

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

GIOVANNI GIUMELLI & ANOR

APPELLANTS

AND

ROBERT JOHN GIUMELLI

RESPONDENT

Giumelli v Giumelli (P55-1997) [1999] HCA 10
24 March 1999

ORDER

Appeal stood over to a date to be fixed for the making of orders joining as a party to the appeal the legal personal representative or representatives of the first appellant and for the making of final orders disposing of the appeal.

On appeal from the Supreme Court of Western Australia

Representation:

A R Castan QC with F G Phillips for the appellants (instructed by Michael Rennie)

M J McCusker QC with R A Harrison for the respondent (instructed by Dwyer Durack)

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

CATCHWORDS

Giumelli & Anor v Giumelli

Equity – Relief – Equitable estoppel – Constructive trust – Equitable charge – Whether relief confined to reversal of detriment – Relevance of other appropriate remedies and of third party interests to measure of relief.

Words and phrases – "constructive", "defensive equity".

The Commonwealth v Verwayen (1990) 170 CLR 394, discussed.

- 1 GLEESON CJ, McHUGH, GUMMOW AND CALLINAN JJ. This is an appeal from the Full Court of the Supreme Court of Western Australia¹. The Full Court (Rowland, Franklyn and Ipp JJ) allowed an appeal by the present respondent from a judgment entered by a judge of that Court (R D Nicholson J) and dismissed a cross-appeal by the present appellants. The Full Court granted a declaration that the appellants hold the whole of the land comprised in Certificate of Title Vol 1400 Folio 628 ("the Dwellingup property") upon trust and that, since May 1986, they have held the Dwellingup property upon trust to convey to the respondent what is presently an unsubdivided portion thereof, identified as "the Promised Lot". The appellants were ordered to do all things reasonably necessary to subdivide the Dwellingup property so as to create the Promised Lot, including the obtaining of State Planning Commission approval. The order of the Full Court further provided:

"that in the event that subdivision cannot be effected or State Planning Commission approval cannot be obtained or in the event that for some other reason the Promised Lot cannot be conveyed to [the respondent, he] be at liberty to apply to a single Judge of this Honourable Court".

Constructive trust and estoppel

- 2 In submissions to this Court, the term "constructive trust" was used to identify the nature of the equitable remedy granted by the Full Court. Care is required in the use of the term "constructive" in this context. Professor Scott has pointed out²:

"It is sometimes said that when there are sufficient grounds for imposing a constructive trust, the court 'constructs a trust.' The expression is, of course, absurd. The word 'constructive' is derived from the verb 'construe,' not from the verb 'construct'. ... The court construes the circumstances in the sense that it explains or interprets them; it does not construct them."

The relief granted by the Full Court involved a trust that was "constructive" in that way. The Full Court so interpreted the circumstances as obliging the appellants, in good conscience, not to retain their beneficial interest in the whole of the Dwellingup property and as requiring them to answer the respondent's equity by bringing about a subdivision of the Promised Lot and conveying the title to it. The equity of the respondent was seen by the Full Court as sufficiently strong as not

1 *Giumelli v Giumelli* (1996) 17 WAR 159.

2 *Scott on Trusts*, 4th ed (1989), vol 5, §462.4.

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only to prevent the appellants from insisting upon their strict legal rights but also, in respect of the Promised Lot, to convey it to the respondent.

3 A constructive trust of this nature is a remedial response to the claim to equitable intervention made out by the plaintiff. It obliges the holder of the legal title to surrender the property in question, thereby bringing about a determination of the rights and titles of the parties.

4 The term "constructive trust" is used in various senses when identifying a remedy provided by a court of equity. The trust institution usually involves both the holding of property by the trustee and a personal liability to account in a suit for breach of trust for the discharge of the trustee's duties. However, some constructive trusts create or recognise no proprietary interest. Rather there is the imposition of a personal liability to account in the same manner as that of an express trustee. An example of a constructive trust in this sense is the imposition of personal liability upon one "who dishonestly procures or assists in a breach of trust or fiduciary obligation"³ by a trustee or other fiduciary.

5 In the present case, the constructive trust is proprietary in nature. It attaches to the Dwellingup property. Such a trust does not necessarily impose upon the holder of the legal title the various administrative duties and fiduciary obligations which attend the settlement of property to be held by a trustee upon an express trust for successive interests. Rather, the order made by the Full Court is akin to orders for conveyance made by Lord Westbury LC in *Dillwyn v Llewelyn*⁴ and, more recently, by McPherson J in *Riches v Hogben*⁵.

6 In these cases, the equity which founded the relief obtained was found in 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. This is a well recognised variety of estoppel as understood in equity and may found relief which requires the taking of active steps by the defendant.

7 There is no occasion in this appeal to consider whether the various doctrines and remedies in the field of estoppel are to be brought under what Mason CJ called "a single overarching doctrine"⁶ or what Deane J identified as a "general doctrine

3 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 392.

4 (1862) 4 De GF & J 517 at 523 [45 ER 1285 at 1287].

5 [1985] 2 Qd R 292 at 302.

6 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 411.

