Case Notes

Estoppel doctrine not clarified: court refuses to grant expectation relief.

Giumelli v Giumelli (1999) 161 ALR 473

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Introduction

The recent decision of the High Court of Australia in the case of *Giumelli v Giumelli* has been much anticipated. It seemed that the High Court had been given the opportunity to settle finally aspects of the doctrine of equitable estoppel left unresolved after the landmark decisions of *Waltons Stores (Interstate) Ltd v Maher*,[1] and *Commonwealth v Verwayen*.[2] Argument in *Giumelli* centred around these matters of doctrine. Their Honours were certainly cognizant of the outstanding theoretical issues,[3] and of the general interest in seeing more doctrinal certainty[4]. Sadly, this did not eventuate.

While some minor matters have been clarified, the large issues with the doctrine of equitable estoppel were effectively by-passed, and the decision gives little real guidance to lower courts. The decision is essentially a pragmatic one, indeed an essential one given the facts of the case, but can only lead to further speculation about the nature of the doctrine.

Nevertheless, the case is notable because it presents an example of when, in the opinion of the High Court, expectation relief should *not* be given. Further, it demonstrates the inherently flexible nature of the remedial

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1 (1988) 164 CLR 387.

2 (1990) 170 CLR 394.

3 'I mean, it really is a terrible burden on trial counsel and judges to have to search through Justice Ormiston and Justice Priestly to find what on earth the High Court is saying on this issue.' per Kirby J, *Giumelli v Giumelli* Transcript, P55/1997 HCA at http://www.austlii.edu.au/do/disp.pl/au...ripts/1999/P55/1.html (9 February 1999) at p48. Copy on file with authors.

4 'This is a very tricky area, and it is full of mine traps for lawyers who are drafting pleadings, and for judges of varying experience who are deciding cases...and it would be highly desirable, as it seems to me that, to the extent that one can do so, this Court should seek to simplify it' per Kirby J, ibid p 41.

response to equitable estoppel, which perhaps by its very nature lacks the certainty and definition practitioners might wish it had. That flexibility clearly encompasses a recognition of the rights of third parties, but does not necessarily explain how those rights fit into the doctrine.

Facts of the case

Giumelli arose out of the disintegration of a family concern. The Giumelli parents owned and lived on an orchard, where they raised their five children. In 1968 they purchased a second, much larger property which they developed as an orchard. As the children left school, they too went to work on the orchard. The respondent, Robert Giumelli, started working in 1971, and was admitted to the family partnership. He worked without wages, although he received pocket-money and his keep. Amounts were credited to him in the partnership accounts, although in general they were not paid. At various times, two other brothers were working as partners on the orchard.

Over time, the parents made a series of promises to Robert. These involved the transfer to him of part of the larger property. The first, general promise was made when Robert started working. When Robert decided to marry in 1980 it was agreed he should build a house on part of the property, and that the house and land on which it stood would be transferred to him. After his marriage, Robert was offered another job. The parents promised that if he stayed working on the orchard, it would be subdivided to give Robert a property including the house and a part of the orchard, (the Promised Lot). Robert continued working in reliance on the promise.

The marriage failed, and Robert was assured that on his divorce the property would be transferred to him. In reliance, Robert continued to develop the orchard. When the divorce was granted in 1983, the land was not transferred. Robert decided to remarry in 1985, but his parents were not enamoured of his choice of wife. They told him to choose between his intended wife, and the property. Robert chose to go with his new wife.

In summary, Robert worked on the orchard from 1971 to 1985. He worked for little or no wages,[5] built a house on the property using his own money, and turned down the offer of another career. Admittedly, he was a partner in the orchard business, and potentially could recover his partnership interest after his parents refused him access to the property. In 1986, he commenced proceedings to wind up the partnership, and obtain his share of profits. Incredibly, this action had not come to trial at the date of the High Court decision. But as the land was registered in his father's name only, a share of partnership profits would not have given

[5] Evidence showed he had worked for 15 years for the sum of $40,000: ibid p9

him any interest in the land. Therefore, in 1990 Robert commenced proceedings based upon a claim of equitable estoppel.

