

## PART III – TRUSTS

### I *Express Trusts*

#### A *Definition*

A trust is an ownership structure, developed by courts of equity, which divides legal and beneficial rights to an object of property among two separate entities. The *cestui que trust*, or trustee, is said to hold legal title 'on trust' for the beneficiary, who holds equitable (beneficial) title.

There are several kinds of trusts, which are now considered in turn:

- **Express trust**  
A trust arising by written declaration of the parties;
- **Resulting trust**  
A trust inferred by law from unequal contributions made to a purchase price, subject to contrary presumption or evidence of actual intention as to beneficial ownership;
- **Common intention constructive trust**  
A trust imposed by law to give effect to the expressed common intention of the parties, where it would be equitable fraud to allow a party to resile upon that intention;
- **Unconscionability constructive trust**  
A new species of constructive trust imposed by law regardless of the parties' intentions, where it would be unconscionable not to take account of each party's post-purchase contributions or other conduct.

The express trust most commonly arises in a commercial context because it confers several taxation advantages (the beneficiary under a trust is said not to own the property for taxation purposes, but can still enjoy its benefits, as by occupation or usage). The other kinds of trust are more commonly associated with domestic or familial living arrangements — often arising between spouses, siblings or other cohabitantes.

#### B *Formalities*

For an express trust to be effective in law, the declarer must comply with several formality requirements. The formal requirements for the creation of an express trust are set out in s 53(1) of the *Property Law Act 1958* (Vic) ('PLA'):

#### **Section 53:**

- (1) ...
- (a) no interest in land can be created or disposed of unless in writing and signed by person creating it (or agent);
  - (b) declarations of trust respecting land or any interest therein must be manifested and proved by some writing and signed by the person who is able to declare the trust; and

(c) disposition of existing equitable interest or trust must also be in writing.

However, trusts that are implied by operation of law (constructive trusts) or legal presumptions (resulting trusts) do not need to be formally declared. They are, by the nature, exempt from the writing requirements: *PLA* s 53(2):

### **Section 53:**

(2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.

In the case of express trusts, formality rules remain important. An oral declaration of trust is insufficient to create a trust (*Wratten v Hunter*). In such circumstances, the interest will be unenforceable in equity.

### ***Wratten v Hunter* (1978) NSW SC:**

#### Facts

- The *Conveyancing Act 1919* (NSW) s 23C(1)(b) requires that:
  - Any declaration of trust must be in writing and signed (unless it is a resulting, implied or constructive trust)
- The father, Ambrose, is dying; A transfers land to son (Bertram), who gains legal title
- At A's funeral, B makes following declaration to his siblings whilst clutching the family bible:
  - 'I promise to live in the house and care for the home and property for all of us'

#### Issue

- Do the plaintiff siblings have proprietary interest?
- Can the defendant Bertram plead the *Statute of Frauds*?
  - Because the promise was not in writing, B could rely upon his own conduct to avoid creating the interest

#### Reasoning

- The *Statute of Frauds* cannot be used to cloak a fraud
  - A person cannot point to their own lack of writing (perpetuate a fraud) to shirk obligations undertaken to others
- Plaintiffs argue that the principle in *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206 applies
  - 'it is fraud on the part of a person *to whom land is conveyed as a trustee*, and who knows it was so conveyed, to deny the trust and claim the land himself' (emphasis added)
  - However, here Bertram is the legal owner not the trustee
  - The plaintiffs argue that the principle should be extended to legal transferees
- Needham J: this principle does not apply to Bertram
  - He did not take title as trustee
    - When he accepted the legal title, there was no obligation expressed that he should hold the land on trust
  - He only made a voluntary declaration of trust *subsequently*

- This is an unenforceable promise

Decision

- Bertram can rely upon the *Statute of Frauds*
- No trust was created
- Formalities matter

## B      *Types of Express Trust*

There are three main types of express trusts:

- 1      **Express trusts *inter vivos***  
Trusts arising voluntarily between parties:
  - By transfer; or
  - By declaration;
- 2      **Express testamentary trusts**  
Trusts arising from devolution; and
- 3      **Statutory trusts**  
Trusts arising from legislative instruments.

Trusts are expressly stated to be unregistrable instruments: *Transfer of Land Act 1958* (Vic) s 37 ('TLA'). That is, trusts cannot be registered. However, they can be protected by lodging a caveat under s 89 of the TLA.

The reason for this is that equitable interests such as trusts are informal by nature. They are not susceptible of registration because equitable interests can be created by conduct, without the knowledge of their creators, or imposed by the courts. A 'registry of equitable interests' simply would not function.

The effect of trusts being unregistrable is to make the Torrens register an incomplete record of equitable interests; enquiries must be made by a potential purchaser to clarify the existence of those interests. To some extent this undermines the mirror and curtain objectives, which are said to underlie the Torrens system.

## C      *Statutory Trusts*

Statutory trusts are a sub-category of express trust which is created by legislation. Two examples follow:

***Conservation Trusts Act 1973* (Vic) s 2:**

- (1) There shall be established a body corporate by the name 'Trust for Nature (Victoria)' which shall have perpetual succession and a common seal and shall be capable in law of suing and being sued and of doing and suffering all acts matters and things which bodies corporate may by law do or suffer.

***Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 4:***

- (1) The Minister may, by notice published in the Gazette, establish Aboriginal Land Trusts to hold title to land in the Northern Territory for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission and shall so establish Land Trusts to hold the Crown Land described in Schedule 1.

The statutory trustee is usually a board established by the legislation.

## II Resulting Trusts

### A Trusts Imposed by Equity

The resulting trust is one of three classes of trust imposed by equity. *PLA* s 53(2) confirms that it is an exception to the writing requirement and can therefore arise independently of a written and signed declaration of trust. The circumstances in which a resulting trust will be implied are defined and delimited by a set of presumptions and counter-presumptions developed by courts of equity. These presumptions embody certain normative claims about the nature of familial and other relationships, and reflect assumptions about the nature of ownership and spousal cohabitation.

The primary context in which resulting trusts arise and are contested in litigation is a situation where members of a family together purchase and inhabit property. Legislative reforms affecting the property of people in domestic relationships have increasingly eclipsed equitable principles in this field.

In domestic contexts, for example, the *Family Law Act 1976* (Cth) is likely to apply to distribute assets upon the breakdown of a relationship. Similar legislation now applies to *de facto* relationships. The *Family Law Act* and amendments to various state *Property Law Acts* provide for a separate regime to reallocate property upon the disintegration a marriage or domestic relationship. If a particular relationship falls within the provisions of the legislation then the general legal and equitable principles of property law do not apply. However, where a *de facto* relationship was created and dissolved prior to the introduction of the legislation, or concerns a same sex relationship, the legislation will not apply.

### B The Nature of a Resulting Trust

Resulting trusts are essentially a presumption made by law about the how the parties intended to divide an asset. They arise because of an equitable inference about the intention of the parties drawn from their conduct in contributing to the purchase price of land or other objects of property.

What creates the trust are the circumstances or conduct of the parties at the time at which the purchase price is paid. The trust comes into existence at the moment of payment. The court merely confirms this subsequently, explaining its existence rather than creating it judicially. In this sense, the nature of a resulting trust is institutional and not remedial.

The importance of this temporal component is that, in a priority contest between subsequent unregistered purchasers and the beneficiary under a resulting trust, the beneficiary will generally have a better interest than subsequent claimants. This is because the contest would be between prior and subsequent equitable interests (*Rice v Rice*).

### C Situations Giving Rise to a Resulting Trust

In determining the distribution of beneficial interests in the subject property, a court exercising equitable jurisdiction examines two factors:

- The nature of the transaction; and
- The parties to the transaction.

If the circumstances are such that the person who in fact holds legal title is presumed not to have intended to hold the beneficial interest in the property, then the court will impose a resulting trust in favour of the party or parties who were so intended.

Traditionally, two types of resulting trusts could be imposed:

- **Automatic resulting trust**  
A declaration of an express trust that does not exhaust the interest of the settlor (more property is left over that hasn't been accounted for). Court looks at the conduct of the settlor to determine beneficial ownership; and
- **Presumed resulting trust**  
Where, apparently, there has been a gift to a volunteer (a transfer for no consideration) or transfer of an interest disproportionate to the contribution of the party.

Examples:

- Transfer to land to a volunteer (without consideration);
- Purchase in the name of another (gift); or
- Unequal contributions to the purchase price (looks like a gift of the difference);

The court here looks at the intentions of the parties to determine beneficial ownership.

It is at least arguable that the distinction between automatic and presumed resulting trusts is today fine to the point of insignificance.

#### 1 *Failure to exhaust the equitable interest*

Where a grantor provides for beneficial holdings in property which do not exhaust the grantor's interest, the court must determine how the remainder is to be held and in what proportions. This most commonly arises as a result of a failure to delimit the property across time.

Example:

*Sam is the registered proprietor of 2 Main St. He transfers the fee simple to his cousin, Trevor, to hold on trust for his son, Bob, who has a gambling problem, for life. Bob is thus beneficiary for an equitable life estate.*

In this example, no provision is made in respect of the remainder. Thus, when Bob dies, the life estate has been exhausted and the property reverts to the grantor. (Or was it a gift to Trevor?) In the result, there is property (in time) without an owner. In equity, that property (the equitable fee simple) returns to Sam, the grantor, not Trevor, the trustee.

In general, where it is unclear who should obtain the remaining property, it returns to the settlor.

Other circumstances in which an equitable interest may not be exhausted include situations in which:

- An express trust is invalid or unenforceable owing to formalities or illegality
- An express trust is established for a particular purpose and that purpose fails (*Quistclose trust*)
  - Eg, to pay dividends to shareholders
  - Purpose may fail because of the death of a party or because of some supervening circumstance (eg, bankruptcy of trustee)
- A resulting trust arises from an *ultra vires* contract

- A charitable purpose trust fails
  - This may create a resulting trust in favour of the grantor or the property may otherwise vest in the Crown *bona vacantia* (ownerless goods)
  - Eg, an orphanage
  - Usually money goes to the Crown, not back to the donor

## 2 *Transfer to a volunteer: presumption of advancement*

Example:

*Sam is registered proprietor of No 2 Main Street. He transfers the fee simple to his brother, Ron, who becomes registered proprietor. Ron provides no consideration for the transfer.*

In equity, a voluntary transfer (for no consideration) gives rise to the presumption of a resulting trust in favour of the transferor (or his estate). In the above example, the presumption is therefore that Ron holds on trust for Sam (the transferor, or his estate if he has died). See *House v Caffyn* [1922] VLR 67. Ron holds the registered legal interest as trustee for Sam, the beneficiary.

As trustee, Ron is subject to strict obligations of confidence and cannot deal with the property inconsistently with these obligations.

However, the presumption of resulting trust can be rebutted by:

- Evidence of substantial consideration (eg, if Ron in fact paid Sam for the transfer);
- Evidence of an intention to make a gift (eg, if it was Ron's 21<sup>st</sup> birthday); or
- Contrary presumption of advancement (see below).

The significance of Ron and Sam being brothers relates to the presumption of advancement. This is a presumption that Sam intended to gift the property to Ron because of their relationship to one another. That is, siblings are presumed to be generous to one another and will be deemed to pass gifts of property rather than transfer title on trust for themselves. However, this too can also be rebutted by evidence of actual intention to the contrary (eg, where Sam and Ron were estranged).

## 3 *Transfer to a volunteer: no rebuttal*

If the transferee provides no consideration, he is treated in equity as a volunteer. In the absence of a contrary presumption or actual evidence of contrary intention, such a party will hold on resulting trust for the transferor.

Example:

*X purchases Blackacre and then transfers the land into the name of T (who becomes registered). X makes the purchase, X pays the money. T provides no consideration. T is the owner in law.*

In equity, the result is that a presumption arises that T holds Blackacre on resulting trust for X (the beneficial owner) because X did not intend to make a gift to T.

## 4 *Contributions not reflected on title*

This is one of the more common examples of a resulting trust. In this scenario, two or more parties each contribute funds to the purchase of property, but only one is listed as the registered proprietor (ie, there is no legal co-ownership).

Example:

*A and B contribute money to the purchase price. A only becomes the registered proprietor. In law, A is the legal owner of the land.*

The result in equity, however, is that there will be a tenancy in common in proportion to their contribution to the purchase price. This is because B *has* contributed to the purchase price such as to raise the presumption of a resulting trust. Thus, in equity, there are two beneficial owners (even though only one legal owner exists). There is said to be a tenancy in common in proportion to their contributions.

#### 5 Unequal contributions not reflected on title

Even if all contributors to a purchase are listed on the title, one of those parties may have contributed more than the others. In such a circumstance, the parties are again deemed, in equity, to be tenants in common in proportion to their contributions to the purchase price.

Example:

*A and B purchase Blackacre for \$100 000. A contributes 60% and B contributes 40% of the purchase price. Both are registered as joint tenants (legal owners). In law, a joint tenancy confers equal and undivided shares (ie, on sale the property would be divided in the proportions 50%, 50%).*

In equity, they are deemed tenants in common as to the percentage of their contributions (and the rules of survivorship do not apply). This is because of their differing contributions to the purchase price.

Note that only contributions at the time of purchase are relevant, not subsequent thereto. Thus, repayments, non-financial contributions, and all other subsequent contributions are irrelevant. Even if the contribution to the purchase price is just a bridging loan, courts are still willing to treat this as a contribution because the party has indicated that they are willing to expose themselves to liability for that amount. However, mortgages created after purchase are not considered.

### D Requirements

For a resulting trust to arise by either presumption or automatic operation of equitable principles, several elements must be satisfied. These requirements are described in *Calverley v Green*:

- Unequal contributions to the purchase price not reflected in legal ownership; or
  - Includes undertaking liability pursuant to a mortgage
  - Excludes all subsequent contributions, such as repayments
  - The only relevant conduct is that occurring when the interest came into being
  - Creates a presumption that a resulting trust arises
  - Parties hold in equity as tenants in common in proportion to their contributions
  - May be rebutted by:
    - The presumption of advancement (parties presumed to make a gift); or
    - Actual evidence that the parties intended to hold in a particular way
- Failure to exhaust an equitable interest.

**Calverley v Green (1984) HCA:**Facts

- Calverley, the ex-husband of Green, is the defendant/appellant
- Green, the ex-wife of Calverley, is the plaintiff/respondent
- They were in a relationship for 10 years, during the first part of which they lived in Mount Crichton at a house owned by Calverley
- Calverley sells the house and repays outstanding moneys, leaving him with \$9000
- Calverley then purchases another property for \$27 250 and obtains a loan for \$18 000 (the other \$250 came from his own pocket)
- Financiers want both Calverley and Green to be personally responsible for repayment
- Both names are on the title; Calverley signs the mortgage documents
- Both are registered as owners of the land
- Calverley pays the mortgage for the duration of their cohabitation, plus some small contribution to the domestic upkeep
- In 1978, the relationship terminates

Issue

- Is Calverley entitled to all, 2/3, or half of the estate in equity?

Reasoning'

- For a resulting trust (though not other trusts), G's contributions to domestic tasks are irrelevant
  - Only her undertaking of liability for the mortgage is relevant
  - This is itself a contribution to the purchase price
- Trial judge:
  - C won (order made for G to transfer interest to C in exchange for C releasing her from mortgage repayment obligations)
- Court of Appeal (NSW):
  - Allows G's appeal
  - The parties in law were joint tenants and equity should follow the law
- High Court of Australia:
  - Both parties made direct contributions to the purchase price at the time that the property was purchased
    - Each assumed liability under the mortgage
    - Direct contribution includes undertaking a mortgage obligation
  - Therefore, equitable ownership is in direct proportion to the contributions to the purchase price, as tenants in common
  - Contributions:
    - C: 9 000 old house, 9 000 mortgage
    - G: 9 000 mortgage
    - C argued that signing was a 'mere formality' and that G's being party to the mortgage was not a contribution
    - HCA rejects this argument:
      - If C defaults on payments, mortgagor will go after G
      - Her obligation is not illusory and has real legal obligations
  - But not paying off amounts under the mortgage (this is indirect contribution)
    - Repayments don't count
    - Only contributions to purchase price made *at the time of purchase*
    - All subsequent contributions are irrelevant

- G's contributions to housekeeping irrelevant
- The fact that C alone paid mortgage irrelevant
- Gibbs CJ:
  - Agrees with the majority but adopts a different course of reasoning
  - 'the general rule that in the situations mentioned it is presumed that a resulting trust arises in favour of the purchaser, or in favour of two purchasers in the proportions in which they contributed the purchase money, is subject to the exception created by the presumption of advancement. "It is called a presumption of advancement but it is rather the absence of any reason for assuming that a trust arose or in other words that the equitable right is not at home with the legal title" [*Martin v Martin* at 303]; in other words, it is "no more than a circumstance of evidence which may rebut the presumption of resulting trust" [*Pettitt v Pettitt* at 814]. The presumption arises when a husband makes a purchase in the name of his wife, or a father in the name of his child or other person to whom he stands *in loco parentis*. The authorities have denied that it arises where a wife makes a purchase in the name of her husband (*Mercier v Mercier*), or a mother in the name of her child (*Bennet v Bennet*, *Scott v Pauly*, *Pickens v Metcalf & Marr*)'
  - 'The principle upon which these decisions have been rested is not altogether satisfactory. Lord Eldon said in *Murless v Franklin* [at 280] that the presumption of advancement arises "where the purchaser is under a species of natural obligation to provide for the nominee". ... The principle upon which the presumption of advancement rests does not seem to me to have been convincingly expounded in the earlier authorities, nor do the two presumptions, of a resulting trust and advancement, together always lead to a result which coincides with that which one would expect to occur in ordinary human experience.' (at 597–8)

#### Decision

- Thus, in law, joint tenants 50/50, but in equity, tenants in common in direct proportion to their contributions to the purchase price (1/3 G, 2/3 C)
- So equitable interest is (2/3), (1/3), C:G

## E *Rebutting Presumed Intention*

The conclusion in *Calverley v Green* follows as a result of a presumption as to what the parties intended. However, this presumption is only a *prima facie* view of what the parties intended, and may be rebutted by:

- Evidence of contrary intention;
- The existence of a competing presumption of advancement; or
- Since the presumption of advancement is itself a presumption of intention, it too can be rebutted by evidence of a contrary intention.

