PROPRIETARY ESTOPPEL IN AUSTRALIA: TWO OPTIONS FOR EXERCISING REMEDIAL DISCRETION

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According to Giumelli v Giumelli (1999) 196 CLR 101, where A successfully makes out a proprietary estoppel claim, courts must positively exercise two sets of remedial discretion. The first concerns whether expectation relief is a disproportionate remedy in view of the detriment A suffers. If expectation relief is held to be justified, a second set of discretion obliges judges 'to consider all the circumstances of the case', including 'the impact upon relevant third parties', to decide whether to enforce A's expectations in specie or to provide a monetary award. This article discusses the problems with Giumelli, both as to the principle it propounds and as to its application on the facts. It then introduces a fundamental analytical proposition, concerning the relationship between different types of private law remedies and discretion, and explores the two options available for the future development of proprietary estoppel in Australia.

I INTRODUCTION

Where A successfully makes out a proprietary estoppel claim against B, ie the requirements of an induced assumption,[1] reliance, and detriment are fulfilled, courts exercise remedial discretion to determine the appropriate remedy.

In England, that discretion is exercised in order to award a remedy proportionate to the detriment A suffers.[2] Although sometimes phrased as two distinct questions – 'What is the extent of the equity?', and 'What is the relief appropriate to satisfy the equity?'[3] – in reality courts do not exercise two distinct

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1 An assumption can be induced positively by way of a representation or promise, or negatively by way of acquiescence.

2 This reflects the compensatory aim of proprietary estoppel in English law: see Ying Khai Liew, *Rationalising Constructive Trusts* (Hart Publishing, 2017) ch 7.

3 *Crabb v Arun District Council* [1976] Ch 179, 193 (Scarman LJ) (Court of Appeal) ('*Crabb v Arun*').

sets of discretion.[4] Instead, both questions are aspects of the same inquiry: the first addresses the proportionality between A's detriment and B's role in inducing it, and the second allows courts to take into account factors such as the need for a clean break and the likely effect of taxation,[5] which may affect what counts as a proportionate *outcome* between the parties at the date of judgment.[6] That is, the second question simply provides courts with 'a reasonable degree of flexibility … to ensure that, on the facts as they stand at the time of the court's order, [A]'s right is adequately protected and enforced'.[7] Thus, if the court determines that a proportionate response is for A's expectation to be fulfilled,[8] it is generally enforced in specie, unless special factors render that outcome disproportionate at the date of judgment.[9]

It would appear that Australian courts take a different approach. In *Giumelli v Giumelli* ('*Giumelli*'),[10] the High Court explicitly indicated that there are two distinct sets of discretion, each having to be exercised *positively*. The first set of discretion is exercised to determine whether expectation relief[11] is appropriate or whether it is a disproportionate remedy in view of the detriment A suffers.[12] If expectation relief is held to be justified, a second set of discretion needs to be

4 See, eg, *Campbell v Griffin* [2001] EWCA Civ 990, [22] (Walker LJ, Thorpe LJ agreeing at [24]).

5 These factors are cited in *Jennings v Rice* [2003] 1 P & CR 8, 115 [52] (Walker LJ) ('*Jennings v Rice*'). In *Jennings v Rice* a sliver of discretion might appear to be reserved for a consideration of third-party interests, but this understanding is probably mistaken. See, in this connection, below n 121 and accompanying text.

6 This reflects how Scarman LJ worked through those questions in *Crabb v Arun* itself: see *Crabb v Arun* [1976] Ch 179, 198–9 (Scarman LJ). See also, *Moore v Moore* [2018] EWCA Civ 2669 [96] (Henderson LJ, Leggatt LJ agreeing at [122], Floyd LJ agreeing at [123]) ('*Moore*'). There are also 'bars' which may prevent the award of the remedy, such as the lack of clean hands or delay or laches; but these considerations are not unique to proprietary estoppel, and in any event do not give judges any positive *remedial* discretion: see Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005) 92 ff.

7 Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press, 2014) 565 [9.14].

8 Regardless of whether this conclusion is reached by adopting as a starting point the enforcement of A's expectations or the 'minimum equity' approach, a matter which English courts have yet to resolve: see *Davies v Davies* [2016] EWCA Civ 463, [39] (Lewison LJ, Patten LJ agreeing at [71], Underhill LJ agreeing at [70]); *Habberfield v Habberfield* [2019] EWCA Civ 890, [61]–[72] (Lewison LJ, Moylan LJ agreeing at [89], Rose LJ agreeing at [90]); *Moore* [2018] EWCA Civ 2669, [25]–[26] (Henderson LJ, Leggatt LJ agreeing at [122], Floyd LJ agreeing at [123]).

9 That positive discretion is not exercised other than to determine what remedy best achieves the compensatory aim of the doctrine explains why, where a constructive trust is awarded, it is not considered to be a 'remedial constructive trust' by English lawyers: the discretion is not at large. Cf Part IV(A)(1) below.

10 (1999) 196 CLR 101 ('*Giumelli*').

11 Which is now accepted to be the prima facie remedy in Australia for proprietary estoppel: see Ying Khai Liew, 'The "*Prima Facie* Expectation Relief" Approach in the Australian Law of Proprietary Estoppel' (2019) 39(1) *Oxford Journal of Legal Studies* 183 ('*Prima Facie* Expectation Relief').

12 *Giumelli* (1999) 196 CLR 101, 120–5 [33]–[48] (Gleeson CJ, McHugh, Gummow and Callinan JJ). This is also borne out in *Sidhu v Van Dyke* (2014) 251 CLR 505, 529–30 [84] (French CJ, Kiefel, Bell and Keane JJ) ('*Sidhu*'), where the High Court contrasted detriment in the form of 'life-changing decisions with irreversible consequences of a profoundly personal nature', where expectation relief would likely be justified, with detriment in the form of 'a relatively small, readily quantifiable monetary outlay', where expectation relief might justifiably be departed from. See also: *Priestley v Priestley* [2017] NSWCA 155, [164]–[165] (Emmett AJA); *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483, 485–6 [4] (Allsop P) ('*Delaforce*'); *Harrison v Harrison* [2013] VSCA 170, [141] [e] (Garde AJA, Harper JA agreeing at [1], Tate JA agreeing at [2]).

exercised to determine the appropriate 'measure of relief'.[13] Here, judges are positively 'obliged to consider all the circumstances of the case',[14] including 'the impact upon relevant third parties',[15] to decide if a lesser remedy would be more appropriate, before awarding a constructive trust. Thus, even if expectation relief is deemed justified, A's expectation would not be enforced in specie as a matter of course: the court may well provide a monetary award measured by the value of A's expectation instead (whether or not coupled with a charge or lien).

As a High Court decision, the approach taken in *Giumelli* is authoritative. Upon closer inspection, however, that decision and the principle it propounds are deeply ambiguous. These ambiguities are addressed in Part II of this article, which discusses the decision in *Giumelli* and notes the problems which arise from that judgment, both as to principle and as to its application on the facts. Part III introduces a fundamental analytical proposition, based on a distinction between 'replicative' remedies which give effect to primary rights, 'reflective' remedies which give effect to secondary rights, and 'transformative' remedies which radically transform pre-trial rights. The discussion in this Part explains how this threefold distinction provides important insights concerning the different ways in which judicial discretion is exercised in private law. Developing this discussion, Part IV explains the two options available for the future development of proprietary estoppel in Australia – the 'reflective/transformative analysis' and the 'purely reflective analysis'. The advantages and drawbacks of each option will be explored. Ultimately, it will be seen that the present state of the law in relation to the exercise of remedial discretion is unsustainable, and a choice of approach urgently needs to be made.

