Circumstances of Conscience: Constructive Trusts and *Giumelli v Giumelli*[1]

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In the recent case of *Giumelli & Anor v Giumelli*[2] the High Court reaffirmed and clarified the circumstances in which a constructive trust is the most appropriate form of relief for holders of equitable rights. The High Court's unanimous judgment upheld the defendants' appeal from the Full Court of the Supreme Court of Western Australia, finding that the Full Court had erred in imposing a constructive trust in favour of the respondent.[3] Gleeson CJ and McHugh, Gummow, Callinan and Kirby JJ held that the imposition of a constructive trust was not necessary to do justice in the circumstances. Indeed, the imposition of a constructive trust went so far beyond 'what was required for conscientious conduct' by the defendants as to lead to possible injustice for third parties.[4]

In this discussion it is argued that the High Court's decision in *Giumelli*[5] represents a judicial preference for a balanced approach to equitable remedies. Furthermore, it is submitted that such an even-handed approach, based on assessing all of the circumstances and consequences, will lead to a more equitable outcome.

I. The facts and decision at first instance

The facts turn on a complicated family business arrangement. The appellants, Mr and Mrs Giumelli, involved their three sons from an early age in the working and running of their properties as orchards. The appellants ran their business, 'G. Giumelli & Co', as a partnership without any written partnership agreement. There were two properties which were used for partnership business — the Pickering Brook property and the Dwellingup property. The registered title of both properties was retained by the appellants and neither property had ever been an official partnership asset.

In July 1973 the two elder sons, Tony and Robert, were admitted to the partnership by Mr and Mrs Giumelli, who had been advised that there were tax advantages in doing so. The third son, Steven, was admitted to the partnership around 1982. The respondent is the middle son, Robert, who worked for the partnership without wages and effected substantial improvements on the Dwellingup property. He brought an action on the basis of three alleged promises made to him by Mr and Mrs Giumelli. These promises related to the transfer of part ownership of the Dwellingup property from the appellants, Mr and Mrs Giumelli, to the respondent, Robert.

The trial judge (RD Nicholson J) of the Supreme Court of Western Australia referred to the promises as 'the general promise', 'the second promise', and 'the third promise.'[6] The general promise was made to Robert in 1974 and was expressed in general terms. It provided for the transfer of an unspecified portion of the Dwellingup property as compensation for Robert's work without wages and also for the costs of the improvements that were being met from partnership funds.[7] The second promise, made in 1980, related to a specific site, identified as the 'Promised Lot'[8] and intended for Robert's matrimonial

1 [1999] HCA 10 (24 March 1999).
2 [1999] HCA 10 (24 March 1999).
3 The High Court agreed with the Full Court's findings as to the equity owed but differed in terms of the appropriate remedy.
4 [1999] HCA 10 at para 50.
5 [1999] HCA 10.
6 [1999] HCA 10 at para18.
7 [1999] HCA 10 at para 18.
8 [1999] HCA 10 at para 1.

home. Robert understood that a portion of the Dwellingup property that he selected with the appellants' help was to be conveyed to him, including any house later built on the land and also an orchard nearby. In reliance on this promise, the respondent constructed a house to the value of $47 000, using $25 000 from partnership funds for materials and labour. The trial judge found that the most important issue was the way in which this second promise was 'understood' between the parties.[9] The third promise, made after the respondent's marriage, was one of specific subdivision. The terms of this promise provided that a lot would be created to include the house and orchard if the respondent agreed to stay on the property and refrain from working for his father-in-law. The respondent later separated from his wife and the appellants reassured him that on his divorce, the property would be transferred.[10]

When the respondent decided to remarry a woman of whom his parents disapproved of, the appellants set an ultimatum — he had to 'choose between his proposed new wife and the Dwellingup property.'[11] The respondent elected to marry and left the Dwellingup property. In 1986, the respondent commenced an action to have the partnership determined — the 'partnership action.'[12] He also sought a declaration that the partnership had an equitable charge over both the Pickering Brook property and the Dwellingup property, to the extent of the value of improvements made by the partnership.

