HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

NO. P9 OF 2022

BETWEEN:

BERNADETTE BOSANAC
Appellant

And

COMMISSIONER OF TAXATION
First Respondent

And

VLADO BOSANAC
Second Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1 These submissions are in a form suitable for publication on the Internet.

PART II: ISSUE ON APPEAL

2 The Commissioner, a creditor of the Appellant's husband, sought a declaration of resulting trust over the equity in half of a property owned by the Appellant wife, Ms Bosanac. A presumed resulting trust does not arise where a husband purchases property in the name of his wife: "*as she was his wife the fact that he found the purchase money for the land raised no presumption in his favour of a resulting trust as it would or might have done had she been a stranger*"[1]. Notwithstanding this, the **Full Court** of the Federal Court of Australia inferred that Mr Bosanac intended to declare a trust over his contribution to the property, essentially from the fact that he borrowed his contribution.

3 The issue raised by the Notice of Appeal is whether the use of borrowed funds to make an advancement "rebutted" the "presumption" of advancement. The issue raised by the Commissioner's notice of contention is whether classification of property as the "matrimonial home" "rebuts" or excludes the "presumption" of advancement. Does an acceptance of either of proposition fall afoul of the often-endorsed proposition that "*[the 'presumption' of advancement] is not to be frittered away by nice refinements*": ***Finch*** *v Finch* (1808) 33 ER 671 at 674 (Lord Eldon)? In other words, does the introduction of further presumptions or default inferences around borrowing or the "matrimonial home" constitute a quasi-legislative frittering with a rule of law which has been relied on by people to manage their affairs for generations?

PART III: NOTICE UNDER SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4 The Appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903 (Cth). No such notice is required.

PART IV: CITATIONS OF THE DECISIONS BELOW

5 The decision of the Federal Court of Australia is *Commissioner of Taxation v Bosanac (No 7)* (2021) 390 ALR 74 (McKerracher J) (**J**). The decisions of the Full Court are *Commissioner of Taxation v Bosanac* [2021] FCAFC 158 (Kenny, Davies and Thawley

[1] ***Martin*** *v Martin* (1959) 110 CLR 297 (Dixon CJ, McTiernan, Fullagar and Windeyer JJ) at 303.

JJ) (**FC**) and *Commissioner of Taxation v Bosanac (No 2)* [2022] FCAFC 5 (Kenny, Davies and Thawley JJ).

PART V: RELEVANT FACTS

6 The core facts are at J [38]-[58] (**Core Appeal Book (CAB) 19-22**). Mr and Ms Bosanac were married on 3 October 1998. They separated in 2012 or 2013 but lived separately under one roof until about mid-2015: J [38] (**CAB 19**). The case concerns the "Dalkeith Property", the former "matrimonial home".

7 On 27 April 2006, Ms Bosanac offered to purchase the Dalkeith Property for $4,500,000.00, subject to her obtaining approval for a loan of $3,000,000.00 from Westpac. Her offer was accepted on 3 May 2006. The contract required Ms Bosanac to pay a deposit of $250,000.00: J [38] (**CAB 19-20**). On 2 June 2006, $250,000.00 was withdrawn from a joint loan account in the names of Mr and Mrs Bosanac: J [39] (**CAB 20**). On 24 October 2006, Mr and Mrs Bosanac applied for two joint loans from **Westpac** Banking Corporation totalling $4,500,000.00 which were offered by the bank on around 24 October 2006: J [40] (**CAB 20**). The purpose of the loans was to purchase the Dalkeith Property: J [46] (**CAB 21**). Two amounts totalling $4,500,000.00 were drawn down in November 2006 from home loan accounts jointly held in the names of Mr and Ms Bosanac: J [48] (**CAB 21**). On 3 November 2006, the Dalkeith Property was transferred into the name of Ms Bosanac as sole registered proprietor: J [49] (**CAB 21**). A mortgage was registered on 21 November 2006: J [53] (**CAB 21**).

8 Mr and Ms Bosanac moved into the Dalkeith Property in late 2006: J [55] (**CAB 22**). They resided at the Dalkeith Property together until 9 September 2015 when Mr Bosanac provided a new residential address: J [56] (**CAB 22**). Mr Bosanac has never made any claim for any interest in the property: J [220] (**CAB 77**). Ms Bosanac remains the sole registered proprietor of the Dalkeith Property: J [56] (**CAB 22**). There was no suggestion that the Dalkeith Property was registered in the name of Ms Bosanac with a view to avoiding creditors: J [58] (**CAB 22**).

9 During the marriage, Mr and Ms Bosanac kept their substantial assets in separate names: J [57] (**CAB 22**). They did not share all of the matrimonial assets jointly or pool their shareholdings: J [57] (**CAB 22**). Rather, Mr Bosanac held a substantial share portfolio in his own name: J [223] (**CAB 78**). At various times, Ms Bosanac owned

other properties, including one at Hardy Street: J [226] (**CAB 79**). At various times, Mr Bosanac also owned other properties, including units 10, 12 and 13 at 41 Mount St, West Perth, WA: J [224] (**CAB 78-79**). This supported the conclusion that there was considerable evidence of separate ownership of property and the use of separately owned properties as security for joint loans: J [228] (**CAB 79**).

10 The only joint assets in evidence were joint bank accounts, that consisted of a pre-existing joint loan account: J [39] (**CAB 20**), new joint loan accounts in the amounts of $3,500,000.00 and $1,000,000.00 to fund the purchase of the Dalkeith Property: J [49] (**CAB 21**) and a joint transaction account: J [50] (**CAB 21**).

