

Equitable Estoppel In Australia: The Court Of Conscience In The Antipodes

EQUITABLE ESTOPPEL IN AUSTRALIA: THE COURT OF CONSCIENCE IN THE ANTIPODES

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Speech to the Australian Law Journal Conference: Celebrating 80 Years
16 March 2007

Introduction [1]

Equity supplements the common law, providing a separate and distinct body of principle that mitigates its rigours. The common law creates rights; equity relieves against strict insistence upon them, when such insistence is against conscience. The concern of equity with conscience – and particularly with unconscionable insistence on strict legal right – is manifest in many of its doctrines and remedies. So, in the field of unconscionable dealings, equity comes to the relief of those who, labouring under a special disadvantage, are unconscientiously exploited by another. The last century or so has seen this doctrine evolve from primarily being concerned with catching bargains by heirs, to providing fundamental protections for disadvantaged persons in commercial dealings. In the field of penalties and forfeiture, equity – looking to the intent rather than the form of the transaction – relieves against insistence on the strict legal rights, because it is against conscience to enforce a penalty disproportionate to the primary obligation, or to insist on a forfeiture where the primary obligation can be performed. Although originally largely concerned with penal bonds, these doctrines have been adapted to hire purchase contracts, and commercial and consumer leases. In the law of trusts, equity binds the conscience of a legal owner, who holds property impressed with a trust, to perform the trusts. The great equitable remedies of specific performance and injunction are likewise concerned with conscience ...

The challenge of encapsulating, in an address of thirty minutes, the past present and future of equity in Australia, is a Herculean task, beyond anyone here except perhaps the General Editor and Chief Judge in Equity himself. The conference theme suggests that I should say something of the origins of equity in Australia, something of its evolution and present role, and something of what might happen in the future. While I am very honoured by the invitation, my essay is somewhat less ambitious: I will say something of the origins of equity in Australia, but take as my theme the operation of equity as an instrument of conscience, to relieve against unconscientious insistence on strict legal right – and particularly its application in the field of equitable estoppel, a field which has proceeded apace over the lifetime of the *Australian Law Journal*.

The early administration of equity in New South Wales [2]

The role of conscience in mitigating the operation of the law has been recognised in one form or another since the earliest days of the colony of New South Wales. The Civil Supreme Court created under the second Charter of Justice (1814) was declared to be a court of equity having equitable jurisdiction, and under its judges – the Bents and Barron Field – who had an interest in equity, there was an incipient jurisdiction in equity. [3] With the creation in 1823 of the Supreme Court under the third Charter, however, equity business declined for a decade, because unlike their predecessors, Forbes CJ and his colleagues had little interest in equity; Forbes being of the view that “In the early stages of society there is comparatively but little occasion for resorting to a Court of Equity”. [4] Roger Therry, who was eventually to become Primary Judge in Equity, was later to observe that, when he arrived in the colony in 1829, “half a dozen days in the course of a year would dispose of all the equity business”. [5]

Therry came to Australia in 1829 as Commissioner of the Court of Requests, a small claims court for suits not exceeding 10 pounds. He took his oaths of office on 17 November 1829. In a feat which even Young CJ in Eq might be hard pressed to rival, at Parramatta on 1 December 1829 he disposed of

130 cases between 10.30am and 7.00pm [6]. As Commissioner, Therry provides us with an early example [7] of the colonial courts fixing on the conscience of the parties, despite the strict legal position, in the special circumstances of the colony. In 1829, Therry tried a case in which a ticket of leave holder sued a professional gentleman for 5*l.* money lent which the defendant, being short of money one afternoon, had borrowed from the plaintiff in exchange for a cheque payable to him for the equivalent amount. When the plaintiff sought to bank the cheque, he was told that the account had no funds to meet it. The Supreme Court had held that convicts with tickets of leave were still *civilliter mortuus* and had no right to maintain a civil action; on that authority, the defendant contended that, as the plaintiff was a convict and therefore 'dead at law', he could not sue. Therry's response was "A Court of Requests is a Court of Conscience, and that such a defence as this shocked all conscience". [8]

The early equity judges were a troublesome lot. John Walpole Willis arrived in the colony in 1837. Whatever else might be said of him, he was knowledgeable in equity, and under an unofficial arrangement between the judges he took all equity matters, to the apparent convenience of all concerned. In due course, however, he demanded a separate court of equity, with himself as its Chief Baron; and he became so problematic to Governor Gipps, and so critical of his brother judges, that the Governor seized an opportunity to appoint him Resident Judge in Port Phillip. [9]

The office of Primary Judge

Sir James Dowling then became the Primary Judge in Equity. [10] Dowling CJ was inexpert in Equity, and preoccupied with other court work; but he could not sub-delegate the role to another judge. [11] However, this was to some extent remedied when, on 28 September 1841, the Legislative Council adopted 5 Vic. No. 9, which empowered the Primary Judge to delegate his duties in some circumstances.

This precipitated the administration of Equity in New South Wales by a Primary Judge experienced in that field, [12] the first of whom, William a'Beckett, [13] was appointed Primary Judge in Equity in 1844. *Walker v Webb*, [14] an early decision of his, again illustrates the application, in the particular conditions of the colony, of equity's concern with matters of conscience:[15]

"The Court" (says Mr Jeremy, in his work on *Equity Jurisdiction*, p94) "will imply a trust upon what it ascertains to be the conscientious duty of a party, and will, in accordance with its general principles, compel him to the performance of that which natural justice demands." It is upon this principle I decide this case – a broad principle, I admit, but one which, in a Court of Equity, would be nugatory, if it were not capable of embracing every state of circumstances in which it could be fairly applied. In seeking to apply it here, I ought not to be deterred by the absence of any cases in point: for in a colony like this, it is inevitable that contracts and dealings will take place, for which no analogy can be found at home. In such cases, whilst we look for our guidance to English law, it is better to risk the misapplication of one of its principles than of rejecting it altogether. Erroneous application could affect only the particular case, and would be capable of a remedy; but non-application might work unknown mischief to a thousand others, without hope of appeal or redress. We must look in administering either law or equity, to the circumstances of the colony; if the present case is new, its novelty is no reason why the court should not deal with it, and, if necessary, mould its decision according to its particular exigency.