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of estoppel by conduct"⁷. These theses were advanced by their Honours in *The Commonwealth v Verwayen* but not accepted by Dawson J⁸ or McHugh J⁹. Brennan J approached the subject on the footing that "equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts on it to his detriment, seeks to resile from the promise"¹⁰. Subsequently, in the joint judgment of Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ in *Australian Securities Commission v Marlborough Gold Mines Ltd*, reference was made to "an equitable estoppel of the kind upheld in *Verwayen*"¹¹.

- 8 Nor does the present case itself turn upon what was identified by Mason CJ, Wilson and Deane JJ in *Baumgartner v Baumgartner* as¹²:

"the general equitable principle which restores to a party contributions which he or she has made to a joint endeavour which fails when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them".

There was a joint endeavour which included the parties to this litigation and others. This was in the form of a partnership, the affairs of which have given rise to other litigation. As will appear, the delay in resolving the partnership dispute does have a significance for the determination of the relief which the respondent should be granted with respect to the Promised Lot.

- 9 The relief granted by the Full Court indicates that the equity of the respondent was more than a "defensive equity". This phrase was used by Deane J in *The Commonwealth v Verwayen*¹³ to denote laches, acquiescence or delay or a mere set-off. Further, by obliging the appellants to execute a conveyance, the equity established by the respondent did more than prevent the appellants from insisting

7 (1990) 170 CLR 394 at 440.

8 (1990) 170 CLR 394 at 454.

9 (1990) 170 CLR 394 at 499-501.

10 (1990) 170 CLR 394 at 428-429.

11 (1993) 177 CLR 485 at 506.

12 (1987) 164 CLR 137 at 148.

13 (1990) 170 CLR 394 at 435.

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upon their strict legal rights as present owners. On the other hand, the respondent did not establish an immediate right to positive equitable relief as understood in the same sense that a right to recover damages may be seen as consequent upon a breach of contract.

10 The present case fell within the category identified by the Privy Council in *Plimmer v Mayor, &c, of Wellington* where "the Court must look at the circumstances in each case to decide in what way the equity can be satisfied"¹⁴. Before a constructive trust is imposed, the court should first decide whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust¹⁵. At the heart of this appeal is the question whether the relief granted by the Full Court was appropriate and whether sufficient weight was given by the Full Court to the various factors to be taken into account, including the impact upon relevant third parties¹⁶, in determining the nature and quantum of the equitable relief to be granted.

11 In their Notice of Appeal, the appellants seek the dismissal of the respondent's claim. However, in their written and oral submissions, they accept that, at least in respect of what was identified as the second promise, the respondent had an equity to some relief. They submit that this fell short of an order for a subdivision and the conveyance of the Promised Lot.

The facts

12 The respondent, whom we shall call Robert, is the son of the appellants, Mr and Mrs Giumelli. Mr Giumelli was born in Italy in 1924. He came to Australia in 1949. Mrs Giumelli was also born in Italy, in 1930, and she came to Australia in 1950. Mr and Mrs Giumelli were married in 1951. There are five children of the marriage. The eldest, Tony, was born in 1953; Robert was born in 1956; Steven in 1959; Sandra in 1965; and Diana in 1968. The family lived on a property at Pickering Brook ("the Pickering Brook property"). This comprised about 16 acres. The title was held in the name of Mr Giumelli.

14 (1884) 9 App Cas 699 at 714.

15 *Bathurst City Council v PWC Properties Pty Ltd* (1998) 72 ALJR 1470 at 1479; 157 ALR 414 at 425-426; *Napier v Hunter* [1993] AC 713 at 738, 744-745, 752.

16 See the remarks of McLachlin J in *Soulos v Korkontzilas* [1997] 2 SCR 217 at 236, 241, 243. See also Oakley, "The Precise Effect of the Imposition of a Constructive Trust", in Goldstein (ed), *Equity and Contemporary Legal Developments*, (1992), 427 at 451-456.

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Mr and Mrs Giumelli developed the property as an orchard and they conducted a business there under the name "G Giumelli & Co" by means of a partnership between them. The partnership was established on the advice of their accountant, Mr Gelle. There was no written partnership agreement.

- 13 In 1966, Mr and Mrs Giumelli purchased the Dwellingup property and they retain the registered title to it. The land is about 100 kms equidistant from Perth and from the Pickering Brook property. The Dwellingup property comprises an area of about 338 acres, of which only 10 acres were completely cleared when it was purchased. Mr Giumelli commenced development of the property by planting trees on the 10 acres and installing irrigation. Although partnership activities have been conducted there, the Dwellingup property itself has never been an asset of the partnership.
- 14 The eldest child, Tony, left school in 1968 and worked with his father at the Pickering Brook and Dwellingup properties. Robert left school in 1971 and commenced full-time work for the partnership. Up to that time, he had worked at the Pickering Brook and Dwellingup properties, along with other members of his family, in a manner and to a degree consistent with the capabilities of his age. Robert worked two hours daily outside of school hours and sometimes all Saturday and half of Sunday. He received no wages, but was paid pocket-money and received the necessities of life.
- 15 In July 1973, Robert and Tony were admitted to the partnership after advice by Mr Gelle to the effect that there were tax advantages in doing so. The two sons were admitted without payment of goodwill or subscription of capital. Robert worked for the partnership without wages but was credited with earnings in the partnership accounts. He continued to receive pocket-money and the necessities of life. He was engaged with other family members in development and improvement work on the Dwellingup property. All expenses for materials and charges for the contractors for this work were paid by the partnership. This is a circumstance of some importance in a consideration of the appropriate remedy in this litigation.
- 16 In 1974, the third child, Steven, left school and commenced full-time work for the partnership on wages, working initially at both properties but later moving to the Dwellingup property. In 1978, Tony left the partnership and ceased to do any work on the Dwellingup property. In about 1982, Steven became a partner.
- 17 The primary judge delivered his reasons for judgment on 10 September 1993 after a five day trial in August 1993. His Honour did not determine the precise extent to which the development and improvement of the Dwellingup property took place as a result of Robert's labours. The primary judge did find that Robert