11 Mr Bosanac had substantial tax liabilities. The Commissioner commenced enforcement proceedings and sought a declaration that half of the equity in the Dalkeith Property was owned beneficially by Mr Bosanac. The Commissioner claimed that the "presumption" of advancement no longer applied to matrimonial homes.

Findings and reasoning of the Courts below

12 The primary Judge rejected the Commissioner's argument that the "presumption" of advancement only applied to particular species of property, being property acquired by one party for the use and enjoyment of the other party to the marriage: J [182], [185], [188], [196], [204], [205] (**CAB 66-68, 71-74**). Instead, having considered the relevant authorities: J [98]–[177] (**CAB 36-65**), his Honour concluded that the "presumption" of advancement for transactions concerning the matrimonial home was not qualified or abolished: J [178]-[196] (**CAB 65-72**). In light of the "presumption" of advancement being "well-entrenched" in the law of property[2], his Honour accepted, based on repeated authority of this Court, that any change to the "presumption" of advancement is best left to Parliament: J [80] (**CAB 29-30**).

13 As the "presumption" of advancement operated to preserve the legal *status quo* in favour of Ms Bosanac, to "rebut" the "presumption", the Commissioner was required to prove that Mr Bosanac held, at the time of purchase, an intention to retain a beneficial interest to the extent of his contribution to the purchase price: J [211], (**CAB 75**). His Honour found that the fact that the Dalkeith property was the matrimonial home and

[2] Citing ***Calverley*** *v Green* (1984) 155 CLR 242, 266 (Deane J).

that Mr Bosanac assumed a substantial liability by signing on to the loan documents did not ground such an inference: J [222] (**CAB 78**).

14 The primary judge observed that there was no evidence that the financier for the Dalkeith property, Westpac, required both Mr and Ms Bosanac to sign onto the loans to obtain finance: at J [222] (**CAB 78**). This allowed the primary judge to distinguish *Calverley*, where the lender had required both Mr Calverley and Ms Green to be parties to the loans (see *Calverley*, 251 (Gibbs CJ)). The primary judge correctly concluded there was nothing to be drawn from the fact that Mr Bosanac assumed a substantial liability without a corresponding beneficial interest[3]. That is hardly surprising – it is foundational to every case involving the "presumption" of advancement that something of value is given for no consideration, otherwise the issue of a resulting trust would never have arisen.

15 The Full Court allowed the Commissioner's appeal and declared that Ms Bosanac held 50% of her interest in the Dalkeith property on trust for Mr Bosanac. The Full Court concluded that the "presumption" of advancement still applied to matrimonial homes: FC [10]-[11] (**CAB 97-98**). However, the Court added that "*the 'presumption' of advancement does not operate to preclude examination of the quality of the particular transaction in connection with which the presumption arises in order to determine whether the evidence as a whole shows the presumption to be inconsistent with what was in fact intended*": FC [16] (**CAB 99**). The Full Court found the primary judge erred by excluding from consideration the fact that "*Mr Bosanac assumed a substantial liability without the benefit of acquiring any beneficial interest*": FC [15] (**CAB 99**). The Court elaborated "*there is significance in the fact that the transaction in this case involved a substantial borrowing by Mr Bosanac for which he would be liable in circumstances where he had no legal title to the property purchased with those borrowings*": FC [16] (**CAB 99**). As such, the Full Court relied on the use of borrowed funds to infer the contrary intention: FC [21], [22], [27] (**CAB 101, 103**).

16 The error in the Full Court's reasons, developed below, was in taking the neutral fact that the relevant advance was sourced from borrowed funds to "rebut" the "presumption" of advancement. It is integral to the "presumption" of advancement that

[3] This is particularly in this case where, unlike in *Calverley*, the Dalkeith Property was purchased only in Ms Bosanac's name, not in their joint names: J [222] (**CAB 78**).

something of substantial value has been transferred without a corresponding beneficial interest. Whether that is the transfer of a substantial asset, or the acceptance of a substantial liability, is simply irrelevant to the enquiry. The two are economically equivalent. There is no good reason for the Full Court's anomalous treatment of a borrowing. Even if there was – it is a matter for the legislature, and not the courts, to modify the "presumption" of advancement.

PART VI: ARGUMENT

Summary of argument

17 The "presumption" of advancement operates to preclude a "presumption of resulting trust" in certain classes of relationships, including where a husband makes an advance to a wife: J [64]-[65], [85] (**CAB 23-24, 31**). As the "presumption" applied to the relationship, the question is whether there were sufficient facts to show an intention not to benefit the transferee[4], or to show that the recipient was intended to take as a trustee. What was required was evidence of a definite intention to retain beneficial title. The law does not assume such an intention merely because the advance confers no benefit to the husband: J [85] (**CAB 31**) – to do so would defeat the entire operation of the presumption. This was the vice in the Full Court's analysis.

18 These submissions develop that contention over five topics.

19 **First**, the presumed resulting trust. A presumed resulting trust arises from the legal assumption that a gift was not intended where the legal title does not reflect a parties' contributions to the purchase. The presumption is an anachronism that developed prior to the 17th Century from the law of uses and feoffments[5]. The presumption has always been subject to exceptions.

