EQUITABLE INTERESTS IN LAND CREATED BY INFORMAL ARRANGEMENTS

College of Law, Sydney

29 March 2011

Edmund Finnane[1]

Introduction

1. Bryson JA said in *Khoury & Anor v Khouri*[2]:

> "It must be obvious to anyone with any business experience and to any adult who gave any thought to his or her own interests that an arrangement involving significant sums of money about something so important as ownership of a family home should be written down. There has been a law requiring dealings with land to be in writing if they are to be effective in England for well over three centuries, and in Australia for as long as there has been a legal system here, and what that law requires is no more than reasonable people would do if they considered their own interests."

2. Unfortunately, people do not always approach dealings concerning land, or large sums of money that are invested in land, as they ought to, acting reasonably. However, to recognise no interests in land other than those that are supported by written evidence, would be to play into the hands of

---

[1] BA/LLB LLM, Barrister, 13th Floor Wentworth Selborne Chambers, Sydney.
[2] (2006) 66 NSWLR 241; [2006] NSWCA 184 at [33]

fraudsters and unscrupulous characters and to otherwise invite unjust results.

3. So equitable relief is available to aggrieved parties in some of these informal situations. But it is crucial to be precise in framing a claim to equitable relief by reference to the appropriate principles of law or equity, rather than fuzzy notions of "justice" or "unjust enrichment". The High Court made this clear when, in *Muschinski v Dodds*[3], it rejected the "new model" constructive trust developed in England, and said to be imposed whenever required by justice and good conscience (in the sense of fairness).[4] Deane J said in that case:[5]

> "The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles … Viewed as a remedy, the function of the constructive trust is not to render superfluous, but to reflect and enforce, the principles of the law of equity."
>
> (citations omitted)

4. This seminar is concerned with the means by which interests in land, recognized in equity, can arise from informal arrangements. In particular, I will be dealing with interests created by the operation of the equitable doctrines of

   - Part Performance (briefly)
   - Express Trusts without writing

---

[3] (1984) 160 CLR 583.
[4] As described by Brennan J in *Muschinski v Dodds* (1984) 160 CLR 583 at 615.
[5] (1984) 160 CLR 583 at 615.

- Resulting Trust
- Constructive Trust of the "common intention" variety
- Constructive Trust of the "Baumgartner" variety
- Estoppel

5. These doctrines, or one or more of them, are often raised as alternative grounds for relief by a person claiming an interest in land. They arise in a large variety of fact situations. A common thread in these cases is that the plaintiff is unable to succeed on the basis of an institution such as contract or express trust because of lack of the necessary formalities for the creation or disposition of an interest in land. In many cases, the basic requirements of a contract (eg, concluded agreement, certainty) or express trust (eg, certainty of intention) are not made out, either.

6. This seminar is concerned with principles of equity. Those principles will not necessarily be determinative of the parties' rights, particularly in legislated areas of family law (including de facto relationships) and family provision (now under the *Succession Act 2006*). However, even when one is practising in such areas, it is sometimes important to ascertain the equitable interest of the parties apart from the application of the relevant legislation.

7. It is convenient to commence the seminar by reviewing the formal requirements affecting land transactions.

Writing and other formalities

Conveying legal and equitable interests in land

8. Section 41 of the *Real Property Act 1900* provides:

> "(1) No dealing, until registered in the manner provided by this Act, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the

payment of money, but upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such dealing, or by this Act declared to be implied in instruments of a like nature."

9. As regards lands outside of the *Real Property Act,* s 23B(1) of the *Conveyancing Act* 1919 provides:

> "(1) No assurance of land shall be valid to pass an interest at law unless made by deed."

10. There are exceptions in subsection 2, which do not need to be considered for present purposes.

11. Therefore, to convey a legal interest in Torrens system land, a registered dealing is necessary, and to convey a legal interest in old system land, a deed is necessary.

12. What about equitable interests?

13. It is here that we must consider sections 23C, 23D and 23E of the Conveyancing Act 1919.

14. Section 23C provides:

> "(1) Subject to the provisions of this Act with respect to the creation of interests in land by parol:
>
> (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the person's agent thereunto lawfully authorised in writing, or by will, or by operation of law,

(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by the person's will,

(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by the person's will, or by the person's agent thereunto lawfully authorised in writing.

(2) This section does not affect the creation or operation of resulting, implied, or constructive trusts. "

15. Section 23D provides:

(1) All interests in land created by parol and not put in writing and signed by the person so creating the same, or by the person's agent thereunto lawfully authorised in writing, shall have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.

(2) Nothing in this section or in sections 23B or 23C shall affect the creation by parol of a lease at the best rent which can reasonably be obtained without taking a fine taking effect in possession for a term not exceeding three years, with or without a right for the lessee to extend the term at the best rent which can reasonably be obtained without taking a fine for any period which with the term would not exceed three years.

16. Section 23E provides:

"Nothing in section 23B, 23C, or 23D shall:

(a) invalidate any disposition by will, or

(b) affect any interest validly created before the commencement of the Conveyancing (Amendment) Act 1930 , or

(c) affect the right to acquire an interest in land by virtue of taking possession, or

(d) affect the operation of the law relating to part performance."

Enforcement of contracts for sale or other disposition of interest in land

17. Finally, let us consider s 54A of the *Conveyancing Act 1919*. That provision is relevant because one form of equitable interest in land is the interest that arises on the basis of a specifically enforceable contract to acquire an interest in land. Section 54A provides:

"(1) No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged.