had worked hard and had made a major contribution to the development and that other members of Robert's family had done likewise.

18 The primary judge made findings with respect to three alleged promises made to Robert by his parents concerning the provision to him of ownership of part of the Dwellingup property. His Honour identified these as "the general promise", "the second promise" and "the third promise". His Honour found that Mr and Mrs Giumelli made a general promise to Robert (and also to Tony) at a youthful age and without reference to any particular portion of the Dwellingup property. The promise to Robert was made in approximately 1974, when he was 18 years of age. It was to the effect that his parents would give him part of the Dwellingup property to compensate him for working without wages, for the effort he was putting into the development and improvements and, later, for the fact that the costs of those matters were being met from funds of the partnership.

19 The second promise relied upon by Robert was said to have been made in 1980. Robert claimed that, having told his parents that he intended to marry and wished to build a house for his matrimonial home, they agreed that he should build a house on the Dwellingup property, they joined with him in selecting a site and they promised him that the house and the land on which it stood (including the orchard) would be his. Robert claimed that, in reliance upon that promise, he engaged a builder and worked with him in constructing on the site a three bedroom brick and tile house to the value of \$47,000 ("the house"). Initially, the partnership advanced to Robert the sum of \$25,000 against his account with the partnership. He expended that sum on the cost of construction and materials for the house.

20 The primary judge found that Robert had not established the factual foundation for a finding in terms of the second promise as pleaded so far as it related to land including the orchard. His Honour held that Robert had made out the pleading that he was promised "the house" and added that the critical issue in relation to this second promise was the way in which it was understood by the parties.

21 In the Full Court, Rowland J encapsulated as follows the findings of the primary judge with respect to the third promise¹⁷:

"After his marriage in July 1981, a promise was made to [Robert] that the [Dwellingup] property would be subdivided to create a lot on the northern section of the property to include the house and orchard if he agreed to stay on the property and not accept an offer to work for his father-in-law and, if

17 (1996) 17 WAR 159 at 162-163.

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the house and land could be subdivided, he would have the orchard as well. On this basis, he was prepared to stay, on the property. Subsequently, [Robert] separated from his wife and he returned to the property. On his return he was reassured that, on his divorce, the property would be transferred. In reliance on this promise, [Robert] stayed and planted the new orchard. He was divorced in 1983."

Thereafter, Robert decided to remarry, but to a woman of whom his parents disapproved. In May 1985, his parents told him to choose between his proposed new wife and the Dwellingup property. Robert chose to go ahead with the marriage and left the Dwellingup property. He has been living since then about 2 kms away.

22 Steven married in 1985 and has lived with his wife and children at the Dwellingup property. They have occupied what was identified as a transportable house which was brought to the Promised Lot in 1976 and thereafter extended and occupied by Robert until 1981. Steven and his family have not occupied the house referred to in the second and third promises and also situated on the Promised Lot. Steven has made various improvements to the Promised Lot, including the building of coolrooms and the planting of 1000 new trees.

23 On 7 May 1986, Robert instituted an action ("the partnership action") in the Supreme Court of Western Australia against his parents and his two brothers seeking, among other relief, an order that the partnership between Robert, his parents and Steven be wound up. He also sought a declaration that the partnership had a charge over the Pickering Brook property and the Dwellingup property to the extent of the value of improvements thereto. It should be noted that neither of Robert's brothers is a party to the other action, that giving rise to the appeal to this Court.

24 The partnership action has yet to come to trial. However, in 1990, Pidgeon J determined, as a preliminary matter, that the partnership had been determined on 14 May 1986, this being the date of the service of the writ. Thereafter, Master White made orders relating to the taking of accounts to enable Robert's entitlement to be ascertained. In 1991, Master Bredmeyer entered judgment for Robert against his parents and brothers in the sum of \$55,106, together with interest from 14 May 1986 until judgment, in part satisfaction of Robert's interest in the partnership. In doing so, the Master proceeded on the footing, which was not challenged, that, pursuant to s 34(1) of the *Partnership Act* 1895 (WA), the partnership assets and profits were to be shared equally between the partners.

