HIGH COURT OF AUSTRALIA

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File Number:	S53/2024
File Title:	Kramer & Anor v. Stone
Registry:	Sydney
Document filed:	Form 27A - Appellants' submissions
Filing party:	Appellants
Date filed:	30 May 2024

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **HILARY LORRAINE KRAMER**
First Appellant
JAIME FERRAR
Second Appellant

and

DAVID LINDSAY STONE
Respondent

APPELLANTS' SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. Is the element of encouragement, coupled with reasonable and detrimental reliance by the respondent sufficient, without more, to establish unconscionable conduct for the purposes of proprietary estoppel by encouragement? If not, is the deceased's constructive knowledge of the respondent's detrimental reliance sufficient to establish unconscionability?

PART III: SECTION 78B NOTICE

3. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: CITATIONS

4. The primary judgment is *Stone v Kramer* [2021] NSWSC 1456 (**PJ**) (Robb J) (Core Appeal Book (**AB**), 5-128). The judgment under appeal is *Kramer v Stone* [2023] NSWCA 270; 112 NSWLR 564 (**AJ**) (Ward P, Leeming and Kirk JJA) (AB 166-258).

PART V: FACTS

5. The proceedings concern the entitlement to a rural property (**the Property**), approximately 100 acres in size, at Upper Colo in NSW (**PJ [6]**) purchased by Dr Harry Kramer (**Dr Harry**) and Dame Leonie Judith Kramer (**Dame Leonie**) as joint tenants in 1969 (**PJ [131], [136]**). Dame Leonie died on 20 April 2016 (**PJ[1]**). Under her final will made 11 November 2011, she left the Property to the First Appellant, and made a bequest of $200,000 to the Respondent (**David**) (**AJ[1]; PJ[22]**). At the time of the grant of probate in December 2016, the Property was valued at $1.5 million (**AJ [14]**).

6. ***1988: Dame Leonie States her Testamentary Intention.*** David commenced share-farming the Property in around 1975 (**AJ [14]**). In 1988, Dr Harry Kramer died prematurely of cancer (**PJ [4]**). His widow, Dame Leonie, had a conversation with David, "*shortly after*" Dr Harry's death, in which she was found to have said: "*Harry always admired your honesty. Harry and I did agree the farm will pass to you upon my death and I want you to know* there will also be a sum of money" (**PJ[91] and**

[249]) (the **Statement**).[1] The conversation occurred without any sort of introduction, was not in response to any kind of complaint by David (eg that he could not make ends meet or about the operation of the farm), and was "*completely out of the blue*" (transcript at **PJ[93], [99]; AJ [24]**). The Statement was never repeated, there was no written record of it, and no evidence that Dame Leonie ever informed any other person that she had made it: (**PJ [166]**). The Statement was not conditional: there was nothing to indicate that the Statement was linked to David remaining as a share-farmer of the Property, or doing anything else (transcript at **PJ[93]**, **[229]; AJ[21], [150]**). It was not made in response to anything David had raised.

7. The Statement "*by itself*" is the only aspect of Dame Leonie's conduct which was found to have amounted to the requisite encouragement or inducement (**AJ[166]-[167]**). Although more than a "*mere statement of revocable intention*", the Statement "*in its terms*" was a "*discrete statement of testamentary intention*" (**AJ[150]**). But it was never repeated (**PJ[92], [220]; AJ [150]**). In this, the facts of the present case stand apart from what Lord Scott called the "*'inheritance' cases*":[2] see further [20] below. Apart from knowledge of detrimental reliance, no other conduct, such as repetition of the statement, encouragement of expenditure or discouragement from leaving the Property, was relied upon to support a conclusion of unconscionability.

8. ***Dame Leonie Forgets about the Statement.*** The PJ proceeded upon the basis that Dame Leonie, at some unspecified point, forgot about the Statement. His Honour said it was "*possible*" that Dame Leonie decided to honour Dr Harry's wishes "*at least in the period early after Dr Harry's death*" (**PJ[204]**). But his Honour recognised that the time at which the Statement was made was "*exceptional, in that Dame Leonie had recently experienced the loss of her husband through his premature death with cancer*" (**PJ[214]**). As such, it *"may well have been a much less significant event in Dame Leonie's mind, given it was made in the highly emotional circumstances of Dr Harry's recent death*" (**PJ[242]**). In the ensuing years, when Dame Leonie continued to pursue the activities that led to her exceptional eminence in society, "*the significance of any*

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1 To avoid confusion with estoppel by representation and given the "core meaning" of the word "representation" (as "*another presentation, generally in words of something, and since that something is presented again it must already have occurred or exist*" – see *Equititrust Limited v Franks* [2009] NSWCA 128, [71]-[72] (Handley AJA); see also P Keane, Estoppel by Conduct and Election (3rd ed, 2023), [11-004]) (**Keane**), these submissions will use the neutral term "statement".

2 *Thorner v Majors,* [20] (Lord Scott), referring to *Gillett v Holt* [2001] Ch 210; *In re Basham* [1986] 1 WLR 1498; and *Walton v Walton* (1994, Court of Appeal, unreported) [1994] Lexis Citation 3926.

statement that she made to David may have diminished in Dame Leonie's own recollection" (**PJ[214]**). There were incomplete and unexecuted draft wills apparently prepared in 1996 and 1999, and wills executed in 2000, 2003 and 2006 - none of which left the Property to David (**PJ[246]**). These wills "*tend[ed] to show that Dame Leonie may not have had in mind from as early as 1996 that she had given any assurance to David that she would leave the Colo Property to him in her will*" (**PJ[247]**). At **PJ[241]**, the PJ said it was "*likely*", in the light of her diagnosis of dementia (in 2010) (**PJ[280]**), that Dame Leonie "*may have forgotten that the representation was made or what its terms were*".

9. ***David Omits to Terminate the Share-Farming Agreement***. David did not do anything, or expend any funds, in reliance upon the Statement. Nor did he consciously decide to omit to do any thing. However, the PJ found that, in the absence of a belief he would inherit the Property, David would have decided "*that the farming operation was too hard going and would have terminated the share farming agreement and successfully pursued a more remunerative occupation*" (**PJ[251]**). His Honour was satisfied that David acted on the faith of the Statement to his detriment by continuing the farming operation on the Property for about 23 years after the Statement was made in the belief that he would inherit the Property (**PJ[250]-[251]**).

