's failure to object to the assumption or expectation on which the other party is known to be conducting [their] affairs".<sup>66</sup>

59 In assessing whether a person who is subject to an estoppel bears "responsibility for the detrimental reliance" of the other party,<sup>67</sup> there is a significant difference between a person whose promise causes another's detriment and a person who merely omits to act where action could spare the other party from detriment. Any responsibility in the latter case must require the omission to occur

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64 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 429.

65 (1933) 49 CLR 507 at 547.

66 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 427.

67 *Sidhu v Van Dyke* (2014) 251 CLR 505 at 523 [58]. See also *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1 at 43 [141], 45 [146].

with knowledge of that person's rights and of the other's mistake so as to give rise to a duty to speak.<sup>68</sup> By contrast, there is no justification for such a requirement in the former case. As Leeming JA said of estoppel by encouragement in his concurring reasons in the Court of Appeal in this case (with which Kirk JA also agreed):<sup>69</sup>

"Why should it be necessary not only to know that the defendant has encouraged the plaintiff to labour under a false belief, but also to know that the plaintiff has relied on the encouragement? The distinction is quite artificial. Further, 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."

## Conclusion

60           The appeal must be dismissed with costs.

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<sup>68</sup> *Ramsden v Dyson* (1866) LR 1 HL 129 at 140-141; *Svenson v Payne* (1945) 71 CLR 531 at 539.

<sup>69</sup> *Kramer v Stone* (2023) 112 NSWLR 564 at 622 [294].



GLEESON J.

## Introduction

61 This appeal arises out of a statement made by Dame Leonie Kramer, the late owner of a 100-acre farm in the Colo Valley, New South Wales ("the farm"), to the respondent, Mr Stone, that the farm would pass to Mr Stone upon Dame Leonie's death. Mr Stone lived on the farm and worked on it as a sharefarmer. Dame Leonie's statement was expressed as a decision to honour an agreement between Dame Leonie and her late husband, Dr Harry Kramer, that Mr Stone should inherit the farm and was made in what the primary judge described as the "highly emotional circumstances of Dr Harry's recent death".<sup>70</sup> The Court of Appeal of the Supreme Court of New South Wales affirmed the primary judge's finding that Dame Leonie's statement was a promise made to Mr Stone and not a mere revocable statement of testamentary intention.<sup>71</sup>

62 For many years, Mr Stone acted in reliance on that promise, principally by continuing to work on the farm and deriving only a meagre income.

63 In 2011, five years before she died, Dame Leonie made her final will in which she left the farm to her daughter, Hilary. In making that final will, Dame Leonie had either forgotten her promise to Mr Stone or decided not to honour it. Mr Stone did not learn of the terms of Dame Leonie's will until after her death.

64 In the courts below, Mr Stone successfully maintained that a proprietary estoppel by encouragement supported the creation of a constructive trust in his favour over the farm. In the Court of Appeal (Ward P, Leeming and Kirk JJA agreeing), the elements required to establish the estoppel were identified by reference to Brennan J's formulation in *Waltons Stores (Interstate) Ltd v Maher*.<sup>72</sup> The estoppel in Mr Stone's favour was found to be based on the following circumstances: (1) Dame Leonie made a promise to Mr Stone, that was not a mere revocable statement of testamentary intention, that Mr Stone would inherit the farm on Dame Leonie's death;<sup>73</sup> (2) Dame Leonie encouraged Mr Stone to act in reliance on the promise, by her conduct in making the promise ("the

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70 *Stone v Kramer* [2021] NSWSC 1456 at [242].

71 *Kramer v Stone* (2023) 112 NSWLR 564 at 595 [151].

72 (1988) 164 CLR 387 at 428-429, cited in *Kramer v Stone* (2023) 112 NSWLR 564 at 581 [77], 613 [257], 619-620 [283], 622 [296].