(2) This section applies to contracts whether made before or after the commencement of the Conveyancing (Amendment) Act 1930 and does not affect the law relating to part performance, or sales by the court.

(3) This section applies and shall be deemed to have applied from the commencement of the Conveyancing (Amendment) Act 1930 to land under the provisions of the Real Property Act 1900 . "

18. It should be noted that s 54A is concerned with <u>agreements</u> in relation to land, whereas s 23C is concerned with the actual creation of the interest (including an agreement intended to have immediate dispositive effect).[6]

Enforcing the contract - Part performance

---

[6] Khoury v Khouri (2006) 66 NSWLR 241; [2006] NSWCA 184 at [51] –[53]; Thompson v White & Ors [2006] NSWCA 350 at [132].

19. When a client comes in with a story of an undocumented commercial arrangement with a business associate or friend involving the acquisition of an interest in land, the first thing you would want to do would be to analyse the facts to determine whether the elements of a contract can be made out. If they are, specific performance may be available in equity, and this may give your client the remedy it needs. It is long established that damages will not be an adequate remedy in the case of contracts for the sale of land.[7]

20. If the contract is unwritten, it will be unenforceable at law, because of s 54A of the *Conveyancing Act.* However, the doctrine of part performance may be called in aid of specific performance. The doctrine is preserved in both s 23E and s 54A(2) of the *Conveyancing Act*.

21. On the present state of authorities in Australia:

    (a) For acts to be relied on as part performance of an unwritten contract, they must be done under the terms and by force of that contract and they must be unequivocally and in their nature referable to some contract of the general nature of that alleged.[8]

    (b) The mere payment of part of the purchase price, on the other hand, cannot constitute part performance under the law in Australia as it presently stands (and subject to revision by the High Court).[9]

    (c) Acts of part performance need not be acts that the contract *requires* to be done, but the cases show that they are almost universally acts which are closely related to possession and use or tenure of the land itself, such as taking possession or carrying out improvements.[10]

---

[7] See *Adderley v Dixon* (1824) Sim & st 607 at 610; *Re Scott and Alvarez's Contract: Scott v Alvarez* [1895] 2 Ch 603; *Dougan v Ley* (1946) 71 CLR 142 and the dissent of Sir Garfield Barwick in *Loan Investment Corp of Australasia v Bonner* [1970] NZLR 724

[8] *Regent v. Millett* (1976) 133 CLR 679 at 682-3; *Walton Stores (Interstate) Limited v. Maher* (1988) 164 CLR 387 at 432.

[9] *Khoury v Khouri* (2006) 66 NSWLR 241; [2006] NSWCA 184 at [77] – [90] and the cases discussed therein.

[10] *Khoury v Khouri* (2006) 66 NSWLR 241; [2006] NSWCA 184 at [77]

22. A further point to note before leaving this topic, is that one should not be too quick to dismiss the prospect of a claim in contract, because the parties have not expressed their agreement clearly. A contract can be implied, wholly or partly, from the conduct of the parties (and that is why requests for particulars of contract pleadings always ask whether the contract is partly or wholly implied). There is much case law in this area. The principles were recently looked at in the New South Wales Court of Appeal decision in *Kriketos v Livschitz.*[11] Allsop JA said that the essential question in such cases is whether the parties' conduct reveals an understanding or agreement or a manifestation of mutual assent, which bespeaks an intention to be legally bound to the essential elements of a contract.[12] The judgment of McColl JA discusses the principles and numerous authorities at length.[13]

Enforcing the express trust without writing

23. There is a long standing principle that equity will not permit the Statute of Frauds to be used as an instrument of fraud.

24. That principle has application in relation to some oral express trusts. Let us first remind ourselves of the requirements for an express trust *inter vivos*. They are:

- certainty of intention,
- certainty of subject matter,
- certainty of object,
- complete constitution of the trust, (usually, brought about either by a conveyance of property by the settlor to the trustee, or by declaration of trust on the part of the trustee).

---

[11] [2009] NSWCA 96.
[12] [2009] NSWCA 96 per Allsop JA at [14].
[13] [2009] NSWCA 96 at [106] – [120].

25. If the elements of an express trust can be proven, the then the absence of writing may be no defence.

26. The key cases are *Last v Rosenfeld* [1972] 2 NSWLR 923, *Bannister v Bannister* [1948] 2 All E.R. 133, *Rochefoucauld v Boustead* [1897] 1 Ch. 196 and *Booth v Turle* (1873) LR 16 Eq 182.

27. Essentially, the principle operates where the trust is constituted by the conveyance of an interest in land to a person on the basis (which is expressed, but not reduced to writing) that that person is to hold such interest as trustee. In the recent case of *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue*[14] Barrett J summarised the principle as follows:

> "This principle has been taken to mean that a plaintiff claiming beneficial ownership of land previously conveyed by it to another may prove by parol evidence that the land was conveyed on trust for it, and may be entitled to a declaration that the transferee holds the land on trust for it notwithstanding that the declaration of trust does not satisfy the requirements of the Statute of Frauds … . It is not necessary that the conveyance was fraudulently obtained: the doctrine will apply whenever the legal owner asserts absolute entitlement under the conveyance so as to defeat the beneficial interest …."
>
> (citations omitted).

