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Proprietary Estoppel in a Testamentary Context

By
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Introduction

With some level of trepidation, I venture into a discussion concerning the phenomenon known as proprietary estoppel.

In a leading decision of the House of Lords, ***Thorner v Major & Ors*** [2009] UKHL 18 ('***Thorner v Major***'), Lord Walker at [29] noted a passage from a UK text book, *An Introduction to Land Law* (2007). The author, Simon Gardner, had observed:

> There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither).

Nevertheless, Lord Walker ventured to explain:

> ... most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance (citation of UK text authority omitted).

My three cases (so far!)

A proprietary estoppel cause of action is something I have had to grapple with on at least three occasions over my thirteen (13) years in the General Division of the WA Supreme Court's Commercial and Managed Cases List (CMC list).

The first case was ***Clifton v Chinnery*** [2011] WASC 294 (delivered 26 October 2011) ('***Clifton***'). Like so many of these cases it began with a family dispute over a shed and a disputed caveat.

Clifton was a sad case about a mother who had fallen out with her son and his partner - over their claimed property interest in her rural property at Boddington - where they had resided with their children for some years in a renovated and upgraded shed.

That case did not arise in a testamentary context. The land owner, Mrs Chinnery, who was the defendant, was very much alive and active in her resistance against that claim. Nevertheless, I needed then to consider the principles underlying a claim by the son and daughter-in-law of proprietary estoppel - at between [45] - [75] of those reasons.

That exercise in ***Clifton*** came years before a seminal proprietary estoppel decision by the High Court in ***Sidhu v Van Dyke*** [2014] HCA 19; (2014) 251 CLR 505 ('***Sidhu***'). ***Sidhu*** was also not a decision made in a testamentary context. Nevertheless, the principles then canvassed by the High Court concerning proprietary estoppel sees ***Sidhu***, along with the High Court's earlier decision in ***Giumelli v Giumelli*** (1999) 196 CLR 101 ('***Giumelli***'), as the two leading Australian cases in the area, to date.

My second professional encounter with proprietary estoppel came in another disputed caveat and occupied shed dispute, ***Worthington v Worthington [No 2]*** [2014] WASC 448 ('***Worthington***'). The context was an unsuccessful interlocutory application to join that plaintiff's mother as a party on an alleged cause of action generically expressed as being in 'estoppel' and benefiting the plaintiff's mother. See my observations particularly at [26] and [27].

There was no occasion on that interlocutory application to deal with any implications of the High Court's decision in ***Sidhu*** which had earlier been delivered in May 2014.

More recently, the occasion did arise for me to consider a claim of proprietary estoppel in a testamentary context. That was in 2020. A trial, resulting in my reasons for decision in ***Lee v Australian Executor Trustees Limited as trustee of the Estate of the Late Ronald William Lee [No 3]*** [2020] WASC 447 (delivered 4 December 2020) presented a direct challenge against an estate grounded on a claim of proprietary estoppel. I will refer to that proprietary estoppel decision as ***Lee [No 3]***.

That decision was delivered effectively as a counterpart to an earlier corporate statutory oppression action arising between the same members of the Lee family - in relation to the substantial corporate asset side of the family - if I may use that expression.

The statutory oppression trial gave rise to my reasons in ***Russell v Lee Holdings Pty Ltd [No 3]*** [2020] WASC 346 (delivered 14 August 2020).

At [19] of the ***Lee [No 3]*** reasons I said ([2020] WASC 447 at [19]):

> ... This genre of equitable estoppel exposes the work of a court of equity, in effect, at its most powerful. It is a rare estoppel situation of equity actually providing a cause of action, and so, relief against unconscionable circumstances, through the principled work of equity as a 'sword', rather than a mere 'shield' against unconscionable conduct.

Four (hopefully) uncontroversial Safe Harbours

Notwithstanding the risks in an area fraught with terminological disagreements, I would like to attempt to identify at least four (4) areas of relative certainty around the notion of a proprietary estoppel in Australia observing, on my assessment, that the local law around this genre of estoppel is presently no different as between Australia to the position in England and Wales - as articulated by the House of Lords in ***Thorner v Major*** and a predecessor decision delivered only months earlier, ***Cobbe v Yeomans Row Management Ltd & Anor*** [2008] UKHL 55; (2008) 1 WLR 1752.

Safe Harbour 1

My first observation is that proprietary estoppel is, by character, an equitable estoppel, and not a common law estoppel.

By contrast, are estoppels *in pais* such as an estoppel by convention - a common law doctrine. In that realm an estoppel is a 'shield', not a sword.

Another manifestation of an equitable estoppel is a promissory estoppel. But there are greater and still unresolved issues around the extent and reach of this related kind of estoppel.

The promissory/proprietary estoppel distinction was explained by Lord Walker in ***Thorner v Major*** at [61] as:

> ... it is a necessary element of proprietary estoppel that the assurances given to the claimant (expressly or impliedly or, in standing-by cases, tacitly) should relate to identified property owned (or, perhaps, about to be owned) by the defendant. That is one of the main distinguishing features between the two varieties of equitable estoppel, that is promissory estoppel and proprietary estoppel. The former must be based on an existing legal *relationship* (usually a contract, but not necessarily a contract relating to land). The latter (i.e. proprietary estoppel) need not be based on an existing legal relationship, but it must relate to *identified property* (usually land) owned (or, perhaps, about to be owned) by the defendants**.** It is the relationship to identified land of the defendant that has enabled proprietary estoppel to develop as a sword and not merely as a shield (Lord Walker referring to the observations of Lord Denning MR in ***Crabb v Arun District Council*** **[**1976] Ch 179 - 187).

Safe Harbour 2

Edelman J observed in ***Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 6]*** **[**2015] FCA 825 at [769] that it is not yet finally resolved in Australia whether a promissory estoppel can operate as a cause of action.

But that is not so for a proprietary estoppel - which is firmly acknowledged by much case authority at the highest levels, to afford a standalone and viable cause of action for a plaintiff in respect of a claim to an interest in property.