Giumelli thus seemed an ideal vehicle for the High Court to consider which of the general approaches to remedy revealed in the earlier cases, namely reliance relief, or expectation relief, ought to form part of the doctrine of equitable estoppel. Expectation relief would see the promise to Robert fulfilled. On the other hand, reliance relief would require an assessment of the detriment Robert had suffered by his acts or inaction in reliance on the promise, and might lead to a lesser or different remedy than transfer to him of the Promised Lot.

However, the matter was further complicated by the existence of a third party. Robert's brother Steven became a partner in the orchard business in 1984. He and his family lived on the Promised Lot in a transportable home from 1985, and were still in residence 14 years later when the matter came before the High Court. Over the years, Steven had made improvements to the Promised Lot, including building coolrooms and planting new trees. Steven was not a party to these proceedings, and there was no evidence led as to the value of the improvements. Nor was there any evidence of Steven's possible entitlement to some part of the land. However, Counsel for the parents asserted that Steven's interest was as a partner in the partnership that had carried out improvements on the land.[6]

Steven gave evidence at the trial, but at no time did he seek to be joined as a party to the dispute, or indicate that he made any claim that would preclude the recognition of Robert's claim.

The Full Court of the Supreme Court of Western Australia held[7] that either upon the basis of a "joint endeavour"[8] constructive trust[9], or upon the basis of equitable estoppel,[10] Robert was entitled to have the Promised Lot transferred to him. Accordingly, there was a declaration that the land was held on trust to convey it to Robert, and an order that the parents do all things necessary to allow the subdivision and transfer to occur.[11]

Grounds of appeal

Part of the parents' challenge in the High Court related to certain findings of fact in the Full Court, concerning whether Robert had suffered detriment. More importantly, the specific relief ordered by the Full Court was challenged as going beyond any reversal of detriment suffered by Robert. This argument presented an opportunity for the High Court to

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6 Ibid p 4
7 *Giumelli v Giumelli* (1996) 17 WAR 159.
8 As in *Muschinski v Dodds* (1985) 160 CLR 583.
9 *Giumelli*, n9, per Ipp J, Franklyn J concurring.
10 Ibid, per Rowland J.
11 Ibid 176.

discuss the basis upon which relief in cases of equitable estoppel should be quantified.

The result in the case

All members of the High Court held in favour of the parents. A joint judgment was given by Gleeson CJ, McHugh, Gummow and Callinan JJ.[12] Kirby J delivered a separate judgment (only four paragraphs long) which essentially agreed with the joint judgment. Although it was agreed that an estoppel was made out, the Court stated that the remedy of constructive trust granted in the Western Australian Supreme Court was excessive. The matter was sent back to the Western Australian Supreme Court for calculation of a monetary remedy payable to Steven. This sum was to represent the value of the Promised Lot, but was to take into account allowances 'so as to do equity between the parties to the action and all relevant third parties.'[13] These included 'a share of profits earned by the partnership from the Promised Lot and of rent from the house' and, on the other hand, the improvements to the value of the land made by Steven since 1986.[14]

The issues - difficulties with the doctrine of equitable estoppel

The primary difficulty with equitable estoppel springs from the two earlier High Court decisions, *Waltons* and *Verwayen*. The problem can be quickly stated: when granting a remedy for equitable estoppel, should a court make good the assumption (expectation relief) or provide a remedy which will remove the detriment suffered in reliance on the assumption (reliance relief)? Several overlapping issues also arise here. Does the ability of a court to make good the assumption effectively encroach on the territory of contract law, enforcing promises which are not supported by consideration? How does the concept of unconscionability affect the remedial response?

The difficulties are magnified because of the near-impossibility of discerning a *ratio decidendi* in *Verwayen*. In that case, although all seven members of the Court discussed their understanding of the doctrine of equitable estoppel and its application to the facts, only two justices actually decided in Verwayen's favour on the basis of the doctrine. Further, their approaches to the doctrine were manifestly different. All of these issues were potentially on the table in *Giumelli*.