20 **Second**, the "presumption" of advancement has always been an exception to the presumption of resulting trust. The "presumption" of advancement arose around the same time as the presumed resulting trust, to exclude from the first presumption particular relationships where it could not be assumed that a difference in legal title

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[4] ***Damberg*** *v Damberg* (2001) 52 NSWLR 492 at [44] (Heydon JA with Spigelman CJ and Sheller JA agreeing); ***Drever*** *v Drever* [1936] Argus LR 446 at 450 (Dixon J, dissenting, but not on this point).
[5] ***Anderson*** *v McPherson [No 2]* (2012) 8 ASTLR 321, 338 [108]-[109] (Edelman J); **Glister**, "Is there a Presumption of Advancement" (2011) 33 *Sydney Law Review* 39 at 45-57.

automatically meant that a trust had been declared. Both the presumed resulting trust and the "presumption" of advancement are foundational aspects of the law of property. It is reasonable to infer that they have been relied on in planning and making property transactions. Given the repeated suggestions by this Court that reform of the presumptions is best left to the legislature, it may also be reasonable to infer that the legislature has considered the possibility of reform and decided not to change the law.

21 **Third**, what does it mean to "rebut" the "presumption" of advancement? The Appellant says that to "rebut" the "presumption", the Court must identify facts that support an intention to declare a trust, that is – a "*definite intention to retain beneficial title*"[6]. Logically, those facts cannot be the same facts that underpin the "presumption" of advancement or the presumed resulting trust. There must be something more than the fact that something of value has been "advanced" without a corresponding benefit.

22 From that foundation, the submissions address the two critical issues in this case. **Fourth**, whether using borrowed funds to make an advancement allows the Court to "rebut" the presumption. The fact that borrowed funds are used to support an advance cannot provide a basis for a "*definite intention to retain beneficial title*" because borrowing says nothing definitive about intention. **Fifth**, is the matrimonial home outside the operation of the "presumption" of advancement? The Appellant relies on the analysis of the trial judge (J [178]-[205]) and the Full Court (FC [9]-[10] (**CAB 97**)) which demonstrates that the mere fact that a property is a matrimonial home does not preclude the application of the "presumption" of advancement and does not "rebut" it. The fact that the Dalkeith Property was the matrimonial home does not allow for an inference that Mr Bosanac intended to declare a trust over his contributions.

Presumption of resulting trust

23 The presumption of resulting trust is the starting point of the analysis. The presumption applies in various circumstances (canvassed at J [62]-[63] (**CAB 23**)) including where purchase money is contributed by two or more persons jointly, but the property is put into the name of one only[7]. In these circumstances, a resulting trust arises because it is

[6] *Damberg*, [44] (Heydon JA with whom Spigelman CJ and Sheller JA agreed); and *Drever*, 450 (Dixon J with whom Evatt J agreed).
[7] *Calverley*, 246 (Gibbs CJ), 258 (Mason and Brennan JJ); see also *Delehunt v Carmody* (1986) 161 CLR 464, 472 (Gibbs CJ, with whom Wilson, Brennan, Deane and Dawson JJ agreed).

presumed that the purchaser did not intend to gift their contribution to the other person, absent evidence of contrary intention or the operation of the "presumption" of advancement: J [64] (**CAB 23-24**). In other words, the resulting trust arises "*in favour of the purchaser, or in favour of two purchasers in the proportions in which they contributed the purchase money ... subject to the exception created by the presumption of advancement*": *Calverley*, 247 (Gibbs CJ)[8].

24 Like the "presumption" of advancement, this presumed resulting trust is an anachronism. It arose by "*strict analogy*" from the rule which applied to the predecessor of the trust, the use[9]. As Edelman J explained in *Anderson* at 338 [109]: "*That rule was that where a feoffment was made without consideration, the use would result to the feoffor*". Historically, the presumption of resulting trust applied to voluntary conveyances of title and purchases in the name of another, and also in cases where the legal title was held in a proportion different from the contribution to the price[10]. The NSW Court of Appeal has observed that it "*seems rather ridiculous that troubles in England at the end of the Middle Ages should be the basis, in the late twentieth century, for making findings of fact*": *Dullow v Dullow* (1985) 3 NSWLR 531, 535 (Hope JA, with Kirby P and McHugh JA agreeing). Although an anachronism, like the "presumption" of advancement it is a well-entrenched landmark in the law of property that should not be disregarded by judicial decision[11].

25 The dominant view is that what is presumed is that the transferor declared an express trust of the property transferred[12]. In other words, "*the reference to a 'presumption of resulting trust' is shorthand for a presumption of a declaration of trust; the rebuttable presumption is of the fact of a manifest declaration*"[13]. In Australia, the intention to be discerned is an objective, manifest intention; not an unexpressed subjective intention[14].

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[8] See also *Calverley*, 258 (Mason and Brennan JJ), 269 (Deane J).
[9] *Anderson*, 338 [109] (Edelman J); and ***Dyer*** *v Dyer* (1788) 30 ER 42, 43 (Eyre CB).
[10] *Anderson*, 338 [108], citing *Lake v Gibson* (1729) 21 ER 1052, *Lake v Craddock* (1732) 24 ER 1011.
[11] *Calverley*, 266 (Deane J), cited in *Brown v Brown* (1993) 31 NSWLR 582, 588 (Gleeson CJ).
[12] Swadling W, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72, 72-73.
[13] *Anderson*, 337 [106] (Edelman J).
[14] *Byrnes v Kendle* (2011) 243 CLR 253, 286-287 [105]-[106] (Heydon and Crennan JJ); *Calverley*, 261 (Mason and Brennan JJ); and *Anderson*, 337 [98] (Edelman J).