The trial judge found that the respondent acted in reliance upon both the second and third promises by expending money and labour on the building of the house, and rejecting a job offer and returning to the property, respectively.[13] He found that the respondent had acted to his detriment over the second promise by 'expending money and labour on the house without the acquisition of title to it.' However, he did not find any element of detriment regarding the third promise, as rejection of the job offer and subsequent work for the partnership would only benefit the partnership, of which he was a member. The trial judge felt that this did not constitute a detriment in the required sense and that the partnership action would determine the issues specifically related to the partnership accounts.[14] The trial judge ordered relief appropriate to the breach of the second promise. He concluded that the circumstances did not warrant nor welcome an order for title in the promised lot to be vested in the respondent. Rather, this was a case where the respondent's expectation could be met by monetary compensation to place him in the position he would have been in if he had owned the house and land on which it was situated, and was able now to realise that asset.[15]

II. On appeal

The Full Court of the Supreme Court of Western Australia (Rowland, Franklyn and Ipp JJ) allowed an appeal by the present respondent. The court made a declaration that the appellants hold the Dwellingup property upon trust to convey to the respondent the Promised Lot. The appellants were ordered to do 'all things reasonably necessary to subdivide the Dwellingup property so as to create the Promised Lot.'[16] It was found that the trial judge had erred in not adequately assessing the detriment suffered by the

9 [1999] HCA 10 at para 20. Also note that the trial judge found that subject land of the second promise did not include the orchard.
10 See the Full Court summary: (1996) 27 WAR 159 at 162–163.
11 [1999] HCA 10 at para 21.
12 [1999] HCA 10 at para 23. It should be noted that the partnership action has not yet come to trial: see para 24.
13 [1999] HCA 10 at para 25.
14 [1999] HCA 10 at para 26.
15 Note that in the United States an equitable charge of this kind is often seen as a 'special and limited' form of constructive trust which confers a security to satisfy a monetary obligation rather than conferring complete title: [1999] HCA 10 at para 32.
16 [1999] HCA 10 at para 1.

respondent regarding the third promise. The respondent had given up a different career path and lost the property that he had worked to improve, 'not to obtain immediate income from that exercise but to gain the proprietary interest.'[17]

III. The High Court decision

The appellants argued that the width of the specific relief granted by the Full Court went beyond 'any "reversal" of detriment' and that in this case it was not open to the Full Court to grant such relief.[18] The appellants relied on the High Court decision in *Commonwealth v Verwayen*.[19] The High Court held that their decision in *Verwayen*[20] did not present authority for curtailment of possible relief, rather it strengthened the notion of a broader view of relief.[21] However, in these circumstances, the notion of broader relief was beneficial to the appellants, as a broad consideration of all the circumstances lead to the conclusion that the constructive trust imposed by the Full Court was an inappropriate remedy here.

In their judgment, Gleeson CJ and McHugh, Gummow and Callinan JJ provide a detailed discussion of what constitutes a constructive trust[22] and a consideration of the concept of detriment,[23] with a particular focus on the decision in *Verwayen*.[24]

1. Constructive trusts and estoppel

The High Court pointed out that care is needed in using the term 'constructive trust.' The word 'constructive' is derived from the verb 'construe' and not from the verb 'construct' and thus the court construes the circumstances that warrant the imposition of a trust.[25] The High Court further points out that circumstances in *Giumelli* come within the category identified by the Privy Council in *Plimmer v Mayor, &c, of Wellington*, which required the court to 'look at the circumstances in each case to decide in what way the equity can be satisfied.'[26] The court should look to the issues in the litigation, and where there is an appropriate equitable remedy that falls short of the imposition of a trust, such a remedy should be granted.[27]

2. Detriment and Commonwealth v Verwayen[28]

In *Verwayen*, Deane J emphasised that the operation of equitable remedies is to preclude departure from the 'assumed state of affairs.'[29] Where relief imposed by a court would exceed what could be 'justified by the requirements of conscientious conduct' and would be unjust to other parties, then any prima facie entitlement to such relief would be

17 (1996) 17 WAR 159 at 166 per Rowland J. Also note that the reasoning of the trial judge placed no weight upon the fact that the partnership had no security of tenure and did not own the real estate: at 174 per Ipp J. The reasoning of Rowland and Ipp JJ were specifically endorsed by the High Court; [1999] HCA 10 at para 27.