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[12] In this note, reference is made to that joint judgment, unless otherwise stated.
[13] *Giumelli*, n1, 487.
[14] Ibid 486.

A further issue in this case was the applicability, on the facts, of relief by way of constructive trust. This required the Court to address the conceptual nature of the remedy. This will be discussed first.

Estoppel and Constructive Trust

In the Western Australian Supreme Court, Robert obtained a declaration of constructive trust in his favour and an order for the appellants to do all things necessary to subdivide the property to create the Promised Lot. The parents argued that this remedy was excessive. Thus, one of the matters for the Court to determine was whether a constructive trust in favour of Robert was appropriate in the circumstances.

In the High Court the judges took the opportunity offered to expand on the nature of that remedy. It is clear that the judges wished to reduce some of the doctrinal obscurity which has surrounded constructive trusts. One matter, which can be mentioned briefly, addresses the relationship between the term 'constructive trust' and property rights.

The judges clarified the notion that the term 'constructive trust' does not always involve proprietary rights. Although the constructive trust usually connotes proprietary interests, they stated: 'some constructive trusts create or recognise no proprietary interests. Rather there is the imposition of a personal liability to account in the same manner as that of an express trustee.'[15] In the category of constructive trusts which do not involve proprietary interests they placed the notion of constructive trust flowing from one 'who dishonestly procures or assists in a breach of trust or fiduciary obligation.'[16] The fact that the Court felt obliged to make this statement merely reinforces that the term 'constructive trust' has been carelessly used.

More significantly, the Court took the opportunity to address matters of theory relating to the constructive trust. First, the members of the Court asserted that the term 'constructive trust' does not suggest that the Court 'constructs' the trust. They quoted from Professor Austin Scott as follows:

It is sometimes said that when there are sufficient grounds for imposing a constructive trust the court 'constructs a trust'. The expression is, of course, absurd. The word 'constructive' is derived from the verb 'construe', not from the verb 'construct'. ... The court construes the circumstances in the sense that it explains or interprets them; it does not construct them.[17]

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[15] *Giumelli*, n1, 475.

[16] Ibid, citing the Privy Council decision of *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. This is a reformulation of the test from *Barnes v Addy* (1874) 9 Ch App 244 at 252 that a stranger can be liable as a constructive trustee if he or she 'assists with knowledge in a dishonest and fraudulent design.' See *Consul Development Pty Limited v D.P.C. Estates Pty Limited* (1975) 132 CLR 373.

[17] Ibid 474, citing Professor Austin Scott, *Scott on Trusts*, 4th ed (1989), vol 5, para 462.4.

This could suggest that the Court wanted to confirm the view of the constructive trust as an institution: a trust that is merely confirmed by the Court without creating new rights. On this view of the constructive trust, the proprietary entitlement already exists, and the Court merely gives effect to that interest. This reasoning can be said to underpin the traditional English view of the constructive trust. Dewar has described the institutional constructive trust as:

One which arises as a necessary consequence, and which necessarily connotes certain legal consequences, whenever certain facts, which are recognised by the law as being esesntial to the creation of the trust are found to exist.[18]

The purely institutional view of the constructive trust was rejected by Deane J in *Muschinksi v Dodds*.[19] His Honour stated that the constructive trust is both a remedy and an institution.[20] In the later decision of *Baumgartner v Baumgartner*[21] the High Court adopted a remedial view of the constructive trust to prevent unconscionability arising from the breakdown of de facto relationships. However, in *Giumelli*, the judges giving the joint judgment specifically noted that this was not a situation where the *Baumgartner* constructive trust could apply.[22]

Despite this, the judges confirmed that they saw a remedial role for the constructive trust here. They stated: 'A constructive trust of this nature is a remedial response to the claim to equitable intervention made out by the plaintiff.'[23] The terminology used raises the question of whether the Court intended to adopt the North American view of the constructive trust as a purely remedial device.