The "presumption" of advancement

26 The "presumption" of advancement only arises where equity might otherwise be called upon to presume a resulting trust. The "*best modern statement of the whole doctrine*" adopted in ***Stewart Dawson*** *& Company (Vic) Pty Ltd v Federal Commissioner of Taxation* (1933) 48 CLR 683 at 690 (Dixon J), is:

> "*Where a husband or father (as the case may be) purchases property in the name of his wife or child, and is proved to have paid the purchase-money in the character of a purchaser, a prima facie but rebuttable presumption arises that the wife or child takes by way of advancement —that is to say, takes beneficially*"

27 The "presumption" of advancement is not a genuine presumption[15]. Rather, it operate "*to preclude a resulting trust from arising for the purchaser*"[16]. It is a description of a fact in which the presumption of resulting trust does not arise: J [65] (**CAB 24**). The fact is that the party who might otherwise have been found to have intended to declare a trust is in a defined relationship with the holder of the legal title.

28 Different views have been expressed as to the basis for the "presumption". Early cases spoke of certain relationships being "*under a species of natural obligation to provide for the nominee*": *Murless v Franklin* (1818) 36 ER 278, 280 (Lord Eldon). Accordingly, the presumption initially applied to a father-child relationship but not a mother-child relationship as there was "*no obligation according to the rules of equity – on a mother to provide for her child*": *Bennet v Bennet* (1879) 10 Ch D 474, 478 (Sir George Jessel MR). But that distinction no longer applies[17].

29 In *Wirth*, Dixon CJ argued for a different foundation. The Chief Justice said it "*obtained a foundation or justification in the greater prima facie probability of a beneficial interest being intended*" (p 237). While this modern rationale was endorsed by Gibbs CJ in *Calverley* (pp 249-250), it has not yet been accepted by a majority of this Court. The Court was divided on the point in *Nelson*, where Deane and Gummow JJ did not

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[15] *Martin* at 303 (Dixon CJ, McTiernan, Fullagar and Windeyer JJ). For further discussion about the issue, see Glister.
[16] ***Wirth*** *v Wirth* (1956) 98 CLR 228, 237 (Dixon CJ), quoting ***Soar*** *v Foster* (1858) 70 ER 64, 67 (Page Wood VC).
[17] ***Nelson*** *v Nelson* (1995) 184 CLR 538, 548-549 (Deane and Gummow JJ), 574 (Dawson J), 586 (Toohey J), 601 (McHugh J).

reject the historical foundation (pp 548-549); Dawson J thought that either moral obligation or the probability rationale of Dixon CJ could apply (p 576); and Toohey J considered the probability rationale to "*have a question begging aspect*" (p 586).

30 Although there may be no definite principle which underpins the "presumption", it is not necessary for there to be one to observe that it is a bedrock part of property law. The lack of a clearly articulated foundation is both a good reason to not expand the "presumption" further, but also a good reason not to fritter it away.

31 In considering the issues raised by this case, this Court should instead apply the repeated statements that the "presumption" is a "*well-entrenched landmark in the law of property which cannot be disregarded by judicial decision*" (J [80] (**CAB 29**), citing *Calverley*, 266 (Deane J)), "*not to be frittered away by nice refinements*"[18]; and "*the better course is to leave reform of this branch of law to the legislature which can, if its thinks fit, abolish or amend the presumptions prospectively*" irrespective of how anachronistic the presumption may appear: J [80] (**CAB 29**) quoting *Nelson*, 602 (McHugh J).

32 It is worth noting that this is exactly what the United Kingdom has sought to do by section 199 of the *Equality Act* 2010 (UK) (not yet in force), which abolishes the presumption but carves out from that change "*anything done before the commencement of this section*". The legislative ability to craft balanced rules, following inquiry and debate, is a sound reason for judicial non-intervention. The legislature, unlike the Courts, can impose rules of prospectively, hear from relevant experts and weigh up the types of sociological and policy considerations that are foreign to the judicial process.

What does it mean to "rebut" the "presumption"?

33 The "presumption" of advancement and the presumption of resulting trust can both be rebutted by evidence concerning the actual intention of the person who provided the purchase money at the time of the purchase: J [67] (**CAB 24-25**)[19]. Critically, the "presumption" of advancement can be rebutted by proof that the grantor, at the time of the transfer or purchase, did not intend the recipient of the property to take unrestricted

[18] J [80] (**CAB 29**), quoting *Wirth*, CLR 241 (McTiernan J), in turn quoting *Finch*, 674 (Lord Eldon).
[19] See, eg, *Wirth*, 240-241 (McTiernan J); *Calverley*, 251 (Gibbs CJ), 269 (Deane J); and *Nelson*, 547 (Deane and Gummow JJ), 586 (Toohey J).

beneficial title to the property[20]. Various decisions have suggested that "rebutting" the presumption gives rise to a further resulting trust[21], although as Deane and Gummow JJ acknowledged in *Nelson* (at 547-548), this reasoning is a somewhat artificial mechanism to avoid the Statute of Frauds.