### 1 *Contrary intention*

This is the actual subjective intention of the person making the contribution (*Calverley v Green*). Justice Deane gave subjective intention less weight in that case.

Subjective intention may be inferred from a party's words or conduct, or any other evidence as happens to be adduced of the relevant intention at the relevant time. If there is more than one

contributor, a common intention may also be inferred from their joint words and conduct (Mason and Brennan JJ in *Calverley v Green*) or from the intention of each (Gibbs CJ in *Calverley v Green*). However, if there are different intentions (as where the contributors are competing) this cannot be taken as evidence of contrary intention.

Intention must be communicated (it cannot be a wholly subjective state of mind). As with the contributions being considered, the relevant intention must be that held at the time the purchase price is paid (*Calverley v Green*; *Brown v Brown*). Consequently, if a party changes their mind after purchase, this will not affect the content of the resulting trust (though arguably it should).

## 2 Presumption of advancement

Certain classes of relationships create a presumption that the party who paid the purchase price did intend to make a gift of the beneficial interest to the transferee. The category of relationships capable of giving rise to a presumption of advancement is not closed (*Nelson v Nelson*), but traditionally encompasses those in which one party owes an obligation of support to the other (Gibbs CJ and Deane J in *Calverley v Green*).

The effect of a presumption of advancement is to render it more probable that not, in the Court's view, that the beneficial interest was intended to be conferred upon the beneficiary (Gibbs CJ, Mason and Brennan JJ in *Calverley v Green*).

Relationships giving rise to such a presumption include (but are not limited to):

- Father to child (archetypal category)
- Husband/fiancé to wife/fiancée (but not vice versa)
  - Not capable of extension to *de facto* situations (*Calverley v Green*)
    - Mason, Brennan and Deane JJ:
      - There should be no presumption among *de facto* couples because they have explicitly chosen not to bring themselves within the *Family Law Act* by not marrying
      - Instead, they're asserting independent economic control
    - *Contra* Gibbs CJ:
      - *De facto* couples can act like married couples and be together as long or longer than married couples
- Generally, 'stronger' to 'weaker' parties, but not the other way around, as traditionally construed

More recently, the presumption of advancement has also been said to apply to voluntary transfers from a mother to her children (*Brown v Brown*; confirmed by *Nelson v Nelson*).

### ***Brown v Brown* (1993) NSW SC:**

#### Facts

- In 1958, Brown, a widowed mother, contributes 2000 pounds to purchase property
- Her sons put in another 2000 pounds between them to the purchase price
- However, the property is in the name of the sons only
- Brown also has daughters, who also live in the house to begin with
- The daughters move out and she lives with one son before moving into a nursing home
- The house has increased in value substantially by this time
- The mother is frail and cannot give oral evidence

Issue

- Does the presumption of advancement extend to gifts from mother to child?
- Thus, can the sons plead oral advancement?
  - I.e., that she gave them a gift of the house by putting the house in their names
  - In equity, it would thus be 50% mother, 50% between the sons (25% each), in proportion to their contributions to purchase price

Reasoning

- Majority:
  - Prima facie, there *is* a resulting trust
  - The issue is whether the presumption can be rebutted
    - The presumption of advancement can be extended to this situation
    - However, it too can be rebutted by evidence of contrary intention
  - Would Brown have really intended to pass the equitable interest of her entire estate to her sons?
    - In the circumstances, Brown would not intend to deplete her assets in this manner
- Kirby J (dissenting): presumptions are nonsense; if we must have them, apply in a gender neutral way

Decision

- The presumption of advancement should be extended to gifts from mother to child
- However, in the circumstances equity would not presume a moral obligation to care:
  - Brown's sons are adults not children
  - Brown is an aged pensioner
  - Giving her sons the land would mean depleting her remaining money
- Thus, on the facts the presumption is rebutted (because the widow is being deprived of her estate, and adult sons)

The presumption of advancement does not extend to *de facto* relationships (*Calverley v Green* per Mason, Brennan and Deane JJ; *contra* Gibbs CJ).

### 3 *Rebutting the presumption of advancement*

The presumption of advancement is, like the presumption of a resulting trust, just that: a presumption. Consequently, it too may be rebutted by evidence of contrary intention. The issue here is: 'in what circumstances will it be so rebutted?'

#### ***Nelson v Nelson* (1995) HCA:**

Facts

- 1987: Mrs Nelson purchases a Bent St property which was put in the name of her son, Peter, and daughter, Elizabeth (\$145 000)
  - A presumption thus arises of a resulting trust in favour of Nelson, with Peter and Elizabeth as trustees
- 1989: Mrs N purchased another property in Kidman Lane, with the assistance a Defence Services Homes Act loan (because Mrs N was the widow of an officer)
- To qualify for this loan, she signed a declaration that she had no other property
  - However, she had an equitable interest in the other house which was in her

- children's names
    - o She knew she had the equitable interest, so the declaration was fraudulent
- 1990: Bent St has increased in value substantially and is now sold for \$400 000 (the balance after paying interest and loan principal is \$232 509)

#### Issues

- Where should the money go?
  - o Elizabeth says she is beneficially entitled to half the proceeds of the sale
  - o Peter and the mother argue that it should all go to the mother because it was held on trust for her
- How can the mother prove that she had the equitable interest?
  - o Mrs N has to rely upon illegality (signing a false statutory declaration) in order to succeed
- Was there a resulting trust in favour of Mrs Nelson?
- Was it rebutted by the presumption of advancement (mother to child)?
- What are the consequences of the illegal purpose for which the trust was established (wrongfully obtaining the loan assistance)?

#### Reasoning

- There is a resulting trust in favour of Mrs Nelson
  - o Purchase in the name of another
- Presumptions therefore arise and must be dealt with
  - o But Mrs Nelson must return the value of reduction in the interest rate for the (illegally gained) loan when she purchased the second house
  - o Ie, she must make equitable accounting for her ill-gotten gains (return to either the Commonwealth or to Elizabeth)
  - o Equity won't reward her illegality
- The presumption of advancement does apply to mother to child transfers (affirms *Brown v Brown*, upholding majority)
  - o Here, it applies: therefore, Mrs N *prima facie* intends to make a gift to her children of the Bent St property
- However, the presumption of advancement is here rebutted by contrary evidence
  - o Mrs N, in fact, intended to keep the property for herself and merely transferred it into her children's name in order to make it appear she didn't legally own the property
  - o Thus, the second presumption is rebutted by pleading an illegal purpose
  - o Will equity let her rely on her illegal purpose?
    - Yes, she can plead her actual intent (her illegal purpose) even though she has entirely carried it out
  - o This approach differs from *Tinsley v Milligan* — the Court rejects the reasoning in *Milligan*
    - There, the minority said that evidence of illegality could be relied upon if it was only an attempt and had not actually been carried out
    - The majority stated that the plaintiff could recover under a resulting trust only if she did not have to rely upon the illegality to establish the trust or rebut the presumptions
  - o The High Court here departs from *Tinsley v Milligan*
    - Even though Mrs N fully carried out her illegal intent by obtaining the loan and purchasing the property which gave rise to her equitable interest (on which she now relies), she can still rely on the evidence
    - However, she must pay the penalty (repayment)
    - Here, the relevant penalty is repayment (but, luckily for Mrs N not forfeiture of the Kidman Lane property)
      - It is not a consequence of the statutory scheme that she should

- lose her property for a false declaration
  - The policy of the Defence Home loan scheme did not require her to lose her proprietary interest as penalty for fraud
    - The Court looks at the policy reasons behind the loan assistance legislation: supporting widows
  - Should she repay the difference first? Should it be to the Commonwealth or to Elizabeth?
    - Dawson J: it is the Commonwealth's responsibility to seek the money from her, and not her responsibility to repay of her own accord
  - Her illegal purpose can rebut the presumption of advancement

#### Decision

- Presumption of advancement rebutted
- Equitable interest retained by Mrs Nelson, so she should receive the purchase proceeds of \$232 509

In summary, evidence that the party providing the purchase price held a contrary intention at the time of purchase will be sufficient to override the presumption of advancement (or, indeed, any equitable presumption). This is a question of fact (*Calverley v Green*).

However, it would be incorrect to describe the operation of these facts as circumstances used to prevent the presumption operating. What is really happening is that the presumption is arising and being rebutted by those surrounding circumstances (*Nelson v Nelson* per McHugh J).

The operation of these equitable presumptions, and any evidence of contrary intention, effectively shifts the onus of proof back and forth between the purchaser and the party seeking a beneficial interest.

#### 4 *Critique of presumptions*

The policy issue in this area is whether the presumption of advancement is outdated. Certainly, there has been an outpouring of judicial exegesis in recent years on whether the presumptions are unfair or biased (see especially Murphy J in *Calverley v Green*; Kirby J in *Brown v Brown*).

Ultimately, whether the presumptions are unfair or biased depends upon how accurately they approximate the parties' actual intentions. Varying (and increasing) levels of judicial scepticism have been expressed on this point. Some pertinent extracts follow.

Toohy J in *Nelson*:

**[585]** In *Brown v Brown*, Gleeson CJ thought that at the present time the drawing of any rigid distinction between parents "may be accepted to be inappropriate". And Kirby P supported the principle that the presumption of advancement, if it is still to be applied, "must be applied equally to gifts by mothers ... as by fathers".

So long as the presumption of advancement has a part to play, there is no compelling reason for making a distinction between mothers and fathers in relation to their children and every reason, in the present social context, for treating the situations alike.

Mc Hugh J in *Nelson*:

**[600]** When a person (the transferor) transfers property without consideration or purchases property and directs the vendor to transfer the title to another person, equity presumes that the transferee holds the property on a resulting trust for the transferor. The presumption may be rebutted by evidence that the transferee received the property as a gift. A different presumption arises where the relationship between the parties falls into a class where dependency, past, present or future, commonly exists or, at all events, commonly existed in the nineteenth and earlier centuries. If such a relationship exists, the transfer is presumed to be made for the benefit of the transferee although the transferor may rebut the presumption by direct evidence or by inferences drawn from the circumstances. Thus, a transfer of property without consideration by a father to a child [http://au.westlaw.com/mate.lib.unimelb.edu.au/result/documenttext.aspx?origin=Search&cnt=DOC&rs=WLAU5.10&fn=top&query=calverley+v+green&ss=CNT&blinkedcitelist=False&sv=Split&rt=CLID\\_QRYRLT282510&mt=WestlawAustralia&sp=UMelbourne-2003&method=WIN&rp=%2fWelcome%2fWestlawAustralia%2fdefault.wl&db=HCA-CS&vr=2.0&n=2&scxt=WL&cxt=RL&service=Search&eq=Welcome%2fWestlawAustralia&docsample=False&dups=False&rtdb=CLID\\_DB082510&fcl=False-FN;FFN.234](http://au.westlaw.com/mate/lib/unimelb.edu.au/result/documenttext.aspx?origin=Search&cnt=DOC&rs=WLAU5.10&fn=top&query=calverley+v+green&ss=CNT&blinkedcitelist=False&sv=Split&rt=CLID_QRYRLT282510&mt=WestlawAustralia&sp=UMelbourne-2003&method=WIN&rp=%2fWelcome%2fWestlawAustralia%2fdefault.wl&db=HCA-CS&vr=2.0&n=2&scxt=WL&cxt=RL&service=Search&eq=Welcome%2fWestlawAustralia&docsample=False&dups=False&rtdb=CLID_DB082510&fcl=False-FN;FFN.234), a husband to a wife, or an intending husband to an intending **[601]** wife is presumed to be made to advance the interests of the transferee.

Until recently, however, the weight of authority favoured the conclusion that the presumption of advancement did not apply to transfers of property made without consideration by a mother to her child. Sir George Jessel MR once said that the presumption of advancement “arises from the moral obligation to give”. He explained the reason for the distinction between a voluntary transfer by a father to a child and one by a mother to a child as resting on the lack of any moral obligation on the part of “a mother to provide for her child”. This explanation for the distinction must seem strange to most persons living in the late twentieth century, but it accords with the then widely held conception of the role of a wife in a late nineteenth century household and with the then legal rule that, upon marriage, the property of the wife became the property of her husband.

While the presumption of advancement continues to apply to transfers of property between father and child, consistency of doctrine requires that the presumption should also apply to transfers of property by a mother to her child. If the presumption of advancement arises, as Sir George Jessel thought, from the obligation of a father to provide for his child, the mother as well as the father now has a legal obligation to support their child. But independently of any legal obligation of a mother, it would not accord with the reality of society today for the law to presume that only a father has a moral obligation to support or is in a position to advance the interests of a child of the marriage. Consequently, the New South Wales Court of Appeal was right to hold in *Brown v Brown* that the presumption of advancement applied as between mother and child as well as between father and child. The real question is whether the courts should continue to hold that the presumption applies to either parent.’

It might well be asked: ‘are the presumptions still relevant or useful?’ Justice Deane in *Calverley* queried the continued relevance of presumptions but held that they were too well established to be upset by a court. Any change would have to be legislative:

**[265]** This appeal turns upon presumptions of equity. The relevant presumptions are those applicable in determining the beneficial ownership of property which is purchased and transferred into the legal ownership of persons otherwise than in accordance with their respective contributions to the purchase price. Those presumptions evolved in times when a majority of adults laboured under restrictions and disabilities in respect of the ownership and protection of property and when it may have been wrong to assume that the fact that property was caused to be transferred into the legal ownership of a

person without any express qualifying limitation was [266] a *prima facie* indication of an intention that he should own it.

Even in those times however, there was much to be said for the view that, except where they served the same function as a civil onus of proof and operated to resolve a factual contest in circumstances where the relevant evidence was either uninformative or truly equivocal, the worth of those presumptions was at best debatable. In present times, their propriety is open to serious doubt in any case in which they establish as the starting point for resolution of an issue of fact, a presumption ... that a person who causes property to be placed in the legal ownership of another, either solely or jointly with himself, is not thereby evincing an intention that the other should, in a real sense, be the sole or joint owner of it.

The relevant presumptions are, however, too well entrenched as “land-marks” in the law of property ... to be simply discarded by judicial decision. Indeed, the law embodying them has been said in this Court to be so clear that it “can ... no longer be the subject of argument” (*Charles Marshall Pty Ltd v Grimsley*). If they are to be modified to avoid *prima facie* assumptions that a person intends the opposite to that which he does, it must be by legislative intervention which will not disturb past transactions which may conceivably have been structured by reference to them. The present case was resolved in the courts below by reference to one or other of those presumptions as a starting point. It must be so resolved in this Court.’

Murphy J in *Calverley*:

[264] Presumptions arise from common experience: see *Actors Equity v Fontana Films*. If common experience is that when one fact exists, another fact also exists, the law sensibly operates on the basis that if the first is proved, the second is presumed. It is a process of standardized inference. As standards of behaviour alter, so should presumptions, otherwise the rationale for presumptions is lost, and instead of assisting the evaluation of evidence, they may detract from it. There is no justification for maintaining a presumption that if one fact is proved, then another exists, if common experience is to the contrary.

I have reconsidered the law on presumptions of resulting trusts including the case of *Napier v Public Trustee (WA)* (in which I agreed with Aickin J). My conclusion is they are inappropriate to our times, and are opposed to a rational evaluation of property cases arising out of personal relationships.

[265] The general presumption of a resulting trust when the purchaser of property causes it to be transferred to another should be discarded. The presumption that when unequal contributions are made to the purchase of property there is a presumption of a resulting trust in shares proportionate to the contributions should also be discarded.

The presumption of advancement, supposed to be an exception to the presumption of resulting trust, has always been a misuse of the term presumption, and is unnecessary. Transfer of the title of property wholly or partially to another is commonly regarded as of great significance, especially by those in *de facto* relationships. The notion that such a deliberate act raised a presumption of a trust in favour of the transferor, would astonish an ordinary person.

