NORTON ROSE FULBRIGHT

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Contents

Chapter 1: Proprietary and Promissory estoppel in Australian and English equity

1 Introductory

In Australian and English law equitable estoppel consists of proprietary and promissory estoppel while common law estoppel consists of estoppel by representation and estoppel by convention. The material difference between equitable and common law estoppel is that equitable estoppel can be the source of legal rights. Conversely, common law estoppel is an evidential principle which establishes the factual platform on which the rights of the parties are then determined in accordance with applicable legal principles. However, in circumstances where estoppel by convention affects the content of contractual rights and obligations the estoppel exhibits the hallmarks of an equitable estoppel. Indeed there have been judicial suggestions that estoppel by convention may need to be reclassified.

Mason CJ in his review of estoppel in *The Commonwealth v Verwayen*[1] suggested that there was a *"single overarching doctrine"* of estoppel. However in the later decision of the High Court in *Giumelli v Giumelli*[2] this approach was questioned. Thus Gleeson JA in *Doueihi v Construction Technologies Australia Pty Ltd*[3] said:

> *[136] The appellants did not seek to argue that there is "a single overarching doctrine" as described by Mason CJ in The Commonwealth v Verwayen [1990] HCA 39; 170 CLR 394 (Verwayen) at 411, or what Deane J identified in Verwayen (at 440) as a "general doctrine of estoppel by conduct". They were correct not to do so. In Giumelli v Giuemelli at [7], the plurality noted that these statements in Verwayen were not accepted by Dawson J (at 454) or McHugh J (at 499-501) and that Brennan J approached the subject on the footing 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" (at 428-429).*

The purpose of equitable estoppel is the prevention of unconscionable conduct. In their joint reasons in *Waltons Stores (Interstate) Ltd v Maher*[4], Mason CJ and Wilson J explained the equity at 404:

> *One may therefore discern in the cases a common thread which links them together, namely, the principle that. equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has "played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it": per Dixon J. in Grundt (68); see also Thompson (69). Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.*

In an overarching comment on the scope of equitable estoppel, Lord Walker in *Cobbe v Yeoman's Row Management Ltd*[5] said:

> *My Lords, equitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way.*

On the dichotomy between proprietary and promissory estoppel his Lordship in *Thorner v Major*[6] said at 795:

> *In my opinion it is a necessary element of proprietary estoppel that the assurances given to the claimant (expressly or impliedly, or, in standing-by cases, tacitly) should relate to identified property owned (or, perhaps, about to be owned) by the defendant. That is one of the main*

[1] (1990) 170 CLR 394
[2] (1999) 196 CLR 101
[3] [2016] NSWCA 105
[4] (1987) 164 CLR 387
[5] [2008] WLR 1752
[6] [2009] 1 WLR 776

> *distinguishing features between the two varieties of equitable estoppel, that is promissory estoppel and proprietary estoppel. The former must be based on an existing legal relationship (usually a contract, but not necessarily a contract relating to land). The latter need not be based on an existing legal relationship, but it must relate to identified property (usually land) owned (or, perhaps, about to be owned) by the defendant. It is the relation to identified land of the defendant that has enabled proprietary estoppel to develop as a sword, and not merely a shield: see Lord Denning MR in Crabb v Arun District Council [1976] Ch 179, 187.*

The earlier decision of the English Court of Appeal in *Crabb v Arun District Council*[7] provides an illustration of how a fact situation may be viewed as raising either a proprietary or a promissory estoppel. In that case the defendant Council led Mr Crabb to believe that he could have access to his land over a road belonging to the Council. Relevantly, Mr Crabb believed that he would have a right of way over the defendant's land. In reliance on that expectation, Mr Crabb allowed his property to become landlocked without reservation of a right of way. The Court found that Mr Crabb was entitled to the right of way. Lord Denning said at 189:

> *In the circumstances it seems to me inequitable that the Council should insist on their strict title as they did; and to take the high-handed action of pulling down the gates without a word of warning: and to demand the plaintiff £3,000 for the price of the easement.*

Scarman LJ said at 199:

> *But there can be no doubt that since Ramsden v Dyson the Courts have acted upon the basis that they have to determine not only the extent of the equity, but also the conditions necessary to satisfy it, and they have done so in a great number of cases.*

However, no member of the Court expressly relied on either a promissory or a proprietary estoppel.

However, Lord Scott in *Cobbe*[8] noted:

> *He (Mr Crabb) was held entitled by way of proprietary estoppel to a right of way as promised. The district council was estopped from denying that he had the right of way.*

Conversely, in *Waltons Store (Interstate) Ltd v Maher*[9], Mason CJ and Wilson J in their joint reasons said at 403:

> *Crabb was an instance of promissory estoppel. It lends assistance to the view that promissory estoppel may in some circumstances extend to the enforcement of a right not previously in existence where the defendant has encouraged in the plaintiff the belief that it will be granted and has acquiesced in action taken by the plaintiff in that belief…As Oliver J pointed out in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] QB 133 at 153, the Court of Appeal treated promissory estoppel and proprietary estoppel or estoppel by acquiescence as mere facets of the same general principle, a point also made by Lord Denning MR in Texas Bank, at 122, and seemingly accepted by the Privy Council in Attorney-General of Hong Kong v Humphreys Estate Ltd [1987] 1 AC 114 at 123-4. In Taylors Fashions Oliver J also remarked (at 153) that what gave rise to the need for the court to intervene was the defendants' unconscionable attempt to go back on the assumptions which were the foundation of their dealings.*

Their Honours then observed at 404:

> *The decision in Crabb is consistent with the principle of proprietary estoppel applied in Ramsden v Dyson (1866) LR 1 HL 129. Under that principle a person whose conduct creates or lends force to an assumption by another that he will obtain an interest in the first person's land and on the basis of that expectation the other person alters his position or acts to his detriment, may bring into existence an equity in favour of that other person, the nature and extent of the equity depending on the circumstances.*

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[7] [1976] Ch 179
[8] at 1765
[9] (1988) 164 CLR 387

2 Requirements for equitable estoppel

2.1 The Brennan J propositions

In *Waltons Stores,* Brennan J identified six requirements for an equitable estoppel as follows:

> *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.*

It is noteworthy that the Australian courts have consistently treated Brennan J's propositions as the authoritative formulation of the requirements for equitable estoppel. Relevantly, Ball J in *TMA Australia Pty Ltd v Indect Electronics & Distribution GmbH*[10] said:

> *[87] Although Brennan J's statement has not been approved by the High Court as a whole, it has been the formulation most commonly cited and applied by lower courts in Australia …*

In commenting on the Brennan formulation, Meagher JA in *DHJPM Pty Limited v Blackthorn Resources Limited*[11]made the following important comments:

> *[47] The primary judge sought to apply Brennan J's formulation of what is necessary to establish an equitable estoppel. Of particular importance to this appeal are propositions (1), (2) and (3) and whether any expectation induced by AIM was as to something AIM was "bound" to do. Two things should be noted about Brennan J's formulation. The first is that any general formulation of the relevant principles must necessarily, in its application in particular circumstances, be subject to qualification and refinement reflecting or giving effect to the broad equitable principles which underlie its application. Some of those qualifications may be found in the judgments in Waltons Stores v Maher and S & E Promotions Pty Ltd v Tobin Bros Pty Ltd at 653-654. The second is that it does not describe the characteristics of the different species of equitable estoppel and, in particular, promissory and proprietary estoppel. This is because Brennan J considered there was a difficulty in limiting the principle of equitable estoppel, in so far as it operated in relation to promises, to those which suspended or extinguished existing rights, or to those which created or conferred proprietary as distinct from non-proprietary interests: at 425-426. In this context I note that this court said in Saleh v Romanous [2010] NSWCA 274, esp at [55], [62], [74], that a promissory estoppel operates as an equitable restraint on the exercise or enforcement of contractual and other rights and is negative in substance.*

In *Doueihi v Construction Technologies Australia Pty Ltd*[12], Gleeson JA in dealing with the applicability of Brennan J's proposition (1) to proprietary estoppel said:

> *It would be wrong, however, to read the reasons of Meagher JA as suggesting that the six propositions of Brennan J are to be applied in every case of proprietary estoppel in a mechanical fashion. As the primary judge noted, Priestley JA made this very point in Austotel v Franklins (at 615-616), when observing that while the "tests" of Brennan J may not represent the majority views of the High Court, they provided a useful check. As the primary judge also recognised (at [137]), it would also be wrong to ignore that in Waltons Stores, Mason CJ and Wilson J did not say that the party asserting that estoppel must have assumed that a particular legal relationship existed, or that the party said to be estopped would not be free to withdraw from an expected legal relationship.*

2.2 Reliance

In *Sidhu v Van Dyke*[13] the High Court plurality explained the scope of this requirement as follows:

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[10] [2014] NSWSC 409
[11] (2011) 83 NSWLR 728
[12] [2016] NSWCA 105
[13] [2014] HCA 19

> *[58] In point of principle, to speak of deploying a presumption of reliance in the context of equitable estoppel is to fail to recognise that it is the conduct of the representee induced by the representor which is the very foundation for equitable intervention. Reliance is a fact to be found; it is not to be imputed on the basis of evidence which falls short of proof of the fact. It is actual reliance by the promisee, and the state of affairs so created, which answers the concern that equitable estoppel not be allowed to outflank Jorden v Money by dispensing with the need for consideration if a promise is to be enforceable as a contract. It is not the breach of promise, but the promisor's responsibility for the detrimental reliance by the promisee, which makes it unconscionable for the promisor to resile from his or her promise. In Giumelli v Giumelli, Gleeson CJ, McHugh, Gummow and Callinan JJ approved the statement of McPherson J in Riches v Hogben that:*
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> > *"It is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation to which it gives rise."*

In her recent judgment in *Slade v Brose*[14], Ward P made the following observations on the concept of reliance:

> *[239] There is no presumption of reliance; reliance is a fact to be found (Sidhu v Van Dyke at [58]). What is required is satisfaction from the whole of the evidence of the fact of reliance on the balance of probabilities.*
>
> *[240] Reliance in the context of estoppel by encouragement was considered by the High Court in Sidhu v Van Dyke. It is clear that it is not necessary that the relevant assumption be the "sole inducement operating on the mind of the party setting up the estoppel" (Sidhu v Van Dyke at [71]); it need only be a "contributing cause" (at [71]-[73] (French CJ, Kiefel, Bell and Keane JJ); [90] (Gageler J)).*
>
> *[241] In Sidhu v Van Dyke the plurality formulated the question as whether (see at [66]) on all the facts there was satisfaction on the balance of probabilities that the promises in question contributed to the respondent's conduct (there, her conduct in "deciding to commit to her relationship with the appellant and adhering to that relationship" for a number of years). In concluding that there was a compelling case of reliance, the plurality referred, among other things to the "probabilities of human behaviour" (see at [69]). The plurality considered that the assurances made in that case had a "significant effect" upon the respondent's decision-making process and that it was indeed more likely than not that the respondent would have acted differently, had the promises not been made. At [76], the question posed by the plurality was "whether the respondent would have committed to, and remained in, the relationship with the appellant, with all that that entailed in terms of the effect upon the material well-being of herself and her son, had she not been given the assurances made by the appellant".* (emphasis added)

2.3 Detriment

In *Kramer v Stone*[15], Ward P made the following comments on the requirement of detriment necessary to establish a proprietary estoppel by encouragement:

> *[94] In a case of estoppel by encouragement, the relevant detriment is not the loss flowing from mere non-fulfilment of a representation or promise (Verwayen at 429 (Brennan J); and see Neuberger LJ in Steria Ltd v Hutchison [2007] ICR 445 at [125]). Rather, what must be established is that the plaintiff has suffered (or will suffer) detriment if the defendant is permitted to resile from his or her representations or promises.*
>
> *[95] As with reliance, there is no presumption of detriment; the fact that detriment has been suffered (or will be suffered) must be established on the balance of probabilities. However, the concept of detriment in the context of proprietary estoppel is neither narrow nor technical (Donis v Donis (2007) 19 VR 577; [2007] VSCA 89 (Donis v Donis) at [20] (Nettle JA, with whom Maxwell ACJ and Ashley JA agreed)).*
>
> *[96] The question of detriment is assessed as at the time a party seeks to depart from the assumption or expectation (DHJPM at [72] (Meagher JA)). Detriment may be of a kind that involves "life-changing decisions with irreversible consequences of a profoundly personal*

[14] [2024] NSWCA 197
[15] [2023] NSWCA 270

nature" (Donis v Donis at [34]; cited approvingly in Sidhu v Van Dyke at [84] (French CJ, Kiefel, Bell and Keane JJ)).

Earlier in *Q (a pseudonym) v E Co (a pseudonym)*[16] Meagher JA (Leeming and Payne JJA agreeing) also in relation to an estoppel by encouragement said:

> *Thus, detriment sufficient to support an estoppel by encouragement need not involve expenditure of money on the property the subject of the estoppel or otherwise, or be capable of financial quantification: Walsh v Walsh [2012] NSWCA 57 at [14]. It is well recognised that detriment in the relevant sense may flow from having significantly changed the course of one's life: see Riches v Hogben [1985] 2 Qd R 292, where the detriment was constituted by the plaintiff selling his possessions, giving up a house in England, and bringing his family to Australia in reliance on an expectation that the defendant, his mother, would provide a house in his name if he and his family migrated; and Delaforce, where, when settling proceedings in the Family Court, and in reliance on a promise that the deceased would bequeath a property to her, the plaintiff gave up a claim to an amount of $50,000 and did not seek an order that she should have title to the property after the death of her former husband.*

Additionally, as recently noted by Hmelnitsky J in *Macaulay v Macaulay*[17] it is relevant to consider whether the acts of reliance involved counterbalancing benefits. As his Honour observed this has been described in England as looking at the question of detriment "in the round" and as part of the determination whether the representee would be "overall worse off" than if they had not acted on the assumption.

Ward P in *Slade v Brose* (supra) in dealing with countervailing benefit said:

> *[285] … Suffice it here to note, however, that detriment is not to be determined by some form of precise arithmetical calculation or balance sheetlike approach in which the counterfactual opportunities are quantified and valued. That is made clear in Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd (2014) 253 CLR 560; [2014] HCA 14 at [88]; Q v E Co at [157]-[158] per Meagher JA; Soulos v Pagones [2023] NSWCA 243 at [389]- [392].*
>
> *[287] The real question is whether the countervailing benefits in effect subsumed or sufficiently made good the representations so as to make it not unconscionable for the Slades to depart from those representations. There are, of course, cases where a benefit (such as rent-free accommodation over a long period) might be treated as making good the promise or representation of an interest in property. Here, however, in the context of a farming operation conducted over a number of properties and over a number of years in reliance on the expectation that those properties (and business) would be transferred to the Broses ("all this will be yours") there was no error in my opinion in his Honour concluding that the countervailing benefits (valuable as they were) did not assuage the equity raised by the Broses' detrimental reliance on the Slades' representations and the renunciation of those representations by the Slades.*

3 Proprietary estoppel by encouragement

The foundation of the modern law on proprietary estoppel rests on the following statement by Lord Kingsdown in *Ramsden v Dyson*[18]:

> *If a man under a verbal agreement with a landlord for a certain Interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain Interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation.*

In *Waltons Stores* Mason CJ and Wilson J in their joint reasons identified the elements of proprietary estoppel at 404:

[16] [2020] NSWCA 220
[17] [2024] NSWSC 1547
[18] (1865) LR 1HL129.

> *Under that principle a person whose conduct creates or lends force to an assumption by another that he will obtain an interest in the first person's land and on the basis of that expectation the other person alters his position or acts to his detriment, may bring into existence an equity in favour of that other person, the nature and extent of the equity depending on the circumstances. And it should be noted that in Crabb, as in Ramsden v Dyson, although equity acted by way of recognising a proprietary interest in the plaintiff, that proprietary interest came into existence as the only appropriate means by which the defendants could be effectively estopped from exercising their existing legal rights.*

And in *Delaforce v Simpson-Cook*[19], Handley AJA characterised proprietary estoppel as an estoppel by encouragement. His Honour said at 488:

> *The proprietary estoppel upheld by the judge was an estoppel by encouragement. Such an estoppel comes into existence when an owner of property has encouraged another to alter his or her position in the expectation of obtaining a proprietary interest and that other, in reliance on the expectation created or encouraged by the property owner, has changed his or her position to their detriment. If these matters are established equity may compel the owner to give effect to that expectation in whole or in part. The general principles governing this form of estoppel were not in dispute, here or below.*

Recently, Rees J in her review of proprietary estoppel in *Pirrottina v Pirrottina*[20] said:

> *[161] There are three main elements, being an assurance, reliance and detriment. As Walker LJ observed in Gillett v Holt [2001] Ch 210, these elements cannot be treated as "watertight compartments" and often overlap, "the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round": at 225. As Walker LJ also observed in Jennings v Rice [2002] EWCA Civ 159, "The cases show a wide range of variation in … the quality of the assurances which give rise to the claimant's expectations and the extent of the claimant's detrimental reliance on the assurances. The doctrine applies only if these elements, in combination, make it unconscionable for the person giving the assurances … to go back on them": at [44].*

Domestic arrangements and commercial transactions

Both the English and Australian authorities highlight the significance of the dichotomy between domestic arrangements and commercial transactions in establishing a proprietary estoppel by encouragement. Relevantly, in *Cobbe* Lord Walker said at 1782:

> *It is unprofitable to trawl through the authorities on domestic arrangements in order to compare the forms of words used by judges to describe the claimants' expectations in cases where this issue (hope or something more?) was not squarely raised. But the fact that the issue is seldom raised is not, I think, coincidental. In the commercial context, the claimant is typically a business person with access to legal advice and what he or she is expecting to get is a contract. In the domestic or family context, the typical claimant is not a business person and is not receiving legal advice. What he or she wants and expects to get is an interest in immovable property, often for long-term occupation as a home. The focus is not on intangible legal rights but on the tangible property which he or she expects to get. The typical domestic claimant does not stop to reflect (until disappointed expectations lead to litigation) whether some further legal transaction (such as a grant by deed, or the making of a will or codicil) is necessary to complete the promised title.* (emphasis added)

In *DHJPM Pty Ltd v Blackthorn Resources Limited*[21], Handley AJA observed:

> *[104] Estoppels by encouragement have been applied in a wide variety of factual situations. Most fall into one of two categories; those where the parties are in a domestic or family relationship, and those where the relationship is commercial. Parties in the latter category typically contemplate a legal relationship and frequently intend to enter into a contract or otherwise formalise their expectation.*

[19] (2010) 78 NSWLR 483
[20] [2024] NSWSC 558
[21] [2011] NSWCA 348

> *[105] In domestic or family cases, the parties are not at arm's length and usually have no intention of entering into a contract or formalising their expectation. The party encouraged will frequently expect to receive a gift, inter vivos or testamentary.*

4 *Cobbe v Yeoman's Row Management Ltd*[22]

A, (*Yeoman's Row Management Ltd)* the owner of land entered into negotiations with B (*Mr Cobbe*) for the sale of the land to B with a view to residential development. A and B concluded an oral "agreement in principle" on the core terms of a sale. There was no written contract nor was there any draft contract for discussion. The agreement in principle was that B, at his expense, would prosecute an application for planning permission and if that were to be successful A would sell the land to B for $X. B would then, again at his own expense, develop the land in accordance with the planning permission, sell off the residential units and when the gross proceeds of sale received by B equalled $2x any further gross proceeds would be divided equally between A and B. B proceeded with the application for planning permission for the residential development. B was encouraged to do so by A and spent a considerable sum in doing so. The parties contemplated that following the grant of planning permission a formal written agreement would be entered into. It would include the core terms agreed orally together with other terms necessary for the implementation of the core terms. It should also be noted that under section 2(1) of the English *Law of Property (Miscellaneous Provisions) Act 1989* a contract for the sale of land is required to be in writing corresponding to section 23C of the *Conveyancing Act 1919* (NSW).

The planning application was successful.

A then initiated fresh negotiations of the core financial terms, in particular asking for a substantial increase in the sum that would represent $X.

B commenced legal proceedings. In those proceedings B originally sought specific performance and damages for breach but subsequently amended his pleadings substituting claims for declarations that A held the subject land on a constructive trust for the benefit of A and B and that A was subject to a proprietary estoppel.

The trial judge (Etherton J) and the Court of Appeal found in favour of B on the basis of proprietary estoppel. Equitable compensation was assessed based on 50% of the increase in the value of the land bought about by the successful planning application.

The House of Lords rejected the claim of proprietary estoppel but held that B was entitled to a quantum meruit payment for his services in obtaining the planning permission.

Lord Scott in discussing Lord Kingsdown's requirements for a proprietary estoppel said at 1764:

> *Lord Kingsdown's requirement that there be an expectation of "a certain interest in land", repeated in the same words by Oliver J in the Taylors Fashions case [1982] QB 133, presents a problem for Mr Cobbe's proprietary estoppel claim. The problem is that when he made the planning application his expectation was, for proprietary estoppel purposes, the wrong sort of expectation. It was not an expectation that he would, if the planning application succeeded, become entitled to a" certain interest in land". His expectation was that he and Mrs Lisle-Mainwaring, or their respective legal advisers, would sit down and agree the outstanding contractual terms to be incorporated into the formal written agreement, which he justifiably believed would include the already agreed core financial terms, and that his purchase, and subsequently his development of the property, in accordance with that written agreement would follow. This is not, in my opinion, the sort of expectation of "a certain interest in land" that Oliver J in the Taylors Fashions case or Lord Kingsdown in Ramsden v Dyson had in mind.*

And at 1768 his Lordship made the following critical observations:

[22] [2008] WLR 1752

> *The reality of this case, in my opinion, is that Etherton J and the Court of Appeal regarded their finding that Mrs Lisle-Mainwaring's behaviour in repudiating, and seeking an improvement on, the core financial terms of the second agreement was unconscionable, an evaluation from which I do not in the least dissent, as sufficient to justify the creation of a "proprietary estoppel equity". As Etherton J said, at para 123, she took unconscionable advantage of Mr Cobbe. The advantage taken was the benefit of his services, his time and his money in obtaining planning permission for the property. The advantage was unconscionable because immediately following the grant of planning permission she repudiated the financial terms on which Mr Cobbe had been expecting to be able to purchase the property. But to leap from there to a conclusion that a proprietary estoppel case was made out was not, in my opinion, justified. Let it be supposed that Mrs Lisle-Mainwaring were to be held estopped from denying that the core financial terms of the second agreement were the financial terms on which Mr Cobbe was entitled to purchase the property. How would that help Mr Cobbe? He still would not have a complete agreement. Suppose Mrs Lisle-Mainwaring had simply said she had changed her mind and did not want the property to be sold after all. What would she be estopped from denying? Proprietary estoppel requires, in my opinion, clarity as to what it is that the object of the estoppel is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat. If these requirements are not recognised, proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable, if it has not already become so. This is not, in my opinion, a case in which a remedy can be granted to Mr Cobbe on the basis of proprietary estoppel.*

Lord Scott concluded (at 1772):

> *Mr Cobbe's expectation of an enforceable contract, on the basis of which he applied for and obtained the grant of planning permission, was inherently speculative and contingent … and … [he] never expected to acquire an interest in the property otherwise than under a legally enforceable contract.*

Lord Walker said at 1781:

> *It is not enough to hope, or even to have a confident expectation, that the person who has given assurances will eventually do the proper thing … hopes by themselves are not enough … in cases with a commercial context*

His Lordship continued at 1785:

> *In my opinion none of these cases casts any doubt on the general principle laid down by this House in Ramsden v Dyson LR 1 HL 129, that conscious reliance on honour alone will not give rise to an estoppel. Nor do they cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract.*

5 The New South Wales Court of Appeal cases

The New South Wales Court of Appeal has considered the boundaries of proprietary estoppel in the context of the Brennan propositions in two important decisions, the first of which is *DHJPM Pty Ltd v Blackthorn Resources Ltd*[23].

The contest in that case turned on the significance of a conversation which took place between the respective chief executives of the appellant and the respondent on 13 May 2006. Relying on that conversation the appellant (*DHJPM*) sought equitable compensation to enforce an equity said to arise from the respondent's failure to fulfil an assumption or expectation which it induced and which the appellant acted upon. The relevant assumption or expectation was that the respondent was bound by an agreement with the appellant to take a sublease or, alternatively, a licence of part of a floor of a multi storey commercial building. The appellant asserted that it only committed to take a head lease of the relevant floor on the basis of an oral commitment by the respondent to take the sublease or licence.

[23] [2011] NSWCA 348.

The Court of Appeal held that there was no basis for an equitable estoppel as pleaded by the appellant.

The 13th May 2006 conversation relied upon by the appellant contained the following exchange between Mr Hannon, the Chief Executive of DHJPM and Mr Flory, the Chief Executive of AIM.

Mr Hannon:	*"I am entering Into a long lease of five years, so you will get a five-year one."*
Mr Flory:	*"Okay".*
Mr Hannon:	*"Marc this is a big commitment for us. We are going to enter into a 5 year lease, and so will you. I will be financing the fit out."*
Mr Flory:	*"Yeah, no problem. We'll be there with you."*
Mr Hannon:	*"I've worked out the rates and your space is going to be around $10,000 a month plus GST."*
Mr Flory:	*"Sure that is fine."*
Mr Hannon:	*"I am going to need to sign the lease soon. It is going to be for five years and your space will be $10,000 per month plus GST. Is everything still Okay?"*
Mr Flory:	*"We're going ahead with the leasing arrangements. We are committed."*

As noted by the primary judge, Mr Hannon relying on Mr Flory's assurances and his assumption that AIM was committed to the project, Mr Hannon, on behalf of DHJPM, entered into a head lease and committed DHJPM to a fitout costing in excess of $499,000. The primary judge rejected DHJPM's estoppel argument.