When, in 1846, a'Beckett PJ in Eq was banished to Melbourne, Stephen CJ demanded that a judge skilled in equity be appointed. Roger Therry accepted the position. Although initially criticised for being inexperienced in the field of equity, Therry applied himself with considerable success. No appeal from his judgments as Equity Judge resulted in the reversal of any decree he had made, although he was criticised for being overly cautious, and reserving every point for consideration.[16]

Therry was a controversial figure, chiefly because of his religion: a Catholic, he took a prominent role in the Catholic Church, and did much to advance the position and standing of Catholics in the colony. His Catholic faith had meant that, prior to his appointment to the Supreme Court, he had often been passed over for promotion and appointment. He was also an early proponent and Fellow of the Senate of the University of Sydney. In his involvement in church and university governance while a judge of the Supreme Court, he set precedents that have since often been followed by his successors, and are reflected in today's bench.

The Primary Judge in Equity was expected to shoulder some of the common law list. But equity business was expanding: from nearly 150 equity suits during the three years 1844-46, to nearly 100 suits in 1853, to nearly 350 suits during the three years 1854-56. [17] In 1847, Stephen CJ proposed the appointment of an additional equity judge to hear all matters other than common law causes, but his protestations fell on deaf ears. [18] By 1857 he moved for the appointment of a Select Committee to examine the workload of the Supreme Court. In his address on the motion he said: [19]

It was the express opinion of all the judges that a separate court should be established for equity business ... Equity was like an unfavoured child – kicked, it might be said, from one room to another until it ran the risk of being utterly neglected.

Therry J, speaking in support of the motion, presented a colourful picture of the difficulties: [20]

Some short time since, a stranger, anxious to know how the Equity business was conducted, inquired where the Equity Judges sat. He was told that there was a Primary Judge in Equity, but where he sat was difficult to say. At 10 o'clock he might be found in chambers listening to some application having reference to a case heard before a police bench; at 12 he might be in one of the Courts at Nisi Prius, and, if particularly wanted about 2, he might be found at Darlinghurst trying a pickpocket. It was utterly impossible that any judge could properly perform the duties of Equity judge if his mind were so distracted.

Later he told the Select Committee: [21]

As to sittings in Equity, I am obliged to occupy any room I find vacant – sometimes one court, sometimes another, sometimes the room for the chamber business, and not unfrequently my own private room.

The Select Committee recommended the appointment of a further judge, to be President of a new Court of Equitable Jurisdiction. The Council adopted the recommendation. The Government promised a Bill, but it never came to fruition. [22]

There was just too much work for one judge. Therry retired at the first opportunity, upon qualifying for his judicial pension after 15 years' service in 1859, complaining that the office "was a burden more than I could bear." [23]

Therry was succeeded as Primary Judge in Equity by the former Master in Equity, Milford, and on the latter's death in 1865 by Hargrave J, whose decision in *Sempill v Jarvis* [24] is an early illustration of New South Wales Equity's insistence on the concurrent operation of equitable principle and the law of trusts with the Torrens system in order to prevent unconscientious insistence on strict legal rights. Hargrave PJ in Eq wrote: [25]

No one can argue that the Real Property Act was intended, *per se*, to alter and abolish by implication the whole law of trusts – also to confound the distinction between legal and equitable estates – as well as to abolish all the equitable doctrines relating to trusts and to notice; and consequently, to set aside all the rights and interests of all *cestui que* trusts

...

I cannot admit for an instant that these real property statutes were intended to enable the trustees of legal estates, with full knowledge and notice of such trusts by mere registration of their title to the legal estate, and obtaining a certificate of such title, to get rid of all their trusts, whether open or secret, and whether for good consideration, for voluntary consideration, or otherwise, then legally existing as against the trustees themselves and their legal estates; and which, except for this registration of title, would be admitted or proved to be enforceable against the trustees by suit in equity

...

If a Court of Equity should give to this statute any such interpretation of this enactment,

its most useful, beneficial, and valuable provisions would become the means of the grossest frauds and would cause a needless and complete repeal of all equitable jurisdiction in the enforcement of all trusts.

Towards the Equity Act

After a number of proposals for reform along Judicature lines, commencing with the appointment in 1870 of a Law Reform Commission, Darley QC (who was to become Chief Justice in 1886) in 1879 agitated a Bill in the Legislative Council for the reform of the defects of practice and procedure in equity litigation. He did not want to fuse equity with common law, and disapproved of the English *Judicature Act*, which he thought clumsy and mistakenly conceived. [26] He had the support of Sir Alfred Stephen CJ, who also believed that the English attempt at amalgamation had been “a great bungle”, and only achieved confusion. [27] Most supported the bill, those who favoured the judicature system seeing it as a preliminary step in the right direction, and the opponents of judicature seeing the Bill as implementing necessary reforms tempered by moderation; even Hargrave PJ in Eq – who considered his own rules of court so effective and expeditious that no change was necessary – did not object to the Bill. [28]

The Bill was eventually passed as the (NSW) *Equity Act* 1880 (44 Vic No 18). It simplified pleadings and procedure; it broadened the availability of declaratory relief; and while it did not fuse equity with the common law, it empowered a judge in equity to grant common law relief when incidental to an equity suit.