25 With respect to the third promise, R D Nicholson J found as follows:

"I consider that [Robert] has established that the third promise was made in terms which obliged [Mr and Mrs Giumelli] to create a lot on the northern section of the Dwellingup property to include the house and orchard.

I am satisfied that [Mr and Mrs Giumelli] induced [Robert] to adopt the expectations in the second and third promises, [Robert] acted in reliance on them; was intended so to do by [Mr and Mrs Giumelli]; and that [Mr and Mrs Giumelli] did not act to fulfil the assumption or expectation. In the case of the second promise reliance is established by the expenditure of [Robert's] money and labour on the building of the house and in the case of the third promise the reliance is shown by [Robert's] rejection of the job offer, his return to the property and, it is claimed, his work in establishing the new orchard."

26 His Honour said that there remained for demonstration what he identified as "the element of detriment" and continued:

"In the case of the second promise the detriment to [Robert] is constituted by the expenditure of money and labour on the house without the acquisition of title to it. This is a detriment which [Mr and Mrs Giumelli] failed to act to avoid.

In the case of the third promise it has not been shown that by the rejection of the job offer and return to work in the partnership [Robert] has suffered a detriment. [Robert] was a member of the partnership and chose to continue in it. The consequence of the third promise was that he did not relinquish his partnership. In my view that cannot be a detriment in itself.

... His work for the partnership is a matter for the taking of account as between him and the partnership, in respect of which [Robert] has another action on foot.

... In my opinion the development of the new orchard was executed in the interests of the partnership of which [Robert] was a member. If the development improved the profitability of the partnership [Robert] stood to gain not to lose. It was not a detriment in the required sense."

27 In this respect, we prefer the conclusions reached by Rowland J and Ipp J in the Full Court. Rowland J approached the matter on the footing that, even if it be conceded that Robert had not suffered an appreciable loss of income by remaining in the partnership, the detriment suffered by him was the loss of the property which he worked to improve, not to obtain immediate income from that exercise but to

gain the proprietary interest¹⁸. For that, Robert gave up the opportunity of a different career path. Ipp J pointed out that the reasoning of the primary judge placed no weight upon the circumstance that the partnership had no security of tenure and did not own the real estate¹⁹. His Honour continued²⁰:

"Accordingly, had [Mr and Mrs Giumelli] not undertaken to transfer the [P]romised [L]ot to [Robert], he would not have remained in the partnership and worked on improving the new orchard. The work done on the Dwellingup property by [Robert], at the expense of the partnership (including [Robert's] share), while benefiting [Mr and Mrs Giumelli] (by adding to the capital value of their property) only stood to benefit [Robert] if the partnership continued for a sufficiently long period, and if [Mr and Mrs Giumelli] honoured their promises to him. As the partnership terminated (through no fault on the part of [Robert]) before the new orchard became productive, [Robert] in fact received little, if any, benefit from developing the new orchard. It was because [Robert] had foreseen this very possibility, and was therefore reluctant to continue as a partner, that [Mr and Mrs Giumelli] had made their promises on which he relied."

28 R D Nicholson J determined the appropriate measure of relief by reference to his findings as to the second promise. His Honour's findings with respect to the third promise led to the dismissal of that aspect of the case from consideration. With respect to the second promise, the finding in favour of Robert as to the house but not the orchard led his Honour to conclude:

"In my opinion it is not appropriate that an order be made that title in the land on which the house is situated be vested in [Robert]. The difficulties of access and use are patent. This appears to me to be a case where it is arguable that [Robert's] expectation can be met by a monetary payment determined in the light of the findings I have made. Subject to what may later be submitted, I consider that the money payment should be either the amount expended by [Robert] on the house or the present value of the house and land on which it is situate, whichever is the greater."

After receipt of further submissions, his Honour ordered that a sworn valuation be prepared, following the receipt of which the court would determine the amount for

18 (1996) 17 WAR 159 at 166.

19 (1996) 17 WAR 159 at 174.

20 (1996) 17 WAR 159 at 174-175.

which Robert might enter judgment against the appellants. The valuation was to indicate:

- "(a) the market value and replacement value of the house constructed in 1980 ... and land on which the house is built (only the land situated directly beneath the house)[; and]
- (b) the annual rental since 1985 representing the amount which might have been paid by a tenant occupying the house on the basis that a tenant was paying a sum which was reasonable having regard to the amenities of the house, the position of the house and any other relevant factors the valuer may regard as appropriate."

29 After provision of the valuation and following additional argument and the provision of reasons to supplement those which had been delivered on 10 September 1993, the primary judge, on 26 May 1994, ordered that the appellants pay to Robert the sum of \$66,071. The order provided that, for the purposes of the calculation of interest thereon pursuant to s 32 of the *Supreme Court Act* 1935 (WA) ("the Supreme Court Act"), the date of judgment be deemed to be 10 September 1993. The figure of \$66,071 represented the valuation as at 1993 of the house at \$66,000 and the land at \$71. The small sum in respect of the land represents the curiosity involved in valuing only that area of the Promised Lot upon which there stood the house.