In dismissing DHJPM's appeal, Meagher JA (Macfarlan JA agreeing) said:

> *[42] …The present case is unlike Waltons Stores v Maher in that at the time of the relevant act of reliance, the parties had not reached agreement about a number of matters concerning AIM's right of occupation. Those matters included the rent or occupation fee to be paid, the commencement date and duration of the occupation and the extent to which AIM would bear any share of the outgoings or increases in the outgoings which may be charged under the head lease. DHJPM and AIM must be taken, however, to have contemplated and intended that any proprietary or other right of occupation would be created by a binding agreement. This much is implicit in Mr Hannon's position that he relied upon his belief that he had an agreement with AIM following the conversation on 13 May. It is also consistent with the fact that subsequently there were negotiations for a written contract.*
>
> *[48] The outcome of this appeal does not turn on whether the equitable estoppel relied upon is a proprietary estoppel or a promissory estoppel with respect to a promise to create new rights. The propositions stated by Brennan J are applicable to circumstances which would give rise to an orthodox proprietary estoppel. The estoppel claimed by DHJPM, if made out, could be supported as an orthodox proprietary estoppel, by which AIM created and encouraged an expectation that an interest by way of reversion on a sub-lease would come into existence.*
>
> *[56] Whether a representation or promise has created or encouraged an expectation which if relied upon will be sufficient to give rise to an equity obviously depends upon the circumstances including the nature of the relationship between the parties and whether they contemplate that any interest to be granted or promise to be performed is to be created by a binding contract. This is illustrated by the decisions of the House of Lords in Cobbe v Yeoman's Row Management Ltd and Thorner v Major [2009] 1 WLR 776. In the former, an equitable estoppel was relied upon in a commercial context. In the latter, the claimant sought to enforce an expectation of inheritance against the estate of his father's cousin.*

His Honour's key conclusions were as follows:

> *[65] The negotiations and discussions between Mr Hannon and Mr Florey were between experienced businessmen. They should be taken to have expected that any right of occupation, whether by way of sub-lease or licence, would have to be the subject of a binding contract and that they could not safely rely upon a promise as legally binding without taking the necessary contractual steps or at least obtaining an assurance that made clear that the promise was to be regarded as binding notwithstanding that those steps had not been taken: Waltons Stores v Maher at 403; Baird Textiles v Marks & Spencer at [92].*
>
> *[66] As at May 2006, Mr Hannon did not believe that DHJPM was unconditionally bound to grant a right of occupancy or sub-lease to AIM. He accepted that if the landlord or any of the other anchor tenants "pulled out", DHJPM would not take a head lease or be bound to grant any right of occupation to AIM. This was consistent with any agreement in so far as it was to grant a sub-lease, being conditional on DHJPM entering into the head lease. However, these and other possible outcomes were not addressed in the arrangement between DHJPM and AIM, adding to the likelihood that neither could regard the other as bound until a contract was signed.*

In his judgment Handley AJA said:

> *[94] The appellant relied on an equitable, that is a proprietary, estoppel, particularly an estoppel by encouragement. Its arguments strayed at times into promissory estoppel but, as this Court unanimously held in Saleh v Romanous [2010] NSWCA 274 (special leave refused [2011] HCATrans 101), a promissory estoppel must be negative in substance. It is an equitable restraint on the enforcement of the promisor's rights.*
>
> *[99] This "transaction" fell outside the established boundaries of a proprietary estoppel by encouragement. What the respondent did was to create or encourage an expectation that an executory contract would come into existence on terms to be negotiated. The case is unlike Waltons Stores (Interstate) Pty Ltd v Maher [1988] HCA 7, (1988) 164 CLR 387 (Waltons Stores) where the terms had been agreed and reduced to writing awaiting exchange.*

The second important decision is *Doueihi v Construction Technologies Australia Pty Ltd*[24]. Here the appellant relied on *DHJPM* to challenge the primary judge's determination that the respondent was entitled to rely on an equitable proprietary estoppel.

Turning to the facts.

Construction Technologies Australia Pty Ltd (CTA), through its director Mr Troy Hogan, conducted negotiations with the first appellant (Doueihi) for the grant of a lease of part of certain premises jointly owned by the appellants. Mr Hogan was the husband of one of the co-owners. Importantly, White J made the following observations on the facts:

> *Nonetheless, the significant point is that Mr Hogan, who was acting for CTA, considered that no formal tenancy agreement was required because of his family connection with the owners. That was a close connection. Not only was Mr Hogan the husband of one of the owners, but he had worked in the family business. Mrs Vatselias had lent him the money he used to acquire his shares in CTA. His and his wife's property was mortgaged in support of the finance provided to the owners for them to acquire the Seven Hills property and construct the building on it.*

CTA entered into possession of the premises and spent substantial sums on the installation of manufacturing plant and equipment. Subsequently, the co-owners and Mr Hogan had discussions regarding the formalisation of CTA's possession. These discussions were unsuccessful.

Following a notice to vacate, CTA brought proceedings relying inter alia, on an equitable proprietary estoppel to the effect that a lease existed between CTA and the co-owners.

White J upheld the equitable proprietary estoppel in favour of CTA and made an order to the effect that a lease existed between CTA and the appellants for a term of five years with a five year option at an annual rent for the first five year term of $12,000.

[24] [2016] NSWSCA 105. (12 May 2016)

The appellants' key submission was that White J was bound to follow *DHJPM Pty Ltd v Blackthorn Resources Ltd*[25] and dismiss CTA's claim of proprietary estoppel because Mr Hogan did not consider that the appellants were *bound* to give CTA a lease as distinct from assuming that they would do so.

Gleeson JA (Beazley P and Leeming JA agreeing) said:

> *[144] Meagher JA concluded (at [65]) that the lessee's equitable estoppel claim against the prospective sub-lessee failed because in the context of negotiations and discussions between experienced businessmen, they should be taken to have expected that any right of occupation, whether by way of sublease or licence, would have to be the subject of a binding contract. They could not reasonably have assumed they could safely rely upon a promise as legally binding without taking the necessary contractual steps or at least obtaining an assurance that made clear that the promise was to be regarded as binding notwithstanding that those steps had not been taken. Meagher JA observed that there was no communication by the prospective sub-lessee indicating that it regarded itself as bound to proceed notwithstanding that there was no agreement as to all of the relevant commercial terms of any right of occupation.*
>
> *[148] In DHJPM v Blackthorn the lessee's expectation or assumption was no more than that that negotiations with the prospective sub-lessee would be successful and a contract would consequently come into existence. Unsurprisingly, Handley AJA did not recognise via a proprietary estoppel an expectation of an executory contract where content of that contract was not known: at [124], [125], [142] (Handley AJA).*
>
> *[150] In the present case, the assumption by CTA that an interest would be granted was made in a very different context to that in DHJPM v Blackthorn. This reflected the different nature of the relationship between the parties and, importantly, the fact that they did not contemplate that the interest to be granted to CTA would be created by a binding contract. Here, the assurance given to Mr Hogan, and through him, CTA, created or encouraged an expectation or assumption that CTA would be granted an interest in the premises in circumstances where there was a consensus as to the essential terms of CTA's occupancy of the premises. Unlike DHJPM v Blackthorn, the focus of CTA's assumption was "not on intangible legal rights but on [the] tangible property" which it expected to exclusively occupy in part and share in other parts, to adopt the words of Lord Walker in Cobbe's case (at [68]). Since CTA's assumption as to its interest was not contingent on the parties entering into a contract to formalise the tenancy arrangement, it is not to the point that CTA did not believe that the appellants were bound to give CTA a lease. The parties had no expectation that a formal lease would be entered into.*

In respect of the appellants' reliance on Brennan J's first proposition in *Waltons Stores,* his Honour said:

> *[154] The appellants contended that because CTA did not have any expectation or assumption that 'a particular legal relationship' would exist and that the appellants would not be free to withdraw from the expected legal relationship, a proprietary estoppel could not arise. I do not agree. Authority establishes that the circumstances in which a proprietary estoppel will arise include those in which assurances are given so as to create or encourage an assumption that 'a particular legal relationship would be established' or 'an interest' would be granted. That can be seen from the statement of principle by Mason CJ and Wilson J in Walton's Stores (at 404) (set out at [132] above); Sidhu v Van Dyke (at [2]) (set out at [133] above); Meagher JA in DHJPM v Blackthorn (at [56]) ; and Handley AJA in DHJPM v Blackthorn (at [102]) and at [126], citing Mobil Oil Australia Ltd v Wellcome International Pty Ltd(1998) 81 FCR 475 (at 513)).*
>
> *[159] The difficulty with the appellants' argument is that it seeks to apply Brennan J's first proposition, formulated in the context of a promissory estoppel case, where the parties intended to enter into a contract, to a different case where the expectation or assumption created or encouraged by the party said to be estopped is that 'an interest' would be granted, in circumstances where the parties did not believe they needed to enter into a contract or otherwise contemplate formalising their legal relationship. There are a number of reasons why that approach should not be accepted.*

Having referred to Meagher JA's two qualifications to Brennan J's six propositions in *Waltons Stores*, his Honour continued:

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[25] [2011] NSWCA 348.

[163] The present case is an illustration of different circumstances to those considered in Waltons Stores, where the general formulation of principles by Brennan J necessarily must be subject to qualification and refinement.

[168] Fifthly, I do not regard the observations by Meagher JA in DHJPM v Blackthorn (at [53]), concerning the passage from Lord Kingdown's speech in Ramsden v Dyson (set out at [67] above), as importing a requirement of an expectation of 'a particular legal relationship' when the expectation or assumption relates to an interest in property that would be granted.

6 Brennan J's proposition (4)

In *Waltons Stores*, Brennan J said at 433:

> *It is essential to the existence of an equity created by estoppel that the party who induces the adoption of the assumption or expectation knows or intends that the party who adopts it will act or abstain from acting in reliance on the assumption or expectation: see per Lord Denning M.R. in Crabb v. Arun District Council.*

His Honour's proposition (4) reflects this statement of principle.

A question which has recently been considered by the New South Wales Court of Appeal is whether the party against whom a proprietary estoppel is raised must have either actual or constructive knowledge of reliance by the representee. In *Kramer v Stone*[26], Ward P made the following observations on this issue:

> *[99] In equitable estoppel in general, the knowledge or intention of the representor or promisor is fundamental in the enquiry as to the unconscionability or otherwise of the representor's conduct.*
>
> *[100] Knowledge was given prominence in Fry J's formulation of proprietary estoppel in Willmott v Barber (1880) 15 Ch D 96, 105-106 (Willmott v Barber), which included a requirement that the representor knew of the representee's mistaken belief. Brennan J's formulation in Waltons Stores v Maher suggests that intention may suffice, insofar as his Honour considered that a requisite element of equitable estoppel is that a party "knew or intended" for the other to act in reliance on the assumption or expectation. However, the standard of knowledge so required is not settled. Deane J in Verwayen suggests that an objective or constructive knowledge test would be sufficient (at 444-445):*
>
> > *…in cases [where a party has induced the assumption by express or implied representation], a critical consideration will commonly be that the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption. [my emphasis]*

Her Honour after referring to Macfarlan JA's comments in *Priestley v Priestley*[27] said:

> *[199] This seems to me to point to the resolution of the conflict between Deane J and Brennan J's different approaches regarding the knowledge requirement in equitable estoppel. Knowledge of acts in reliance on the representation (or assumed state of affairs) is a necessary element for a proprietary estoppel by acquiescence (since it is the knowledge and standing by that engages the conscience of the party sought to be estopped) but it is not a necessary element where the representor's conscience has been sufficiently engaged through the encouragement made by the representation in the first place. This enables cohesion with the standard of proof a plaintiff bears in proving there was detrimental reliance, which is similarly an objective standard (see Sidhu v Van Dyke at [69] per French CJ, Kiefel, Bell and Keane JJ) and conforms with the approach to unconscionable conduct in other areas of equity, as in the case of Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447; [1983] HCA 14.*

As to the question as to whether actual or constructive knowledge of reliance is necessary to establish a proprietary estoppel Leeming JA said:

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[26] [2023] NSWCA 270
[27] [2017] NSWCA 155

> *[291] I think the correct position is that the point is unsettled, with the weight of authority suggesting, as the primary judge correctly observed, that actual knowledge is not necessary.*

In accepting that a distinction must be drawn between proprietary estoppel by encouragement and proprietary estoppel by acquiescence his Honour said:

> *[294] When dealing with whether an equitable estoppel could be supported by silence, Brennan J's reasons make it clear that knowledge is required. "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": at 426. But where the assumption has been brought about by the defendant's positive encouragement of the plaintiff, there is no reason in principle why some further knowledge on the part of the defendant should be required. Why should it be necessary not only to know that the defendant has encouraged the plaintiff to labour under a false belief, but also to know that the plaintiff has relied on the encouragement? The distinction is quite artificial. Further, I can see no reason why two landowners, both of whom make the same representation to their neighbours who act upon it, should be in different positions if one is thereafter absent from the country and has no means of knowing what steps have been taken by the neighbour.*

7 Promissory estoppel: cause of action or defensive equity

The significance of establishing promissory estoppel as a cause of action has been somewhat diminished by the availability of a remedy under section 18 of the Australian Consumer Law for misleading or deceptive conduct. Thus factual situations which may be relied upon as providing a cause of action based on a promissory estoppel may attract a remedy under the legislation.

The dichotomy between proprietary estoppel and promissory estoppel as species of equitable estoppel is well established in Australian and English law. However, in *Walton Stores* Brennan J expressed some reservation about the need for the dichotomy. Relevantly, his Honour said at 420:

> *If cases of equitable estoppel are in truth but particular instances of the operation of the general principles of equity, there is little purpose in dividing those cases into the categories of promissory and proprietary estoppel which are not necessarily exhaustive of the cases in which equity will intervene. Like Scarman L.J. in Crabb v. Arun District Council (13), I do not find it generally helpful to divide into classes the cases in which an equity created by estoppel has been held to exist.*

In *Crabb v Arun District Council*, Scarman LJ in considering whether on the facts the plaintiff established an equity said at 193:

> *In pursuit of that enquiry I do not find helpful the distinction between promissory and proprietary estoppel. This distinction may indeed be valuable to those who have to tach or expound the law; but I do not think that, in solving the particular problem, raised by a particular case, putting the law into categories is of the slightest assistance.*

In Australian law or perhaps more specifically in New South Wales law there is an unresolved controversy as to whether promissory estoppel is a purely defensive equity and unavailable as a cause of action. It is clear that in English law promissory estoppel is a purely defensive equity and may only operate in relation to existing legal or contractual rights. However, *Waltons Stores* has been understood as departing from the English position by recognising promissory estoppel as a cause of action on newly created rights. Arguably, Brennan J's judgment provides the strongest support for promissory estoppel as a cause of action. Relevantly, his Honour said at 425:

> *If the object of the principle were to make a promise binding in equity, the need to preserve the doctrine of consideration would require a limitation to be placed on the remedy. But there is a logical difficulty in limiting the principle so that it applies only to promises to suspend or extinguish existing rights. If a promise by A not to enforce an existing right against B is to confer an equitable right on B to compel fulfilment of the promise, why should B be denied the same protection in similar circumstances if the promise is intended to create in B a new legal right*

> *against A? There is no logical distinction to be drawn between a change in legal relationships effected by a promise which extinguishes a right and a change in legal relationships effected by a promise which creates one. Why should an equity of the kind to which Combe v. Combe refers be regarded as a shield but not a sword? The want of logic in the limitation on the remedy is wen exposed in Professor David Jackson's essay "Estoppel as a Sword" in Law Quarterly Review, vol. 81 (1965) 223, at pp. 241-243.*
>
> *Moreover, unless the cases of proprietary estoppel are attributed to a different equity from that which explains the cases of promissory estoppel, the enforcement of promises to create new proprietary rights cannot be reconciled with a limitation on the enforcement of other promises. If it be unconscionable for an owner of property in certain circumstances to fail to fulfil a noncontractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person to fail to fulfil a noncontractual promise that he will confer a non-proprietary legal right on another? It does not accord with principle to hold that equity, in seeking to avoid detriment occasioned by unconscionable conduct, can give relief in some cases but not in others.*

And in their joint reasons Mason CJ and Wilson J said at 403:

> *Crabb was an instance of promissory estoppel. It lends assistance to the view that promissory estoppel may in some circumstances extend to the enforcement of a right not previously in existence where the defendant has encouraged in the plaintiff the belief that it will be granted and has acquiesced in action taken by the plaintiff in that belief.*

The Hon K R Handley (formerly a Justice of the New South Wales Court of Appeal) has been a consistent critic of the scope of promissory estoppel as it has developed in Australian law. In his article *The Three High Court Decisions on Estoppel 1988-1990* (2006) 80 ALJ 724 he observed as follows at 729:

> *The radical development in Waltons Stores was the enforcement of a promissory estoppel where there was no legal relationship between the parties. Hitherto, promissory estoppel had been a negative and defensive equity which restrained enforcement of the promisor's existing rights to protect the promisee from detriment caused by his change of position. It was not a freestanding right of the promisee but a restraint of an existing right of the promisor. Such an equity would not have helped the owners in Waltons Stores.*

In *Saleh v Romanous*[28], sitting as Handley AJA in the New South Wales Court of Appeal said:

> *In my judgment the Judge correctly held that the purchasers had established a promissory estoppel which entitled them to restrain the vendors from enforcing the contract of sale. Such an estoppel is not the equitable equivalent of a contract, and cannot give the purchasers positive rights to rescind and recover their deposit that they would have had if the pre-contractual promise had contractual force. A pre-contractual promissory estoppel which conferred positive rights of that nature would be contrary to Hoyts' case.*
>
> *A promissory estoppel is a restraint on the enforcement of rights, and thus, unlike a proprietary estoppel, it must be negative in substance.*

Giles and Sackville JJ agreed with Handley AJA's comments.

White J in *Construction Technologies Australia Pty Ltd v Doueihi*[29] described the decision in *Saleh* as controversial.

The New South Wales Court of Appeal revisited the boundaries of equitable estoppel in *DHJPM Pty Ltd v Blackthorn Resources Ltd*[30].

Handley JA returned to the theme which he developed in *Saleh.* His Honour said at 750:

> *The appellant relied on an equitable, that is a proprietary, estoppel, particularly an estoppel by encouragement. Its arguments strayed at times into promissory estoppel but, as this court*

[28] (2010) 79 NSWLR 453
[29] [2014] 1717 at [130]
[30] (2011) 83 NSWLR 728

> *unanimously held in Saleh v Romanous [2010] NSWCA 274 (special leave refused [2011] HCATrans 101), a promissory estoppel must be negative in substance. It is an equitable restraint on the enforcement of the promisor's rights.*
>
> *A promissory estoppel would not assist the appellant which must assert positive rights against the respondent. Its claim for equitable compensation depends on proof, through an estoppel by encouragement, of its right to enforce an expectation that the respondent would enter into a sublease for a term of five years.*

Handley JA also noted at 754:

> *…Waltons Stores is not binding authority for the recognition via proprietary estoppel of an executory contract where the content of that contract is not known.*

The later observations of the New South Wales Court of Appeal in *Hammond v JP Morgan Trust Australia Ltd*[31] lend some support to Handley JA's restrictive view of promissory estoppel.

Meagher JA (Basten JA and Bergin CJ in Eq agreeing) noted:

> *[26] It is argued on behalf of the appellant that she had the benefit of a promissory estoppel arising from statements made by the respondent's representative, Challenger Mortgage Management (Challenger) which induced her to pay $23,034.84 to the respondent on 22 April 2008. A promissory estoppel operates as a restraint on the enforcement of rights: Hughes v Metropolitan Railway Company (1877) 2 App Cas 439 at 448; Legione v Hateley [1983] HCA 11; 152 CLR 406 at 432-433; Saleh v Romanous [2010] NSWCA 274; 79 NSWLR 453 at [62], [74] per Handley AJA (Giles JA and Sackvllle AJA agreeing).*

Saleh and *DHJPM* were again considered by the New South Wales Court of Appeal in *Ashton v Pratt*[32].

Bathurst CJ noted that in those cases the Court appears to have taken a restrictive view of the doctrine of promissory estoppel, namely, that the doctrine provided purely a defensive equity consistent with the position in English law. His Honour referred specifically to the observations of Handley AJA in *Saleh*.

His Honour then considered the decisions of the House of Lords in *Thorner v Major* and *Cobbe v Yeoman's Row Management*. In respect of *Thorner* and the earlier cases his Honour noted:

> *[137] Two matters emerge from this case. First, the distinction between promissory estoppel and proprietary estoppel was maintained in a manner which appears consistent with statements in this court in Saleh and DHJPM. Second, the case emphasises the importance of the context in which the circumstances said to give rise to the estoppel occur.*
>
> *[138] This analysis of the authorities demonstrates two significant obstacles to Ms Ashton's claim based on equitable estoppel. First, there is a significant body of authority in this court, as well as at least one decision of the House of Lords, which has maintained the distinction between the scope of promissory and proprietary estoppel. These cases indicate that the former only acts as a restraint on the enforcement of legal rights whilst the latter can be a source of obligation. However, it must be acknowledged that there is significant dicta contrary to this limitation on promissory estoppel.*
>
> *[139] Second, assuming that promissory estoppel can be the source of enforceable obligations, can the doctrine extend to requiring the promisor to adhere to an obligation said to arise under an assumed contract, which itself was void for uncertainty or incompleteness? Cases such as Cobbe and Austotel suggest to the contrary. However, these cases involve commercial transactions. Although there is an element in which this case could be said to involve a commercial transaction it seems closer to a domestic arrangement where a more liberal approach to the issue of certainty has been applied, at least in the case of proprietary estoppel.*

[31] [2012] NSWCA 295.
[32] [2015] NSWCA 12.

However, his Honour found it unnecessary to resolve these issues as the plaintiff was unable to establish detrimental reliance being the first hurdle in respect of any pleaded estoppel case.

Also, Edelman J in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)*[33] observed:

> *It is not yet finally resolved in Australia whether promissory estoppel can operate as a cause of action. In New South Wales it has been said that it is not.*

His Honour then referred to Handley AJA in *Saleh v Romanous* but noted the following comment by Bathurst CJ's in *Ashton v Pratt*:

> *It must be acknowledged that there is significant dicta contrary to this limitation on promissory estoppel.*

The issue was considered by the Court of Appeal of Victoria in *FJ & PM Curran Pty Ltd v Ammand Investors Land*[34]. Without resolving the issue the Court noted at 266:

> *As can be seen, what Mason CJ and Wilson J described as the 'traditional notion' that promissory estoppel is a 'defensive equity' retains judicial support … The outcome in Waltons Stores is not inconsistent with an insistence upon promissory estoppel's defensive character because in that case what was sought was specific performance of the lease which had not been exchanged (or damages in lieu) and the tenant was estopped from denying exchange.*

It is also noteworthy that in *Zugic v Vesuvius Australia Pty Ltd*[35], Ward CJ in Eq (as her Honour then was) in considering whether a promissory estoppel was assignable as a cause of action said:

> *[244] There may also be a question of coherence (albeit one that is not raised by the facts of this case), as to why, if contractual rights and obligations can be assigned, a conventional promissory estoppel working to control the exercise of those rights cannot be assigned with it. These matters might also raise issues as to whether promissory estoppel is properly conceived as a cause of action or is, rather, limited to an operation "negative in substance" (see the debate raised by dicta in DHJPM Ltd v Blackthorn Resources Ltd (2011) 83 NSWLR 728; [2011] NSWCA 348 (DHJPM) and Saleh v Romanous (2010) 79 NSWLR 453; [2010] NSWCA 274 (Saleh)). Again however, this is not necessary here to explore.*

Her Honour also observed:

> *[269] At the outset I note that, in equity, a distinction continues to be drawn between "proprietary estoppel" and "promissory estoppel" (see Ashton v Pratt (2015) 88 NSWLR 281; [2015] NSWCA 12 (Ashton v Pratt) at [138]; Thorner v Major [2009] 3 All ER 945; [2009] 1 WLR 776 (Thorner v Major) at [61]). The question of the proper scope of promissory estoppel (and the potential difficulty of using the generalised label "equitable estoppel") was raised in academic commentary following certain remarks in the Court of Appeal in Saleh. There, Handley AJA (with whom Giles JA and Sackville AJA agreed) said that: a promissory estoppel was "not the equitable equivalent of a contract"; it operated as "a restraint on the enforcement of rights"; and it "must be negative in substance" (at [73]-[74]). Those remarks received subsequent endorsement (see DHJPM at [93] (Handley AJA); Hammond v JP Morgan Trust Australia Ltd [2012] NSWCA 295 at [26] (Meagher JA, Basten JA and Bergin CJ in Eq agreeing); Van Dyke v Sidhu [2013] NSWCA 198, [38]-[39] (Barrett JA, Tobias AJA and Basten JA agreeing)). In 2015, in Ashton v Pratt, the controversy was noted but not resolved (at [102]-[140]; [263] (Bathurst CJ, McColl and Meagher JJA agreeing).*
>
> *[270] The authors of Meagher, Gummow & Lehane's Equity: Doctrines & Remedies have suggested that the "controversy" is more apparent than real, contending that the import of the reasoning in cases such as Saleh and DHJPM is merely that promissory estoppel is preclusionary in nature; it creates "no legal relationship or cause of action where none previously could arise" but it may, in certain circumstances, preclude a party from denying that such a relationship has arisen (see J D Heydon, M J Leeming, P G Turner, Meagher, Gummow & Lehane's Equity: Doctrines and Remedies (5th ed, 2015, LexisNexis) [17-270]-[17-280]). In*

[33] [2015] FCA 825
[34] [2019] DSCA 236
[35] [2020] NSWSC 106

> *such a case, the authors note, the parties would be bound to certain legal relations, such as an intended contract, by a court of equity and their obligations are then governed by reference to that postulated relationship.*

It is noteworthy that throughout her judgment, her Honour refers to a cause of action in promissory estoppel.