Estoppel in Equity

In no field is the intervention of equity to prevent insistence on strict legal right more apparent than in that of equitable estoppel. Equity comes to the relief of a plaintiff who has acted to his or her detriment on the basis of a fundamental assumption in the adoption of which the defendant has played such a part that it would be unfair or unjust if he or she were left free to ignore it, on the footing that it would be unconscionable for the defendant to deny the assumption. [29] An essential element of an equitable estoppel is that the defendant knows or intends that the party who adopts it will act or abstain from acting in reliance on the assumption or expectation. [30] It is this knowledge or intention which affects the defendant’s conscience so as to warrant the intervention of equity. Such knowledge or intention may easily be inferred where the adoption of the assumption or expectation is induced by the making of a promise, but may also be found where the defendant encourages a plaintiff to adhere to an assumption or expectation already formed, or acquiesces in an assumption or expectation when in conscience objection ought to be stated. [31] The unconscionability which attracts the intervention of equity is the defendant’s failure, having induced or acquiesced in the adoption of the assumption or expectation with knowledge that it would be relied on, to fulfil the assumption or expectation or – arguably – otherwise avoid the detriment which that failure would occasion. [32]

In *Legione v Hateley*, [33] Mason and Deane JJ identified three general classes of estoppel: estoppel of record, estoppel of writing, and estoppel in pais, which they described in the following terms:[34]

Estoppel *in pais* includes both the common law estoppel which precludes a person from denying an assumption which formed the conventional basis of a relationship between himself and another or which he has adopted against another by the assertion of a right based on it and estoppel by representation which was of later development with origins in Chancery. It is commonly regarded as also including the overlapping equitable doctrines of proprietary estoppel and estoppel by acquiescence or encouragement.

In *Commonwealth v Verwayen*,[35] Deane J said, of the doctrine of estoppel by conduct, that its central principle was to prevent an unconscientious departure by one party from an assumption adopted by the other as the basis of a relationship to the other’s detriment: [36]

The law will not permit an unconscionable – or more accurately, unconscientious – departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that other party’s detriment if the assumption be not adhered to for the purposes of the litigation.

This unfortunately introduced into aspects of common law estoppel the concept of unconscientious conduct, and was productive of suggestions, in places of very high authority, that what have hitherto been understood as various distinct species of estoppel are all emanations of one overarching doctrine of estoppel which operated uniformly at law and in equity and under which there was no relevant distinction between a statement of existing fact and a promise, prediction, or other statement as to the future. These suggestions now seem to be wilting under strong attack, both judicial and extra-judicial. Handley JA, writing extra-judicially, [37] observes that these developments have not been followed elsewhere, and suggests that the current High Court will not follow them, and indeed the current High Court has shown no inclination to do so, in *Giumelli v Giumelli*. [38] Currently, most seem to accept that there is no fused notion of estoppel in the sense of some overarching doctrine, and distinctions are recognised between common law and equitable estoppels – and, within the rubric of equitable estoppel, between, for example, promissory and proprietary estoppels. That this is not a New South Wales-centric view is apparent from the observations of the Victorian Court of Appeal in *Risdeda Nominees Pty Limited v St Vincent's Hospital (Melbourne) Ltd*. [39]

It is also unnecessary to decide whether there is an overarching doctrine of estoppel, and in particular a doctrine so comprehensive as to subsume estoppel by convention, or to address the question whether that view is open, as a matter of precedent, to any Australian court other than the High Court. The passages in *Verwayen's* case that might be thought to support it are to be found in the judgment of Mason C.J. at 409-13, Deane J. at 431-46 and Gaudron J. at 487. The contrary view finds support in the judgment of Brennan J. at 422-4, Dawson J. at 454 and McHugh J. at 499-501. Toohey J. refers only to promissory estoppel at 475. Some of the rules of estoppel are common to both law and equity and s. 29(1) of the Supreme Court Act 1986, the Victorian equivalent of s. 25 (11) of the Judicature Act 1873 (Eng.), might apply to others; *sed quaere* whether a unified doctrine, as opposed to a similar result, can be achieved without embracing what the learned authors of Meagher, Gummow and Lehane have consistently repudiated as “the fusion fallacy”. As Kirby J. noted in *Maguire v Makaronis* (1997) 71 A.L.J.R. 781 at 802, the waters of the confluent streams of law and equity have not yet mingled in Australia. A similar result might be achieved if there are cases where equity may intervene to prevent the unconscientious assertion, or to modify the consequences, of a common law estoppel. See and compare *Linsley v Petrie* [1998] 1 V.R. 427.

That there is no overarching doctrine of common principle is reflected in the disparate operation of the different estoppels: some estoppels are founded on unconscionability, which is irrelevant to others; some estoppels alter the rights of the parties, others alter only the facts; some, once raised, are permanent, whereas others may be only temporary. But acceptance that there is no overarching doctrine of which all estoppels are variants, does not answer the question, what is the distinction of equitable estoppel.

I suggest that the equitable estoppels – promissory and proprietary – are distinguished from common law estoppels by the circumstance that equitable estoppel is concerned with the conscience, and in particular with prevention of unconscionable insistence on strict legal right. This reflects the explanation of a distinguished American judge, Perley CJ, [40] that the grounds upon which legal and equitable estoppels act are not only different but directly opposite:

The legal estoppel shuts out the truth, and also the equity and justice of the individual case, on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law ... equitable estoppels are admitted on exactly the opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.

Promissory estoppel

It was in the context of representations relating to the enforcement of rights under a pre-existing contract between the parties that the doctrine of equitable promissory estoppel was originally formulated and expounded by Lord Denning MR, [41] and explained by the Privy Council in *Ajayi v R T Briscoe (Nigeria) Limited*: [42]

The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualifications (1) that the other party has altered his position, (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (3) the promise only becomes final and irrevocable if the promisee cannot resume his position.

The scope of the doctrine, which was accepted in Australia in *Legione v Hately*, [43] has since expanded beyond pre-existing contractual relations, and in Australia has been authoritatively described by Brennan J, in *Waltons Stores (Interstate) Limited v Maher* in the following terms: [44]

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) the 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.