34 Whether rebutting the "presumption" of advancement requires a search for a resulting or express trust, and whether the "presumption" is a presumption or not – what is clear is that "rebutting" the presumption required proof of a "*definite intention*" on the part of the transferor to retain beneficial title: *Damberg* at [44] (Heydon JA, with whom Spigelman CJ and Sheller JA agreed) and *Shiu Shing Sze Tu v Lowe* (2014) 89 NSWLR 317 at [194] (Gleeson JA, applying *Drever* at 450 (Dixon J, with whom Evatt J agreed)).

35 In *Drever*, a husband transferred land to his wife without consideration. He retained the certificates of title standing in the wife's name and he received the rents of the land, in accordance with an agreement that he was to be entitled to do so during his life. The wife, seeking to recover possession of the certificates, alleged there was a presumption of gift by husband to wife, and that the transfer was for the unlawful purpose of evading income tax. The primary judge found this was not the case and the High Court (Latham CJ, Starke and McTiernan JJ in the majority), dismissed the wife's appeal. Dixon J (p 450) said that to rebut the "presumption" of advancement, the husband was under an obligation of proving that "*a definite intention existed in his mind at the time of transfer that, during his life at any rate, the beneficial interest in the property should belong to him and not pass*" to his wife. His Honour continued, "*more is necessary than a nebulous intention to rely upon the matrimonial relationship as a source of control over the property he was vesting in his wife*". Dixon J (with whom Evatt J agreed) dissented and concluded that the husband could not and had not rebutted the "presumption" of advancement by "*setting up a design of clothing his wife with a false appearance of ownership during his lifetime lest he should be unable to meet his liabilities*" (p 450).

36 Typically, the definite intention to retain beneficial title is to be found based on the direct evidence of the person (*Martin*, 304-305 (the Court)), or from evidence of the

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[20] ***Charles Marshall Pty Ltd*** *v Grimsley* (1956) 95 CLR 353, 364-365; and *Nelson*, 547 (Deane and Gummow JJ).
[21] *Nelson*, 547-548 (Deane and Gummow JJ); *Martin*, 298; *Soar*, 67 (Page-Wood V-C).

circumstances surrounding the transfer such as the relationship of the parties and statements made by them[22].

37 Logically, the facts which support or rebut the definite intention to retain beneficial title must be found in something outside the basal facts that support either the presumed resulting trust or the "presumption" of advancement. The question of rebuttal only arises after the Court is satisfied that something has been advanced that would otherwise give rise to a presumed resulting trust (i.e. the giving of something of value without retaining beneficial title) in the content of a relationship covered by the "presumption" of advancement, such that there should not be a presumed resulting trust (i.e. a husband and wife). It would be entirely circular for the Court to entertain an argument that the "presumption" of advancement was rebutted by the fact that something of value was given without retaining beneficial title. Equally, it would be circular for the Court to weigh against that the fact that the thing of value was given in the context of the relationship of husband and wife. Something more is required. The Full Court's analysis of Mr Bosanac's borrowing is guilty of this erroneous reasoning – it took that borrowing of Mr Bosanac and used it to rebut the "presumption" of advancement.

The significance of borrowing: does it rebut the "presumption" of advancement?

38 In this case, there was no direct evidence from the parties. The Appellant's position is that there were no facts from which a "*definite intention*" to retain beneficial title could be inferred. The Full Court reasoned to the contrary, relying on the fact that the security for the loan over the Dalkeith Property was a mortgage "*tends strongly against the presumption of advancement applying in this case. We consider less probable than not in the circumstances just described that Mr Bosanac would take on a very substantial liability in respect of the Dalkeith Property without at the same time acquiring a corresponding beneficial interest in the Property*": FC [21] (**CAB 101**). The Full Court, in effect, created a new presumption where borrowed funds are advanced there is an intention to retain beneficial title. The Full Court's reasoning is a clear case of a "*nice refinement*", frittering away the "presumption" of advancement.

39 The Full Court's holding is inconsistent with authority. This Court has repeatedly treated borrowed funds as the contribution for the purpose of "presumptions" of

[22] *Charles Marshall Pty Ltd*, 364-365; *Calverley*, 251 (Gibbs CJ), 262 (Mason and Brennan JJ).

resulting trust and advancement[23]. Where parties intend to acquire property subject to a mortgage, the moneys raised on the mortgage are treated as a contribution by the parties who have borrowed the money from the mortgagee[24]. That principle would be undone if the borrowing could be used to rebut the "presumption" of advancement.

40 In *Martin*, the husband's purchase of property was mostly funded out of an overdraft (p 300). The Court did not suggest that this fact had any bearing on the operation of the presumption. Rather, the Court reviewed (at pp 305, 306) the motives of the husband in making the transfer and ultimately deferred to the trial judge's assessment of the husband's evidence (p 308). There was, in other words, some sound basis on which a definite intention could be assessed. Likewise in *Stewart Dawson* (at pp 691-692), the "presumption" of advancement was not rebutted, despite Mr Dawson apparently funding the disposition of the shares to his daughters out of a loan account (cf p 686). That is, he "*assumed a substantial liability without the benefit of acquiring any beneficial interest*" in the words of the Full Court: FC [15] (**CAB 99**)[25].