In ***Giumelli***, Gleeson CJ, McHugh, Gummow and Callinan JJ observed towards a proprietary estoppel, at [6]:

> In these cases, the equity which founded the relief obtained [i.e. a constructive trust that was proprietary in nature] 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.

And see ***Sidhu*** at [2] per the plurality, namely French CJ, Kiefel, Bell and Keane JJ (with whose reasons Gageler J agreed at [89]).

In ***Saleh v Romanous*** [2010] NSWCA 274; (2010) 79 NSWLR 453, Handley AJA (with the agreement of Giles JA and Sackville AJA, at [74] said, contrasting features of these two equitable estoppels:

> A promissory estoppel is a restraint on the enforcement of rights, and thus, **unlike a proprietary estoppel**, it must be negative in substance. (my emphasis in bold)

Safe Harbour 3

Potential for a stand alone cause of action for a plaintiff, pursued as an equitable proprietary estoppel claim, to impact in the testamentary context and consequently, to intrude so as to bear upon estate and succession issues, is undoubted.

The reach of a proprietary estoppel is of course a lot wider than just in the testamentary realm and so, goes well beyond merely impacting against deceased

estates in its potential application - as the facts of cases like ***Sidhu*** and indeed ***Clifton***, illustrate.

Lee [No 3] is an example of a proprietary estoppel cause of action's direct and successful impact - in that context of a Bullsbrook farming property as the deceased's chief estate asset. There a disappointed son, John, who had not, on his father's passing, received the valuable cattle grazing property he believed was promised to him by his father, Ron Lee, (the owner) during Ron's lifetime. The successful equitable relief outcome for John was a result of the failure of the father's (home made) will to dispose of any of his personal assets, let alone leave the cattle property to John, as represented verbally on several occasions.

John then successfully pursued a Supreme Court action to obtain the cattle property against the trustee company that had been appointed by the court as administrator of his late father's estate.

Safe Harbour 4

The underlying facts relied upon as grounding a proprietary estoppel claim are always critically important and invariably, unique.

As will be seen, all too frequently, the underlying reasons given in proprietary estoppel cases and in decisions rendered by a court will likely span events unfolding across many prior years, or across even generations. The cases are invariably densely factual and always require a careful assimilation. No one

size fits all. Frequently, due to the death of one or more of the key protagonists, only one version of events is heard. Courts are always alive to the potential for a one-sided 'spin doctoring' of the evidence presented in those types of case.

The journey explained

What I propose in the course of this paper is first to focus upon the key features of a proprietary estoppel claim - as explained by the WA Court of Appeal in ***Currie v Currie [No 2]*** [2019] WASCA 2 ('***Currie***') and which I came to follow in ***Lee [No 3]***.

Second, I propose to mention something concerning the underlying ramifications of the two leading Australian proprietary estoppel cases of ***Giumelli*** and ***Sidhu***.

Third, I propose to descend a little more deeply into the facts of three cases - where proprietary estoppel claims have successfully impacted for a plaintiff. Two of them present in a testamentary context. ***Sidhu*** is the first of the cases considered, albeit not arising upon testamentary facts.

Further illustrations of the principle that I propose to discuss are a decision of the Court of Appeal of Victoria in ***McNab v Graham*** [2017] VSCA 352; (2017) 53 VR 311 ('***McNab v Graham***') and, if there is time, my decision in ***Lee [No 3].***

I propose to conclude with some brief remarks concerning another of my decisions, ***Shepherd v Galea and Byrne*** [2019] WASC 164 ('***Shepherd***'), upheld

on appeal by the WA Court of Appeal in ***Shepherd v Galea*** [2020] WASCA 152 (Quinlan CJ, Murphy and Mitchell JJA) delivered 11 September 2020.

In the context of a succession law conference, ***Shepherd*** presented, I thought, an interesting issue concerning a once venerable succession planning strategy - for the aging asset owner to dispose of all their assets in their lifetime - to prevent (as thought) the prospects of later disputation between the surviving relatives after passing.

That venerable inter vivos disposition strategy adopted towards a gifting away of the family home to only some of his children, saw the late Joseph Galea less than successful in inhibiting major dispute litigation in the family after his death.

Ingredients for a successful proprietary estoppel action

Across the Australian States ***Sidhu***, since its delivery on 16 May 2014, in a context of the High Court of Australia's clear recognition of proprietary estoppel as a viable equitable cause of action - has been extensively followed and applied. Non-exclusively, I mention some interesting intermediate court decisions, including the Victorian Court of Appeal's decision in ***McNab v Graham*** (Tate JA, with whom Santamaria JA and Keogh AJA agreed). That was a decision rendered in the testamentary context. Second, I mention ***Priestley v Priestley*** [2017] NSWCA 155 ('***Priestley***') (delivered 27 June 2017) (Emmett AJA with whom McColl JA and Macfarlan JA agreed - Macfarlan JA adding his own further reasons). More recently is the New South Wales Court

of Appeal's decision in ***Trentleman v The Owners - Strata Plan 76700*** [2021] NSWCA 242; (2021) 106 NSWLR 227 per Bathurst CJ at [116] - [125] and Leeming JA at [209] and [211].

In my home jurisdiction, the leading Court of Appeal authority is ***Currie*** under joint reasons of Murphy, Mitchell and Beech JJA and dismissing in that non-testamentary context an appeal from Le Miere J. The factual context was another farming family partnership dispute arising between brothers.

In ***Lee [No 3]***, I applied the explication of principles towards proprietary estoppel by Le Miere J, which at the appeal in ***Currie*** came to be endorsed without any controversy by the WA Court of Appeal at [89].

The ***Currie*** discourse about this equitable principle ranges across 13 points. It is a helpful assembly of key principles and the forensic elements of a proprietary estoppel claim (and with testamentary outcome emphasis today, on points 5, 6, 9 and 11 below):

> The judge outlined the principles of proprietary estoppel in terms to the following effect:
>
> 1. Proprietary estoppel is a variety of estoppel and may found relief which requires the taking of active steps by the defendant.
>
> 2. The elements of proprietary estoppel are:
>
> (a) the plaintiff assumes the future acquisition of ownership of property;
>
> (b) the plaintiff's assumption was induced, encouraged or acquiesced in by the defendant;

(c) the plaintiff has detrimentally relied upon his assumption; and

(d) it would now be against conscience for the defendant to be permitted to depart from the assumed state of affairs.