In Canada, for example, the constructive trust will be available simply as part of the range of equitable remedies, and can be used by the Court as a remedy even where no prior entitlement to property exists.[24] In *Lac Minerals Ltd v International Corona Resources Ltd*,[25] La Forest J in the majority for the Canadian Supreme Court, explained that the issue of remedy is only addressed once the necessary cause of action has been established. The Court 'examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment'.[26]

His Honour then set out a number of suggested guidelines:

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[18] John L Dewar, 'The Development of the Remedial Constructive Trust' (1982) 60 *Can Bar Rev*, 265, n4.

[19] (1985) 160 CLR 583.

[20] Ibid 614.

[21] (1987) 164 CLR 137.

[22] *Giumelli*, n1, 476.

[23] Ibid 475.

[24] The constructive trust is available as a remedy for unjust enrichment, and also to remedy a wrongful act of the defendant, even in the absence of unjust enrichment. See *Soulos v Korkontzilas* [1997] 2 SCR 217.

[25] *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14.

[26] 61 DLR (4th) 14, 48. Note since *Soulos*, n25, the remedy may not be confined to situations of unjust enrichment.

1. No special relationship between the parties is necessary.
2. The constructive trust is not to be reserved for cases where a right of property is recognized. The constructive trust can itself create a right of property.
3. A constructive trust should only be granted if there is reason to grant the plaintiff the additional rights which flow from the recognition of a property right. Such reasons include: whether it is appropriate for the plaintiff to receive priority in bankruptcy of the defendant; should the plaintiff receive the benefit of changes in value of the property; is the moral quality of the defendant's conduct such that a court would deny to the defendant the right to retain the property?

In *Giumelli* the Court seems to be adopting the latter remedial approach to constructive trusts. In the joint judgment it was stated: 'Before a constructive trust is imposed, the court should first decide whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust.'[27]

Although the statements regarding the remedial nature of the constructive trust are interesting, in this case they may not be significant. The identification of the relevant trust as remedial may be confined to the arena of estoppel. In the context of equitable estoppel, the statement that a constructive trust remedy will be remedial should not be surprising. This is particularly the case with the facts in question. The equity 'was found in an assumption as to the future acquisition of ownership of property which had been induced by representations upon which there had been detrimental reliance by the plaintiff.'[28] In other words, this is a case where the traditional doctrine of proprietary estoppel (or estoppel by acquiescence) could be used to create proprietary rights in the plaintiff. The link with proprietary estoppel is clear in the Court's reliance on authorities such as *Dillwyn v Llewellyn*[29] and *Plimmer v Mayor, Councillors and Citizens of the City, of Wellington.*[30]

Thus, if the comments are interpreted only within the context in which they were made, nothing new is being suggested. Equity has long accepted that where promises regarding the ownership of property have led to detrimental reliance, then an equity will arise, and the Court will determine how best to satisfy that equity. A proprietary interest will be ordered where necessary. The members of the High Court made precisely this point in their reference to *Plimmer*, when they adopted the following statement from that case: 'the Court must look at the circumstances in each case to decide in what way the equity can be satisfied.'[31]

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[27] *Giumelli*, n1, 476.
[28] Ibid 475.
[29] (1862) 4 De GF & J 517, 45 ER 1285.
[30] (1884) 9 App Cas 699.
[31] *Giumelli*, n1, 476, quoting from *Plimmer*, (1884) 9 App Cas 699 at 714.

What remains to be seen is how creatively the High Court's reasoning will be used in cases which do not involve estoppel. On what grounds will parties seek to invoke a purely remedial constructive trust?

Contract and estoppel

Giumelli must finally lay to rest the fears 'that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises.'[32] The law of contract enforces promises for which consideration has been given. Enforcement is by way of fulfilling the promise, and the remedy is as of right. Equitable estoppel, as a cause of action, may encroach on the law of contract if it enforces promises for which no consideration has been given. If the remedial response to an equitable estoppel is automatic enforcement of the promise, it can be argued that the risks to the law of contract justify limiting relief to removing the detriment suffered.