In the absence of those presumptions, the legal title reflects the interests of the parties, unless there are circumstances (not those false presumptions) which displace it in equity. False presumptions which override the registered title are destructive of an orderly Torrens title system and should not be tolerated. The Torrens system permits the

protection of interests by the use of caveats, so that the registered title reflects the true position and prevents the Torrens system becoming as complex as the old system.'

Kirby J in *Brown*:

'[596] a number of decisions in this country have cast doubt upon the continued applicability of the earlier exposition of the presumption as one confined to a gift by a male donor. As long ago as 1917, [597] in *Scott v Pauly* ... Isaacs J ... noted the doubts cast upon the differentiation between gifts by fathers and mothers. He suggested that the distinction might not prove to be a sure foundation for the process of reasoning of a modern court of equity. Instead, he contemplated a different distinction — one based upon the particular relationships of the parties rather than the gender of the donor. In this regard, Isaacs J was beckoning, in my view, towards the position ultimately expressed by Murphy J in *Calverley*.

[598] The remarks of Gibbs CJ in *Calverley* provide a compelling reason for releasing the presumption of advancement from its earlier gender-based discrimination. So long as it survives as a tool of legal reasoning, it should be grounded not in the gender of the parties making and receiving gifts but in the relationship which exists between them. It is from such relationships, in the ordinary experience of human existence, that substantial gifts may be grounded in the presumption of advancement, rather than controlled by the presumption of a resulting trust.

[599] To the extent that such differentiation was earlier justified by the want of any legal obligation on the part of a woman to maintain her children or to make proper provision for them, that distinction has been removed. In such a legal context, to continue the distinction upon the footing of gender is clearly unacceptable. In terms of legal policy the same considerations apply. If presumptions are to be maintained as helpful tools, in the practical task of legal reasoning in disputes of this kind, they must be based upon modern social norms and understandings. They may be freed from the stereotyped notions of the obligations men owed to their wives and children but which women did not owe to their husbands and children. ...

[601] If the view of Murphy J had prevailed in *Calverley*, the appropriate way of resolving the disputed claims of the sons and of the daughters would have been by the application, not of fixed presumptions to the undoubted legal estate in favour of the sons, but by the application of unencumbered reason and logic.'

Mc Hugh J in *Nelson*:

'[602] No doubt in earlier centuries, the practices and modes of thought of the property owning classes made it more probable than not that, when a person transferred property in such circumstances, the transferor did not intend the transferee to have the beneficial as well as the legal interest in the property. But times change. To my mind — and, I think, to the minds of most people — it seems much more likely that, in the absence of an express declaration or special circumstances, the transfer of property without consideration was intended as a gift to the transferee. That being so, there is a strong case for examining whether the presumption of a resulting trust accords with the effect of contemporaneous practices and modes of thought. If that presumption goes, there is no compelling reason for a presumption of advancement in the case of transfers of property by parents to children. Indeed, the presumption of advancement itself may not accord with contemporaneous practices and modes of thought.

A presumption is a useful aid to decision making only when it accurately reflects the probability that a fact or state of affairs exists or has occurred. As Murphy J said in *Calverley v Green* “[p]resumptions arise from common experience ... As standards of behaviour alter, so should presumptions”. If the presumptions do not reflect common experience today, they may defeat the expectations of those who are unaware of them. Nevertheless, as Deane J pointed out in *Calverley*, the presumptions are “too well entrenched as ‘landmarks’ in the law of property ... to be simply discarded by judicial decision”.

Although the operation of the presumptions may sometimes defeat the expectations of transferors and transferees, it may be that many transfers of property have been made on the basis of the presumptions. If evidence was no longer available to confirm that property had been transferred to achieve a result in accord with the presumptions, serious injustice might be done to those who have dealt in the property. In the absence of knowledge as to what effect the abolition of the presumptions would have on existing entitlements, the better course is to leave reform of this branch of the law to the legislature which can, if it thinks fit, abolish or amend the presumptions prospectively.’

### III **Common Intention Constructive Trusts**

#### A *Definition and Equitable Basis*

The basis of the constructive trust is that it would be unconscionable for the person holding the legal title to assert their legal interest to the exclusion of the person claiming the beneficial interest. This is so because of a common intention formed between the parties that the beneficial interest would be held in a certain way.

A common intention constructive trust arises in several circumstances:

- **Uncompleted contract**

Where the doctrine of conversation operates to create equitable interests under a specifically enforceable contract for the sale of land;

- In *Bunny Industries*, although specific performance was not available, a remedy was granted on the basis of constructive trusts (there being a relationship of trustee/beneficiary): account of profits

- **Transfer to a stranger**

However, indefeasibility of title in the Torrens system limits the availability of relief;

- **Fiduciary relationships**

Where a fiduciary relationship exists, a constructive trust will often be imposed upon the fiduciary as trustee, with the effect that the fiduciary cannot act in breach of their obligations.

- Typically arises in the context of trustee–beneficiary, but note also solicitor–client and doctor–patient (*Hospital Products Ltd v United States Surgical Corp*)
- A person in a position of power, trust or confidence, who has special power over the more vulnerable dependent, must use their power only for the weaker party's benefit and not for their own purposes

#### B *Historical View of the Constructive Trust*

The common intention constructive trust was traditionally imposed in certain circumstances regardless of the intention of the parties.

It was said to arise as an institution: that is, the equitable interests were conferred upon the beneficiaries upon the occurrence of the relevant act or acts giving rise to the trust (rather than upon the subsequent granting of a remedy by a court).

Imposing a constructive trust removes any benefit from a fiduciary gained where there may be a conflict of interest.

## C Alternative Rationales

### 1 Unjust enrichment

The rationale for constructive trusts is sometimes said to be unjust enrichment. According to this view, a constructive trust is a remedy imposed to prevent a party being unjustly (inequitably) enriched by their conduct. The constructive trust is thus a remedy and not an institution.

This is not the position in Australia (though it is in the United States and Canada).

The argument has been made that unjust enrichment provides a sounder basis for the imposition of a constructive trust in Australia. However, it is yet to be accepted by a court.

### 2 'Palm tree' justice

Until the early 1970s, United Kingdom courts dispensed so-called 'palm tree justice'. (This phrase is intended to conjure images, however unwholesome, of a benevolent, slightly sunburnt member of the House of Lords sitting among the sands dispensing justice from under the shade of a palm tree.)

However, with *Pettit v Pettit* [1970] AC 777; and *Gissing v Gissing* [1971] AC 886, this approach was conclusively rejected. Property cannot be apportioned on the basis of what courts think is fair. Court cannot shape the parties' relationship in this way. Equity should develop by rules and principles. The relevant rule and principle was, according to *Gissing*, that a trust is

*created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever **the trustee has so conducted himself** that it would be **inequitable** to allow him to deny to the cestui que trust a beneficial interest in the land acquired, and he will be held so to have conducted himself if by his words or conduct he has **induced the cestui que trust to act to his own detriment** in the **reasonable belief** that by so acting he was acquiring a beneficial interest in the land.*

## D Current Test

A constructive trust arises whenever parties to a relationship have a common intention shared about how the property will be apportioned between them, and they act on this basis in detrimental reliance upon the common intention. This test bears similarities to the test of equitable estoppel developed in *Waltons Stores v Maher* (representation and detrimental reliance).

By contrast, an unconscionability style constructive trust will be imposed when it would be unconscionable for one party to assert legal title to property to the exclusion of the other, regardless of the intention of the parties. This typically arises where one party attempts to use their legal title to extinguish a beneficial interest.

For a common intention constructive trust to arise, then, the following elements must be satisfied:

### 1 Common intention

The parties shared a common intention about how beneficial ownership of the property was to be divided; and

**2 Detrimental reliance**

The party claiming the beneficial interest acted to her detriment on the basis of that common intention; such that

**3 Equitable fraud**

It would be equitable fraud (ie, unconscionable) for the legal title holder to deny the interest of the party acting in reliance.

In most cases, equitable fraud will be a natural consequence of the existence of a common intention and detrimental reliance. This is because the alleged trustee usually derives some benefit from the alleged beneficiary's conduct. Courts emphasise this benefit the trustee derived from the beneficiary's reliance, and will often use that benefit to as a basis for finding that it would be inequitable for the trustee to assert their full legal title.

The common intention can arise before or after the acquisition of property (*Ogilvie v Ryan*). The intention may be inferred from the parties' words or conduct. Part performance will commonly be pleaded in conjunction with a constructive trust. Evidence that the alleged trustee derived benefit from the beneficiary's conduct will generally make it inequitable not to recognise her interest.

***Ogilvie v Ryan* (1976) NSW SC:**Facts

- Ogilvie owns a cinema with two units at its rear; Mrs Ryan rents one of the units
- Ogilvie's wife dies, and he subsequently moves in with Mrs Ryan, paying her board to put towards the rent; she was effectively the landlady
- When 77, Ogilvie sells the cinema and associated land
- He suggests to Mrs Ryan that they live together, with her caring for him and entitled to live in the house rent free for the rest of her life
- Mrs Ryan thereby gives up the opportunity to live independently and does not look for another source of income
- Instead, she moves in with Mr Ogilvie in a house purchased by him and in his name
- Two years later, Ogilvie dies, leaving 1000 pounds in a bank account for Mrs Ryan (in the care of his son) but not mentioning Mrs Ryan at all in his will; the property is instead left entirely to his son
- The estate now seeks to evict Mrs Ryan on the basis that the son has a legal claim to the property

Issue

- Is Mrs Ryan entitled to a fee simple life estate?

Reasoning

- Oral agreement and part performance?
  - No, not unequivocally referable (see above): alternative explanation is care and affection (*Maddison v Alderson*)
    - She cared for him as any loving wife might
  - This defeats the oral agreement argument, but it also founds the constructive trust
- Common intention: that Mrs Ryan would be entitled to a life estate
  - There was an express oral agreement (but one could also have been *inferred*) made before the property was purchased
  - The terms of this agreement were that she would live with Ogilvie and care for him and that, in return, he would leave her a life estate

- **Note that the intention could also have been to grant a revocable licence (personal right) only**
- Detrimental reliance
  - Failed to look for a house for herself (at his mercy; loss of a chance to live independently)
  - Cared for him for no wages; labour
- Unconscionable for O to have the benefit of care and affection without rewarding her as he promised
- Basis of the imposition (recognition of the CT):
  - In circumstances of common intention and detrimental reliance thereupon, and O's acceptance of the benefit of that reliance, it would be inequitable to deprive her of benefit of his promise of a life estate once he has had benefit of her reliance on his promise
  - The estate cannot rely upon the *Statute of Frauds* (s 55) to perpetrate a fraud: can't be pleaded because unconscionable
- *Inference* drawn of the agreement from words and conduct
- Here, **the common intention occurred before the property was purchased** — indeed, was the very reason for purchasing the property (otherwise Ogilvie would probably have continued to pay board to Mrs Ryan in her new house)
  - However, the common intention **can arise after purchase**
- Note: what would happen if the son had registered his legal title before she initiated proceedings?
  - Even if he had notice of the prior equitable interest, title would be indefeasible unless there was fraud (ie, registration was dishonest)
  - However, there may be an account of profits available, as in *Bunny Industries*: the estate would have to repay Mrs Ryan's labour

#### Decision

- Part performance of an oral agreement: failed
- Constructive trust based on common intention for Mrs Ryan to hold an equitable life estate: succeeded
- The son holds his legal estate as trustee for Mrs Ryan, who has an equitable life estate

If the beneficial interests are intended to be held upon the meeting of some condition, this condition must be met before a common intention will be held to exist (*Allen v Snyder*). Further, acts of reliance must be made on the basis of the common intention and not independently.

#### ***Allen v Snyder* (1977) NSW SC:**

##### Facts

- Allen and Snyder live together as a couple for a period of about 25 years
- They had originally decided to marry when her divorce was finalised, but never did so, even when the divorce came through
- Their agreement is that the house, which he purchased (in his name), would in 1974 be registered in both their names, when they married
- She convinces him to apply for a loan, one condition for which is that the house must be in his name alone (though they retained their previous understanding)
- He provides in his will that the property should go to her
- They separate, but she continues occupation
- He seeks to evict her, but she claims that she has a half-share

Issue

- Was there a common intention?

Reasoning

- Common intention:
  - There must be an actual, not imputed intention
  - Can be express or inferred as a matter of fact, but must be subjective, on the basis of specific words or deeds
  - Cannot be imputed
    - Cf Mahoney J (dissenting):
      - Good conscience demands that the legal title holder not exploit his legal title
      - (This becomes the basis for the unconscionability style trust)
    - A court will not look at behaviour and deem an intention to be had when it wasn't
  - This intention can arise after the acquisition of property
- On the facts there is no *relevant* common intention
  - Here, the common intention was that she would obtain a half share on marriage
  - But they didn't marry; this condition was not fulfilled
  - Thus, there was no common intention for her to get a half share *until* they married
    - The fact that the property could only be in his name is irrelevant
  - The fact that property was left in his will suggests that he intended for her to get the property when he died
  - But there is no intention now
  - Therefore, no constructive trust
- There was no common intention, but there was still detriment
  - The contribution made by the alleged beneficiary (the detrimental reliance) need not be equivalent in value to the estate that they claim
    - Thus, there doesn't need to be any proportionality between the quantum of an act of reliance and the property gained thereby
    - Just needs to be some reliance which is substantial and made in reliance upon the common intention
    - The beneficial interest is always what the common interest was
- The detrimental behaviour must be in reliance upon the common intention (such that it would be a fraud to deny the beneficial interest)
  - Here, however, her acts of housekeeping are not a sufficient detriment
    - This is because these acts were not done in reliance upon the common intention
    - The acts themselves could have been capable of constituting reliance, but they weren't linked to the common intention
  - She purchased the furniture and it remained her property (she kept it when they separated)
    - She hadn't contributed anything she couldn't take back

Decision

- No, no common intention, because the precondition of marriage was never fulfilled
- She fails; harsh decision?
  - Note the significant extent of reliance
  - It is suggested that circumstances such as these would be better addressed by the more general unconscionability constructive trust, had it existed in 1977

A common intention will also arise when an inference is capable of being drawn from the parties conversations and general circumstances that they wanted to share the acquisition of property (*Hohol v Hohol*). The common intention must induce reliance. Giving up 'the security and comfort' of a home and 'undertaking the new tasks' of co-ownership are sufficient detriments.

### ***Hohol v Hohol* (1981) VR 221:**

#### Facts:

- Hohol and Hohol live together as man and wife for a period of about 19 years
- However, they are not married at common law (despite choosing to share the same surname)
- During this time, Mr Hohol acquires various parcels of land, which are held in his name
- Mrs Hohol performs domestic tasks and raises their four children
- In 1970, the parties separate; Mrs Hohol now brings an action seeking a declaration that she has an equitable interest in two of the properties so acquired
- Applicable statutory provisions
  - *Not* the *Marriage Act 1958* (Vic) s 161(4): statutory presumption of joint tenancy, inapplicable because parties were never married
  - *Not* the *Family Law Act 1976* (Cth): does not apply to their relationship because it was terminated before the Act came into effect
  - Instead, consider general principles of law and equity: *Wirth v Wirth*
- Applicable principles of law and equity
  - Doctrine of constructive trusts
  - General elements required:
    - Common intention (about how the interest will be beneficially owned)
      - Can be express or implied
      - Will usually arise at the time of the transaction
    - Detriment of the beneficiary
    - Fraud (would occur if the trustee could deny the beneficiary's interest)

#### Issue:

- Does a constructive trust exist as a result of a common intention that Mrs Hohol should receive a beneficial interest, such that Mr Hohol holds the property on trust for Mrs Hohol?