28. The "fraud" with the principle is concerned need not be fraud in the original transaction, but may be constituted by the defendant's insistence upon the absolute nature of the conveyance to defeat the plaintiff's rights.[15] "Fraud" here means, of course, fraud in the equitable sense of conduct that

---

[14] [2003] NSWSC 697 (the decision, but not the parts relevant to this issue, is reported in 59 NSWLR 196).

[15] [1972] 2 NSWLR 923 at 934.

offends the conscience, and is not limited to conduct that is deliberately dishonest.

29. The principle only applies where property is transferred to a person on the basis that it be held on trust; it has no application to trusts created by the legal owner declaring himself or herself the trustee of the relevant property.[16]

30. Within that limited sphere, the principle has been applied in various situations, and these are discussed in *Last v Rosenfeld.*[17] Hope J said:

> "There are a substantial number of reported decisions where the oral trust so enforced was a simple trust, the alleged trustee giving no consideration and taking the land absolutely for the beneficiary ... In some cases, the conveyance or transfer to the alleged trustee was expressed to be for valuable consideration, but the consideration was not in fact paid … On other occasions the alleged trustee had expended his own money upon the acquisition of the property but upon terms that he acquired the property as trustee for the beneficiary and had a lien for the moneys he had expended … In other cases, a consideration had been paid by the trustee for the purchase of the land, but he had acquired it on terms that he should hold as trustee to some limited extent for the vendor …
>
> Another class of case comprises those where it is alleged that a purchaser of land has taken as agent for another. In such a case, it is well established that the principal can prove the agency despite the lack of writing ….
>
> Another class of case where what I have described as the general approach is adopted is that where land has been conveyed by what on

---

[16] *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* [2003] NSWSC 697 at [329] – [336]; *Wratten v Hunter* [1978] 2 NSWLR 367 at 369-371; *Last v Rosenfeld* [1972] 2 NSWLR 923 at 933.

[17] [1972] 2 NSWLR 923 at 929 - 931

its face is an absolute conveyance, but where the transaction was intended to be defeasible. The mortgage cases are included in this class."

31. Because of the language used in some of the decisions, there is room for debate as to whether the trust that is enforced in this case is an express trust, or a constructive trust.[18] In any event, it is likely that, if one were to plead such claim in terms of an express trust created orally, one would be pleading, as one alternative, a constructive trust based on common intention (as to which, see below).

Resulting Trust

32. The principles I have discussed above require, at least, a clear (if not always express) intention on the part of the parties. The resulting trust, however, can arise in the absence of an actual intention that any trust relationship be constituted. Instead, the law presumes the relevant intention.

33. In *Black Uhlans Inc v New South Wales Crime Commission* [2002] NSWSC 1060, Campbell J (as his Honour then was) said that the presumption of a resulting trust can operate in, broadly, three types of situation:

"The first is where property is conveyed at law, but the entire beneficial interest in that property is not disposed of. The second is where property has been conveyed at law, on a basis which, initially, disposes of the entire beneficial interest, but at a later time equitable obligations attaching to the property fail or are set aside. The third situation is that a presumption of resulting trust arises where one person provides the purchase price of property, which is conveyed into the name of another person."

---

[18] See Heydon & Leeming, *Jacobs Law of Trusts in Australia (7th Edition)*, 2006, LexisNexis Butterworths Australia, p. 92, 259-260

(emphasis added)

34. The first and second categories are concerned with the consequences of the failure of some transaction or disposition, and for the most part they arise in relation to deceased estates (although the *Quistclose* trust[19] can also be seen as falling within the second category).

35. It is the third category of case which is of general relevance to the topic of today's seminar. A presumption of a resulting trust will be generated whenever property is purchased in the name of party A (or several parties), but with the purchase money being provided by party B. It will also arise when party B transfers the property to party A without consideration.[20]

36. The presumption arising from the contribution of purchase monies will also arise where two or more persons contribute in unequal shares to the purchase of property, which property is conveyed to them in their joint names. In that situation, those parties are presumed in equity to hold the legal estate in trust for themselves as tenants in common in shares proportionate to their contributions.[21]

37. Where the resulting trust arises from contributions to purchase money, one needs to be clear as to what is and is not regarded as purchase money for these purposes. I would make three points.

38. *First*, purchase money includes, not merely the purchase price but also incidental expenses – that is, "the totality of the money which purchasers have in truth outlaid to obtain the property".[22]

39. *Second*, monies borrowed for the purchase of property are treated as a contribution of the party borrowing them, so that if the parties jointly take

---

[19] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.
[20] *Napier v Public Trustee (WA)* (1980) 32 ALR 153 at 158.
[21] *Calverley v Green* (1984) 155 CLR 242, 59 ALJR 111, 56 ALR 483, 9 Fam LR 940, [1984] FLC 91-565.
[22] *Ryan v Dries* (2002) 10 BPR 19,947, [2002] NSWCA 3 at 53.

on a mortgage debt for the purchase then the loan proceeds will be treated as contributed equally by both.[23]

40. *Third*, in general, subsequent payment of the mortgage debt by one party does not affect the respective interests of the parties pursuant to the resulting trust. However, such payments may be relevant on an equitable accounting between the parties.[24]

Accounting - an aside

41. Further to the third point, it should be kept in mind that ascertaining that a party has an equitable interest in property will not necessarily be the end of the analysis of the parties' rights and obligations. If the parties are treated as co-owners in equity (whether under a resulting trust, express trust or otherwise) they are subject to the principles of accounting between co-owners. If they are jointly liable for a debt, such as a mortgage debt, a party who contributes more than his or her share is entitled to contribution from the other/s. If a party is a trustee of property, the principles of accounting between trustee and beneficiary apply. These topics will not be dealt with in this seminar.