Their Honours rejected the notion that equitable estoppel encroaches on the law of contract. This is irrespective of whether the remedy granted is to relieve against detriment, or to enforce the assumption. The Court has confirmed that there is a fundamental difference between permitting estoppel as a cause of action and the enforcement of gratuitous promises. Their Honours adopted the views of Dawson J in *Verwayen*[33] that the discretionary nature of relief granted in equity made such a fear unwarranted.[34] Reference was also made to McPherson J's concise explanation of the differences between contract and estoppel in *Riches v Hogben*.[35] These were

(1) the critical requirement that the defendant encouraged the plaintiff to act upon the representation;
(2) the existence of a legally binding agreement - if one exists, its promises must be enforced under the law of contract, with equity supplementing that law rather than replacing it;
(3) in estoppel, the element attracting the principle is the expectation created by the promise, whereas in contract the promise itself attracts the attention of the court; and
(4) the plaintiff's actions in reliance which give rise to estoppel. If the plaintiff takes no reliant steps, there is no scope for the doctrine of equitable estoppel.[36]

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[32] *Waltons*, n2, 423 per Brennan J.
[33] *Verwayen*, n3, 454.
[34] *Giumelli*, n1, 482.
[35] [1985] Qd R 292, 300-301.
[36] *Giumelli*, n1, 482.

Thus, it appears that contract law requirements that promises be supported by consideration are not relevant in discussions of equitable estoppel. The fear of an overlap is not a sufficient reason to force the High Court to adopt a remedial approach to relief which is limited to doing the minimum required to remove the detriment. Contract and estoppel are inherently different. Although in certain cases the remedy given is the same (expectation relief), that is not because estoppel is undermining the law of contract. Rather it is because the circumstances of the alleged estoppel require such a remedy, which equity is sufficiently flexible to provide.

If the theoretical fear of encroaching on the law of contract is gone, this removes an impediment to acceptance of prima facie expectation relief. It remained to be seen which approach the High Court was prepared to endorse as the remedial starting point.

Remedy and Equitable Estoppel

The confusion with equitable estoppel relates primarily to the role of remedy in the doctrine. In *Verwayen*, the Court was essentially divided into two camps. A majority of judges approved the concept that the appropriate remedy was to remove the detriment suffered in reliance on the assumption.[37] Fundamental to this formulation are the concepts of 'broad' and 'narrow' detriment. 'Broad' detriment is 'the detriment which would result from the denial of correctness of the assumption.'[38] 'Narrow' detriment is 'the detriment which the person has suffered as a result of his reliance upon the correctness of the assumption.'[39] In the 'minimum equity' formulation, the role of the estoppel is to remove only the narrow detriment. In the right case, this could require fulfilment of the assumption.

Despite the fact that six judges approved of the minimum equity formulation, the remedy actually given to Verwayen involved enforcing the promise given by the Commonwealth that it would not rely on the defences available to it. In the majority, Dawson J theoretically approved the 'minimum equity' formulation, but held that in this case it was necessary to enforce the promise.[40] Gaudron J held in Verwayen's favour on the basis of waiver.[41] However, Her Honour also suggested in obiter that if she had decided on the basis of estoppel, it may have been necessary to enforce the assumption against the Commonwealth.[42]

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37 *Verwayen*, n3, per Mason CJ at 416, Brennan J at 429, Dawson J at 454, Toohey J at 475, Gaudron J at 487, McHugh J at 501. Mason CJ adopted this in relation to a 'merged' view of common law and equitable estoppel.