73 *Kramer v Stone* (2023) 112 NSWLR 564 at 595 [150]-[151].

encouragement finding");<sup>74</sup> (3) Mr Stone reasonably relied upon the promise by working on the farm for many years in the belief that he would inherit it on Dame Leonie's death;<sup>75</sup> (4) in relying on the promise, Mr Stone acted to his detriment;<sup>76</sup> and (5) Dame Leonie failed to fulfil her promise.<sup>77</sup> The primary judge did not make an explicit finding as to the effect of the encouragement finding but the Court of Appeal inferred that the primary judge had made that finding.<sup>78</sup>

65 On the appeal to this Court, the appellants (the executors of Dame Leonie's estate) contended that the Court of Appeal erred in finding an estoppel in Mr Stone's favour in the absence of an additional element, being: (1) conduct by Dame Leonie, after the promise was made, that encouraged Mr Stone to act in reliance upon his assumption, created by the promise, of eventual inheritance of the farm; which conduct (2) may be established by actual, but not constructive, knowledge on the part of Dame Leonie that Mr Stone had acted to his detriment in reliance upon the assumption.

66 The first contention was said to mirror the formulation of Mason CJ and McHugh J in *Corin v Patton*<sup>79</sup> of "the doctrine of equitable estoppel, where an equity arises in favour of an intended donee from the conduct of the donor after the making of the voluntary promise by the donor".

67 The second contention, premised upon acceptance of the first contention, challenged the Court of Appeal's conclusions that actual knowledge on the part of Dame Leonie of Mr Stone's detrimental reliance on the promise was not required for an estoppel in this case.

68 In my view, the first contention should be accepted and, accordingly, the appeal should be allowed. The Court of Appeal erred in finding an estoppel in the absence of conduct by Dame Leonie, after the promise was made, that encouraged Mr Stone to act in reliance upon her promise. The requirement of encouragement after a voluntary promise recognises that such a promise will rarely be sufficient to induce an assumption that a promisee will inherit property, so as to bind the promisor to that voluntary promise. A "voluntary promise will not generally give

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74 *Kramer v Stone* (2023) 112 NSWLR 564 at 597-598 [166]-[167], 603 [197].

75 *Kramer v Stone* (2023) 112 NSWLR 564 at 610 [236], 613 [252].

76 *Kramer v Stone* (2023) 112 NSWLR 564 at 610 [234]-[236].

77 *Kramer v Stone* (2023) 112 NSWLR 564 at 567 [1].

78 *Kramer v Stone* (2023) 112 NSWLR 564 at 597-598 [166].

79 (1990) 169 CLR 540 at 557.

rise to an estoppel".<sup>80</sup> It is not sufficient for an estoppel that an assurance is made that justifies "hope, or even ... a confident expectation" in its future performance.<sup>81</sup> The circumstances of this case and, in particular, the absence of a finding that Dame Leonie either intended or expected Mr Stone to rely upon her promise preclude a departure from the general position.

69 The second contention does not arise on the case brought by Mr Stone, which was based on estoppel by encouragement, and not by acquiescence.<sup>82</sup> Neither actual nor constructive knowledge on Dame Leonie's part that Mr Stone had relied upon her promise to his detriment would have supported an estoppel by encouragement. As explained by Leeming JA, the relevant state of mind for an estoppel by encouragement is an intention on Dame Leonie's part to induce Mr Stone to adopt the assumption that he would inherit the farm.<sup>83</sup> There was no finding that Dame Leonie had that state of mind when she made the promise.<sup>84</sup>

### Proprietary estoppel based upon encouragement

70 A proprietary estoppel is a species of equitable estoppel; that is, it is an equity created by estoppel.<sup>85</sup> Like other equitable estoppels, its object is "to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment".<sup>86</sup> Whether a party will be bound by a promise depends on the part taken by that party in occasioning its adoption by the other

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80 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 406.

81 *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at 1781 [65]; [2008] 4 All ER 713 at 744.

82 *Kramer v Stone* (2023) 112 NSWLR 564 at 598 [168].

83 *Kramer v Stone* (2023) 112 NSWLR 564 at 620 [287].

84 *Stone v Kramer* [2021] NSWSC 1456 at [245]; *Kramer v Stone* (2023) 112 NSWLR 564 at 597-598 [166], 602-603 [192], 603 [196].

85 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 416, 418. See also *Inwards v Baker* [1965] 2 QB 29 at 38.