#### Reasoning: (O'Bryan J)

- Prior authorities
  - *Gisseng v Gisseng*: if the trust is not created by a signed, written instrument, then the formalities required under the *Transfer of Land Act 1958* (Vic) s 53(1) will not have been satisfied; the only way a trust can then arise is by construction, implication or result of conduct
    - Such a trust is created when the trustee 'has so conducted himself that it would be inequitable to allow him to deny to the *cestui que trust* a beneficial interest in the land acquired'
    - Required elements: conduct by the trustee inducing the alleged beneficiary to act in reliance upon a reasonable belief that by so acting she was acquiring a beneficial interest
    - If spouses make an express agreement about how their interests in a property are to be divided, and then proceed to purchase that property, such an agreement can be given effect
    - However, there must be some form of contribution (whether to the deposit, mortgage repayments, or some other 'material sacrifice' for the

- general family expenditure) by the female; otherwise, the sharing of interests would be a mere donation and unenforceable for want of writing
- A court gives effect to the trust resulting or implied from the common intention expressed in this oral agreement between the spouses
  - *Allen v Snyder*: application of principles to parties who were unmarried
    - Court held that equitable and legal principles of property law were 'equally applicable to the case of unmarried persons'
    - Followed
  - *Eves v Eves*: another application of principles to parties who were unmarried
    - Trust existed in favour of wife because husband lied to her about placing the home in both their names
    - It would be inequitable for the husband to be allowed to deny the claim, so a constructive trust was imputed
    - No common intention was present: the constructive trust was imputed *without* the intention of the parties
      - O'Bryan J rejects this approach
      - It is necessary to find an 'actual common intention at the date when the property was purchased that it should become jointly owned or, at least, that the plaintiff should have a beneficial interest in it'
  - Common intention
    - Evidence is essential to determine the probable intention of each party
      - 'A person's intention can be found or inferred from his or her contemporaneous words and conduct. From a consideration of a person's words and conduct certain inferences may be drawn, having regard to the surrounding circumstances and context in which they were uttered or performed.'
    - O'Bryan J describes the defendant as 'autocratic and authoritarian'; though his Honour accepts Mr Hohol's evidence on financial matters, he prefers that of Mrs Hohol on matters concerning their relationship
    - When Lot 180 was purchased, both parties intended to acquire it as jointly owned property
      - At that time, the Hohols were living in rented accommodation and the property was purchased for the family
      - Mrs Hohol was involved in finding and evaluating the property for purchase
      - The property was described as being 'for all of us, it's for you and for me'
      - The defendant did not deny using these words
    - Relevant matters from which to infer Mr Hohol's intention
      - He and Mrs Hohol were living together in an intimate relationship and raising children
      - Lot 180 was to become the permanent matrimonial home, with the intention of developing it into a profitable farm
      - The defendant's personality explains why the contract was executed in Mr Hohol's name alone; he did not say anything to Mrs Hohol that might evidence an intention not to share the property with her
    - An inference is capable of being drawn from their conversation and general circumstances that the intention of the parties was to share in the acquisition of Lot 180
  - Inducement
    - The words 'it's for all of us, it's for you and for me' were sufficient inducement for Mrs Hohol to join Mr Hohol on the new property

- This was effectively a promise that they would together become the owners of the property
- Detriment
  - Mrs Hohol left the security of a rented home, where she lived in comfort with her children
  - She moved to Lot 180 to live in a garage 'in most primitive circumstances' for several years, whilst having to take care of her family and improve the property
  - Giving up 'the security and comfort' of her old home and 'undertaking the new tasks' constitute a 'real and substantial detriment'
- In light of Mr Hohol's promise and Mrs Hohol's labours, it would be 'a fraud on the plaintiff for the defendant now to deny her part ownership of Lot 180'

Decision:

- Mr Hohol holds the legal estate in Lot 180 upon trust for himself and Mrs Hohol in equal half-shares
  - The improvements made to the house also fall within the common intention of the parties to divide the interests equally
  - The onus is on the defendant to adduce evidence that he should be entitled to a charge upon the trust property to recoup money expended since purchase; Mr Hohol has not discharged this burden
- Mr Hohol must formalise his ex-partner's equitable interest by executing a transfer of the half-share into her name; alternatively, he has the option to pay her for the half-share and retain legal ownership

*Hohol v Hohol* has been subsequently followed by:

- *Hurt v Freeman* [2002] NSWSC 264
- *Greenwood v Greenwood* [2001] VSC 56
- *Rasmussen v Rasmussen* [1995] 1 VR 613
- *Higgins v Wingfield* [1987] VR 689
- *Cooke v Cooke* [1987] VR 625

The common intention can arise after acquisition of the property. If there are multiple intentions, the newest is used. Intentions can be inferred from words or conduct and acquiescence to those words or that conduct (*Rasmussen v Rasmussen*). Detriment must be 'substantial and material', and not just a disappointment.

***Rasmussen v Rasmussen* (1995) Vic SC:**Facts

- Paul and Elizabeth Rasmussen own a farm
- The farm consists of land in several parcels, each a separate allotment, and all registered in P's name (initially)
- They have several children, with whom their parents have an understanding that they would work the land without wages and eventually be given parcels of the farm
- Eventually, two of the sons, Earnest and Billy, remain on farm under this arrangement
- From the 1950s, Earnest left school to build a home on one of the farm blocks and worked the land
  - He didn't have an independent life (his father controlled his bank account)

- He also gave up opportunities for employment or further study
- Paul transfers legal title to the various parcels back and forth (based on his erroneous beliefs about tax law, death duties, etc)
  - The result is that no-one really knows what they own
- Conversations transpire that Billy would receive the northern block of land and Earnest would receive the southern block
  - Some of this land is registered in the name of E, some in the name of B
  - 'Markeys' is the name of a block that E understands to be registered in his name
- In 1973, B dies
  - Instead of leaving land to the two remaining sons, P decides to leave some land to B's son (Peter) and to E's son (Harold) (P's grandsons)
  - Earnest is getting skipped over, and is aware of this
- Harold, the grandson, now worked on the land in partnership with Earnest (his father) for a time, but they fell out at around 1981
  - Harold leaves
  - Earnest still thinks that he owns 'Markeys'
- P told E that land that would have been left to him would instead be left to Elizabeth (Earnest's mother) for life, and then to E's son H
  - There are thus a series of common intentions which change over time
  - Common because everyone engages in conversations about them and acquiesces by words and conduct
- At this time E believes that the 'Markey's' block already in his name
  - In fact it is not
- 1987: P dies, leaving all land to his wife for life (including 'Markey's') and the remainder to Harold
- 1991: Elizabeth dies; the land, including 'Markey's' is transferred into the name of H
  - E asks his son H to transfer the land back to him
  - H refuses, and offers to lease the land to E
  - Eventually, H leases it to a third party, but E puts chains over the gate blocking access
    - Harold has taken legal title but hasn't paid for it
    - He is thus a volunteer
  - E caveats the title (and leaves the chains on the gates so that the lessees cannot get possession)
- H brings a legal action seeking to remove E from the property

Issue

- Does Earnest have an equitable interest in the land?
  - If so, which land?

Reasoning

- Common intention: about the existence of the proprietary interest
  - Actual intention can be inferred from
    - Direct evidence of express communications
    - Direct evidence of admissions by the parties
    - Words and conduct of the parties if there are no express oral declarations
  - However, intention cannot be imputed
  - Timing:
    - The intention can arise at the time of purchase or afterwards
  - Here, various intentions operated over the course of some 40 years
    - The intention changed when P changed the plan
    - By acquiescing, the new common intention is substituted
    - However, everyone thought he had the 'Markey's' block; he succeeds in

this respect

- Detriment
  - The detriment must be suffered by the person claiming the interest
  - That person must have acted to their detriment in reliance on the common intention (*Hohol; Rasmussen*)
    - Cf *Ogilvie*, where the focus was on the benefit given by the relying party to the alleged trustee
    - All that is required is that there is a link between detrimental actions and common intention
  - Detriment must be 'substantial and material'
    - Can't simply be disappointed expectations
    - Can't just be pain and suffering or disappointment
    - Must be material:
      - Actual loss of or forgoing income
      - Physical labour
      - Giving up an independent life or education
  - On the facts:
    - E worked for no wages over a long period of time
    - Paid profits back into the family farm
    - Very clear detriment
    - A clear link between detrimental reliance and the existence of common intention
- Fraud
  - It must be equitable fraud to deny the beneficial interest
  - Here, it would be fraud for H to deny E's interest
  - Is equitable fraud a separate element?
    - Not necessarily
    - Automatically flows from the satisfaction of the first two requirements; see *Rasmussen* and *Hohol*
    - Fraud will usually be present if common intention and detriment have also been made out
    - If there is substantial detriment suffered in reliance on a common intention about beneficial ownership of the property, this is generally sufficient to establish the necessary element of unconscionability (*Higgins v Wingfield*; cited in *Rasmussen*)

#### Decision

- A common intention constructive trust is established on the facts

Detrimental reliance must be upon the common intention. The common intention must itself relate to property not to something more intangible.

### E Summary

- The constructive trust is not confined to familial property situations (although the principles developed in these contexts);
- A trust is declared in accordance with the common intention, so there is no need to calculate the value of contributions and apportion beneficial interests appropriately;
- The constructive trust is institutional: a court is declaring existing proprietary interests, not adjusting or rearranging them. [???

## IV 'New Style' Constructive Trusts

### A Requirements

**Issue:** what if parties do not have a common intention?

For a common intention constructive trust to arise, the parties must actually share a common intention. For the presumption of resulting trust not to be rebutted, there must not be evidence of a contrary intention by the settlor. The express trust requires a mutual declaration of common intention. These kinds of trusts require some form of common intention, albeit manifested in different ways and with different consequences; common to all these forms of trust is the property that courts are not prepared to impute an intention to the parties as to the holding of a beneficial interest.

However, constructive trusts may also be imposed as a remedy on the basis of unconscionability. The imposition of a constructive trust will be justified if it would be unconscionable for the legal owner to deny a beneficial interest to another party. In such circumstances, there is no requirement of common intention.

### B Scope

**Question:** in what circumstances will equity impose a constructive trust, thereby redistributing property among the parties?

#### 1 Doctrinal basis and history

The development of case law has been characterised by increasing flexibility and willingness to award a proprietary remedy.

#### ***Muschinski v Dodds (1985) HCA:***

##### Facts

- Mrs Muschinski and Mr Dodds began living together in 1972; they are not married
- In 1975, they purchase a parcel of land on which to live, and on which to conduct an art and craft business
- They purchase the land, which is then transferred to the man and woman as tenants in common in equal shares
- Mrs Muschinski paid 10/11ths of the purchase price using proceeds from the sale of her old house
- Mr Dodds was supposed to make his financial contribution after his divorce settlement came through (apparently ~\$8000); he was also to perform physical work
- They had the intention to renovate the cottage for arts and crafts and put a prefabricated house on the property as their home, but the council rejected the house construction and Mr Dodds' divorce money was less than expected (only \$3500)
- As a result, the business and personal relationship failed, and in 1980 they separate
- Mrs Muschinski claims that she has the sole beneficial interest in the land as a result of a trust resulting from her payment of the purchase price
  - At first instance: presumption of resulting trust has been rebutted because the

evidence is that she intended Mr Dodds to take immediate beneficial ownership and to perform his obligations later

- On appeal: unsuccessful, presumption still rebutted by actual intention
- She appeals to the High Court of Australia

#### Issue

- Does Mrs Muschinski have a full beneficial interest in the property?

#### Reasoning

- Resulting trust?
  - What was the intention of the parties?
    - Immediate transfer of half-interest to Mr Dodds
    - Therefore presumption of resulting trust rebutted
  - Does the presumption of advancement apply?
    - No: *Calverley v Green* upheld — the presumption does not apply to unmarried couples
- Common intention constructive trust?
  - What was the common intention?
    - That they would both take legal and equitable ownership in equal shares at the time of transfer
    - This is not the result Mrs M seeks
- Unconscionability constructive trust?
  - Would it be unconscionable for the parties to retain their 50/50 shares?
    - Relevant principle
      - ‘...it would be unconscionable (for the purpose of the relevant rules of equity) after the failure of the joint venture between the parties for the man to assert his legal entitlement without recognising the woman’s payment’
      - They each hold their legal title on constructive trust for the other
    - Test for apportionment
      - Beneficial interest is determined by actual contributions of each party to the venture
        - Cf common intention trust: beneficial interest determined by common intention
      - It would be unconscionable for Mr Dodds to rely on his legal title when he has not performed the obligations required of him
    - Unjust enrichment is not the rationale of this constructive trust
      - Court rejects unjust enrichment as a ground for a constructive trust
        - M argued that D had been unjustly enriched
        - HCA: not the law of Australia
    - Time at which the trust arose
      - Court imposed to take effect from the date of the publication of the decision
      - Note discussion about the constructive trust as both an institution and a remedy, bearing features of each: at 623–4
      - If the trust is an institution of law, then it arises by operation of law at the relevant time (like resulting trusts: time of conduct; common intention: time of detrimental reliance)
      - If the trust is a remedy, does it only come into existence when the court declares it to and imposes it? If so, its existence is uncertain (existence unknown until court has declared such) —

- other equitable interests may arise before the litigation is finalised: could the interest be caveated? (see below)
- Deane J: to treat ‘institution’ and ‘remedy’ as dichotomies is unhelpful; whether the constructive trust is an institution or a remedy isn’t possible to determine, because it has elements of both (at 614)
    - Viewed in its modern context, a ‘constructive trust can properly be described as a *remedial institution* which *equity imposes* regardless of actual or presumed agreement or intention ... to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle’ [emphasis added]
    - The rationale is to uphold ‘equitable principle’
      - Cf resulting trusts: courts not prepared to arbitrarily engage in ‘palm tree justice’ — only willing to follow precedent and principle
      - However, here, ‘equitable principle’ refers to established doctrines of equity (eg, *Amadio*, etc), so its imposition is very much based on precedent and principle
    - Note hybrid phrase ‘remedial institution’: a remedy is something which is *imposed* at the time of the court’s judgment, but *institution* is a proprietary relationship arising at the time of the conduct concerned -- this distinction isn’t absolute; more uncertain now, but arguably more flexible
  - Will the Court recognise an interest because it would be unfair not to, or on grounds of unjust enrichment?
    - Deane J (621): No
      - There is no relationship with fairness and justice; the Court rejects ‘idiosyncratic notions of fairness and justice’
      - What is fair and just is relevant to determine whether the conduct should be characterised as ‘unconscionable’
      - However, this doesn’t depend on a judge’s own understanding of fairness
      - Instead, the remedy ‘is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles’ (at 615)
  - On what basis was the trust imposed in *Muschinski*?
    - Both the common law and equity recognise that where money is paid according to a joint relationship, and then the endeavour fails such that no blame can be laid, then the losses should fall in proportion to the parties’ respective contributions
    - By analogy to a failed joint venture, Deane J (at 618):
      - ‘the principle operates in a case where the substratum of a joint relationship or endeavour is removed *without attributable blame* and where the benefit of money or other property contributed *by one party* on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the *other party* [ie, one party has put in more] in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, *equity will not permit* that other party to assert or retain the benefit of the relevant property *to the extent that it would be unconscionable for him so to do.*’
    - The person who gets the windfall of the additional contribution of the other party

can't insist on retaining that contribution if it would be unconscionable to do so

- Gibbs CJ: agreed but on different grounds
  - Agreed with the result (the division of property) but didn't support the reasoning of Deane and Mason JJ
- Brennan and Dawson JJ (dissenting):
  - Mrs Muschinski made a conditional gift: Dodds had a legal and equitable interest at the time of transfer, on condition of contributions, Dodds didn't fulfil the conditions, but M's remedy isn't for D to forfeit his proprietary interest
  - M can pursue D in contract to recover for breach of promise, but not in equity as trustee

#### Decision

- Majority:
  - After payment of jointly incurred debts, title is held in the proportions 10/11 and 1/11 between Mrs M and Mr D, respectively the residue after sale in equal shares
- Three Justices of the Court support this outcome
  - But only two Justices adopted the unconscionability constructive trust reasoning

Because only Deane and Mason JJ supported their conclusions on the basis of a constructive trust, *Muschinski v Dodds* does not stand for the proposition that unconscionability is a basis for imposing such a trust. However, the reasoning in *Muschinski* has subsequently been applied authoritatively in *Baumgartner* to impose a constructive trust on that basis.

### ***Baumgartner v Baumgartner* (1987) HCA:**

#### Facts

- The parties, Mr Francis and Ms Leo, pool their earnings for the purposes of their joint relationship
  - This is not a joint business venture but a personal relationship
  - However, the parties are not married, so the *Family Law Act* does not apply
- They live together for around 4 years in Francis' unit and have a child
- They purchase land with a deposit using Francis' money from the sale of his unit
- A bridging loan is also obtained in Francis' name; slowly, they build a house on the new land
- Legal title is in his name but it was intended to be a joint home
- Mr Francis would not have made the purchase without Ms Leo: she has a say in the decision
  - 'It's for all of us' (similar to *Hoho*)
  - 'The harder I work, the better it will be for us'
  - Discussions took place in front of friends to the effect that there would be no need for both names to be placed on the title
  - 'Francis knows that it's our house after it's built' (suggests that Leo intended it to be held commonly)
- However, there is no common intention
  - The unilateral intention of Mr Francis was to retain legal ownership
- Both parties made substantial contributions
  - They pooled their incomes to pay for living expenses and fixed commitments
  - Proceeds from the sale of the unit were \$12 800; this was contributed by

- Mr Francis for the purchase of the new land
- Repayments were also made by Francis
- Francis also took care of other living expenses (car registration, entertainment)
- However, he paid from the pooled resources (Leo's income was combined with his to pay the bills)
- There are roughly \$88 000 worth of pooled resources (\$50 000 from Mr Francis, \$38 000 from Ms Leo)
- If Leo had not been on maternity leave for 3 months, she would have earned another \$x (Court is considering both financial and non-financial contributions)
- The property is now worth \$67 000
- Eventually, Ms Leo leaves, taking the furniture worth between \$7 000 and \$10 000 (purchased from the pooled fund)
- Mr Francis claims sole ownership of the property
- Ms Leo argues that they intended it to be shared and that ownership should be shared accordingly, or failing that, that it would be unconscionable for Francis to retain sole ownership

#### Issue

- What is Ms Leo's beneficial interest, if any, in the property?