The distinction of equitable promissory estoppel can be understood by comparison with the analogous but distinct doctrine of common law conventional estoppel, [45] which precludes either party from denying an assumption which has formed the conventional basis of a relationship between them, [46] and can operate alongside contractual variation and promissory estoppel in the field of consensual departures from contractual rights, sharing some characteristics with each. The analogies and distinctions between contractual variation and conventional estoppel appear from the observations of Lord Denning MR in *Amalgamated Investment and Property Co Limited (in liq) v Texas Commerce International Bank Limited*, [47] to the effect that if parties to a contract by their course of dealing put a particular interpretation on its terms, on the faith of which each to the knowledge of the other acted and conducted their mutual affairs, they are bound by that interpretation just as much as if they had recorded it as a variation of the contract. With reference to *Grundt v Great Boulder Proprietary Gold Mines*, his Lordship explained that such parties had by their course of dealing adopted a conventional basis for the governance of their relations and were bound by it – because, having regard to the dealings between the parties, it would be unjust to allow either to insist on the strict interpretation of the original terms. Nor is it necessary that the parties, in adopting their assumption, have adverted to the express terms of the contract. As Lord Denning MR said in *Amalgamated Property Co v Texas Bank*: [48]

There is no need to inquire whether their particular interpretation is correct or not – or whether they were mistaken or not – or whether they had in mind the original terms or not. Suffice it that they have, by their course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

Thus whereas an intention to vary the original terms is necessary to support a contractual variation, no advertence to the original terms is necessary to found a conventional estoppel having the same effect.

An estoppel by convention depends upon the adoption by the parties of an assumption as the conventional basis of their relationship. [49] In *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Limited*, [50] Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ

emphasised the need for the conduct of relations on the basis of an agreed or assumed state of facts: [51]

Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted upon by a representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying.

Any requirement that the assumption be of a state of facts (as distinct from law) has been discarded. [52]

While it has been said that both common law estoppel by convention and equitable promissory estoppel are included in the rubric of estoppel in pais, [53] there are distinctions as well as analogies. In equitable promissory estoppel, it is necessary for a plaintiff to establish (1) that it has adopted an assumption as to the terms of a legal relationship with the defendant; (2) that the defendant has induced or acquiesced in the plaintiff's adoption of that assumption; (3) that the plaintiff has acted in reliance on its assumption; (4) that the defendant knew or intended that the plaintiff so act; and (5) that it will occasion detriment to the plaintiff if the assumption is not fulfilled. [54] In common law conventional estoppel, it is necessary for a plaintiff to establish (1) that it has adopted an assumption as to the terms of its legal relationship with the defendant; (2) that the defendant has adopted the same assumption; (3) that both parties have conducted their relationship on the basis of that mutual assumption; (4) that each party knew or intended that the other act on that basis; and (5) (arguably) that departure from the assumption will occasion detriment to the plaintiff. [55]

The similarities between the two doctrines should not be allowed to mask their differences, which reflect the disparate origins of promissory estoppel and conventional estoppel. Conventional estoppel, a creature of the common law, is focussed on the consensual basis of the parties' relationship: it operates when both parties have adopted the same assumption as the basis of their relationship, often without appreciating that any departure from the strict legal position is involved, so as to hold both parties to their common understanding. Promissory estoppel, a creature of equity, is, typically, focussed on the conscience of the defendant: it operates when the defendant has induced or acquiesced in the adoption by the plaintiff of an assumption that the defendant will not assert its strict legal rights, so to prevent unconscientious insistence by the defendant on them.

The differences in the second and third elements outlined above, impact on the requisite state of knowledge of the defendant, particularly in a case of acquiescence (or inducement by silence). In the case of promissory estoppel, where the defendant has not positively encouraged the plaintiff to adopt the relevant assumption, a plaintiff must show that the defendant at least failed to deny the assumption with knowledge that the plaintiff was relying on it to the plaintiff's potential detriment, and that the assumption could be fulfilled only by a diminution or suspension of the defendant's contractual rights. [56] As I have mentioned, it is essential to an equitable estoppel that the defendant knows or intends that the party who adopts the assumption will act or abstain from acting in reliance on it. [57]

The cases emphasise that a party who seeks to set up an equitable estoppel of this type must show that the other has made, whether by words or conduct, an unequivocal representation that it did not intend to enforce its strict legal rights, [58] and it has been said that to found an estoppel, a representation or assumption must be "clear and unequivocal". [59] But as Mason and Deane JJ explained in *Legione v Hateley*, the requirement that a representation – or assumption – must be clear if it is to found an estoppel *in pais* or a promissory estoppel, does not mean that it must be express, and a sufficiently clear representation – or assumption – may properly be implied from words, conduct or even silence; moreover, it is not necessary that a representation – or assumption – be clear in its entirety, it sufficing that so much of it as is necessary to found the propounded estoppel satisfies the requirement. Their Honours illustrated this by the example that a representation that a particular right will not be asserted for at least x days is not rendered, for the purposes of promissory estoppel, unclear or equivocal merely because the words used are equivocal as to whether the relevant period is x days, x plus one day or x plus two days, so that if what is said or done amounts to a clear and unequivocal representation that the particular right will not be asserted for a period of at least x days, a representation to that effect can be relied on to found an estoppel. [60] And a promise may be definite, in the sense that there is a clear promise to do something, even though exactly what is promised is not precisely defined. [61]

As Tobias JA has observed, even if a representation is insufficiently precise to give rise to a contract,

that does not necessarily disqualify it from founding a promissory estoppel, much depending upon the circumstances in which the representation is made and the context against which it is to be considered; thus a representation will be sufficiently clear and unambiguous if it is reasonable for the representee to have interpreted it in a particular way, which it is clearly capable of bearing and upon which it is reasonable for the representee to rely, and in those circumstances it would be unconscionable for the representor to deny responsibility for the detriment that arises because of that reliance. On the other hand, if it is not reasonable for the representee to rely on the meaning he attributes to the representation, then it cannot be unconscionable for the representor to deny responsibility for the detriment that the representee sustains because of that unreasonable reliance. [62] Thus, the requirement that a party should not be estopped on an ambiguity does not mean that the precise terms of the assumption or representation which founds the claimed estoppel must be entirely and unequivocally clear: an estoppel can arise even though the precise terms of the assumption or representation may be difficult to ascertain, so long as it is clear that there was an assumption, and the scope of the assumption, though its full extent may be uncertain, is at least sufficient that it can be said that the defendant's conduct would involve a departure from it.