10. David was farming the Property under an oral (**PJ[49]**) share farming agreement which was terminable at will (**PJ[160], [163]**). Under the terms of the agreement: **(a)** farm expenses except for fuel would be paid by the Kramers. Initially, fuel costs were shared equally but, after March 1980, the Kramers agreed to pay two thirds of the fuel costs (**PJ[58]**). The Kramers were obliged to meet all of the costs of maintaining and improving the property (**PJ[68]**); **(b)** income from the farm produce would be shared equally; **(c)** David would live rent-free in a four-bedroom house on the property (**PJ[52]-[53]; AJ[15]**); **(d)** from September 1975, the Kramers had agreed to pay David a quarterly "*bonus*" (**PJ[56]**), which increased to $1500 a quarter at some stage (transcript at **PJ[93]**) in return for work done towards improving the property "*in the nature of maintaining the fencing and painting buildings*" (**PJ[57]**).

11. ***Unconscionability.*** As noted above, the only conduct of Dame Leonie which was relied upon at the trial (apart from the Statement) was her knowledge of David's

detrimental reliance.[3] In that setting, the PJ correctly held that, "*[f]or an equitable estoppel to arise, the representor must know that the representee has placed reliance on the representation*" (**PJ[231]**). There was no finding, and no basis for inferring, that Dame Leonie intended the Statement to be relied upon by David at the time it was made (**AJ[195]-[196]**). Further, there was no finding that Dame Leonie later knew (or earlier intended)[4] that David would detrimentally rely on the Statement by omitting to terminate the Share Farming Agreement. The PJ said that the available evidence did not justify the Court making any finding concerning Dame Leonie's "*subjective honesty*" (**PJ[242]**) - by which his Honour evidently meant subjective knowledge of detrimental reliance. On one hand, the Statement was made only once, in "*highly emotional circumstances*" in 1988, was never repeated or referred to again, and at least by 1996 Dame Leonie had forgotten about it (see [8] above). On the other hand, David was a share farmer operating under a mutually beneficial and freely negotiated contractual arrangement –which was relevantly more advantageous and "*more of a collaboration*" than a conventional share farming agreement (**PJ [69]-[71**]) - with which he expressed no dissatisfaction, and which he never threatened to terminate. Indeed, David had taken up the offer to share farm the Property "*very happily*" (transcript at **PJ [145]**), "*freely acknowledged … his love of farming and living a rural life*" (**PJ [333])** and had told people on many occasions how much he enjoyed "*living and working on the farm*" (transcript at **PJ [93]**).

12. However, the PJ concluded that a finding of "*subjective*" knowledge was unnecessary to establish unconscionability (**PJ[234], [242], [251]**). The PJ's dispositive finding was that Dame Leonie "*ought to have known that part of David's motivation for continuing was the expectation that he would inherit the Colo property*" (**PJ[251])**. The sufficiency of the PJ's constructive knowledge finding was challenged in the NSWCA (Ground 4). However, the Court of Appeal rejected that ground because it held that knowledge was not required at all in a case of estoppel by encouragement: **AJ[200], [203], [294]-[295]**. Ward P considered it was accordingly "*not necessary to*

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[3] David alleged that Dame Leonie knew of David's expectation or belief (see **PJ[23]**). The Appellants' case at trial was that neither Dr Harry nor Dame Leonie intended or knew that David was only staying on the property because of what had been said to him (see **PJ[243]**).

[4] At **JA[193]**, Ward P considered that the PJ "*must have inferred*" that Dame Leonie knew at the time of making the Statement that it "*would be relied upon by the respondent*". This *obiter dictum* (see [12] below) is a wrong characterisation of the PJ's findings: see [8] above and **PJ[242]**. Nor does the finding at **PJ[244]**, to which her Honour referred, suggest otherwise.

express any concluded view as to whether such knowledge must be actual … or constructive": **AJ[202], [287]**. In a concurring judgment with which Kirk JA agreed, Leeming JA said by way of elaboration that, whilst "*the point is unsettled*", the "*weight of authority*" suggests actual knowledge is not necessary: **AJ[291], [295]**.

PART VI: ARGUMENT

13. Ground 1 of the Notice of Appeal is that the NSWCA erred by concluding that, in cases of proprietary estoppel by encouragement, the elements of *encouragement* coupled with *reasonable and detrimental reliance* are sufficient, without more, to establish unconscionable conduct.

Ground 1(a): The Equity Arises from Conduct After the Voluntary Promise

14. Ground 1(a) is that the NSWCA erred in that it ought to have held, following *Olsson v Dyson* (1969) 120 CLR 365 (***Olsson***), that the equity recognised by proprietary estoppel arises from the conduct of the donor after making the voluntary promise. Ground 1(a) is made out for the following reasons. ***First,*** it was not open to the NSWCA to depart from the binding authorities including *Olsson* which establish this: [15]-[16] below. ***Second***, the NSWCA's contrary approach (ie that unconscionability is sufficiently established by *encouragement* coupled with *reasonable* and *detrimental reliance*) is disconsonant with other equitable doctrines which ensure harmony with the law, specifically the maxims that "equity will not perfect an imperfect gift" and that "equity will not assist a volunteer": [18]-[21] below. ***Third***, the *Olsson* principle appropriately recognises that the intervention of equity in proprietary estoppel cases is justified only by equitable fraud: [22]-[24] below. ***Fourth***, the NSWCA's approach introduces disharmony within what this Court has described as a single "variety" or "category" of equitable estoppel: [25]-[28] below. ***Fifth***, the NSWCA's approach is influenced and undermined by a misdirected pursuit towards a "unified" theory of equitable estoppel, which this Court has correctly and authoritatively declined to embrace: [29]-[31] below.

15. ***The NSWCA's conclusion was contrary to binding authority.*** The reasoning in *Dillwyn v Llewelyn* (1862) 45 ER 1285 (***Dillwyn***) was authoritatively considered by this Court in *Olsson*. Delivering the leading judgment, Kitto J held that the "*ultimate basis*" of *Dillwyn* was that the father's "*subsequent conduct in encouraging the son*",

ie "*after the act of incomplete gift*", is what "*created an equity*".[5] The principle in *Dillwyn* was held to be "*impossible to apply*" on the facts of *Olsson*, because the donor had never adverted to the question of detrimental reliance after the making of the purported gift.[6] The reasoning in *Olsson* has been approved several times by this Court. In *Corin v Patton*,[7] *Olsson* was cited as authority for the proposition that the equity arises "*from the conduct of the donor after the making of the voluntary promise by the donor*". In *Giumelli v Giumelli*,[8] four members of this Court referred with evident approval to the reasoning of McPherson J in *Riches v Hogben*[9] that "*[t]he critical element is the conduct of the defendant after the representation in encouraging the plaintiff to act upon it*".[10]

16. These authorities were cited to the NSWCA (see **AJ[154]-[155]**). However, it is possible that Ward P may have misunderstood *Olsson* as standing for a narrower proposition, that the "*foundation*" for the estoppel is "*conduct which induces a change of position for the worse in reliance thereon*" (**AJ[81]**). As a summary of *Olsson*, **AJ[81]** is obviously incomplete. It ignores the insistence in *Olsson* and later cases upon there being conduct after the initial attempt or promise to make a gift of a proprietary interest. It ignores the importance, in this context, of the principle that equity will not complete an imperfect gift: see [18] below.