38 Ibid 415 per Mason CJ. See also Brennan J at 429.

39 Ibid.

40 Ibid 462.

41 As did Toohey J.

42 Ibid 487.

The other member of the majority who held in Verwayen's favour on the basis of estoppel was Deane J. His Honour did not accept the 'minimum equity' formulation. Instead, His Honour adopted a 'unified' doctrine of estoppel which does not operate as a cause of action, and which has as its remedy, the prima facie fulfilment of the assumption.[43] It is only where enforcement of the assumption would create an unjust result that Deane J would grant a lesser remedy.[44] In adopting this view of estoppel, Deane J was able to take into account the fact that Verwayen's detriment included his 'last-minute denial of... expectation'.[45]

It is this divergence between theory and result in *Verwayen* that has led to confusion in the Courts in later decisions. Although it has been accepted that a majority view from *Verwayen* adopted the minimum equity approach, the remedy more often granted is that of fulfilment of the promise.[46] The Courts are struggling with the concept of the 'minimum equity' and how to satisfy that without enforcing the assumption. The decision of the Victorian Supreme Court in *Commonwealth of Australia v Clark*[47] is a case in point. This case arose from the same fact situation as *Verwayen*, the HMAS Voyager naval disaster. Marks J effectively admitted that he did not understand the 'minimum equity' approach,[48] and refused to consider reliance detriment separately from expectation detriment.[49] Ormiston J ostensibly applied the minimum equity approach, but took a 'generous' view of the relevant detriment.[50]

All of this is rendered even more obscure by the notion of unconscionability. This concept was used in *Verwayen* to justify both the 'minimum equity' approach, and the 'fulfilment of expectation' approach.[51]

Therefore, it was hoped that *Giumelli* would provide some more helpful guidelines on this issue. How is it that Courts are supposed to know when to give a remedy which is less than fulfilment of the promise? How is the remedy to relate to unconscionability and to reliance detriment? Unfortunately, *Giumelli* provides no guidance on these issues. Although in argument it appeared that the Court was interested in these theoretical matters,[52] the decision does not address them.

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43 Ibid 442 and 445-6.

44 Ibid.

45 Ibid 448.

46 Andrew Robertson collected some statistics on this which suggest that courts nearly always enforce the promise. See A Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after Verwayen' (1996) 20 *MULR* 805, 828-9.

47 [1994] 2 VR 333.

48 Ibid 342.

49 Ibid 343.

50 Ibid 383. The third member of the Court, Fullagar J, held that he was bound by the Victorian Court of Appeal decision of *Verwayen v The Commonwealth (No 2)* [1989] VR 712 due to a lack of clear ratio in the High Court: ibid 335.

51 *Verwayen*, n3, per Mason CJ at 411, Brennan J at 428-9, McHugh J at 501 in support of the minimum equity approach, Per Deane J ibid 444 in support of the fulfilment of expectations approach.

52 *Giumelli*, n4, 40-41.

The judges in *Giumelli* also refused to give any guidance on the future direction of the doctrine of equitable estoppel. More specifically, they refused to answer the question whether common law and equitable estoppel should remain separate, or should be subsumed within 'a single overarching doctrine.'[53] If the doctrines are to merge, will the formulation of Mason CJ, or Deane J, (or neither) be adopted?

Fundamentally, all that the judges were prepared to say outright was that the remedy for equitable estoppel is a flexible one. The judges referred to the various judgments in *Verwayen*, highlighting the fact that both the 'minimum equity' and 'fulfilment of promise' approaches contemplate that the Court may need to enforce the promise. Accordingly, they agreed that '*Verwayen* does not foreclose, as a matter of doctrine, the making in the present case of an order of the nature made by the Full Court.'[54] In other words, nothing in *Verwayen* prohibits the fulfilment of assumption as the final remedy granted. With respect, this is a facile conclusion.

The Court held that the remedy granted to Robert in the Western Australian Full Court 'went beyond what was required for conscientious conduct by Mr and Mrs Giumelli.'[55] It is possible to argue that, reading between the lines, this shows some approval for the approach of Deane J in *Verwayen*. This is exactly the way that Deane J phrased his reasons to justify why it may not always be appropriate to grant the prima facie entitlement to enforcement of the assumption. Perhaps it can be argued that if the Court actually approved of the 'minimum equity' approach it would have stated that the remedy given 'went beyond the minimum equity'. Or, it could just as easily be argued that if the Court had approved of the 'minimum equity' approach, it would have endorsed the 'minimum equity' theory. This certainly did not happen.