II *GIUMELLI V GIUMELLI*

In *Giumelli*, Robert (A)'s parents, B1 and B2, promised to subdivide their farm, Dwellingup, and to transfer a certain lot to A. In reliance on those promises, A respectively worked without wages and developed and improved the farm, built a house on the property, and refused outside employment. A successful estoppel claim was found to have been made out on these facts.[16]

The High Court agreed with the lower court's judgment that it was not disproportionate to award expectation relief.[17] However, the High Court disagreed with the lower court's decision to enforce A's expectation in specie by imposing a constructive trust.[18] A further exercise of discretion was said to be necessary to ascertain the *form* of the remedy which should be awarded to provide expectation relief. The applicable principle was: 'Before a constructive

13 *Giumelli* (1999) 196 CLR 101, 125 [51] (Gleeson CJ, McHugh, Gummow and Callinan JJ).
14 Ibid 125 [49] (Gleeson CJ, McHugh, Gummow and Callinan JJ).
15 Ibid 113–14 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ).
16 By way of a joint judgment by Gleeson CJ, McHugh, Gummow and Callinan JJ, Kirby J agreeing separately.
17 *Giumelli* (1999) 196 CLR 101, 120–5 [33]–[48] (Gleeson CJ, McHugh, Gummow and Callinan JJ).
18 Ibid 125 [49]–[50] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

trust is imposed, the court should first decide whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust'.[19] Those circumstances include 'various factors … including the impact upon relevant third parties'.[20]

On the facts, the High Court awarded the monetary value of A's expectation, secured by way of a charge imposed on Dwellingup.[21]

The approach propounded in *Giumelli*, which entails the exercise of two sets of discretion, is clearly binding in Australia in relation to proprietary estoppel,[22] as a matter of High Court authority.[23] Indeed, to date, lower courts have regularly applied the *Giumelli* approach without question. While dicta in some cases to the effect that A's 'prima facie right is to have the assurance made good'[24] might suggest that A starts out having a right to the enforcement of his or her expectation in specie, upon closer inspection it is clear that judges do not consider that 'making good' A's assumption necessarily entails the enforcement of A's expectation in specie. As Ward CJ in Eq aptly held in the recent case of *E Co v Q [No 4]*:

> It is made clear in the authorities [ie, *Sidhu v Van Dyke* (2014) 251 CLR 505 ('*Sidhu*') and *Giumelli*] … that the prima facie entitlement (on establishing a claim of proprietary estoppel) is the making good of the relevant expectation. That may well involve the declaration as to the existence of a constructive trust but that is only one of a number of ways in which potentially the expectation might be made good … It is also clear that such a prima facie entitlement will give way where particular relief would be wholly disproportionate, or out of all proportion, to the detriment; and, in a number of cases there is reference to the flexibility of equity in the crafting of relief in all the circumstances of a particular case.[25]

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19 Ibid 113–14 [10] (footnote omitted) (Gleeson CJ, McHugh, Gummow and Callinan JJ), see also discussion at 125 [49].

20 *Giumelli* (1999) 196 CLR 101, 113–14 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ). See also *Donis v Donis* (2007) 19 VR 577, 583 [20] (Nettle JA, Maxwell ACJ agreeing at 579, Ashley JA agreeing at 596); *Delaforce* (2010) 78 NSWLR 483, 493 [60]–[61] (Handley AJA); *Sidhu* (2014) 251 CLR 505, 511 [2] (French CJ, Kiefel, Bell and Keane JJ); *McNab v Graham* (2017) 53 VR 311, 331 [73] (Tate JA, Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]) ('*McNab*').

21 *Giumelli* (1999) 196 CLR 101, 125 [51] (Gleeson CJ, McHugh, Gummow and Callinan JJ). The judgment does not indicate the time from which the charge was to take effect. A priority question did not arise in relation to the charge.

22 *Giumelli* is sometimes taken to inform the operation of constructive trusts more widely. At other times it is also taken to inform the development of other forms of estoppel, particularly in discourses which analyse proprietary estoppel as falling within a wider analytical framework such as 'equitable estoppel' or a general unified estoppel doctrine. This article focuses only on proprietary estoppel, in relation to which *Giumelli* is unquestionably binding: it does not discuss the potentially wider impact of *Giumelli*, since that discussion raises other concerns and debates outside the scope of the present discussion.

23 The only other High Court decision to date which squarely considers proprietary estoppel remedies, *Sidhu* (2014) 251 CLR 505, was solely concerned with the first set of discretion: it was agreed that a monetary award was the appropriate remedy, and the appeal was simply concerned with determining whether that award ought to have reflected the value of A's expectation.

24 *R v Abdel-Malik* [2018] QDC 163, [94] (Reid DCJ). See also *Harrison v Harrison* [2013] VSCA 170, [141] [d] (Garde AJA, Harper JA agreeing at [1], Tate JA agreeing at [2]); *Browne v Browne* [2019] WASCA 1, [118] (Murphy, Beech JJA and Allanson J).

25 [2019] NSWSC 429, [626] (Ward CJ in Eq). See also *McNab* (2017) 53 VR 311, 314 [7] (Tate JA, Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]).

A Problems in Principle

It is first necessary to note that the aim of proprietary estoppel is the avoidance of detriment, as I have argued extensively elsewhere.[26] Stated more fully, a successful claim entails that an award is made *against B* in order to avoid *A* from suffering (or continuing to suffer) detriment due to *B*'s reneging on the induced assumption for which *B* is responsible.[27] This remains the aim even where A is granted expectation relief: '[i]t is … [B]'s responsibility for the detrimental reliance by [A] which makes it unconscionable for [B] to resile from his or her promise'.[28]

The underlying aim of the doctrine suggests that the considerations which affect the courts' exercise of remedial discretion extend *only* to those which achieve justice *inter partes*.

For example, it is consistent with the aim of the doctrine for courts to refuse the enforcement of A's expectations in specie where it causes undue hardship to B vis-a-vis A. This might be so where the promised property is the only significant asset B has, and depriving B of it would cause difficulties for B to satisfy his or her ordinary future financial,[29] medical,[30] or other needs. Here, the operative reason is one affecting only *the parties'* interests. Hence, a possible explanation might be that B's promise or assurance which induces A's assumption is inherently uncertain (or at least not as certain as it would be had it been contractual), and it therefore necessarily implies that certain future contingencies may affect the extent to which the promise or assurance can be performed in specie.[31] To put it in another way, it would be *unreasonable* for A to expect that his or her induced assumption would be fulfilled even if it would render B homeless or destitute.[32]

As another example, it is consistent with achieving justice *inter partes* for a lesser remedy to be awarded where enforcing A's expectations in specie would, in the final outcome, impose an overly burdensome tax liability upon B in the light of A's detriment.[33]

To cite yet another example, it is also consistent with the aim of the doctrine to refuse to enforce A's expectations in specie on the basis of the need for a

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26 See Liew, '*Prima Facie* Expectation Relief' (n 11) 184–95. This aim of the doctrine is most clearly enunciated by the High Court in *Sidhu* (2014) 251 CLR 505, 511 [1] (French CJ, Kiefel, Bell and Keane JJ), citing *Commonwealth v Verwayen* (1990) 170 CLR 394, 409 (Mason CJ) to this effect. Cf JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 527–8 [17-130].

27 See, eg, *Priestley v Priestley* [2017] NSWCA 155, [134]–[135] (Emmett AJA).

28 *Sidhu* (2014) 251 CLR 505, 523 [58] (French CJ, Kiefel, Bell and Keane JJ).

29 See, eg, *Browne v Browne [No 2]* [2017] WASC 375, [103] (Smith AJ); *Smilevska v Smilevska [No 3]* [2017] NSWSC 820; *CC Growth Pty Ltd v Amiga Growth No 2 Pty Ltd* [2019] VSC 340, [86] (Riordan J).

30 See, eg, *Thorner v Major* [2009] 1 WLR 776, 783–4 [19] (Scott LJ).

31 For a recent example of this in England, see *Moore* [2018] EWCA Civ 2669, [91] (Henderson LJ).

32 An analogous point is found in the law of assignment, where the view has been expressed that the assignment by an individual of his or her entire estate is unenforceable because it might render him or her destitute: see Ying Khai Liew, *Guest on the Law of Assignment* (Sweet & Maxwell, 3rd ed, 2018) 114 [4-19].

33 See, eg, *E Co v Q [No 4]* [2019] NSWSC 429, [651] ff (Ward CJ in Eq).

'clean break' between the parties.[34] In practice, A is best placed to judge the state of his or her post-judgment relationship with B, and is free to ask for an expectation-measure monetary award instead.[35] But the cases tend to suggest that the *court* is also able to deny the enforcement of A's expectation in specie on the same ground, even though that is what A seeks. Whatever the merits of courts doing so,[36] the need for a clean break is undoubtedly a consideration designed to achieve justice *inter partes* and is therefore consistent with the underlying aim of proprietary estoppel.

In contrast, an inconsistency arises where third-party considerations affect the courts' exercise of remedial discretion. It is impossible to reconcile the aim of proprietary estoppel with an approach which takes into account the competing interests of those who are extraneous to A's and B's relationship. If proprietary estoppel truly aims to avoid A from suffering detriment vis-a-vis B, then it is difficult to justify why, if at all, the interest of third parties might itself provide a reason to deny the enforcement of A's expectations in specie.

There is also good reason as a matter of positive law to cast serious doubt over the relevance of third-party considerations in the exercise of remedial discretion.

It appears that only on three occasions has a lower court in Australia ever purported to apply this consideration to deny the award of relief in specie, but in none of these cases was that consideration an operative reason which led to the remedy ultimately awarded.