Most recently, in *Fiorenza v Fiorenza*[36] Peden J said:

> *[77] Handley AJA's remarks in Saleh have been approved on a number of subsequent occasions, including by the Court of Appeal in DHJPM Pty Ltd v Blackthorn Resources Ltd (2011) 83 NSWLR 728 at [93] (Handley AJA), Hammond v JP Morgan Trust Australia Ltd [2012] NSWCA 295 at [26] (Meagher JA, Basten JA and Bergin CJ in Eq agreeing) and Van Dyke v Sidhu [2013] NSWCA 198 at [39] (Barrett JA, Tobias AJA and Basten JA agreeing).*
>
> *[78] Ultimately, and until the aforementioned uncertainty is resolved, I consider I am bound by the decision of the Court of Appeal in Saleh, the effect of which, on lower courts, is that promissory estoppel must be viewed only as a restraint on the enforcement of rights, and negative in substance: Nock v Maddern [2018] NSWCA 239 at [35] (White JA, Leeming JA and Sackville AJA agreeing).*

At the end of the day despite the numerous references to the question whether promissory estoppel can operate as a cause of action, the matter remains unsettled in Australian law. The Handley view is yet to be properly reconciled with *Waltons*. In the circumstances practitioners need to be cautious in providing advice on the availability of promissory estoppel as a potential remedy.

8 The remedial response to equitable estoppel

In *Commonwealth of Australia v Verwayen*[37] Mason J in emphasising the discretionary nature of the remedy in cases of equitable estoppel said at 412:

> *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 it 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.*

In his judgment, Mason J fastened on the expression used in previous English authority[38] in which the remedy was referred to as "the minimum equity to do justice to the plaintiff".

However, the High Court in *Giumelli v Giumelli*[39] rejected the notion of 'minimum equity' as the appropriate response to equitable estoppel. Relevantly, the plurality said:

> *[33] The appellants challenge the width of the specific relief granted by the Full Court. In particular, they emphasise that an order for the creation and conveyance of the promised lot went beyond any "reversal" of the detriment occasioned by the respondent in reliance upon the third promise. They submit that it was not open to the Full Court, in a case such as the present, to grant relief which went beyond the reversal of such detriment. In that regard, the appellants claim decisive support from the decision in Verwayen. However, in our view and consistently with the course of Australian authority since Verwayen, that decision is not authority for any such curtailment of the relief available in this case. Rather, there is much support in the judgments for a broader view of the present matter.*

Subsequently, the High Court in *Sidhu v Van Dyke*[40] adopted the same approach. Relevantly, Gagelar J said at 530:

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[36] [2024] NSWSC 549
[37] (1990) 170 CLR 394
[38] *Cobbe v Arun District Council [1976] 1 Ch 179 per Scarman LJ*
[39] (1999) 196 CLR 101

The appellant's argument, rightly, sought no support from the discussion in cases decided before Giumelli v Giumelli of the need to mould the remedy to reflect the "minimum relief necessary to 'do justice' between the parties". There may be cases where "[i]t would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption"; but in the circumstances of the present case, as in Giumelli v Giumelli, justice between the parties will not be done by a remedy the value of which falls short of holding the appellant to his promises. While it is true to say that "the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct", where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise.

The plurality said at 529-30:

In Giumelli v Glumelli, Gleeson CJ, McHugh, Gummow and Callinan JJ held that, because the fundamental purpose of equitable estoppel is to protect the plaintiff from the detriment which would flow from the defendant's change of position if the defendant were to be permitted to resile from his or her promise, the relief granted may require the taking of active steps by the defendant including the performance of the promise and the performance of the expectation generated by the promise. That holding is supported by the leading decisions to which this category of equitable estoppel is usually traced.

The requirements of good conscience may mean that in some cases the value of the promise may not be the just measure of relief. In Commonwealth v Verwayen, Deane J noted that:

> *"There could be circumstances in which the potential damage to an allegedly estopped party was disproportionately greater than any detriment which would be sustained by the other party to an extent that good conscience could not reasonably be seen as precluding a departure from the assumed state of affairs if adequate compensation were made or offered by the allegedly estopped party for any detriment sustained by the other party."*

If the respondent had been induced to make a relatively small, readily quantifiable monetary outlay on the faith of the appellant's assurances, then it might not be unconscionable for the appellant to resile from his promises to the respondent on condition that he reimburse her for her outlay. But this case is one to which the observations of Nettle JA in Donis v Donis are apposite:

[H]ere, the detriment suffered is of a kind and extent that involves life-changing decisions with irreversible consequences of a profoundly personal nature ... beyond the measure of money and such that the equity raised by the promisor's conduct can only be accounted for by substantial fulfilment of the assumption upon which the respondent's actions were based.

[85] The appellant's argument, rightly, sought no support from the discussion in cases decided before Giumelli v Giumelli of the need to mould the remedy to reflect the "minimum relief necessary to 'do justice' between the parties". There may be cases where "[i]t would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption"; but in the circumstances of the present case, as in Giumelli v Giumelli, justice between the parties will not be done by a remedy the value of which falls short of holding the appellant to his promises. While it is true to say that "the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct", where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise.

[86] In the circumstances of the present case, no reason has been Identified by the appellant to conclude that good conscience does not require that the appellant be held to his promises. In particular, it is no answer for the appellant to say that the performance of his promises was conditional on the completion of the subdivision and the consent of his wife to the transfer to the respondent. His assurances to the respondent were expressed categorically so as to leave no room for doubt that he would ensure that the subdivision would proceed and that the consent of the appellant's wife would be forthcoming.

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[40] (2014) 251 CLR 505

In the context of equitable proprietary estoppel Nettle JA in *Donis v Donis*[41] said at 583:

> *The prima facie position will yield to individual circumstances. Principle and authority compel the view that where a plaintiffs expectation or assumption is uncertain or extravagant or out of all proportion to the detriment which the plaintiff has suffered, the court should recognise that the claimant's equity may be better satisfied in another and possibly more limited way. Thus, as was also said in Giumelli, before granting relief the court is required to consider all of the circumstances of the case, including the possible effects on third parties, and to avoid going beyond what is required for conscientious conduct or would do injustice to others. But that does not mean that the court is required to be "constitutionally parsimonious" or that it is necessary for there to be substantial correspondence between expectation and the monetary value of the detriment suffered, or which but for the relief to be accorded would be suffered. The object of the exercise is to do equity and for that purpose "detriment" is no narrow or technical concept. It need not consist of expenditure of money or other quantifiable financial disadvantage so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether departure from a promise would be unconscionable in all the circumstances.*

In *Delaforce v Simpson-Cook*[42], the New South Wales Court of Appeal revisited the issue of "minimum equity". Allsop P noted:

> *[3] I agree in particular with Handley AJA that the reasons of Gleeson CJ, McHugh, Gummow and Callinan JJ in Giumelli v Giumelli (1999) 196 CLR 101 appear to remove as a governing principle in the relief to be granted in equitable or proprietary estoppel cases the notion of enforcement or vindication only of the "minimum equity" ... That, of course, does not make irrelevant matters that can assuage the detriment brought about by the resiling from the representation or encouragement by the party concerned. It does mean, however, that relief in such cases is not to be measured by weighing detriment too minutely in order that it be converted into some equivalent of cash or kind, as If one were measuring the consideration for a commercial bargain. Equity will look at all the relevant circumstances that touch upon the conscionability (or not) of resiling from the encouragement or representation previously made, including the nature and character of the detriment, how it can be cured, its proportionality to the terms and character of the encouragement or representation and the conformity with good conscious of keeping a party to any relevant representation or promise made, even if not contractual in character.*

In the seminal decision of the United Kingdom Supreme Court in *Guest v Guest*[43] the Court analysed the principles applicable for the determination of a remedy to an equitable proprietary estoppel. Lord Briggs (Lady Arden and Lady Rose agreeing) relevantly said:

> *[74] I consider that, in principle, the court's normal approach should be as follows. The first stage (which is not in issue in this case) is to determine whether the promisor's repudiation of his promise is, in the light of the promisee's detrimental reliance upon it, unconscionable at all. It usually will be, but there may be circumstances (such as the promisor falling on hard times and needing to sell the property to pay his creditors, or to pay for expensive medical treatment or social care for himself or his wife) when it may not be. Or the promisor may have announced or carried out only a partial repudiation of the promise, which may or may not have been unconscionable, depending on the circumstances.*
>
> *[75] The second (remedy) stage will normally start with the assumption (not presumption) that the simplest way to remedy the unconscionability constituted by the repudiation is to hold the promisor to the promise. The promisee cannot (and probably would not) complain, for example, that his detrimental reliance had cost him more than the value of the promise, were it to be fully performed. But the court may have to listen to many other reasons from the promisor (or his executors) why something less than full performance will negate the unconscionability and therefore satisfy the equity. They may be based on one or more of the real-life problems already outlined. The court may be invited by the promisor to consider one or more proxies for performance of the promise, such as the transfer of less property than promised or the provision of a monetary equivalent in place of it, or a combination of the two.*
>
> *[76] If the promisor asserts and proves, the burden being on him for this purpose, that specific enforcement of the full promise, or monetary equivalent, would be out of all proportion to the*

[41] (2007) 19 VR 577
[42] [2010] NSWCA 84
[43] [2022] UKSC 27

cost of the detriment to the promisee, then the court may be constrained to limit the extent of the remedy. This does not mean that the court will be seeking precisely to compensate for the detriment as its primary task, but simply to put right a disproportionality which is so large as to stand in the way of a full specific enforcement doing justice between the parties. It will be a very rare case where the detriment is equivalent in value to the expectation, and there is nothing in principle unjust in a full enforcement of the promise being worth more than the cost of the detriment, any more than there is in giving specific performance of a contract for the sale of land merely because it is worth more than the price paid for it. An example of a remedy out of all proportion to the detriment would be the full enforcement of a promise by an elderly lady to leave her carer a particular piece of jewellery if she stayed on at very low wages, which turned out on valuation by her executors to be a Faberge worth millions. Another would be a promise to leave a generous inheritance if the promisee cared for the promisor for the rest of her life, but where she unexpectedly died two months later.

Lord Leggatt in noting that the aim of the remedy for equitable proprietary estoppel is to prevent detriment stated the applicable principles as follows:

[256] In principle, there are two methods of achieving this aim. One is to compel A to perform the promise (or to award a sum of money calculated to put B into as good a position, as best money can do it, as if A's promise had been performed). The other is to award a sum of money calculated to put B into as good a position, as best money can do it, as if B had not relied on A's promise: in other words, to compensate B's reliance loss. Since both methods will in principle achieve the aim of preventing detriment to B, if on the facts both are practicable the court should adopt whichever method results in the minimum award necessary to achieve that aim.

[257] In deciding what remedy to grant, there is a distinction between cases where the promise has already fallen due for performance and cases where performance was conditional on an event (typically, the promisor's death) which has not yet occurred.

[258] In the former type of case where the promise has fallen due for performance, a remedy designed to give effect to the promise is likely to be appropriate if (as eg in Thorner v Major): (1) B's reliance loss is of a kind which is very difficult to quantify in money terms; and (2) the value of the interest in property promised by A is not clearly disproportionate to B's reliance loss. But where, even though B's reliance loss is difficult to quantify, the value of the interest in property appears clearly disproportionate to it (eg Jennings v Rice), the court should generally make the best estimate that it can of B's reliance loss, approximate as it will inevitably be, to avoid granting a remedy which is unjust to A because it goes beyond what is necessary to avoid detriment to B.

[259] In the second type of case where the promise has not yet fallen due to be performed but A has resiled from it, the court should see whether A has made an offer of compensation to B. Where A has made an offer which represents a genuine and reasonable attempt to prevent B from suffering detriment as a result of the changed circumstances (as eg in Uglow v Uglow), the court should be slow to order relief which goes beyond the offer made.

9 Relationship between estoppel by convention and promissory estoppel

In *Moratic Pty Ltd v Gordon*[44], Brereton J described the relationship between the two species of estoppel as follows:

[33] 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. 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 as to prevent unconscionable (or unconscientious) insistence by the defendant on its strict legal rights. On the other hand, 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.

[44] [2007] NSWSC 5

Chapter 2: The restraint of trade doctrine: principles and practice

1 Restraint of trade generally

1.1 The common law

The common law doctrine of restraint of trade is founded on considerations of public policy.

However, in the working out of the doctrine the common law has endeavoured to reconcile two competing pillars of public policy explained by Lord MacMillan speaking for the Privy Council in *Vancouver Malt and Snake Brewing Co v Vancouver Breweries*[45]. Relevantly, his Lordship said:

> *It is no doubt true that the scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter. Public policy is not a constant. More especially is this so where the doctrine represents a compromise between two principles of public policy; in this Instance, between, on the one hand, the principle that persons of full age who enter into a contract should be held to their bond and, on the other hand, the principle that every person should have unfettered liberty to exercise his powers and capacities for his own and the community's benefit.*

The reconciliation of the competing elements of public policy was achieved by invoking the concept of reasonableness. Thus in his seminal judgment in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*[46]. Lord MacNaghten said[47]:

> *All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.*

The central importance of Lord MacNaghten's test for the justification of a covenanted restraint of trade was highlighted by Walsh J in *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd*[48] at 306:

> *The formulation by Lord MacNaghten in Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd of the principles by which the enforceability of a covenant in restraint of trade is to be tested has been constantly repeated and adopted.*

In his examination of the two limbs of the reasonableness test, His Honour observed:

> *The requirement of reasonableness with reference to the interests of the parties and that of reasonableness with reference to the interests of the public are to be regarded, in my opinion, as raising distinct questions. That has been laid down in many cases of high authority. But it does not mean, in my opinion, that in dealing with the first of those questions, no element of public policy is involved. It is public policy which lies at the root of the rule that agreements in restraint of trade are, prima facie, unenforceable. A decision whether the circumstances of a particular case call for the application of that rule or justify a departure from it is a decision on a matter concerning public policy. Therefore, if a restraint is imposed which is more than that which is required (in the judgment of the Court) to protect the interests of the parties, that is a matter which is relevant to the considerations of public policy which underline the whole doctrine, since to that extent the deprivation of a person of his liberty of action is regarded as detrimental to the public interest … I acknowledge that the consequence of what I have just stated is that there is to some extent a merging of the second branch of the Nordenfelt formulation of the applicable principle with its first branch. But this does not mean that the distinction between them is wholly obliterated. In order to justify a restraint of trade both tests must be satisfied. The restraint must be reasonable in the interests of the parties in that it affords no more than adequate protection to the covenantee "while at the same time is in no*

[45] [1934] AC 181
[46] [1894] AC 535
[47] at 565
[48] (1972) 133 CLR 288 at 305

way injurious to the public" … It may be that although a restraint satisfies the first requirement it is injurious to the public for some reason other than being in excess of what is reasonable in the interests of the parties.

1.2 Threshold questions

In *Peters (WA) Limited v Petersville Limited*[49] the plurality referred to three preliminary questions in respect of the applicability of the doctrine:

> *First, it may be asked whether there is a "restraint" within the meaning of the doctrine. That is to be answered by having regard to the practical working of the alleged restraint rather than merely to its legal form. Secondly, it may be suggested that the restraint is not upon or in respect of "trade". Buckley v Tutty established that, for the purposes of the common law doctrine, the notion of "trade" is not to be read narrowly, so that, for example, it is not limited to any category of skilled occupation and applies to employment generally. The third question is that with which this case is concerned, namely whether the restraint in question is one to which the doctrine applies so that, if the answer is in the negative, there is no occasion to go on to consider the question of reasonableness.*

In relation to the third question the plurality turned to the decision of the House of Lords in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*[50] in which various tests were advanced as to the applicability of the doctrine. The one favoured by the plurality was that advanced by Lord Wilberforce who stated that the various transactions which were outside the doctrine could be explained "by saying that they have become part of the accepted machinery of a type of transaction which is generally found acceptable and necessary, so that instead of being regarded as restrictive they are accepted as part of the structure of a trading society". The plurality noted that in *Esso* all members of the House of Lords agreed that the doctrine did not extend to covenants given by a purchaser or lessee restricting the use to which the relevant land purchased or leased may be put. However, in *Specialist Diagnostic Services Pty Ltd (formerly Symbion Pathology) v Health Scope Ltd*[51] restrictive covenants binding the lessor in a lease of private hospital premises for use as a pathology practice were held subject to the restraint of trade doctrine. The lessor argued that the restraint of trade doctrine did not apply to the lease. In holding that the restrictive covenants were subject to the doctrine the Victorian Court of Appeal gave, amongst others, the following reasons:

> *(a) The obligations constituted by the covenants extended beyond the land retained by the lessor and it would be anomalous if the geographic extent of such obligations could not be examined by the Court on reasonableness grounds;*
>
> *(b) Even where a covenant contained in a lease is reasonable as between the parties, questions of the public interest might arise in respect of restraints on the supply of essential medical services.*

Recently there has been a discussion in the case law as to whether restraints contained in settlement agreements concerning disputes as to the enforceability of restraints were exempt from the doctrine. In *Creak v Ford Motor Company of Australia Ltd*[52], Gleeson and Kirk JJA in their joint reasons having reviewed the authorities said:

> *[17] The approaches taken in these cases to restraints imposed in agreements entered as "genuine and proper compromises" of disputes are thus as follows:*
>
> *(1) the restraint of trade doctrine does not apply at all (Noack);*
>
> *(2) the doctrine does not apply at all at least if the previous dispute involved controversy about restraints of trade (George Michael, Man Financial, note also Metcash);*
>
> *(3) the covenantor is unable to argue that the restraint is unreasonable as between the parties, but may still argue that it is contrary to the public interest (Properties Northside);*

[49] (2001) 181 ALR 337
[50] [1968] AC 269
[51] [2012] VSCA
[52] [2023] NSWCA 217

(4) there is some degree of reversal of the onus of proof on the issue of whether the restraint is unreasonable as between the parties, such that it is borne by the covenantor (World Wide Fund; White JA in this case).

Their Honours noted:

[24] The fourth approach, involving some degree of reversal of the burden of proof or persuasion, is closer to an acceptable balance of the competing considerations, at least in cases where the original dispute was about a restraint of trade. If it was not, then the public interest in resolving disputes simpliciter is no more of a trump than it is for any other relevant interest.

However their Honour's concluded:

[29] A preferable way of approaching the issue is to treat the settlement of a dispute about a restraint of trade as of itself a legitimate interest to which a restraint may be directed. That interest may be additional to any other legitimate interest of the covenantee, the subject of the first restraint of trade. A restraint imposed in such a situation is still subject to the general rule requiring justification, and with the usual principle as to the onus of proof and persuasion applying.

2 Interpretation of restraint of trade clauses

There are numerous statements in the cases as to the proper approach to the interpretation of restraint of trade covenants. The clearest statement of principle is contained in the decision of the Full Federal Court in *Findex Group Limited v McKay*[53]. The Court said:

[83] In deciding whether there are special circumstances justifying a restraint of trade, the Court should be wary of placing weight upon "improbable and extravagant contingencies as indicating the restraint to be unreasonable": Adamson v NSW Rugby League Ltd (1991) 31 FCR 242, 286 per Gummow J citing Haynes v Doman [1899] 2 Ch 13, 26.

[84] Agreements in restraint of trade, like other agreements, must be construed with reference to the object sought to be attained by them. The object is the protection of one of the parties against rivalry in trade. Such agreements cannot be properly held to apply to cases which, although covered by the words of the agreement, cannot reasonably be supposed ever to have been contemplated by the parties, and which, on a rational view of the agreement, are excluded from its operation by falling, in truth, outside and not within its real scope: Haynes v Doman [1899] 2 Ch 13, 26.

[85] If a clause is valid in all ordinary circumstances which have been contemplated by the parties, it is equally valid notwithstanding that it might cover circumstances which are so 'extravagant', 'fantastic', 'unlikely or improbable' that they must have been entirely outside the contemplation of the parties: Home Counties Dairies Ltd v Skilton [1970] 1 WLR 526, 536 endorsed in Rentokil, 304 (Doyle CJ), 320-321 (Matheson J) and 339 (Debelle J). See also Marion White Ltd v Frances [1972] 1 WLR 1423; Littlewoods Organisation Ltd v Harris [1978] 1 All ER 1026; Clarke v Newland [1991] 1 All ER 397.

Recently, Hmelnitsky J in *Sprout Trading NSW Pty Ltd v PBH Trading Pty Ltd*[54], his Honour examined the meaning of particular words in the following non-interference clause in a services agreement.

12.3 Non-Interference

The Supplier, the Supplier's Representative and each director of the Supplier must not, and must ensure that each of their respective Affiliates do not, during the Restraint Period:

(a) solicit, canvas or secure the custom of a person who is, or was within 12 months before the termination or expiration of this Agreement, a Client of the Business;

(b) divert or attempt to divert to itself or any competitor, any business or Client of the Business or of [the plaintiff]; or

[53] [2020] FCAFC 182
[54] [2024] NSWSC 1647

> *(c) employ or seek to employ any person who is at the time employed by [the plaintiff], or otherwise induces any such person to leave his or her employment, during a Restraint Period.*

In his judgment his Honour construed the meaning of the words "solicit" and "secure" in clause 12.3(a) and the words "divert or attempt to divert" in clause 12.3(b).

Turning to these expressions.

(a) ***Solicitation***

The constructional question was whether this expression is apt to include responses to initial approaches. In other words, is the covenantor in breach of covenant by accepting instructions from former clients who initiate contact with the departed employee. In this context Hmelnitsky J cited the following comments by Brereton J in *IceTV v Ross [2007]*[55]:

> *[47] "However, I accept that who makes the initial contact is not decisive. On the other hand, not every positive response to an approach by a former client is solicitation of that client. As Barrett and Hellman show, the line is crossed where the former employee, in response to an approach by a customer, does not merely indicate a willingness to be engaged, but positively encourages the customer to engage him or her."*

(b) ***Secure***

As to the meaning of this word in clause 12.3(a) his Honour noted:

> *[98] I do not read the expression "solicit, canvas or secure" in the manner suggested by the plaintiff. The verb "to secure" is capable of a range of meanings, but to speak of a person "securing" a client generally connotes some active effort or encouragement on the part of the person doing the "securing". In my view, the whole of the expression "solicit, canvas or secure" in clause 12.3(a) contemplates circumstances in which there has been some measure of active encouragement by the defendants. I am not prepared to read the expression as if the word "secure" is synonymous with the notion of having merely accepted instructions.*

(c) ***Divert or attempt to divert***

As to the scope of this provision in clause 12.3(b) his Honour observed

> *[107] The precise scope of the restraint in clause 12.3(b) is somewhat unclear. There is a large area of overlap between paragraphs (a) and (b) of clause 12.3. If the defendants were actively to solicit a client of the plaintiff (contrary to paragraph (a)), they would at the same time be attempting to divert that client, or the business of that client, to themselves (contrary to paragraph (b)).*
>
> *[110] The construction of clause 12.3(b) for which the plaintiff contends comes extremely close to being a blunt restraint on competing with the plaintiff. On the plaintiff's construction, any person who chooses to use Mr Hollingworth as his or her broker has been "diverted" away from the plaintiff even where Mr Hollingworth has taken no steps to entice that person away, and even where that person may have had no connection with Mr Hollingworth in the past.*
>
> *[111] I am unable to accept the plaintiff's construction of clause 12.3(b). In the context of clause 12 of the Services Agreement as a whole, clause 12.3(b) is concerned with conduct that involves more than just competing and more than just passively accepting instructions. Those are matters that are comfortably within the scope of clause 12.1, because they are the ordinary incidents of competing with the plaintiff. Clause 12.3(b) on the other hand concerns something more, namely interference with the business or clients of the plaintiff by diverting or attempting to divert business or clients away from the plaintiff and to someone else. In my view, it involves something more than simply accepting the instructions of a client who has already decided not to give those instructions to the plaintiff.*

[55] [2007] NSWSC 635

3 Classes of agreement subject to the doctrine

Historically the doctrine applied principally to the following:

(1) contracts of employment, specifically in respect of post-employment restraints;

(2) contracts for the sale of a business, specifically in relation to restraints designed to protect the goodwill of the business acquired by the purchaser.

The doctrine may also apply to contracts between contractor and principal, franchise agreements and partnerships.

Gleeson JA in *Isaac v Dargan Financial Pty Ltd*[56] reaffirmed the position that generally a stricter and less favourable view is taken of covenants in restraint of trade between employer and employee than in commercial agreements. In referring to the reasons for this approach his Honour referred to the inequality of bargaining power between employer and employee and to the circumstance that the employee may be giving up that employee's only asset which depends on specialised training and which may not be at all negotiable.

In respect of franchise agreements Gleeson JA referred to the following observations of Macfarlan J in *BB Australia Pty Ltd v Karioi Pty Ltd*[57]:

> *Franchise agreements commonly have characteristics relevant to both employment and vendor/purchaser categories… As a result, to determine whether the stricter, less favourable view taken in the employment cases should be applied to the present case, it is necessary to look carefully at the features of the particular franchise relationship in question, without presuming in advance that the approach relevant to one rather than the other of the categories is necessarily applicable.*

4 Justifying a restraint

4.1 The test of reasonableness

In *Tullett Prebon (Australia) Pty Ltd v Purcell*[58] Brereton J said:

> *[47] Whether a restraint is reasonable having regard to the interests of the parties depends on two, albeit related, considerations: first, whether the covenantee has a legitimate protectable interest, and secondly, whether the restraint is no more than reasonable for the legitimate protection of that interest. A covenantee is not entitled to be protected against mere competition; the legitimate interests which may be the subject of protection by covenant are in the nature of proprietary subject matter [Vandervell Products Ltd v McLeod [1957] RPC 185; Tank Lining Corporation v Dunlop Industries Ltd (1982) 40 OR (2d) 219; 140 DLR (3d) 659 at 664], including trade secrets and confidential information, and goodwill including customer connection.*

More recently in *Belflora v Vinflora*[59], his Honour observed that:

> *The identification of a legitimate protectable interest is fundamental, without one, no restraint is reasonable, and where one is established, it informs the extent of what is reasonable to protect it, the legitimate interests which may be the subject of protection by covenant are in the nature of proprietary subject matter, including trade secrets and confidential information, and goodwill including customer protection. It extends to information as to the identity of reliable suppliers, even though not such as to amount to a "trade secret" which would attract equitable protection in the absence of express agreement; and to connection with staff, so that "anti-poaching" covenants prohibiting a former employee from soliciting the employers staff have been upheld. However, it is well established that a covenantee is not entitled to protection against mere competition.*

[56] [2018] NSWCA 163
[57] [2010] NSWCA 347 at [61]
[58] [2008] NSWSC 852
[59] [2021] NSWCA 178

4.2 Protectable interests

The legitimate protectable interests identified by the Courts include the following:

(a) Confidential information and trade secrets;

(b) Customer connection including customer and client lists;

(c) Goodwill.