86 *Thompson v Palmer* (1933) 49 CLR 507 at 547, cited in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 398, 413, 443, 458, *Foran v Wight* (1989) 168 CLR 385 at 412, 434, *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 409, 422, 453, 471, 480, 500, and *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 467-468 [39].

party.<sup>87</sup> It is a promisor's responsibility for the promisee's detrimental reliance upon the promise which gives rise to an estoppel.<sup>88</sup>

71 Conduct of a property owner that will give rise to a proprietary estoppel against them has variously been described as "fraudulent",<sup>89</sup> "unconscionable",<sup>90</sup> an "affront to conscience"<sup>91</sup> and "inequitable or unjust".<sup>92</sup> However, these labels do not support "idiosyncratic concepts of justice and fairness".<sup>93</sup> As Dixon J observed in *Grundt v Great Boulder Pty Gold Mines Ltd*:<sup>94</sup>

"The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it. But the law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied."

72 A fundamental principle governing whether a proprietary estoppel will arise is that failure to fulfil a voluntary promise, without more, does not amount to

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87 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 404, 460-461. See also *Kramer v Stone* (2023) 112 NSWLR 564 at 620 [285]-[286].

88 *Sidhu v Van Dyke* (2014) 251 CLR 505 at 522-523 [58].

89 Finn, "Equitable Estoppel", in Finn (ed), *Essays in Equity* (1985) 59 at 71.

90 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 419. Finn, "Equitable Estoppel", in Finn (ed), *Essays in Equity* (1985) 59 at 72, citing *Shaw v Applegate* [1977] 1 WLR 970 at 978; [1978] 1 All ER 123 at 131 using the formulation "dishonest or unconscionable".

91 *Guest v Guest* [2024] AC 833 at 841 [8].

92 *Crabb v Arun District Council* [1976] Ch 179 at 187-188, 195. See also *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 at 448; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 417, 428.

93 *Legione v Hateley* (1983) 152 CLR 406 at 431.

94 (1937) 59 CLR 641 at 675-676.

unconscionable conduct. Mason CJ and Wilson J expressed this principle clearly in *Waltons Stores* when their Honours stated:<sup>95</sup>

"As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required."

73 This principle has its genesis in the equitable maxim that "equity will not assist a volunteer".<sup>96</sup> A similar principle that arises out of this maxim, which was laid down in the 1862 decision of *Dillwyn v Llewelyn*<sup>97</sup> and adopted by this Court in *Olsson v Dyson*,<sup>98</sup> is that an imperfect gift will only give rise to a proprietary estoppel where acts of a donor, subsequent to the gift, encourage the donee to act in reliance on that purported gift. It was in *Giumelli v Giumelli*<sup>99</sup> and *Sidhu v Van Dyke*<sup>100</sup> that this Court, relying on *Dillwyn*, *Olsson* and the decision of the Supreme Court of Queensland in *Riches v Hogben*,<sup>101</sup> extended this principle to promises and held that, while promises can give rise to a proprietary estoppel, a promise will not ordinarily give rise to such an estoppel unless the promisor's subsequent conduct encourages the promisee's detrimental reliance on that promise.

74 The extension is justified by recognising that an imperfect gift involves an implied promise to treat property in accordance with the gift or the creation of an assumed state of affairs between donor and donee as to the ownership of the gifted property.<sup>102</sup> Once it is accepted that there is no distinction of principle between a failed present gift and a promise of a future gift, because a failed present gift implies a promise, there is no justification for any difference in approach for the purpose of identifying a proprietary estoppel.

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95 (1988) 164 CLR 387 at 406.

96 *Corin v Patton* (1990) 169 CLR 540 at 551.

97 (1862) 4 De G F & J 517 at 521 [45 ER 1285 at 1286].

98 (1969) 120 CLR 365 at 386.

99 (1999) 196 CLR 101.

100 (2014) 251 CLR 505.

101 (1985) 2 Qd R 292.