3. The fact that a plaintiff does not assume that a 'particular legal relationship' would exist between the parties is not determinative of a proprietary estoppel claim.

4. There may be circumstances, particularly in domestic/family cases, where the parties did not contemplate that a particular legal relationship would exist, but simply that an interest in land would be granted.

5. **An assumption that land will be received by will is capable of giving rise to a proprietary estoppel.**

6. In order to found an estoppel in favour of a representee, the representation must be **clear** in the sense that the words used by the representor must be able to be understood by the representee in a particular sense, thereby providing the basis for the assumption or expectation upon which the representee acts. **The words must be capable of misleading a reasonable person in the way that the representee claims he or she has been misled.**

7. To establish estoppel by encouragement it is not necessary that the defendant's conduct should be the sole inducement operating on the mind of the plaintiff setting up the estoppel. It is sufficient that the defendant's promises or assurances were an inducement to the plaintiff doing the things which constituted the detrimental reliance.

8. Where assurances given were intended to be relied upon and were in fact relied on, it is not necessary to look for an irrevocable promise since it was the other party's detrimental reliance on the promise that made it irrevocable.

9. If a proprietary estoppel is established, the appropriate relief depends upon the facts. The court must look at the circumstances to decide in what way the equity can be satisfied. **Relief may be moulded to recognise practical considerations, including the need to achieve a clean break so far as possible, and to avoid or minimise future friction.**

10. The court must also take into account the impact of its orders on relevant third parties and any hardship or injustice they would suffer.

11. **The court will enforce a reasonable expectation which the party bound** created or encouraged, **unless the circumstances require a different outcome.**

> 12. Conditions may be imposed on a plaintiff to take into account conditions subject to which the plaintiff assumed he or she would acquire ownership of the property.
>
> 13. The circumstances may be such that the equity raised by the defendant's conduct can only be accounted for by declaring a constructive trust, or ordering the transfer of property, during the defendant's lifetime. That is notwithstanding that the relevant representation was that the property would be transferred by will upon the defendant's death, or that there was no representation as to the timing of the transfer, if the defendant has unconscionably disavowed or resiled from the assumed or expected position during the defendant's lifetime. However, in those circumstances 'the acceleration of the benefit the subject of the disappointed expectation' may be a factor relevant to the assessment of the scope of the relief granted. (my emphasis in bold)

Whilst mentioning decisions of intermediate Courts of Appeal across Australia, I also note a decision of the Full Federal Court of Australia, ***Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788*** [2021] FCAFC 121; (2021) 396 ALR 27. Those appeal reasons were delivered in a context of unsuccessful arguments concerning an attempted invocation of a promissory estoppel. Nevertheless, the reasons in ***Sidhu*** were closely discussed. The overall contemporary discussion of principle found in the joint reasons of McKerracher and Colvin JJ, as well as in the dissenting reasons of Derrington J, is, if I may respectfully say, is both contemporary and enlightening.

Antecedents for proprietary estoppel relief

In ***Priestley***, Macfarlan JA returned to discuss what he had identified in earlier appeal reasons as two distinct lines of authority concerning claims grounded upon a proprietary estoppel.

The first line of cases, descending from ***Dillwyn v Llewellyn*** (1862) 45 ER 1285, is where a defendant makes an explicit promise or representation and a plaintiff later acts in detrimental reliance upon the promise or representation.

In earlier reasons delivered in ***Milling v Hardie*** [2014] NSWCA 163 at [52], Macfarlan JA had explained that both ***Giumelli*** and ***Sidhu*** were examples of the first line of proprietary estoppel type of case.

A second line of case authority in this realm was further explained by Macfarlan JA as descending from ***Ramsden v Dyson*** (1866) LR 1 HL 129, illustrating the scenario of an estoppel by acquiescence.

The second line of estoppel case can be applicable where a person say, improves land whilst under a mistaken assumption that it is his own, with the owner of the land fully aware of the mistake, yet deliberately doing nothing positive to disabuse the land's improver of their error. This is sometimes also called, 'lying by'.

Equity will prevent the acquiescent land owner with knowledge from unconscionably profiting from such a mistake by an improver of their land.

The 5th edition of *Meagher Gummow & Lehane's Equity Doctrines and Remedies* categorises the two lines of case as **first**, proprietary estoppel by encouragement and **second**, proprietary estoppel by acquiescence, observing:

> The estoppel associated with ***Dillwyn v Llewellyn*** is otherwise known as an estoppel by encouragement. It binds the donor of the property where after the making of an imperfect gift, the donor induces the donee to act on the assumption that the imperfect gift is effective or on the expectation that it will be made effective. The other estoppel, descendant from ***Ramsden v Dyson***, is otherwise known as estoppel by acquiescence or standing by. By that estoppel, equity binds the owner of property who induces another to expect that an interest in the property will be conferred on that other person.

See as well ***Rowe v Roman Catholic Archbishop of Perth [No 2]*** [2022] WASCA 28 at [28] citing *Meagher, Gummow & Lehane* at [17 - 065].

Sidhu v Van Dyke **: the facts**

The wonderful thing about most proprietary estoppel cases is that they provide ready made film scripts. Invariably, the underlying facts are highly personal. They invariably extend over a saga of years before litigation results and culminates and sometimes, after at least three visits to a court, with different results along the way.

On full display in such cases are the usual gamut of human frailties, lust, noble dreams, betrayals, raw emotions and ultimately either vindication or despair - depending on the litigation's outcome.

The facts underlying ***Sidhu*** deliver almost a perfect script for a Netflix mini-series blockbuster!

I only have time to skate quickly over the underlying facts. They are found very conveniently collected and summarised in the reasons of Tate JA in ***McNab v Graham*** at [68].