Turning to each of these interests.

Confidential information

In *Littlewoods Organisation Ltd v Harris*[60] Lord Denning said at 1479:

> *It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not: and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.*

In identifying confidential information as a protectable interest it is important to distinguish between confidential information which is subject to protection in equity and confidential information which is not so protected. The point is explained by Edelman J in *Emeco International Pty Ltd v O'Shea [No 2]*[61]. Relevantly, his Honour said:

> *[98] I accept that the starting point in relation to a competitor restraint is that these restraints are often justified on the basis of an interest of the employer in confidential information. However, it is not necessary to identify precisely the confidential information about which, at the date of contract, Emeco could reasonably have expected Mr O'Shea would be exposed.*
>
> *[99] There is sometimes a difficulty in drawing a precise line between confidential and non-confidential information. In Miles v Genesys Wealth Advisers Limited, in a passage contained in part of the judgment of Hodgson JA with which the other judges agreed, his Honour explained that the case fell into the category where 'there is a restraint on engaging in certain conduct, by reference to the potentiality for confidential information to be used to the promisee's detriment'. His Honour explained that different considerations apply in such cases from an equitable or contractual obligation of confidentiality or the existence of a trade secret. In the latter cases 'it is plainly necessary to identify with some precision the confidential information'. But this is not so in relation to the interest concerned with the potentiality for confidential information to be used to the promisee's detriment.*
>
> *[101] In other words, the court must be satisfied of the anticipated existence of confidential information at the time of contract, and of potential prejudice to the employer's interests from that information. But it is not necessary for an employer to identify that confidential information with precision. If the confidential information and the non-confidential information cannot be separated it will be impossible to identify confidential information with precision at the date of contract.*

In *McMurchy v Employsure Pty Ltd*[62], Gleeson JA referred to Edelman J's analysis and to the different considerations which apply to confidential information as a protectable interest and confidential information which attracts equitable protection. Specifically his Honour noted that to establish an equitable obligation of confidentiality it was necessary to identify with precision the relevant confidential information.

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[60] [1977] 1 WLR 1472
[61] [2012] WASC 348
[62] [2022] NSWCA 201

Also, in determining whether information obtained by an employee during employment is protected in equity, Hodgson JA in *Del Casale v Artedomus Pty Ltd*[63] said:

> *[37] However, in applying these general equitable principles to the particular case of post-employment use, by an ex-employee, of the confidential information of an employer obtained during employment, there are particular considerations which tend to qualify their operation. They are that very often an employee will necessarily through employment come to have knowledge which the employer would prefer not to have generally known, that often such knowledge will become part of the employee's know-how (which the employee should be able to use after employment ceases), that very often it is difficult or impossible to isolate from the employee's general know-how particular pieces of confidential information which the employee is not permitted to use while otherwise being free to use know-how generally, and that competition should not be prevented by preventing ex-employees using their know-how.*

Customer connection

In *Cactus Imaging Pty Ltd v Glenn Peters*[64] Brereton J noted:

> *[25] It is plain that an employer's customer connection is an interest which can support a reasonable restraint of trade [Hitchcock v Coker (1837) 6 Ad & El 438, 454; [1835-42] All ER Rep 452, 456-7 (Tindal CJ); Herbert Morris Ltd v Saxelby, 709; Dewes v Fitch [1920] 2 Ch 159, 181; Coote v Sproule (1929) 29 SR (NSW) 578, 580 (Harvey CJ in Eq); Lindner v Murdock's Garage, 633-634 (Latham CJ, Webb J agreeing), 650 (Fullagar J), 654 (Kitto J); Koops Martin v Reeves, [29]-[33]]. Such a restraint is legitimate if the employee has become, vis-à-vis the client, the "human face" of the business, namely the person who represents the business to the customer - or, as it was put by Hoover J in Arthur Murray Dance Studios of Cleveland Inc v Witter 105 NE (2d) 685, 706 (Ohio, 1951): "The personal relation between the employee and the customer [is] such as to enable the employee to control the customer's business" [Twenty-First Australia Inc v Shade (NSWSC, Young J, 31 July 1998, unreported), BC9803667, 12; Koops Martin v Reeves, [34]]. While the employer is not entitled to be protected against mere competition by a former employee, the employer is entitled to be protected against unfair competition based on the use by the employee after termination of employment of the customer connection which the employee has built up during the employment – which, because the employee has in effect represented the employer from the customer's perspective during the employment, might at least temporarily appear attached to the employee, but in truth belongs to the employer [Koops Martin v Reeves].*

In this case, Mr Peters was employed under a contract of employment with Cactus which contained the following restraint provision:

> *9.1 The employee will not directly or indirectly and whether solely or jointly or as director, manager, agent or servant of any person or corporation, do any of the following acts at anytime during the course of employment and for 12 months thereafter:*
>
> > *9.1.1 Carry on or be engaged or interested in any business of a nature of the company's business, within New South Wales;*
> >
> > *9.1.2 Canvas, solicit or endeavour to entice away from the employer any person who or which at any time during the preceding 12 months were or are clients or customers of the employer or in the habit of dealing with the employer;*
> >
> > *9.1.3 Solicit, interfere with or endeavour to entice away any employee, consultant or contractor of the employer; or*
> >
> > *9.1.4 Counsel, procure or otherwise assist any person to do any of the acts referred to in clauses 9.1.2 or 9.1.3*

In relation to the validity of clause 9.1.2 Brereton J said:

> *[32] Were the restraint in cl 9.1.2 supported solely by customer connection, it would be prima facie excessive insofar as it prohibited solicitation of customers other than those with whom Mr*

[63] [2007] NSWCA 172
[64] [2006] NSWSC 717

Peters dealt, and in particular those who had become customers only since he had left Cactus [Coote v Sproule, 580; Harlow Property Consultants Pty Limited v Byford [2005] NSWSC 658, [30]; Konski v Peet [1915] 1 Ch 530, 539; Smith v Ryngiel [1988] 1 QdR 179, 186].

[33] However, such a restraint may be reasonable, notwithstanding that it extends beyond customers with whom the employee has personal contact, in particular where, despite the absence of personal contact, the employee may have acquired influence over or special knowledge of the clientele as a result of the seniority of his or her position, or where the employee's role includes obtaining and extending custom for the employer's business [Stenhouse Australia Limited v Phillips [1974] AC 391; Guildford Motor Company v Horne [1933] 1 Ch 935; G W Plowman & Sons Limited v Ash [1964] 1 WLR 568; [1964] 2 All ER 10; Business Seating (Renovations) Ltd v Broad [1989] ICR 729, 733; Normalec Limited v Britton [1983] 9 FSR 318, 324; Dean, The Law of Trade Secrets, 2nd edn, [11.150]; Koops Martin v Reeves, [44]]. Mr Peters' position as State Sales Manager places him in that category in respect of the New South Wales clientele, even those with whom he did not personally deal.

[34] Moreover, cl 9.1.2 is supported, not only by protection of customer connection, but also by protection of confidential information. Protection of confidential information could have supported a restraint on employment by a competitor at all, such as is imposed by clause 9.1.1, although Cactus does not seek to enforce it. Clause 9.1.2 can therefore legitimately, in aid of protection of Cactus' confidential information, prohibit solicitation of the existing clientele of Cactus, whether Mr Peters dealt with them or not. That is because his knowledge of pricing parameters and market strategies would advantage him, in the employ of a competitor of Cactus, in soliciting any customer of Cactus, whether or not he had previously personally serviced that customer.

Subsequently in *Wallis Nominees (Computing) Pty Ltd v Pickett*[65], Warren CJ and Davies AJA in their joint reasons made the following observations on customer connection as a legitimate protectable interest:

[21] The test for whether an employer has a legitimate interest in protecting its customer connection through restraint clauses has been put in various ways.

[22] One variation is that a legitimate interest will arise [w]here an employee is in a position which brings him into close and personal contact with the customers of a business in such a way that he may establish personal relations with them of such a character that if he leaves his employment he may be able to take away from his former employer some of his customers and thereby substantially affect the proprietary interest of that employer in the goodwill of his business …

[23] Another variation is where there is some element in the employee-customer relationship which causes customers to rely on the employee and to regard the employee as the business to the exclusion of the employer.

[24] A third variation is where the personal relation between the employee and the customer be such as to enable the employee to control the customer's business as a personal asset. This describes 'the ability of the employee to use the relation of influence, which can properly be regarded as the employer's property, for the employee's purposes as distinct from those of the business'.

[25] A fourth variation is where the employee is described as having become the 'human face' of the business. This is understood to mean that the employee has become the person who represents the business to the customer or has such a personal relation with the customer as to enable them to control the customer's business, or as a way of emphasising 'that the source of influence must be the personal relationship which is likely to develop, or has developed, between the employee and customer as a result of dealings between them on behalf of the employer and its business.'

Turning to the facts.

Mr Pickett was employed by DWS (Wallis Nominees Computing Pty Ltd) as an IT consultant. He was assigned to work with Grocon Pty Limited on behalf of DWS. His employment contract contained a non-solicitation clause.

[65] [2013] VSCA 24

After working with Grocon for about 11 months Mr Pickett was offered the position of IT Manager with Grocon. He accepted and resigned from DWS.

DWS sought to invoke the restraint clause to prevent Mr Pickett from providing services to Grocon, their now former client.

The trial judge held that the restraint in Mr Pickett's employment contract was invalid and against public policy as DWS had failed to demonstrate that it had a legitimate interest in restraining Mr Pickett.

The first part of the appeal turned on whether DWS had a protectable interest in the form of customer connection.

In finding for DWS on this point the Court of Appeal noted, amongst others, the following relevant circumstances:

(a) Mr Pickett's services were the main part of the transaction between Grocon and DWS (DWS delivered its services through the agency of consultants):

(b) Mr Pickett's contact with Grocon took place at Grocon premises (Consultants would generally provide services at customer premises);

(c) Mr Pickett was skilled and not merely a subordinate working under another's supervision;

(d) Mr Pickett was working closely with Grocon for a long time;

(e) Mr Pickett was In frequent, face-to-face contact with Grocon employees;

(f) It was usual for consultants to work In a team with a project leader or manager. Each consultant would work in their individual field of expertise;

(g) However, DWS failed on the reasonableness test. Accordingly, the relevant restraint was invalid.

Goodwill

In *Isaac v Dargan Financial Pty Ltd*, Gleeson JA noted:

> *[66] "Goodwill" has been described as a rather elusive concept: Sidameneo (No 456) Pty Ltd v Alexander at [54]. Goodwill has been referred to as the product of combining and using the tangible, intangible and human assets of a business for such purposes and in such ways that custom is drawn to it: Federal Commissioner of Taxation v Murry (1998) 193 CLR 605; [1998] HCA 42 at [24]. It has been said that it is more accurate to refer to goodwill as having sources than being composed of elements, given that goodwill is to be seen as adding value to a business "by reason of" situation, name and reputation, and other matters, not because goodwill is composed of such elements: Federal Commissioner of Taxation v Murry at [24], citing Inland Revenue Commissioners v Muller & Co's Margarine Ltd [1901] AC 217 at 235 (Lord Lindley). It has also been recognised that many of the sources of goodwill are not themselves property, nor assets for accounting purposes: Federal Commissioner of Taxation v Murry at [25].*

4.3 Principles governing the reasonableness test

In the application of the test there are two key principles to note.

When is the test applied?

The test is applied at the time of entry into the contract. However in *Cactus Imaging Pty Ltd v Glenn Peters* Brereton J noted:

[37] The reasonableness of a restraint must be judged at the time when the contract was made, but that does not mean that at that time the parties must disregard prospective future developments, including the prospect of promotion as an ordinary incident of employment.

Onus of proof

The onus of establishing that a restraint is reasonable as between the parties lies on the person seeking to enforce the restraint, while the onus of establishing that the restraint is contrary to the public interest lies on the person seeking to invalidate the restraint; Palmer J in *Idameneo (No 123) Pty Ltd v Angel-Honnibal*[66]. Also, Gleeson JA in *Isaac v Dargan* approved without finally deciding that Palmer J's view that the apportionment of the onus of proof in respect of reasonableness as between the parties and as to whether the restraint was in the public interest was unaltered by the *Restraints of Trade Act* 1976 (NSW).

4.4 Reasonableness and duration of the restraint

The duration of a restraint is frequently the focus of a challenge to its validity.

Starting with Brereton J's judgment in *Cactus Imaging Pty Ltd v Glenn Peters*[67]. His Honour in considering the reasonableness of a 12 month non-solicitation restraint supported by both protection of customer connection and confidential information said:

[36] In this case it is necessary to consider the duration of the restraint bearing in mind that it is supported by both protection of customer connection and protection of confidential information. Generally, the test of reasonableness for the duration of a non-solicitation covenant, when it is supported by customer connection, is what is a reasonable time during which the employer is entitled to be protected against solicitation, which in turn depends on how long it would take a reasonably competent replacement employee to show his or her effectiveness and establish a rapport with customers [Stenhouse v Phillips; Daly Smith Corporation (Australia) Pty Limited v Cray Personnel Pty Limited (NSWSC, Young J, 14 April 1997, unreported)]. A related, albeit subsidiary, consideration is how long might the hold of the former employee over the clientele be expected to last before weakening [Koops Martin v Reeves, [88]]. But where protection of confidential information is involved, considerations such as how long the information is likely to remain current and of commercial advantage will also be relevant.

In *Hanna v OAMPS Insurance Brokers Ltd*[68], Allsop P having considered the authorities noted the existence of two possible methods for assessing the reasonableness of a restraint period. First, how long would it take a reasonably competent replacement employee to show his or her effectiveness and establish a rapport with customers. Alternatively, how long would it take to sever the relationship built up between the employee and customers. Counsel for the appellant contended that the primary judge erred in not applying the alternative test. Allsop P in response said:

43. I disagree. There is no legally required test in these circumstances. The use of one test or another depends on the facts and the evaluation of the approach that is reasonable. The judge is required to evaluate the evidence about connection and adopt an appropriate approach to assessing what is required to protect reasonably the connection of the former employer. The proper approach was described in Stenhouse Australia Ltd v Phillips [1974] AC 391 at 400 set out by Hodgson J A in Miles v Genesys Wealth Advisers Ltd [2009] NSWCA 25 at [36]-[37], as follows:

> *[36] In my opinion, there is no precise rule on the basis of which the period for which an employer Is legitimately entitled to protection can be determined. I would not endorse the statement by Young J in DalySmith [Corporation (Aust) Pty Ltd v Cray Personnel Pty Ltd (Supreme Court of NSW, Young J, 14 April 1997, unreported)] at 13 that "a restraint that enures after the time taken for a reasonably competent new employee to master the job and be able to demonstrate to the customer that he or she is effective and efficient will be too long".*

[66] [2002] NSWSC 1214
[67] [2006] NSWSC 717
[68] [2010] NSWCA 267

Regard should also be had to what the Privy Council said in Stenhouse at 402:

> *... The question is not how long the employee could be expected to enjoy, by virtue of his employment a competitive edge over others seeking the clients' business. It is, rather, what is a reasonable time during which the employer is entitled to protection against solicitation of clients with whom the employee had contact and influence during employment and who were not bound to the employer by contract or by stability of association. This question ... their Lordships do not consider can advantageously form the subject of direct evidence. It is for the judge, after informing himself as fully as he can of the facts and circumstances relating to the employer's business, the nature of the employer's interest to be protected, and the likely effect on this of solicitation, to decide whether the contractual period is reasonable or not. An opinion as to the reasonableness of elements of it, particularly of the time during which it is to run, can seldom be precise, and can only be formed on a broad and common sense view.*

Recently in *McMurchy v Employsure Pty Ltd*[69] which involved a 12 month competitor restraint supported by protection of confidential information, Gleeson JA said:

> *[69] In assessing the reasonableness of the duration of the restraint, his Honour gave significant but not conclusive weight to the parties' agreement to a restraint of twelve months: at [382]. There was no error in doing so: Woolworths v Olson at [39]. Next, his Honour noted that an assessment must be made as to the length of time Employsure's confidential information "remains current and of a commercial advantage": at [383]. Again, there was no error in that approach: Cactus Imaging Pty Ltd v Peters (2006) 71 NSWLR 9; [2006] NSWSC 717 at [36] (Brereton J). In reading down the restraint to nine months, his Honour gave the following reasons:*
>
> > *[383] ... I accept that Mr McMurchy was in a position where he was to support and deliver strategy and to that end would have had and been interested to have a real interest in commercially sensitive information. But there can be long-term and short-term strategies and of course strategies change.*
> >
> > *[384] Mr McMurchy was working for the Plaintiff at a key moment in the development of BrightHR but there must be an element of reality attaching to placing too much weight on the possibility that a departing employee could retain information for too long apart from the information arguably becoming outdated. It may be accepted that strategic considerations may fall into a slightly different category. In all the circumstances and given the nature of the confidential information in this case and Mr McMurchy's status I consider a period of nine months' restraint in the circumstances, beginning on 12 January 2021.*
>
> *[70] The finding that a restraint of nine months from 12 January 2021 was reasonable (that is, six months from termination of employment) involved an evaluative assessment by his Honour who, relevantly, took into account the contractual consensus of a longer restraint of 12 months (Woolworths v Olson at [39]), the length of time Employsure's confidential information remained current and of a commercial advantage (Cactus at [36]), and had regard to the nature of that information and Mr McMurchy's status as Manager of BrightHR. Contrary to the appellants' submission, this finding was not "effectively plucked from nothing". No error has been shown in his Honour's evaluative conclusion that the restraint should operate for nine months, that is, six months from termination of Mr McMurchy's employment. Ground 3 is not made out.*

5 The Restraints of Trade Act 1976 (NSW) (Act)

In agreements governed by the law of New South Wales it is necessary to consider the impact of the Act on a restraint of trade provision.

Section 4 provides:

> ***4 Extent to which restraint of trade valid***

[69] [2022] NSWCA 201

> *(1) A restraint of trade is valid to the extent to which it is not against public policy, whether it is in severable terms or not.*
>
> *(2) Subsection (1) does not affect the invalidity of a restraint of trade by reason of any matter other than public policy.*
>
> *(3) Where, on application by a person subject to the restraint, it appears to the Supreme Court that a restraint of trade is, as regards its application to the applicant, against public policy to any extent by reason of, or partly by reason of, a manifest failure by a person who created or joined in creating the restraint to attempt to make the restraint a reasonable restraint, the Court, having regard to the circumstances in which the restraint was created, may, on such terms as the Court thinks fit, order that the restraint be, as regards its application to the applicant, altogether invalid or valid to such extent only (not exceeding the extent to which the restraint is not against public policy) as the Court thinks fit and any such order shall, notwithstanding sub-section (1), have effect on and from such date (not being a date earlier than the date on which the order was made) as is specified in the order.*
>
> …

Section 4(1) enables a Court to evaluate a proposed breach of a restraint to be measured against the test of reasonableness thereby avoiding the common law requirement that the validity of a restraint clause be measured against all potential breaches. The operation of the section was authoritatively considered by McLelland J in *Orton v Melman*[70]. In his judgment his Honour having referred to the Law Reform Commission report which led to the legislation said:

> *[587] Reference to that report clearly demonstrates that the perceived mischief or defect in the law was not confined to the rule that one could not by severing the words, change the substance of a restraint. The mischief or defect was that in determining the validity of a restraint, the courts were bound to consider all possible breaches within its terms (after any permissible severance) and determine whether public policy was infringed by the restraint of all such breaches, rather than by the actual or threatened breaches provide in the particular case …*

His Honour then explained the proper approach to the application of the legislation as follows:

> *In my opinion where the court is to determine, in relation to a restraint to which s 4(1) applies whether (having regard to public policy) the restraint is enforceable in respect of an alleged breach (or threatened breach), it is proper first to determine whether the alleged breach (independently of public policy considerations) does or will infringe the terms of the restraint properly construed, and if so, then to determine whether the restraint, so far as it applies to that breach, is contrary to public policy. If the restraint, so far as it applies to that breach, is not contrary to public policy then by force of s 4(1) the restraint is to that extent valid, subject always of course to any order which may be made under s 4(3).*
>
> *Whether, and if so the extent to which, the court will have to define the outer limits of validity of a restraint in a particular case, will depend upon the nature, and degree of generality, of the relief which in that case it is necessary or proper for the Court to grant. For example, where injunctive relief is granted, the duration of a valid restraint of any breach enjoined will have to be determined. In applying s 4(1) the court should consider the circumstances of the particular case before it and determine the validity of the restraint to the extent that it purports to operate in those circumstances, and it is unnecessary to consider its purported operation in other conceivable sets of circumstances.*

Gleeson JA in *Isaac v Dargan Financial Pty Ltd*[71] endorsed McLelland J's approach and noted:

> *[62] The effect of s 4(1) of the Restraints of Trade Act is to require, for the purpose of determining the validity of a restraint, that attention be focussed on the actual or apprehended*

[70] [1981] 1 NSW LR 583
[71] [2018] NSWCA 163

breach, rather than on imaginary or potential breaches: Cactus Imaging Pty Ltd v Peters (2006) 71 NSWLR 9; [2006] NSWSC 717 at [10] (Brereton J).

As to whether section 4(1) of the Act changed the onus of proof Gleeson JA referred with manifest approval to the following remarks of Palmer J in *Idameneo (No 123) Pty Ltd v Angel-Honnibal*[72]

> *[48] Other than to enable the Court to "read down" the restraint of trade covenant to the particular breach alleged, s.4(1) adds nothing to the common law rules as to the validity of a restraint of trade clause. In particular, the section says nothing about who is to bear the onus of establishing reasonableness as between the parties and as to whether the restraint is in the public interest. I can see no reason why the apportionment of the onus of proof on these two issues, as laid down in Herbert Morris Ltd v Saxelby, should be regarded as altered in any way by the Restraints of Trade Act. This seems to have been accepted by the majority of the Full Court in Hospitality Group Pty Ltd v Australian Rugby Union Ltd (2001) 110 FCR 157, at 181, where the majority acted on a concession from Counsel to this effect; it seems also to have been accepted by the Court of Appeal in Curro and Anor v Beyond Productions Pty Ltd (1993) 30 NSWLR 337, at 344C.*

6 The Cascading Restraint Clause

It is not uncommon for a restraint provision to provide for multiple restraint periods and restraint areas. In this way an offending provision may be severed either under the rules of the common law or pursuant to the *Restraints of Trade Act* 1976 (NSW). The enforceability of these types of provision was considered by Allsop P in *Hanna v OAMPS Insurance Brokers Ltd*[73].

In that case the relevant clause provided:

1. To reasonably protect the goodwill and the legitimate business interests of the Company, during the Restraint Period and within the Restraint Area (referred to below), you will not, without prior written consent of the Company, directly or indirectly. . .

2. Restraint Period means, from the date of termination of your employment:

(a) *15 months;*

(b) *13 months;*

(c) *12 months.*

Restraint Area means:

(a) Australia;

(b) The State or Territory in which you are employed at the date of termination of your employment;

(c) The metropolitan area of the capital city in which you are employed at the date of termination of your employment.

3. Each restraint contained in this Deed (resulting from any combination of the wording in clauses 1 and 2) constitutes a separate and independent provision, severable from the other restraints. If a court of competent jurisdiction finally decides any such restraint to be unenforceable in whole or in part, the enforceability of the remainder of that restraint and any other restraint will not be affected.

[72] [2002] NSWSC 1214
[73] [2010] NSWCA 267

The primary judge rejected an argument by the appellant that the so called "cascading" clause was uncertain as the provision contained no mechanism for the selection of the operative clause.

In dismissing the appeal Allsop P said:

1. *Two principal reasons were propounded for the asserted conclusion as to uncertainty. First, on its proper construction the restraint deed was said to contain a single covenant which contained mutually inconsistent obligations. Secondly, even if the restraint deed contained more than one covenant it was uncertain because it made no provision or mechanism to determine which one or more of the several restraints applied and in what order.*

2. *The first argument relied heavily on the existence of the definite article ("the") before each of the phrases "Restraint Period" and "Restraint Area". It ignored or failed to give adequate weight, however, to the terms and effect of cl 4. Clause 4 made clear that the various periods and areas in cl 2 were part of separate and independent provisions. Thus there were nine restraints, from the widest (15 months in Australia) to the narrowest (12 months, in Mr Hanna's case, in the metropolitan area of Sydney). All were binding. Taken as individual covenants, all capable of being understood by the use of clear words and all being capable of being complied with without breaching any of the others, the one covenant argument must fail.*

3. *The second argument has implicit in it a proposition that there is a legal requirement for a hierarchy of the clauses and a mechanism for their order of operation. Reduced to its essential element, there was said to be uncertainty in more than one clause covering by different terms the same ground of a party's obligation. I cannot agree with the width of these propositions. It may be that if multiple obligations on the same subject matter so conflict that a contracting party cannot know what it is to do, such clause, or the contract in which it is found, is uncertain and void. For instance, a clause that says that the party must perform by doing only act X and another clause that says that the party must perform by doing act Y (which is inconsistent with X) may lead to a conclusion of uncertainty. No such difficulty arises here. Compliance with any relevant clause will not lead to breach of any other clause. All bind, but at one level of practicality the most relevant is the widest. Nevertheless, all are binding. Neither their operation nor any principle of law concerned with certainty of contract requires a mechanism or hierarchy of order of operation.*

His Honour noted but did not dispose of an argument that even if the restraint deed was not void for uncertainty, provisions such as those referred to in this case amounting to repetitive and overlapping restraints of ever widening reach and subject matter were against public policy for the purposes of the *Restraints of Trade Act* 1976.