30 In his supplementary reasons, the primary judge said that the compensation to which Robert was entitled in respect of the second promise was that sum which would place him in the position he would be in if he owned the house on the land on which it was situated and was able now to realise that asset. The relief sought on the pleadings did not independently extend to loss of rent from the house from the date of Robert's exclusion and this was not a matter which could be taken into account "in the award of equitable compensation for loss of the house and the land on which it stands".

31 His Honour did not make any order which would have had the effect of charging upon the Dwellingup property, or the Promised Lot, or any portion thereof, the amount for which he entered judgment and interest thereon. Such a charge or lien has been ordered in various decisions which are authorities in this field. They include, in the Privy Council, *Chalmers v Pardoe*²¹; in New Zealand,

21 [1963] 1 WLR 677 at 681-682; [1963] 3 All ER 552 at 555.

*In re Whitehead, Whitehead v Whitehead*²² and *Stratulatos v Stratulatos*²³; and, in the Supreme Court of New South Wales, *Morris v Morris*²⁴ and *Cadorange Pty Ltd (in liq) v Tanga Holdings Pty Ltd*²⁵.

32 It may be noted that, in the United States, an equitable charge or lien of this variety is often regarded as a form of constructive trust which is "special and limited" because, rather than giving complete title, it confers a security interest to satisfy an obligation sounding in money²⁶. This illustrates the point made earlier in these reasons respecting the care needed in using, without further detail, the term "constructive trust".

33 The Full Court differed from the primary judge with respect to the third promise. This extended to the Promised Lot. That being so, the consideration by the Full Court of the appropriate relief was not confined to the house and the land to which it was a fixture. The appellants challenge the width of the specific relief granted by the Full Court. In particular, they emphasise that an order for the creation and conveyance of the Promised Lot went beyond any "reversal" of the detriment occasioned by the respondent in reliance upon the third promise. They submit that it was not open to the Full Court, in a case such as the present, to grant relief which went beyond the reversal of such detriment. In that regard, the appellants claim decisive support from the decision in *Verwayen*²⁷. However, in our view and consistently with the course of Australian authority since *Verwayen*²⁸, that decision is not authority for any such curtailment of the relief

22 [1948] NZLR 1066 at 1071.

23 [1988] 2 NZLR 424 at 438.

24 [1982] 1 NSWLR 61 at 64.

25 (1990) 20 NSWLR 26 at 36-38. See also *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 54 and the discussion by Kirby P in *Baumgartner v Baumgartner* (1985) 2 NSWLR 406 at 419 of *Morris v Morris* and *Chalmers v Pardoe*. See, generally, Wright, *The Remedial Constructive Trust*, (1998), pars 3.58-3.66.

26 *In re Marriage of Allen* 724 P 2d 651 at 658 (1986); *Restatement of Restitution*, Ch 9, §161, "Equitable Lien", (1937); Dobbs, *Law of Remedies*, 2nd ed (1993), vol 1, §4.3(3).

27 (1990) 170 CLR 394.

28 The cases, which include *Blazely v Whiley* (1995) 5 Tas R 254; *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241; and *Woodson (Sales) Pty Ltd v* (Footnote continues on next page)

available in this case. Rather, there is much support in the judgments for a broader view of the present matter.

Detriment

- 34 In their submissions, the appellants stress the need to limit the measure of equitable relief lest the requirement for consideration to support a contractual promise be outflanked and direct enforcement be given to promises which did not give rise to legal rights. However, in *Verwayen*²⁹, Dawson J, after pointing out that at common law the role of estoppel was largely as a rule of evidence, stated that in equity its role has been vastly expanded to raise questions of substance. His Honour continued³⁰:

"At the same time, the discretionary nature of the relief in equity marks a further reason why the fear of the common law that promissory estoppel would undermine the doctrine of consideration is unwarranted."

- 35 The matter was taken further by McPherson J in *Riches v Hogben*³¹. His Honour noted that the critical element is the conduct of the defendant after the representation in encouraging the plaintiff to act upon it³² and continued³³:

"A consequence of applying the principle may be to complete an otherwise imperfect gift, as in *Dillwyn v Llewelyn*³⁴, or to give effect to an agreement

Woodson (Aust) Pty Ltd (1996) 7 BPR 97590 at 14,685, are said to show that "it is only in comparatively rare cases that relief can be granted which neatly reverses the claimant's reliance loss": Robertson, "Reliance and expectation in estoppel remedies", (1998) 18 *Legal Studies* 360 at 366-367; cf *Mobil Oil Australia Ltd v Wellcome International Pty Ltd* (1998) 81 FCR 475 at 516-518.

29 (1990) 170 CLR 394 at 454.

30 (1990) 170 CLR 394 at 454.

31 [1985] 2 Qd R 292. See also Halliwell, "Estoppel: unconscionability as a cause of action", (1994) 14 *Legal Studies* 15 at 17, 20-22; Smith, "How Proprietary Is Proprietary Estoppel?", in Rose (ed), *Consensus Ad Idem* (1996), 235 at 239-243.

32 [1985] 2 Qd R 292 at 300.

33 [1985] 2 Qd R 292 at 300-301.