17. Plainly, it was not open to the NSWCA to depart from this line of authority. Only this Court could overrule *Olsson*. Since the appeal must succeed unless this Court overrules *Olsson*, these submissions will proceed to address why it remains good law; indeed, why it has rightly been described as the "*most satisfying analysis*" of proprietary estoppel by encouragement.[11]

18. ***Harmony with other Equitable Doctrines.*** The earliest expositions of proprietary estoppel were scrupulous in reconciling the equity with the principle that "*a voluntary*

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5 *Olsson*, 378-379 (emphasis added) (Kitto J with whom Barwick CJ relevantly agreed and whom Menzies and Owen JJ agreed).
6 *Olsson*, 379.
7 *Corin v Patton* (1990) 169 CLR 540, 557 (Mason CJ and McHugh J), citing *Olsson*, 378-379.
8 *Giumelli v Giumelli* (1999) 196 CLR 101, [35] (Gleeson CJ, McHugh, Gummow and Callinan JJ
9 *Riches v Hogben* [1985] 2 Qd R 292, 300-301 (***Riches***). *Riches* has been cited with approval in numerous cases, such as *Sullivan v Sullivan* [2006] NSWCA 312, [15] (Handley JA).
10 *Riches,* 300 (citing *Olsson*, 379). See also Keane, [11-004].
11 Heydon, Leeming and Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (5th ed, 2015) (**MGL**), p.520 [17-075].

agreement will not be completed or assisted by a Court of Equity, in cases of mere gift."[12] The rationale for refusing to complete an incomplete gift inheres in the freedom which the law accords to individuals, to decide and then re-consider how to dispose of their own property: "*a donor should not be compelled to make a gift, the decision to give being a personal one for the donor to make*."[13] Harmony with the doctrine of consideration is also implicated in the rationale for these equitable maxims. On one hand, equity as a risk-allocation mechanism acknowledges that donees can negotiate contracts to secure their expectations – if they decline to pay for those expectations, they are at risk.[14] On the other hand, it is recognised that proprietary estoppel requires scrutiny lest it operate to defeat the doctrine of consideration by a "*side-wind*,"[15] by compelling the performance of promises made without consideration.[16]

19. Proprietary estoppel, especially in cases involving statements of testamentary intention, cannot be reconciled with these equitable maxims except by requiring something to bind the conscience of the donor *other* than the making of an incomplete gift. Whereas "*a mere donee can have no right to claim more than he has received",* the *"subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift.*"[17] For this reason, Kitto J in *Olsson* was correct to insist that "*what gives rise to an equity which the attempted making of the gift did not by itself create is the conduct of the intending donor after the act of incomplete gift*".[18]

20. English cases in recent times have not expressed the principle in similar terms. But what Lord Scott called the "*inheritance cases*" can all be seen to have involved "*subsequent acts of the donor*". The facts of these cases therefore presented no occasion to grapple with the problem which arose on the facts in *Olsson*, and which

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12 *Dillwyn*, 1286.
13 *Corin v Patton*, 558 (Mason CJ and McHugh J).
14 Eg *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (***Waltons Stores***), 403 (Mason CJ and Wilson J): "*generally speaking, a plaintiff cannot enforce a voluntary promise because the promise may reasonably be expected to appreciate that, to render it binding, it must form part of a binding contract*"; see also 422-423 (Brennan J).
15 See *Waltons Stores*, 400 (Mason CJ and Wilson J).
16 MGL, p.520 [17-075], noting that the "*narrow view*" was that the early proprietary estoppel cases involved no more than "*contracts express or implied*".
17 *Dillwyn*, 1286 (emphasis added).
18 *Olsson*, 379 (emphasis added).

arises again in this case. The mother in *Walton v Walton*[19] would respond to the son's complaints from time to time by using her "*stock phrase*": "*You can't have more money and a farm one day*". The stepfather in *In re Basham*[20] made multiple reassuring statements in distinct episodes over an extensive period.[21] The gentleman farmer in *Gillett v Holt*[22] made a number of assurances which were "*repeated over a long period, usually before the assembled company on family occasions*". The taciturn uncle in *Thorner v Majors*[23] had a "*continuing pattern of conduct*" relied upon by his nephew. Most recently, the first lines of Lord Briggs' judgment in *Guest v Guest*[24] commence: "*'One day my son, all this will be yours'. Spoken by a farmer to his son when in his teens, and repeated for many years thereafter*."

21. In parts of its reasons, the NSWCA recognised the significance of these maxims. Ward P correctly stated at **AJ[82]** that the equity recognised by proprietary estoppel "*does not arise through the mere attempt or promise to make a gift to another of a proprietary interest*". Her Honour then correctly cited Mason CJ and Wilson J in *Waltons Stores* at 406, stating that there needs to be "*something more*" to bind the conscience of the defendant. However, in ultimately holding that unconscionability is established merely by encouragement (which on the NSWCA's approach may be the promise itself) coupled with reasonable and detrimental reliance (without conduct after the encouragement, eg that the defendant *knew* about the detrimental reliance), the NSWCA's decision abrogates these principles. It forecloses a donor's ability to change her mind because there has been (unbeknownst to her) detrimental reliance, in effect abridging testamentary freedom. Applied to these facts, it makes Dame Leonie strictly liable for acts of reasonable and detrimental reliance by David which she did not intend to occur, and about which she was ignorant, and in the context of a Statement she had forgotten (see [8] and [11] above). While a statement of testamentary intention may be "*tantamount to a promise*" (**AJ [150**]), the "inheritance

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19 *Walton v Walton* (unreported, 14 April 1994, Court of Appeal (Civil Division), Glidewell, Kennedy and Hoffman LJ) [1994] Lexis Citation 3926.