7 Severance

The starting point in respect of the application of severance to restraint of trade covenants is the decision of the High Court in SST *Consulting Services Pty Ltd v Riesen*[74] [75].

The Court said:

> *[46] The modem law respecting severance in relation to covenants in unreasonable restraint of trade may be seen as turning on three questions. The first question is whether the covenantee can enforce the restraining covenant to the extent to which it would have been valid had it been narrowly drafted. The answer is that the covenantee can do so if the parts which are too wide can be removed without altering the nature of the contract and without having to add to, or modify, the wording in any way other than by excision. The second question is whether the covenantor can enforce the promise in consideration of which the restraining covenant was given. The answer is that the covenantor can enforce the promise if the main consideration provided for it is not illegal. The third question is whether, if a contract is unenforceable because it contains a covenant in restraint of trade, transactions connected or associated with it are also unenforceable. The answer is that the unenforceability of the contract may affect the enforceability of other transactions with which it is closely connected.*

[74] Restated by His Honour in *Otis Elevator Co Pty Ltd v Nolan* [2007] and cited with approval by Sackar J in *Paul Fishlock v The Campaign Palace Pty Limited.*
[75] [2006] 225 CLR516

In commenting on the test Warren CJ and Davies AJA in *Wallis Nominees* said:

> *94 Thus there are two clear parts to the test. The first is that the impugned part must be capable of simply being removed - as if simply crossed out with a blue pen; a court can remove words from a restraint clause but not rewrite it. Secondly, the part to be severed must be an independent covenant and capable of being removed without affecting the meaning of the remaining part. The only change should be to the sphere of operations of the clause.*

In rejecting the applicability of severance to the relevant restraint in *Wallis Nominees*, the majority concluded:

> *96 DWS submitted that the restraint clause meets the test. It submitted that the impugned part has work to do over and above the first half and that the clause divides clients into two distinct and mutually exclusive and distinguishable groups.*
>
> *97 Mr Pickett submitted that there was only one covenant, not two independent ones. Mr Pickett submitted that the court needed to be satisfied that the covenant itself manifested a clear intention that the parties intended the single sentence to be substantially equivalent to*
>
> *98 two covenants. It was further submitted that the court could not be so satisfied as the covenant was directed towards Mr Pickett providing services to clients and merely provided a description of two different types of clients. Moreover, cl 24 as a whole was already divided into three subclauses, with subcl 24(b) addressing the acceptance of providing services to DWS clients which was an integral restraint standing on its own.*
>
> *99 Were it necessary to decide, we would have ultimately been persuaded that the restraint clause fails to meet the test for severance. On one view, the clause addresses two distinct (if partially overlapping) groups - the first limb refers to DWS clients to whom specific services were provided by the employee and the second limb clients to whom the employee had contact with during the normal course of their employment. However, it is not, for example, in the form of a list, enumerating the various clients captured by the restraint, each one standing alone. Nor is it in the commonly used form of a cascading clause where it starts with the broadest possible restraint then provides increasingly narrow alternatives, each one standing alone. Instead, the language of the clause is such that the "alternative" option is not a stand alone option but contains reference to the first option. The clause restrains the provision of services:*
>
> > *to any client of DWS to whom the Employee provided specific services whilst in the employ of DWS or in addition [to that group of clients] any client to which the Employee had cause to be in contact with during the normal course of the Employees provision of services to DWS Clients.*
>
> *99 In our view, it is therefore impossible to read the second limb of the restraint as separate from the first. It is not an independent covenant. It is an attempt to expand on the first covenant. One could not, for example, sever parts of the restraint clause such that only the clients expressly mentioned In the second limb remained . To read it as an independent covenant, especially in the context of the clause as a whole which is already divided into subclauses, would not reflect its true meaning. It might have well been that the clause could have been written in a form where a restraint against clients with whom the employee had contact was severable. However, this clause is not in such a form.*
>
> *100 Accordingly, we consider it plain that the clause does not contain two separate covenants. Therefore, were it necessary to decide, we would have found that the second limb of the restraint clause was not severable.*

Chapter 3: The equitable obligation of confidentiality and contractual promises of confidentiality

1 The elements of an equitable obligation of confidentiality

In *Coco v A N Clark (Engineers) Ltd*[76] Megarry J identified the elements of an equitable obligation of confidentiality as follows:

> *First, the information itself … must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.*

In respect of the third element his Lordship said at 47-48:

> *However secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential. From the authorities cited to me, I have not been able to derive any very precise idea of what test is to be applied in determining whether the circumstances import an obligation of confidence. … It may be that that hard-worked creature, the reasonable man, may be pressed into service once more; for I do not see why he should not labour in equity as well as at law.*

In Australian law the elements of an equitable obligation of confidentiality were restated by Gummow J in *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department Of Community Services and Health*[77]. His Honour said at 87:

> *A general formulation apt for the present case of an equitable obligation of confidence has four elements: (i) the plaintiff must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question, and must be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge) (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence, and (iv) there is actual or threatened misuse of that information, without the consent of the plaintiff.*

Subsequently, Barrett JA in *Streetscape Projects (Australia) Pty Ltd v City of Sydney*[78], in commenting on the requirements said:

> *[159] The need for specificity in the identification of the information said to be confidential in respect of which relief is sought comes from the fact that the court must make an assessment of the quality of that information, that is, whether it is in truth of a confidential nature. An aspect of that inquiry may turn on whether the whole or some part has become the subject of general disclosure or notoriety. Precise delineation of the subject matter is accordingly essential. The task of a plaintiff, in this respect, is, in the words of Gummow J in Smith Kline & French Laboratories (Aust) Ltd v Dept of Community Services and Health (1990) 22 FCR 73 at 87, "to identify with specificity, and not merely in global terms, that which is said to be the information in question".*
>
> *[160] The confidential quality of information does not depend on its being in the nature of a trade secret...*

In considering the second element of Gummow J's formulation (the information has the necessary quality of confidentiality), Abraham J in *Gold Titan Pty Ltd v Lopez*[79] identified the following factors as relevant to the determination:

> *[86] Second, the information itself must have the necessary quality of confidence. This is a question of fact having regard to a range of various factors: Wright v Gasweld Pty Ltd (1991) 22 NSWLR 317 at 334; Del Casale v Artedomus (Aust) Pty Ltd [2007] NSWCA 172; (2007) 165 IR 148; (Del Casale) at [40]. These factors (often arising in an employment context) include:*

[76] [1969] RPC 41
[77] (1990) 22 FCR 73; These elements were originally formulated by Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266
[78] [2013] NSWCA 2
[79] [2021] FCA 918

(1) the extent to which the information is known outside the business;

(2) the skill and effort expired to collect the information;

(3) the extent to which the information is treated as confidential by, for example, the employer;

(4) the value of the information to the applicant and its competitors;

(5) the ease or difficulty with which the information can be duplicated by others;

(6) whether it was made known, for example, to the employee that the information was confidential; and

(7) whether the usages and practices in the industry support the claim of confidentiality.

The practical application of these principles is illustrated by Vickery J's judgment in *Vasco Investments Ltd v Morgan Stanley Australia Ltd*[80].

Morgan Stanley was involved in a project for the recapitalisation of the Orchard Group which was in severe financial distress as a result of the 2008 financial crisis.

Vasco was an advisory firm providing wholesale and retail investment management services in relation to equity funds, fixed income funds and private equity real estate funds. It described itself as a "multi-boutique real estate investment management firm".

Between April and June 2011, Vasco presented a plan to Morgan Stanley for the recapitalisation of the Orchard Group. Vasco claimed that the presentation was made on a confidential basis. It received no payment from Morgan Stanley following the successful recapitalisation of the Orchard Group. In relation to the part played by the Vasco plan in the success of the recapitalisation, Vickery J said:

> *[320] I am satisfied that the principal elements of Vasco's Plan were used by Morgan Stanley as the starting point for the ultimate transaction for the Orchard recapitalisation as it was ultimately consummated as a working transaction. Indeed, most of the elements were contained in the final transaction. The substantial elements of the Vasco Plan which found their way into the final transaction are described above. The Vasco Plan was the catalyst which interested Morgan Stanley in the first place. It was the Plan which motivated Morgan Stanley to actively seek the input of Vasco in building a transaction which was advanced to the target, Orchard, in the form of an expression of interest, which in turn provided the fundamental foundation for the settled transaction.*

Morgan Stanley contended that the Vasco Plan was prepared at such a high level of abstraction that the necessary quality of confidence was absent. This was reinforced by the fact that there needed to be, and was in fact, substantial input by Morgan Stanley itself in developing, negotiating and ultimately implementing the recapitalisation of Orchard for the transaction to succeed.

As a starting point, it was necessary to set out the necessary elements of a cause of action for breach of confidence. Relevantly, his Honour said:

> *[273] The elements of the equitable claim for breach of confidence in this situation, which involves the plaintiff seeking protection for a commercial idea, comprise:*
>
> *(a) the idea must be sufficiently developed to attract the protection afforded by the cause of action and the information sought to be protected must be identified with specificity;*
>
> *(b) it must have the necessary quality of confidence;*
>
> *(c) it must have been imparted in circumstances importing an obligation of confidence; and*

[80] [2014] VSC 455

(d) there must be an unauthorised use of the information.

In finding that Vasco's recapitalisation plan was confidential, his Honour concluded:

> *[311] As such, I am satisfied that the idea contained in the Vasco Plan was sufficiently developed to warrant protection in equity.*
>
> ***Whether the Information inherently had the Quality of Confidence***
>
> *[312] I am satisfied that the Vasco Plan was confidential in that it was possessed of the inherent quality of confidence. It was developed by Vasco and was not communicated to anyone else. Further, the inherent confidentiality of the Vasco Plan can be inferred from the following facts:*
>
> *(a) no other person had developed or advanced a holistic approach for the recapitalisation of the Orchard platform;*
>
> *(b) Morgan Stanley had previously looked at the Orchard platform but had not applied the elements of the Vasco Plan to its considerations. It was not aware of the Vasco Plan prior to 31 March 2011 meeting; and*
>
> *(c) Morgan Stanley also considered the Vasco Plan confidential when circulating the second draft of the EOI. It was plainly confidential in the market, as potentially relevant to the target, its bankers, its shareholders and unit holders.*
>
> ***Importation of the Obligation of Confidence by the Circumstances of its Disclosure to Morgan Stanley***
>
> *[313] The circumstances described by Mr Kingsley make it plain that the Vasco Plan was disclosed to Morgan Stanley in circumstances which imported an obligation of confidence.*
>
> *[314] Mr Kingsley knew when he received the email of 25 March 2011 and the standard Vasco non-disclosure agreement that the opportunities that Vasco was intending to raise were sought to be covered by the non-disclosure agreement. As from 25 March 2011, Mr Kingsley knew that Mr Coulter, Mr Kotak and Vasco considered the project to recapitalise Orchard which they had outlined to him was confidential.*
>
> ***Whether the Defendant Breached the Obligation of Confidence***
>
> *[317] Unauthorised use of confidential information is just as much a breach of confidence as unauthorised disclosure.*

2 Confidential information as a species of property

In *Norman v Federal Commissioner of Taxation*[81], Windeyer J said at 26:

> *Anything that in the eye of law can be regarded as an existing subject of ownership, whether it be a chose in possession or a chose in action, can today be assigned, unless it be excepted from the general rule on some ground of public policy or by statute.*

The issue is whether confidential information constitutes a species of property and is assignable at law or in equity. In *TS & B Retail Systems Pty Ltd v 3Fold Resources Pty Ltd (No 3)*[82] Finkelstein J said:

> *[74] Confidential information, however, is not property "in any normal sense": Boardman v Phipps [1967] 2 AC 46, 128. Indeed it is not property at all. Confidential information is protected by equity by "the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained": Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2) (1984) 156 CLR 414,438. A court of equity will protect information only if it is truly confidential and the confidence is worth preserving.*

[81] (1963) 109 CLR 9
[82] [2007] FCA 151

The characterisation of confidential information was considered by Ward J in *Painaway Australia Pty Ltd v JAKL Group Pty Ltd*[83] in which her Honour said:

> *[316] This debate raises the question what exactly is being assigned under a commercial sale agreement that seeks to assign "confidential information", "trade secrets" or "know how" to a purchaser.*
>
> *[317] In TS & B Retail Systems Finkelstein J sheds some light on this debate, but there is still uncertainty surrounding the nature of confidential information. TS & B Retail Systems involved an attempted assignment of confidential information pursuant to an agreement, which purported to assign "all intellectual property and proprietary rights ... including... drawings, trade secrets, technical data formulae ... databases, know-how... and similar industrial or intellectual property rights". Finkelstein J held that the assignee was entitled to "whatever protection a court of equity will give in respect of the confidential information it obtained" [at 77], He therefore characterised what was being assigned in the commercial agreement as the right to enforce an obligation to keep information confidential, as opposed to the confidential information itself.*
>
> *[318] This view was also taken by Campbell J in Mid-City Skin Cancer & Laser Centre v Zahedi-Anarak [2006] NSWSC 844 at [196-238], where his Honour held that a skin cancer clinic that had acquired certain assets (including patient details and records) from another clinic had the right to sue a doctor who used those records in another practice.*
>
> *[319] Overall, although there is still uncertainty surrounding this area, it is generally accepted that it is not possible for equity to assign confidential information, as confidential information is not "property" capable of being assigned. There is authority, however, for the proposition that it is possible to assign the right to enforce an obligation to keep information confidential.*

3 Remedies

3.1 An overview

The potential remedies for breach of an equitable obligation of confidentiality include:

(1) account of profits;

(2) equitable compensation;

(3) statutory compensation under 1317H of the Corporations Act 2001 (Cth).

3.2 Account of profits and equitable compensation: alternative remedies

In *Dart Industries Inc v The Decor Corporation Pty Ltd*[84], the majority said at 110:

> *Damages and an account of profits are alternative remedies. An account of profits was a form of relief granted by equity whereas damages were originally a purely common law remedy. As Windeyer J pointed out in Colbeam Palmer Ltd v Stock Affiliates Pty Ltd, even now an account of profits retains its equitable characteristics in that a defendant is made to account for, and is then stripped of, profits which it has dishonestly made by the infringement and which it would be unconscionable for it to retain. An account of profits is confined to profits actually made, its purpose being not to punish the defendant but to prevent its unjust enrichment. The ordinary requirement of the principles of unjust enrichment that regard be paid to matters of substance rather than technical form is applicable.*

Subsequently, in *G M & A M Pearce & Co Pty Ltd v Australian Tallow Producers*[85], Warren CJ said (Chernov JA and Dodds-Streeton AJA agreeing):

> *[53] An account of profits directs a defendant to give the plaintiff the monetary value of what she or he has obtained, whereas equitable compensation directs the defendant to restore the monetary value of the loss which she or he has caused to the plaintiff.*

[83] [2011] NSWSC 205
[84] (1993) 179 CLR 101
[85] [2005] VSCA 113

Her Honour continued:

> *[56] A plaintiff, where faced with a choice between an account of profits or equitable compensation, must make a decision as to which one it will pursue. For instance, in Tang Man Sit v Capacious Investments, the plaintiff was awarded an account of profits and compensation in the same suit and sought to enforce both remedies. However, in that case the Privy Council reiterated, as did the High Court in Warman International Ltd v Dwyer, that an account for profits and an award of damages are alternative and not cumulative remedies. Normally, where both remedies are available, a plaintiff must elect between them. Ordinarily, the election need not be made before the trial starts and may be delayed until determination of the cause of action. There is therefore no difficulty where the plaintiff claims both equitable compensation and an account of profits in the prayer for relief, however, election must be made when (but not before) judgment is given. Where the plaintiff does not know which remedy is more favourable at the time of judgment on liability, the court may order discovery or other orders designed to give the plaintiff the information it requires to make the election.*

The Full Federal Court in *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd*[86], in the context of breaches of fiduciary duty examined the relationship between the equitable remedies of account of profits and equitable compensation on the one hand, and statutory compensation under section 1317H of the Corporations Act on the other hand. Relevantly, the court (comprising Emmett, Edmonds and Rares JJ) noted:

> *[55] The object of the equitable remedy of compensation or damages is restitution of what the victim has lost. The question is whether the loss would have occurred but for the breach. While the monetary sum awarded to the victim is normally computed by reference to the detriment actually suffered by the victim, it may occasionally be computed by reference to the profit that has been made by the errant fiduciary. Nevertheless, the primary purpose of equitable compensation or damages is compensatory (Nocton v Lord Ashburton [1914] AC 932; Re Dawson (1966) 84 WN (Pt 1) (NSW) 399). No element of penalty is involved. (Meagher, Gummow and Lehane, Equity: Doctrines & Remedies (4th ed) at [23-02]).*
>
> *[56] The obligation imposed by equity to pay damages or compensation is not fettered by the usual notions that serve to diminish the quantum of an award of damages at common law. The obligation imposed by equity upon an errant fiduciary is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract. Thus, the obligation is not limited or influenced by common law principles governing remoteness of damage, foreseeability or causation (Hill v Rose [1990] VR 129 at 144). However, while foreseeability is not a concern in assessing equitable compensation or damages, the only losses that are made good are those that, on a common sense view of causation, are caused by the breach of duty (Canson Enterprises Ltd v Boughton and Co [1991] 3 SCR 534 at 556).*
>
> *[57] On the other hand, the purpose of an account of profit is to prevent the unjust enrichment of the fiduciary by compelling the fiduciary to surrender any profits actually made by the fiduciary that were made improperly, and nothing beyond that. It is not to punish the errant fiduciary (Dart Industries Inc v Decor Corporation Pty Ltd (1993) 179 CLR 101 at 111) (Dart). The errant fiduciary is made to account for, and is then stripped of, profits made that it would be unconscientious for that person to retain, because they are profits made by the fiduciary dishonestly. For example, in the case of infringement of intellectual property rights, the account is limited to the profits of the wrongdoer during the period when the victim's rights were being infringed (Colbeam Palmer Ltd v Stock Affiliates Pty Ltd (1968) 122 CLR 25 at 34).*

3.3 Account of profits: net profit and cost

There has been debate in the case law as to the appropriate method for determining net profit for the purpose of an account of profits as an equitable remedy. For example, in the calculation of profits made by a party infringing a patent, to what extent are costs incurred by the infringer in manufacturing an infringing product to be deducted from revenue. In *Dart Industries Inc v Decor Corporation Pty Ltd*[87], the majority noted at 111:

> *But it is notoriously difficult in some cases, particularly cases involving the manufacture or sale of a range of products, to isolate those costs which are attributable to the infringement from*

[86] [2013] FCAFC 16
[87] (1993) 179 CLR 101

> *those which are not so attributable. Whilst it is accepted that mathematical exactitude is generally impossible, the exercise is one that must be undertaken, and some assistance may be derived from the principles and practices of commercial accounting. Unfortunately, neither the Australian nor the English authorities contain any precise analysis of the problem.*

And in *Warman International Ltd v Brian Dwyer*[88] , the High Court in discussing account of profits noted at 556:

> *The remedy is ancient and notoriously difficult in practice and it gives rise to a liability, even in a case of a fiduciary, which is personal. In the context of patent infringement, the purpose of ordering an account is not to punish the defendant, but to prevent the defendant's unjust enrichment. But the liability of a fiduciary to account differs from that of an infringer in an intellectual property case. It has been suggested that the liability of the fiduciary to account for a profit made in breach of the fiduciary duty should be determined by reference to the concept of unjust enrichment, namely, whether the profit is made at the expense of the person to whom the fiduciary duty is owed, and to the honesty and bona tides of the fiduciary. But the authorities in Australia and England deny that the liability of a fiduciary to account depends upon detriment to the plaintiff or the dishonesty and lack of bona tides of the fiduciary.*

In *Dart Industries* the High Court in the context of a patent infringement action examined the process for calculating net profit. The central issue was highlighted by the majority following their citation of a passage from the judgment of Harvey CJ in *Leplastrier and Co Ltd v Armstrong-Holland Ltd*[89]. The majority said at 112:

> *Dart relies upon the same passage to support its submission that the correct accounting principle to employ in the taking of an account of profits is incremental costing rather than absorption costing. Incremental costing takes account only of the change in costs incurred by the manufacture or sale of a particular product and does not seek to apportion to the manufacture or sale of that product any part of general overheads, such as rent, light, heating or office expenses, which cannot be identified as a direct result of producing that product. Absorption costing on the other hand is a costing method whereby general overheads are apportioned by some appropriate means, often by sales or volume, to the manufacture or sale of each product.*

The majority concluded at 119:

> *Whether Decor and Rian should succeed in their contentions depends upon whether, as a matter of fact and substance, the overheads which they seek to have deducted are attributable to the manufacture and sale of the infringing product. In arriving at an answer, the Court must ' consider such questions as whether the overheads in any particular category were increased by the manufacture or sale of the product, whether they represent costs which would have been reduced or would have been incurred in any event, and whether they were surplus capacity or would, in the absence of the infringing product, have been used in the manufacture or sale of other products. Dealing with the last of these questions may require the use of the concept of opportunity cost. If any of the categories are to be brought into account, the proportion to be allocated to the infringing product must be determined and it is here that approximation rather than precision may be necessary.*

McHugh J said at 133:

> *Based on the above analysis of accounting and economic principles and practice, as well as the United States cases, the absorption method of cost accounting is the appropriate method of accounting for general overheads in a case of infringement. The test to be applied was concisely stated in Alfred Bell and Co v Catalda Fine Arts*[90] *here the Court said: "The test is not whether such an overhead item had been increased by the handling of the infringements but whether this overhead item actually assisted in the production of the infringing profits."*

3.4 Remedial outcome in *Vasco Investments Ltd v Morgan Stanley Australia Ltd*

[88] (1995) 182 CLR 544
[89] (1926) 26 S.R. (NSW) 585
[90] (1949) 86 F. Supp. at 415

Vickery J analysed three possible remedies in respect of the relevant breach namely, equitable compensation, account of profits and quantum meruit.

(a) **Equitable compensation**

His Honour held that the evidence adduced by the plaintiff did not support an award of equitable compensation. On this point, his Honour said:

> *[325] Like any equitable remedy, in a case like the present involving a breach of the obligation of confidence, the remedy will be fashioned to meet the needs of the case.*
>
> *[326] If the Plaintiff elects to seek a remedy on the basis of equitable compensation, I would take into account the nature of the confidential information. In this regard, I am satisfied that the confidential information was something special, in that it involved the application of specialised knowledge to a unique set of commercial circumstances. The creation of the confidential information involved inventive steps and the application of those inventive steps to a commercial enterprise which was unusual and was distressed in unusual circumstances. The confidential information could not be obtained by simply going to a consultant in the ordinary course. Accordingly, the value of the confidential information is much greater that a fee which a consultant, in the usual course of business, could charge for it.*
>
> *[327] I am satisfied that the equitable compensation payable should be assessed, as far as it is possible to do so on the evidence, as the price which a willing buyer, who is desirous of obtaining the information, would pay for it. It is the value established as between a willing seller and a willing buyer.*
>
> *[329] The Plaintiff called as an expert on the question of quantum Mr Jonathan Buckley. Mr Buckley was a corporate adviser in funds management and securities, with more than 25 years' experience in Australia and overseas. His expertise in the corporate finance sector generally was not challenged.*
>
> *[330] However, Mr Buckley did not assess the value of Vasco's Plan as confidential information. Rather, he confined himself to a quantum meruit assessment of the services as a whole provided by Vasco to Morgan Stanley between 25 March and 22 June 2011, including the work that went into the drafting of the expression of interest. Although this included presentation of Vasco's Plan, Mr Buckley did not provide any opinion as to the value of the confidential information comprised in the Plan itself.*

(b) **Account of profits**

Again, his Honour denied this remedy to the plaintiff. Relevantly, his Honour said:

> *[333] In the present case, on the assumption that a breach of confidential information has been made out, I am not satisfied that Vasco ought to be permitted to make an election as to whether to proceed to claim an account of profits prior to the entry of judgment.*
>
> *[334] The difficulties in establishing the necessary causal link between the misuse of the confidential information and any profits derived by that conduct in my opinion are insurmountable given that the confidential information was so entwined with the extensive development work undertaken by Morgan Stanley itself to consummate the ultimate transaction. No evidence has been called by Vasco which directly addresses this issue.*
>
> *[335] Accordingly, I will not permit Vasco to exercise any election to seek an account of profits because no basis has been demonstrated on the evidence to establish that such a claim is viable.*

(c) **Quantum meruit**

His Honour sustained the plaintiffs claim on this basis. After an examination of the classes of case where restitution will be made on a quantum meruit basis, his Honour concluded:

> *[365] Given that there was no binding or enforceable contract between Vasco and Morgan Stanley for the provision of its services, the question is whether Morgan Stanley has an obligation, independent of contract, to pay a fair and reasonable sum to Vasco for the services it*

provided and the documentation it prepared, arising from its claim in quantum meruit. I find on the facts of this case that there is such an obligation.

[366] The gist of Vasco's claim made under the first class of case in quantum meruit is that Morgan Stanley actually or constructively accepted the benefit of Vasco's services, when it should have realised that Vasco expected to be paid for them and where it would be unjust for it do so without making restitution to Vasco.

Actual or Constructive Acceptance of Vasco's Services.

[367] A relevant factor in determining whether there was acceptance is whether Morgan Stanley requested Vasco's services. In this case I am satisfied that Morgan Stanley made, as I have found, various requests of Vasco to perform services between 25 March and 22 June 2011. This provides evidentiary support for a finding that Morgan Stanley accepted the services it provided for the purposes of satisfying this element of the first class of case in quantum meruit. It also evidences the making of requests for work to be done for the purposes of the second class of case in quantum meruit.

[368] Further, the very fact that requests were made by Morgan Stanley to Vasco for provision of the documentation it prepared, and the services it performed, lends weight to the conclusion that the documentation and the services were of benefit to Morgan Stanley.

[369] In the factual context of this case, I find that Morgan Stanley accepted the benefit of the services performed by Vasco.

3.5 Statutory compensation

The *Corporations Act 2001 (Cth)* contains the following provisions:

183 Use of information—civil obligations

Use of information—directors, other officers and employees

(1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation.