In one of those cases, proprietary estoppel was not, strictly speaking, in issue.[37] Another was the Court of Appeal case from which the appeal to the High Court in *Sidhu* originated.[38] B and his wife (X) were joint tenants of land. A detrimentally relied on B's promise to subdivide the land and give a portion of it (which contained a cottage) to A. The trial judge held, and the Court of Appeal agreed, that enforcing A's expectation in specie would 'impact on relevant third parties'[39] – it would affect X's rights as co-owner. Therefore, an expectation-measure monetary award was granted instead. But the *reason* for the remedy,

34 *Delaforce* (2010) 78 NSWLR 483, 493 [60] (Handley AJA); *Harrison v Harrison* [2013] VSCA 170, [140] (Garde AJA, Tate JA agreeing at [2], Harper JA agreeing at [1]); *Browne v Browne [No 2]* [2017] WASC 375, [101] (Smith AJ); *E Co v Q* [2018] NSWSC 442, [1213] (Ward CJ in Eq).

35 See, eg, *Stenlake v Whipps* [2016] NSWSC 719. See also *Baker v Baker* [1993] 2 FLR 247, where A's expectation was that A would obtain the right to live in the property jointly with B (or B's successor, in the former case) for the rest of A's life, and A sought and successfully obtained an expectation-measure monetary award secured by a charge on the property.

36 Instances of this perhaps ought to be rarer. Courts tend to make unjustified assumptions concerning how A would make use of the land if it were transferred to A, and thus draw unjustified conclusions concerning A's and B's post-judgment relationship.

37 *Australian Building & Technical Solutions Pty Ltd v Boumelhem* (2009) 2 ASTLR 336 ('*Boumelhem*'). In this case, proprietary estoppel was pleaded in the alternative, the main claim being a declaration of a constructive trust by virtue of 'the principles outlined in *Baumgartner v Baumgartner* (1987) 164 CLR 137': at 340 [3] (Ward J). A *Baumgartner* constructive trust is a 'remedial constructive trust', which entails the ability to deny an award based on third-party considerations. So, this decision does not, strictly speaking, serve as an example of the exercise of remedial discretion by way of proprietary estoppel.

38 *Van Dyke v Sidhu* (2013) 301 ALR 769 ('*Van Dyke v Sidhu*').

39 Ibid 795 [138] (Barrett JA, Basten JA agreeing at 771[1], Tobias AJA agreeing at 797 [148]).

surely, was not that X would otherwise be prejudiced (although this may well have been its *effect*), but that B was *unable* to promise that the subdivision would undoubtedly occur. Given that the content of B's promise or assurance provides the upper limit of A's expectation,[40] it would likewise be unreasonable for A to expect that subdivision would necessarily take place as a matter of course.

The third case is the recent decision of in *Grant v Roberts*, where Ward CJ in Eq refused the enforcement of A's expectation a right of indefinite occupation in specie, apparently because 'the estate is in such a small amount and there are other family members whose needs require consideration'.[41] However, upon closer examination, the operative reason why expectation relief was denied was that A's detrimental reliance was in the form of a relatively small financial outlay.[42] That is to say, expectation relief was a disproportionate remedy in view of the extent of A's detrimental reliance; third-party considerations did not, after all, affect the award ultimately made.

In other cases where a third party[43] was identified who would potentially be prejudiced, courts have consistently held that the third party's interest is an irrelevant consideration.

For example, in *McNab v Graham* ('*McNab*'),[44] B promised to leave an absolute interest in his land to A1 and A2, who were B's carers. After B had died, it was discovered that A1 and A2 were left with only a life interest; a hospital (X) was named as the remainderman. An argument was made that the award of a constructive trust would prejudice X, who would otherwise have taken the land in question as remainderman under B's will. The argument was rejected, the court holding that X 'was a volunteer with no other claim and equity does not assist a volunteer'.[45] The same reason was given in *De Blac v Lo* ('*De Blac*')[46] for denying that the deceased (B)'s de facto partner (X) had any influence on the award of a constructive trust in A's favour.[47] And in *Mould v Canale* ('*Mould*'),[48] third parties (X) who had contracted with B's successor in title for the acquisition of the land in question were unsuccessful in their efforts to resist a constructive trust award in A's favour, the reason being that '[A]'s interests [were] first in time. If the merits are equal, priority in the time of creation is considered to give the better equity'.[49]

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40 *Jennings v Rice* [2003] 1 P & CR 8, 114 [50] (Walker LJ).

41 *Grant v Roberts* [2019] NSWSC 843, [127].

42 Ibid [121], [125]. That outlay amounted to a mere $5,800: at [128].

43 Of course, if the third party is a bona fide purchaser of the legal title of the property in question for value without notice, then that third party will take free of A's interests: *Enima Pty Ltd v Redevelopments Pty Ltd* [2009] ACTSC 95, [152] (Refshauge J) (reversed on appeal in *Redevelopments Pty Ltd v Enima Pty Ltd* (2010) 174 ACTR 1 but no objection was taken to the principle presently made).

44 (2017) 53 VR 311.

45 Ibid 353–4 [133] (Tate JA, Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]) (citations omitted).

46 [2014] NSWSC 142, [74].

47 Ibid [82].

48 [2017] VSC 793.

49 Ibid [104].

In noting the (supposed) relevance of the third-party considerations, the judgment in *Giumelli* relied[50] on the Canadian case of *Soulos v Korkontzilas* ('*Soulos*'), a cited page of which contains the following statement of principle:

> There must be no factors which would render imposition [sic] of a constructive trust unjust in all the circumstances of the case; eg, the interests of intervening creditors must be protected.[51]

The context of McLachlin J's words in *Soulos* indicates that it was one of 'four conditions which generally should be satisfied' for the imposition of (Canadian) constructive trusts in general.[52] To the extent that the High Court in *Giumelli* relied on that passage, and in the absence of any explicit confinement of its application to the specific context of proprietary estoppel, it would appear that the High Court thought that the interest of third parties was a consideration arising in the proprietary estoppel context because it was a consideration affecting constructive trusts more generally.

Yet, the Australian law of constructive trusts provides no support for this wide-ranging proposition.[53] It is observable that the existence of trusts (properly so-called) very often has the precise effect of causing prejudice to third parties who would otherwise have a claim on the property subject to the trust. But it has never seriously been contended that the existence of many constructive trusts, for example those arising in the context of the rule in *Corin v Patton*,[54] specifically enforceable contracts of sale,[55] an assignment or declaration of trust of future property,[56] or the mutual wills doctrine,[57] lead to third-party prejudice and ought for that reason to be denied.[58] Moreover, Australian courts have also expressly held, in relation to the 'common intention constructive trust',[59] constructive trusts arising over stolen money,[60] and those arising over mistaken payments where the recipient has knowledge of the mistake,[61] that these trusts arise from the moment the relevant events occur; they are therefore unaffected by considerations which may arise later, including third-party considerations.

Indeed, these doctrines are most often called into play precisely because it is necessary to determine whether the putative 'beneficiary' under the constructive

50 *Giumelli* (1999) 196 CLR 101, 113–14 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

51 [1997] 2 SCR 217, 241 [45] (La Forest, Gonthier, Cory, McLachlin and Major JJ, Sopinka and Iacobucci JJ dissenting at 243 [53] ff).

52 Ibid.

53 See Liew, *Rationalising Constructive Trusts* (n 2) 253–4. Cf Keith Mason, 'Deconstructing Constructive Trusts in Australia' (2010) 4(2) *Journal of Equity* 98, 109.

54 (1990) 169 CLR 540. Also known as 'the rule in *Re Rose*'.

55 *Chang v Registrar of Titles* (1976) 137 CLR 177.

56 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9; *Holroyd v Marshall* (1862) 10 HLC 191; 11 ER 999.

57 *Birmingham v Renfrew* (1937) 57 CLR 666.

58 It is of course *theoretically* possible to analyse these constructive trust doctrines as being consistent with some discretion to deny their imposition where third-party considerations are in play. However, *in practice*, there has never been a single instance where Australian courts have withheld these constructive trusts on that basis. Legal theory should always march alongside practical reality: *Blackburn v Attorney-General* [1971] 2 All ER 1380, 1382 (Denning LJ).

59 *Parsons v McBain* (2001) 109 FCR 120.

60 *Black v S Freedman & Co* (1910) 12 CLR 105.

61 *Wambo Coal Pty Ltd v Ariff* (2007) 25 ACLC 809.

trust or a third party (creditor, legatee, or the like) ought to succeed. It is difficult to see why the state of the law ought to be any different in this regard in relation to proprietary estoppel.

B Problems on the Facts

In *Giumelli*, A's expectation was not enforced in specie, apparently because the interest of third parties was a relevant consideration in that case. But a closer examination of the facts does not support that conclusion.

To make this point, it is necessary to revisit the facts of that case in greater detail.