20 *In re Basham* [1986] 1 WLR 1498.

21 Eg in around 1942 "*You don't have to worry about money, you'll be alright*"; and in 1976, "*It's putting money on the property for you*": *In re Basham* [1986] 1 WLR 1498, 1501D and 1502F.

22 *Gillett v Holt* [2001] CH 210, 228 (Walker LJ).

23 *Thorner v Majors* [2009] UKHL 18, [60] (Lord Walker), see also [2] (Lord Hoffman), [17] (Lord Scott), [24] (Lord Rodger), [69] (Lord Neuberger).

24 *Guest v Guest* [2022] UKSC 27, [1] (Lord Briggs, with whom Lady Arden and Lady Rose agree).

cases" confirm that there is no basis to treat such promises more strictly than other kinds of promise: see further [28] below.

22. ***Proprietary Estoppel is based upon Equitable Fraud.*** A further reason for reaffirming *Olsson v Dyson* is bound up in the nature of proprietary estoppel as a species of equitable fraud.[25] The early cases were explicit in articulating that equity would interfere only "*in order to prevent fraud*".[26] Justice Fry's famous five probanda were a deliberate attempt by him to explain "*the elements or requisites necessary to constitute fraud*" in the relevant sense - since "*[a] man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights*".[27] A terminological shift to "unconscionable" conduct has occurred.[28] At the same time, unconscionability is held not to be a "'*triable issue' as such*" (**AJ [97]**; see also **PJ [35]**). Instead, unconscionability, like fraud, is the conclusion that is drawn from the facts when viewed through the prism of principles. But when all that is required is *encouragement* coupled with *detrimental and reasonable reliance* (without more), this obscures the basis for equity's intervention. As Fry J put it, if the defendant does not know of the detrimental reliance, "*there is nothing which calls upon him to assert his own rights*."[29] The NSWCA's decision is, to this extent, an instantiation of the difficulty that "unconscionability" as a label sometimes generates: it "*has the potential to 'mask[] rather than illuminate[] the underlying principles at stake*".[30]

23. It is well established that there is no fraud merely in departing from a voluntary promise.[31] Therefore, "*the critical element is the conduct of the defendant after the representation in encouraging the plaintiff to act upon it*".[32] It is the conduct after the

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25 See MGL, p.522 [17-090] ("*The fraud of the other party and the action by the complainant are sufficient for equity to intervene*").

26 *Ramsden v Dyson* (1866) LR 1 HL 129 (***Ramsden***), 170 (Lord Kingsdown); see also *Ward v Kirkland* [1967] Ch 194, 238 (Ungoed-Thomas J); Finn, "Equitable Estoppel" in Finn (ed), *Essays in Equity* (1985), 66: "*The jurisdiction [Lord Kingsdown] invoked was doubtless grounded in the prevention of fraud*."

27 *Willmott v Barber* (1880) 15 Ch D 96 (***Willmott v Barber***), 105-106 (Fry J), approved by this Court in *Svenson v Payne* (1945) 72 CLR 531, 542-543 (Latham CJ, Rich and Williams JJ).

28 *Sabaza Pty Ltd v Australian Mutual Provident Society* (1981) 2 BPR 9631 (NSWSC), [97153] (McLelland J). See eg *Waltons Stores*, 406 (Mason CJ and Wilson J)

29 *Willmott v Barber*, 105 (Fry J).

30 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, [140] (Gageler J).

31 See eg *Jordan v Money* (1854) 10 ER 868, 882; *Waltons*, 422-423 (Brennan J).

32 *Riches*, 300 (cited with approval in *Giumelli*, [35]).

promise which justifies the stigma of unconscionability or fraud. In assessing whether equitable intervention is required, the court "*looks backwards rather than forwards*"[33] and it is "*the promisor's responsibility for the detrimental reliance by the promise, which makes it unconscionable for the promisor to resile from his or her promise"*.[34] The NSWCA's approach would give unwarranted and determinative weight to the existence of the promise; "*estoppel by encouragement [is] not based on implied contract*".[35] Its approach would provide a perverse incentive for a donee to stay silent (so as to avoid the possibility of the donor correcting the assumption), which is further complicated by the likelihood of claims of proprietary estoppel being adjudicated against the estates of deceased testators.

24. Further, proprietary estoppel is a cause of action which typically (as in this case) leads to deprivation of proprietary rights. It is the "*relation to identified land*" which has enabled proprietary estoppel "*to develop as a sword, and not merely a shield*."[36] Proprietary estoppel is, in particular, a cause of action in that it generates new rights and interest in or over land, and limits or extinguish the proprietor's rights.[37] "*Certainty is important in property transactions*" and proprietary estoppel should be "*formulated and applied in a disciplined and principled way*".[38] The English approach of encouraging courts to "*stand back and look at the claim in the round*"[39] jeopardises that stricture. Yet even that encouragement is missing in the NSWCA's reasoning, insofar as it holds to be sufficient the encouragement coupled with reasonable and detrimental reliance – without having to "*look … in the round*".

25. ***There is but one doctrine of proprietary estoppel.*** The reasoning of the NSWCA introduces a sharp and unwarranted division within what this Court has described as a single "*variety*"[40] or "*category*"[41] of equitable estoppel (**cf AJ [292]-[293]**).

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33 *Milling v Hardie* [2014] NSWCA 163, [55](2) (Macfarlan JA, Beazley P agreeing).
34 *Sidhu v Van Dyke* (2014) 251 CLR 505 (***Sidhu***), [58] (French CJ, Kiefel, Bell and Keane JJ, emphasis added) and [139] (Keane J).
35 Keane, [11-015]-[11-016]. See also *Olsson*, 379 (Kitto J).
36 *Thorner v Majors* [2009] UKHL 18, [61] (Lord Walker).
37 *Crabb v Arun District Council* [1976] Ch 179 (***Crabb***), 187E-H (Lord Denning MR).
38 *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752, [46] (Lord Walker). See eg *Muschinski v Dodds* (1985) 160 CLR 583, 616 (Deane J).
39 *Uglow v Uglow* [2004] WTLR 1183, [9] (Mummery LJ), quoted with approval in *Guest v Guest* [2022] UKSC 27, [48] (Lord Briggs (with whom Lady Rose and Lady Arden agreed)). See also *Gillett v Holt* [2001] CH 210, 225 (Walker LJ).
40 *Giumelli v Giumelli* (1999) 196 CLR 101, [6] (Gleeson CJ, McHugh, Gummow and Callinan JJ).
41 *Sidhu*, [2], [77] and [81] (French CJ, Kiefel, Bell and Keane JJ).