Rebutting the presumption of a resulting trust

42. The resulting trust presumption can be rebutted by the "presumption" of advancement. The High Court of Australia said in *Nelson v Nelson*:[25]

> "The other presumption, that of advancement, is perhaps not strictly a presumption at all. Rather, the position is that there are certain relationships from which equity infers that any benefit provided for one party at the cost of the other has been provided by way of "advancement". The consequence is that the equitable estate follows

---

[23] *Currie v Hamilton* [1984] 1 NSWLR 687 at 691.
[24] *Calverley v Green* (1984) 155 CLR 242 per Gibbs CJ at 252, 59 ALJR 111, 56 ALR 483, 9 Fam LR 940, [1984] FLC 91-565; for an example of such an allowance being made see *Currie v Hamilton* [1984] 1 NSWLR 687 at 693.
[25] (1995) 184 CLR 538 at 547.

the legal estate and is at home with the legal title; there is an absence of any reason for assuming that a trust arose."

43. The presumption traditionally arose only in the cases of a transfer from a father to his child and from a husband to a wife. In *Nelson v Nelson*[26] the presumption was held to extend to transfers from a mother to her child. However, so far, the presumption does not apply to a benefit provided by wife to her husband,[27] and nor does it apply to parties to a de facto relationship.[28]

44. The presumption of a resulting trust may also be rebutted by proof of a contrary intention.[29] This intention is to be inferred from what the parties do or say. For example, an agreement at the time of purchase that one party alone will be responsible for the mortgage repayments, may support that person's claim to an exclusive interest in the property.[30]

45. Similarly, the presumption of advancement is open to be rebutted by proof of a contrary intention.[31]

Spouses buying property together

46. I have said that there is a presumption of advancement in the case of wives. However, the decision of the High Court of Australia in *Trustees of Cummins*[32] appears to establish a special rule as to how the presumption of a resulting trust works in the case of married couples who buy a property together. That is to say, normally, a husband and wife who purchase a property together (that is, with both contributing, but not necessarily in equal shares) will be treated in equity as holding the

---

[26] (1995) 184 CLR 538 at 547.
[27] Hepburn, *Principles of Equity and Trusts (4th Edition)*, 2009, The Federation Press, Sydney,
[28] *Calverley v Green* (1984) 155 CLR 242, 59 ALJR 111, 56 ALR 483, 9 Fam LR 940, [1984] FLC 91-565; *Shepherd v Doolan* [2005] NSWSC 42.
[29] *Calverley v Green* (1984) 155 CLR 242 at 261, 59 ALJR 111, 56 ALR 483, 9 Fam LR 940, [1984] FLC 91-565.
[30] *Currie v Hamilton* [1984] 1 NSWLR 687 at 691; *Calverley v Green* (1984) 155 CLR 242 at 262, 59 ALJR 111, 56 ALR 483, 9 Fam LR 940, [1984] FLC 91-565.
[31] *Glynn v Commissioner of Stamp Duties NSW)* [1977] 2 NSWLR 673.
[32] (2006) 227 CLR 278; [2006] HCA 6 at [71] – [72].

property in equal shares, regardless of contributions to the purchase price. It is inferred in such circumstances that their intention was to have equal ownership.[33]

Constructive Trusts - terminology

47. The term “constructive trust” is used in various senses. The term may be used to describe an equitable interest in property, which arises by operation of law, but has much in common with the express trust and the resulting trust.

48. The term can also be used to describe a variety of situations in which an equitable remedy is granted against a person who is found, on the basis of some equitable doctrine, to be liable as a constructive trustee.

49. The remedy in these situations will not always be the imposition or recognition of a proprietary interest – it may go no further than a liability to account or to pay equitable compensation. Further, the remedy may be proprietary, but not a trust: a charge or lien may be imposed. In *Giumelli v Giumelli*[34] the High Court said:

> “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

---

[33] (2006) 227 CLR 278; [2006] HCA 6 at [71].
[34] (1999) 196 CLR 101 at 112 (para [4]).

assists in a breach of trust or fiduciary obligation" by a trustee or other fiduciary."

(footnote omitted)

Constructive trust based on common intention

50. In *Hohol v Hohol*[35] O'Bryan J identified three essential elements of a common intention constructive trust as follows:

> "From the cases I have referred to it can be said that the essential elements of the trust are, first, that the parties formed a common intention as to the ownership of the beneficial interest. This will usually be formed at the time of the transaction and may be inferred as a matter of fact from the words or conduct of the parties. Secondly, that the party claiming a beneficial interest must show that he, or she, has acted to his, or her, detriment. Thirdly, that it would be a fraud on the claimant for the other party to assert that the claimant had no beneficial interest in the property...".
>
> (emphases added)

51. The necessary common intention may arise after the relevant property is acquired.[36]

52. Such intention may be proved by evidence of an express agreement, but it may also be inferred from conduct, and notwithstanding the absence of express communication.[37]

53. In contrast to the resulting trust, an actual intention is required. The court does not impute to the parties an intention which they never had but would have had if they had applied their minds to it.[38]

---

[35] [1981] VR 221 at 225.
[36] *Allen v Snyder*[1977] 2 NSWLR 685 at 691.
[37] *Allen v Snyder*[1977] 2 NSWLR 685 at 691; *Green v Green* (1989) 17 NSWLR 343 at 355.