In very brief compass, ***Sidhu*** saw a claim of proprietary estoppel advanced by a woman - on the basis of multiple verbal inducements to her made. Her lover was the husband and co-owner of the station land ('Burra Station'). The object of his affection and promises was his wife's sister-in-law. She was promised repeatedly that a cottage ('Oaks Cottage') on the station and where they had conducted their long term liaison - would at some stage be hers.

But Ms Van Dyke's enjoyment of the cottage and its land had become thwarted by a failure to get a subdivisional assent from the landowner's unco-operative wife for a subdivision. Upon her divorce Ms Van Dyke did not seek a property settlement from her ex-husband - thinking she would get the cottage. She also decided not to pursue more fulltime work - and instead, to perform more unpaid work at the station by (valuable) maintenance and renovation work on the cottage - until it was later subsequently destroyed by a fire.

The love affair eventually ended. The homestead block was never able to be subdivided to permit the cottage land to be carved out and transferred to Ms Van Dyke.

Someone with artistic flair should snap up the rights to what would be a mini-series akin to a 'Thornbirds' like saga. I am happy to be an executive producer if required.

The proprietary estoppel claimant to the cottage and land, by Ms Van Dyke, failed at first instance. Ward J (as she then was) said she had been left not satisfied by the trial evidence that the claimant had been led to a detrimental reliance on Mr Sidhu's assurances to her.

However, Ms Van Dyke later succeeded on her appeal to the New South Wales Court of Appeal.

Even later still, special leave was obtained, and another appeal was taken by Mr Sidhu to the High Court of Australia.

The High Court's reasons do not articulate any startling new principles concerning the ingredients of a proprietary estoppel cause of action. Such principles were essentially taken as settled - by reference to endorsing what was stated earlier by the High Court in ***Giumelli***.

The earlier as now seen 13 principles collected in ***Currie*** are framed by reference to what will be found in ***Giumelli*** and later, in ***Sidhu***.

But there nevertheless emerged three vital aspects within ***Sidhu***, which may be highlighted towards the running of a successful proprietary estoppel claim of action.

Three aspects of *Sidhu*

The three aspects of ***Sidhu*** I wish to highlight from out of the plurality reasons of French CJ, Kiefel, Bell and Keane JJ and the supporting further reasons of Gageler J are addressed below.

First aspect of *Sidhu*: No presumptions or shift of onus

Sidhu is important from a forensic perspective in terms of the proving at a trial of a claim of proprietary estoppel. Towards the proving of a requirement for detrimental reliance, the analysis undertaken in the Court of Appeal canvassed questions of suggested onus, inference and use of a 'presumption' towards proving a forensic establishment of detrimental reliance at a trial (where the appellant landowner, Mr Sidhu, and his wife had not given evidence). As the original plaintiff at trial, Ms Van Dyke had given evidence and was heavily cross-examined).

At the appeal in the High Court a strong complaint made by the husband/appellant was that the New South Wales Court of Appeal had reversed, in effect, the legal onus of proof - towards a plaintiff showing reliance - by an erroneous application of a suggested presumption favouring the fact of a reliance being found on the facts, arising, in effect, from out of the intrinsic character of the promises or representations made to Ms Van Dyke.

Although it did not affect the ultimate end result of Mr Sidhu's appeal ultimately failing, the High Court did agree with his point and found error in this respect.

The High Court plurality observed at [58] on the Court of Appeal's error of principle, in speaking of deploying a presumption of reliance, in this context of an equitable estoppel claim. The error was in failing to recognise that it was the very conduct of the representee, as induced by the representor, which was the cornerstone to found an equitable intervention. Any use of presumptions in that environment was out of place as it distorted a proper focus on ascertaining the existence of causatively induced resulting conduct by the person who received the inducements.

Reliance was a necessary fact to be found at the trial. But reliance was not to be imputed on a basis of evidence that fell short of the proof of that necessary fact.

It was the key factual ingredient of an actual reliance by a promisee (representee), and a resulting adverse state of affairs so created, which answered academic concerns of principle - that the work of an equitable estoppel ought not be allowed to outflank the common law of contract, as had once been expressed in ***Jorden v Money*** (citation omitted). The academic concern was over dispensing by this equitable path with a need for the proving of (legal) consideration - if what was otherwise a voluntary promise were, in effect, to be rendered enforceable by a court - as if it were of the same character as a contractual promise that is necessarily supported by a true legal consideration (citing at footnote 64 ***Commonwealth v Verwayen*** (1990) 170 CLR 394 ('***Verwayen***') at [410], [416]):

> 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. …

(and referring back to earlier observations in ***Giumelli*** at [35] - which in turn had approved observations by McPherson J in a 1985 Queensland decision, ***Riches v Hogben*** [1985] 2 Qd R 292 at [301], namely:

> 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.

Accordingly, the ***Sidhu*** plurality, said at [61]:

> … The legal burden of proof borne by a plaintiff did not shift … To speak of a shifting onus of proof is both wrong in principle and contrary to authority. The respondent at all times bore the legal burden of proving that she had been induced to rely upon the appellant's promises.

Resolving the forensic error over what was the non-existent presumption as to reliance, the ***Sidhu*** plurality's reasoning had exposed the underlying rationale for a finding of an equitable estoppel (and axiomatically so, for a proprietary estoppel), namely by reason of the ascertainment of a level of detrimental reliance by the promisee/representee, so induced.

To refute arguments a court of equity was, in effect, enforcing voluntary promises and this would effectively subsume and would wreck the law of contract, particularly for want of a true legal consideration, the clear focus of principle for this relief needed to be directed at the resultant wounded party's conduct - and not on the (broken) promise or unfulfilled representations.

With an equitable estoppel the focus was not at the (broken) promise. Rather, it was on the detrimental reliance by the claimant - acting upon an expectation that had been unconscionably created. That must be the true focus of the enquiry in an equitable estoppel claim.

That true focus could not be allowed to be distorted or deflected - by a 'shortcut' resort to a presumption to ground the factual finding of a detrimental reliance.

Second aspect of *Sidhu*: No need to be the 'sole' cause

Fortunately for Ms Van Dyke, there was filed on her behalf a respondent's notice of contention. This, in effect, saved the day for her at the High Court appeal.