Proprietary estoppel by encouragement and proprietary estoppel by acquiescence are closely related and share many features in common, including (prior to the decision below) the existence of a knowledge requirement.[42] Indeed, they are so closely related that in marginal cases it may not be clear which doctrine applies (**JA[292]**). As the PJ pointed out (**PJ [228]**), a "*promise 'may be implied wholly or partly from conduct or inferred from silence or inaction*"'.[43] The NSWCA holds that knowledge is necessary in *acquiescence* cases but not in *encouragement* cases - introducing a sharp divide between the elements required to establish each of them. In marginal cases, retention of property rights may therefore depend upon whether the defendant's conduct is properly characterised as *encouragement* (in which case knowledge is not required) or *acquiescence* (in which case it is). This is unsatisfactory (see [24] above).

26. The NSWCA seemed to justify the distinction by reference to the supposedly different effects upon conscience of *encouragement* compared to *silence*: see **AJ[103], [199]** (Ward P), **AJ[294]** (Leeming JA)). However, its approach (see **AJ [199]-[200]** and **AJ [286]-[294]**) relies on speculation or assumption that the donor's conscience has been "*sufficiently engaged*" by the making of the promise (**AJ [199]**). It ignores that, as in the present case, the promise: may not be intended to be relied upon; may not encourage the donee to do *anything*; and may have been forgotten by the donor.

27. The distinction between cases of encouragement and silence is not sustainable. The moral quality of the defendant's conduct is not changed by the fact that spoken words had the encouraging effect rather than silence. The suggested distinction in the effect on conscience of *acquiescing* and *encouraging* was authoritatively rejected in *Olsson*, at 379, where Kitto J referred approvingly the following statement of Ungoed-Thomas J in *Ward v Kirkland* [1967] Ch 194:

> It was suggested before me that there was a distinction between an act which is acquiescing or encouraging a person in such circumstances to expend money and merely standing aside with the knowledge that such money was being expended in reliance on having the right which is claimed. I, for my part, fail to see any substance in this distinction. The fundamental principle of the equity is unconscionable behaviour, and unconscionable behaviour can arise where there is knowledge by the legal owner of the circumstances in which the claimant is

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42 See MGL, [17-095] who identified the common elements as including "(e) the acts A performs in reliance on the relevant expectation or belief are either encouraged by B or known to B, who fails to assert title to the property when A acts adversely thereto" (citation omitted).

43 Quoting *Q v E Co* [2020] NSWCA 220; 383 ALR 469, [15] (Meagher JA, Leeming and Payne JJA).

> incurring the expenditure as much as if he was himself requesting or inciting that expenditure.[44]

28. Even where the express words are reasonably construed as a promise, still there is no difference recognizable in equity. This is because it is not sufficient to establish unconscionability that there has been "*reliance on an executory promise to do something, resulting in the promisee changing his position or suffering some detriment*".[45] Such detrimental reliance does not bring estoppel "*into play*"; "*[s]omething more would be required.*"[46] As Young J has explained: "*that something more will usually be found in looking to see what the opposing party did to his detriment, to the knowledge of the first party, in reliance on the promise*".[47]

29. ***The misdirected pursuit of a "Unified Estoppel".*** As Lord Denning MR once said, "*there are estoppels and estoppels. Some do give rise to a cause of action. Some do not.*"[48] In concluding that encouragement combined with reasonable and detrimental reliance was sufficient, without more, to establish unconscionability, the NSWCA was influenced by Professor Robertson's article entitled "*Knowledge and Unconscionability in a Unified Estoppel*".[49] The influence of the article is apparent from its citation at **AJ [103], [294]** and the harmony of the NSWCA's conclusions with Professor Robertson's thesis. Professor Robertson argued that, where a person has induced the relevant assumption, the additional element of unconscionability identified in equitable estoppel cases was satisfied by the existence of the "*core elements*"[50] of assumption, inducement, detrimental reliance and reasonableness. He argued (wrongly)[51] that "*the requirement of knowledge has generally been imposed only in cases of estoppel by acquiescence*".[52]

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44 *Ward v Kirkland* [1967] Ch 194, 239 (emphasis added).

45 *Waltons Stores*, 406 (Mason CJ and Wilson J). See also *Pipikos v Trayans* (2018) 265 CLR 522, [60] (Kiefel CJ, Bell, Gageler and Keane JJ).

46 *Waltons Stores*, 406 (Mason CJ and Wilson J).

47 *Milchas Investments Pty Ltd v Larkin* (1989) 96 FLR 464, 472-473 (Young J)

48 *Crabb*, 187E-H (Lord Denning MR).

49 A Robertson, "Knowledge and Unconscionability in a Unified Estoppel" (1998) 24(1) *Monash University Law Review* 115 (**Robertson**) (emphasis added).

50 See Robertson, 117.

51 Professor Robertson relevantly did not refer to *Olsson*, *Riches* or *Corin*. *Dillwyn* was referred to (without analysis) in a single footnote and Lord Kingsdown's statement of principle in *Ramsden* sidelined by what Robertson considered to be the "*better view*": Robertson, 125 (fn 60) and 127.

52 See Robertson, 126.

30. Professor Robertson's article took as its "*starting point*" that "*equitable and common law doctrines of estoppel should be unified*", and he sought to "*assist in facilitating that unification*".[53] In this "*starting point*", Prof Robertson's article was consistent with aspects of Brennan J's analysis in *Waltons Stores*, which proceeded on the basis that "*the distinction between promissory and proprietary estoppel*"[54] was "*generally [un]helpful*".[55] However, the passage of time has not been kind to this unification imperative. There is no hegemonic estoppel, and certainly no warrant for Professor Robertson's "*starting point*". While it can be accepted that the different varieties of estoppel serve "*the same fundamental purpose, namely 'protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted*", this Court has made clear that such a common purpose "*does not support a single unifying doctrine of estoppel*".[56] As Keane J has observed, "*[g]iving effect to this purpose may require different approaches in different contexts*".[57] Accordingly, this Court has affirmed that the "*various doctrines and remedies in the field of estoppel*" are not to be brought under a *"single overarching doctrine*".[58]