#### Reasoning

- It would be unconscionable for the legal title holder, after his relationship with her had failed, to assert sole ownership of the property to the exclusion of the other party
- Majority (Mason CJ, Wilson and Deane JJ):
  - Note *Allen v Snyder*: possible to impute intention (Mahoney JA)
  - Constructive trust can be imposed regardless of intention: need only be unconscionable for the party to rely on legal title
    - Here, the relevant unconscionability is constituted by Mr Francis' assertion of sole legal and beneficial ownership
  - No common intention about ownership
    - However, their earnings were pooled
    - It would be 'artificial and unreal' to say she made a gift of her contributions
    - Contributions were made for the purpose of maintaining their joint relationship — sharing, not a gift
    - Evidence shows that the land and house were acquired for the purposes of their joint relationship
  - Court examines extent of respective contributions, but does not consider non-financial contributions except for Ms Leo's child maternity leave (but only because it had an associated opportunity cost)
  - Speaks of the desirability of accounting for non-financial contributions, but doesn't actually do that; little guidance is provided on how to value non-financial contributions
  - Axiomatic equitable principle: equity favours equality (starting position is 50%/50%) — unless there is a reason to depart from this
    - Here, contributions were 55%/45% (Francis/Leo) because Francis used funds from the sale of his old property and continued work
    - Leo didn't make other kinds of contributions to offset the disparity between financial contributions (though maternity leave is accounted for)
    - In dollar terms, the proceeds of sale should be divided in the proportions 55% (of \$68 000), 45% (of \$68 000)
    - Further adjustments are made in Francis' favour:
      - Francis' contributions made before and after the period when the parties were living together

- This includes the net proceeds of the sale of the unit that were applied to the purchase of the property, less the amount of payment of instalments under the mortgage over the unit that were paid for from pooled resources
  - Repayment of mortgage instalments since the relationship ended
    - However, this itself must be offset against the use and occupation of the property denied to her during this period
    - She was excluded from a property in which she had an equitable interest
    - She can therefore charge him use and occupation (*quit*) rent, assuming he forced her to leave
      - However, this can be offset against the greater contributions made to the mortgage by Mr Francis during this period
  - The value of furniture now in her possession, which was purchased from pooled funds: Francis should be entitled to recover half of this
    - Final figures: of her 45%, take away \$13 000 for sale of the unit, \$7 000 for furniture, leaving her \$10 600
- Gaudron J:
  - Agrees with the joint judgment regarding the constructive trust, and the orders proposed by the majority
  - Makes the social observation that most homes are acquired by mortgage funds and repayments over time
    - The more money paid back to the bank, the greater equity (investment) the mortgagor has over it
    - An equitable interest is thus acquired over time through pooled resources
  - If the house had been purchased with pooled funds (rather than the mortgage bridging loan and the money from the sale of his unit) then a resulting trust would have arisen in her favour
  - Where equity in a property is acquired by applying money from pooled funds, it would be inequitable for the legal owner to deny the beneficial interest in the other because of that other's contributions to the pooled funds
  - Imposition of a constructive trust is the appropriate remedy to prevent this, because it reflects the social reality of how people acquire property today
  - Still need to make adjustments for equity acquired other than through their joint fund
  - It may be necessary to enquire about non-financial contributions: but doesn't identify examples or explain how to put a dollar value on them

#### Decision

- He held the house on trust for them both in the proportions in which they contributed their earnings to its acquisition (subject to a charge in his favour for contributions to the purchase price)
- The essential difference between unconscionability and resulting trusts is that the Court is here looking not only to contributions at the time of purchase price, but contributions over time
- Likewise, the difference between unconscionability and all other trusts is that the Court pays little if any heed to the actual intentions of the parties
- Majority (Mason CJ, Wilson and Deane JJ):

- Clear authority for the proposition that a constructive trust founded on unconscionability can be awarded as a remedy where parties together contribute to the acquisition and maintenance of a property as a joint endeavour

In summary, it appears that an unconscionability constructive trust will arise when the following conditions are satisfied:

- There is a 'joint endeavour' between the parties
  - May be evidenced by pooled funds, though this is not required
- Contributions are made for the purposes of the joint endeavour, such that it would be 'artificial and unreal' to say that they were a gift
- The land and house were acquired for or occupied pursuant to the purposes of the joint relationship
- It would be unconscionable for the legal owner to deny the beneficial interest of the other party, or it would be unconscionable for them to hold in their legal proportions

In determining the quantum of a beneficial interest, property rights are apportioned proportionate to each party's financial and non-financial contributions:

- Equity favours equality; the starting position is 50/50 shares unless there is a reason to depart from this
- Financial contributions
  - Contributions to purchase price
  - Subsequent repayments
  - Employment
  - Improvements
  - Repairs
  - Maintenance
- Non-financial contributions
  - *Baumgartner*: Ms Leo's child maternity leave is factored into the apportionment
  - Domestic services

## 2 Distinguishing *Baumgartner* and *Muschinski*

According to Chambers, the distinction between *Baumgartner* and *Muschinski* is that the value of the trust in *Muschinski* was calculated on the basis of acquisitions and improvements made to the house, whereas in *Baumgartner*, the focus was on contributions made to the property as a whole. *Baumgartner* suggests that one rationale for the unconscionability style constructive trust is compensation for lost opportunities.

Thus, the value of the trust over the Baumgartners' house was determined not according to contributions to acquisition and improvement, but according to contributions made to the relationship or joint endeavour as a whole. The trust did not restore to Francis an unjust enrichment obtained by Leo at her expense. It was used to reward Francis for the value of contributions she had made to the relationship, whether or not those contributions survived as family assets.

For example, credit for income lost during maternity leave has no connection with the ultimate value of the asset (the house). The trust is therefore designed, in part, to compensate her for her lost opportunities (not restitution for unjust enrichment). This is a compensatory rather than an enrichment-based rationale. See further Chambers 308–9.

## 3 Further examples

Green per Mahoney JA:

[366] It has recently been authoritatively stated that the existence of a constructive trust is to be determined, not on “**vague notions of what is fair**”: *Muschinski v Dodds* (1985) 160 CLR 583 at 608 per Brennan J; or by way of “**the indulgence of idiosyncratic notions of fairness and justice**” (at 615–16 per Deane J); but by the application of the appropriate principles. If the plaintiff’s claim that Kirrawee or Blakehurst was held for her on constructive trust is to be considered according to principle, it is necessary to see precisely what is involved.

Gleeson CJ in *Green v Green*:

[353] the **unifying principle** underlying the cases where such intervention is regarded as appropriate is that in the circumstances of the case, and in accordance with equitable doctrines, it would be **unconscionable** on the part of the person against whom the claim is set up **to refuse to recognise the existence of the equitable interest**: *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 147 per Mason CJ, Wilson and Deane JJ.

Whelan J in *Youssef v Victoria University Of Technology*:

[86] [Deane J: there can be no true dichotomy between the two notions {remedial/institutional}] This is a fortiori in the case of constructive trust where, as has been mentioned, the remedial character remains predominant in that the trust itself either represents, or reflects the availability of, equitable relief in the particular circumstances. Indeed, in this country at least, the constructive trust has not outgrown its formative stages as an equitable remedy and should still be seen as constituting an in personam remedy attaching to property which may be moulded and adjusted to give effect to the application and interplay of equitable principles in the circumstances of the particular case.

[87] There is no doubt that **the constructive trust remedy can and should be adjusted and moulded so as to take account of competing claims and particular circumstances**.

[http://www.lexisnexis.com.mate.lib.unimelb.edu.au/au/legal/frame.do?tokenKey=rsh-23.227646.3923323737&target=results\\_DocumentContent&parent=docview - 32](http://www.lexisnexis.com.mate.lib.unimelb.edu.au/au/legal/frame.do?tokenKey=rsh-23.227646.3923323737&target=results_DocumentContent&parent=docview - 32)

Barrett J in *Brandling v Weir*:

[39] **There was not, in reality, any pooling of assets** by Mr Weir and Mrs Weir after the mortgagee sale of the Matraville property. The Eastlakes property was bought by Mrs Weir alone. ... any pooling or joint endeavour there may have been at an earlier stage had already ended. Mr Weir’s ongoing contribution to living expenses (“... anything else we need to run the house, like the food, electricity and other things”) was referable to his ordinary role as husband and father rather than to any contribution to a pool of wealth or a joint enterprise with respect to property.

Whitlam and Jacobson JJ in *Official Trustee in Bankruptcy v Lopatinsky*:

[130] The principles which underlie the imposition of a constructive trust in equity provide a more flexible approach than the resulting trust in two important respects. First, as Deane J said in *Muschinski v Dodds* (1985) 160 CLR 583 at 614 ; 62 ALR 429 at 451 ; 11 Fam LR 930 at 949 (*Muschinski*), the constructive trust is a remedial institution which is imposed by equity without regard to the actual or presumed intentions of the parties. Second, the relevant events which [30 Fam LR 499 at 519] lead to the finding of an interest may occur after acquisition and beneficial interests may change in the course of the relationship: see *Green v Green* (1989) 17 NSWLR 343 at 355–6 per Gleeson CJ.

[131] The unifying principle under which equity will intervene to declare the existence of a constructive trust over a former matrimonial home is that a constructive trust will be imposed where it would be unconscionable on the part of one of the parties to refuse to recognise the existence of an equitable interest in the other: see *Baumgartner* at CLR 147 ... per Gleeson CJ.

[132] Here, Mrs Lopatinsky had a legal interest in 50% of the proceeds of sale of the Peakhurst property. Can it then be said that a constructive trust ought to be imposed to increase her beneficial interest in the property to 81%?

[133] The principle which underlies the decision of the High Court in *Baumgartner* is that a party is to have restored to him or to her the contributions which he or she has made to a joint endeavour which has failed where the contributions have been made in circumstances in which it was not intended that the other party should enjoy those benefits. Upon the failure of the joint endeavour it would be unconscionable for the other party to retain them; see *Baumgartner* at CLR 148 ... per Deane J.

[137] Here, there was a form of "pooling". It was done out of necessity rather than by way of agreement as in *Baumgartner*. There was pooling of the earnings of Mr and Mrs Lopatinsky for the purpose of meeting the mortgage instalments, first on the Kogarah property and later on the Peakhurst property. However, as we have said, we cannot determine the precise percentage borne by Mrs Lopatinsky in excess of her 50% liability.

[138] We do not see why the payments made as a matter of necessity should leave Mrs Lopatinsky in a different position from a wife or partner who made the payments under an express agreement as in *Baumgartner*. In our view, it would be inconsistent with the principle to which we referred at [129], that is, the restoration of contributions to a failed joint enterprise, to hold otherwise.

Williams JA in *Waterhouse v Power*:

[23] On my reading of the passages in *Muschinski* and *Baumgartner* referred to, the court should, in the first instance, consider the position in law and equity given the actual intention of the parties. The conclusion so derived may then be set aside to the extent that enforcing ownership of the property in that way "would be contrary to equitable principle." That must mean that the position as to ownership reached by considering the relevant conduct, including the agreement between the parties, was a result evidencing "unconscionable conduct" according to general principles of equity. The High Court in the passages referred to was also at pains to point out **that the imposition of a constructive trust did not involve applying "idiosyncratic notions of what is just and fair" but rather traditional principles of equity.**

Jacobson J in *Parianos v Melluish*:

[33] As Gleeson CJ observed in *Green v Green* at NSWLR 353–4; Fam LR 345, the most common case in which a constructive trust has been imposed is where a person for whom the trust is found has, directly or indirectly, made financial contributions toward the cost of acquiring, improving or maintaining the property. In those cases, it would be unconscionable to deny the beneficiary an equitable interest either because the trustee has induced the cestui que trust to act to his or her detriment in the reasonable belief that he or she was acquiring a beneficial interest or, alternatively, because resources have been pooled for a joint relationship which has come to an end.

[55] ... it is plain that a constructive trust ought to be imposed irrespective of any intentions of Mr Parianos in order to give effect to the principle which underlies the decisions in *Muschinski and Baumgartner*.

[56] That is to say, this is a case in which the parties pooled their earnings and their contributions, both financial and non-financial, toward the acquisition and maintenance of the Drummoyne property. They did so to secure the accommodation of themselves and their children. The relationship having come to an end in August 1999, it would be unconscionable to deny to Mrs Parianos the benefit of her contributions made to a failed joint endeavour.

[57] The contributions which Mrs Parianos made were numerous. ... They included the contribution of the inheritance from her uncle and the gift from her mother. They also included the financial and non-financial contributions to the conversion of the rooms in the Drummoyne property to a flat, the housekeeping funds which she provided from her work as a nanny and from the Christmas club account ...

[58] If the case is to be determined under the “pooling” principle, notions of practical equity must prevail: see *Baumgartner* at CLR 150; ALR 85; Fam LR 924 (per Mason CJ, Wilson and Deane JJ). Thus, the maxim that equity favours equality would have to be applied and the Drummoyne property would then be held for Mrs Parianos on a constructive trust as to a one-half share as a tenant in common with the trustee as trustee of the estate of the late Mr Parianos.

Scott J in *Hayes v Grayson*:

[21] In this case, in my view it is plain that the intention of the parties at the time of the purchase of the property was that they should own it equally. The fact that the property was purchased as joint tenants, in my view is consistent with that intention.

[26] In my opinion, the appropriate resolution of this matter is an order that the property be sold and that from the proceeds after payment of the mortgages the plaintiff should be credited with the sum of \$63,937.55 and the defendant should be credited with the sum of \$38,913. Those payments reflect an appropriate accounting balance between the parties. In my view, as the intention of the parties was that they should own the property jointly, the balance of the proceeds (if any), should be divided between the plaintiff and the defendant equally. As I have said, the intention of the parties when the property was purchased was that they should jointly own the land. In my view, they are each equally entitled to the balance of the proceeds, **including any capital appreciation**.

*Ikeuchi v Liu*:

[115] The principle so expressed has been applied in a considerable number of cases including *Kais v Turvey*, *Bertei v Feher* and *Fradd v Blythman*, all of which are cases where payments were made in contemplation of a marriage which failed to proceed.

[117] Because the plaintiff and the first defendant had marriage in contemplation they had the expectation of a permanent relationship. It was the existence of that expectation which provided the background against which the plaintiff, albeit with some other motivations, placed so many of his assets in the name and/or under the control of the first defendant. Both the plaintiff and first defendant had an expectation that the assets would be shared to their mutual benefit throughout the duration of their relationship. With that expectation, the plaintiff proceeded to divest himself of a large part of a considerable fortune established through inheritance and his industry over much of his lifetime.

[118] In these circumstances, the conduct of the first defendant in insisting on sole beneficial interest in the real property, its proceeds and in one half of the moneys in joint accounts and in the monies transferred from joint accounts, is unconscionable and warrants the imposition of a constructive trust.

Young CJ in Eq in *Keogh v Rush*:

[38] It is difficult to see anyone whose conscience was affected by what occurred. Mr Brewer provided the benefaction, both the life tenant and the remaindermen obtained what Mr Brewer devised to them - nothing more, nothing less.

[39] The Master, however, found that although Mrs Tyson knew her rights and was not in any way misled by the appellant or the remaindermen, nonetheless "The executor...and through him the remaindermen, sat by and allowed Mrs Tyson to provide for them about 45% of the value of the property at the date of death of Mr Brewer."

[40] With respect, I cannot see anything unconscionable in sitting back and allowing Mrs Tyson to do what she did. It benefited her as well as the remaindermen, but the remaindermen would have to account in due course for the capital sum outlaid by the life tenant, which, in due course, they did.

Atkinson J in *Swettenham v Wild*:

[31] The correct decision in this case depends on a consideration of the interplay of three equitable doctrines or principles — the presumption of a resulting trust in favour of the person who provided the purchase price; the presumption of advancement in favour of the child who receives property from a parent; and the doctrine of a constructive trust arising where it would be unconscionable for one party to retain the benefit of the equitable as well as the legal interest in the property where the common endeavour between the parties failed without attributable fault.

[32] **The starting point in this case is the legal interest of the respondent in the property subject to the appellant's right to reside.** Where the purchase price is provided by a person other than the person holding the legal interest, there is a presumption of a resulting trust in favour of the person who provided the purchase price. Such a presumption is capable of being rebutted by evidence of intention. Where a party who provides the purchase price intends to confer an immediate legal and beneficial interest on the other party, the presumption of a resulting trust is rebutted. That is what happened in this case.

[36] In *Muschinski v Dodds*, the circumstances were such as to entitle Mrs Muschinski, as the party making the greater contribution, to claim relief by way of the declaration or imposition of a constructive trust. A constructive trust may arise when the common

intention of the parties was based on the expected continuation of the relationship between them and the relationship fails without attributable fault.