102 *Riches v Hogben* (1985) 2 Qd R 292 at 301, quoted in *Giumelli v Giumelli* (1999) 196 CLR 101 at 121-122 [35]. See also McFarlane, *The Law of Proprietary Estoppel*, 2nd ed (2020) at 364 [6.90].

*Dillwyn and Olsson*

75 In *Dillwyn*, a father signed a memorandum which purportedly transferred ownership of his farm to his son and later invited him to build a house on it. The son built a house on the farm for £14,000, but the father's gift was never perfected as the purported transfer was ineffective. After the father's death, the son claimed that he was entitled to have the legal estate conveyed to him. Lord Westbury LC upheld the claim. The key passage in Lord Westbury's reasoning is:<sup>103</sup>

"A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift. ... [T]he subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. ... [I]f A puts B in possession of a piece of land, and tells him, 'I give it to you that you may build a house on it,' and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made. The case is somewhat analogous to that of verbal agreement not binding originally for the want of the memorandum in writing signed by the party to be charged, but which becomes binding by virtue of the subsequent part performance."

76 The promise mentioned in this passage seems to arise from the statement that a gift had been made. However, as Brennan J explained in *Waltons Stores*, "[i]t was the father's conduct after making the incomplete gift which made it unconscionable for him not to fulfil the expectation of title in reliance on which, to the father's knowledge, the son had laid out his money".<sup>104</sup>

77 In *Olsson*, Mr Dyson told Mrs Dyson, his wife, that she could have the rights to a £2,000 debt that was owing to him by a company and that he would tell the managing director of that company that future payments of interest should be made to her. Thereafter, although the debt was not validly assigned to Mrs Dyson, the company paid the interest on the debt to her. After Mr Dyson's death, the executors of Mr Dyson's estate brought an action against the company for the debt and interest. Mrs Dyson claimed that she was entitled to the debt and interest on the basis that a proprietary estoppel had arisen against Mr Dyson which bound his executors, as she had relied detrimentally on Mr Dyson's gift by abstaining from making an application for family maintenance under the *Testator's Family Maintenance Act 1918* (SA).

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**103** (1862) 4 De G F & J 517 at 521 [45 ER 1285 at 1286].

**104** *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 419. See also *Guest v Guest* [2024] AC 833 at 846 [22].

78 Kitto J (with whom Barwick CJ, Menzies J and Owen J relevantly agreed<sup>105</sup>) explained that *Dillwyn* was the case "usually cited" as authority for the creation of an equity to have property made over to the donee of a gift.<sup>106</sup> Kitto J identified a line of reasoning in *Dillwyn*, which analogised the circumstances with a non-binding verbal agreement which becomes binding by virtue of subsequent part performance. In the absence of a contract between father and son, "the conduct of the father after making the incomplete gift was such as to bind him in conscience to make the legal situation correspond with the implication in the encouragement that he gave to his son to lay out the money".<sup>107</sup> Kitto J went on to explain that the guiding principle in such cases is that "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".<sup>108</sup>

79 Kitto J reasoned that no equity arose as there was "not the slightest evidence that after the making of the purported gift [Mr Dyson] 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".<sup>109</sup> His Honour also emphasised that while Mr Dyson intended to make Mrs Dyson a gift, and had assumed that he had done so, that was the end of the matter. Mr Dyson did not offer his wife "any encouragement or inducement to adopt a course prejudicial to herself" and nor did he do "anything else that can be held to have bound him in conscience to perfect the imperfect gift".<sup>110</sup>

80 Kitto J's reasoning illustrates that the making of a failed gift will not necessarily operate upon the donee as encouragement to act in reliance upon the gift even in a case in which the shared assumption is that the property the subject of the gift has already passed to the donee. Kitto J's analysis "fixes upon the acts of the owner after the promise of an interest in or gift of the property or purported present gift in encouraging the other party to act to his detriment".<sup>111</sup>

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105 (1969) 120 CLR 365 at 368, 380, 394.

106 (1969) 120 CLR 365 at 378.

107 (1969) 120 CLR 365 at 378.

108 (1969) 120 CLR 365 at 379.

109 (1969) 120 CLR 365 at 379.

110 (1969) 120 CLR 365 at 379.

111 Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 426-427 [1719].