54. The requirement that the plaintiff acts to his or her detriment gives the doctrine the flavour of estoppel. Indeed, there is debate about whether cases described in terms of a constructive trust based on common intention are better analysed as a form of proprietary estoppel,[39] and/or (in some cases at least), an express trust which will be enforced notwithstanding the absence of writing, on the principles I have discussed above.[40] However, unless and until the courts eliminate this category of case, it is useful for practitioners to be ready to plead, and argue, the common intention constructive trust.

The Baumgartner Constructive Trust

55. The constructive trust based on a failed joint endeavour is a relatively recent development, and arose in the context of de facto relationships.

56. This class of constructive trust rests on what was identified by Mason CJ, Wilson and Deane JJ in *Baumgartner v Baumgartner*[41] as: "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."

57. With this type of constructive trust, it is not necessary to prove a common intention as to beneficial ownership of property.

58. Rather, what must be shown in general terms is:

- That there was a joint endeavour between the parties,
- that the claimant made contributions to the property for the purpose of that joint endeavour,

---

[38] *Allen v Snyder*[1977] 2 NSWLR 685 at 690, 698 and 701; *Shepherd v Doolan* [2005] NSWSC 42 at [34].
[39] Sen v Headley [1991] Ch 425 at 439-440; Re Basham [1986] 1 WLR 1498; [1987] 1 All ER 405; Rasmussen v Rasmussen [1995] 1 VR 613 at 629.
[40] Heydon & Leeming, Jacobs Law of Trusts in Australia (7th Edition), 2006, LexisNexis Butterworths Australia, pp. 259-260, 305.
[41] (1987) 164 CLR 137 at 148.

- that the joint endeavour failed and that the legal ownership of the relevant property is disproportionate to the contributions,

- such as to render it unconscionable for the party holding legal title to all or a disproportionate part of such property to insist on his or her legal rights.[42]

59. Whilst this doctrine was developed in the area of de facto relationships, there is no reason in principle why it cannot apply in purely commercial, or arm's length, situations. The main reason why it will tend not to is that, in commercial contexts, there will usually be some agreement or at least common intention as to beneficial ownership of the relevant property.

60. The constructive trust in these cases is based on the avoidance of an unconscionable result rather than giving effect to an intention (actual, imputed or presumed). This gives the court some flexibility in shaping a remedy (and hence uncertainty for lawyers in advising). So, in *Baumgartner*,[43] the High Court started with the proposition that equity favours equality, so that where there was a pooling of resources and efforts over a number of years, the starting point would be to consider whether the parties should have an equal beneficial interest in the property. However, in that case, the contributions were not approximately equal, but rather, they were in the ratio 55:45, and the beneficial interests should be in those proportions. Further adjustments were necessary, by reference to payments made by the appellant after the relationship, and property taken by the respondent after the relationship. The judgment does not contain the final form of the orders, but it appears that the orders would have been along the lines of:

    a. A declaration that the appellant held his interest in the property in trust for himself and the respondent in the proportions 55:45;

---

[42] *Muschinski v Dodds* (1985) 160 CLR 583 at 608 at 620, 60 ALJR 52, 62 ALR 429, 11 Fam LR 930; *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 148 to 149, 62 ALJR 29, 76 ALR 75, 11 Fam LR 915; *West v Mead* [2003] NSWSC 161 at [52] –[64].
[43] (1987) 164 CLR 137 at 149-151.

b. Orders for sale of the property;

c. A declaration that the appellant was entitled to be paid certain amounts out of the proceeds of sale of the property prior to the interests at (a); and

d. A declaration that the appellant was entitled to a lien over the proceeds of sale to secure that amount.

61. That regime of orders would not be appropriate in every case. In a commercial situation, it is likely that contributions will be more readily quantifiable than in the case of domestic relationships, and so an accounting exercise might be appropriate.

62. In the case of *Muschinski v Dodds,*[44] which preceded *Baumgartner*, the precise final orders are again unavailable. However, the Gibbs CJ and Mason J agreed with the approach proposed by Deane J, which was to declare that parties held their interests in the relevant property upon trust (after payment of joint debts incurred in improvement of the property):

a. to repay to each their respective contributions; and then

b. for them both in equal shares.

63. Such an approach is similar to a partnership accounting, as well as to the way in which joint venture agreements are often structured – that is, on the basis that contributions are first repaid, and then the surplus is shared equally.

Equitable Estoppel

[44] (1985) 160 CLR 583

64. The current state of authority concerning equitable estoppel is summarised in the following (oft-cited) passage from *Waltons Stores (Interstate) Ltd v Maher*[45]:

> "In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs."

65. That landmark case was responsible for the development of promissory estoppel into a doctrine that could be used as a sword. However, the above passage of Brennan J is a description of the broader concept of equitable estoppel, of which promissory estoppel is (or can be seen as) one variety.

---

[45] (1988) 164 CLR 387 at 428-9; Meagher RP, Heydon JD and Leeming MJ, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, Butterworths, 2002) p 550.