The notice, once deconstructed somewhat, raised a truer question for the court as identified by the plurality, putting aside then erroneous notions as to reliance presumptions and by using more appropriate terminology - focusing on the impacts of all the evidence.

As reframed, the correct question was articulated at [66]:

> … whether, when all the facts are in, the court is satisfied on the balance of probabilities that the promises in question contributed to the respondent's conduct in deciding to commit to her relationship with the appellant and adhering to that relationship (with all that that entailed) for eight and a half years.

Attending to that truer enquiry, that was conducted by reference to **all** the evidence, the High Court, in effect, found the primary judge, in effect, had set the bar too high - whilst seeking to ascertain whether or not there had been a

detrimental reliance by Ms Van Dyke on Mr Sidhu's assurances to her about receiving the cottage.

Close questioning of Ms Van Dyke by her cross-examination at trial had obviously been significant in her result at trial. She seemed to have accepted at points that she possibly would have acted as she did anyway, and even irrespective of the promises that were made to her by Mr Sidhu about the cottage.

But the High Court found there did not need to be proved any **exclusive degree** of reliance by her representee.

To that forensic end, the ***Sidhu*** plurality said, at [71]:

> … [the] finding that the appellant's promises 'played a part in her willingness to spend time and effort in the maintenance and improvement of The Oaks cottage and assisted on the Burra Station property' warranted the conclusion that the respondent had discharged the onus she bore on the basis that to establish estoppel by encouragement it is **not necessary** that the conduct of the party estopped should be **the sole inducement** operating on the mind of the party setting up the estoppel. (my emphasis in bold)

(the High Court plurality citing at footnote 100, Handley QC's 2006 text *Estoppel by Conduct and Election* page 170 at par [11 - 011]).

Sometimes the evaluative criteria used for proving a detrimental reliance at a trial are expressed as being whether the representation was a 'significant factor', referring back to Lord Neuberger's observations in ***Steria Ltd v Hutchinson*** [2007] ICR 445 at 465 [117].

> 'Contributing cause' of the representee's conduct was a 'sufficient connection between the assumption and the position of detriment'.

(see ***Sidhu*** plurality observations 73).

By the concurring observations in ***Sidhu*** of Gageler J at [90], his Honour, in turn, referred in this sphere to reasons of Rich, Dixon and Evatt J in ***Newbon v City Mutual Life Assurance Society Ltd*** (1935) 52 CLR 723 at 735.

Gageler J said at [90]:

> The respondent **did not need** to establish that the belief to which she was induced by the appellant's representations was the **sole or predominant** cause of the course of action or inaction she took but, in the language of … ***Newbon v City Mutual Life Assurance Society Ltd***, she did need to establish that the belief was a '**contributing cause**'. (my emphasis in bold)

That clarification that emerged in ***Sidhu*** concerning the degree of detrimental reliance that needs to be proven at a trial - is the second forensic aspect of importance I highlight - found both within the plurality reasons and also in the concurring additional reasons of Gageler J.

Third aspect of *Sidhu*: Relief by making good on what is promised and expected

The last point I would seek to highlight to take away of ***Sidhu*** is its welcome express clarification concerning the end relief, particularly in light of the end relief given under the High Court's earlier proprietary estoppel decision, ***Giumelli***.

In effect, the High Court in ***Sidhu*** firmly rejected a once favoured approach of minimalism - towards the level of the appropriate equitable relief in personal relationship focused cases.

One of the arguments rejected at the appeal in ***Sidhu*** was that the constructive trust relief orders, issued in Ms Van Dyke's favour by the New South Wales Court of Appeal, went too far.

It had been argued in the High Court that if she were to remain successful, nevertheless even so, only lesser relief, as in the nature of equitable compensation assessed by reference to the value of just the worth of her contributions to the cottage's value ought to have been the relief ordered instead.

That minimal compensation relief argument was not successful. Instead, the level of compensation was to be the value of the cottage and land (albeit the cottage had later been destroyed by the fire) as at the date of judgment.

At the earlier ***Giumelli*** appeal the High Court had in the end result varied the Western Australian Court of Appeal's relief orders - which had required the conveyance of a Dwellingup property to that claimant son - under the medium of constructive trust relief as ordered in his favour. On the appeal to the High Court in ***Giumelli***, the court rejected property conveyance end relief, altering the end relief down to an award of equitable compensation, secured by a charge.

However, as came to be explained in ***Sidhu***, the rationale for granting that reduced level of relief in ***Giumelli*** was not to be found in the application of a principle of relief minimalism by a court of equity. Rather, it was found in the underlying factual ***Giumelli*** circumstances, particularly a pending further unresolved partnership winding up proceedings and in the potential level of possible prejudice to other family members, one of whom had made valuable improvements upon the same land - on which a house and orchard had been situate.

But from a testamentary succession ramifications perspective, it was the High Court's expressed amenability in ***Sidhu*** to granting relief that ultimately will make good on promises and representations made as inducements in compensating Ms Van Dyke for her not receiving the Oaks cottage and land - on which there had been found proved her detrimental reliance - that is perhaps the appeal's most noteworthy long term feature.

This is a significant message to take out of the plurality reasons in ***Sidhu***. In the realm of these types of cases concerning personal disputes over claims to property, it is their human dimension and the clear acknowledgement of a level of human suffering manifested in such cases - that emerged to be emphasised towards any finding of appropriate level of relief from a court of equity.

To that end, the reasons and result in ***Giumelli*** were explained by ***Sidhu*** as being fully consistent with a representee's more fulsome property acquisition

expectations being met - see the ***Sidhu*** reasons at [82], explaining the ***Giumelli*** plurality reasons of Gleeson CJ, McHugh, Gummow and Callinan JJ at [6] and [40] - [48].

The plurality in ***Sidhu*** at [83] also emphasised earlier observations made in ***Verwayen*** by Deane J:

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

Verwayen, of course, was an infamous promissory estoppel case where representatives of the Commonwealth, in effect, had promised the lawyers acting for the survivors of a notorious naval collision incident - that they would not take a limitations statute defence against the plaintiffs. Later, they did just that. The High Court, by a majority, held the Commonwealth was estopped from raising the limitation defence.