*Riches, Giumelli and Sidhu*

81 *Riches* was reported in 1985, three years before this Court's decision in *Waltons Stores*. In *Riches*, a mother promised her son that, if his family emigrated to Australia, she would buy him a house and put it in his name. The mother encouraged the son to rely on her promise. The encouragement included offering to pay and paying for the family airfares to Australia. In reliance on the promise, the son brought his family to Australia "at considerable loss to himself".<sup>112</sup> Although the family came to Australia, the mother failed to fulfil her promise.

82 The son brought a claim against the mother in the Supreme Court of Queensland. McPherson J held that the son and the mother had made a binding agreement. His Honour also held that if there was no such binding agreement, an "equity of expectation" had arisen which was said to be "a form of equitable estoppel".<sup>113</sup> It was reasoned that such an estoppel had arisen because the mother had encouraged her son to rely on her promise after it was made. His Honour stated:<sup>114</sup>

"[There] is said in the texts to be a form of equitable estoppel that arises where the plaintiff is led by the defendant's representations to expect that he has been or will be given an interest in property of the defendant, and where the plaintiff is encouraged by the defendant to act to his detriment on that representation: see Meagher, Gummow & Lehane: *Equitable Doctrines and Remedies*, 2nd ed, para 1717 ... [I]t is clear from *Crabb v Arun District Council* [1976] Ch 179 ... that the principle is applicable to representations or assurances as to future conduct ... The critical element is the conduct of the defendant after the representation in encouraging the plaintiff to act upon it: see *Olsson v Dyson* (1969) 120 CLR 365, 379, *per* Kitto J. That is what makes it unconscionable for the defendant to deny the right which the plaintiff has been led to expect".

83 The decision in *Crabb v Arun District Council*,<sup>115</sup> referred to in the passage above, concerned an "agreement in principle" in which an expectation had been created by the defendant Council that Mr Crabb, the plaintiff, would be granted a right of way along a road owned by the Council which adjoined a property owned by Mr Crabb. By fencing the boundary between the road and Mr Crabb's land and erecting gates which indicated an entrance point onto Mr Crabb's land, the Council

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112 [1985] 2 Qd R 292 at 301.

113 [1985] 2 Qd R 292 at 300.

114 [1985] 2 Qd R 292 at 300.

115 [1976] Ch 179.



encouraged Mr Crabb to act to his detriment in selling part of his land without reservation over it of any right of way. Lord Denning MR reasoned that the equity that prevented the Council from insisting upon its strict rights did not depend on agreement but on words or conduct. Although there was only an "agreement in principle", meaning that there were "some further processes" to be completed before the agreement became binding, "the subsequent conduct of the [Council] was such as to dispense with" those processes.

84 In the same year that *Riches* was reported, Professor Finn argued that the requirement of subsequent conduct in the imperfect gift cases, such as *Olsson*, harmonised with a similar requirement in cases where an expectation is created or encouraged that a right is to be given, citing *Ramsden v Dyson*<sup>116</sup> as an example.<sup>117</sup> In that case, Lord Kingsdown stated the following principle in dissent which has subsequently been accepted to be authoritative:<sup>118</sup>

"If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."

85 McPherson J's reasoning in *Riches*, which had relied on the decision in *Crabb*, was explicitly affirmed by this Court in *Giumelli*, specifically in the context of the Court upholding a decision which concluded that a proprietary estoppel had arisen because of subsequent encouraging conduct after the making of a promise.

86 The facts were that the respondent son had incurred detriment from acting in reliance on a promise made by his parents that their property would be subdivided to create a lot that would include a house and land for an orchard that would be owned by the son if he agreed to continue working for his parents' business and not to accept an offer to work for his father-in-law. On that basis, the son was prepared to stay on the property. Subsequently, having left the property but later returning, the son was reassured that, on his divorce, the property would be transferred to him. In reliance on his parents' promise, the son stayed and planted a new orchard. The appellant parents later sought to depart from the promise after the son chose to marry a person of whom they disapproved.

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116 (1866) LR 1 HL 129.