31. Any other approach must embrace "*top-down reasoning*",[59] which, as this Court has recognised in the context of unjust enrichment, is contrary to correct judicial method.[60] The pursuit of a unified doctrine of estoppel suffers "*the pitfalls of overgeneralisation*" and overlooks or underappreciates "*considerations that are practically important but theoretically inconvenient*".[61] In the context of estoppel, it overlooks and underappreciates that the operation of proprietary estoppel is different in fundamental

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53 Robertson, 115.
54 *Crabb,* 193 (Scarman LJ).
55 *Walton Stores*, 420.
56 *Sidhu*, [1] (French CJ, Kiefel, Bell and Keane JJ, citing *Commonwealth v Verwayen* (1990) 170 CLR 394 (***Verwayen***), 409 (Mason CJ)). See also *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1 (***Crown Melbourne***), [37] (French CJ, Kiefel and Bell JJ) and [139] (Keane J).
57 *Crown Melbourne,* [139]. See also [141].
58 See *Giumelli*, [7] (Gleeson CJ, McHugh, Gummow and Callinan JJ). See eg *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 728, [43]-[44] (Meagher JA, Macfarlan JA agreeing). See also Keane, [1-034] ("*Each form has a separate history and a distinct source in law or in equity. The various rationales… are quite different. There is no single overarching doctrine*").
59 See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 *(**Roxborough***), [73]-[74] (Gummow J).
60 *Roxborough*, [72] (Gummow J). See also *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 (***Mann***), [79] (Gageler J) and [199] (Nettle, Gordon and Edelman JJ).
61 *Mann*, [80] (Gageler J). See also *Republic of India v India Steamship Co Ltd (The Indian Endurance) (No 2)* [1988] AC 878, 914 (Lord Steyn).

respects to common law and promissory estoppel. As for common law estoppel (estoppel *in pais*), it is confined to representations of an "*existing fact*"[62] and does not extend to "*a statement of something which the party intends or does not intend to do*".[63] An estoppel *in pais* does not create any rights; it establishes the assumed state of affairs by reference to which the legal relationship between the parties is to be ascertained.[64] As for promissory estoppel, whilst it extends to promises as to future conduct, on NSW authority at least, it acts "*as a restraint on the enforcement of legal rights*"[65] and thus "*it must be negative in substance*".[66]

32. Proprietary estoppel is fundamentally different. It is not a preclusionary principle, ie "*a doctrine by operation of which assertion of a right is precluded*";[67] it is instead a cause of action based upon equitable fraud which yields property rights: see [24] above. It involves *"enforcement of a non-contractual executory promise by specific performance, damages or equitable compensation"* – something which equity typically "*does not do*".[68] That difference compels greater scrutiny of what binds the conscience of the person to be deprived of property rights. *Olsson* was correct to insist that what binds the conscience of the donor is conduct occurring *after* the promise.

Ground 1(b): Constructive Knowledge is Insufficient

33. Ground 1(b) is that the NSWCA ought to have held that constructive knowledge of detrimental reliance is insufficient to establish unconscionability, at least where (as in this case) knowledge was the only relevant matter arising after the making of the promise which could support a conclusion of unconscionability.

34. ***No finding of actual knowledge.*** For present purposes,[69] "actual" knowledge can be taken to encapsulate: **(i)** subjective knowledge; **(ii)** wilful blindness, in the sense of

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62 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, 324 (Isaacs J).

63 *Jorden v Money* (1954) 10 ER 868, 882. See also Keane, [2-006].

64 *Waltons Stores*, 414 (Brennan J). See also *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472 (Priestley JA, Hope and McHugh JJA agreeing).

65 *Ashton v Pratt* (2015) 88 NSWLR 281, [138] (Bathurst CJ, McColl JA agreeing).

66 *Saleh v Romanous* (2010) 79 NSWLR 453, [74] (Handley AJA, Giles JA and Sackville AJA agreeing) (special leave refused - [2011] HCATrans 101). See also *DHJPM*, [47] (Meagher JA) and [93] (Handley AJA). Cf *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825, [769] (Edelman J).

67 *Allianz Australia Insurance Ltd v Delor Vue Apartments* (2022) 97 ALJR 1, [137] (Gageler J).

68 Keane, [13-040].

69 The five categories of knowledge in *Baden v Société Générale* [1992] 4 All ER 161, 242-243 (Peter Gibson J) have been accepted as useful by this Court in exposition of the principles governing liability for knowing receipt: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 (***Farah***), [174] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

wilfully shutting one's eyes to the obvious;[70] and **(iii)** such a calculated (ie wilful and reckless) "*abstention from inquiry*" as to disentitle the person to rely upon lack of actual knowledge.[71] In equity, each is equivalent to actual knowledge.[72] The PJ made no finding that Dame Leonie had actual knowledge of detrimental reliance in any of these senses. Instead, the PJ found that "*subjective knowledge*" (**PJ[35], [234]**), "*actual knowledge*" (**PJ[231]**), or "*intention or subjective appreciation*" (**PJ[245]**) were not necessary.

35. ***An ambiguous finding of constructive knowledge.*** Equity has developed two instances of "constructive knowledge", particularly in disputes respecting old system conveyancing:[73] **(i)** knowledge of circumstances which would indicate the facts to an honest and reasonable person – this being a "*default rule*" which prevents a person relying upon their own *"moral obtuseness"* as the reason for not recognising what would be apparent to a reasonable person;[74] and **(ii)** knowledge of circumstances putting an honest and reasonable person on inquiry, which "*derives from the bona fide purchaser for value without notice doctrine*"[75] and is termed "constructive notice".

36. The PJ expressed himself in terms that Dame Leonie "*ought to have known that part of David's motivation for continuing was the expectation that he would inherit the Colo property*" (**PJ[251]**). But his Honour did not engage with either category of constructive knowledge, and did not link the dispositive finding to any supporting reasoning. Other passages suggest that the constructive knowledge finding depended upon anterior findings to the effect that David's income from the share farming operation was inadequate compared to what he might have earned elsewhere: see eg **PJ[156], [234]**. The PJ's reasoning process seems to have been: **(i)** a reasonable person would have "*assumed*" that David was detrimentally relying on the Statement; by reason of the fact that **(ii)** David's income was "*meagre and irregular*": **PJ[201],**

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70 In the context of criminal law, this Court has endorsed the explanation of Glanville Williams, *Criminal Law: The General Part* (2nd ed., 1961), 159: "*He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge*": see *R v Crabbe* [1985] HCA 22; 156 CLR 464, 470-471 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).

71 *Grimaldi v Chameleon Mining NL & Another (No 2)* (2012) 200 FCR 296 (***Grimaldi***), [261] (Finn, Stone and Perram JJ).