41 Something more than the mere fact of borrowing is required. For example, in *Calverley*, a *de facto* couple sought to purchase a house but after finding difficulty obtaining finance, the man told the woman that the finance company required the purchase to be in their joint names. Money was then raised on a mortgage under which the parties were jointly and severally liable to make repayments. Only Gibbs CJ considered the facts in the case gave rise to a "presumption" of advancement (at pp 250-251) but he found the presumption was rebutted as "*the appellant made no suggestion that the property be put in joint names until he experienced difficulty in obtaining finance*" and "*he said the finance company required the purchase to be in the joint names*" (at p 251). Accordingly, the observations of Gibbs CJ in *Calverley* (at p 251) show that something more than the mere fact of borrowing is required to rebut the presumption, such as the fact that the recipient's name must be on the loans for the purpose of obtaining finance.

42 Various Courts of Appeal have applied or considered the "presumption" of advancement where borrowed funds were the source of the advancement: see, for

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[23] *Calverley*, CLR 251 (Gibbs CJ), 257-258 (Mason and Brennan JJ).
[24] *Ingram v Ingram* [1941] VLR 95, 102 (O'Bryan J); *Currie v Hamilton* [1984] 1 NSWLR 687, 692 (McLelland J); *Calverley*, CLR 251 (Gibbs CJ), CLR 257-258 (Mason and Brennan JJ), and 267-268 (Deane J); *Murtagh v Murtagh* [2013] NSWSC 926, [75] (Hallen J).
[25] cf *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460, 480.

example *Davis v Williams* (2003) 11 BPR 21,313[26], *Sleboda v Sleboda* [2008] NSWCA 122[27], and *Swettenham v Wild* [2005] QCA 264[28]. None suggested that the fact of borrowing operated to rebut the "presumption".

43 No overseas jurisdiction has relied on borrowing as a basis to infer an intention to rebut the presumption. Although (as detailed below) English courts have developed a different position on the operation of the "presumption" with respect to matrimonial property, they have treated the mortgage as the contribution for the purpose of the "presumption" of advancement rather than a fact that rebutted the presumption: ***Silver v Silver*** [1958] 1 All ER 523. In Canada, the Supreme Court found that the "presumption" of advancement had not been rebutted where a husband made the down payment of $10,000.00 out of his own funds and used borrowed funds for the remainder of the purchase, with title taken in the wife's name only: *Jackman v Jackman* [1959] SCR 702. Locke, Martland and Judson JJ applied the "presumption" of advancement and did not suggest that borrowing was relevant to the search for intention.

44 Each of these decisions show that in cases involving the purchase of property in the name of a wife, courts have weighed a mix of testimony and documentary material that was of logical probative value in forming a view about intention. The mortgage and borrowed funds were mere context. In circumstances where the Court is seeking to identify a "*definite intention*" to retain beneficial title, this is hardly surprising.

45 In this case, there was simply nothing from which the same sort of analysis of intention could be conducted. The Commissioner never called Mr Bosanac to give evidence about his intention. It was the Commissioner's case to prove, and the significant gap in

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[26] At 21,322 [48]-[49] (Hodgson JA), 21,338 [197] (Young CJ). The primary judge (with whom the majority of the NSW Court of Appeal agreed) found that the "presumption" of advancement applied to the mortgage payments made by the husband and was not rebutted.

[27] A father and son bought a farm as tenants in common in equal shares in 1979. The father did not seek to rebut the "presumption" of advancement at [9], and neither the trial judge nor the NSW Court of Appeal relied on the father's claim that he purchased the property entirely using his own funds, including by way of making all mortgage repayments, to rebut the presumption.

[28] The Queensland Court of Appeal at [34]-[35] found that the "presumption" of advancement, which arose when a father transferred property to his daughter, had been rebutted, but this was not because the father had paid a majority of the purchase price out of his own money ($190,000.00) or because he had borrowed $55,000.00 to help meet the remaining cost of the property which his daughter and her husband agreed to repay (at [19]-[22]). Rather, the common intention was that the father would transfer the property to his daughter and in return, he was to retain a right to reside in the granny flat and be cared for by his daughter and her family (at [35], [42]).

the evidence is a consequence of the Commissioner's strategic decision not to call or subpoena him to give evidence. Instead, the Commissioner sought to argue that it was enough to prove that the property was the matrimonial home, and that it was possible to infer an intention to declare a trust from that fact alone.

46 Although the Full Court rejected that contention, it instead sought to take a different contextual fact and elevate it beyond its proper use. The consequence of the Full Court's analysis cannot be overstated – this Court can readily appreciate that as between husband and wife (or parent and child) most purchases of real property in Australia involve the use of borrowing. To allow the fact of borrowing to "rebut" or exclude the presumption would be entirely out of step with the reality faced by the population.

47 There is no good reason for the Full Court's analysis to be adopted. There is no sound basis in logic for treating a borrowed advancement different to one funded by cash. The Full Court's reasons are essentially conclusory. The Full Court's reasoning is distilled at FC [16] (**CAB 99**): "*the gifting by a husband to his wife of one of a number of houses, owned outright, is qualitatively quite different from borrowing to acquire and gift a house … The significance is that the nature of the transaction permits an inference as to intention consistent with the inference drawn in* Cummins[29] *at [71], in the second passage quoted from Professor Scott's work*". It is, with respect, difficult to identify from that analysis any sound basis for the conclusion.

48 The use of borrowed funds begs a question about intention rather than providing an answer. A person may borrow funds because they choose to, it being an efficient or commercially sensible decision; or because they need to, it being the only way that they can fund the purchase. Neither of these scenarios say anything about the intention to gift or hold beneficially. The same intention to gift can arise no matter the source of the funds used to fund that gift. To provide some examples – can it be said that a husband who borrows money to purchase an engagement ring intends to declare a trust over the asset? Is a mother who purchases a home for her daughter any more or less likely to have intended a gift or to retain beneficial title if she borrowed money to do so?