1317H Compensation orders—corporation/scheme civil penalty provisions

Compensation for damage suffered

(1) A Court may order a person to compensate a corporation or registered scheme for damage suffered by the corporation or scheme if:

(a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme; and

(b) the damage resulted from the contravention.

The order must specify the amount of the compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

Damage includes profits

(2) In determining the damage suffered by the corporation or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence.

Damage includes diminution of value of scheme property

(3) In determining the damage suffered by the scheme for the purposes of making a compensation order, include any diminution in the value of the property of the scheme.

Section 1317H was the subject of critical comment by the Full Federal Court. In *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd*[91], the Court said:

> *[54] The language of section 1317H is singularly inelegant. Section 1317H (1) provides that the court may order a person to compensate a corporation for damage suffered by the corporation, if the damage resulted from a contravention of relevant provisions of the Corporations Act by that person. Section 1317H (2) then appears to direct the court determining the damage suffered by the corporation to include, as damage, profits made by any person resulting from the contravention. That appears to refer to profits made, irrespective of whether there was countervailing damage suffered by the corporation. That is to say, the effect of section 1317H (2) is definitional, in the sense that it brings into the compensatory scheme of section 1317H the capacity for the court to order that the compensation include profits, even though there was no corresponding loss on the part of the corporation (Grimaldi v Chameleon Mining (No 2) 200 FCR 296 at [630]-[631]). That scheme involves a conflation of the concepts of equitable compensation or damages, on the one hand, and account of profits, on the other.*

4 Contractual promises of confidentiality

The first question is whether an equitable obligation of confidentiality may coexist with a contractual obligation of confidentiality. In *Streetscape Projects (Australia) Pty Ltd v City of Sydney*[92] Barrett JA referred to the conflict of authority on this question. His Honour said (Meagher and Ward JJA agreeing):

> *[150] There is a question whether an equitable duty of confidence arises against one party and in favour of another where those parties have given and received contractual promises of confidentiality creating equal or greater protection of the same subject matter. The Full Court of the Federal Court, in Optus Networks Pty Ltd v Telstra Corporation Ltd [2010] FCAFC 21; (2010) 265 ALR 281, decided that the two kinds of obligation could co-exist (reference was there made to an earlier case in which a contractual duty was described as "parasitic upon" the equitable duty: Australian Medic-Care Co Ltd v Hamilton Pharmaceuticals Pty Ltd [2009] FCA 1220; (2009) 261 ALR 501 at [628] and [629]). The contrary view was taken by Gordon J in Coles Supermarkets Australia Pty Ltd v FKP Ltd [2008] FCA 1915 (at [63]), citing the observation of Campbell JA in Del Casale v Artedomus (Aust) Pty Ltd [2007] NSWCA 172 ; (2007) 73 I PR 326 (at [118]) that, if there is a contractual obligation covering the topic, there is no occasion for equity to inter-vene to impose its own obligation (Campbell J A, as a judge of the Equity Division, had expressed similar views in AG Australia Holdings Ltd v Burton [2002] NSWSC 170; (2002) 58 NSWLR 464 at [75] and Mid-City Skin Cancer & Laser Centre Ltd v Zahedi-Anarak [2006] NSWSC 844 ; (2006) 67 NSWLR 569 at [155]). The approach preferred by Gordon J and Campbell J A accords with the residual nature of the equitable duty as recognised by Deane J in Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2) (above) at 437-8. Deane J referred to "the equitable jurisdiction to grant relief against an actual or threatened abuse of confidential information not involving any tort or any breach of some express or implied contractual provision, some wider fiduciary duty or some copyright or trade mark right" [emphasis added]. It is also consistent with the notion of equity's "supplementing" role discussed above in relation to fiduciary duties.*

In *Gold & Copper Resources Pty Ltd v Newcrest Operations Ltd*[93], Stevenson J expressed his agreement with Barrett JA's approach. Relevantly his Honour said:

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[91] [2013] FCAFC 16

[92]

[93] [2013] NSWSC 281

> *[97] My conclusion, is therefore, that, to adopt Campbell JA's words in Del Casale as "there is a contractual obligation covering the topic there is no occasion for equity to intervene to enforce its own obligation.*

Recently in *Jackson Power Real Estate Pty Ltd v Jones*[94] Richmond J noted:

> *[47] In circumstances where there is both a contractual obligation and an equitable obligation of confidence, generally equity will not intervene if there is an adequate remedy at law: Del Casale at [118]; Streetscape Projects (Aust) Pty Ltd v City of Sydney (2013) 85 NSWLR 196; [2013] NSWCA 2 at [150]; Gold & Copper Resources Pty Ltd v Newcrest Operations Ltd [2013] NSWSC 281 at [96]-[97]; Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd [2021] FCA 809 at [312]; JD Heydon et al, Meagher, Gummow & Lehane's Equity: Doctrines and Remedies (5th Ed Lexis Nexis 2015) at [42-050].*

Further assistance on the relationship between equity and contract can be derived from the judgments of Allsop CJ and Lee J in *Crown Resorts Ltd v Zantran Pty Ltd*[95]. Relevantly, Allsop CJ said:

> *[34] It can be accepted that where there is an express term in a contract as to confidentiality it will be enforced by a court of equity subject to equitable defences, including any discretionary considerations, unclean hands and subject to identified public policy that makes void or unenforceable a contract or a contractual provision as to confidence. The principles underlying and informing such notions of public policy should not be seen as part of an entirely separate universe of discourse from the considerations as to what is confidence recognisable by equity …*

Lee J said:

> *[93] Obviously enough, relevant obligations of confidence owed by a third party to a party to litigation may be legal or equitable. The orthodox remedial response to any wrongful disclosure will likely not be compensatory (that is, in the case of a breach of contract, an action for common law damages, or in the case of an equitable obligation of confidence, a suit seeking some form of equitable compensatory order in equity's exclusive jurisdiction – compensatory rights which may, in certain circumstances, co-exist: see the Hon Justice M Leeming, A response to Peter Turner, "Equitable Compensation for Breach of Confidence", Seminar paper, 30 March 2017). Rather, a party responding to actual or anticipated breach will seek to enforce such rights as it has to prevent disclosure. Where there is an express or implied contractual (and hence legal) obligation not to disclose specified information, this will usually mean invoking equity's auxiliary jurisdiction to enjoin breach; alternatively, where the obligations of confidence arise in equity, the exclusive equitable jurisdiction will be invoked to enjoin the use of confidential information, arising from the circumstances in or through which confidential information was obtained or communicated: Seven Network Limited v News Limited [2007] FCA 1062 at [2949].*

The practical consequence of the case law would appear to be that a confidant having the benefit of a contractual promise of confidentiality would be entitled to contractual damages for breach together with injunctive relief invoking equity's auxiliary jurisdiction. However, the confidant would not be entitled to equitable compensation or an account of profits. Relevantly, contractual damages unlike equitable compensation are limited by the common law rules of causation and remoteness. However the principal advantage of a contractual promise of confidentiality is that the confidant can introduce a definition of confidential information as widely as may be required.

The important issue in *Crown Resorts Ltd* as formulated by Lee J was whether one party to litigation could obtain information, apparently relevant to facts in issue in a proceeding from a third party to the litigation, when that party is bound by contractual obligations of confidence owed to the other party to the litigation and to obtain that information prior to trial, so that consideration could be given to calling the third party as a witness. The primary judge in an interlocutory application and in the exercise of his discretion made orders relieving the third party employees of Crown Resorts from their contractual obligations of confidentiality. In his

[94] [2024] NSWSC 1665
[95] [2020] FCAFC 1

reasons for judgment the primary judge said that an obligation of confidentiality (whether contractual or equitable) will not be enforced by a court, or will be treated as void by a court, if it has an adverse effect on the administration of justice. The Full Federal Court allowed Crown Resort's appeal. In his judgment Allsop CJ relying on the decision of Beazley JA in *Richards v Kadian*[96] said:

> *[51] A reading of [84]–[87] would lead to a rejection of any proposition that the enforceability of a confidentiality clause in the context of pre-trial preparation of civil litigation is to be decided upon by reference to discretionary considerations involving a balancing exercise in which weight is given to the efficient preparation of litigation. What must be found for a clause to be unenforceable is that it is contrary to a found public policy. There is no basis to consider that her Honour expressed the view that a clause which has the effect of impeding or affecting the efficient preparation of litigation is against public policy; the expression of reasons at [84]–[87] is to the contrary of any such proposition. That this is how one should read Richards v Kadian is reinforced by the evident approval of aspects of AG v Burton and her Honour's recognition of the obiter statements in A v Hayden that went beyond the administration of the criminal law.*

Lee J in discussing the rejection in Australia of the "public interest" defence to justify publication of an otherwise confidential publication which has been adopted in England said:

> *Gartside was not an exclusive jurisdiction case: an injunction was sought as final relief in aid of contractual rights: see Heydon, J D, Leeming, M J and Turner, P G, Meagher, Gummow & Lehane's Equity Doctrines and Remedies (5th ed, Butterworths, 2015) at [42-160]. As is well known, the principles explained in Gartside have come to be developed in England as an independent "public interest" defence to justify publication of an otherwise confidential publication: see, for example, Initial Services Ltd v Putterill [1968] 1 QB 396 at 405-406; Attorney-General v Guardian Newspapers (No 2) [1990] 1 AC 109 at 268-269. But as Gummow J explained in Corrs Pavey at 455-456:*
>
> > *… if there be some other principle of general application inspired by Gartside v Outram, it is in my view of narrower application than the "public interest defence" expressed in the English cases. … That principle, in my view, is no wider than one that information will lack the necessary attribute of confidence if the subject-matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.*

The second question is whether the restraint of trade doctrine applies to a contractual promise of confidentiality. In *Maggbury Pty Ltd v Hafele Australia Pty Ltd*[97] the plurality in the High Court (Kirby and Callinan JJ dissenting) held that the restraint of trade doctrine did apply. Subsequently in *Reed Business Information Pty Ltd v Seymour*[98] Ball J said:

> *[36] There is no doubt that an obligation can be imposed by contract to keep information confidential and that that obligation can extend to cover subject matter which is not protected by an equitable duty of confidence: see Wright v Gasweld Pty Ltd (1991) 22 NSWLR 317; John Fairfax Publications Pty Ltd v Birt [2006] NSWSC 995. Contractual obligations of that type are treated as restraints of trade. Consequently, they are unenforceable unless they are reasonable. The reasonableness of a restraint is to be judged at the time the restraint is imposed: Woolworths v Olson [2004] NSWCA 372.*

His Honour identified the following factors as applicable in applying the test of reasonableness to a contractual promise of confidentiality:

> *(a) the extent to which the information is known outside the business; (b) the skill and effort expired to collect the information; (c) the extent to which the information is treated as confidential by the employer; (d) the value of the information to competitors; (e) the ease or difficulty with which the information can be duplicated by others; (f) whether it was made known to the employee that the information was confidential; and (g) whether the usages and practices in the industry support the claim of confidentiality: see Wright v Gaswell Pty Ltd (1991) 22*

[96] (2005) 64 NSWLR 210
[97] (2001) 210 CLR 181
[98] [2010] NSWSC 790

NSWLR 317 at 334 per Kirby P; Del Casale v Artedomus (Aust) Pty Ltd [2007] NSWCA 172 at [40] per Hodgson JA referring to R Dean, The Law of Trade Secrets and Personal Secrets, (2002) 2nd ed at 190.

Ball J's judgment in *Reed Business Information Pty Ltd* was cited with manifest approval by Richmond J in *Jackson Power Real Estate Pty Ltd v Jones*.

Chapter 4: The equitable remedy of rectification

1 Conceptual framework

In his paper *Rectification and other Mistakes*[99], Lord Hoffmann drew a distinction between what he referred to as *"documentary rectification"* on the one hand and *"contract rectification"* on the other. The distinction is explained by his Lordship as follows:

> *28. Document rectification is based upon the equitable principle of making people keep their promises, in the same way as specific performance. Even though there no longer has to be a prior binding contract, there still has to be a prior and continuing agreement, that is to say, promises made by one party to the other about, even if not legally binding, about what the written contract will require them to do. Document rectification gives retrospective effect to the prior agreement of the parties. And the existence of that agreement is objectively determined. It has nothing to do with subjective states of mind.*
>
> *29. Contract rectification, on the other hand, is entirely about subjective states of mind. It is based upon a different equitable principle, namely the overarching principle of good faith which has generated specific rules imposing upon parties negotiating a contract specific obligations of good faith. Included in such rules are a requirement that they may not induce mistakes as to the terms of the contract, or knowingly allow the other party to be mistaken as to what the terms of the contract are. In such a case, the court has jurisdiction to enforce the contract in the terms in which they were understood by the mistaken party. Unilateral rectification is an equitable exception to the rule that the terms of a contract are objectively determined. It is, as Slade LJ pointed out in the Nai Genova, an exceptional order. It is not necessarily made even where there is jurisdiction to do so. But it can be done.*

Relevantly, contract rectification is considered by the High Court decision of *Taylor v Johnson*[100].

2 Rationale and underlying basis

The most recent statement by the High Court on the nature of equitable rectification is contained in the joint reasons of Gageler, Nettle and Gordon JJ in *Simic v New South Wales Land and Housing Corporation*[101]. Their Honours said:

> *[103] Rectification is an equitable remedy, the purpose of which is to make a written instrument "conform to the true agreement of the parties where the writing by common mistake fails to express that agreement accurately". For relief by rectification, it must be demonstrated that, at the time of the execution of the written instrument sought to be rectified, there was an "agreement" between the parties in the sense that the parties had a "common intention", and that the written instrument was to conform to that agreement. Critically, it must also be demonstrated that the written instrument does not reflect the "agreement" because of a common mistake. Unless those elements are established, the "hypothesis arising from execution of the written instrument, namely, that it is the true agreement of the parties" cannot be displaced.*

Earlier, in *Franklins Pty Ltd v Metcash Trading Ltd*[102], Campbell JA explained the underpinning rationale of the remedy. His Honour said:

> *[444] In considering whether to grant rectification of a written contract, equity does not use any of its own principles to decide what the terms of the contract are, or how they are construed -- those matters are decided solely by the common law. Rather, equity focuses on what it is unconscientious for a party to assert about the contract. The rationale is that it is unconscientious for a party to a contract to seek to apply the contract inconsistently with what he or she knows to be the common intention of the parties at the time that the written contract was entered. In other words, when a plaintiff succeeds in a claim for rectification, the plaintiff is found to have been justified in effect saying to the defendant "you and I both knew, when we entered this contract, what our intention was concerning it, and you cannot in conscience now*

[99] Lecture to the Commercial Bar Association in London; 3 November 2015
[100] (1983) 151 CLR 422
[101] (2016) 260 CLR 85
[102] [2009] NSWCA 407

try to enforce the contract in accordance with its terms in a way that is inconsistent with our common intention."

[445] Before that rationale can apply there has to actually be an intention of both contracting parties concerning the subject matter of the terms in which it is submitted the contract should be rectified. If the matter that has come to be the subject of debate is a matter that was not addressed during the negotiations, and/or was not otherwise shared by the parties (Ryledar v Euphoric at 660 [281]) so that there was no subjective common intention concerning it, then there is no room for rectification.

[446] The remedy that is granted is, as with all equity's remedies, one that will seek to undo, so far as is in practice possible, the departure, that the litigation has shown to exist, from equity's standards of conscientious behaviour. The way this is achieved, when a remedy of rectification is granted, is by rewriting the contract so that it no longer departs from the common intention of the parties. The rewriting is done in a quite literal sense -- the proper form of order identifies the precise words of the contract that are to be struck out, the precise words that are to be inserted, and where those words are to be inserted …

In *Ryledar Pty Ltd v Euphoric Pty Ltd*[103], his Honour said:

[315] That the rationale for granting rectification is to avoid unconscientious departure from the common intention assists in deciding what is required for there to be a "common intention". If two negotiating parties each had a particular intention about the agreement they would enter, and their intentions were identical, but that intention was disclosed by neither of them, and they later entered a document that did not accord with that intention, what would be the injustice or unconscientiousness in either of them enforcing the document according to its terms?

3 Overview of principles

In *Mayo v W & K Holdings (NSW) Pty Ltd (in liq) (No 2)*[104], Gleeson JA (Meagher JA and Sackville AJA agreeing), summarised the governing principles as follows:

[56] First, a written document that has been executed is presumed to be the true record of the parties' agreement: Equuscorp Pty Lt v Glengallan Investments Pty Ltd [2004] HCA 55 ; 218 CLR 471 at [33]. However if there is clear evidence of a mistake in the recording of their agreement the equitable remedy of rectification is available to reform the parties' document, but not to reform the parties' bargain: Maralinga Pty Ltd v Major Enterprises Pty Ltd [1973] HCA 23 ; 128 CLR 336 (Maralinga) at 350 (Mason J); J W Carter, Contract Law in Australia, (6th ed 2013, LexisNexis Butterworths) at [21-02].

[57] Secondly, the rationale of rectification of a written document in equity is that it is unconscientious for a party to the contract to seek to apply the contract inconsistently with what that party knows to be the common intention of the parties at the time the written contract was entered into: Ryledar at [315] (Campbell JA; Mason P agreeing).

[58] Thirdly, the "intention" that is relevant to rectification of the contract is the subjective intention of the parties, sometimes called the actual intention: Ryledar at [267]. Before rectification of the contract is granted, the actual intention needs to exist in circumstances where it can be seen that there is a common intention of all those entering into the contract: Ryledar at [279].

[59] In Ryledar at [281], Campbell JA emphasised that when that intention relates to the terms upon which the parties will contract with each other, it is still necessary for them to know enough of each other's intentions for it to be said that there is a common intention. His Honour explained that the parties might come to know each other's intentions where those intentions are directly stated, or through the various other means by which one person's intentions can become known to another person …

[103] [2007] NSWCA 65
[104] [2015] NSWCA 119

4 The type of intention relevant to rectification

In *Simic v New South Wales Land and Housing Corporation*[105], Kiefel J (as her Honour then was) said:

> *[42] What is necessary to be shown is the actual intention of each of the parties. This has often been referred to by intermediate appellate courts as the subjective intention of the parties. A court, in determining whether the burden of proof is discharged, may be said to view the evidence of intention objectively, in the sense that it does not merely accept what a party says was in his or her mind, but instead considers and weighs admissible evidence probative of intention. It is in this sense that statements such as that of Hodgson J in Bush v National Australia Bank Ltd, that common continuing intention "must be objectively apparent from the words or actions" of each party, may be understood.*

Campbell JA in *Ryledar* noted that the type of intention relevant for rectification is the subjective intention – sometimes called the actual intention – of the parties. This is to be contrasted with the ascertainment of the common intention of the parties relating to contract formation or construction where the common intention must be ascertained objectively. To highlight the distinction Campbell JA referred to the following passage in Mason J's judgment in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[106] at 346:

> *The implication of a term is to be compared, and at the same time contrasted, with rectification of the contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it - it is not a term that they have actually agreed upon. Thus, In the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties' actual Intention; the implication of a term is designed to give effect to the parties' presumed intention.*

A point raised in *Ryledar* and addressed by Tobias JA was whether the subjective intention of the parties could be ignored where their prior dealings objectively viewed would suggest the existence of a particular common intention at variance with evidence of their actual intentions. Tobias JA said:

> *[176]... The issue in question is whether, as Ryledar submitted, when dealing with a claim for rectification the court was entitled to determine the common intention of the parties objectively by confining itself to the correspondence between them including any relevant conduct and ignoring as irrelevant any inconsistent evidence which established that, subjectively speaking, no such common intention was held.*
>
> *[181]… In my view it would be wrong in principle to simply rely on the prior correspondence of the parties and their objective conduct where the evidence otherwise positively establishes that the correspondence and conduct did not coincide with any subjective intention on the part of either party which was capable of overcoming the "inherent probability" that the parties intended the clear and unambiguous terms of Item 4 of the Reference Schedule to mean exactly what they said.*
>
> *[187] I would therefore reject Ryledar's submission that rectification In the present case must be ordered where an outward expression of the parties' common intention is said to be established by their correspondence and conduct notwithstanding the primary judge's findings that that intention was not in fact held by one or both parties in terms of their respective subjective states of mind.*

The central importance of subjective intention in Australian law is to be contrasted with the position in English law up to 2019.

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[105] (2016) 260 CLR 85
[106] (1982) 149 CLR 337

The historical position in English law was explained by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd*[107] as follows at 1126:

> *Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the "common continuing intention" were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not. On the contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be. Perhaps the clearest statement is by Denning LJ in Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd [1953] 2 QB 450.*

However, Lord Hoffmann's objective approach to the ascertainment of intention in respect of rectification was rejected by the English Court of Appeal in *FSHC Group Holdings Limited v GLAS Trust Corporation Limited*[108]. Leggatt LJ (as his Lordship then was) said:

> *[172] We find the Australian authorities, in particular, strongly persuasive. They are consistent with and provide compelling reasons for adhering to what we consider to be the true principles on which contractual documents may be rectified for common mistake in English law.*
>
> *…*
>
> *[176]… we are unable to accept that the objective test of rectification for common mistake articulated in Lord Hoffmann's obiter remarks in the Chartbrook case correctly states the law. We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that, as a result of communication between them, the parties understood each other to share that intention.*

In Australian law the focus has always been on the actual intention of the parties. English and Australian law are now aligned on this point. Starting with the judgment of Sheller JA in *Commissioner of Stamp Duties (NSW) v Carlenka*[109], in which his Honour having referred to Denning LJ's dictum in *Rose v Pim*, said at 336:

> *The dictum does not represent the law. In the first place the availability of relief depends upon disconformity between the form or effect of the document executed and the intention of the parties or party who executed it. In the second proof of an intention which persists to the moment the document to be rectified is executed must be convincing but is not limited to evidence of outward acts.*

In *Ryledar* Tobias JA said:

> *[182] It follows from the forgoing that first, the common intention which must be established by clear and convincing proof to justify rectification must be the actual or true common intention of the parties. Second, evidence of that intention may be ascertained not only from the external or outward expressions of the parties manifested by their objective words or conduct but also from evidence of their subjective states of mind.*

Campbell JA said:

> *[316] For the reasons I have given, the common intention that is required to grant rectification is subjective. Even though there is a requirement for the intention to be disclosed before it can count as a common intention, that disclosure need not be by words that say in substance "this is my intention". The need for disclosure fills the role of being a limitation on the types of subjective intention that can be enforced through the remedy of rectification, or a limitation on*

[107] [2009] 1 AC 1101
[108] [2019] EWCA Civ 1361
[109] (1995) 41 NSWLR 329

the circumstances in which a subjective intention must exist before it can be enforced through the remedy of rectification. It still remains that proof of the subjective intention of the parties to the contract Is fundamental to the grant of rectification. Hence It is not possible to ignore a factual finding by the trial judge, to the effect that he was not satisfied that the plaintiff intended the rebate to apply in relation to deliveries to any location within New South Wales outside the Sydney Metro locations, and look only to the correspondence for the purpose of finding a "common intention".

His Honour then concluded:

[102] The existence or otherwise of a "common intention" (or prior consensus or prior concluded agreement) is determined on the basis of an objective assessment of the parties' communications and conduct. Whilst evidence from a party about his or her subjective intention is admissible as to whether the alleged consensus was reached, the question of whether such a consensus existed and continued involves an objective assessment. The authorities suggest that the test is what an objective observer would have thought the intentions of the parties to be. In this regard, it Is not the inward thoughts of the parties which matter but whether the alleged intention has been objectively manifested. To adopt the words of Street J, the intention on each side must be manifested "by some act or conduct from which one can see that the contractual Intention of each party met and satisfied that of the other. On such facts there can be seen to exist objectively a consensual relationship between the parties."

5 Requirement for outward expression of accord

Starting with Hodgson J's comments in *Bush v National Australia Bank Ltd*[110]. In his judgment his Honour accepted as correct the following statement of principle in *Westland Savings Bank v Hancock*[111]:

(3) That while there need be no formal communication of the common intention by each party to the other or outward expression of accord, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each other party.

In *Ryledar*, Campbell JA noted:

[273] There is ongoing debate about whether it is necessary for there to be an "outward expression of accord" before rectification can be granted.

[280] Caution is needed in evaluating the case law relating to whether or not an outward expression of accord is needed. That is because it is not clear how much (or how little) is involved in an assertion, or denial, of the need for an "outward expression of accord". It is not clear just what the phrase means. One possibility is that the parties have said "we agree", or something similar, or performed an act like shaking hands or opening a bottle of champagne that Is commonly recognised as an Indication of a consensus having been reached ...

[281] In my view, when the fundamental requirement for granting rectification is a continuing common intention of the parties, it is of more assistance to concentrate on what is needed before an intention of the parties to a negotiation counts as a common intention. In my view, when that intention relates to the terms upon which they will contract with each other, it is still necessary for them to know enough of each other's intentions for it to be said that there is a common intention. They might come to know of each other's intentions in this way through those intentions being directly stated, or they might come to know of them through the various other means by which one person's Intention can become known to another person. Those means can sometimes involve a process of conscious and deliberate inference.

His Honour cited the decision of Clarke J in *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd*[112] as supporting the proposition that an outward expression of accord is not a necessary pre-requisite for rectification.