Although there are cases in which silence, when there is an obligation to speak, may convey a representation capable of founding an estoppel, silence is usually not unequivocal, as there can be multiple reasons for a party remaining silent. [63] Brennan J, in the passage cited above, limited the circumstances in which silence would found an equitable estoppel to those in which the relevant assumption of the plaintiff could be fulfilled only by a diminution of the defendant's rights (or an increase in its obligations) and the defendant, with knowledge that the plaintiff's reliance on the assumption may cause detriment to the plaintiff if not fulfilled, failed to deny to the plaintiff the correctness of the assumption. His Honour had earlier explained: [64].

Silence will support an equitable estoppel only if it would be inequitable thereafter to assert a legal relationship different from the one which, to the knowledge of the silent party, the other party assumed or expected: see *Ramsden v. Dyson*, at pp 140-141; *Svenson v. Payne* (1945) 71 CLR 531, at pp 542-543; *Willmott v. Barber* (1880) 15 ChD 96, at pp 105-106. What would make it inequitable to depart from such an assumption or expectation? Knowledge that the assumption or expectation could be fulfilled only by a transfer of the property of the person who stays silent, or by a diminution of his rights or an increase in his obligations. A person who knows or intends that the other should conduct his affairs on such an assumption or expectation has two options: to warn the other that he denies the correctness of the assumption or expectation when he knows that the other may suffer detriment by so conducting his affairs should the assumption or expectation go unfulfilled, or to act so as to avoid any detriment which the other may suffer in reliance on the assumption or expectation. It is unconscionable to refrain from making the denial and then to leave the other to bear whatever detriment is occasioned by non-fulfilment of the assumption or expectation.

Thus, in promissory estoppel, it is the defendant's knowledge of the potential for the plaintiff to incur detriment if it remains silent that may impose on the defendant's conscience an obligation to speak. In a case of conventional estoppel, however, all that is required is the mutual adoption of the relevant assumption, as Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ emphasised in *Con-Stan Industries*: [65]

Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted upon by a representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying.

Although it seems that detriment (if the assumption be falsified) is an element of conventional estoppel, [66] and that each party must know or intend that the other act on the relevant assumption, there is no requirement that either have induced, or acquiesced in, the adoption of the assumption by the other, and in particular there is no requirement that either know that the other may incur detriment by reliance on the assumption. To the contrary – since the assumption is one common to both parties, and may involve a mistaken interpretation of the contract – the possibility that either party might incur detriment by reliance on it will usually not occur to the other.

Proprietary estoppel

Numerous judicial and academic attempts have been made over the years to identify the elements of estoppel of this type. [67] At least generally speaking, the matters which a plaintiff must establish to found an equitable estoppel may be characterised as including certain conduct of the plaintiff, certain conduct of the defendant, and certain qualities of the subject matter, which at least usually may sufficiently be summarised as follows: [68]

- *First*, as to the conduct of the plaintiff: that the plaintiff acted (or abstained from acting) in reliance upon an assumption or expectation that a particular legal relationship existed or would exist between the plaintiff and the defendant, or that the plaintiff had or would acquire some interest in the defendant's property;
- *Secondly*, as to the conduct of the defendant: that the defendant induced the plaintiff to adopt the assumption or expectation and encouraged the reliant activities of the plaintiff, or at least failed to deny the assumption or expectation with knowledge that the plaintiff was relying on it to the plaintiff's potential detriment and that it could be fulfilled only by transfer of the defendant's property, a diminution of the defendant's rights or an increase in the defendant's obligations;
- *Thirdly*, as to the subject matter: that the assumption or expectation in respect of it was one that the defendant could lawfully satisfy.

In the usual case, the conduct of the plaintiff and the conduct of the defendants are factually interwoven.

One form that this equity not infrequently takes is to convert a revocable licence to use or occupy property into an irrevocable, or permanent, one. Thus in *Vinden v Vinden*, [69] Needham J considered circumstances in which a licence to occupy property, which was expressed to be subject to the licensee making contributions to mortgage payments and rates, would become irrevocable by the licensee (in *Vinden*, it was the defendant, whom the plaintiff owner was endeavouring to eject) acting to his detriment on the expectation that he would be permitted to remain in the property indefinitely. His Honour referred to *Plimmer v Mayor of Wellington*, [70] in which a revocable licence to occupy a jetty was held by the Privy Council to have become irrevocable by reason of the licensee incurring expenditure on improvements in the expectation, encouraged by the licensor, of being permitted to remain indefinitely. *Plimmer* and *Vinden* both illustrate that an owner of land may become bound by an equitable obligation to permit an occupier to remain permanently, if the occupier, to the knowledge of the owner, acts to his or her detriment in reliance on an expectation of being permitted to remain indefinitely – and that the occupier acquires a corresponding equitable right to remain.

In some cases, an equity that arises by estoppel in this way may be conditional on the performance by the plaintiff of certain obligations. *Vinden* shows that where there are conditions attached to the expectation – such as contributing to outgoings – the equity is subject to performance of those conditions by the licensee. As Needham J said (emphasis added): [71]

In my opinion, *while the defendant continued or remained willing to meet those obligations*, his licence was irrevocable – or, to put it another way, an equity arose which could be satisfied only by holding the plaintiff estopped from denying that the licence was irrevocable.