49 To return to the question-begging example given by the Full Court – why is a husband who owns multiple houses more capable of the intention to make a gift to his wife

[29] Being *Trustees of Property of Cummins (a bankrupt) v* ***Cummins*** (2006) 227 CLR 278.

compared to a husband who owns no property but is willing to borrow to do so? It cannot be merely because what is involved is a transfer rather than a purchase of property – as "*no substantial distinction universally can be drawn*" between those two[30]. It appears to rest on the implicit assumption that a wealthy husband with several houses is more capable of the intention to gift than the less wealthy husband who must borrow. That foundation is simply inconsistent with human experience. No universal assumptions about intention can be made from such slender facts.

50 This Court should hold that there is nothing in the fact that an advancement is made with borrowed funds that indicates or rebuts the intention of gift: J [222] (**CAB 78**). On the facts of this case, there was no evidence to suggest that Mr Bosanac's undertaking to repay the loan was anything but voluntary. The reasonable inference to draw is that the funds were borrowed out of choice. Mr Bosanac had significant assets that he could have sold to fund the purchase outright: J [224] (**CAB 78-79**) – his loan applications disclosed he held securities valued at $24,841,000.00 and total assets of over $25,000,000.00[31]. If he had transferred those assets to Ms Bosanac, then (according to the Full Court) that transfer would be covered by the "presumption". Instead, he used his properties to secure the borrowing. The correct analysis is that Mr Bosanac's choice to borrow rather than sell or transfer assets says nothing of his intention.

51 In the absence of a fact that allows for a clear inference to be drawn about intention, the Court should have applied the "presumption" of advancement. The Full Court erred in reasoning to the contrary at FC [15] (**CAB 99**). The Full Court's analysis distorts the operation of established doctrine in a way that is inconsistent with logic or precedent and could lead to wholly perverse results. Equally, to exclude or modify the operation of the presumptions in the context of species of property would be to completely re-cast the presumption so as to amount to quasi-legislative modification of the law.

Notice of Contention - the significance of the matrimonial home

52 The Commissioner's notice of contention raises the issue on which he was unsuccessful before both the primary judge and the Full Court. Ms Bosanac's submissions in response

[30] *Donaldson v Freeson* (1934) 51 CLR 598 at 614.
[31] See Affidavit of Yi Deng sworn 12 September 2019, at paragraphs 16.1 and 26 (Appellant's book of further materials (**AFM**) at **11** and **13**) and annexures YD-7 at p 64 (**AFM 24**), YD-12 at p 103 (**AFM 35**) and YD-13 at p 113 (**AFM 46**).

are as follows. First, the Commissioner's contention is inconsistent with principle: in Australia, the "presumption" of advancement applies to relationships and not species of property. Second, the Commissioner's contention is inconsistent with authority: the "presumption" of advancement has been raised in cases involving a matrimonial home in a stream of High Court authorities, particularly *Martin*, *Wirth* and ***Hepworth*** *v Hepworth* (1963) 110 CLR 309. Third, the Commissioner's contention is wrong if it suggests that *Cummins* overruled those authorities. Fourth, the Commissioner's contention is wrong to rely on the English approach to these matters.

53 As a preliminary matter, the Commissioner's contention raises this question: what does he mean by the "matrimonial home"? Is the answer "*the house that a husband and wife live in*"? Does it matter if the property was purchased by one party before the marriage, or must it be purchased after the wedding? What if the husband and wife live over two houses, or have a holiday home? Can an investment property be a "matrimonial home" if the income from that property is used jointly to support the matrimonial lifestyle? In cases where a husband and wife have one property, the answer may be clear cut. On the facts of this case, however, Mr and Ms Bosanac owned several properties. While they lived together in the Dalkeith Property, there is no reason to doubt that they benefitted from the other properties that they owned – whether through income on rents, capital gains or access to borrowed funds.

54 Ms Bosanac does not dispute that, as a matter of fact, the Dalkeith Property was a "matrimonial home" – but notes the difficulty created by the Commissioner's attempt to create a bright-line rule to apply generally about intention from such a nebulous concept. This Court's recent decision in *Fairbairn v Radecki* [2022] HCA 18 demonstrates the factual complexities that can arise in relationships between spouses and the properties that they co-habit.

55 **First contention**: the "presumption" of advancement applies to relationships and not species of property. To find to the contrary would be to overturn authorities of this Court such as *Scott v Pauly* (1917) 24 CLR 274 at 281-282 and *Stewart Dawson* at p 690. It would also ignore seminal English cases such as *Dyer* at 43-44.

56 There are sound reasons for not creating general statements of intention that apply to types of property and effectively create a third set of equitable presumptions.

57 Family decisions about real property are complex and nuanced. That is so whether the property is the "matrimonial home" or an investment property. Such a purchase is undeniably significant for almost all families. It is also a purchase accompanied by a high degree of formality – with each state having rules about the significance of legal title as reflected in the register. It is reasonable to assume that the decision about who would hold the property was carefully and thoughtfully made. In particular, where a husband decides to borrow property but not have the property put in their joint names, it is reasonable to infer that this was done thoughtfully by someone with the capacity to make such a decision. Why should equity intervene to assume that someone who made such a decision intended to declare a trust?