66. Also encompassed within the concept is proprietary estoppel, which has 2 limbs.

67. The first strand is referred to as estoppel by encouragement and follows the decision in *Dillwyn v Llewelyn*[46] and the more recent decision of *Riches v Hogben.*[47] It arises where the owner of land creates or encourages in another person an expectation that the person will have a certain interest in the land and that person changes his or her position on the faith of that expectation. [48]

68. The second strand is referred to as estoppel by acquiescence and follows the decision in *Ramsden v Dyson*.[49] This form of estoppel is established where an owner of land, being aware of his/her rights and also that they are being infringed by another, who to his/her knowledge is mistaken about his/her own rights, stands by in silence in order to profit by the other person's mistake.[50]

69. In both categories of case the intervention of equity is justified because it is unconscionable for the property owner to stand by while the other person incurs expenditure or exerts himself/herself under a belief or expectation which the owner knows to be mistaken.

70. According to Meagher, Heydon and Leeming,[51] both strands have the following common factors:

    (a) an expectation or belief by A as to the property of B; for example, that it is the property of A or that B has given or will give an interest in it;

    (b) knowledge by B of this expectation or belief of A;

---

[46] (1862) 45 ER 1285

[47] [1985] 2 Qd R 292 at 302.

[48] Handley, K, "Estoppel" (2006) 20 (2) CLQ p. 29 at p. 31

[49] *Ramsden v Dyson* (1866) LR 1 HL 129

[50] Handley, K, "Estoppel" (2006) 20 (2) CLQ p. 29 at p. 31; *Ramsden v Dyson* (1866) LR 1 HL 129

[51] Meagher RP, Heydon JD and Leeming MJ, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, Butterworths, 2002) at p 565-6

(c) activity of A in reliance on his/her expectation or belief, whether by expenditure upon the property, or giving up, or not enforcing other rights he/she might have in relation thereto;

(d) the interest or expectation of A must be one which B could lawfully satisfy;

(e) encouragement by B of the activities of A under (c) or at least knowledge of those activities, with failure to assert his/her title to his/her property when they are adverse to it, so that he/she "dishonestly remained wilfully passive" and therefore it is fraudulent for him/her to rely on his/her legal rights to defeat the expectation encouraged by his/her conduct or lack of it; and

(f) knowledge by B of his/her property rights as under his/her enjoyment, control and disposition.

71. Some further points can be made about proprietary estoppel.

72. **Level of certainty**: Whereas clear and unambiguous language is required for an estoppel by representation, that requirement clearly does not apply to estoppel by acquiescence. Nor does it apply to estoppel encouragement.[52]

73. **Promises about wills:** Bearing in mind that wills are revocable, it is necessary to be careful when considering alleged promises as to testamentary dispositions. To succeed on proprietary estoppel, a plaintiff needs to show that the relevant promises:

> **"**were, and were intended to be, and were reasonably acted upon by him [or her] as, promises of the making, not of a revocable testamentary instrument, but of a gift by will taking effect on death.**"**[53]

Remedy

---

[52] Handley, K, "Estoppel" (2006) 20 (2) CLQ p. 29 at p. 31.

[53] *Kleber v Kleber* [2007] Fam CA 749 at [41] to [42]; see also of *Delaforce v Simpson-Cook* [2010] NSWCA 84 at [36] to [38].

74. Whereas common law estoppels operate as rules of evidence, so as to foreclose particular facts equitable estoppel, including proprietary estoppel, give rise to an equity, and the court must decide what relief is appropriate in the circumstances.

75. It has been argued that, in cases of **estoppel by acquiescence** (the *Ramsden v Dyson* line of authority), the remedy should be limited to reversal of the plaintiff's detriment. This may involve a charge or lien on the relevant land in the amount of the plaintiff's expenditure.[54] However, it seem arguable that, since *Giumelli v Giumelli*[55] (discussed below in relation to estoppel by encouragement), the remedy is not necessarily so limited.

76. As for **estoppel by encouragement** Meagher, Heydon and Leeming say that prima facie the defendant is required to make good the expectation and transfer the land, although they acknowledge that supervening events may prevent this and, further, that the courts have not in fact uniformly applied this view.[56]

77. In *Giumelli v Giumelli*[57] the High Court of Australia dealt with an appeal concerning the appropriate form of relief, in circumstances where estoppel by encouragement had been made out. The majority (Gleeson CJ, McHugh, Gummow and Callinan JJ) considered submissions to the effect that the decision in *The Commonwealth v Verwayen* (1990) 170 CLR 394 supported a limitation to the relief available for equitable estoppel.

78. Referring to *Verwayen,* the majority said:

> [42] Deane J emphasised:
>
> "Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief

---

[54] Meagher RP, Heydon JD and Leeming MJ, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, Butterworths, 2002) at p 568.
[55] (1990) 196 CLR 101 at 125.
[56] Meagher RP, Heydon JD and Leeming MJ, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, Butterworths, 2002), p 567
[57] (1999) 196 CLR 101.

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 ultimately:

"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 equity.

[43] Dawson J referred to such authorities as the speech of Lord Kingsdown in Ramsden v Dyson and the judgment of McPherson J in Riches v Hogben 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] Although Gaudron J decided the case on other grounds, her Honour observed that "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 that: "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".

[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 damages.

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

[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."