This is, admittedly, speculation. But, the Court's failure to endorse its earlier decision does suggest that this differently constituted court has diverging views on the matter. Because it was not critical to decide in *Giumelli*, the Court left the debate until another day. This also explains the Court's reluctance to address the question of fusion of common law and equitable estoppel. In order to address this issue, the Court would have to have been prepared to answer the remedy question.

The role of unconscionability and third party rights

In determining a remedy to prevent unconscionability, the Court has traditionally only been required to consider the relationship between the

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[53] *Giumelli*, n1, 475, citing Mason CJ in *Verwayen*, n3, 411.

[54] *Giumelli*, n1, 485 (joint judgment). And per Kirby J ibid 487 that *Verwayen* 'did not preclude the making of such an order.'

[55] Ibid 485. Or, per Kirby J, 'would exceed the requirements of conscientious conduct': ibid 487.

plaintiff and the defendant. Thus, in *Waltons Stores*, the issue was what remedy was necessary to prevent unconscionability as between Waltons Stores and the Mahers. In *Verwayen*, only the position of the Commonwealth and Verwayen was considered. However, in *Giumelli*, one of the Court's reasons for rejecting the order of constructive trust in favour of Robert was that a limitation on remedy was 'necessary to... avoid injustice to others.'[56]

Although it may have been necessary in this case to frame relief with the interests of third parties in mind, this conclusion will render the calculation of remedy even more difficult in future cases. Experience since *Verwayen* has shown that courts are already struggling with the remedy when only the interests of the plaintiff and the defendant must be considered. The High Court has now highlighted that it may be necessary to have regard to the interests of others, even when they are not parties to the litigation.

This raises a doctrinal difficulty. If it is the unconscionability of the promisor to the promisee that attracts the attention of the court, how is it that unconscionability altered the existence of a third party? *Giumelli* suggests a defendant can make their conduct less unconscientious by continually denying the equitable interest created in favour of the promisee, and perhaps making inconsistent promises to another. Unless the passage of time, and the improvements that would have been made over that period, have assumed some relevance in *Giumelli*, there seems little in the defendants' conduct which has changed. This raises the issue of when the assessment of unconscionability should occur. Is unconscionability judged as at the time the promisor seeks to resile from the promise, or at the time the matter comes before the court? In *Giumelli*, the focus seems to have moved from the defendant's unconscionability, towards some subjective balancing of the interests, not only of the promisee and the promisor, but also of any implicated third parties. Surely the court does not intend to encourage promisors to limit their liability after resiling from a promise, by making an inconsistent promise to a third party.

If the party seeking relief must take into account the possible claims of third parties, it must be because a plaintiff who seeks equity must also do equity. That, however, does not appear related to the issue of the defendant's unconscionability, which is said to attract the doctrine of equitable estoppel.[57] There seems no correlation between a promisor's unconscionability, and a requirement that a promisee do equity to a third party. How a plaintiff is to determine the extent of the third party rights to be taken into account is unclear, and it is not hard to imagine a scenario in which that plaintiff was unaware of any third party rights.

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[56] Ibid 485.

[57] *Waltons*, n2, 404 per Mason CJ and Wilson J; 419 per Brennan J.

Conclusion

The recent decision in *Giumelli* adds a little, but disappointingly, only a very little to the body of knowledge concerning the doctrine of equitable estoppel in Australia. It demonstrates an occasion on which the High Court was unanimous in believing that expectation relief should not be granted. This, however, has left exposed a potentially larger difficulty in understanding the element of unconsionability in the context of the doctrine.

While the decision may have answered some peripheral concerns about the application of the doctrine, it has failed to come to grips with the more thorny, central issue of quantification of relief. Any comment on whether later courts will seek to relieve the detriment suffered by the representee, or fulfil the promise made by the representor in attempting to apply *Giumelli* are, at best, speculative. Unfortunately, it seems further litigation will be necessary before the High Court is prepared to show its hand.