72 See *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 454 (Nourse LJ).

73 *Farah*, [174] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

74 *Grimaldi*, [261] (Finn, Stone and Perram JJ).

75 *Grimaldi*, [261] (Finn, Stone and Perram JJ).

[234] and **[245]**. However, the logic of the constructive knowledge finding must collapse without also finding **(iii)** that the reasonable person would recall (ie would not forget) that the Statement had been made. At that point, however, the syllogism collides with his Honour's sympathetic findings about the context of the Statement itself, specifically: **(a)** it was made only once, in "*highly emotional circumstances*" for Dame Leonie in 1988, and was never repeated or referred to again ([6] above); **(b)** it was not conditional – it was not linked to David remaining as a share-farmer of the Property, or doing anything else; **(c)** Dame Leonie (not unreasonably) forgot about it ([8] above); and **(d)** the surrounding context about David's love of living and working on the farm: see [11] above. These findings cannot be reconciled with a conclusion that Dame Leonie had been "morally obtuse" not to appreciate that David was detrimentally relying on the Statement.

37. In light of this difficulty, the PJ's use of the term "*assumed*" obscures whether the "*meagre and irregular*" income was regarded by his Honour as a circumstance from which a reasonable person would *know* that David was staying at the Property in reliance on the Statement, or instead was one which would lead a reasonable person to further enquiry. The obscurity is compounded by the fact that the part of the judgment discussing David's income treated it as a matter which went relevantly to the likelihood of a finding of detrimental reliance (**PJ[150]**).

38. ***Summary.*** On the question of principle, Leeming JA indicated that he thought the "*correct position*" was that *"the weight of authority*" suggests that *"actual knowledge is not necessary*" (**AJ[291]**), and that this was consistent with principle at least in situations where "*the defendant's own positive encouragement brought about the plaintiff's assumption*" (**AJ[295]**). This conclusion should not be accepted, and Ground 1(b) should be upheld, for ***three*** reasons. ***First***, where the conduct relied upon after the encouragement is knowledge, only actual knowledge justifies equity's intervention. ***Second***, Leeming JA's analysis rests upon on an erroneous distinction between cases of encouragement and acquiescence (see [24]-[27] above). ***Third***, the analysis by the PJ and Leeming JA of the "*weight of authority*" miscarried, in that it: **(i)** ignored the "*leading decisions*" ([40]-[42] below); **(ii)** placed inappropriate weight upon the heterodoxy of Deane J in *Commonwealth v Verwayen,*[76] ([43] below); and

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[76] *Commonwealth v Verwayen* (1990) 170 CLR 394 (***Verwayen***), 445 (Deane J).

(iii) rested upon an unsustainable reading of Brennan J's reasons in *Walton Stores* - which, properly analysed, support an actual knowledge requirement ([44]-[45] below).

39. ***The Basis of Proprietary Estoppel requires Actual Knowledge.*** As identified in Ground 1(a), the relevant equity arises from the conduct of the donor after making the voluntary promise. In circumstances where mere detrimental reliance on an executory promise is not enough (see [28] above), equity insists on actual knowledge so as to ensure that the donor's conscience has, in fact, been engaged. If constructive knowledge were sufficient, the courts would be effectively "*simply protecting reasonable reliance*"[77] and ignoring the need for "*something more*" (see [21] above). To insist upon actual knowledge also reflects the foundations of proprietary estoppel in equitable fraud and unconscionable conduct: see [22] above. As Queensland Court of Appeal has observed: "*[b]ecause the basis of the estoppel is dishonesty, or fraud, which is a subjective state of mind, the knowledge required for the conduct, the encouragement or inactivity must be actual".*[78]

40. ***The Leading Decisions require actual knowledge.*** The "*leading decisions*"[79] on proprietary estoppel depend upon actual knowledge of the donee's detrimental reliance. In *Dillwyn*, Lord Westbury LC formulated the principle in terms which required that B must "*on the strength of that promise, with the knowledge of A*" expend money.[80] That language must be read together with other passages, which identified that the son had taken possession and built a residence at significant expense with the father's "*assent and approbation*" ("*knowledge and approbation*")[81] – terms which are not reconcilable with constructive knowledge. It was the subsequent expenditure "*with the approbation of the father*" which "*created a binding obligation*"[82] – thus showing the centrality of knowledge to the generation of the equity.

41. When describing the key facts of *Dillwyn,* Kitto J would later say that the father had "*thereafter assented to and approved of the son's proceeding with the building.*"[83]

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77 Robertson, 132. See eg *Thorner v Majors* [2009] UKHL 18, [17] (Lord Scott).

78 *Portland Downs Pastoral Company Pty Ltd v Great Northern Developments Pty Ltd & Ors* [2012] QCA 18, [57] (Chesterman JA, with whom Wilson AJA agreed). See also at [44].

79 *Sidhu*, [82] (French CJ, Kiefel, Bell and Keane JJ) (referring to *Dillwyn*, *Ramsden*, *Riches* and *Verwayen*).

80 *Dillwyn*, 1286 (emphasis added).

81 *Dillwyn*, 1285-1286 (emphasis added).

82 *Dillwyn*, 1287.

83 *Olsson*, 378 (Kitto J, emphasis added).

Olsson itself amply illustrates the need for actual knowledge, in particular because the claim can be seen to have failed without it. The principle in *Dillwyn* was held "*impossible to apply*" because there was "*not the slightest evidence that after the making of the purported gift the deceased ever again adverted to the question*".[84] The result was that there was nothing to bind the deceased's conscience, notwithstanding that the deceased "*no doubt realised that [the donee] too assumed*" that he had completed the gift.[85] There was no question in *Olsson* of asking what the deceased "*ought to have known*". The claim failed because the donor had not consciously "*adverted*" to the donee's detrimental reliance.

42. A requirement of actual knowledge also emerges clearly in *Ramsden v Dyson* (1866) LR 1 HL 129 (***Ramsden***). Lord Kingsdown's formulation, later approved by the Privy Council,[86] identified the relevant "*rule of law*" by saying that the expenditure must be incurred "*with the knowledge of the landlord, and without objection by him*".[87] It hardly makes sense to rely upon a failure to "object" unless the person knows there is occasion to object. Lord Cranworth spoke about Person A "*perceiving*" and "*s[eeing]*" Person B's mistake, and his Lordship examined that which was actually known by the representor based on the evidence.[88] To the same end, in *Willmott v Barber*, [89] Fry J was unable to conclude on the facts that "*the mistaken belief of the Plaintiff was brought home to Bowyer's mind*", and was therefore unable to "*restrain Bowyer from exercising his legal rights*".[90] The NSWCA wrongly proceeded on the basis that these cases, insofar as they required knowledge,[91] imposed that requirement only in cases of acquiescence: **AJ [103], [295]**. But there is no bright-line distinction between acquiescence and encouragement: see [25]-[27] above.

