EQUITABLE INTERESTS IN LAND ARISING FROM ESTOPPEL

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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. However, to recognise no interests in land other than those that arise from transactions attended with the proper formalities, would be to play into the hands of fraudsters and unscrupulous characters and to otherwise invite unjust results.

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[2] (2006) 66 NSWLR 241; [2006] NSWCA 184 at [33]

3. So there are various equitable doctrines that enable parties to obtain interests in land (or other relief) notwithstanding the absence if writing and other formalities. In this seminar I will be talking about the operation of equitable estoppel in this area. I will also be talking about constructive trusts based on common intention.

4. Other doctrines that can be relevant to informal arrangements relating to property are:

   - Part Performance
   - Express Trusts, which may sometimes be enforced in relation to land, notwithstanding the absence of writing
   - Resulting Trusts
   - Constructive Trust of the "Baumgartner" variety

5. Those doctrines will not be discussed in this seminar. Nor will the legislation in the areas of family law (including de facto relationships) and family provision (now under the *Succession Act 2006*).

6. 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

7. 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."

8. 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."

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

10. 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.

11. What about equitable interests?

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

13. 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. "

14. 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.

15. 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

16. 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.
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> (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.
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> (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 . "

17. 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).[3]

Constructive Trusts - terminology

18. 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.

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

19. 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.

20. 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*[4] 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 assists in a breach of trust or fiduciary obligation" by a trustee or other fiduciary."
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> (footnote omitted)

Constructive trust based on common intention

21. In *Hohol v Hohol*[5] 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, <u>first</u>, that the parties formed a common intention as to the ownership of the beneficial interest. This will usually

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[4] (1999) 196 CLR 101 at 112 (para [4]).
[5] [1981] VR 221 at 225.

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)

22. The necessary common intention may arise after the relevant property is acquired.[6]

23. 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.[7]

24. 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.[8]

25. 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,[9] 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.[10] 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.

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[6] *Allen v Snyder*[1977] 2 NSWLR 685 at 691.
[7] *Allen v Snyder*[1977] 2 NSWLR 685 at 691; *Green v Green* (1989) 17 NSWLR 343 at 355.
[8] *Allen v Snyder*[1977] 2 NSWLR 685 at 690, 698 and 701; *Shepherd v Doolan* [2005] NSWSC 42 at [34].
[9] 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.
[10] Heydon & Leeming, Jacobs Law of Trusts in Australia (7th Edition), 2006, LexisNexis Butterworths Australia, pp. 259-260, 305.

Equitable Estoppel

26. The current state of authority concerning equitable estoppel is summarised in the following (oft-cited) passage from *Waltons Stores (Interstate) Ltd v Maher*[11]:

> "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."

27. That landmark case was responsible for the development of promissory estoppel into a doctrine that could be used as a sword. However, the

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[11] (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.

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.

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

29. The first strand is referred to as estoppel by encouragement and follows the decision in *Dillwyn v Llewelyn*[12]and the more recent decision of *Riches v Hogben.*[13] 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. [14]

30. The second strand is referred to as estoppel by acquiescence and follows the decision in *Ramsden v Dyson*.[15] 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.[16]

31. 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.

32. According to Meagher, Heydon and Leeming,[17] both strands have the following common factors:

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[12] (1862) 45 ER 1285

[13] [1985] 2 Qd R 292 at 302.

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

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

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

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

(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;

(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.

33. Some further points can be made about the two forms of proprietary estoppel.

Level of certainty

34. 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 by encouragement.[18]

Remedy

35. Proprietary estoppel is equitable estoppel. Whereas common law estoppels operate as rules of evidence, so as to foreclose particular facts

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

equitable estoppel gives rise to an equity, and the court must decide what relief is appropriate in the circumstances.

36. So 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.[19] However, it seem arguable that, since *Giumelli v Giumelli*[20] (discussed below in relation to estoppel by encouragement), the remedy is not necessarily so limited.

37. As for **estoppel by encouragement** Meagher, Heydon and Leeming say that prima facie the defendant 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.[21]

38. In *Giumelli v Giumelli*[22] 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.

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

> [42] Deane J emphasised:
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> "Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of that assumed state of affairs would be inequitably harsh, that some lesser form of relief should be awarded."

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[19] Meagher RP, Heydon JD and Leeming MJ, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, Butterworths, 2002) at p 568.

[20] (1990) 196 CLR 101 at 125.

[21] Meagher RP, Heydon JD and Leeming MJ, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, Butterworths, 2002), p 567

[22] (1999) 196 CLR 101.

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.
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> [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."
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> (Footnote marks omitted)

40. Their Honours then said:

> **"The circumstances of the case**
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> [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.
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> [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."

41. 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[23];

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.

42. 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.

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

44. 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
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> 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:
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> > "...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."
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> 19 As the more recent decision in Giumelli v Giumelli shows, however, there is no such restriction in cases where the expectation

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

> 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.
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> 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."

45. 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."

46. 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."

47. 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.

48. 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."

49. *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.

50. There are several other cases decided in recent years on proprietary estoppel. It is useful to consult these cases, as they give a flavour of the range of approaches the court can take to working out a remedy. It need hardly be said, however, that the cases do not yield a formula or rule as to how the court is to work out the remedy. This of course makes advising clients as to the likely result a difficult exercise.