B1 and B2 had promised in 1981 to effectuate a transfer of the 'Promised Lot', an undivided portion of the Dwellingup property which they owned, to A, a promise upon which A had detrimentally relied. A moved out of the property in May 1985, when B1 and B2 reneged on their promise. More than 10 years prior, members of the family had formed a partnership to develop a different piece of land as an orchard. Although the partnership did not own Dwellingup, improvement work was done on Dwellingup in 1973 which was charged to the partnership. After A left Dwellingup, his brother, Steven, got married and lived with his family on the Promised Lot, making improvements to it. In 1986, A instituted a partnership action, to which Steven was a party, seeking (among other things) a declaration that the partnership was entitled to a charge over Dwellingup to the extent of the value of improvements made on it.

The Supreme Court of Western Australia decided that it was appropriate to enforce A's expectations in specie by way of a constructive trust.[62] But the High Court held that 'all the circumstances of the case' pointed towards a monetary award instead. These were: '[T]he still pending partnership action, the improvements to the promised lot by family members other than [A], both before and after his residency there, the breakdown in family relationships and the continued residence on the promised lot of Steven and his family'.[63]

Five observations need to be made concerning these 'circumstances of the case', which indicate that third-party considerations were not at play in the case, contrary to the High Court's own view.

First, the relevant 'breakdown in family relationships' was that between A and his parents, B1 and B2. This factor does not bring into play any consideration of third-party interests and is therefore consistent with the aim of proprietary estoppel.[64]

Secondly, it appears from the judgment that Steven and his family were mere volunteers in relation to the Promised Lot: they were neither purchasers of the legal title, nor is there any indication that they had any equitable interest (or, at any rate, one taking priority over A's) in the Lot. It is difficult to see how their position was any better than the hospital's in *McNab*, B's de facto partner's in *De Blac*, or the contracting parties' in *Mould*.

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62 *Giumelli* (1999) 196 CLR 101, 111–12 [2] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

63 Ibid 125 [49] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

64 But see above n 36.

Thirdly, it is unclear why the improvements undertaken in 1973 had anything to do with the exercise of the court's remedial discretion. Dwellingup was never partnership property, and so the improvements of Dwellingup which were charged to the partnership were simply expenditures. Expenditures, as opposed to investments, are, of course, generally netted off against gains in the account books; they certainly do not give rise to any proprietary right or other equity.

Fourthly, by parity of reasoning, the improvements *Steven* undertook on the Promised Lot ought likewise to have been written off as expenditures, unless there was any good reason for reaching a different conclusion. It is clear that the improvements alone did not somehow give Steven an equity in the Lot. And even if it did, A's interest was 'first in time': 'If the merits are equal, priority in the time of creation is considered to give the better equity'.[65] In any event, nothing prevented the court from making a constructive trust award conditional upon A repaying Steven for his outlay, on the basis that A should not be unjustly enriched by the value of the improvements at B's expense.

Fifthly, even if the partnership action eventually succeeded and the partnership obtained a charge over the Dwellingup property (which would have included the Promised Lot), this would not have caused hardship to any third party; to the contrary, it would have been prejudicial *to A*, since the charge would have taken priority over any interest A obtained in the Promised Lot by way of proprietary estoppel. Note, in this regard, that the improvements done to Dwellingup at the partnership's expense were carried out in 1973, years before the relevant promise was made by B1 and B2 to A (in 1981) upon which A's proprietary estoppel claim succeeded.

In sum, despite suggesting that third-party considerations are relevant to the exercise of remedial discretion, the High Court in *Giumelli* did not itself exercise that jurisdiction – or, at any rate, exercise it *properly* – on the facts of the case.

III DISCRETION AND REMEDIES

The decision in *Giumelli*, as a High Court decision, clearly has the force of authority. Thus, its misgivings aside, a wider question warrants asking: is there any legitimate means by which Australian courts can take into account factors extraneous to *inter partes* considerations, such as the interest of third parties, in exercising remedial discretion?

In order to arrive at a satisfactory answer, it is necessary to address an analytical proposition concerning the relationship between private law remedies and discretion. This topic provides fertile ground for extensive discussion, which has been comprehensively undertaken elsewhere.[66] But it is necessary to address this point, however briefly, in order to advance the discussion in this article.

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65 *Mould v Canale* [2017] VSC 793 ('*Mould*').

66 See, eg, Zakrzewski (n 6); Liew, *Rationalising Constructive Trusts* (n 2) chs 2, 7. For an overview of other analyses: see Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 1, 18–21.

A remedy is an order of the court.[67] A helpful framework for understanding the interplay between remedies and discretion can be found in an analysis of remedies vis-a-vis the pre-trial, substantive (primary or secondary) rights to which they relate. Such an analysis reveals three distinct types of remedies.[68]

The first can be labelled 'replicative' remedies. These give effect to primary rights. Primary rights are those which exist 'in and per se':[69] A has a primary right against B if that right arises from events other than a wrong; its existence does not hinge on B committing a breach of a duty. A replicative remedy simply restates the content of A's primary right (hence the term 'replicative'). There is no room for judges to exercise any discretion as to the goal or content of the remedy: the fact that the law deems A's primary right as worthy of being enforced *per se* negates the need for courts to exercise discretion as to the goal of the awarded remedy; and the content of such a remedy is determined by direct reference to the parties' rights and duties which make up their legal relationship. For example, an order that a trustee restores to the trust fund trust property of which the trustee has taken possession is replicative in nature: the court order simply restates and enforces the beneficiary's primary right to the property as revealed in the trust instrument. A's right arises from certain pre-trial, non-wrong events, and the court's role in awarding the remedy is purely declaratory.

The second can be labelled 'reflective' remedies. These give effect to secondary rights. Secondary rights 'arise out of violations of primary rights':[70] when B breaches a primary duty, A obtains a secondary right against B to have the consequences of B's breach corrected. A reflective remedy allows the exercise of discretion as to the content of the awarded remedy: courts may determine the extent or type of remedy awarded, taking into account (for example) issues of causation and remoteness. But that content-related discretion is not a discretion at large: it is exercised with a view to giving effect to A's secondary rights (hence the term 'reflective'). Thus, it is exercised with reference to a remedial goal determined by 'the reasons for the primary obligation that was not performed when its performance was due'.[71] For example, pursuant to a compensatory goal, equitable compensation may be awarded where a trustee's negligent investment of trust property causes loss to the trust fund; and the court has discretion to determine the content (ie, quantum) of the award. To the extent that A's secondary right arises from the pre-trial event of B's breach of a duty, it can be said that A's right to the remedy arises before the court order; however, the precise content of A's remedy remains at large until judgment is handed down.

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67 Zakrzewski (n 6) 17.

68 See generally, Ying Khai Liew, 'Reanalysing Institutional and Remedial Constructive Trusts' (2016) 75(3) *Cambridge Law Journal* 528, 533–7; Liew, *Rationalising Constructive Trusts* (n 2) ch 2.

69 John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (John Murray, 5th ed, 1885) 762 (emphasis omitted).

70 Ibid.

71 John Gardner, 'What Is Tort Law for? Part 1: The Place of Corrective Justice' (2011) 30(1) *Law and Philosophy* 1, 33.

The third can be labelled 'transformative' remedies. These do not relate to A's pre-trial rights in the same way as the foregoing types of remedies do; instead, their award creates 'a legal relation that significantly differs from any legal relation that existed before the court order was made'.[72] A transformative remedy therefore has little correlation to A's pre-trial rights, and its award has the result of substantially transforming any of A's pre-trial rights (hence the term 'transformative'). These remedies provide for the widest remedial potential, allowing for discretion to be exercised both as to the goal and content of the appropriate remedy. While providing the greatest degree of flexibility, it is often difficult to predict in advance whether a transformative remedy will be awarded in a particular case, and – if it is awarded – what its content will be. A statutory example of a jurisdiction to award transformative remedies can be found in section 183(6) of the *Bankruptcy Act 1966* (Cth). This provides that, where a trustee in bankruptcy has died, his or her administrator may apply to the court for the release of the trustee's estate from any claims arising out of the trustee's administration of the bankrupt's estate, and 'the Court may make such order as it thinks proper in the circumstances'. The administrator does not have a 'right' to any particular remedy in the same way as one does in relation to replicative or reflective remedies; instead, the court's remedial discretion plays a central role in determining the type and extent of A's remedy, taking into account all the circumstances of the case.

IV TWO OPTIONS

There is little doubt that proprietary estoppel does not exist to give effect to A's primary rights; or, to make the same point differently, any remedy awarded pursuant to a successful proprietary estoppel claim does not replicate A's primary right.