Although never, as a matter of principle, to be viewed as the enforcement of a voluntary promise where legal consideration is not given, a court ordered relief obligation upon a defendant, as the subject of estoppel relief, to require that defendant to take 'active steps' - including by the affirmative performance of a promise made to deliver the making good of the acquisition of property

expectation generated by the promise - delivers, in effect, a very similar end relief outcome.

***Sidhu*: 'usual' relief**

At [84] of the ***Sidhu*** plurality reasons, some earlier observations made by Nettle JA (as he then was) in a 2007 decision in the Victorian Court of Appeal - came to be identified with approval and applied. These were from out of his Honour's reasons in ***Donis v Donis*** [2007] VSCA 89; (2007) 19 VR 577 ('***Donis***') at 588 - 589 [34]. The plurality reasons in ***Sidhu*** at [84] say in that regard:

> ... But this case is one to which the observations of Nettle JA in ***Donis v Donis*** are apposite:
>
> > '[H]ere, the detriment suffered is of a kind and extent that involves **life-changing decisions** with **irreversible consequences** of a **profoundly personal nature** … **beyond the measure of money** and such that the equity raised by the promisor's conduct can only be accounted for by **substantial fulfilment of the assumption** upon which the respondent's actions were based. (my emphasis in bold)

Putting aside *de minimus* types of cases of the ilk described by Deane J at [413] in ***Verwayen*** - where proportionately only a small award of equitable compensation presents as more appropriate relief - the greater remedy of ordering a constructive trust by a court over land that, in effect, compels the performance by a fulfilment of an assumption that has been detrimentally relied upon by a recipient, is likely to be ordered. Such expectation fulfilment relief looks now to be favoured as being at least the prima facie '**usual**' position

towards end relief - notwithstanding what may once have been thought after the ***Giumelli*** appeal relief.

Paragraph [85] of the ***Sidhu*** plurality reasons says:

> The appellant's argument, rightly, sought no support from the discussion in cases decided before ***Giumelli v Giumelli*** of the need to mould the remedy to reflect the 'minimum relief necessary to do justice between the parties'

referring by reference to footnote 93 to earlier decisions of the High Court in ***Verwayen*** at [416] and [429] and ***Waltons Stores (Interstate) Ltd v Maher*** (1988) 164 CLR 387 at [404] - [405], [419].

They continued at [85]:

> There may be cases where '[i]t would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption' [referring to ***Verwayen*** at [413]] but in the circumstances of the present case, as in ***Giumelli v Giumelli***, **justice between the parties will not be done by a remedy the value of which falls short of holding the appellant to his promises**. While it is true to say that 'the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct' [referring again to ***Waltons Stores (Interstate) Ltd v Maher*** at [419]] where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment **the relief which is necessary in this sense is usually that which reflects the value of the promise**. (my emphasis in bold)

Lest there be doubts over a required fulfilment of a promised outcome as the usual relief, the plurality continued at [86]:

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

Concluding observations on *Sidhu*: succession planning

From a succession planning perspective, the High Court's acknowledgement in ***Sidhu*** of a 'usual' relief approach - against minimum equitable relief outcomes - as is observed in the plurality reasons in ***Sidhu***, is now significant to the provision of sound professional advice in such situations.

Local limitation statutes aside, there is no conceptual reason why a court ordered proprietary constructive trust - ordering that a promised property be held for the disappointed plaintiff - otherwise left 'let down', should not be the favoured relief, where expectations are not otherwise met under the workings of a testamentary instrument, or (as in ***Lee [No 3]***) an intestacy. Such a disappointed person may viably, depending always on the facts, pursue equitable relief against the estate and against its property assets to redress their disappointment.

The principled rationale for this level of relief approach - that fulfils unconscionably engendered expectations - is captured by the adoption in ***Sidhu*** of Nettle JA's description of the life-changing decisions, carrying irreversible consequences of a '**profoundly personal nature**'. The underlying human dimension recognised in those observations is strongly evident.

By contrast are some 'colder' commercial relationships, as between say disappointed property coventurers - as was discussed by Lord Walker of Gestingthorpe in ***Cobbe v Yeoman's Row Management Ltd & Anor***.

At [68], his Lordship observed there towards more commercially grounded facts in that proprietary estoppel claim:

> It is unprofitable to trawl through the authorities on domestic arrangements in order to compare the forms of words used by judges to describe the claimants' expectations in cases where this issue (hope or something more?) was not squarely raised. But the fact that the issue is seldom raised is not, I think, coincidental. In the commercial context, the claimant is typically a business person with access to legal advice and what he or she is expecting to get is a *contract*. In the domestic or family context the typical claimant is not a business person and is not receiving legal advice. What he or she wants and expects to get is an *interest* in immoveable property, often for long-term occupation as a home. The focus is not on intangible legal rights but on the tangible property which he or she expects to get. The typical domestic claimant does not stop to reflect (until disappointed expectations lead to litigation) where there is some further legal transaction (such as a grant by deed, or the making of a will or codicil) is necessary to complete the promised title. …

See also [82].

At [87] his Lordship continued:

> … When a claim based on equitable estoppel is made in a domestic setting the informal bargain or understanding is typically on the following lines: if you live here as my carer/companion/lover you will have a home for life. The expectation is of acquiring and keeping an interest in an identified property. In this case, by contrast, Mr Cobbe was expecting to get a contract. …

Another example of a proprietary estoppel action in a testamentary setting: *McNab v Graham*

Next, I wish to discuss the comprehensive reasons as delivered by Tate JA in the Victorian Court of Appeal in ***McNab v Graham***.

This was a proprietary estoppel claim successfully brought against executors by the disappointed inhabitants of an adjoining property that had been promised to them by a deceased testator - in return for what had been their long-term personal carer efforts to the deceased and his widow.

Again, the underlying facts display another generational saga - long, detailed and highly personal - another readymade script for a future Netflix mini-series drama - perhaps 'The Sword of Estoppel', Season Two.