18 [1999] HCA 10 at para 33. Note also at para 11 that the appellants accepted in written and oral submissions that there is an equity owed to the respondent regarding the second promise. They submit that the relief necessary fell short of an order for subdivision and conveyance of the Promised Lot.

19 (1990) 170 CLR 394.

20 (1990) 170 CLR 394.

21 [1999] HCA 10 at para 33.

22 [1999] HCA 10 at paras 2–11.

23 [1999] HCA 10 at paras 34–48.

24 (1990) 170 CLR 394.

25 [1999] HCA 10 at para 2, quoting from Scott AW, *The Law of Trusts*, Little Brown & Co, Boston, 4th ed, 1989, vol 5, at 462.4.

26 (1894) 9 App Cas 699 at 714.

27 [1999] HCA 10 at para 10. See *Bathurst City Council v PWC Properties Pty Ltd* (1998) 72 ALJR 1470 at 1479; 157 ALR 414 at 425–426; *Napier v Hunter* [1993] AC 713 at 738, 744–745 and 752.

28 (1990) 170 CLR 394, for a discussion of the facts in *Verwayen* see [1999] HCA 10 at paras 37–40.

29 (1990) 170 CLR 394 at 443.

qualified.[30] Gaudron J commented that avoiding detriment does not 'in every case' require the 'making good' of the promise or assumption.[31]

The High Court concluded that the appellants in this case were correct in submitting, in reliance on *Verwayen*, that the facts did not 'foreclose, as a matter of doctrine' the imposition of a constructive trust by the Full Court.[32] The High Court considered that in the circumstances, which included the pending partnership action, the improvements to the Promised Lot by family members other than the respondent (particularly his brother Steven) and the breakdown of family relationships, the respondent's prima facie entitlement to the 'Promised Lot' was qualified.[33] If the constructive trust imposed by the Full Court had been allowed to stand, the impact on the respondent's brother Steven, whose family had been resident on the Promised Lot since the respondent left over ten years ago, would have been unjust and inequitable. Thus, the qualification was necessary to do justice in the circumstances and to avoid relief that went beyond what was required for 'conscientious conduct' by Mr and Mrs Giumelli. Hence, the respondent's qualified entitlement to the Promised Lot meant that monetary relief, reflecting the original approach taken by the trial judge, was the most appropriate remedy in these circumstances.[34]

IV. Conclusion

Perhaps the lasting message of *Giumelli v Giumelli*[35] is that balance in all things is essential, no less in equitable remedies than in anything else. The High Court has reinforced the notion of considering all the circumstances, so as to tailor the most appropriate remedy. If it is possible to do justice without imposing a trust, then it is best to do so. This will minimise any impact on third parties, without detrimentally affecting the party seeking equity. Thus, it is submitted that in *Giumelli v Giumelli*, the High Court has struck a balance that will ensure a greater measure of equity in the true sense of the word. To concentrate on the equitable rights of only one party does not do justice to wider notions of equity and fairness. In stressing that equitable relief should be appropriate to the circumstances, the High Court is reminding us that remedies such as the constructive trust should be reserved for circumstances that warrant such extreme judicial action.

30 (1990) 170 CLR 394 at 445.
31 (1990) 170 CLR 394 at 487.
32 [1999] HCA 10 at para 48.
33 [1999] HCA 10 at para 49.
34 [1999] HCA 10 at para 50. See also Kirby J at para 62–65 who concurs with the discussion and conclusions of the majority judgment.
35 [1999] HCA 10.