However, the plaintiff can be relieved from performance of such conditions, by conduct of the defendant. Thus, in *Vinden* - where the conditions that the occupier (the defendant in that case) was bound to perform included paying council rates, household expenses and mortgage repayments - the plaintiff owner, through an agent, made it impossible for the defendant to pay the rates, by re-directing the rate notices; and the plaintiff also made winnings on the horse races, and re-paid the mortgage himself, so that there was no further need for the defendant to make mortgage payments. Needham J said: [72]

The evidence is, as I have already stated, that, without the defendant's knowledge or consent, the plaintiff, through Mrs Sullivan, put it out of the defendant's power to continue to make some of the payments; further, the betting success of the plaintiff made it unnecessary for the defendant to make further payments off the mortgage. But the defendant is meeting all other obligations and has been frustrated in his efforts to pay the rates. It is my opinion that, while the defendant meets those obligations which the plaintiff permits him to meet, being obligations accepted by him in 1975, the plaintiff is estopped from alleging that the defendant's licence to reside in the house is

revocable.

If such conditions can be released or modified by unilateral conduct of the owner that renders performance impossible or unnecessary, they can equally be released or modified by agreement, or even by acquiescence.

If a person has acquired an equitable interest by way of proprietary estoppel, that interest is itself capable of assignment to a third party, and may be enforced by such a third party against the original legal owner. [73] If such an interest can be assigned, it can also be held upon trust for a third party, or itself can pass by proprietary estoppel to a third party, who can enforce it directly against the legal owner. This is analogous to the principle that where A holds upon trust for B who holds upon sub-trust for C, A holds in trust for C and B is not a necessary party. [74]

There remains controversy as to whether, in this type of case, the plaintiff's *prima facie* entitlement is to relief based on the assumed or expected state of affairs which the defendant is estopped from denying, [75] or is limited to the minimum equity needed to avoid the detriment – which at least in some cases may nonetheless require nothing less than satisfaction of the expectation or assumption. [76] In a proprietary estoppel case, [77] the expectation basis of the equity favours the view that the *prima facie* entitlement of a successful plaintiff is to satisfaction of the relevant expectation, although such a remedy may be declined in favour of a lesser one where it would be disproportionate to the requirements, in the circumstances, of conscionable behaviour. [78]

The view that equitable intervention is not concerned with perfecting imperfect gifts or putting plaintiffs in a position as if the act/omission complained never occurred has led to a view, sometimes expressed in places of very high authority, that the purpose of equitable estoppel is the avoidance of detriment. Thus in *Waltons Stores*, Brennan J said: [79]

The unconscionable conduct which it is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion. The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon. If this object is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed.

And in *Verwayen*, Mason J said: [80]

It follows that, as a matter of principle and authority, 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. To that extent there is an overlap between equitable estoppel generally and estoppel by conduct in its traditional form. But since the function of equitable estoppel has expanded and it has become recognized that an assumption as to future fact may ground an estoppel by conduct at common law as well as in equity, it is anomalous and potentially unjust to allow the two doctrines to inhabit the same territory yet produce different results. Moreover, as I have already indicated, the fact that estoppel by conduct has expanded beyond its evidentiary function into a substantive doctrine means that there is no longer any justification for insisting on the making good of assumptions in every case.

Brennan J said: [81]

The ordinary principles of equitable estoppel which might apply to a promise of this kind were discussed in *Waltons Stores v Maher*. The judgments of a majority of the Court in *Waltons Stores v Maher* held that equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another

who acts on it to his detriment, seeks to resile from the promise. The remedy is to effect what Scarman LJ called “the minimum equity to do justice” in *Crabb v Arun District Council*: see *Waltons Stores v Maher*, per Mason CJ and Wilson J; per Brennan J. The remedy is not designed to enforce the promise although, in some situations (of which *Waltons Stores v Maher* affords an example), the minimum equity will not be satisfied by anything short of enforcing the promise.

Gaudron J said: [82]

Although it is not necessary for me to deal with the argument that the object of an estoppel is to avoid detriment and not to make good the assumption on which it is founded, it is convenient that I note my agreement with Mason CJ 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. Even so, it may be that an assumption should be made good unless it is clear that no detriment will be suffered other than that which can be compensated by some other remedy. Where the nature or likely extent of the detriment cannot be accurately or adequately predicted it may be necessary in the interests of justice that the assumption be made good to avoid the possibility of detriment even though the detriment cannot be said to be inevitable or more probable than not. On that basis and were the present matter to be determined by reference to the substantive doctrine of estoppel, the mere possibility of increased stress and anxiety to Mr Verwayen would tend in favour of making good the assumption that liability would not be put in issue by the Commonwealth.

But equity's concern is to prevent unconscientious insistence on strict legal right, not the avoidance of detriment. Though there is a relationship between detriment and unconscionability, they are distinct concepts. As Professor Birks has stated: “There is no other kind of unconscionable behaviour other than that which consists in failing to honour one's promises”. [83] Where a person's failure to fulfil an expectation or representation would be unconscionable, the *prima facie* remedy is fulfilment of the expectation, representation or assumption. In this way, practically speaking, an equitable estoppel may often result in enforcing the promise or assumption made, except where to do so would exceed the bounds of what was necessary to cure unconscionability. Both the principle and the qualification were referred to in *Giumelli*, in which Gleeson CJ, McHugh, Gummow & Callinan JJ said: [84]

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

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

The future

So long as there is scope for the strict application of rules of law to work injustice, there will be a need for a system of rules to moderate their rigours. While civil law systems include notions of good faith that take account of parties' underlying motives, the common law has no such equivalent. Instead, equity relieves against unconscionable insistence on strict legal right, recognising that obligations may

arise in the absence of, or even despite, formal agreement, and holding parties to those obligations where conscionable behaviour so requires.

The recognition of equity as a separate body of principle, and its administration by a specialist court, is a reflection of equity's role in preventing unconscionable insistence on strict legal rights, thus giving effect to certain values that are antithetic to the common law. Those values – adherence to standards of conscionable behaviour notwithstanding strict legal rights – form part of our legal and social identity. By denying their separateness, we lose part of our legal culture and history, and more: to lose sight of the distinction of the doctrines of equity is to diminish their significance.