43. ***Verwayen does not support constructive knowledge.*** The PJ said **PJ[231]** that there was "*High Court authority to the effect that constructive knowledge is sufficient,*" referring to a passage in the reasons of Deane J in *Verwayen.* In *Verwayen*, Deane J

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84 *Olsson*, 379 (Kitto J).
85 *Olsson*, 379 (Kitto J).
86 See *Plimmer v Wellington Corporation* (1884) 9 AC 699, 710-711, 713. Lord Kingsdown's remarks have been described by Handley JA as "*[t]he classic statement of the ingredients of an estoppel by encouragement*": *Sullivan v Sullivan* [2006] NSWCA 312, [11].
87 *Ramsden*, 170.
88 *Ramsden,* 142, 151-153, and 157.
89 *Willmott v Barber* (1880) 15 Ch D 96, 105-106 (Fry J).
90 *Willmott v Barber* (1880) 15 Ch D 96, 106-107 (Fry J).
91 Following Professor Robertson – as to which, see fn 51 above.

said that, in cases where a party has induced the assumption by express or implied representation, a "*critical consideration will commonly be that the estopped party knew or intended or clearly ought to have known*" of the detrimental reliance.[92] Deane J cited no authority or reasoning for the "*clearly ought to have known*" aspect of this statement, and it is not clear was meant by use of the adverb "*clearly*". It is unnecessary to pursue that matter further, because the passage in question was part of his Honour's exposition of a single "*doctrine*", which his Honour said "*should be seen as a unified one which operates consistently in both law and equity*".[93] That is not, as Ward P recognised (**AJ [102]**) the doctrine of this Court: see [29]-[32] above.[94]

44. ***Waltons Stores supports actual knowledge.*** In *Waltons Stores*,[95] Brennan J said that that it was "*essential to the existence of an equity created by estoppel*" that the defendant "*knows or intends*" that the assumption or expectation will be relied upon. Brennan J's fourth element was therefore that the "*defendant knew or intended*" the plaintiff to act or abstain from acting in reliance on the assumption or expectation.[96] There is no suggestion in his Honour's reasons that constructive knowledge would have been sufficient, and indeed his Honour's discussion of the facts confirm that "knows or intends" was meant to convey actual knowledge. Thus, his Honour concluded that "*Waltons must have known that Mr Maher either assumed that the contract had been made or expected that it would be made and Waltons was not free to withdraw*"; further, "*Waltons intended that Mr Maher should continue to build the store in reliance on that assumption or expectation.*"[97]

45. Brennan J's fourth element formed part of an articulation of what his Honour described as "*the general principles of equity*" and what was necessary "*to establish an equitable estoppel*".[98] Accordingly, and contrary to the gloss placed upon the reasoning by

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92 *Verwayen*, 445 (Deane J).

93 *Verwayen*, 445 (Deane J).

94 The Appellants note in this respect that Deane J accepted the requirement of actual knowledge in acquiescence cases; his Honour observed that a departure from an assumption would be unconscionable where the party alleged to be estopped "*knew that the other party laboured under the assumption and refrained from correcting him when it was his duty in conscience to do so*": see *Verwayen,* 444.

95 *Waltons Stores*, 423 (Brennan J).

96 It is clear from the context that the fourth element was concerned with the defendant's knowledge or intention concerning detrimental reliance: see **AJ[203]** per Ward P; cf **AJ [284], [286]-[288]**.

97 *Waltons Stores*, 429 (Brennan J, emphasis added). See also *Waltons Stores*, 406-407 (Mason CJ and Wilson J), holding that what made the appellant's conduct unconscionable was that, "*knowing that the respondents were exposing themselves to detriment by acting on the basis of a false assumption*", the appellant adopted a course of inaction which encouraged the respondent on that assumption.

98 *Waltons Stores*, 420 and 428 (emphasis added).

Leeming JA (**AJ[288]**), the conjunction "or" in the "knew or intended" formulation cannot be seen as piece of careful drafting "*to capture cases of encouragement and also cases of silence*". It is evident from 423 that the "*knew or intended*" formulation was sourced in Lord Denning's judgment in *Crabb*,[99] which was derived from promissory estoppel cases[100] in which promises intended to affect legal relations which the promisor "*knew or intended*" to be acted on were held to be binding if in fact acted upon. Justice Leeming's analysis focussed (see **AJ [285]-[287]**) on the wrong part of Brennan J's reasons, where Brennan J had been addressing a discrete question about "*whether silence is capable of inducing the adoption of the assumption or expectation*"[101] (i.e. the second rather than the fourth element). Justice Brennan adopted the observations of Dixon J in *Thompson v Palmer* (1933) 49 CLR 507 at 547, made about estoppel *in pais*, in that limited connection only (cf **AJ [286]-[287]**). Elsewhere, Brennan J was acutely conscious of the distinctions between estoppel *in pais* and equitable estoppel,[102] and had expressly accepted the principle associated with *Dillwyn* and *Olsson*, ie that it is the conduct and knowledge of the defendant *after* the promise that generates the equity.[103]

Part VII: Orders sought

46. The Appellants seek the orders set out in their Notice of Appeal (AB 303-304).

Part VIII: Estimate

47. The Appellants estimate that they will need 2.25 hours to present their argument.

Dated: 30 May 2024

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99 See *Crabb*, 188.

100 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, 134-135 and 136 and *Charles Rickards Ltd v Oppenhaim* [1950] 1 KB 616, 623.

101 *Walton Stores*, 427.

102 See *Waltons Stores*, 413-416. These estoppels cannot properly be assimilated: [31]-[32] above.

103 See *Walton Stores*, 419, 420 and 424.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **HILARY LORRAINE KRAMER**
First Appellant
JAIME FERRAR
Second Appellant

and

DAVID LINDSAY STONE
Respondent

ANNEXURE TO THE APPELLANTS' SUBMISSIONS

For the purposes of paragraph 2 of the Practice Direction No 1 of 2019, no constitutional provisions, statutes or statutory instruments are referred to in the Appellants' Submissions.