This is clearly indicated by the aim of the doctrine, which is the avoidance of detriment. Detriment 'is that which would flow from the change of position if the assumption were deserted that led to it'.[73] Without a 'desertion' of A's assumption – ie, if B does not *breach* his or her promise or assurance to A – A does not suffer any detriment, and will not have a claim in proprietary estoppel since detriment is a key ingredient of the claim.[74] Given that a breach of a

72 Zakrzewski (n 6) 203.

73 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 (Dixon J) cited with approval in relation to equitable estoppel (which includes proprietary estoppel) in *Sidhu* (2014) 251 CLR 505, 528 [80] (French CJ, Kiefel, Bell and Keane JJ).

74 It is sometimes suggested that it is only necessary to show that A *would* suffer detriment *if* B does not fulfil his or her promise: see, eg, Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) 199, 210; McFarlane (n 7) 133 [3.26]. The difficulty with this view is that it would follow that the avoidance of detriment always requires the prevention of B from deserting the assumption he or she induced – ie expectation relief ought invariably to be provided. But it is clear that this is not how proprietary estoppel works, and it is at least clear that where monetary compensation is awarded, B is in effect allowed to breach his or her primary duty, subject to making good any harm the

primary right is a key event for proprietary estoppel to operate, the doctrine clearly does not replicate A's primary right.

Another clear indicator is found in the range of potential remedies available to the courts. Remedial discretion is always exercised on a case-by-case basis to determine whether the aim of the avoidance of detriment requires the provision of expectation relief or something less. The exercise of such discretion is inconsistent with the notion that A has a right *to a particular remedy*, which would be the case if the doctrine replicated A's primary rights.[75]

It is also clear that proprietary estoppel remedies are not *simply* transformative remedies, such that courts have the unbounded freedom to take into account any and all policy goals in determining the remedy. Such an analysis would be inconsistent with the well-accepted goal of proprietary estoppel, which, as discussed earlier, is the avoidance of detriment.

Eliminating the possibility of analysing proprietary estoppel remedies as purely replicative or purely transformative in nature leaves us with two options, which will be labelled the 'reflective/transformative analysis' and the 'purely reflective analysis'. What follows is a consideration of the rationales and reasons for these two options, their analytical and practical consequences, and the potential problems they raise. But before embarking on this discussion, two important points need to be made.

The first is that, thus far, the article has made a deliberate attempt to avoid equating the phrase 'enforcing A's expectation in specie' with the expression 'an award of a proprietary remedy'. This is because the award of a proprietary remedy does not necessarily entail that A's expectation is enforced in specie. For example, the award of a charge or lien on B's land to secure a money award to A is a proprietary remedy, however it may not have been what A had expected to obtain.

But in the discussion which follows, where the language of 'proprietary remedy' is employed, it is deliberate. This is because the exercise of discretion to award proprietary remedies potentially raises a priority issue, whether or not the remedy enforces A's expectation in specie. So, for example, even if obtaining a charge or lien was not what A had expected, the court's decision to award such a remedy might potentially be affected by third-party considerations, for example where a third party obtains a charge over the land in question between the time of B's breach and the date of judgment. Thus, in *Tadrous v Tadrous*,[76] Meagher JA held that, even in the award of an equitable charge or lien, 'it is also relevant to consider whether the relief proposed would impact adversely on other persons'. In short, it is proprietary remedies which are squarely affected by the discussion concerning whether third-party considerations ought to matter.

The second point relates to the common tendency to speak of relief in specie and the award of a constructive trust in coterminous terms. Indeed, in *Giumelli*

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breach may cause. For other reasons for rejecting this 'prospect of detriment' view, see Liew, *Rationalising Constructive Trusts* (n 2) 144, 155.

75 See Liew, *Rationalising Constructive Trusts* (n 2) 145–9 for other reasons why proprietary estoppel does not give effect to A's primary rights.

76 [2012] NSWCA 16, [49] (Meagher JA, Young JA agreeing at [1], Handley AJA agreeing at [61]).

the court was concerned with the discretion involved in the award of constructive trusts. But a moment's thought would reveal that there is no necessary correlation between the two. It may well be possible, for example, for B to have promised to provide – and hence for A to have expected to receive – some monetary recompense secured by a charge on B's land, or a licence in relation to the use of B's land.[77] *Giumelli* tells us nothing about how courts ought to approach these cases: its focus was strictly on what a court should do '[b]efore a constructive trust is imposed'.[78] However, the two options explored below would accommodate these sorts of expectations, because those analyses are not specific to constructive trusts. In short, by speaking of reflective and transformative *remedies*, the analyses are intended to encompass proprietary remedies beyond constructive trusts.

A The Reflective/Transformative Analysis

The first option is to analyse the award of any monetary remedy as a reflective remedy, and any proprietary remedy as a transformative remedy. This approach stays faithful to the two-stage remedial methodology propounded in *Giumelli* and provides the best explanation of what the High Court contemplated in that case.

The reflective/transformative analysis works as follows:

At the first stage, courts are concerned with deciding whether it is disproportionate to award expectation relief to A. This decision is made firmly with the aim of proprietary estoppel in view: the goal is to prevent or avoid A from suffering detriment caused by B's unreliability in relation to assumptions B induced,[79] and the purpose is to determine an outcome which is proportionate to the detriment A suffers. It follows that only factors based on *inter partes* justice arise for consideration in the exercise of that discretion, ie those which inform the court as to the extent to which B (and no other) should be held responsible for the detrimental reliance suffered by A (and no other).

Importantly, whatever the court decides at this stage, it is at least clear that *at a minimum* (ie, if this position is not improved at the second stage) A will obtain a monetary award (or 'equitable compensation'[80]). Analytically, this award is a *reflective* remedy. It responds to A's secondary right which arises when B acts unreliably in relation to the assumptions he or she induces in A; and it is the product of the court's exercise of discretion to determine the *content* of the remedy in order to achieve the goal of avoiding detriment.

A's position may or may not be improved at the second stage of the courts' exercise of remedial discretion. At this stage, the possibility of imposing a proprietary remedy arises. If at the first stage expectation relief was deemed justified, then at the second stage courts have the option of imposing a remedy

77 See, eg, *Parker v Parker* [2003] EWHC 1846 (Ch).

78 (1999) 196 CLR 101.

79 B acts unreliably where he or she does not inform A that B intends to renege on his or her promise before A acts in reliance, or where B fails to perform his or her promise otherwise: see Liew, *Rationalising Constructive Trusts* (n 2) 135–7.

80 *Sidhu* (2014) 251 CLR 505, 511 [2] (French CJ, Kiefel, Bell and Keane JJ).

which enforces A's expectations in specie. Alternatively, if at the first stage expectation relief is held to provide a disproportionate remedy, or if a remedy in specie is denied at the second stage, courts have discretion as to whether to award a charge or lien to secure A's monetary award.[81] Although the High Court in *Giumelli* did not analyse its award of a charge on the facts of the case as a product of the exercise of their second-stage discretion,[82] it is clear that a charge or lien has proprietary effect, and therefore raises the same concerns in principle as a constructive trust – which was in consideration in *Giumelli* – concerning the interest of third parties.[83]

The reasoning underpinning the exercise of discretion at this stage is separate from, and in addition to, that which underpins the first-stage discretion: at the second stage, courts may explicitly rely on factors other than those designed to achieve *inter partes* justice, such as third-party considerations. That is, courts are able to exercise discretion not only as to the content of the remedy awarded but also the goal(s) which that remedy is to achieve. It thus follows that any proprietary remedy which is awarded is transformative in nature.

1 Remedial Constructive Trusts

One upshot of the reflective/transformative analysis is that, where a constructive trust is awarded, it reflects what is presently said to be a 'remedial constructive trust'. A 'remedial constructive trust' does not bear any technical or well-accepted meaning; but some characteristics of that device as it is used in Australia are well-accepted, and these precisely mirror the characteristics of transformative remedies.[84]

For example, the device can potentially be imposed in any case (assuming that the defendant has title to identifiable property over which it can be imposed) and whatever the field of private law involved;[85] and its award has little to do with the plaintiff's pre-existing rights, and instead much to do with the redistribution of property rights to reflect various policy goals which are subject to the courts' discretion. Those potentially relevant policy goals are open-ended, subject only to the proviso that courts do not 'disregard legal and equitable rights and simply do what is fair'.[86] For example, it has been said that remedial constructive trusts can be imposed where it is needed to circumvent conduct which is 'contrary to justice and good conscience',[87] to achieve 'practical

81 Compare, for example, *Petronijevic v Milojkovic* [2014] NSWSC 1337, where a charge was awarded, and *Ryan v Ryan* [2016] TASSC 4, where the court was silent on the point.

82 See above n 21.

83 Thus, for example, the award of a charge or lien was clearly subject to the court's discretion in *Tadrous v Tadrous* [2012] NSWCA 16, [50]–[53] (Meagher JA, Young JA agreeing at [1], Handley AJA agreeing at [61]) and *Quinn v Bryant* (2011) 6 ASTLR 316, 337 [153] (Sackar J) (NSW Supreme Court).