And there is the additional benefit of separation that it has allowed a specialisation to flourish, as has occurred in New South Wales since 1841 with the creation of the position of Primary Judge in Equity, prompting J.M. Bennett, over 130 years later, to comment: [85]

The commencement of a specially qualified Equity Bench which, in due time, supported a specialist Equity Bar ensured great expertness. That was much to the public advantage.

As Bennett notes, he was not the first to think so: Kenyon CJ, more than 200 years ago, said in *Bauerman v Radenius*: [86]

I have been in this profession more than 40 years, and have practised both in Courts of Law and Equity ... I find that in these courts proceeding by different rules, a certain combined system of jurisprudence has been framed most beneficial to the people of this country, and which I hope I may be indulged in supposing has never yet been equalled in any other country on earth.

END NOTES

1. The author wishes to acknowledge the assistance of his tipstaff, Charles Alexander, in the preparation of this paper.
2. For this and the two following sections, the author is deeply indebted to J M Bennett, *A History of the Supreme Court of New South Wales*, (1974) Law Book Company, Sydney, Chapter 5 "Equity Jurisdiction"; and also the same author's *Equity Law in Colonial New South Wales: 1788-1902* (Sydney University, Law Faculty Research Project 59/20c, 1962) Press, Sydney, on which they are based.
3. Bennett, *A History of the Supreme Court*, p94.
4. Forbes to Darling, 15 December 1827, Chief Justice's Letter Book, HRA I/XIII, p680 at p681; cited in Bennett, *A History of the Supreme Court*, p94.
5. *Sydney Morning Herald*, 27 August 1857, 3; cited in Bennett, *A History of the Supreme Court*, p94.
6. R Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria*, (1974) Sydney University Press, Sydney, p [16]
7. By no means the earliest; Ellis Bent granted equitable relief: Bennett, *A History of the Supreme Court*, p94.
8. R Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria*, (RAHS, Sydney University Press, 1974), p319.
9. Bennett, *A History of the Supreme Court*, pp95-96.
10. By s 20 of 4 Vic. No. 22 *The Administration of Justice Act* 1840, the Governor was authorized to appoint the Chief Justice, or if he shall decline one of the puisne judges, to hear and determine without the assistance of the other judges all matters in Equity at Sydney.
11. Bennett, *A History of the Supreme Court*, p96.
12. Judicial proposals (in 1843) for separate courts, as in pre-judicature England, were not acted upon, and the Supreme Court remained a single court, but with separate jurisdictions [*Browne v Patterson* (1883) 4 NSWLR (Eq) 1]. However, the judges made plain that equity could not be sought in the common law jurisdiction [*The Bank of Australia v Murray* (1850) 1 Legge 612, 614]. See Bennett, *A History of the Supreme Court*, p97.
13. Later to be the first Chief Justice of Victoria.
14. (1845) 1 Legge 253
15. (1845) 1 Legge 253, 264
16. J.M. Bennett, Introduction to R. Therry, *Reminiscences*, [27], citing Therry to Macarthur, 24 August

- 1861; Macarthur Papers, Vol 34, ML A2930, 99.
17. Bennett, *A History of the Supreme Court*, p98, citing Bennett, *Equity Law in Colonial New South Wales*, p 45.
 18. Bennett, *A History of the Supreme Court*, p98.
 19. *Sydney Morning Herald*, 27 August 1857, p3; cited in Bennett, *A History of the Supreme Court*, p98.
 20. *Sydney Morning Herald*, 27 August 1857, p3; cited in Bennett, *A History of the Supreme Court*, p98.
 21. Evidence before a Select Committee of the Legislative Council, 2 *JLC* (1857) 141, 165; cited in Bennett, *A History of the Supreme Court*, p98.
 22. Bennett, *A History of the Supreme Court*, p99.
 23. *Sydney Morning Herald*, 3 March 1859, p4; cited in Bennett, *A History of the Supreme Court*, p99.
 24. (1867) 6 SCR Eq 68.
 25. (1867) 6 SCR Eq 68, 72; cited in Bennett, *A History of the Supreme Court*, pp107-108.
 26. Bennett, *A History of the Supreme Court*, p 101; (1879-1880) 1 NSWPD 473.
 27. (1879-1880) 1 NSWPD 474, cited in Bennett, *A History of the Supreme Court*, p 101
 28. Bennett, *A History of the Supreme Court*, p 101.
 29. *Grundt v Great Boulder Pty Gold Mines Limited* (1937) 59 CLR 641, 675; *Thompson v Palmer* (1933) 49 CLR 507, 547; *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387, 404 (Mason CJ and Wilson J)
 30. *Crabb v Arun District Council* [1976] Ch 179, 188; *Waltons v Maher*, 423 (Brennan J).
 31. *Waltons v Maher*, 423 (Brennan J).
 32. *Waltons v Maher*, 423 (Brennan J).
 33. (1983) 152 CLR 406.
 34. (1983) 152 CLR 406, 430.
 35. (1990) 170 CLR 394
 36. 170 CLR 394, 444.
 37. K Handley, 'Estoppel' (2006) 20(2) Commercial Law Quarterly 29. He also opines that *Verwayen*, having no *ratio decidendi*, is possibly not binding on lower courts.
 38. (1999) 196 CLR 101
 39. [1998] 2 VR 70, 77-78
 40. *Horn v Cole* 51 NH 287 (1868), 290-2; extracted in Meagher, Heydon, Leeming, *Equity Doctrines and Remedies* 4th ed, p570 [17-125].
 41. *Central London Property Trust v High Trees House Ltd* [1947] 1 KB 130; *Combe v Combe* [1951] 2 KB 215
 42. [1964] 1 WLR 1326, 1330; 3 All ER 556, 559
 43. (1983) 152 CLR 406, 420-1 (Gibbs CJ and Murphy J), 437 (Mason and Deane JJ).
 44. (1988) 164 CLR 387, 428
 45. *MK & JA Roche Pty Limited v Metro Edgley Pty Limited* [2005] NSWCA 39, [71].
 46. *Legione v Hateley*, 430 (Mason and Deane JJ)
 47. [1982] QB 84, 121
 48. [1982] QB 84, 121
 49. *Dabbs v Seaman* (1925) 36 CLR 538, 549; *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Limited* (1986) 160 CLR 226, 244-5
 50. (1986) 160 CLR 226
 51. (1986) 160 CLR 226, 244
 52. *Eslea Holdings Limited v Butts* (1986) 6 NSWLR 175, 185-9; *Waltons Stores (Interstate) Limited v Maher*, 415-6, 432, 452, 458; *Foran v Wight* (1989) 168 CLR 385, 435, 457; *Commonwealth v Verwayen*, 413, 445, 501; *Amalgamated Investment and Property Co Limited (in liq) v Texas Commerce International Bank Limited*, 122; Meagher, Heydon and Leeming, *Equity Doctrines & Remedies*, 4th ed, [17-020]; *MK & JA Roche v Metro Edgley*, [71]
 53. *Legione v Hateley*, 430 (Mason and Deane JJ)
 54. *Waltons v Maher*, 428-429 (Brennan J)
 55. *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, [83], [96]
 56. See generally *Waltons v Maher*, 428-429 (Brennan J); Meagher, Heydon & Leeming, *Equity Doctrines and Remedies* 4th [17-050]
 57. See *Crabb v Arun District Council* [1976] Ch 179, 188; *Waltons v Maher*, 423 (Brennan J)
 58. *Allied Marine Transport Ltd v Vale Do Rio Doce Navegacao SA (The Leonidas)* [1985] 1 WLR 925, 941 (Robert Goff LJ); *Legione v Hateley*, 435-7; *Foran v Wright*, 410-11, 435-6
 59. See *Legione v Hateley*, 436-437 (Mason and Deane JJ); *Woodhouse AC Israel Cocoa Limited SA v Nigerian Produce Marketing Co Limited* [1971] 2 QB 23, 60 (Lord Denning MR); *Low v Bouverie* [1891] 3 Ch 82, 106 (Bowen LJ), 113 (Kay LJ)
 60. *Legione v Hateley*, 438-439
 61. *Flinn v Flinn* [1999] 3 VR 712, 738 (Brooking JA, Charles and Batt JJA concurring); see also *Australian Crime Commission v Gray* [2003] NSWCA 318, [184-200] (Ipp JA; Mason P and Tobias JA