34 (1862) 4 De GF & J 517 [45 ER 1285].

that, for want of certainty or consideration or of some other essential element, falls short of constituting an enforceable contract. Many of the reported cases are concerned with imperfect gifts; but there is of course a sense in which all agreements made or promises given without consideration are imperfect gifts of the benefits they purport to confer. What distinguishes the equitable principle from the enforcement of contractual obligations is, in the first place, that there is no legally binding promise. If there is such a promise, then the plaintiff must resort to the law of contract in order to enforce it, it being the function of equity to supplement the law not to replace it. The second distinguishing feature is that what attracts the principle is not the promise itself but the expectation which it creates. In that respect it represents the precise converse of what was said by Jessel MR in *Ungley v Ungley*³⁵ to be the basis for enforcing the contract in that case. Finally, the equitable principle has no application where the transaction remains wholly executory on the plaintiff's part. 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. That is why in *Dillwyn v Llewelyn*³⁶, where the son built on land promised but not effectively conveyed to him by a memorandum signed by his father, Lord Westbury LC said that the only inquiry was 'whether the son's expenditure, on the faith of the memorandum, supplied a valuable consideration, and created a binding obligation'."

- 36 In *Olsson v Dyson*³⁷, Kitto J observed that the judgment of the Lord Chancellor in *Dillwyn v Llewelyn* seemed to contain two concurrent lines of reasoning. One was that, assuming there was no contract, nevertheless the conduct of the father was such as to bind him in conscience to make the legal situation correspond with the implication and the encouragement given the son to lay out the money. The other was that the father's conduct in encouraging the son to build

35 (1877) 5 Ch D 887 at 891. [The Master of the Rolls there described acts of part performance of the plaintiff which prevented the setting up of the Statute of Frauds as a bar to the specific enforcement of a parol contract respecting an interest in land as indicative of "not a mere expectation, but an actual promise". See also, as to this distinction between promise and expectation as foundations of obligations, McBride, "The Classification of Obligations and Legal Education" in Birks (ed), *The Classification of Obligations*, (1997) 71 at 75-77.]

36 (1862) 4 De GF & J 517 at 522-523 [45 ER 1285 at 1287].

37 (1969) 120 CLR 365 at 378.

the house on the footing that the land would be his, when acted upon by the son, created an equity which bound the father to make good the son's expectation.

37 It is necessary now to say something as to the circumstances which gave rise to the litigation in *Verwayen*, upon which decision the appellants place much reliance. By its defence to an action in tort brought against it by a former naval serviceman, the Commonwealth admitted liability and did not plead that the action was statute-barred or that it had owed no duty of care to the plaintiff because he was injured whilst acting as a serviceman in the course of combat exercises. The failure to plead such defences was in accordance with the then stated policy of the Commonwealth. The question of damages remained in issue. Following a change in that policy, the Commonwealth applied to a Master for leave to amend its defence so as to raise both defences. Leave was opposed³⁸ but was granted. There does not appear to have been any appeal brought from the Master's decision. The reports of the litigation in this Court do not disclose any reasons given by the Master.

38 It would seem that in the exercise of the discretion upon opposition to the grant of such leave, a question arose as to whether, in the light of the past conduct by the Commonwealth of the litigation, leave should be refused. That presented to the Court the task not of adjudicating legal or equitable rights but of assessing the relevant factors. In a comparable situation in England, the House of Lords in *Roebuck v Mungovin* spoke of the decision upon such an application as "a classic exercise of a discretion [by] simply taking the defendants' conduct into account"³⁹.

39 However that may be, leave was granted to amend so as to raise both defences. By his reply the plaintiff pleaded that the Commonwealth had waived the two defences and that it was estopped from relying on either. After an interlocutory excursion to the Full Court of the Supreme Court of Victoria⁴⁰, arguments raised by the pleadings were dealt with by the trial judge before a jury was empanelled and as matters of law on agreed facts. The trial judge entered judgment for the Commonwealth⁴¹.

40 In this Court, the majority (Deane, Dawson, Toohey and Gaudron JJ; Mason CJ, Brennan and McHugh JJ dissenting) upheld the reply to the amended

38 See (1990) 170 CLR 394 at 464, 478.

39 [1994] 2 AC 224 at 236.

40 *Verwayen v The Commonwealth of Australia* [1988] VR 203.

41 *Verwayen v The Commonwealth of Australia (No 2)* [1989] VR 712 at 713-717.

defence and decided that the Commonwealth was not free to dispute its liability to the plaintiff. Deane J and Dawson J decided the appeal on the footing of estoppel, the equity being raised by the Commonwealth's conduct being such as could only be accounted for by holding it to the assumed state of affairs before the amended defence. Toohey J and Gaudron J decided that the Commonwealth had waived its right to rely on either defence.

- 41 In this Court, the Commonwealth had submitted that the only reliance by the plaintiff had been his apparent decision to continue with the action where, had there been no representation, the action may have been discontinued⁴². It further submitted that the only detriment flowing from the reliance was legal costs so that to uphold the reply would be to confer a remedy disproportionate to that detriment⁴³.

42 (1990) 170 CLR 394 at 397-398.

43 (1990) 170 CLR 394 at 398.