117 Finn, "Equitable Estoppel", in Finn (ed), *Essays in Equity* (1985) 59 at 82.

118 (1866) LR 1 HL 129 at 170

87 The primary judge, and the Full Court of the Supreme Court of Western Australia, had found that the parents were bound by a proprietary estoppel. In this Court, Gleeson CJ, McHugh, Gummow and Callinan JJ stated that the equity which founded the relief in *Dillwyn* and *Riches*, and which may found relief requiring the taking of active steps by the defendant, was "an assumption as to the future acquisition of ownership of property which had been induced by representations upon which there had been detrimental reliance by the plaintiff".<sup>119</sup> Their Honours approved of the reasoning of McPherson J in *Riches*, noting the latter's observation "that the critical element is the conduct of the defendant after the representation in encouraging the plaintiff to act upon it".<sup>120</sup>

88 Their Honours identified *Plimmer v The Mayor, Councillors, and Citizens of the City of Wellington*<sup>121</sup> as an example of the relevant category of cases.<sup>122</sup> The proprietary estoppel that arose in *Plimmer* can be understood as predicated on a promise followed by subsequent encouraging conduct. Mr Plimmer had been given a licence to use land which was indefinite in duration but revocable at will. At the request of and for the benefit of the respondents, Mr Plimmer incurred substantial expenditure in extending a jetty and erecting a warehouse on the land. The Privy Council concluded that the licence became irrevocable because the transactions by which Mr Plimmer was induced to incur the expenditure "were sufficient to create in [Mr Plimmer's] mind a reasonable expectation that his occupation would not be disturbed; and because they and the subsequent dealings of the parties cannot be reasonably explained on any other supposition".<sup>123</sup> The reasons in *Plimmer* referred to *Dillwyn* in the course of determining the extent of the interest acquired by Mr Plimmer by his expenditure.

89 In *Sidhu*, this Court affirmed the reasoning in the joint judgment in *Giumelli*, again in the context of upholding a decision which concluded that a proprietary estoppel had arisen because of subsequent encouraging conduct after the making of a promise.

90 The facts were that the appellant had promised that he would complete a subdivision of his property and transfer part of the property, on which there was a cottage where the respondent had been living, to the respondent. In response to the respondent's expressions of concern as to the security of her position, the appellant

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119 (1999) 196 CLR 101 at 112 [6].

120 (1999) 196 CLR 101 at 121 [35].

121 (1884) 9 App Cas 699. See also Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (1975) at 364 [1712].

122 (1999) 196 CLR 101 at 113 [10].

123 (1884) 9 App Cas 699 at 714.

gave the respondent assurances, in the form of handwritten notes and an email, in which he confirmed his earlier promise. The appellant and his wife later refused to convey the property to the respondent.

- 91 French CJ, Kiefel, Bell and Keane JJ (with whom Gageler J relevantly agreed) upheld the finding of the Court of Appeal of New South Wales that a proprietary estoppel had arisen.<sup>124</sup> The joint judgment adopted the statement in *Giumelli* above as to the equity that founded the relief in *Dillwyn* and *Riches*.<sup>125</sup> Their Honours went on to observe that:<sup>126</sup>

"[I]t is the conduct of the representee induced by the representor which is the very foundation for equitable intervention. ... 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."

- 92 The conclusion that it was "unconscionable for the appellant now to resile from his assurances"<sup>127</sup> was informed:<sup>128</sup>

"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.'"

### Overview

- 93 In *Dillwyn*, *Plimmer*, *Crabb*, *Riches*, *Giumelli* and *Sidhu*, there was a gift or the promise of a gift, followed by acts or words of encouragement, that operated to induce the promisee's detrimental reliance upon the expectation created by the gift or the promise of a gift. The cases demonstrate that, for a proprietary estoppel by encouragement, something more than a promise and detrimental reliance upon

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**124** (2014) 251 CLR 505 at 530 [87], [89].