[37] It may in such circumstances be inequitable to leave the legal and beneficial interests to fall where they lay at the end of the relationship (at 618):

*Both common law and equity recognize that, where money or other property is paid or applied on the basis of some consensual joint relationship or endeavour which fails without attributable blame, it will often be inappropriate simply to draw a line leaving assets and liabilities to be owned and borne according to where they may prima facie lie, as a matter of law, at the time of the failure.*

[40] That principle has been applied in this Court[14: This reasoning has also been followed and applied in the Court of Appeal in New South Wales in *Green v Green* (1989) 17 NSWLR 343 at 354 per Gleeson CJ; in the Full Court of the Supreme Court of South Australia in *Parij v Parij* (1997) 72 SASR 153 and *Chapman v Chapman* [2000] SASC 195, 29 June 2000 at [25]; and by the Full Court of the Supreme Court of Western Australia in *Lloyd v Tedesco* [2002] WASCA 63; (2002) WAR 360 per Murray and Hasluck JJ.] in *Turner v Dunne* where Pincus JA observed that:

*It is clear from the principal judgment in Baumgartner that a trust may be imposed 'regardless of actual or presumed agreement or intention'.*

[41] The imposition of a constructive trust is not confined to the breakdown in relationship between de facto couples. A constructive trust was imposed in *Bennett v Horgan*<sup>20</sup>. in a case very similar on its facts to this. As Bryson J observed in that case:

*It is a sadly recurring judicial experience to see that family relationships do deteriorate and become intolerable, and that the persons involved did not foresee that this might happen.*

[42] In this case, Mr Swettenham intended that Ms Wild would take the legal title to the property. However in return he was to retain not only a right to reside in the granny flat but also receive the support and comfort of living in a family environment with his daughter and her family as he aged. That was the joint endeavour between them and not, as the learned trial judge held, the conferral by Ms Wild on Mr Swettenham of the right to reside in the granny flat for the rest of his life. That joint endeavour between the parties was to be for their mutual benefit but failed through no attributable fault of either party. Mr Swettenham contributed a large proportion of the purchase price. **In these circumstances it would be unconscionable for Ms Wild to retain the beneficial interest in the whole of the property** subject only to Mr Swettenham's right to reside in the granny flat.

[43] In determining what constitutes unconscionability, **one is not left "at large to indulge random notions of what is fair and just as a matter of abstract morality"**. In this case, as in *Muschinski v Dodds*, **the conduct which has an unconscionable character is the respondent's conduct in seeking to assert and retain the benefit of a legal interest in the property without making any allowance for the fact that the appellant contributed a disproportionate amount of the cost of its purchase**, where, as here, no arrangement had been made between the parties as to what should happen in the unforeseen circumstances of the collapse of the relationship. There is a need to call in aid the principle of equity applicable to preclude the unconscionable assertion of legal rights in this class of case, just as in *Muschinski v Dodds* it was held that "equity requires that the rights and obligations of the parties be adjusted to compensate for the disproportion between their contributions to the purchase and improvement of the ... property."

[44] It follows that a constructive trust should be imposed so that, irrespective of their intentions, the parties should be proportionately repaid their respective contributions to the property acquired during the relationship.

[45] Prima facie, Mr Swettenham is entitled in these circumstances to the proportionate share of the property relative to his capital contribution to the property. Such an order would have given Mr Swettenham his proportionate share of the increase in the value of the property. It had increased in value from \$235,000.00 when it was purchased in 2000 to \$390,000.00 at the time of trial. However, what Mr Swettenham sought on appeal was merely repayment of his original contribution together with a modest rate of interest from the time of the break down of the relationship giving a total sum of \$213,760.00. To this, he is undoubtedly entitled.

Lander J in *Windt v Carabelas*:

### **The Trial Judge's Findings On Joint Endeavour**

[63] The trial judge found that there was no joint endeavour undertaken by the plaintiff and the defendant. In fact he found that the plaintiff was "mainly independent of the defendant."

[64] It must be remembered that the plaintiff had maintained her independence throughout the period until 1984. True it was that the plaintiff asked the defendant to assist to find her accommodation in late 1983 early 1984 but the trial judge was of the view that that did not compromise her independence.

[65] Prior to this time the plaintiff had sought nothing from the defendant by way of financial assistance or otherwise. After finding her the accommodation the relationship continued in much the same vein as it had before. The defendant made some contributions but in the main he left her to subsist on whatever income she could earn, supplemented by whatever entitlements she might receive by way of social security.

[66] The ending of the sexual relationship in 1984 or 1985 is consistent with the plaintiff's independence.

[67] On the trial judge's finding there was no joint endeavour of any kind and therefore, for reasons which I will mention, the plaintiff's claim was bound to fail.

### **The Law**

[69] If the law were simply that a constructive trust could be imposed at any time where a trial judge believed it to be fair and just then this plaintiff would have a much stronger claim, but unfortunately, from her point of view that is not the law.

[70] The law in England and Australia in relation to the imposition of a constructive trust where parties have undertaken a joint endeavour in relation to the acquisition or maintenance or improvement of property has diverged: *Muschinski v Dodds* (1985) 160 CLR 583 per Gibbs CJ at 595 per Deane J at 615.

[83] The [*Baumgartner*] majority, Mason CJ, Wilson and Deane JJ said at 149:

**"In this situation it is proper to regard the arrangement for the pooling of earnings as one which was designed to ensure that their earnings would be expended for the purpose of their joint relationship and for their mutual**

**security and benefit.** To the extent which the pooled funds were the source of payment of mortgage instalments by the appellant, the pooled funds contributed not only to **present accommodation expenses** but also to the **security of the parties' accommodation in the future.** In this context it would be unreal and artificial to say that the respondent intended to make a gift to the appellant of so much of her earnings as were applied in payment of mortgage instalments. There was no evidence which would sustain a finding that the respondent intended to make a gift to the appellant in this way.

The case is accordingly one in which the parties have **pooled their earnings for the purposes of their joint relationship**, one of the purposes of that relationship being **to secure accommodation for themselves and their child.** Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship. In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, **amounts to unconscionable conduct which attracts the intervention of equity** and the imposition of a constructive trust at the suit of the respondent."

[87] In this case the trial judge concluded that there was no joint endeavour. That finding is not attacked and because that finding is allowed to stand the plaintiff's case must fail.

[88] However, even if there had been a joint endeavour of the kind contended by the plaintiff, in my opinion, that would not support a further finding that it would be unconscionable for the defendant to fail to recognise any proprietary interests of the plaintiff in the subject property.

[89] In my opinion, the joint endeavour did not include the purchase, acquisition, maintenance or renovation of the subject property and therefore no proprietary rights attached to the plaintiff which would have made it unconscionable for the defendant to assert that the property was his alone.

[90] In those circumstances, even if the trial judge's finding did not stand, the plaintiff's claim must fail.

[91] **The law in Australia is clear. Proprietary rights between parties are not to be adjusted by reasons of fairness or justice but only by reference to legal and equitable principles.** Whether any personal rights exist, which might be enforceable by the plaintiff against the defendant, again is not a matter for decision in this case, because no personal rights were asserted. The only rights asserted were proprietary rights.

Williams JA in *Swettenham v Wild*:

[8] On appeal it was argued that the Court should impose a constructive trust reflecting the breakdown of the joint endeavour pursuant to which legal title in the property had been transferred to the respondent.

[9] In *Muschinski v Dodds* (1985) 160 CLR 583 Mason and Deane JJ recognised that the court could impose a constructive trust consequent upon the failure of a joint venture between the parties because it was unconscionable for the man to assert his legal entitlement without recognising the considerable financial input from the woman. I agree

with the analysis of that decision made by Atkinson J, but would add the following quote from the judgment of Deane J at 622:

*In circumstances where the parties neither foresaw nor attempted to provide for the double contingency of the premature collapse of both their personal relationship and their commercial venture, it is simply not to the point to say that the parties had framed that overall arrangement without attaching any condition or providing any safeguard specifically to meet the occurrence of that double contingency. As has been seen, the relevant principle operates upon legal entitlement. It is the assertion by Mr Dodds of his legal entitlement in the unforeseen circumstances which arose on the collapse of their relationship and planned venture which lies at the heart of the characterisation of his conduct as unconscionable. Indeed, it is the very absence of any provision for legal defeasance or other specific and effective legal device to meet the particular circumstances which gives rise to the need to call in aid the principle of equity applicable to preclude the unconscionable assertion of legal rights in the particular class of case.*

**[10]** That approach was affirmed by all the members of the High Court in *Baumgartner v Baumgartner* (1987) 164 CLR 137. In their joint judgment Mason CJ, Wilson and Deane JJ based their decision on the proposition that after the relationship had failed in circumstances where the property had been financed in part through the pooled funds of the parties, the man's assertion of entitlement to the exclusion of any interest in the woman was unconscionable conduct which attracted the intervention of equity and the imposition of a constructive trust. Toohey J reasoned that the constructive trust could in the circumstances be based either on unconscionable conduct or on the principle of unjust enrichment.

**[11]** In the present case the conduct of the respondent in asserting an entitlement to the full legal and beneficial ownership of the home to the exclusion of any interest in the appellant is clearly caught by the reasoning in *Muschinski v Dodds* and *Baumgartner v Baumgartner*. Her conduct is clearly unconscionable and in the circumstances equity would intervene and impose a constructive trust. I am also of the view, although it is not necessary in the circumstances to elaborate on the reasoning, that the same conclusion could be reached by relying on the concept of unjust enrichment as it has been developed in a number of recent cases.

**[12]** Here the appellant contributed virtually all of the purchase price of the house in question and that was done against the background of an agreed joint endeavour intended to mutually benefit the parties; the respondent was to get the benefit of ownership of the house and the appellant was to get the benefit of a home in which to reside in a family atmosphere and receive comfort and care from the respondent. The formal arrangement between the parties did not make provision for what would happen if that joint endeavour failed.

**[13]** In the circumstances of this case the constructive trust which the Court imposes should be based on the contributions to the acquisition of the property made by each of the parties.

#### 4 Further developments

*Baumgartner* was soon after applied in *Hibberson v George*. According to *Hibberson*, a strict pooling of resources is unnecessary. It will be sufficient if, by mutual arrangement, money is spent by either party for the purposes of their joint relationship, and such contributions enable the alleged trustee to increase his own assets. It is also confirmed that non-financial contributions

must be accounted for, and that a consequential (enrichment-based) approach to apportionment may be desirable. This represents a widening of the *Baumgartner* style constructive trust.

**Hibberson v George (1989) NSW SC:**Facts

- A house is owned by a Mr George, who lives with a Ms Hibberson
- George has no intention that she should have a beneficial interest
- Ms Hibberson and Mr George cohabit for around nine years; they never marry
- George makes clear that he has no intention of conferring a beneficial interest to Hibberson — the house is for him alone
- George takes out a mortgage of \$24 000 and pays the balance of the purchase price himself
- However, Hibberson spent most of her earnings on improvements to house, contents and care of family, including children; she also spent her savings on decorations and structural repairs; she has improved the value of Hibberson's physical asset
  - She also ceased work in order to care for his mother
- There is a disparity of resources: Hibberson had \$2000 savings, George had \$15 000
- There is no pooling of resources: the parties maintained separate accounts and finances
- He was relieved of those expenses for which he would otherwise would have been responsible which enabled him to increase his own assets as a result of her contributions
- Eventually, she leaves George, and places a caveat over the title
  - This means that any new legal owner of the land won't be able to register title until she has been notified and had time to bring litigation
  - She is effectively claiming an equitable interest
- She claims:
  - A beneficial interest in property; as a result of
  - Money she paid to improve the property; and that
  - The Court should consider her non-financial contributions

Issues

- Must there be pooling of resources?
- Does Hibberson have a beneficial interest in the property on the basis of the money she paid to improve it?

Reasoning

- McHugh JA:
  - 'It is not necessary that there should be a physical pooling'
  - 'It is probably enough that by mutual agreement the parties have each spent moneys for the purpose of their joint relationship knowing that part of it was to be spent in financing the purchase of the home'
  - Needs to be a mutual understanding that parties contribute jointly to the relationship
  - Following *Baumgartner*:
    - No actual pooling of funds; but he was relieved of those expenses for which he would otherwise would have been responsible; this enabled him to increase his own assets as a result of her contributions
    - It was thus possible for George to increase his equity in the land because of Hibberson's provision of childcare services and domestic moneys
    - By mutual arrangement (not physical pooling of money) the money was spent for the purposes of a joint relationship
    - Actual intention that house in his name; also a mutual intention that it was a home for them as a family
    - Her work and expenditure was intended to and did improve value of asset owned by him
  - In these circumstances, it would be unconscionable for George to assert sole

- beneficial ownership
    - 'equity must intervene and impose a constructive trust to circumvent the respondent's unconscionable conduct'
  - The terms of the trust are valued at (60:40) in favour of George, with adjustments for other contributions
    - The actual intention of the parties was different from the intention manifested by Hibberson's conduct in making substantial improvements
    - The value of the asset was improved as a result of Hibberson's contributions (enrichment approach)
  - Given these circumstances, it would be unconscionable for George to deny Hibberson's beneficial interest in the property
    - Equity must intervene and impose a constructive trust
- Mahoney JA (dissenting):
  - There was no common intention about the house
  - She spent money on chattels, but she can simply remove them
  - There was no suggestion that he could not afford the purchase price or repayments without her financial assistance (although he may have had less disposable money if she had not used some of her money to pay for household expenses)
  - The fact that resources were not actually pooled is fatal to her claim
  - If there is pooling, the Court should look to actual contributions of each party
  - There is significant difficulty associated with valuing non-financial contributions; notes that the *Baumgartner* Court did not give any guidance here
  - Hibberson cannot have any beneficial interest by way of trust; but she can have an equitable charge on the property to the value of her expenditure on renovations

#### Decision

- Here, there was no contract or shared accounts
- But there was a mutual understanding about how they were to live as a family
- Majority: terms (60:40) with adjustments for other money paid
  - George put in more money: \$10 000 initial contribution
  - Effectively, 'greater financial power' equates to a greater interest in the property
  - What should be the role of their common intention in determining the proportions of the ultimate trust?
  - Hibberson spent money on chattels: she can keep them
  - Also, Hibberson was not the sole reason why George could make the repayments; it might have been easier, but he could have done it anyway
  - Look at the actual contributions of each party
  - Note the difficulty of valuing non-financial contributions
- Minority:
  - Not prepared to create a trust, but a charge is placed on the property in her favour to force George to repay the money spent by Hibberson on the property

#### 5 *Interaction between common intention and unconscionability*

Common intentions are flexible and can change. However, unconscionability is often applicable on the same facts.

For example, *Rasmussen v Rasmussen* shows that both a common intention and new style constructive trust can be relevant to the same situation. Justice Coldrey considered the judgment of Deane J in *Muschinski* but did not apply it to the situation before him. His Honour did not need

to consider the issue of unconscionability because a common intention constructive trust was already made out. However, a *Baumgartner*-style constructive trust would probably have been present, as would estoppel.

In *Ogilvie v Ryan*, it is unclear whether Mrs Ryan would also have succeeded on the basis of an unconscionability style constructive trust. Although it could probably be argued that there was a joint endeavour (cohabitation and mutual care and support), and that the property was acquired for the purposes of this endeavour, and even that Mrs Ryan's non-financial contributions were made pursuant to this endeavour, it is not clear that those contributions afforded any financial advantage to Ogilvie, who was retired.

Thus, unlike *Hibberson v George*, even though there was no pooling of resources, the contributions did not assist with the acquisition of equity or enable Mr Ogilvie to more easily acquire something he wouldn't otherwise have been able to. So although it may well be unconscionable for Ogilvie to deny to Ryan that which he promised her, and on the basis of which she cared for him, it is unclear whether Mrs Ryan's contributions are of a kind able to be directly related back to the joint endeavour upon the financial analysis adopted in *Hibberson*. Even on a more contributory *Baumgartner* analysis, Ryan's care and support, in the absence of any other financial or direct non-financial contributions may be insufficient to establish an unconscionability style constructive trust.

## C Nature of a Beneficial Interest

### 1 Type of interest

The beneficial rights conferred under a constructive trust are equitable proprietary rights. This may be contrasted with an estoppel remedy, for which the consequence is not inevitably proprietary and will depend to some extent on discretionary factors such as 'appropriateness' (see *Giumelli v Giumelli*).

### 2 Moment of creation

For priorities disputes it is critical to know at what moment the constructive trust (and hence the equitable interests of the parties to it) arises in law. The conventional view is that the constructive trust is an institution (so that it arises independently of a court at the time of the relevant conduct or detrimental reliance).

Under the traditional view, a constructive trust arises:

- At the time of detrimental reliance (common intention constructive trust); or
- At the time contributions are made to the joint endeavour (unconscionability constructive trust).

However, the judgment of Deane J in *Muschinski* suggests that the constructive trust also embodies remedial features, being a remedy imposed to ameliorate unconscionable conduct. The trust in *Muschinski* was also imposed prospectively to avoid any burden on third party purchasers who were not aware of the dispute. This suggests that the Court may in its discretion declare the trust to come into effect at some time other than the moment of contribution.