42 Deane J emphasised⁴⁴:

"Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of that assumed state of affairs would be inequitably harsh, that some lesser form of relief should be awarded."

His Honour added that ultimately⁴⁵:

"the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted".

The prima facie entitlement to which his Honour had referred would be qualified if that relief would "exceed what could be justified by the requirements of conscientious conduct and would be unjust to the estopped party"; an appropriate qualification might be a requirement that the party relying upon the estoppel do equity⁴⁶.

43 Dawson J⁴⁷ referred to such authorities as the speech of Lord Kingsdown in *Ramsden v Dyson*⁴⁸ and the judgment of McPherson J in *Riches v Hogben*⁴⁹ as authority for the proposition that avoidance of the detriment involved may require that the party estopped make good the assumption, although his Honour noted that, depending upon the circumstances of the case, the relief required may be considerably less.

44 (1990) 170 CLR 394 at 443.

45 (1990) 170 CLR 394 at 445.

46 (1990) 170 CLR 394 at 442. See, as to the imposition of terms in such a case, *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637 at 653, 656-657.

47 (1990) 170 CLR 394 at 454.

48 (1866) LR 1 HL 129 at 170.

49 [1985] 2 Qd R 292 at 302.

44 Although Gaudron J decided the case on other grounds, her Honour observed that⁵⁰:

"the substantive doctrine of estoppel permits a court to do what is required to avoid detriment and does not, in every case, require the making good of the assumption".

It is apparent from the tenor of these remarks that the detriment was seen as a prejudice which the plaintiff was still suffering at the relevant time, not merely prejudice which had already been sustained before the initiation of action.

45 Of those judges in the minority, Mason CJ took the position that⁵¹:

"equitable estoppel will permit a court to do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped, but no more. In appropriate cases, that will require that the party estopped be held to the assumption created, even if that means the effective enforcement of a voluntary promise."

His Honour added that if a single overarching doctrine of estoppel be adopted, there would be "no longer any justification for insisting on the making good of assumptions in every case"⁵².

46 Brennan J held that the case before the Court was not one where "the minimum equity needed to avoid the relevant detriment" was the holding of the Commonwealth to its promises by the entry of an interlocutory judgment for the plaintiff and an order for the assessment of his damages⁵³.

47 McHugh J concluded that what will be required to satisfy the equity which arises against the party estopped depends on the circumstances and that, whilst often the only way to prevent the promisee suffering detriment will be to enforce the promise, in the present case there was no equitable estoppel established because

50 (1990) 170 CLR 394 at 487.

51 (1990) 170 CLR 394 at 412.

52 (1990) 170 CLR 394 at 412.

53 (1990) 170 CLR 394 at 429.

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there had been no representation by the Commonwealth as to present or past facts⁵⁴.

- 48 The upshot is that the respondent is correct in his submissions that the reasoning in the judgments in *Verwayen* does not foreclose, as a matter of doctrine, the making in the present case of an order of the nature made by the Full Court.

The circumstances of the case

- 49 However, the appellants correctly challenge the Full Court order on other grounds. Before making an order designed to bring about a conveyance of the Promised Lot to the respondent, the Full Court was obliged to consider all the circumstances of the case. These circumstances included the still pending partnership action, the improvements to the Promised Lot by family members other than Robert, both before and after his residency there, the breakdown in family relationships and the continued residence on the Promised Lot of Steven and his family. It will be recalled that Steven is a party to the partnership action but not to the present action.

- 50 When these matters are taken into account, it is apparent that the order made by the Full Court reflected what in *Verwayen* was described as the prima facie entitlement of Robert. However, qualification was necessary both to avoid injustice to others, particularly Steven and his family, and to avoid relief which went beyond what was required for conscientious conduct by Mr and Mrs Giumelli. The result points inexorably to relief expressed not in terms of acquisition of title to land but in a money sum. This would reflect, with respect to the third promise, the approach taken by R D Nicholson J when giving relief in respect of the second promise.

Conclusion

- 51 Whilst the holding of the Full Court with respect to the third promise should be upheld, the Full Court erred in the measure of relief which it granted in respect of the Promised Lot. This is a case for the fixing of a money sum to represent the value of the equitable claim of the respondent to the Promised Lot. It will be necessary for the matter to be remitted to a judge of the Supreme Court to take that step. The amount so ascertained, with interest, should be charged upon the whole of the Dwellingup property. There will be no requirement of a subdivision of the Promised Lot as part of the remedy.

54 (1990) 170 CLR 394 at 501.

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52 Fixing of the amount will require the making of valuations and allowances for a range of matters, some of which have been indicated above. It is neither possible nor appropriate now to fix any closed list of matters properly to be taken into account when the matter is remitted⁵⁵. Further submissions and, if that court so chooses, additional evidence will be needed.

53 We should note that the judgment of Master Bredmeyer took matters of partnership accounting only up to June 1986 and, in any event, did not deal fully with all matters in dispute.