Beyond the lucidity of her Honour's reasons given towards all of the leading case authorities in the area, including ***Sidhu*** and ***Giumelli***, this Victorian case is important again, towards the issue of end relief - evaluated there against an attempted defensive invocation of the local Victorian limitation statute - under circumstances where there had been a delay of over 15 years in a bringing of the eventual claim.

In the end, the limitation defence argument failed badly. But along the way the institutional, as opposed to a merely remedial nature of constructive trust relief as ordered in the face of an established proprietary claim against land - was exposed.

Essentially, it was held that the local Victorian limitation statute could not be validly engaged as a defence, because another of its provisions (s 21(1)(b) of the *Limitation of Actions Act 1958* (Vic)) exempted proceedings for the '**recovery of trust property**' from them being caught under that limitation statute.

This time events unfolded over many years at Moonee Ponds, Victoria. They spanned a close and neighbourly relationship concerning an occupation of two

adjoining maisonettes (numbers 73 and 75 Ormond Road) across a period of late 1973 through to late 1997. That was when the executor promisor died.

The Grahams had been promised and had expected the late Mr Turner's will would grant to them, as promised, their absolute ownership of number 73 (the property). They were disappointed by the terms of the will.

Mr Turner's will only left them a life interest in the property. The residue was given over to a local hospital in East Melbourne.

On the day of Mr Turner's funeral, in November 1997, a local lawyer, Mr McNab, elder partner in a law firm (of which his two sons, the defendants, were the executors and junior partners) told Mr Graham verbally about the life interest content of the will - which Mr McNab Senior had himself prepared on instructions of Mr Turner - in relation to the granting only of a life interest to the Grahams over the number 73 maisonette. Told of the Grahams' thoughts of challenging the will, Mr McNab told Mr Graham they had 'no hope of success' and that if such a claim were made it would be 'defended'.

Mr Graham's trial evidence was, at [22], that Finlay McNab was:

> a no nonsense, straight talking bloke who knew his job.

Consquently, Mr Graham for many years accepted the position, in effect, was hopeless.

Proceedings for proprietary estoppel relief were only commenced in September 2015 out of the County Court of Victoria.

The Grahams came then to be successful at first instance in the County Court and also, later in the Victorian Court of Appeal in November 2017 under Tate JA's reasons.

Another testamentary illustration of proprietary estoppel at work: Lee family disputation: Re *The Australian Executor Trustees Ltd as trustee of the estate of the late Ronald William Lee [No 3]* [2020] WASC 447 (delivered 4 December 2020)

Next, I wish to direct some more attention to a third potential mini-series script, namely my own decision concerning a Bullsbrook cattle property, the personal asset of the late Ron Lee, in ***Lee [No 3]***.

This decision, rendered after ***Sidhu***, was an orthodox application of principles of proprietary estoppel used as a cause of action. The end relief took effect against administrators of the estate of the lee family patriarch, the late Mr Ron Lee.

Contextually, the ***Lee [No 3]*** decision, as I refer to it, should be read with my earlier decision in 2020, concerning substantial corporate held assets of the Lee family - canvassed in a context of a corporate statutory oppression action advanced by two sisters (shareholders) and combined with a derivative action brought by leave against Lee Holdings Pty Ltd - the apex holding company in a

pyramid corporate empire structure set up by Mr Ron Lee as sole governing director and governing shareholder during the early 1960s: see ***Russell v Lee Holdings Pty Ltd [No 3]*** [2020] WASC 346 (delivered 14 August 2020). AET, as the appointed trustee of Mr Lee's estate, was fourth defendant in that action.

Time and space does not permit the exposition of another underlying saga surrounding the corporate oppression action. Save to say, statutory corporate oppression had essentially been admitted by the time of the trial by the defendant parties (Ron Lee's widow, Fay, and his son, John).

Fairly typically, the real issue in dispute at the statutory oppression trial was the proper end relief.

At the end, the relief question was essentially which side of a divided Lee family was prepared to buy out the family shareholders on the other side of the family - and at what price.

In that environment I eventually fixed a ceiling share price by reference to market value evidence as to the corporate assets (exceeding $13.5 million). I allowed the protagonists (the plaintiff sisters on one side, vis-à-vis their brother, John, and their mother, Fay, on the other) to submit confidential sealed buy out bids for the shares in the holding company not held already. A winding up order was the back-up outcome - in the event there were no acquisition bids made per

share for the unheld shares in Lee Holdings, or there was a failure to settle on an otherwise winning bid.

Ultimately, I fixed a floor price of $215.40 per share by reference to 63,124 shares issued in Lee Holdings. After receipt of competing bids from each side of the family, the two plaintiff sisters emerged as the higher bidders at $216.13 per share in respect of the shares in Lee Holdings they did not already hold as between themselves. I was informed later that a settlement came to be effected in due course at that winning bid price. There was no appeal.

The personal farming assets of the late Ron Lee: another action [*Lee No 3*]

The other side of the Lee empire was concerned with cattle farming properties - all held personally in the name of Ron Lee at the time of his death.

Unfortunately, notwithstanding his wealth, Ron's will had been personally written out by him on a home-made will form. That instrument was exposed after Ron's passing as being wholly ineffective to dispose of any of his property - resulting then in what was a de facto intestacy - which required an appointment of AET to be administrator of Ron's estate - that would otherwise then be distributed on the statutory basis provided as between his widow and his three children.

Significantly, as between Ron and his son, John, a number of rural properties all owned by Ron - in the north-east of Perth in the Bullsbrook area - had been

acquired piecemeal and built up as eventually, a successful beef cattle operation over many years.

Perhaps aligning with many of this genre of proprietary estoppel by encouragement case, John, at his father's urging, had given up his university studies in commerce to devote himself (for low level remuneration) to his working of long hours of labour on these rural properties - with his father closely overseeing his work. That was until age and ill health had forced Ron Lee to pull back, essentially from then leaving the operation and work in John's hands.

The cattle property, of course, was still held exclusively in the name of the late Ronald William Lee at his death.

As mentioned, Ron's will was ineffective.