**125** (2014) 251 CLR 505 at 511 [2], citing *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 [6].

**126** (2014) 251 CLR 505 at 522-523 [58]; see also 526 [72].

**127** (2014) 251 CLR 505 at 528 [78].

**128** (2014) 251 CLR 505 at 527-528 [77].

that promise is required. The "something more" was described by Meagher, Gummow and Lehane in the passage cited by *Riches*, quoted above, as "encouragement by B of the activities of A" in reliance upon A's expectation or belief.<sup>129</sup>

### The rationale for the encouragement element

94 The requirement that, for a proprietary estoppel by encouragement, the promisor must encourage the promisee's reliance upon the relevant expectation through acts subsequent to the promise denies the creation of an estoppel by mere reliance on an executory promise to do something. As Professor Finn recognised:<sup>130</sup>

"Ordinarily, if P acts or expends upon the basis of his belief [that a property right will be conferred on him in the future] he must bear the risk of that right not later being conferred, of his actions etc being rendered worthless, and [accept] this even if he believes it to be reasonable to act in anticipation of the right becoming his. ... But if E not only encourages P's belief that the right will be his, but also encourages his reliance thereon, ... then an equity can be raised against E."

95 The requirement of subsequent conduct serves "an intelligible purpose"<sup>131</sup> because, without more, a voluntary promise is generally insufficient to justify an inference either that: (1) the promisee acted reasonably in relying upon the promise to their detriment; or (2) a reasonable person in the promisor's position would expect or intend that the promisee would rely upon the promise. That is for two main reasons.

96 First, drawing any such inference would be contrary to the general legal rules concerning the non-enforceability of promises. Generally, a property owner is free to deal with their property as they see fit,<sup>132</sup> and a promise affecting that freedom is not enforceable in the absence of a binding contract.<sup>133</sup> A promisor is reasonably entitled to assume, and a promisee is reasonably expected to appreciate,

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129 Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies*, 2nd ed (1984) at 409-410 [1717]. See also Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 523 [17-095].

130 Finn, "Equitable Estoppel", in Finn (ed), *Essays in Equity* (1985) 59 at 82-83.

131 Finn, "Equitable Estoppel", in Finn (ed), *Essays in Equity* (1985) 59 at 82.

132 *Guest v Guest* [2024] AC 833 at 873 [107].

133 *Guest v Guest* [2024] AC 833 at 839 [4].

that a promise must form part of a binding contract to render it binding.<sup>134</sup> Particularly in domestic situations, people can make promises that are "reasonably understood as commitments in which trust is invited and can reasonably be placed, even though the promise is not legally enforceable".<sup>135</sup> However, the mere making of a voluntary promise cannot ordinarily be understood to amount to such a commitment without evidence that supports those two additional aspects of the promise. As well as reflecting the law of contract, this reasonable expectation is consistent with the maxim that equity will not assist a volunteer.<sup>136</sup> These rules reflect basic societal norms that inform how a promisor and promisee are likely to understand the effect of a promise, and that inform the reasonableness of relying upon a promise before it is fulfilled. To that extent, they are highly relevant to the evaluation of a claim based upon an estoppel arising from a disappointed promise.

97 Secondly, in the case of a testamentary promise, drawing any such inference referred to above would be contrary to the principle that a testamentary promise is generally not enforceable in the absence of a valid will.<sup>137</sup> It is ordinarily not reasonable to rely upon a representation by a living person as to their intentions for their will.<sup>138</sup> A property owner is free to change their will from time to time, subject only to questions of mental capacity. Another consideration is that a valid will requires compliance with certain formalities.<sup>139</sup> Thus, in *Gillett v Holt*, Robert Walker LJ observed that "it is notorious that some elderly persons of means derive enjoyment from the possession of testamentary power, and from dropping hints as to their intentions, without any question of an estoppel arising".<sup>140</sup>

98 There are many valid reasons why a person may depart from a promise of a future inheritance. Without more, a bare promise does not provide a basis for a reasonable assumption that future events may not affect the fulfilment of the testamentary promise (whether that assumption is said to have been made by a

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**134** *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 403, 406, 423; *Amalgamated Investment & Property Co Ltd (In liq) v Texas Commerce International Bank Ltd* [1982] 1 QB 84 at 107.

**135** *Guest v Guest* [2024] AC 833 at 893 [187].

**136** *Corin v Patton* (1990) 169 CLR 540 at 551, 556; Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 522 [17-090].