agreeing on this point)

62. *Galaxidis v Galaxidis* [2004] NSWCA 111, [93]-[94]

63. *The Leonidas*, 941; Handley, *Estoppel by Conduct and Election* (2006) Sweet & Maxwell, Sydney, p 54, [3-013]

64. *Waltons v Maher*, 427.

65. 160 CLR 226, 244.

66. *MK & JA Roche v Metro Edgley*, [72], and see *Waterman v Gerling*, [96]. However, although the NSW Court of Appeal so held in *MK & JA Roche v Metro Edgley* (Hodgson JA, Beazley & Ipp JJA agreeing), Handley JA writing extra-judicially opines that detriment is not a necessary element of conventional estoppel, and the references in *MK & JA Roche* to equitable considerations of unconscionability sit uncomfortably in the context of a purely common law estoppel.

67. See, for example, Fry J's five probanda in *Willmott v Barber* (1880) 15 Ch D 96; Brennan J's six proofs in *Waltons v Maher*; Priestley JA's seven propositions in *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, as modified in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582; and Meagher Gummow and Lehane's six common factors, in *Equity: Doctrines & Remedies* 4th ed, [17-105]

68. See generally, *Waltons v Maher*, 428-429 (Brennan J); Meagher, Heydon & Leeming, *Equity: Doctrines & Remedies*, 4th ed, [17-105].

69. [1982] 1 NSWLR 618

70. (1884) 9 App Cas 699

71. [1982] 1 NSWLR 618, 625B. That a plaintiff cannot enforce an equitable interest arising by way of proprietary estoppel so long as he or she is in default of a condition attached to the enjoyment of the equity appears also from *Wood v Browne* [1984] 2 Qd R 593, and *Beaton v McDivitt* (1985) 13 NSWLR 134, 157C-D.

72. [1982] 1 NSWLR 618, 625C

73. *Hamilton v Geraghty* (1901) 1 SR (NSW) Eq 81; Meagher, Heydon & Leeming 4th ed, [17-120]

74. *Head v Teynham* (1783) 1 Cox Eq Cas 57; 29 ER 1061; *Grainge v Wilberforce* (1889) 5 TLR 436 (Chitty J); Pettit, *Equity and the Law of Trusts* 6th ed, (1989) Butterworths, London, p 76; Ford & Lee, *Principles of the Law of Trusts* 2nd ed (1990) Law Book Company, Sydney, [607]; *Young v Lalic* (2006) 197 FLR 27, [83].

75. *Commonwealth v Verwayen*, 443 (Deane J)

76. *Commonwealth v Verwayen*, 412 (Mason CJ), 429 (Brennan J), 501 (McHugh J)

77. As distinct from a windfall equity case, as to which see *Henderson v Miles (No 2)* (2005) 12 BPR 98,200; [2005] NSWSC 867.

78. *Giumelli v Giumelli*, [48]-[50], [64]; *Jennings v Rice* [2002] EWCA Civ 159, [50]; *Henderson v Miles*, [57]-[89]

79. 164 CLR, 423 (in a passage approved by Dawson J in *Verwayen*, 454).

80. 170 CLR, 412

81. 170 CLR 394, 428-9

82. 170 CLR 394, 487

83. Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, (1996) 24 UWAL Rev 1 at 64

84. *Giumelli*, 125

85. Bennett, *A History of the Supreme Court of New South Wales*, p 97.

(1798) 101 ER 1186, 1188, cited in Bennett, *A History of the Supreme Court*, p283.