Ron's administrators then found themselves in the unenviable position of defending at trial John's property claim made against Ron's estate - grounded on proprietary estoppel - based upon John's contended detrimental reliance, on his evidence of multiple verbal representations and assurances made to him over many years by his father - to the effect John one day would receive the Bullsbrook property as his.

Once again a generation spanning and dramatic human saga came to be exposed across the trial and in my reasons. Again, it provides a perfect script for a mini-series series three.

Over the course of the reasons in ***Lee [No 3]***, I collect a number of essentially uncontradicted events concerning multiple verbal assurances made to John by Ron about his one day receiving the Bullsbrook cattle property.

The decision is an orthodox application of the proprietary estoppel cause of action - which action by John impacted against the administrators of the late Ron Lee's estate. It was a decision rendered in the wake of the High Court's 2014 reasons in ***Sidhu*** (supra) and principles as seen explained in ***Currie***.

I came to conclude the reasons in ***Lee [No 3]***:

> [76] Possibly, had the 2003 estrangement between Ron and John continued, very different trial questions might have emerged. However, I am satisfied that this 30 month of so hiatus was overcome and that, assessed holistically, John's farm work contributions between 1982 and 2016, made towards the establishment and enhancement of the Bullsbrook farm (and before that towards the Farndon Downs property) was significant, in hours and economically valuable. I am satisfied that this work was performed in reliance upon a reasonable expectation created in John, by Ron's words to him, that the Bullsbrook farm would eventually be John's own. John received little remuneration from Ron for his work under these arrangements. The understanding was a longer term reward of the farming land itself for John.
>
> **[77]** This expectation was engendered by Ron within a family environment and a culture of hard work towards a common family greater long term good, which John had experienced essentially from childhood. The reasonable expectation created in John by Ron (fostered by Fay as well) was that as the sole male sibling in the family, if John devoted himself to a life career as a farmer, working diligently upon the family farm alongside his father, at a point to be determined by Ron - but, by inference, certainly not

> later than at his father's death (whenever that might transpire) or whenever the Lee family accountant (Frank Iannantuoni) thought it appropriate - that the Bullsbrook farm would be transferred to John's sole ownership. John would then enjoy full beneficial ownership in return for his largely unremunerated farm work efforts made over his working life. To that end, I reject the contention by AET that what was said to John by his father as to John receiving the farm in due course was ambiguous, equivocal or insufficiently certain in order to be reasonably relied upon by John. My assessment of the trial evidence is wholly and strongly to the contrary.

That saga of the Lee family litigation, particularly the proprietary estoppel action by John concerning his claim to his father's rural cattle operation at Bullsbrook, exemplifies that a cause of action in proprietary estoppel is a true cause of action with real 'teeth' - fully capable of impacting so as to upset a prima facie outcome delivered under the terms of a will, or on an intestacy.

More particularly, the decision of the High Court in ***Sidhu*** emphasising an amenability in a court of equity to require an unfulfilled promise or representation, that is made and is then detrimentally relied upon - to be, in effect, later enforced by court ordered relief, is a significant clarification of the law where there is a proven detrimental reliance. ***Lee [No 3]*** was another case of life changing decisions in a context of relationships of a profoundly personal nature.

For such domestic situations the remedy of equity goes beyond the measure of money and can be accounted for, as the High Court observed, by reference to Nettle JA's observations in ***Donis***, by:

> ... a substantial fulfilment of the assumption upon which the respondent's actions were based.

See also ***Sidhu*** at [84].

Some wider concluding observations: get rid of it inter vivos?

Just in case the force of cases that are seen to alter or disrupt testamentary or intestacy outcomes might stir inclinations towards thinking that all such problems are best avoided by fully disposing of a person's hard won accumulated assets on an inter vivos basis - to stop the family members later fighting over them after death, then I suggest considering the underlying facts of a further potential mini-series script (perhaps the best to date).

This was ***Shephard v Galea and Byrne*** [2019] WASC 164 (delivered 17 May 2019), later upheld on the appeal decision of the Western Australian Court of Appeal (Quinlan CJ, Murphy & Mitchell JJA) as ***Shephard v Galea*** [2020] WASCA 152 (delivered 11 September 2020).

The extraordinary facts of another enigmatic life of that family patriarch, Joseph Galea, and the subsequent disputation as between his four children are collected and canvassed in all those reasons.

Of special interest to me, however, albeit less significant at the appeal, was the nature of the asserted standing to bring that action - in the plaintiff. The action was brought by one of the deceased's daughters, herself a named beneficiary in the will (the estate holding negligible assets), but who was not a named executor.

This was a so called derivative action - brought against her brother and sister (as the named executors) - said to be seeking to recover back for the estate, being her father's fiscally depleted estate - a gifted away residential property in Bassendean (that Joseph as a young man had personally built, brick by brick, by his bare hands after arrival in Australia from Malta in the 1950s).

A unique area of the law concerning estate challenges that I needed to become familiar with in that litigation was discussed by Powell J in ***Ramage v Waclaw*** (1988) 12 NSWLR 84. And as to that, see my observations at [171] - [177].

Essentially, 'exceptional circumstances' were said to be needed to be demonstrated by a beneficiary in order for them to be allowed to bring such an action on behalf of the estate, rather than the executors.

The nature of that action, however, contending for undue influence, or by unconscionable conduct upon her late father by two of her siblings - required a four-day trial to run - in order to ascertain whether any level of exceptional circumstances necessary to get the standing to bring such a derivative action, existed or not.

In the end, the whole action failed. But I was left concerned that family emotions, in effect, once again had got in the way of commercial rationality.

As I said at [191] of those reasons:

> Consequently, an expanding future horizon of even more litigation by disgruntled adult children over assets that were disposed of by their parents during the parents' lifetime needs to be closely monitored as a most unwelcome trend. More family litigation is a bad thing for society and for community harmony more generally. It brings discord and fragmentation that destroys families. In my view, the law is in need of some serious and urgent legislative reform here. In my view, it should be necessary, at least, for would be plaintiffs such as Georgina to first obtain permission of the court as a matter of merit before being able to proceed with a derivative action of the present kind.

Thank you for your very kind invitation to address this most worthy conference.

KJM
August 2022