(Footnote marks omitted)

79. Their Honours then said:

"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 Nicholson J when giving relief in respect of the second promise."

80. From that decision, the correct approach to remedies for proprietary estoppel (or at least, estoppel by encouragement, as *Giumelli* was such a case) may be described as follows:

a. Ascertain that the plaintiff has an equity, raised by the estoppel;

b. Consider all the circumstances of the case to determine how that equity ought to be satisfied, and in particular, whether there is an appropriate remedy falling short of a trust[58];

c. In consequence, whilst the plaintiff may have a prima facie case for a conveyance of property (at least in the case of estoppel by encouragement), determine whether some qualification of this is needed; and

d. Make appropriate orders.

81. Thus, in *Giumelli,* the circumstances meant that the plaintiff could not have a conveyance of the property. This would have affected third parties and would also have gone beyond what was required for conscientious conduct on the part of the defendants. Accordingly, the plaintiff was instead entitled to a money sum, to be charged on the property.

82. There are numerous cases decided since *Giumelli* in which the courts have sought to apply the principles in that decision.

83. In *Donis v Donis*, [2007] VSCA 89 Nettle JA of the Victorian Court of Appeal (with whom Maxwell ACJ and Ashley JJA agreed) said:

> "The minimum equity
>
> 18 Each of the appellants' arguments is to some extent premised on the idea that equitable estoppel "permits 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". That idea finds support in some of the judgments in Waltons Stores (Interstate) Ltd v Maher7 and Verwayen v The Commonwealth8 and in particular in the observations of Mason CJ in Verwayen that:
>
> > "...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."

---

[58] See also *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 584-585.

> 19 As the more recent decision in Giumelli v Giumelli shows, however, there is no such restriction in cases where the expectation which is encouraged is the acquisition of an interest in property. In such cases the remedy relates to the understanding of the parties and the expectation that has been encouraged. Prima facie the estopped party can only fulfil his or her equitable obligation by making good the expectation which he or she has encouraged. The estopped party, having promised to confer a proprietary interest on the party entitled to the benefit of the estoppel, and the latter having acted upon the promise to his or her detriment, is bound in conscience to make good the expectation. It follows that the detrimental reliance that supports the estoppel need not constitute in any sense a consideration moving to the party bound. It is a unilateral element of the estoppel and not the price paid for it.
>
> 20 The prima facie position will yield to individual circumstances. Principle and authority compel the view that where a plaintiff's expectation or assumption is uncertain or extravagant or out of all proportion to the detriment which the plaintiff has suffered, the court should recognise that the claimant's equity may be better satisfied in another and possibly more limited way. Thus, as was also said in Giumelli, before granting relief the court is required to consider all of the circumstances of the case, including the possible effects on third parties, and to avoid going beyond what is required for conscientious conduct or would do injustice to others. But that does not mean that the court is required to be "constitutionally parsimonious"15 or that it is necessary for there to be substantial correspondence between expectation and the monetary value of the detriment suffered, or which but for the relief to be accorded would be suffered.16 The object of the exercise is to do equity and for that purpose "detriment" is no narrow or technical concept. It need not consist of expenditure of money or other quantifiable financial disadvantage so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether departure from a promise would be unconscionable in all the circumstances."

84. That decision related to a finding of estoppel by encouragement. It was found that the plaintiff had been promised by her parents-in-law that if she acted to her detriment by going to live on a rural property with her husband she would be entitled to a quarter share of a rural property. The marriage came to an end, and the property was sold, the trial judge awarded her a money sum. The working out of that money sum by the trial judge – whose decision was upheld on appeal – is an interesting demonstration that in reality, the court has a broad discretion as to remedy once a finding of equitable estoppel is made. The property was bought by property

developers for a substantial sum, some time after separation. That sum substantially exceeded its value at the time of the separation. There were other factors which were also taken into account, and the result was that the plaintiff was awarded an amount of $600,000. This was a figure between the value of a quarter share at separation and the value of such share when the property was sold to property developers. The starting point was that the plaintiff was entitled to a quarter share of the property, and hence the proceeds of sale, but given the particular circumstances, that would have been disproportionate. The reasoning is embodied in the following passage from the trial judge:

> “"In my view the present problem is not satisfactorily resolved on an attempted simple arithmetical basis and, for reasons mentioned, it could not be. That is by reason of the nature of the detriment on the one hand, and the specific promise and the value of the land in the various attendant circumstances on the other hand. Taking all relevant matters into account I consider that the amount required to satisfy the plaintiff's equity is not appropriately assessed through or by the channel of the value at separation or on the sale in 2002 as discussed above. In other words, it is not one or the other. Whereas in my assessment the former carries with it injustice to the plaintiff the latter carries with it injustice to the first and second defendants to a degree in each case that is disproportionate and unjust. The true and just position is between those positions at a point that cannot be calculated with precision as to amount for the reasons discussed. Regarding all the relevant circumstances, in my view the plaintiff's equity is appropriately and justly, considering the prejudice on each side, assessed at $600,000."