84 See generally Liew, 'Reanalysing Institutional and Remedial Constructive Trusts' (n 68); Liew, *Rationalising Constructive Trusts* (n 2) ch 11.

85 Donovan Waters, 'The Constructive Trust: Two Theses – England and Wales, and Canada' (2010) 8(3) *Trust Quarterly Review* 1.

86 *Muschinski v Dodds* (1985) 160 CLR 583, 594 (Gibbs CJ).

87 *Baumgartner v Baumgartner* (1987) 164 CLR 137, 147 (Mason CJ, Wilson and Deane JJ), quoting *Allen v Snyder* [1977] 2 NSWLR 685, 707 (Mahoney JA).

justice',[88] to protect third-party creditors who are 'materially interested' or 'directly affected' by the award,[89] or to deter the defendant from keeping the proceeds of his or her wrongdoing.[90]

So it is in relation to the reflective/transformative analysis. Where A's expectation is enforced in specie by the award of a constructive trust, the discretion leading to its imposition would have been informed by 'various factors … including the impact upon relevant third parties'.[91] The constructive trust is a 'remedial constructive trust'.

One issue raised by remedial constructive trusts concerns timing. The imposition of a transformative proprietary remedy gives rise to rights which arise for the first time at the date of the court order, since without the court having first decided what goals ought to be achieved (and what content best does so) on the facts of a particular case, A cannot be said to have a *right* to the particular remedy in question. This timing aspect was thought to be a problem in *McNab*.

In that case, Tate JA went to great lengths to deny that constructive trusts awarded by way of proprietary estoppel are 'remedial constructive trusts' which take effect only from the time of the court order.[92] This was motivated by a limitation point which arose in that case. The action was commenced 18 years after B's death, and while section 8 of the *Limitation of Actions Act 1958* (Vic) provides a 15-year limitation period for an action to recover land, section 21(1)(b) provides that no period of limitation applies to an action by a beneficiary 'to recover from the trustee trust property'. By holding that the trust was not remedial in nature, Her Honour was able to allow A to rely on section 21(1)(b), on the basis that the trust 'comes into existence before a court makes any order'.[93]

So, the question to be asked is: can the reflective/transformative analysis achieve a similar outcome to that in *McNab*, in cases where a remedial constructive trust is awarded? It is submitted that it can. In Australia, judges have discretion to decide whether remedial constructive trusts will take effect from the date of judgment or from some other earlier point in time.[94] This indicates that courts have the ability to backdate the effects of a constructive trust 'by virtue of some doctrine of relation back'[95] to the time of B's breach.

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88 *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 403 [505] (Finn, Stone and Perram JJ) ('*Grimaldi*').

89 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 47–8 [136], 48–9 [139] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) ('*John Alexander's Clubs*').

90 *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 21 ACLC 1030, 1043–4 [77] (Mason P, Stein and Giles JJA agreeing at 1044).

91 *Giumelli* (1999) 196 CLR 101.

92 See *McNab* (2017) 53 VR 311, 341–2 [101] (Tate JA, Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]). For a recount of the material facts in *McNab*, see above n 44 and accompanying text.

93 Ibid 342 [102] (Tate JA, Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]).

94 *Muschinski v Dodds* (1985) 160 CLR 583, 615 (Deane J).

95 Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) 1235 [9.2.89]. Such remedial constructive trusts even appear to be caveatable in relation to land: see *Karan v Nicholas* [2019] VSC 35.

Whether or not such backdating occurs is inherently a question for the court, a decision which is to be exercised in line with the factors affecting the court's discretion to impose the trust in the first place. If the justifications for which the remedial constructive trust is imposed would be frustrated unless the trust takes effect from an earlier point in time, then this provides a principled reason for backdating the trust.[96] Thus, in *McNab*, it would have been open to Tate JA to backdate the remedial constructive trust to the date of B's breach on the basis (for example) that it was necessary to ensure that the interpolation of the limitation statute did not hinder A1 and A2 from fully obtaining the benefit of the remedy.

2 Advantages

A significant advantage of adopting the reflective/transformative analysis is that it draws a bright analytical line between factors which relate to *inter partes* justice and those which address other (eg third-party) factors. It does so by incorporating a framework which explains the different types of remedies at play: reflective, where a purely monetary award is made, and transformative, where a proprietary remedy is awarded.

Practically, this encourages – indeed, requires – courts to address these different justifications separately and explicitly. At present, there is a tendency to de-emphasise as being a mere 'secondary qualification'[97] the ability to *deny* the award of a proprietary remedy based on considerations extraneous to *inter partes* justice. There is also a tendency not to provide satisfactory reasons *for the award of* a proprietary remedy, with judges preferring instead to (for example) rely simply on the *nunc pro tunc* maxim[98] or some fictitious element of an intention on B's part to hold the property on trust for A.[99] The reflective/transformative analysis would avoid these tendencies by demanding that the reasons for the award of a proprietary remedy are explicitly justified.

This approach also provides an explanation for why third-party considerations may affect the remedy awarded even though it cannot be squared with the aim of proprietary estoppel: the second-stage discretion, which affects whether or not a transformative proprietary remedy is awarded, is not restricted by the aim of proprietary estoppel, and thus provides courts with the ability to exercise discretion as to the aim or goal of the remedy awarded.

Another advantage of the reflective/transformative analysis is that it avoids a more general and fundamentally damaging misconception that *any* proprietary remedy can be denied by a court if a third party might be prejudiced.[100] Without distinguishing between factors which affect A and B on the one hand and other (eg third-party) factors on the other, it might be thought that the jurisdiction to

96 Hence backdating does not occur 'arbitrarily', as Tate JA suggested in *McNab* (2017) 53 VR 311, 334 [109] (Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]).

97 Ibid 353 [131] (Tate JA, Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]).

98 Ibid 344 [108] (Tate JA, Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]).

99 Ibid 346–9 [114] (Tate JA, Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]).

100 See, eg, ibid 351 [123] (Tate JA, Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]).

deny (for example) a constructive trust is universal.[101] Such an analysis is destabilising.[102] For example, it would be heretical to suggest that constructive trusts arising in the context of the rule in *Corin v Patton*, specifically enforceable contracts of sale, an assignment or declaration of trust of future property, the mutual wills doctrine, the common intention constructive trust, or constructive trusts over stolen money can be denied if there are third parties who may be prejudiced.[103] Indeed, third parties are almost always prejudiced by the imposition of constructive trusts in those situations, but this does not prevent those trusts from arising. The reflective/transformative analysis rightly highlights the fact that constructive trusts arising by way of proprietary estoppel are of a different breed than those arising in those other contexts, because their remedial methodologies are different.

3 Objections

Those advantages notwithstanding, the reflective/transformative analysis might be objected to on three fundamental grounds.

First, because the policy goals which may potentially inform the award of transformative remedies are open-ended, their award is only justified where conditions are fine-tuned. Indeed, this is what later cases have observed about 'the *Giumelli* line of cases':[104] 'proprietary relief can be expected to be given more guardedly'.[105] But this does not square with the frequency in which we find proprietary remedies being awarded by way of proprietary estoppel. Either *Giumelli* was wrong to propound a transformative analysis after all (in which case the 'purely reflective analysis', discussed below, will obtain), or else a vast majority of later cases have been decided *per incuriam*.

Secondly, adopting the reflective/transformative analysis may have the effect of severely curtailing the instances in which proprietary remedies are awarded by way of proprietary estoppel in the future due to the practical requirement of joinder, as required in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*.[106] In that case, the High Court held that, 'where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined'.[107] Such third parties are able not only to make a case against the plaintiff's 'substantive case', but also to argue that the award of a proprietary remedy would unfairly prejudice them.[108] This would mean, for example, that a constructive trust could not have been awarded in *McNab* because the remainderman (the hospital) was not joined as a

101 Mason (n 53) 109.
102 See Liew, *Rationalising Constructive Trusts* (n 2) 253–4.
103 See, on this precise point, *Grimaldi* (2012) 200 FCR 296, 403–4 [504]–[509] (Finn, Stone and Perram JJ).
104 *John Alexander's Clubs* (2010) 241 CLR 1, 45–6 [129].
105 *Grimaldi* (2012) 200 FCR 296, 404 [509] (Finn, Stone and Perram JJ).
106 (2010) 241 CLR 1.
107 Ibid 46 [131].
108 Ibid 46–7 [134].

party to the proceedings. The desirability of developing the law of proprietary estoppel in this direction is, at best, doubtful.

Thirdly, it might be argued that the considerations which inform the award or refusal to award a transformative remedy ought not to be relevant at all in the context of proprietary estoppel because it would potentially hinder the underlying aim of the doctrine, which is to avoid detriment. In the same way that third-party considerations never prevent a constructive trust from arising in many other contexts as discussed above,[109] there seems to be no reason why factors other than those based on *inter partes* justice should affect the determination of what A ought to obtain from B.