54 On one view, as to which we express no decision, for what is now some 12 years, the respondent has been deprived of a share of profits earned by the partnership from the Promised Lot and of rent from the house. Further, in fixing the sum to represent an appropriate monetary order there may be a case for an allowance in his favour representing a share of anticipated profits from the partnership in relation to the Promised Lot for a specified period of future years, perhaps contingent upon the joint lives of Mr and Mrs Giumelli.

55 On the other hand, an allowance would have to be made for the improvement to the value of the land since 1986 brought about, in particular, by Steven's work. In addition to the planting of fruit trees and the construction of sheds and coolrooms, the appellants contend there has been significant expenditure on water supply and storage systems.

56 To enable the matter to be dealt with adequately, it would be appropriate for the partnership action to be brought on concurrently for trial of remaining issues. The moving party in that action is the present respondent and he should be required by the Supreme Court, by direction in the present action, to take the necessary steps to prosecute to trial all remaining issues in the partnership action.

57 As we have indicated, the court seized with the present action should, as to it appears fit, grant leave for further evidence to be led upon the issues going to the computation of monetary relief. It may also be appropriate to adapt the procedure taken by R D Nicholson J at an earlier stage for the provision of valuation evidence.

Orders

58 The Court should make orders to the following effect. The appeal to this Court should be allowed. Orders 2, 8 and 9 of the Orders of the Full Court made on 12 March 1997 should be set aside and in place thereof Orders 1 and 2 of the

⁵⁵ cf *Stratulatos v Stratulatos* [1988] 2 NZLR 424 at 440-441.

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Orders made by R D Nicholson J on 26 May 1994 should be set aside. In place thereof it should be declared that (a) the respondent is entitled to payment by the appellants of a sum representing the present value of the Promised Lot, to be determined by a judge of the Supreme Court in accordance with the reasons of this Court, taking into account all considerations for which allowance should be made in calculating that sum so as to do equity between the parties to the action and all relevant third parties, and upon such further evidence as that Court may allow and (b) such sum, when so ascertained and made payable by the appellants, will be charged upon the whole of the Dwellingup property with interest under s 32 of the Supreme Court Act as fixed by the Supreme Court.

59 The respondent obtained a costs order in his favour of the action tried by R D Nicholson J. We would not disturb this order. Before this Court, neither side fully succeeded and we would make no order as to the costs of the appeal to this Court. The comprehensive picture which should be presented before costs of the proceedings in the Full Court of the Supreme Court are finally disposed of will be available only upon conclusion of the steps now to be taken before a judge of the Supreme Court. We would set aside Order 5 of the Orders of the Full Court and order that the costs of the appeal and cross-appeal to the Full Court be the costs of the remaining proceedings in this action in the Supreme Court.

60 Mr Giumelli, the first appellant, died on 21 January 1999 after the hearing of this appeal. That situation does not destroy or end the appeal but, before final orders are made, Mr Giumelli's legal personal representative or representatives should be made a party to the appeal⁵⁶.

61 Upon delivery of these reasons for judgment, the Court will order that the appeal stand over to a date to be fixed by the Registrar for the making of orders joining Mr Giumelli's legal personal representative or representatives as a party to the appeal and for the making of final orders disposing of the appeal.

56 See *Ryan v Davies Bros Ltd* (1921) 29 CLR 527 at 532, 536.

62 KIRBY J. The facts, the issues ultimately argued and the applicable authorities in this appeal from the orders of the Full Court of the Supreme Court of Western Australia⁵⁷ are stated in the reasons of the other members of the Court.

63 In relation to what was called the "third promise"⁵⁸, I prefer the conclusions of Ipp J⁵⁹ in the Full Court to those reached by the primary judge⁶⁰. My reasons are generally the same as those of the other members of this Court. I also agree with their conclusion that the principles established by this Court in *The Commonwealth v Verwayen*⁶¹ did not preclude the making of an order of the kind made by the Full Court. I cannot add to their Honours' analysis of the applicable rule.

64 However, I also agree that, in framing its orders, and fashioning the equitable relief which should be granted to Mr Robert Giumelli, the Full Court was obliged to consider, amongst the circumstances of the case, the matters which stood in the way of a simple order to convey to him the land envisaged by the "Promised lot". Unless allowance were made, in that regard, for the outstanding partnership suit, for the improvements effected upon the land by other members of the Giumelli family (and for the actual residence on the land by Mr Steven Giumelli, his wife and their children), the order made would exceed the requirements of conscientious conduct on the part of the late Mr Giumelli senior and his wife.

65 Once that conclusion is reached it is inevitable that the equitable relief proper to all of the circumstances of the case was the provision to Mr Robert Giumelli of a money sum rather than the conveyance to him of the "Promised lot". To permit that remedy to be provided, in lieu of that ordered by the Full Court, the orders proposed by the other members of this Court should be made, and the future conduct of the litigation should be as they have indicated.

57 *Giumelli v Giumelli* (1996) 17 WAR 159.

58 *Giumelli v Giumelli* (1996) 17 WAR 159 at 162 per Rowland J.

59 *Giumelli v Giumelli* (1996) 17 WAR 159 at 174-175 (Franklyn J concurring).

60 R D Nicholson J. His reasons are set out by the other members of this Court.

61 (1990) 170 CLR 394.