Even so, *Parsons v McBain* [2001] FCA 376 makes clear that a common intention constructive trust does not first come into existence when declared by the court. Instead, it is created at the time of detrimental reliance and formation of the relevant common intention.

In *Parianos v Melluish*, Jacobson J confirms that the same approach may be relevant to an unconscionability constructive trust:

**From when does the constructive trust exist?**

**[59]** In *Parsons v McBain* (2001) 109 FCR 120 ... a Full Court (Black CJ, Kiefel and Finkelstein JJ) held that **a constructive trust does not first come into existence when it is declared by the court**. Their Honours referred to a passage from the judgment of Deane J in *Muschinski* at CLR 614 ... in which his Honour said there does not need to have been a curial declaration or order before equity will recognise the prior existence of a constructive trust.

**[60]** The constructive trust in *Parsons v McBain* was founded upon a common intention. It seems to me that the same approach to the question of when the constructive trust will take effect applies regardless of whether the trust is imposed by reason of an inferred intention or under the pooling principle stated in *Baumgartner*.

## D Apportioning Equitable Interests

Determining the content of an unconscionability constructive trust is arguably harder than determining its existence. Unlike a common intention constructive trust, there is no common intention as to beneficial ownership that may easily be given effect to. Instead, the Court must conduct a forensic exercise, examining and valuing the contributions of each party over (what is often) a very long period, only sparsely populated by evidence and largely disputed by the parties.

To guard against the obvious injustice that would result from contributions being valued incorrectly, equity favours equality unless there is a substantial disparity between the parties' contributions. The onus to establish disparity is on whomever seeks to supplant an alternative measure of the parties' interests (*Baumgartner v Baumgartner*).

Regard may be had for both financial and non-financial contributions (*Baumgartner, Muschinski; Hibberson*). However, it proves exceedingly difficult to value the latter kind. In *Baumgartner*, for example, opportunity costs associated with maternal leave were incorporated, though no metric according to which such contributions may be valued was provided.

In *Parij v Parij*, non-financial contributions were recognised on the basis that Mrs Parij's domestic work freed up her husband to go out and earn money.

### ***Parij v Parij* (1997) SA SC:**

#### Facts

- A *de facto* couple live together; they jointly own their home and car
- She works at home, allowing her husband to work hard on his accountancy business
- From those profits, he purchases two more houses, another car and a boat (each of which are in his name)

#### Issue

- Does she have any beneficial interest in her husband's property?

#### Reasoning

- Her contributions are purely non-financial in nature
- The Court does include non-financial contributions; but the precise quantum of the contributions is difficult to assess
- It would be unfair for Mr Parij to keep the other assets, the acquisition of which was made possible by her domestic work
- DeBelle J in *Parij v Parij* (1997) 72 SASR 153, 163 [http://www.lexisnexis.com.mate.lib.unimelb.edu.au/au/legal/frame.do?tokenKey=rsh-23.351896.7779737436&target=results\\_DocumentContent&parent=docview-17](http://www.lexisnexis.com.mate.lib.unimelb.edu.au/au/legal/frame.do?tokenKey=rsh-23.351896.7779737436&target=results_DocumentContent&parent=docview-17):
  - ‘when determining whether it is **unconscionable** for one party to a de facto relationship to retain the sole beneficial ownership of property acquired in the course of the relationship, **regard will be had to the manner in which the parties have conducted their relationship and the contributions each have made**. When assessing their respective contributions, **regard will be had to non-financial contributions as well as to financial contributions**. The latter proposition is clear from the references to the “practical equation between direct contributions in money or labour and indirect contributions in other forms such as support, homemaking and family care” in *Muschinski v Dodds* at 622 and in the reference to “contributions either financially or in kind” in *Baumgartner* at 150.’
  - ‘The principle that regard will be had to non-financial contributions when considering the division of property on the dissolution of a marriage has been affirmed on more than one occasion: see *Mallet v Mallet* (1984) 156 CLR 605, 623 (Mason J) and the cases there cited. ... That principle was reaffirmed by Mason CJ, Deane and McHugh JJ in *Singer v Berghouse (No 2)* (1994) 181 CLR 201, 212–13 in these terms:
    - “As recent cases in this Court have made plain (eg *Mallet v Mallet* (at 623)), it is important that the courts do not disregard or discount the non-financial contributions made to the property and finances of the party to a marriage or marriage-like relationship, such as the contributions made by parties as homemakers and parents, which are not directly productive of a monetary return.”
  - ... The reference to recent cases stating that non-financial contributions are relevant in marriage-like relationships is plainly a reference to *Muschinski v Dodds* and *Baumgartner*. Thus, *Singer v Berghouse* affirms the authority of those decisions. ...
  - In this case, the trial judge rejected the plaintiff's contention that the other assets were impressed by a constructive trust, holding that the decisions in *Muschinski v Dodds* and *Baumgartner* did not authorise the imposition of a constructive trust upon assets of the defendant where the plaintiff had made no financial contribution and could only point to performance of the roles of primary homemaker and caregiver. ... The High Court has expressed a general principle and the application of that principle will vary according to the facts of each case.’

#### Decision

- Decision: majority 20%, minority 33% interest
- There is no real practical justification for this difference in opinion
- This case highlights the difficulty of assessing non-financial contributions, but stands for the proposition that they may be taken into account when apportioning beneficial interests under an unconscionability constructive trust

### ***Bryson v Bryant:***

#### Facts

- A couple is married for 60 years
- During that time, she had made various financial and non-financial contributions
- The house was in his name
- He died; then she died; their wills specified different beneficiaries

Issue

- Does her beneficiary inherit an equitable interest in the house?

Decision

- It would not be unconscionable for his heir to have the benefit of her house work and deny legal title
- Kirby J (dissenting):
  - Unconscionability may almost be too flexible

Majority in *Baumgartner*:

**[149]** Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that **joint relationship**. In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed in part **through the pooled funds**, is his **sole property**, is his property beneficially to the exclusion of any interest at all on the part of the respondent **amounts, to unconscionable conduct which attracts the intervention of equity** and the imposition of a constructive trust at the suit of the respondent.

Deane J in *Mucscinski v Dodds*:

**[622]** *any assessment of what would and would not constitute unconscionable conduct would obviously be greatly influenced by the special considerations applicable to a case where a husband and wife or persons living in a "de facto" situation contribute, financially and in a variety of other ways, over a lengthy period to the establishment of a joint home. In the forefront of those special considerations there commonly lies a need to take account of a practical equation between direct contributions in money or labour and indirect contributions in other forms such as support, home-making and family care.*

McHugh JA in *Hibberson v George*:

*Equity favours equality. As Mason CJ, Wilson and Deane JJ said (at 149) in Baumgartner where the parties have lived together for years and have pooled their resources 'there is much to be said for the view that they should share the beneficial ownership equally as tenants in common, subject to adjustment to avoid any injustice which would result if account were not taken of the disparity between the worth of their individual contributions either financially or in kind'.*

Nettle J in *Read*:

[62] [the non-financial contribution of a homemaker is] 'plainly ... a far cry' [from *Baumgartner and Muschinski*] ... 'But if I may say so with respect, it accords with the underlying principle identified by Deane J in *Muschinski*'

[63] the relationship between Ethel Read and Kyran Nicholls endured so long and that the support and comfort that she is likely to have given to him for the period of its duration were so significant that Ethel Read's contribution should be regarded as equal to the financial contributions made by Kyran Nicholls out of his income

Moore J in *Lopatinsky v Official Trustee in Bankruptcy*:

[16] the indirect contribution of one party can take the form of support, home-making and family care. The applicant provided all of these things in large measure in addition to her financial contribution. As DeBelle J noted in; *Parij v Parij* (1997) 72 SASR 153 at 166, substantial and not token regard should be had to the contribution of a partner who is the home maker and care giver. I should note that in that matter, the members of the Full Court identified, by a mechanism involving no particular exactitude, the interest in a constructive trust of the former de facto wife (in property, the legal title of which was vested in the former de facto husband) as one fifth (Cox and Millhouse JJ), on the one hand, and one-third (DeBelle J) on the other.

[17] I am confident that the interest which should be attributed to the applicant in the constructive trust just discussed exceeds the 81% identified by the Full Court. If it was necessary to specify the respective interests under the constructive trust, I would conclude that the interests of the applicant and the bankrupt were 85% and 15% respectively.

Atkinson J in *Waterhouse v Power*:

[47] In determining what constitutes unconscionable conduct, one is not left "at large to indulge random notions of what is fair and just as a matter of abstract morality". In this case, as in *Muschinski v Dodds*, **the conduct which has an unconscionable character is the respondent's conduct in seeking to assert and retain the benefit of a full one-half interest in the property without making any allowance for the fact that the appellant contributed a disproportionate amount of the cost of its purchase**, where, as here, no arrangement had been made between the parties as to what should happen in the unforeseen circumstances of the collapse of the relationship. There is a need to call in aid the principle of equity applicable to preclude the unconscionable assertion of legal rights in this class of case, just as in *Muschinski v Dodds* it was held that '**equity requires that the rights and obligations of the parties be adjusted to compensate for the disproportion between their contributions to the purchase and improvement of the Picton property**'.

[48] It follows that applying the law as stated by Deane J in *Muschinski v Dodds*, a constructive trust should be imposed, in this case as it was there, so that notwithstanding the parties' intention to share ownership of the property equally, the parties should be proportionately repaid their respective contributions to the property acquired during the relationship to the extent allowed by the proceeds of any sale.

Pullin J in *Lloyd v Tedesco*:

[63] The controversial contention raised is that the non-financial contributions as de facto wife, home-maker and mother were enough to establish a right to the relief claimed. This contention is said by the appellant to be supported by the decision of the Full Court of the Supreme Court of South Australia in *Parij v Parij* (1997) 72 SASR 153.

[65] *Parij* was a case of a de facto relationship between parties over a 17-year period. It is significant to note that they acquired three properties as joint tenants in which they lived during their relationship. When the relationship ended, the plaintiff claimed that Mr Parij held the interest in a superannuation fund, in his boat, his vehicle, a house which Mr Parij had acquired towards the end of the relationship and which became his home after the separation, and another property. These were all assets held by Mr Parij in his own name at the end of the relationship. The Court referred to them as the "other assets".

[66] DeBelle J, who delivered the main judgment, quoted the following words from the judgment of Deane J in *Muschinski v Dodds* at 622, where he said:

*'The personal relationship provided the context and explains the content of the planned commercial venture. If the personal relationship had survived for years after the collapse of the commercial venture, and the property had been unmistakably devoted to serve as a mutual home, any assessment of what would and would not constitute unconscionable conduct would obviously be greatly influenced by the special considerations applicable to a case where a husband and wife or persons living in a 'de facto' situation contribute, financially **and in a variety of other ways**, over a lengthy period to the establishment of a joint home. In the forefront of those special considerations there commonly lies a need to take account of a practical equation between direct contributions in money or labour **and indirect contributions in other forms such as support, homemaking and family care.**'*

[74] In *Parij*, DeBelle J correctly observed (at p162 and p163) that in neither *Muschinski v Dodds* nor *Baumgartner's* case did the High Court have to consider the relevance of the claimant's contributions as a home-maker.

[76] It has to be borne in mind that in cases of this sort, the Court is dealing with a claim concerning property. The precise remedy claimed is equitable compensation but, in effect, it is a claim to a share of the increase in value of property of which the respondent is the legal owner. Such a remedy can still be described as a constructive trust. See *Giumelli v Giumelli* (1999) 196 CLR 101 at [3] to [4]. As Brennan J said in his dissenting judgment in *Muschinski v Dodds* at p608:

*There is no jurisdiction in an Australian court of equity to declare an owner of property to be a trustee of that property for another merely on the ground that, having regard to all the circumstances, it would be fair so to declare: ... The flexible remedy of the constructive trust is not so formless as to place proprietary rights in the discretionary disposition of a court acting according to vague notions of what is fair.*

[77] Similarly Deane J said at 615:

*... there is no place in the law of this country for the notion of 'a constructive trust of a new model' which, '(b)y whatever name it is described, ... is ... imposed by law whenever justice and good conscience' (in the sense of 'fairness' or what 'was fair') 'require it' ... Under the law of this country — as, I venture to think, under the present law of England ... proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion ..., subjective views*

*about which party 'ought to win' ... and 'the formless void of individual moral opinion' ...*

[78] In *Parij*, the reasons of Cox J (agreed with by Millhouse J) leave me with the **impression** that the 20 per cent interest granted was **his Honour's view about what was fair in the circumstances**. All that his Honour says by way of explanation is that there was no general pooling of income, that the pair started with "practically nothing", and that the plaintiff earned an appreciable income in part-time and full-time employment. His Honour then concluded at p155, "**I would reckon her interest in the houses at St Agnes and Port Vincent and in the defendant's accountancy practice at 20 per cent** of the defendant's beneficial interest in them." Similarly, the assessment by Debelle J of 30 per cent, which he would have preferred to give, in my view, **cannot be understood as more than an assessment of what was a fair thing**. There is no reasoning within the two judgments which allows the reader to know why 30 per cent or 20 per cent should be chosen. There is no reference to the type of **dollars and cents calculation** which was made by the High Court in *Muschinski v Dodds* and in *Baumgartner*.

[79] In *Parij*, reliance was placed on *Mallet v Mallet* (1984) 156 CLR 605 and *Singer v Berghouse (No 2)* (1994) 181 CLR 201 to support the view that the performance of home-maker duties alone can found a claim for a constructive trust (see Debelle J's judgment at p163 and p164). Both of those cases, however, involved claims where the Court was exercising a discretion to adjust property rights, which discretion had been conferred on the Court by statute. In *Mallet*, the dispute was between a married couple. The *Family Law Act*, confers a discretion on the Court to deal with property of the marriage. *Singer's* case was a testator's family maintenance claim. The legislation confers on the Court a discretion to make provision for maintenance, support and advancement in life of the applicant. There is no discretion to be exercised in this case. In my view, *Mallet's* case provides no support for deciding that home-maker duties are sufficient to found a claim by way of constructive trust in a de facto relationship case.

[84] It is not enough to merely prove that there was a de facto relationship and then to consider whether one party has acted unconscionably. Gleeson CJ in *Green v Green* (1989) 17 NSWLR 343 at 353 said:

*It is clear that the mere existence of a matrimonial or de facto relationship combined with expressed or implied understandings to provide support and accommodation will not form a sufficient basis for concluding that there is a constructive trust by virtue of which a proprietary interest in the home occupied by the parties is created ... In a legal system which does not include concepts of family or community property and where an obligation on the part of a husband to house and provide for his wife is commonly regarded as an incident of the matrimonial relationship an undertaking of the kind referred to cannot of itself confer upon a wife a legal or equitable interest in the matrimonial home ... The acceptance of an obligation on the part of the husband to house his wife would not normally be regarded as an undertaking to give her a proprietary interest in the home in which they live, and wives usually have reasons for living with their husbands other than an expectation that they will increase their assets.*

[85] This passage was quoted with approval in *Stowe v Stowe* (1995) 15 WAR 363 at 369. Similarly, Owen J said in *Stowe v Stowe (No 3)*, unreported; SCt of WA (Owen J); Library No 970389; 5 August 1997 at p 8:

*The mere existence of a de facto relationship could not, of itself, establish a joint endeavour of the type contended for ... The mere fact that a woman has performed household chores and acted as caregiver will not entitle her to seek*

*relief from the man in the form of proprietary interest in property owned by him and nor will it entitle her to compensation ...*

[86] What has to be established over and above the de facto relationship is that the parties embarked upon a joint enterprise in the nature of a "commercial venture". In my view, the learned trial Judge correctly observed that the proof of the joint endeavour required proof of an actual intention to pool resources. Proving the existence of an intention of a joint enterprise in the nature of a "commercial venture" will usually lead to evidentiary issues, such as whether the parties expressly agreed to embark upon such a joint enterprise or whether that intention can be inferred from all the circumstances.

[87] The facts in *Parij* suggest to me that the South Australian Court had sufficient material before it to infer that there was an intention to be involved in a joint enterprise in the nature of a "commercial venture". Such an inference could be drawn from the fact that, in that case, the parties purchased three houses and put them in joint names; that the plaintiff borrowed money for the purpose of making improvements to a house and repaid the loans; and that sometimes the plaintiff borrowed moneys and the defendant repaid the loans.