B The Purely Reflective Analysis

The alternative is to analyse *any* remedy awarded to A, whether proprietary or personal, as a purely reflective remedy.

Unlike the reflective/transformative analysis which entails a two-stage exercise of discretion, the purely reflective analysis requires the exercise only of one set of discretion. Where A successfully makes out a proprietary estoppel claim, remedial discretion is exercised in order to arrive at an outcome which is proportionate to the detriment A suffers. The remedial options available for this purpose range from a purely monetary award (whether or not secured by a charge or lien) to the enforcement of A's expectations in specie by way of a proprietary remedy.

As Simon Gardner explains, in line with this approach:

> Proprietary estoppel exists to adjust the prevailing balance of property between [A] and [B] when [A] has formed the relevant kind of expectation, and has acted detrimentally in reliance on it, and these occurrences are ascribable to [B] (via his encouragement of or acquiescence in them), so that it would be unconscionable for him to insist on the status quo. It would be inept if this jurisdiction were applicable only to cases in which [A] is precise in his expectation and minutely circumspect in his reliance. The whole point may be that [B] has lulled [A] into an assumption that all will be well, without need for clear particularisation. It is no surprise, therefore, that the law tolerates inexactitude over these matters. To complete its work, this tolerance has to be carried forward into the apparatus for quantifying relief.[110]

Understood in this way, whatever remedy is ultimately imposed is a reflective remedy. The goal of the exercise of remedial discretion is the avoidance of detriment, and at no point is the remedial goal subject to the court's exercise of discretion. This means that only considerations designed to achieve justice *inter partes* are relevant considerations; other factors are precluded. The discretion of the court relates to the *content* of the remedy, in order to ascertain the appropriate type and extent of the award.

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109 See above n 53 and accompanying text.

110 Simon Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122(3) *Law Quarterly Review* 492, 508 (citations omitted).

1 Timing

Where a proprietary remedy is deemed to be an appropriate award, it is clear that it exists for the first time at the date of the court order: A had no prior right to the particular remedy awarded by the court, since its type and extent remained amorphous until liquidated by the court. But this does not mean that the effects of a proprietary remedy will not pre-date the claim.[111]

On the purely reflective analysis, the remedial effect of any proprietary remedy is *invariably* backdated to the time of B's breach. The reason for this is clear. It is impossible to be certain whether a constructive trust arises until a later event (the court order) occurs, since the court has the crucial and exclusive role of weighing up the merits of A's claim in order to determine whether a proprietary remedy is an appropriate award. But, where a constructive trust is deemed appropriate, that decision is based precisely on the need to prevent A from suffering detriment. Such detriment is first suffered at the time B commits a breach of the duty to act reliably in relation to assumptions he or she induces. Hence it is necessary to backdate the effect of the remedy to that point in time. Indeed, if the proprietary remedy only took effect from the date of the court order, then A would likely be left with an unremedied loss between the date of B's breach and the date of judgment.

Furthermore, the decision to award a proprietary remedy *ex hypothesi* indicates that a purely personal monetary award is insufficient. If the effects of the proprietary remedy were not backdated to the time of B's breach, then there is a risk that A's proprietary right may be subordinated to any third party who has a proprietary claim on the property arising between the date of B's breach and the date of judgment. This may leave A in an equivalent or worse position than that which would prevail had a purely personal monetary award been provided.

A question arises whether an alternative explanation is possible – that, from the moment of B's breach, A gains a right to a *proprietary* remedy which enforces his or her expectations in specie, which may be reduced or diminished by the court at the date of judgment according to the nature and extent of A's detriment. If this analysis holds good, then where a proprietary remedy is ultimately awarded, it becomes possible to say that it takes effect from the moment of B's breach without invoking any 'doctrine of relation-back'. For example, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* suggests that

> the relatively recent establishment in Australia of a clear prima facie entitlement to the fulfilment of the relevant assumption or expectation would seem to put in place sufficient certainty for it to be said that the beneficiary of a proprietary estoppel generally has, prima facie at least, some equitable interest in the relevant property without a court first intervening to say it is so.[112]

Similarly, certain cases have suggested that a (proprietary) constructive trust arises automatically from 'the time of the reliance which would render departure

111 Cf *McNab* (2017) 53 VR 311, 313 [3] (Tate JA, Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]).

112 Heydon, Leeming and Turner (n 26) [17-130].

from the fulfilment of the promise unconscionable',[113] the court's role being simply to ascertain, as a matter of pure deduction, whether such an event had occurred in the past in order simply to make a declaration.

This alternative explanation must be rejected. Consider cases where, despite successfully making out a proprietary estoppel claim, A's detriment is not substantial enough to justify expectation relief.[114] It is difficult to see how A can be said to have obtained a *proprietary* right which enforces A's expectation in specie at the time of B's breach, when it is clear that the extent of detriment A suffered would *never* have justified such an outcome.

A related problem is that the alternative explanation assumes that A's reliance is always fully and completely incurred by the time B commits the relevant breach (so that it can be said that A obtains a proprietary right at that time); but we know that this is not necessarily true. For example, in *Secretary Department of Social Security v Agnew*, a father (B) represented to his three sons that his farm was 'yours now'.[115] In reliance, the sons (As) did a number of things, which included improving the land, doubling its capacity, and extending a house on the land.[116] The Full Federal Court held that a constructive trust was an appropriate award, and that it 'arose when, in reliance on [B's] statement that the land was [theirs, As] acted in the manner … described'.[117]

But because As' reliance consisted of a number of acts undertaken across a period of time, the degree of reliance would have increased incrementally throughout that time. So, it would make little sense to say that the constructive trust arose (for example) from the first day those acts of reliance were embarked upon. Had a claim been brought at that time, a court would surely have held that a constructive trust was a disproportionate remedy.[118] But neither is it correct to say that As could not make out a successful proprietary estoppel claim during the early days of incurring reliance, assuming that B had breached his duty to transfer the farm to As 'now'. The incremental nature of As' reliance indicates that it would be misleading to say that a proprietary right arose from the moment of B's breach.

Thus, the correct explanation is as follows: A gains a personal right against B from the moment of B's breach; courts have discretion to award a proprietary remedy; and where a proprietary remedy is awarded, its effect is backdated to the date of B's breach, in order to ensure that A does not suffer any detriment, consistent with the aim of proprietary estoppel.

113 *McNab* (2017) 53 VR 311, 344 [107] (Tate JA, Santamaria JA agreeing at 355 [140], Keogh AJA agreeing at 356 [141]). See also *Varma v Varma* (2010) 6 ASTLR 152; *Secretary, Department of Social Security v Agnew* (2000) 96 FCR 357 ('*Agnew*').

114 See, eg, *Young v Lalic* (2006) 197 FLR 27; *Petronijevic v Milojkovic* [2014] NSWSC 1337; *Ryan v Ryan* [2016] TASSC 4; *Smith v Smith* [2004] NSWSC 557.

115 *Agnew* (2000) 96 FCR 357, 357.

116 Ibid 359 [3] (Drummond, Sundberg and Marshall JJ).

117 Ibid 365–6 [19] (Drummond, Sundberg and Marshall JJ).

118 Cf Heydon, Leeming and Turner (n 26).

2 Advantages

The purely reflective analysis has three distinct advantages over the reflective/transformative analysis.

First, it better highlights the significance of the underlying aim of proprietary estoppel. On the reflective/transformative analysis, A's interest is prima facie protected by an award of equitable compensation. But if a personal remedy is prima facie sufficient to avoid A from suffering detriment, there seems to be no reason why courts should ever consider awarding a proprietary remedy at all. Thus, a better analysis is that any remedy, proprietary or personal, is at the courts' disposal in order to ensure A does not suffer any detriment. Relatedly, the purely reflective analysis better accords with the aim of proprietary estoppel because it recognises that it is only factors which concern *inter partes* justice, and no other, which are relevant to the remedy awarded.

Secondly, the purely reflective analysis avoids the need for courts to exercise discretion as to the timing of a proprietary remedy. It is inevitable that discretion as to timing causes uncertainty and instability. For example, a rule which provides that proprietary estoppel claims are not time-barred *whenever* a constructive trust is awarded better allows parties to plan their actions (eg in deciding whether to bring a claim, whether to settle a claim out of court, etc) as compared to a rule which provides that such plaintiffs *may or may not* rely on that subsection even if a constructive trust is awarded. The latter sort of uncertainty arises on the reflective/transformative analysis, due to the discretion as to timing inherent in the award of 'remedial constructive trusts'. But the difficulty is avoided on the purely reflective analysis, since the proprietary effects of any proprietary remedy are *invariably* backdated to the time of B's breach.