85. In *Sullivan v Sullivan* [2006] NSWCA 312, each of the judges agreed that a proprietary estoppel (of the encouragement variety) was made out, but Hodgson and McColl JJA differed from Handley JA on the relief that was appropriate. The headnote records the facts:

> “In a Christmas card in 1995, the first and second respondents, husband and wife, represented that they would purchase a house for the appellant, the first respondent's sister, to live in for life with the requirement to pay minimal rent after the first year. In March 1996, the appellant gave up her Housing Commission accommodation and moved to the house bought by the third respondent company, of which

> the first and second respondents are the sole directors and shareholders. The appellant refused to vacate the property when requested to do so by the first and second respondents on 30 January 2004, and brought proceedings claiming that the respondents were estopped from evicting her since she had acted to her detriment in reliance on the representation by giving up her Housing Commission accommodation and spending money on improving the house."

86. Handley JA discussed numerous decisions on estoppel by encouragement. His Honour considered that the plaintiff's prima facie entitlement, that is, to have the expectation fulfilled, had not been displaced by the evidence, and therefore the respondents should be restrained by an injunction from disturbing the appellant's possession of the property that she had moved into following their representation.

87. However, Hodgson JA, with whom McColl JA agreed, decided that the appellant should be permitted to remain in the house for 7 years, provided that she pay rent at $65 per week, CPI adjusted. His Honour said, in support of this approach:

> "94 I agree with Handley JA, in accordance with Guimelli v. Guimelli [1999] HCA 10, 196 CLR 110 at [40]-[50], that prima facie the operation of estoppel by conduct is to preclude departure from the assumed state of affairs, but that this entitlement would be qualified if relief on this basis would exceed what would be justified by the requirements of conscionable conduct and would be unjust to the estopped party.
>
> 95 In my opinion, to give relief that would in substance hold the respondents to a promise that the house would be the appellant's for life would go beyond what is justified by the requirements of conscientious conduct and/or would be unjust to the respondents, for the following reasons:
>
> (1) the promise was gratuitous, given in the absence of any substantial moral obligation or any kind of trade off;
>
> (2) the promise was given in the context of an affectionate family relationship, which has since unfortunately broken down;
>
> (3) the appellant is now about 40, so has a life expectancy that could be of the order of 40 years;
>
> (4) although there is no evidence of the respondents' financial circumstances, an order that bound the respondents for up to a

> further 40 years or so could work significant hardship if their financial circumstances change;
>
> (5) all this must be considered in the light of the paucity of evidence referred to earlier, which should not operate in favour of the appellant.
>
> 96 I accept that there can be an evidentiary onus on a defendant to bring forward material that would cut down the entitlement to continuance of the assumed state of affairs. But it is still the case, in my opinion, that an ultimate onus is on the plaintiff to prove that the extent of the detriment, flowing from the original change of position, if the assumed state of affairs is not continued, is such as to justify the relief sought. I think the potential availability from public sources of reversal of the detriment can be a ground for reducing relief, particularly when the original detriment consists of giving up the benefit of support from the very same public sources. I also accept that the absence of a pre-existing moral obligation does not preclude reliance on estoppel; but in my opinion it is relevant to the extent of relief to be granted, in circumstances where the affectionate family relationship which brought about the promise has broken down."

88. *Lieschke v Lieschke* [2003] NSWSC 743 is an example of a case where estoppel by encouragement was established, and the remedy was (in effect) fulfilment of expectation, without any form of mitigation by reason of other factors. The cross claimant had been told by his father that a farm was his, whereupon he commenced to farm it and make improvements on it, over a period of some 25 years. The property having been sold before the hearing, Austin J held that the cross claimant was entitled to the whole of the sale proceeds.

89. In the recent case of *Delaforce v Simpson-Cook* [2010] NSWCA 84 the New South Wales Court of Appeal upheld a finding of proprietary estoppel, as well as a remedy involving expectation-fulfillment. In that case The deceased and the plaintiff were former spouses and they had entered into a Family Court settlement on the basis of a representation, which was noted in the orders, that the deceased would retain the plaintiff as a beneficiary in his will and would bequeath a particular property to her, unencumbered. He died after changing his will so as not to leave anything to the plaintiff.

90. At trial and on appeal, it was held that the plaintiff was entitled to the property. The discussion of principle by Handley AJA, with whom Allsop P and Giles JA agreed, at paragraphs [65] to [92] is based in part on what his Honour said in the earlier case of *Sullivan* (supra), but in this later case his Honour was in the majority and the other judges agreed with him. The passage should be read closely and re-read every so often. Some key points that are made or can be derived from that passage are that:

    a. The notion that the court should frame the relief to enforce "the minimum equity to do justice to the plaintiff" is *probably* not the law in this country since *Giumelli.*

    b. The court should prima facie enforce a reasonable expectation which the party bound created or encouraged.

    c. Where the expectation is undefined or uncertain equity must fashion its relief from the circumstances, but where the expectation was defined with certainty by the party estopped that is where the court must start.

    d. There are grounds on which relief might be refused or something less than enforcement of the expectation might be given.

    e. One such ground is "practical considerations such as the need for a clean break".

    f. Another ground is the interests of third parties – as in *Giumelli.*

    g. Another ground is proportionality: that is, where the enforcement of the plaintiff's expectation would be out of all proportion to the detriment. His Honour said that this is particularly so where the expectation was not defined, so that the court has a broader discretion. However the priniciple is a negative one: a plaintiff need not show that the relief is proportionate. Rather, the enforcement of the expectation must not be disproportionate.

91. Allsop P agreed with Handley AJA but added some comments which should also be taken on board, in relation to the “minimum equity” principle and in relation to the principle of proportionality.