[88] Once such an inference was drawn, then it would have been quite correct for the Court to reach the conclusion that it was unconscionable for Mr *Parij* to seek to deny that Mrs *Parij* had some interest in the "other assets". The facts in the case would support a conclusion that there was a joint enterprise of a "commercial nature". See p164 and p165, where *Debelle J* said:

*'The parties did not pool their resources in any formal sense. They did not operate a joint bank account. However, it is apparent that, throughout their time together, the parties both contributed funds to discharge different aspects of family expenditure. ... On two occasions the plaintiff borrowed small amounts of money for the purpose of effecting improvements to the home, and repaid most of those loans. On some other occasions, when the plaintiff had borrowed money, the defendant repaid the greater part of the loan. ... In addition, the plaintiff has performed the roles of home-maker and caregiver for the defendant and the children throughout the period of their relationship.'*

[89] I have already mentioned the fact that the parties in *Parij*'s case owned several properties as joint tenants. So the references to home-maker contributions are merely seen as additional matters to note, but it is the financial aspects that lead to the conclusion there was a joint enterprise in the nature of a "commercial venture" concerning property.

Campbell J in *Hill v Hill* at [34]:

[34] Though *Baumgartner v Baumgartner* (1987) 164 CLR 137 was a case which involved a couple in a de facto relationship, the principles stated in it can apply to a domestic relationship which does not involve de factos, including a domestic relationship between parent and child: *Swettenham v Wild* [2005] QCA 264.

[37] This is a situation where the *Baumgartner v Baumgartner* (1987) 164 CLR 137 type of constructive trust or charge can operate because the relationship has come to an end in circumstances which the parties did not foresee and did not provide for.

[38] Unlike many cases where a *Baumgartner v Baumgartner* (1987) 164 CLR 137 charge or trust is asserted, this is not a case where there has been any acquisition of property in the context of a domestic relationship — **the plaintiff owned the relevant**

**property all along. There was no mortgage which needed to be paid off to acquire the property. Thus there is no room for a trust or charge arising from any contributions to the purchase price.**

[39] There have, however, been improvements effected at Peter's expense. He has given evidence of having paid \$26,000 for building permits and materials, \$760 for plans, a little over \$26,000 for labour, a little under \$15,000 for various items of maintenance and improvements inside the house, and a little under \$4000 for improvements in the outside area. These amounts total a little over \$70,000. The plaintiff concedes that the total amount spent by Peter on the property was \$60,000. I will, for the purpose of this case, take these contributions at the figure which he gives evidence of, of the order of \$70,000.

**[40] However, the mere making of the contribution in a domestic relationship is not something which automatically results in a trust, or a charge for an amount equal to the amount of the contribution.**

**[41] Even though there have been improvements carried out to the property, there is no evidence which shows whether the improvements are the type which have increased the value of the property, or, if the value has increased, whether it has increased by an amount which is more or less than the cost of effecting the improvements.**

[45] The fundamental question in deciding whether a *Baumgartner v Baumgartner* (1987) 164 CLR 137 type trust exists is **whether it would be unconscionable that the rights of the parties, on determination of the relationship, should be simply what the bare legal right of the parties to the assets is.**

Fiona Spry in *Non-Financial Contributions*:

[4] Macrossan CJ's reliance on, *inter alia*, the non-pooling of resources as well as the failure by the respondent to alter the 'prevailing arrangements', it is submitted, while prima facie an indication that no trust was created, cannot alone suffice in a finding for the appellant. There are numerous cases where the non-pooling of resources has not been fatal to a finding of a constructive trust.[22: *Hibberson v George* (1989) 12 Fam LR 723 at 742 per McHugh JA; *Tairua v Bennett* (1991) DFC 95-103.]

## E Legislative Reforms

In response to the perceived inadequacies of constructive trusts in dealing with family property disputes, legislation has been introduced into all Australian jurisdictions dealing with disputes between *de facto* couples and married spouses. Prior to these enactments, couples went to principles of law and equity to distribute their assets upon termination of a relationship. These rules were seen as skewed towards the male partner.

The legislative reforms consist of the following instruments:

- *Family Law Act 1975* (Cth); and, in Victoria
- *Property Law Act 1958* (Vic) part IX
  - *De facto* (heterosexual) couples are now able to rely on state legislation, if their relationship came into existence or existed on or after the commencement date
  - However, it does not apply to non-sexual or homosexual couples (such disputes still turn to be governed by *Baumgartner*)

Why is the legislative regime necessary? Academics note the desirability of further recognising contributions made by the female member of the relationship that are not reflected by the legal title. See further BMM 228–9; Sackville and Neave's discussion of *Allen v Snyder* [CB].

## V Tutorial Exercises

### A Quiz

- 1 **[Resulting trust]** Ruby has a legal estate in fee simple. However, in equity Ruby holds the estate on trust for Susan in the proportions in which they contributed to the purchase price (*Calverley v Green*). Here, Susan contributed 100% of the purchase price so she has a full equitable estate in the land. However, this is only a presumption and may be rebutted by Ruby.
- 2 **[Resulting trust]** At law, Susan and Ruby have separate and divisible half shares in the land as tenants in common. In equity, the presumption arises that Ruby holds her share on trust for Susan, who paid all of the purchase price (*Calverley v Green*). However, this presumption may be rebutted by evidence that Susan intended to give Ruby her half share, or if the presumption of advancement applies. If Ruby is, for example, related to Susan, the onus of proof may be reversed so that, prima facie, they have separate shares.
- 3 **[Resulting trust]** Effectively, Susan is contributing all of the purchase money because she is exposing herself to liability for the full amount. This means that Ruby, the legal owner, will prima facie hold the property on trust for Susan (who has an equitable estate in fee simple). The mortgagor (bank) has either an equitable or legal entitlement to repayment of the balance (\$90 000), depending on the type of mortgage that exists.
- 4 **[Resulting trust]** At common law, Susan and Ruby are both entitled to the entirety of the land. In equity, they have interests as tenants in common proportionate to their contributions to the purchase price (60% Susan, 40% Ruby).
- 5 **[Resulting trust]** Susan is effectively contributing \$60 000, and Ruby \$40 000, so they have in equity a 60% and a 40% equitable interest, respectively. In equity they would hold as tenants in common. At common law, joint tenancy. The mortgagor retains a proprietary interest in repayment of the balance.
- 6 **[Constructive trust]** Contributions are assessed as at the time of purchase (*Calverley v Green*), so Susan is deemed to contribute the entirety of the purchase price. She therefore holds a full equitable interest in the property, for whom Ruby — as legal owner — holds the property on trust. The fact that Ruby pays the mortgage repayments is irrelevant unless that conduct is specifically referable to an oral agreement, such that Ruby could claim an interest in the property commensurate with its terms.

Alternatively, Susan may be able to assert an equitable interest on the grounds that she detrimentally relied upon a reasonable belief induced by Rose that they would share beneficial ownership of the property, such that a common intention constructive trust arises. Whether this is the case depends upon the specific circumstances and conduct of the parties.

## B Hypothetical

### 1 Rights

#### (a) Zara ('Z')

##### (i) Inheritance

- Z may argue that Mary's ('M') 'entire estate, real and personal' encompasses an equitable interest in Waterview arising from a resulting trust; if successful, Mary's interest will flow to Z as beneficiary under her will
- A was registered proprietor; M's interest, if any, was not written and therefore did not satisfy the requirements of s 53(1) of *PLA*: need an equitable exception under s 53(2)

##### (ii) Resulting trust?

- In law, A is the owner of Waterview, and can devise it in its entirety to Q (subject to B's and M's equitable interests, if any)
- In equity, at 1956, a presumed resulting trust arises on the basis of M's purchase of Waterview in the name of another (A)
  - A and M are tenants in common in proportion to their contributions to the purchase price (50%/50%)
- However, this is only a presumption and may be rebutted by evidence of contrary intention (none on facts) or if the contrary presumption of advancement applies
- Presumption of advancement probably applies because M is in a position of support viz A (as mother)
  - Must fall within traditional class of relationships
  - Clearly applies father → child – does it extend mother → child?
  - Seems consistent with the 'stronger'/'weaker' classification into which recognised relationships are traditionally grouped
  - Certainly courts seem willing to expand the class of relationships in which the presumption will arise (*Brown v Brown*; *Nelson v Nelson*), though this may limit its utility
  - *Brown v Brown*: gender neutral application (Kirby J)
- If it applies, M is presumed to have actually intended to make a gift of the beneficial interest to A, such that A is the complete owner in equity (*Calverley v Green*)
- However, the presumption can itself be rebutted by contrary evidence; this doesn't appear to be the case here – no illegality (unlike *Nelson*), but other prevailing circumstances, if they exist, may be called upon by Z to show otherwise
  - Not depleting assets, unlike *Brown*
  - (Leaving all assets to Z)

(iii) If the presumption of resulting trust has not been rebutted by the presumption of advancement, M has a 50% interest as a tenant in common and can divest to Z; Z has an equitable interest in Waterview

(iv) If the resulting trust has been rebutted, no equitable interest

## (b) Benazir ('B')

## (i) Formalities

- Prima facie, no right to the property in law since not the registered proprietor and no express trust created using a recognised instrument: *PLA* s 53(1)
- However, B may argue that A (and, since a trust is a proprietary interest, her heirs) held the property on constructive trust for B; this is an exception created by *PLA* s 53(2)

## (ii) Resulting trust?

- No resulting trust exists because title has not actually been transferred; no presumption can be drawn about the parties' intentions from their conduct

## (iii) Common intention constructive trust?

- Common intention: that B would be entitled to an equitable life estate in return for caring for A
  - Promise 1
    - 'looked after for the rest of your life'
    - Similar to *Ogilvie v Ryan*
  - Promise 2
    - A's intention can be inferred from an express oral promise: 'stay here for as long as you like and not pay any rent'
  - B's intention can be inferred from her subsequent (substantial) expenditure on the house's floorboards and hot water system
  - However, A's intention could have been merely to grant a revocable licence
    - This would be a personal right, and therefore would not bind successors in title, including Qinghua
    - It is difficult to determine her intention with the required precision: on one hand, her earlier comment seems directed at clearly distinguishing the interest she intends to grant B from ownership in fee simple ('don't ever expect that this place will be yours'); on the other, the interest A does purport to grant is 'the least [she] can do', suggesting a magnanimous gesture
  - Her intention may also have changed, originally meaning to grant a licence, but later a life estate by the time of their subsequent conversation: *Rasmussen*
  - Can probably be inferred, but won't be imputed: *Allen v Snyder* (but note Mahoney JA)
  - However, unlike *Ogilvie* the common intention occurred after purchase – common intention not 'the very reason' why the house was acquired (no barrier though: *Allen v Snyder*)
- Assuming the common intention pertains to a life estate: clear detrimental reliance
  - B gives up the 'comfort and security' of her old house, developed over 30 years of habitation: *Hohol v Hohol*
  - B nurses A for 3 years in difficult circumstances

- B spends most of her savings (\$450) on fixing up the house
    - B makes other improvements to the garden, and pays various household expenses
  - Fraud
    - Unconscionable for A to have the benefit of care and affection without rewarding her as he promised: like *Ogilvie v Ryan*
    - Natural consequence of the detriment
    - Therefore, A's estate (and subsequently Q) cannot rely upon the *Statute of Frauds* (s 55) to perpetrate a fraud: can't be pleaded because it would be unconscionable
  - The common intention is difficult to infer from the provided facts; assuming this can be established, B may succeed in acquiring a life estate (fulfilling the common intention); however, the onus rests upon her and more evidence is likely to be necessary
- (iv) Unconscionability trust
- Even if no common can be inferred, may provide an alternative basis: imposed regardless of intention
  - Not based on 'idiosyncratic notions of fairness and justice': *Muschinski* per Deane J
  - B needs to establish that it would be unconscionable, according to equitable principles, for A (or her successors) to deny B's beneficial interest in the land
  - The analogy adopted in *Muschinski* and *Baumgartner* is difficult to apply here: there isn't a failed venture (though A did, indeed, die): closest approximation is a personal relationship of asymmetric palliative care
    - Could also be a pooling of resources, but unlike *Baumgartner*, land not acquired for the purposes of that relationship (was acquired some 34 years earlier) – also, no familial relationship (would need to extend to friendship and potentially platonic relationships)
    - B's contributions to the garden appear to have been made for the purpose of the relationship: 'do A's health the world of good' (but didn't pay for these)
    - B's payment of bills appear to be more a gift than a pooling of resources
  - However, consistent with general equitable principles to treat retention of the full legal interest as unconscionable at the time of A's death
    - B had given up three years to care for her A; she did this on the basis that she would be 'looked after for the rest of [her] life'
    - A made that promise, and it would be inequitable for her to receive the benefits of B's care (though she did, ultimately, die) without fulfilling her side of the bargain
  - But perhaps facts more similar to Brennan and Dawson JJ's approach in *Muschinski*: allow B to recover on the basis of a personal right against A
    - However, this produces an unsatisfactory result where, as here, the right is sought to be enforced against a successor and no written agreement exists

- If B's conduct can be characterised as sustaining a joint venture, a trust may be imposed on this basis
  - Remedial consequences considered below
- (v) Proprietary estoppel
- To establish an equity, B must demonstrate that A requested or encouraged her to spend money on the land in the expectation that she would be granted an interest in it
  - Representation about existing (future?) state of affairs
    - Like *Giumelli*, multiple promises, getting more specific
    - Getting 'looked after' is probably too vague
    - But 'not pay any rent' is specific enough
  - Inducement
    - The extent of encouragement of less than in *Inwards*; unlike Jack, B was never specifically encouraged to expend money; however, she was encouraged to care for A (and to make the appropriate sacrifices including improvements where necessary — this she did), so this may also give rise to an equity capable of enforcement by the court as a life estate
  - Reliance and acquiescence
    - Like *Waltons Stores*, A watched B care for her, labouring under her assumption
    - Positive acts of reliance are clear: moving house, spending money, etc
  - Unconscionable for A to depart from B's assumption: A has knowledge of B's expectation and reliance thereupon
  - Remedy
    - Must satisfy the equity
    - Flexible: minimum necessary to do justice is here arguably to grant a life estate (fulfil the expectation)
      - Compensation or a personal right would be insufficient (A is dead, B would go uncompensated)
    - Sphere of enforceability is narrower: can't be devised; but can be enforced against third parties with notice
    - Q probably has notice, but not entirely clear
    - If Q has notice, because she inherits the land as a volunteer and with knowledge of B's interest, the land is 'impressed with the obligation in equity' (*Inwards v Baker*) (Minimum necessary)
- (vi) Oral agreement and part performance?
- Prima facie, evidence of an oral agreement between A and B to the effect that B would be granted an interest in the land is inadmissible parol evidence: *PLA* s 53(1)
  - However, in proceedings against Q, B could adduce evidence of part performance (caring for A, paying bills, making improvements) to lead evidence of the OA
  - *Maddison v Alderson*: B's acts of care and affection in general not 'unequivocally referable' to an agreement – B's care might just evince affection or loyalty from their long friendship: equivocal
  - But with *Regent v Millet's* redefinition of the *McBride* test, taking account of *Steadman*, B's acts of PP may just need to be unequivocally referable 'to some contract' (ie, general OA)

- Even so, difficult to conclusively relate to any agreement (another plausible explanation exists for B's behaviour: friendship)
  - *ANZ v Widin* unlikely to apply: not a commercial context, unlike a bank, friends lend their aid for reasons other than pecuniary self-interest
  - OA by PP unlikely to be established
- (vii) Remedial consequences
- If a trust is imposed on one of the above bases, it will be necessary to consider the quantum of A's (and subsequently Q's) and B's shares
  - Starting point: 'equity favours equality' unless substantial disparity in contributions (*Mushinski; Baumgartner*)
  - Onus on A (Q) to show otherwise
  - Q likely to refer to A's payment of 50% purchase price, lack of any contribution from B
  - Likely to be sufficient to displace shares by at least 25%
  - Q also likely to refer to the fact that most of B's expenses were drawn out of housekeeping money provided by A
  - A can point to the \$450 spent on improvements, and bill payments in the final days, as well as her substantial non-financial contribution of care for 3 years
  - Unlike *Parij v Parij*, B's care *didn't* free up A to perform work!
  - Situation more like *Bryant v Bryant* (no share)
  - 80%/20% if property held on trust, otherwise life estate
  - Remedial consequence: arises when imposed by the court? If so, because transfer to Q hasn't been effected yet, Q will receive a title burdened by B's equitable life estate (or remainder)
- (viii) Applicable legislation
- Because they are not in a married or familial relationship, the *Family Law Act 1976* (Cth) does not apply

## 2 Enforcement against Qinghua ('Q')

- (a) B could lodge a caveat under *PLA* s 89 to protect her equitable interest; this would prevent Q from registering her legal title
- (b) Consequences of a resulting trust in Z's favour
- (i) Equitable interest passes to Z and Q in equal shares, subject to the equitable life estate held by B
  - (ii) A priority dispute may arise between Z, Q and B
  - (iii) The conduct giving rise to Z's interest predates either Q or B's, so it may prevail
  - (iv) However if, as seems likely, Z has no interest, B's interest will prevail whether the trust is imposed at the time of the acts of reliance or at the time of judgment (since Q had not yet been registered)
- (c) Consequences of a constructive trust in B's favour
- (i) If the equitable life estate is given effect to, B will have grounds to lodge a caveat to prevent Q taking full legal title
- (d) Consequences of A being estopped
- (i) Not necessarily proprietary
  - (ii) See above