**137** *Guest v Guest* [2024] AC 833 at 873 [107].

**138** *Guest v Guest* [2024] AC 833 at 839 [4]; *Gillett v Holt* [2001] Ch 210 at 227-228.

**139** *Guest v Guest* [2024] AC 833 at 890 [175].

**140** [2001] Ch 210 at 228.

promisor or promisee). For example, events may cause a person to sell their property, whether arising from the person's financial need (such as to pay for unforeseen medical or nursing care) or otherwise. Moreover, changes in testamentary intentions may result from a change in the relationship between the property owner and the promisee. As Lord Leggatt JSC observed in *Guest v Guest*, "it is often a fair inference that, when A made informal promises to leave property to B in her will, she did so on the unspoken assumption that they would remain on good terms until she died".<sup>141</sup> There is no reason to doubt that, generally, a promisor would expect this to be the case after making a testamentary promise and a reasonable promisee would draw this inference. Finally, it should not be overlooked that changes in testamentary intentions may result from the property owner's relationships with persons other than the promisee.

**"Knowledge" of a promisee's likely reliance upon a promise will not suffice**

99 The separate categories of promissory and proprietary estoppel allow for different approaches to the determination of whether the promisor should be held responsible for the promisee's assumption and subsequent detrimental reliance.<sup>142</sup> The requirement of the defendant's encouragement to create a proprietary estoppel by encouragement may be contrasted with the second and fourth requirements of a promissory estoppel identified by Brennan J in *Waltons Stores*, namely, that the defendant has induced the plaintiff's adoption of an assumption or expectation based upon the promise, and knew or intended the plaintiff to act or abstain from acting in reliance on the assumption or expectation. Encouragement fixes the defendant with responsibility, not for the breach of an otherwise unenforceable promise, but for the promisee's detrimental reliance. Whether the defendant's encouragement must be intentional to create a proprietary estoppel was not the subject of argument on the appeal.

100 In the Court of Appeal, Ward P (with whom Leeming and Kirk JJA agreed) concluded that the primary judge must have inferred that Dame Leonie knew, when she made her promise, that Mr Stone would rely upon the promise.<sup>143</sup> Such a finding falls short of a finding that Dame Leonie encouraged Mr Stone to rely upon the promise, as required for a proprietary estoppel by encouragement. It also falls short of a finding that Dame Leonie intended Mr Stone to rely upon the promise, as required for a promissory estoppel.

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<sup>141</sup> [2024] AC 833 at 892 [182].

<sup>142</sup> *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1 at 43 [141].

<sup>143</sup> *Kramer v Stone* (2023) 112 NSWLR 564 at 603 [193].

101 In any event, the primary judge's findings did not support Ward P's conclusion. There was no reason to doubt that Dame Leonie was acting honestly when she made her promise. Obvious inferences about her possible state of mind include a belief that it would convey to Mr Stone the great affection that she and her late husband had for Mr Stone or that Dame Leonie wished to provide for Mr Stone's financial security but without any knowledge or belief about how that communication might affect Mr Stone's choices. The primary judge found that Dame Leonie knew that Mr Stone's financial position was grim when she made the promise, and that she was also aware of Mr Stone's love of the farm and farming in general. Knowing those facts, Dame Leonie may never have considered that Mr Stone was other than fully committed to living out his life on the farm.

102 Finally, it is unhelpful to introduce considerations of a promisor's knowledge about how a promisee will act into the analysis. A belief about the future conduct of another is best understood in terms of what is expected, likely or intended. Even where a person states how they propose to act in the future, that statement will give rise to a belief about what is expected rather than knowledge about how the promisee will act. The language in Brennan J's fourth requirement for an equitable estoppel, that "the defendant knew or intended" the plaintiff to act or abstain from acting, accommodates the possibility of estoppels arising by the defendant's encouragement or by their acquiescence, that is, standing by in the knowledge of the defendant's detrimental reliance.

### **Conclusion**

103 The appeal should be allowed, with the result that the respondent's statement of claim would be dismissed with costs.