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[110] (1992) 35 NSWLR 390
[111] [1987] 2 NZLR 21
[112] (1986) 6 NSWLR 740

In *Simic*, Kiefel J made the following important observations:

> *[43] It is not to be expected that parties to contractual negotiations will express themselves in terms of their intentions. It is therefore to be expected that proof to the necessary standard will usually require some manifestation of the intention of each party by their words or conduct and that the requisite common intention will be a matter of inference for the court from that evidence. As Yeldham J pointed out in Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd , it would not be sufficient for proof of intention to refer to a party's state of mind which remained undisclosed in the course of negotiations.*
>
> *[44] Yeldham J also observed that there was some divergence of judicial and academic opinion as to whether more was required for proof of intention and, in particular, whether intention must be evidenced by "some outward expression of accord", as was suggested in Joscelyne v Nissen. Further, in Maralinga Pty Ltd v Major Enterprises Pty Ltd, Mason J referred to (68) what had been said by Buckley LJ in Lovell & Christmas Ltd v Wall, namely that it was necessary for rectification to find that intention "was communicated by one side to the other".*

There is no doubt that in English law there is a requirement for an outward expression of accord. In *FSHC Group Holdings Ltd v Glas Trust Corporation Ltd*[113] Leggatt LJ (as his Lordship then was) said:

> *[73] By insisting on the requirement of an outward expression of accord, the Court of Appeal was thus making clear that it is not sufficient for rectification to prove that each party privately and independently had the same intention as the other with regard to a particular provision of their contract. There can be no common intention of a kind with which the written contract can justifiably be made to conform if the relevant intentions remained "locked separately in the breast of each party" without being communicated by each party to the other. At the same time, the judgment in Joscelyne v Nissen makes it equally clear that the insistence on an outward expression of accord does not supplant or detract from the need to establish what the parties actually intended the relevant term of the contract (or its effect) to be. The Court of Appeal was not suggesting that only outward appearances are relevant for rectification and that, provided they appear outwardly to be in agreement, the actual intentions of the parties do not matter. On the contrary, the unequivocal holding in Joscelyne v Nissen that the law was correctly stated by Simonds J in Crane's case leaves no room for doubt that, in order to find a common intention, it is necessary to establish what was in the minds of the parties. As we have outlined and as was considered in detail in the Shipley case, which was then approved in Crane's case, that has always been the basis of the equitable remedy of rectification. The essence of the remedy is that, in a proper case where there is shown to have been a real mistake, the terms of a written contract (or other document) should be reformed in order to give effect to the parties' real intention.*

In *Newey v Westpac Banking Corporation*[114] Gleeson JA noted:

> *[172] No issue arises in this case about whether it is necessary for there to be an "outward expression of accord" before rectification can be granted. As Campbell JA observed in Ryledar at [273], this issue is noted but not resolved in Pukallus v Cameron at 452 (Wilson J, with whom Gibbs CJ agreed). Here however it is common ground that the February offer was an outward expression of the parties' intentions.*

Leeming JA in his extra judicial paper cited above doubted the requirement for an outward expression of accord. Relevantly, his Honour said:

> *It is difficult to resist the thought that thinking about equitable rectification in terms of contract led the English Court of Appeal to the result reached in Joscelyne v Nissen*[115]*. There it was said that a plaintiff seeking rectification must also show that the parties' common intention was evidenced "by some outward expression of accord". This conflates the difficulties of proof of uncommunicated states of mind with what is required in order to establish an entitlement in equity. It is on no view of things the law in Scotland. It was criticised by Leonard Bromley shortly thereafter in a famous note in the Law Quarterly Review*[116]*.*

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[113] [2019] EWCA Civ 1361
[114] [2014] NSWCA 319
[115] [1970] 2 QB 86
[116] "Rectification in Equity" (1971) 87 LQR 532

Although the requirement for an outward expression of accord remains uncertain in Australian law, it is clear that at a minimum each party must be aware of the other's actual intention in respect of the relevant contractual terms.

6 Standard of proof

In *Newey v Westpac Banking Corporation* Gleeson JA relevantly said:

> *[170] The principles which govern the rectification of the contract were not in dispute on the appeal. The authorities were considered by this Court in Franklins, and again in detail in Ryledar. It is uncontroversial that the onus on the party seeking rectification is a heavy one. Various expressions have been used to describe the standard of proof required to establish the parties' common intention. The common theme in the authorities is that the party seeking rectification must advance "clear and convincing proof" that the written contract does not embody the final intention of the parties: Pukallus v Cameron [1982] HCA 63; 180 CLR 447 at 452 ("convincing proof"); Bishopgate Insurance Australia Ltd v Commonwealth Engineering (NSW) (Bishopgate) [1981] 1 NSWLR 429 at 431 (Yeldham J) ("clear and strong evidence"); and Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd (Carlenka) (1995) 41 NSWLR 329 at 345 (McLelland AJA) ("clear and convincing proof").*

Earlier, in *Franklins Pty Ltd v Metcash Trading Ltd*[117], Campbell JA said:

> *[451] What needs to be proved in accordance with that standard is not only that the written document does not correctly record the common intention of the parties, but what the common intention of the parties actually was ...*
>
> *[452] A short phrase like "clear and convincing proof' can fail to draw attention to why the cases have repeatedly stated expressly that it is an essential requirement for rectification. A reader uninformed by the history and policy of the law concerning rectification might well be puzzled by it, and enquire "So when do you expect a court to act on dubious or unconvincing proof?"*

In *Slee v Warke*, in their joint reasons Rich, Dixon and Williams JJ adopted the following statement by Simonds J in *Crane v Hegeman-Harris Co Inc*[118] at 665:

> *Let it be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was.*

7 Mistake as to legal effect and mistaken assumptions

A common mistake attracting an entitlement to a rectification order may relate either to the words used in the document or the meaning and effect of those words as they are recorded in the document.

In *Ryledar*, although the words were deliberately chosen and were clear it was contended by Ryledar that the parties nevertheless laboured under a common mistake as to the meaning and effect of those words.

In *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd*[119], Sheller JA noted:

> *The central issue was whether the Court will rectify or reform a document which contains words the parties or party executing it have purposely used under the mistaken belief that the words had a different legal effect.*

Previously in *Bush v National Australia Bank Ltd* supra, Hodgson J said:

> *I think that the preponderance of authority now favours the view that, provided all other requirements of rectification are satisfied, rectification will not be refused merely because the*

[117] [2009] NSWCA 407
[118] (1939) 1 All ER 662
[119] (1995) 41 NSWLR 329 at 336

common mistake is as to the legal effect of the words used, rather than as to the actual words used.

This approach was adopted in *Ewing International LP v Ausbulk Ltd*[120] and *Thiess Pty Ltd v Flsmidth Minerals Pty Ltd*[121]. In the latter case McMurdo J noted:

[92] As Hodgson J explained, where the parties intend the instrument to have an effect which is not the result of their deliberately chosen words, there may be two common intentions. The first is to be bound by an instrument with those words. The second is to achieve a certain legal effect by the instrument. It is the second which is relevant to a claim for rectification at least where that is the "predominant intention".

Commenting on the facts in *Ryledar,* Tobias JA said:

[129] In the present case, the parties have purposely used the words which are now sought to be rectified, and, in particular, it was Ryledar that proposed the contents of Item 4 of the Reference Schedule to the 1999 Variation. Accordingly, it seems to me that in order to succeed in rectifying Items 4 and 5 of the Reference Schedule in the manner proposed by Ryledar ... it is required to establish by convincing evidence that both it and Euphoric were mistaken as to the effect of the deliberately chosen words in that, notwithstanding the unambiguous language which they employed, nevertheless were mistaken as to the effect of those words ...

[162] Applying the principles which I have set out ... although it was never established that rectification is available in an appropriate area even where the words the parties have employed were purposely and deliberately used, the fact that those words convey a clear, unambiguous and unmistakeable meaning or legal effect renders it less likely that the parties were mistaken as to that meaning or effect. It further renders it less likely that they had a common intention which was fundamentally inconsistent with the words they had deliberately employed.

Relevantly, his Honour cited the following passage in the judgment of McClelland AJA in *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* at 345:

In general, the remedy of rectification of an instrument is available where it is established by clear and convincing proof that at the time of execution of the instrument the relevant party or parties as the case may be had an actual intention (if more than one party, a common intention) as to the effect which the instrument would have which was inconsistent with the effect which the instrument as executed did have in some clearly identified way. In this context "effect" means the legal and factual operation of the instrument according to its true construction, but does not include legal or factual consequences of the operation of the instrument of a more remote, or collateral kind, for example, its liability to stamp duty.

Although the Australian courts accept that rectification may be available where the mistake is as to the effect of words deliberately chosen they also recognise the difficulty in establishing the remedy in this circumstance. Thus Hodgson J in *Bush v National Australia Bank Ltd*[122] said:

However, I accept that where the mistake is as to the legal effect of a document, rather than its words, it will often be more difficult to satisfy the requirements for rectification. Not only may it be more difficult to have evidence of sufficient clarity as to the common intention and common mistake, but there may be other more particular difficulties as well.

…

A further difficulty which may arise when rectification is sought on the basis of a common mistake as to the legal effect of words is that the Court cannot draft an agreement for the parties, to give effect to some intention of the parties which they have totally failed to accomplish with the words they have chosen. It is necessary that the common intention be such that the Court can conclude, with the appropriate clarity, both the substance and the detail of the precise variation which needs to be made to the wording of the instrument: see Pukallis v Cameron (1982) 56 AUR 907 at 909-911, GPI Leisure Corporation at 9-14.

[120] [2009] SASC 381
[121] [2010] QSC 006
[122] (1992) 35 NSWLR 390 at 407

However, common mistaken assumptions are outside the purview of the rectification remedy as illustrated by the decision of the Victorian Court of Appeal in *Club Cape Schanck Resort Co Ltd v Cape Country Club Pty Ltd*[123].

Turning to the facts.

Cape Schanck Country Club (the "**Club**") owned an area of land in Cape Schanck in Victoria. The Club sold part of the land to Club Cape Schanck Resort (the "**Resort**") for use as a hotel site and golf course. The Club owned and operated a sewage treatment plant on its land. By an agreement described as a Supply Service Agreement the Club agreed to receive and treat sewage discharged by the Resort from the land which it had purchased.

In 1995 the Resort commenced proceedings alleging that the fees charged by the Club for the sewage services had been excessive thereby entitling the Resort to terminate the Supply Service Agreement.

In June 1998, following protracted negotiations the parties agreed terms of settlement. These terms provided for the cancellation of the Supply Service Agreement and for a negotiation to take place between the parties to settle the sewage charges for 1998 and later years. The terms then went on to provide that failing agreement between the parties, each party was at liberty to refer the determination of the charges to the Planning Division of the Administrative Appeals Tribunal. However, it was clear that under the relevant statute the tribunal had no power to fix sewage charges.

The Club then commenced the present proceedings seeking rectification of the terms of settlement by deleting the reference to the tribunal and substituting a reference to an arbitrator.

The Victorian Court of Appeal rejected the application. Phillips JA concluded at 536:

> *... It Is difficult none the less to see how rectification was open if the common intention of the parties, as it evolved, was indeed seen best expressed in the terms of settlement as entered into, but I pass that by in case I have misunderstood the submission. More Importantly, the common intention as found by the judge was not challenged and it seems to me that that common intention was, as a matter of fact, correctly expressed in the terms of settlement, in particular c12, in the form in which that document was executed. The common intention was that the parties should reach agreement themselves about the sewage charges for 1998 and thereafter, and in default of agreement, those charges were to be determined by the Administrative Appeals Tribunal. The parties were not mistaken about their common intention or in their expression of it in cl2 of the terms of settlement; they were mistaken only in their common assumption that the tribunal had the jurisdiction to make the determination which the parties intended it should. As Morris LJ said in Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd "the fact that they were under a mistaken impression as to what their agreement would achieve does not disturb the clarity and the fixity of the agreement which they in fact made".*

Chernov JA concluded at 541:

> *Where rectification of a document is sought on the ground of common mistake, as was the case here, before the remedy is granted it must be established that the mistake is one which relates to the embodying of the parties' intention in the written agreement - see Pukallus v Cameron. As Phillips JA has shown, no such mistake occurred in this case. The mistake which the parties made was to assume that the tribunal had jurisdiction or power to do what the terms of settlement contemplated. They proceeded to make the agreement on that wrong assumption, but there was no mistake as to the embodying of their common intention in the terms of settlement. They agreed that, failing agreement between them, either could request the tribunal to determine the level of ongoing charges and that, subject to the appeal process, such a determination would be binding. What they so agreed upon was faithfully reproduced in the written agreement signed by them. Unlike the situation in Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd, the document here, on its true construction, did not wrongly state the parties' intention. Thus, there is no basis on which the court could properly rectify the terms of*

[123] (2001) 3 VR 526

settlement. The situation is not dissimilar to that which prevailed in Pukallus where the parties signed a contract of sale of land which was identified by reference to title particulars, believing that the area contained a bore and some cultivated land. In fact, both lay outside the subject land. It was held that the contract could not be rectified so as to include the bore and the cultivated land because that mistake was not a mistake in the embodiment of the parties' intention in the written agreement, but was a mistake as to what features were within the boundaries of the land sold. The parties in Pukallus, like the parties in the present case, proceeded to reach an agreement on a wrong assumption but made no mistake in embodying their agreement in the document which they executed with the intention that it be binding on them.

8 Contract rectification

There is a jurisdiction in equity to remake a contract in certain cases of unilateral mistake.

The leading authority is *Taylor v Johnson*[124]*.*

Turning to the facts.

The vendor of a parcel of land (Mrs Johnson) believed that she was selling her 5 acres for $15,000 per acre when in fact the contract recorded a total price of $15,000. She commenced proceedings seeking rectification or, alternatively, an order setting aside the contract of sale.

Importantly, there was evidence that Mr Taylor carefully avoided disabusing Mrs Johnson of her error, indeed, Mr Taylor actually pursued a course of conduct preventing its discovery. Mason, Murphy and Deane JJ in finding in favour of Mrs Johnson described the applicable principle of law in the following terms:

> *The particular proposition of law which we see as appropriate and adequate for disposing of the present appeal may be narrowly stated. It is that a party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension. What we have said is sufficient to demonstrate the broad basis of support which the authorities provide for that proposition. Moreover, and perhaps more Importantly, it is a principle which is best calculated to do justice between the parties to a contract in the situation which it contemplates, in such a situation it is unfair that the mistaken party should be held to the written contract by the other party whose lack of precise knowledge of the first party's actual mistake proceeds from wilful Ignorance because, knowing or having reason to know that there is some mistake or misapprehension, he engages deliberately in a course of conduct which is designed to inhibit discovery of it.*

In *Leibler v Air New Zealand Ltd (No 2)*[125] Kenny JA summarised the High Court's analysis in *Taylor v Johnson* as follows:

> *If (1) one party, A, makes an agreement under a misapprehension that the agreement contains a particular provision which the agreement does not in fact contain; and (2) the other party, B, knows of the omission and that it is due to a mistake on A's part; and (3) lets A remain under the misapprehension and concludes the agreement on the mistaken basis in circumstances where equity would require B to take some step or steps, depending on those circumstances, to bring the mistake to A's attention; then (4) B will be precluded from relying upon A's execution of the agreement to resist A's claim for rectification to give effect to A's intention [36].*

In *International Advisor Systems Pty Limited v XYYX Pty Ltd*[126], Brereton J considered the scope of rectification in relation to unilateral mistake.

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[124] (1983) 151 CLR 422
[125] [1999] 1 VR 1. Cited with approval by McLure P in *Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd* [2015] WASCA 21
[126] [2008] NSWSC 2

His Honour said:

> *[22] As well as for common mistake, rectification can be founded on the unilateral mistake of one party, of which the other party knew ... The requirement for rectification In a case of unilateral (as distinct from common) mistake is, at least, knowledge on the part of the defendant of the plaintiff's mistake coupled with silence amounting to sharp practice.*

His Honour referred to *Taylor v Johnson* in relation to this proposition.

Brereton J continued:

> *[23] Accordingly, sharp practice falling short of actual fraud may suffice ... An actual knowledge of the mistake is not required; it is sufficient that the other party "must have known" or "strongly suspect" that the first party is making a mistake.*

His Honour then referred to and adopted the approach of Young J in *Misiaris v Saydels*[127] in relation to the required knowledge of the unmistaken party adopting the following statements of Young J:

> *A great deal of debate has taken place before me as to when a party Is to be taken to have known of the other party's mistake. On one side it was put that so long as there is a strong suspicion that the other party has made a mistake it is sufficient, indeed, it might be sufficient if the unmistaken party Is totally innocent of knowledge of the mistake. On the other side it Is said that actual knowledge of the mistake is necessary.*
>
> *…*
>
> *In my view it is enough that the defendant strongly suspects that the plaintiff has made a mistake of a fundamental nature about the contract for the court to provide the remedy of rectification.*

[127] (1989) NSWConvR 55-474

Chapter 5: Rectification by construction

1 Rectification by Construction

1.1 The concept explained

The expression "rectification by construction" was explained by Leeming JA in *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liquidation)*[128]. The fundamental principle is that where a contract contains an obvious mistake the court may correct the mistake to avoid an absurdity or inconsistency. The concept is not new and can be traced back to the High Court decision in *Fitzgerald v Masters*[129]. In the words of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd*[130], "something must have gone wrong with the language".

Relevantly in *Seymour Whyte,* Leeming JA said:

> *6 At common law, if the error is clear, and it is also clear what a reasonable person would have understood the parties to have meant, then the mistake may be corrected as a matter of construction. This is old law. Lord St Leonards said in Wilson v Wilson (1854) 5 HL Cas 40 at 66-67; 10 ER 811 at 822:*
>
> > *"Now it is a great mistake if it is supposed that even a Court of Law cannot correct a mistake, or error, on the face of an instrument: there is no magic in words. If you find a clear mistake, and it admits of no other construction, a Court of Law, as well as a Court of Equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes - without, I say, going into those cases at all, both Courts of Law and of Equity may correct an obvious mistake on the face of an instrument without the slightest difficulty."*
>
> *7 Examples may be found in linguistic errors, such as "inconsistent" being read as "consistent" in Fitzgerald v Masters (1956) 95 CLR 420; [1956] HCA 53, or conceptual errors, such as "lessor" being read as "lessee" in McHugh Holdings Pty Ltd v Newtown Colonial Hotel Pty Ltd (2008) 73 NSWLR 53; [2008] NSWSC 542. The language of a contract is not read like a computer program, such that any slip is fatal.*
>
> *8 Two conditions are necessary in order to correct the contractual language in this manner: (a) that the literal meaning of the contractual words is an absurdity and (b) that it is self-evident what the objective intention is to be taken to have been: see Mainteck Services Pty Ltd v Stein Heurtey SA (2014) 89 NSWLR 633; [2014] NSWCA 184 at [117]-[119], approving National Australia Bank Ltd v Clowes [2013] NSWCA 179; 8 BFRA 600, where it was stated at [34]:*
>
> > *"Where both those elements are present ... ordinary processes of contractual construction displace an absurd literal meaning by a meaningful legal meaning."*
>
> …
>
> *10 The court must be satisfied of those matters to a high level of conviction. To use the language of Dixon CJ and Fullagar J in Fitzgerald v Masters at 426-427, it must be "clearly necessary in order to avoid absurdity or inconsistency". As this Court said in Miwa Pty Ltd v Siantan Properties Pty Ltd [2011] NSWCA 297 at [18], the test of absurdity is not easily satisfied. Any question of absurdity or inconsistency must be identified according to established principles, by reference to the text of the agreement as understood in its factual and legal context: Wyllie v Tarrison Pty Ltd [2007] NSWCA 184 at [46]; Newey v Westpac Banking Corporation [2014] NSWCA 319 at [85]. Courts which are asked to delete, insert or rewrite part of a contract because of what is said to be an obvious error should bear steadily in mind that imperfections and infelicities and ambiguities in contractual language commonly reflect the give and take of negotiations, or the parties' appreciation that some obscurities are incapable of resolution. As Lord Hoffmann explained, the court does "not readily accept that people*

[128] [2019] NSWCA 11
[129] (1956) 95 CLR 420
[130] [2009] AC 1101

have made mistakes in formal documents": Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101; [2009] UKHL 38 at [23].

In *Perpetual Limited v Myer Pty Ltd*[131] the Court of Appeal of Victoria endorsed Leeming JA's formulation of the principle. The Court said:

> *124 We respectfully adopt Leeming JA's summaries of the relevant principles to be applied. In summary, for the owners to succeed on their absurdity contention, they must establish to a high level of conviction that:*
>
> *(1) the literal meaning of clause 3(b) of the fourth schedule contains a clear mistake, which produces an absurd result;*
>
> *(2) the absurdity is such that 'it is self-evident what the objective intention is to be taken to have been'; and*
>
> *(3) it is clear what correction ought to be made.*
>
> *125 In considering these essential elements of 'rectification by construction', it is important to keep steadily in mind that 'the principle is premised upon absurdity, not ambiguity', and that the 'test of absurdity is not easily satisfied'.*
>
> *126 The trial judge set out the applicable principles in terms consistent with those discussed above. He expressed the caution required before a court engages in rectification by construction in the following terms:*
>
> > *The courts are, of course, cautious to warn of the limits of this type of reasoning, lest it be considered a means—by way of a loose definition of 'absurdity'—to avoid contracts that a party might have come to regard as commercially onerous or unreasonable. Accordingly:*
> >
> > *(a) '[a] court is not justified in disregarding unambiguous language simply because the contract would have a more commercial and businesslike operation if an interpretation different to that dictated by the language were adopted';*
> >
> > *(b) '[i]f the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust';*
> >
> > *(c) '[t]he courts have no mandate to rewrite agreements, so as to depart from the language used by the parties, merely to give a provision an operation which, as it appears to the court, might make more commercial sense';*
> >
> > *(d) the 'test of absurdity is not easily satisfied'; and*
> >
> > *(e) the principle requires a very strong level of conviction that a mistake has been made.*
>
> *127 We agree with those words of caution.*

The Full Federal Court in *Commissioner of Taxation v The Trustee for the Michael Hayes Family Trust*[132] also adopted Leeming JA's formulation in *Seymour Whyte*. Relevantly, Steward J (Griffiths and Derrington JJ agreeing) said:

[131] [2019] VSCA 98
[132] [2019] FCAFC 226

[34] The correction of obvious errors by an application of the ordinary principles of construction is well known. As Dixon C.J. and Fullagar J. said in Fitzgerald v Masters (1956) 95 CLR 420 at 426-427:

> *Words may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency.*

In that case, the word "inconsistent" was read as meaning "consistent" in a contract for sale.

[35] The principle is premised on absurdity and not ambiguity. Indeed, it is applicable even where the language is unambiguous: National Australia Bank Ltd v Clowes [2013] NSWCA 179; (2013) 8 BFRA 600 at [34]-[35] per Leeming J.A., citing Westpac Banking Corporation v Tanzone Pty Ltd [2000] NSWCA 25; (2000) 9 BPR 17,521 at [21] per Priestley, Fitzgerald JJ.A. and Foster A.J.A. and Noon v Bondi Beach Astra Retirement Village Pty Ltd [2010] NSWCA 202; (2010) 15 BPR 28,221 at [46] per Giles J.A. (with whom Macfarlan J.A. agreed).

[36] Once again, I turn to Leeming J.A. for the most recent expression of the principle …

[37] I note the expression of the test as involving two conditions which must be satisfied, namely:

(1) that the literal meaning of the contractual words is an absurdity; and

(2) that it is self-evident what the objective intention is to be taken to have been.

The level of satisfaction about these matters must be "high".

1.2 The terminology revisited

The New South Wales Court of Appeal in *James Adam Pty Ltd v Fobeza Pty Ltd*[133] took a fresh look at the terminology of 'rectification by construction'. It is suggested the following material points emerge from the decision.

First, Bell P (as his Honour then was) rejected the use of the terminology. Relevantly his Honour said:

> *[2] I would personally eschew the terminology of "rectification by construction". Whilst Leeming JA makes very plain the distinction between this concept and the equitable doctrine of rectification, the use of "rectification" in both contexts is, in my opinion, apt to confuse. Rectification in equity is a mainstream doctrine and the principles associated with it are well understood in Australia and are set forth in leading texts. So also, decisions such as Fitzgerald v Masters (1956) 95 CLR 420 are well understood as permitting a contract to be construed in very limited circumstances in a way that involves a recognition that the drafting of the contract has miscarried. The principles of contractual construction most closely associated in Australia with Fitzgerald v Masters do not, in my opinion, need to be elevated to the status of a "doctrine" or fixed with a label which might be thought to undermine the importance of courts adhering to the language parties have chosen to employ in setting out the nature and scope of their contractual relations.*

Macfarlan JA agreed with Bell P's comments.

Secondly, Leeming JA stands by the existing terminology. His Honour in explaining the common features of equitable rectification and rectification by construction said:

> *[31] Both doctrines are founded on an error in the expression of an instrument. Both doctrines result in the legal meaning departing from what would otherwise be the ordinary meaning of the instrument. And both doctrines involve an elevated standard of proof. Like other doctrines which displace the orthodox approach to construction, such as sham or non est factum, there is a need to keep these doctrines within narrow limits. Although rectification by construction does not resort to the parties' subjective intentions, it remains an aspect of construction which is circumscribed lest it detract from the certainty and predictability of ordinary principles of the construction of written documents.*

[133] [2020] NSWCA 311

> *[32] In the case of rectification in equity, reference is regularly made to the need for "clear and convincing proof" (or variants to the same effect), as explained in Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603; [2009] NSWCA 407 at [451]-[461] and Newey v Westpac Banking Corporation [2014] NSWCA 319 at [170]. Rectification in equity turns upon establishing that the document does not reflect the parties' actual intentions, viewed objectively from their words or actions: Simic v New South Wales Land and Housing Corporation (2016) 260 CLR 85; [2016] HCA 47 at [41]-[42] and [103]-[104].*

His Honour in an extra judicial paper titled '*The Limits of Rectification*' presented at the 2023 Journal of Equity Conference immediately after referring to Bell P's comments above said:

> *To reprise: the first point is "rectification by construction" or "contractual rectification" is not an aspect of the law of contract at all. The second point is that it should not be called "rectification". What is happening in these cases is merely an aspect of construing (which is to say, giving legal meaning to) a legal text. The occasions where the requisite levels of confidence that a mistake has occurred and what its solution should be may vary depending on the nature of the instrument (including no doubt, as Lord Hobhouse observed, whether its author was an accomplished or alternatively a deficient draftsperson).*

Thirdly, Leeming JA posed the question: what comes first, common law or equity?