Thirdly, the purely reflective analysis is consistent with the approach to proprietary estoppel taken by English courts.[119] It follows that adopting the purely reflective analysis would align the Australian law of proprietary estoppel closely with English law. The advantage is that, instead of attempting to forge each's path in isolation, courts in both jurisdictions will be able to draw from the rich jurisprudence of the other in the future development of the doctrine.

3 Addressing Potential Objections

It might be thought that a significant drawback of the purely reflective analysis is that it is expressly inconsistent with *Giumelli*, which requires a two-stage approach and demands that the interests of third parties are considered at the second stage. But, as the above investigation has shown,[120] it is not at all obvious that the High Court in fact took third-party considerations into account at all on the facts of that case; and moreover, the interest of third parties have hardly affected the outcome of any proprietary estoppel case since *Giumelli*. It is therefore at least possible for future courts explicitly to hold that *Giumelli* does not in fact require the adoption of the reflective/transformative analysis.

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119 See above n 2 and accompanying text.

120 See Part II(B) above.

But a different sort of objection might be raised, namely that the purely reflective analysis can lead to the imposition of a proprietary remedy which ultimately causes difficulty for third parties.

One example may be where B tells A 'this land will be yours when I die', but at B's death it is discovered that the land is the only property B has, out of which B has made a testamentary provision for his severely disabled (and otherwise unprovided for) daughter (X). In the English case of *Jennings v Rice*,[121] Robert Walker LJ thought that the court could take into account '(to a limited degree) the other claims (legal or moral) on [B] or his or her estate' in framing the relief. It is submitted that the merit of X's (legal or moral) claim has no *direct* impact on the remedy A ought to obtain. *However*, X's interest may be protected indirectly by one of two means, both of which are consistent with the aim of proprietary estoppel. The first is a liberal (but reasonable) interpretation of what B promises A – for example, that B's promise is impliedly subject to certain future contingencies which so personally affect B. The second is through an examination of A's expectations – for example, if A knew, or had reason to know, of X's existence and her potential legal or moral claim against B's land, then it would be *unreasonable* for A to expect B to carry out his promise in specie, *come what may*. But if A's expectation was, in the final analysis, reasonable, and B's promise was, on an objective interpretation, absolute in nature, then it is not at all obvious on what basis the court may withhold from A the remedy A would otherwise have obtained based on factors unrelated to the matter between A and B. To reduce A's award *solely* on the basis of X's interest would be to leave some of A's detriment un-avoided, contrary to the aim of proprietary estoppel.

Other examples of difficulty may be where the award of a proprietary remedy would allow A to insist on subdividing a plot of land over which a third party (X) has an interest, or if X has expended time and money improving land which A would be entitled to by way of a proprietary remedy.

An exhaustive response is not possible, given the necessarily fact-specific nature of the response. However, some important points can be made.

First, B is incapable of transferring to A a greater interest than that which B has. An example of this has been discussed above in relation to *Sidhu*, where if B and X are joint tenants of a piece of land and B promises to subdivide the land and transfer a portion of it to A, a proprietary remedy will not arise if X does not consent to the subdivision.[122] The *reason* for the remedy is not the protection of X, but the inherent limitation or contingency in B's promise.

Secondly, where equities are equal the first in time prevails.[123] Suppose B promises to grant X a licence to occupy B's land, but later B promises to transfer his land to A, A being unaware of X's existence. Suppose further that X and A have both detrimentally relied to such an extent that the enforcement of both their expectations in specie is justified. It would seem that A's expectation of

121 *Jennings v Rice* [2003] 1 P & CR 8.
122 See above n 38 and accompanying text.
123 *Mould* [2017] VSC 793.

obtaining the absolute ownership of B's land would be qualified by an order requiring A to recognise X's licence. The reason for curtailing the enforcement of A's proprietary remedy is not that it would otherwise cause hardship to X, but rather due to the fact that interests in equity are inherently vulnerable to the priority of other equitable interests which arise first in time.

Thirdly, if X has made an improvement on the relevant land, the outcome would depend on the timing and reason for the improvement.

If the improvement is carried out in reliance on B's promise or assurance that X will obtain an interest in the land, then to the extent that a proprietary remedy in X's favour is an appropriate remedy, this will take priority over any remedy A may obtain if X's interest arises 'first in time'.

If X's improvement is not undertaken in reliance on any such promise but pursuant to a contract, for instance where such improvement is carried out at B's request and X is duly remunerated, then of course X has no relevant proprietary interest in the land.

If, however, X's work is voluntarily undertaken, and if there is no evidence that X intended the improvement to be a gift, then a resulting trust may have arisen to the extent that any identifiable value of the work survives in the land. If so, then any proprietary remedy awarded to A would be subject to A repaying X for the surviving value of his outlay. Alternatively, such an award may be justified on the basis that it is necessary to prevent A from being unjustly enriched at X's expense.

In neither of these scenarios is third-party hardship a sufficient reason in itself for denying the award of a proprietary remedy in A's favour.

Fourthly, X may be a volunteer occupant of B's land at the time when A brings a proprietary estoppel claim against B. Even here, the award of a proprietary remedy cannot be denied by reason merely of hardship to X, for X is a mere volunteer with no equity in the land: X is in the same position as one (say, Y) who, for example, obtains the land in question as an object of a testamentary bequest under B's will. Neither X nor Y will be able to resist A's proprietary estoppel claim.

Alternatively, there may have been a delay in A's bringing of the claim against B. In *Nguyen v Condo* where such a delay occurred, it was held that A's equity had diminished over time due to B having worked on the property and borne responsibility for the land's outgoings over a prolonged period.[124] By parity of reasoning, a delay may diminish A's equity by virtue of X's working of the land and being responsible for its outgoings. Again, however, the operative reasoning here is not that X's interests would be prejudiced, particularly if X's actions were voluntary. Rather, the result would obtain as a consequence *of A's delay*, by virtue of the principle that '[r]elief may be refused or reduced if the plaintiff's equity has been diminished by later events'.[125] It would thus be relevant to investigate the effects of A's delay in bringing the claim, rather than

124 *Nguyen v Condo* [2014] QSC 239.
125 *Delaforce* (2010) 78 NSWLR 483, 493 [61] (Handley AJA).

the extent to which X would be prejudiced by the award of a proprietary remedy to A.

Finally, if the land is sold to X who is ignorant of A's equity, then the reason that A will be denied a proprietary remedy is found in the land registration rules, and not because X would be unduly prejudiced.

In sum, although the purely reflective analysis provides for less flexibility than the reflective/transformative analysis, in the sense that the reasons on which courts can rely are confined to those designed to achieve *inter partes* justice, there seems to be no real need for any extra flexibility in the law. In particular, it is unnecessary to exercise discretion in order to protect the interest of third parties when determining the appropriate content of A's remedy, because other formal rules which apply universally to all equitable interests would provide sufficient protection to third parties who require such protection. It is not at all obvious that those who fall outside the ambit of that protection ought to be accorded any special treatment where a proprietary estoppel claim is in question.

V CONCLUSION

Far from injecting clarity into the law, the High Court decision in *Giumelli* raises more questions than it answers. The requirement for judges to take into account 'various factors', in particular 'the impact upon relevant third parties',[126] is difficult to reconcile with the underlying aim of proprietary estoppel accepted by the High Court, which is the avoidance of detriment. These considerations are at tension, since the interest of third parties has nothing to do with the extent to which B ought to be responsible for causing A to suffer detriment due to B acting unreliably in relation to assumptions B induces.

Through a careful understanding of how private law remedies and discretion relate, it becomes clear that there are two options available to Australian courts.

On the one hand is the reflective/transformative analysis, which allows for a wide range of justifications to inform the courts' discretion to award or refusal to award a proprietary remedy. On the other hand is the purely reflective analysis, which provides that the courts' discretion to award any remedy, whether personal or proprietary, is to be exercised consistently with the aim of proprietary estoppel, which is to avoid detriment.

The former option has the appearance of consistency with the High Court judgment in *Giumelli*; but the justification for its adoption is not entirely convincing. Moreover, its adoption suggests that proprietary remedies should be awarded far less frequently in proprietary estoppel claims than at present – a state of affairs which is not obviously desirable. On the other hand, while the latter option has the advantages of remaining consistent with the underlying aim of the doctrine and of accounting for the frequency in which we find proprietary remedies being awarded, its adoption would entail rejecting what has become

126 *Giumelli* (1999) 196 CLR 101, 113–14 [10].

apparently become conventional wisdom, namely the ability to refuse the award of proprietary remedies due to third-party considerations.

With each option having their respective advantages and disadvantages, there may be no one 'right' answer. But what is certainly clear is that to refuse to make a choice would clearly be wrong.