In his judgment his Honour referred to a hierarchy in the two doctrines (equitable rectification and rectification by construction). The question which his Honour put was whether in approaching an apparent mistake in a document the first step is construction with equitable rectification only applying after the construction process is completed. His Honour explained the issue more fully in his paper cited above as follows:

> *Rectification is an equitable remedy. It may be withheld on discretionary grounds and it may be granted on terms. This is utterly different from the position at law. It is surely therefore axiomatic that a document should not ordinarily be rectified in equity unless it be shown that there is an inadequate remedy at law. If an obvious mistake in a document has an obvious solution, such that "rectification by construction" is available, that should be preferred ahead of rectification in equity. After all, the purpose of rectification in equity is that the legal meaning of the written document does not reflect the parties' actual intentions. Sir Herbert Cozens-Hardy MR said "the question of construction logically comes first. The question of rectification only arises if and when the plaintiffs have failed on the question of construction.*

Turning to the facts.

James Adam Pty Ltd entered into a contract for sale with Fobeza Pty Ltd as purchaser for a lot of land in the Cowra area. The contract contemplated that the subject lot would be subdivided into lot 101 and 102. The contract contemplated that lot 101 would be excluded from the sale and transferred to the Cowra Council and Rural Fire Services for use as its depot for the area. Annexed to the contract was a sketch plan of the proposed subdivision of the lot. However, the area of lot 101 in the sketch plan was wrong. The area was in fact 10 percent larger than the stated area of 2001m2. Clause 39.3 of the contract relevantly provided:

> *Completion of the contract is conditional upon the registration of the plan of subdivision in accordance with the sketch plan.*

Clause 41.3 gave the purchaser a right of rescission as follows:

> *(a) The Purchaser may rescind this contract if the area of lot 102 in the plan of subdivision as registered is shown on the plan as being 2,100 sq. m or more, or if the location or the width of the easement are substantially different to that shown on the sketch plan set out in clause 39.*

Following the registration of the plan of subdivision the purchaser purported to rescind the contract on the basis that the area of lot 101 was more than 2100m2. The vendor denied the validity of the purchaser's rescission and served a notice to complete. The purchaser sought a declaration that it had validly rescinded and the vendor by cross-summons sought an order for specific performance.

The primary judge found that the area of proposed lot 101 on the sketch plan should in fact have been 2205m2.

The vendor relied on a rectification by construction of the reference to 2100m2 in clause 41.3(a) on the basis of obvious mistake. The vendor contended that the consequence of construing clause 41 in accordance with its literal meaning was that a vendor who complied with its contractual obligation to register a plan of subdivision in accordance with the sketch plan would immediately trigger the purchaser's right of rescission. This was argued to be sufficiently absurd or inconsistent to engage the doctrine of rectification by construction. In agreeing with the submission, Leeming JA said:

> *[56] There is no rational basis for imputing to the parties an intention that the purchaser was free to rescind the contract if the vendor complied with the obligation to subdivide in accordance with the very precise dimensions and bearings on the sketch plan.*

However, the vendor was unsuccessful in its appeal. In his judgment, Leeming JA found that the vendor was unable to satisfy the second requirement of a rectification by construction, namely, to identify with precision the alternate words of the clause. In his conclusion Leeming JA said:

> *[72] It does not matter that in the present case the notice of rescission would be invalid irrespective of whether the reference in cl 41.3(a) to "2,100 sq m" were rectified to "2300 sq m" or "2315 sq m" or "2320 sq m" or some other area. In order for the contract to be rectified as a matter of construction, it is necessary for it to be self-evident what the objective intention is taken to have been. The primary judge was correct in reasoning, at [51], that this was not self-evident. This is not a case of a mere slip, where a word is missing, a concept confused with its antonym, or a clause misnumbered or incorrectly cross-referenced in the contract. There is no clear or self-evident solution to the absurdity that the figure of 2100m2 presents.*
>
> *[73] In summary, it is clear that something has gone wrong. But the error is not one which can be cured as a matter of construction. That outcome ought not to come as a surprise. The parties' written bargain was informed by the erroneous area on the surveyor's sketch plan, but where neither appreciated that there was an error, it is impossible as a matter of construction to impute to them how their bargain would have been framed had the error not been made.*

Perhaps on the facts the vendor should have sought rectification in equity although the vendor may have had difficulty in succeeding for the same reason as its failure to secure a rectification by construction.

Chapter 6: The effect of common mistake on contract formation at common law and in equity

2 General background

There is little doubt that the subject of mistake in Australian law is both difficult and confusing. It has been described as "arcane, uncertain in application, complex and controversial"[134]

The High Court has considered the applicable principles in three cases, namely, *McRae v Commonwealth Disposals Commission*[135], *Svanosio v McNamara*[136]; and *Taylor v Johnson*[137]. The first two cases were concerned with common mistake, that is, a mistake shared by both contracting parties and *Taylor* concerned unilateral mistake.

In England the leading authorities are *Bell v Lever Bros*[138]; *Solle v Butcher*[139] and *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*[140] .

Historically, *Bell v Lever Bros* has been treated as delimiting the effect of common mistake at law and *Solle v Butcher* as delimiting the boundaries of equitable jurisdiction to grant relief by setting aside a contract. The fundamental difference between the treatment of common mistake at law and in equity was that in the former the subject contract was void ab initio while in the latter the subject contract was voidable, that is, liable to be set aside.

Lord Atkin in his seminal speech in Bell v Lever Bros in dealing with the effect of common mistake as to the identity or quality of the subject matter of a contract advanced the following test for determining whether the contract was to be treated as void ab initio.

> *Does the state of the new facts destroy the identity of the subject matter as it was in the original state of facts.*

In *Solle v Butcher* Denning LJ in analysing Lord Atkin's speech said at 691.

> *The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their Inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms and the same subject matter, then the contract is good unless and until it is set aside for failure of some condition in which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on its own mistake to say it was nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake.*

His Lordship continued at 693:

> *A contract is also liable in equity to be set aside If the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.*

The result of *Solle v Butcher* was the creation of parallel systems at common law and in equity in respect of the treatment of common mistake. However there remained a lack of clarity as to how the systems were intended to interact. Thus the confusion.

Subsequently, in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*[141] the English Court of Appeal embarked on a thorough examination of the law relating to common mistake. The Court concluded that a contract otherwise valid and enforceable at

[134] Seddon: (2006) 80 ALJ 92 at 95-96
[135] (1950) 84 CLR 377
[136] (1956) 96 CLR 186
[137] (1983) 151 CLR 422
[138] [1932] AC 161 (HL)
[139] [1950] 1 KB 671 (CA)
[140] [2003] QB 679
[141] [2003] QB 679

law was not liable to be set aside in equity. Further, Denning LJ's view in *Solle v Butcher* as to the reach of equitable jurisdiction was inconsistent with the decision of the House of Lords in Bell v Lever Bros. Lord Phillips, who delivered the judgment of the Court of Appeal, said:

> *[118]... We do not find it conceivable that the House of Lords overlooked an equitable right in Lever Bros to rescind the agreement, notwithstanding that the agreement was not void for common mistake at common law. The jurisprudence established no such right. Lord Atkin's test for common mistake that avoided the contract, while narrow, broadly reflected the circumstances where equity had intervened to excuse performance of a contract assumed to be binding in law.*
>
> *[131] If the result in Solle v Butcher extended beyond any previous decision the scope of the equitable jurisdiction to rescind a contract for common mistake, the terms of Denning LJ's judgment left unclear the precise parameters of the jurisdiction. The mistake had to be 'fundamental', but how far did this extend beyond Lord Atkin's test of a mistake 'as to some quality which makes the thing without the quality essentially different from the thing as it was believed to be'? The difficulty in answering this question was one of the factors that led Toulson J. to conclude that there was no equitable jurisdiction to rescind on the ground of common mistake a contract that was valid in law. Was it open to him after half a century and is it open to this Court to find that the equitable jurisdiction that Denning LJ identified in Solle v Butcher was a chimera? Principles of both equity and common law have been developed by the judges and that is not a process which ceased with the Judicature Act. Does the doctrine of precedent require, or even permit, this court to hold that the jurisdiction that Denning LJ purported to exercise in Solle v Butcher does not exist because that decision was in conflict with that of the House of Lords in Bell v Lever Brothers?*
>
> *[157] Our conclusion is that it is impossible to reconcile Solle v Butcher with Bell v Lever Bros Ltd. The jurisdiction asserted in the former case has not developed. It has been a fertile source of academic debate, but in practice it has given rise to a handful of cases that have merely emphasised the confusion of this area of our jurisprudence. In his judgment, Toulson J ([2001] All ER (D) 152 (Nov) at (110)-(121)) has demonstrated the extent of that confusion. If coherence is to be restored to this area of our law, it can only be by declaring that there is no Jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law. That is the conclusion of Toulson J. Do the principles of case precedent permit us to endorse it? What is the correct approach where this court concludes that a decision of the Court of Appeal cannot stand with an earlier decision of the House of Lords? There are two decisions which bear on this question.*

Lord Phillips having considered the evolution of the doctrine of frustration and the rejection of any theory of an implied term as providing a basis for that doctrine, concluded that a common mistake would be effective to void a contract if the following elements are present:

(1) a common assumption as to the existence of a state of affairs;

(2) no warranty by either party that that state of affairs exist;

(3) the non-existence of the state of affairs must not be attributable to the fault of either party;

(4) the non-existence of the state of affairs must render performance of the contract impossible; and

(5) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

3 Mistake in Australian law

The following key questions arise for consideration.

(1) Does a common mistake by the parties as to the existence, quality or attributes of the subject matter of a contract or as to its terms render the contract void ab initio? If so, what is the relevant test?

(2) Do the Australian courts possess a jurisdiction in equity to set aside a contract for a fundamental common mistake or misapprehension?

Turning to each of these questions.

3.2 Common mistake at law

The decision of the *High Court in McRae v Commonwealth Disposals*[142] Commission is of fundamental importance in assessing the scope of common mistake in Australian law.

I turn to the facts.

The plaintiffs were the successful tenderers to the Commonwealth to purchase for salvage an oil tanker allegedly lying off the coast of north eastern Australia. A contract of sale was entered into. Due to the negligence of Commonwealth officers there was a failure to appreciate that no tanker ever existed at the particular location. The plaintiffs sought reliance damages against the Commonwealth for breach of contract. The Commonwealth argued that the contract was void ab initio by reason of the common mistake of the parties as to the existence of the subject matter at the time of contract. The High Court found for the plaintiffs. In their joint judgment Dixon CJ and Fullagar J noted:

> *When once the common law had made up its mind that a promise supported by consideration ought to be performed, it was inevitable that the theorisings of the civilians about "mistake" should mean little or nothing to it. On the other hand, the question of whether a promisor was excused from performance by existing or supervening*
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> *impossibility without fault on his part was a practical every-day question of which the common law has been vividly conscious ... But here too the common law has generally been true to its theory of simple contract, and it has always regarded the fundamental question as being: "what did the promisor really promise?". Did he promise to perform his part of all events, or only subject to the mutually contemplated original or continued existence of a particular subject matter? So questions of intention or "presumed intention" arise, and these must be determined in the light of the words used by the parties and reasonable inferences from all the surrounding circumstances. That the problem is fundamentally one of construction is shown clearly by Clifford v Watts.*

Their Honours went on to conclude at 410:

> *The only proper construction of the contract is that it included a promise by the Commission that there was a tanker in the position specified. The Commission contracted that there was a tanker there. ...If, on the other hand, ... this case ought to be treated as cases [sic] raising a question of "mistake" then the Commission cannot in this case rely on any mistake as avoiding the contract, because any mistake was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without any reasonable ground. There was a contract, and the Commission contracted that a tanker existed in the position specified. Since there was no such tanker, there has been a breach of contract, and the plaintiffs are entitled to damages for that breach.*

[142] (1950) 84 CLR 377

In *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*[143] Lord Phillips referred to McRae v Commonwealth Disposals Commission with manifest approval. His Lordship said at 703:

> *[78] In the leading judgment Dixon and Fullagar J J expressed doubt as to the existence ' of a doctrine of common mistake in contract. They considered that whether impossibility of performance discharged obligations, be the impossibility existing at the time of the contract or supervening thereafter, depended solely upon the construction of the contract. They went on, however, to consider the position if this were not correct. They observed that the common assumption that the tanker existed was one that was created by the Commission, without any reasonable grounds for believing that it was true. They held (at 408):*
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> > *'...a party cannot rely on mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground,*
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> > *and, on the other hand, deliberately induced by him in the mind of the other party.'*
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> *[79] They held (at 410) that, on its proper construction the contract included a promise by the Commission that the tanker existed in the position specified. Alternatively, they held that If the doctrine of mistake fell to be applied-*
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> > *'then the Commission cannot in this case rely on any mistake as avoiding the contract, because any mistake was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without any reasonable ground.'*
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> *[80] This seems, if we may say so, an entirely satisfactory conclusion and one that can be reconciled with the English doctrine of mistake. That doctrine fills a gap in the contract where it transpires that it is impossible of performance without the fault of either party and the parties have not, expressly or by implication, dealt with their rights and obligations in that eventuality. In Associated Japanese Bank (International) Ltd v Credit du Nord SA (1988) 3 All ER 902 at 912, (1989) 1WLR 255 at 268 Steyn J observed:*
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> > *'Logically, before one can turn to the rules as to mistake, whether at common law or in equity, one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fall or prove to have been unnecessary. Only If the contract is silent on the point is there scope for invoking mistake.'*

Subsequently in *Australia Estates Pty Ltd v Cairns City Council*[144] the Queensland Court of Appeal accepted *Great Peace Shipping Ltd* as good law in Australia. Atkinson J (Jerrard J agreeing) said:

> *[64] In my view, the correct question to be posed on this appeal is whether the agreement is void at common law for common mistake. The test that should be applied is that found in the five elements set out in Great Peace Shipping v Tsavliris. It is abundantly clear in applying those elements to this case that the common law of mistake could not be used to declare the agreement void. For the reasons discussed below, there was no mistake. Even if there had been, the mistake (or non-existence of a state of affairs) alleged by the appellant did not render the performance of the agreement impossible. <u>There is no equitable jurisdiction to set aside, on the ground of common mistake, an agreement, which is valid and enforceable at common law,</u> (emphasis added)*

As to the status of *Solle v Butcher*, her Honour said:

> *[49] The common law doctrine of common mistake, as the Court of Appeal held, fills a gap in the contract where it transpires that it is impossible of performance without the fault of either party and the parties have not, expressly or by implication, dealt with their rights and obligations in that eventuality. A common mistake at common law makes a contract void ab*

[143] [2003] QB 679
[144] [2005] QCA 328

> *initio. For example in Strickland v Turner neither the vendor nor the purchaser of an annuity realised that the annuitant had died when the bargain was completed. In such a case there was no annuity in existence, and the contract was void ab initio. A common mistake in equity on the other hand rendered a contract voidable. An example is found in Cooper v Phibbs when a contract whereby a purchaser bought property which neither he nor the seller realised already belonged to the purchaser was liable to be set aside in equity for that common mistake. However the Court of Appeal observed that cases of common mistake were likely to be rare because where parties agree that something shall be done which is impossible at the time of making the agreement, it is more likely that, on a true construction of the agreement, one or the other will have undertaken responsibility for the mistaken state of affairs. Solle v Butcher had, even before its overruling in the House of Lords, a cautious reception in the High Court. The first case in which it was referred to was McRae v Commonwealth Disposals Commission where the court held that the contract in question was not voidable in equity for mistake. The case concerned the sale of an oil tanker by the respondent to the appellant. It was apparently one of many vessels which were wrecked or stranded off the coast of Australia during the Second World War and which were sold for salvage. However, there was no oil tanker lying at the location specified by the Commission in its agreement with McRae.*
>
> *[53] Solle v Butcher had, even before its overruling in the House of Lords, a cautious reception in the High Court. The first case in which it was referred to was McRae v Commonwealth Disposals Commission where the court held that the contract in question was not voidable in equity for mistake. The case concerned the sale of an oil tanker by the respondent to the appellant. It was apparently one of many vessels which were wrecked or stranded off the coast of Australia during the Second World War and which were sold for salvage. However, there was no oil tanker lying at the location specified by the Commission in its agreement with McRae.*
>
> *[55]... Dixon and Fullagar JJ reject the proposition that the contract in question could be avoided because of mistake, mistake being defined as "a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual relations." Rather their Honours held that the appellant was entitled to damages for breach of contract because the contract included, on its proper construction, a promise by the Commission that the tanker existed in the position specified. If the doctrine of mistake were to be considered, their Honours held:*
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> > *...then the Commission cannot in this case rely on any mistake as avoiding the contract, because any mistake was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without any reasonable ground.*
>
> *McRae was referred to with approval in Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, as an example of the second and third of the elements to which it referred which must be present for a contract to be void for common mistake.*

More recently, in *HWG Holdings Pty Ltd v Fairlie Court Pty Ltd*[145], Sifris J although endorsing the approach of Atkinson J in *Australia Estates* as to the position at common law did not express any concluded view as to the scope of an equitable jurisdiction to relieve against common mistake. However, there are indications in his Honour's judgment that such a jurisdiction may remain a part of Australian law. Relevantly his Honour said:

> *[46] In this case, as pointed out, it is not necessary to consider the decision of the Queensland Court of Appeal in Australian Estates, the effect of which is to abolish or severely restrict the equitable jurisdiction to set aside a contract for mistake. The case before me is only concerned with the common law position which is accepted and to some extent clarified by Great Peace Shipping, the English case relied on by the Queensland Court of Appeal in Australian Estates.*

The question in *HWG Holdings* was whether a share buy-back agreement was void ab initio at common law because of a common mistake by the parties as to whether the dividend payable on the subject shares had the benefit of a franking tax offset. This was a mistake of a fundamental nature and undermined the rationale of the buy-back.

[145] [2015] VSC 519

In holding that the agreement was void ab initio, Sifris J said:

> *[55] Neither Great Peace Shipping nor Australian Estates affects the common law position. In fact it clarifies and reinforces it, in slightly different language, by reference to and approval of both Bell v Lever Bros and Associated Japanese Bank. Accordingly, if the parties establish that the common mistake rendered the subject matter of the contract "essentially and radically different" from the subject matter which the parties believed to exist, or if there is no subject matter so that the contract has no content, the contract may be void ab initio. As pointed out there are very few cases on point. The principle, however, remains. Most cases are of res extincta, that is where the subject matter does not exist and the contract is incapable of fulfilment. These cases involve mistakes that are obviously very serious and fundamental. Contracts where the subject matter does exist, but is of a lesser quality are more difficult. Nevertheless, the mistake may still be serious and fundamental.*
>
> *[56] Courts do not lightly declare or find contracts to be void ab initio for common mistake. However, it is ultimately a matter of construction of the particular contract made by the parties, particularly in relation to which party is to bear the risk. In the unusual case where the contract is silent, gap filing mechanisms are not available, there is no misrepresentation or misleading conduct, and the breach is serious, the result in a particular case may well be the stated narrow common law position, namely that the contract is void ab Initio. This is such a case.*
>
> *[57] In this case, in my view, the subject matter of the contract is essentially and radically different from the subject matter of the contract which the parties believed to exist. It follows that performance of the buy-back agreement as specifically contemplated and intended by the parties is impossible. The parties made a very serious mistake. The buy-back agreement is silent as to risk allocation. There was no misrepresentation or misleading conduct and no-one is a fault. The plaintiffs are accordingly entitled to the relief they seek.*

In *Menegazzo v PricewaterhouseCoopers*[146], Applegarth J followed *Australia Estates*. Relevantly his Honour said:

> *[116] The plaintiff submits that his cause of action based upon "equitable common mistake" is supported by the dicta of Denning MR in Soils v Butcher. However, this aspect of Solle v Butcher was overturned by the Court of Appeal in England in Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd. After a comprehensive analysis of authority, the Court of Appeal found that it is impossible to reconcile Solle v Butcher with Bell v Lever Bros Ltd. It declared that there is no Jurisdiction to grant rescission of a contract on the ground of common mistake where the contract is valid and enforceable on ordinary principles of contract law. That decision has been considered and followed by the Queensland Court of Appeal in Australia Estates Pty Ltd v Cairns City Council, which preferred the decision in Great Peace to Solle v Butcher.*
>
> *[117] I should follow the Court of Appeal's analysis of legal principle and authority in Australia Estates. The analysis of Atkinson J (with whom Jerrard J A agreed) is, with respect, correct. Even if it was open to me to take a different view of the law to that adopted in Australia Estates, I would not do so since the reasoning of the English Court of Appeal in Great Peace is compelling. No decision of the High Court supports a different conclusion. The plaintiff cites Taylor v Johnson, but the references in that decision to Solle v Butcher were not concerned with equitable common mistake. They were concerned with unilateral mistake and the mistake in that case was of a fundamental kind as to whether the sale price was $15,000 per acre or $15,000 in total. The decision to set aside the transaction turned on the buyer's conduct in deliberately setting out to ensure that the seller did not find out about the mistake. It was the buyer's inequitable conduct, rather than a common mistake as to value, which entitled the seller to relief.*

In respect of Sifris J's decision in *HWG Holdings*, Applegarth J said:

> *[118] HWG Holdings Pty Ltd v Fairlie Court Pty Ltd was cited by the plaintiff as suggesting that the analysis of Atkinson J in Australia Estates may not represent the current state of the law in Australia. That case was concerned relevantly with the position at common law. HWG Holdings did not endorse the expansive doctrine of equitable common mistake upon which*

[146] [2016] QSC 94

> *the plaintiff's proposed new cause of action depends concerning a mistake as to value. It did not suggest (and the point was not argued) that the doctrine of common mistake in equity extends beyond mistakes which are fundamental. Whatever the scope of the doctrine of common mistake is under Australian law, no authority extends it to a common mistake simply about the value of property. A more fundamental mistake is required, for example, as to the existence, identity or fundamental character of the subject matter of the contract.*

However, the decision in Australia Estates has not received universal support in the Australian cases. Most recently in *Hawcroft v Hawcroft General Trading Co Pty Ltd*[147] Young AJ said:

> *[54] Even if one applies Great Peace Shipping, there are still some difficulties in this case in applying it. Just what is covered by the expression "state of affairs" in the guidelines? The fifth guideline says that it covers "the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible." Clearly covered are assumptions as to the existence and ownership of the commodity the subject of the contract and certain fundamental conditions to performance, but does it cover a statement of the reason as to why the parties have entered into the contract?*

3.3 Common mistake in equity

As previously noted, in *Australia Estates Pty Ltd v Cairns City Council*[148] [149] the Queensland Court of Appeal concluded that *Solle v Butcher* should no longer be regarded as good law in Australia. Relevantly Atkinson J said:

> *[52] In this case, the persuasiveness of the court's reasoning In Great Peace Shipping v Tsavlins Salvage, together with the negative reference to Solle v Butcher by Heydon J A in Harris v Digital Pulse and the somewhat qualified approach taken to Solle v Butcher by the High Court, the history of which is detailed below, suggests that the law as stated in Great Peace Shipping should be applied by this Court in preference to the law as stated in Solle v Butcher and the cases which have followed it.*

The question is whether her Honour's conclusion is consistent with existing High Court authority.

In *Svanosio v McNamara*[150], Dixon CJ and Fullagar J said at 196:

> *"Mistake" might, of course, afford a ground on which equity would refuse specific performance of a contract, and there may be cases of "mistake" in which it would be so inequitable that a party should be held to his contract that equity would set it aside. No ' rule can be laid down a priori as to such cases: see an article by Professor R A Blackburn in Res Judicata (1955), Vol 7, p 43. But we would agree with Professor Shatwell (1955)*
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> *33 Can BR, at pp 186, 187 that it is difficult to conceive any circumstances in which equity could properly give relief by setting aside the contract unless there has been fraud or misrepresentation or a condition can be found expressed or implied in the contract.*

Subsequently in *Taylor v Johnson*[13], Mason ACJ, Murphy and Deane J J in their joint reasons said at 430:

> *In McRae v Commonwealth Disposals Commission (1951) 84 CLR 377 at 407-8 and in Svanosio v McNamara (1956) 96 CLR 186 at 195-6, which were cases involving formal written contracts, Dixon CJ and Fullagar J referred with approval to the remarks of Denning LJ.*

147 [2016] NSWSC 555
148 [2005] 96 clr 186
149 (1956) 96 CLR 186
150 (1983) 151 CLR 422

In reference to the passage from the joint reasons of Dixon CJ and Fullagar J set out above, their Honours noted at 431:

> *Dixon CJ and Fullagar J referred, in the above passage from their judgment in Svanosio, to a difficulty in conceiving circumstances in which equity could properly give relief by setting aside the contract unless there had been fraud or misrepresentation or a condition could be found expressed or implied in the contract. Presumably, their Honours were referring to "fraud" in the wide equitable sense, which includes unconscionable dealing. If they were not, we do not share the difficulty to which they referred. To the contrary, it seems to us that the reported cases, including Solle v Butcher itself, readily provide concrete examples of such circumstances.*

Despite some tentative support for the views of Denning LJ in the High Court, the better view is that Australia Estates is correct in its rejection of the existence of a jurisdiction in equity to set aside a contract valid and enforceable at law on the ground of common mistake. This position finds support with the authors of Meagher, *Gummow and Lehane's Equity: Doctrines and Remedies* (15th edition, 2015) at [14-080] where they state:

> *Save perhaps for one matter, it may now confidently be said that the views of Lord Denning that there was a jurisdiction in equity to rescind for common mistake, although they were followed in a number of cases, do not represent the law.*

However, there are still some faithful adherents to the reach of equity in this area. Young AJ in *Hawcroft v Hawcroft General Trading Co Pty Ltd* said:

> *[52] There are great problems with applying both Great Peace Shipping and the principles espoused in leading Australian cases such as McRae v Commonwealth Disposals Commission, Svanasio v McNamara and Taylor v Johnson endorsing the role of equity in cases of mistake. At the very least, despite what is said in Great Peace Shipping, there must be some room for the operation of equitable principles.*

His Honour does not identify the "great problems" to which he refers. However, it is doubtful that the High Court decisions to which his Honour refers clearly established the existence of the relevant equitable jurisdiction.