58 **Second contention**: the "presumption" of advancement has been raised in a stream of High Court cases involving a matrimonial home, particularly *Martin, Wirth* and *Hepworth*. In *Martin*, although the "presumption" was rebutted (at pp 307-308), the mere fact that it was a matrimonial home did not preclude the presumption from being raised. The primary judge observed that "*the relevant land [in* Martin*] was contiguous to, and part and parcel of the entirety of the land which the couple jointly lived on and worked. There is nothing in* Martin *which would suggest that the matrimonial home is in some different category from other property*": J [115], (**CAB 41**).

59 The "presumption" of advancement was also raised in *Wirth*, where a couple, who were engaged to marry, purchased land on which to build their future matrimonial home as joint tenants. The respondent (man) paid £150 of the purchase money of the £200 purchase price. Before the marriage, the man transferred his joint interest in the land to the appellant. The consideration stated in the transfer was £100 but this was not paid to him. After many years of marriage, the respondent later obtained an order declaring the appellant held the land as trustee for the two of them. The majority of the High Court (Dixon CJ and McTiernan J) found a resulting trust did not arise from the transfer. The primary Judge correctly analysed *Wirth* at J [107] (**CAB 39**), observing that "*[t]here is little doubt that Dixon CJ applied the 'presumption' of advancement to the matrimonial home*" and "*[a]t no point do the reasons of McTiernan J or Taylor J suggest that the fact that the property in question was the matrimonial home had any bearing on the operation or not of the 'presumption' of advancement*".

60 The primary judge correctly held that *Hepworth* "*clearly stands for the proposition*" that the "presumption" of advancement applies to the matrimonial home: J [121] (**CAB 43**). Although that case was determined on the basis that the wife had acquired the property without the consent of the husband, the primary judge noted that none of the Court's reasons indicate that the wife would also need to overcome the fact that the property was the matrimonial home.

61 **Third Contention**: *Cummins* did not overturn those authorities or modify the law of the "presumption" of advancement – it was not even a case about the "presumption". The primary judge correctly identified at J [178] (**CAB 65-66**), the question of "*whether, in relation to the matrimonial home, the High Court has departed from the 'presumption' of advancement despite relatively clear authority that it does apply to the matrimonial home. Such a departure, in light of this history, might be thought to require a degree of clarity*". The Commissioner's case, including on appeal, depended on an artificial reading *of Cummins* at [71]. As the primary judge held at J [181] (**CAB 66**), and the Full Court held at FC [11] (**CAB 97-98**), nothing about the reference to the work of Professor Scott (in *Cummins* at [71]) was sufficiently clear to indicate an abolition of the very longstanding "presumption" of advancement or to gut it in the context of marriage and the matrimonial home. The primary judge at J [179] (**CAB 66**), rejected the argument made by the Commissioner that "*the passage (at [71]) should be given precedence over the decisions of* Wirth *and* Martin *delivered more than 45 years ago*".

62 The Full Court reached a corresponding conclusion at FC [10] (**CAB 97**). The Full Court correctly observed that the Commissioner's argument amounted to a suggestion that *Cummins* created a new presumption in itself which would then need to be rebutted. The Full Court at FC [10] (**CAB 97**) identified four reasons why such a contention was wrong. The Commissioner's position (at least as articulated before the primary judge and the Full Court) simply misstates the principle from *Cummins*. If *Cummins* did create a new presumption, then it was wrong to do so and the Appellant submits that this Court should not follow *Cummins* to the extent it stands for any general proposition that the "presumption" of advancement does not apply to the matrimonial home or is presumed to be rebutted in relation to the matrimonial home.

63 **Fourth Contention**: Australian courts have consistently rejected England's divergent approach to treat matrimonial and *de-facto* property cases as being appropriately resolved by equity declaring trusts.

64 For example, in *Hepworth*, Windeyer J (at p 318) rejected the discretionary approach adopted in some English authorities and finding that English cases should not be followed to the extent that they stray beyond the strict application of equitable principles: cf J [119] (**CAB 42-43**). As the primary judge noted, the approach in the UK has been "*resoundingly rejected*" in Australia (J [210] (**CAB 75**)), drawing on the reasoning of the Court in *Allen v Snyder* [1977] 2 NSWLR 685: see J [132]-[138] (**CAB 47-50**). The proposition that the Court can impute to the parties an intention which never actually existed is not part of Australian law.

65 The House of Lord decisions of ***Pettitt*** *v Pettitt* [1970] AC 777 and ***Gissing*** *v Gissing* [1971] AC 886 concerned instances where a partner or spouse claimed a beneficial interest in property held in the name of the other partner or spouse based on contributions in the form of improvements and maintenance to the property rather than a contribution to the purchase price. As such, the "presumption" of advancement did not arise. But their Lordships, in their *dicta*, traverse many of the circumstances in which a beneficial interest in the matrimonial home is claimed by one spouse against the other, and consider appropriate inferences to draw about the intentions of such couples from their conduct: cf J [124] (**CAB 44**).

66 The primary judge reflected on these cases at J [126] (**CAB 45**), noting "*it seems that the prevailing principle from their Lordships' speeches is that a trust will be found to exist where the moving party can establish, having regard to the evidence and conduct of the parties, a common intention at the time of the purchase that the property was to be shared*"[32]. Lord Reid and Lord Diplock, who were in the minority, espoused the view that a common intention could be deemed by "*judicial imputation*" in the absence of any evidence to support such an inference: *Pettitt* at 794-796, 822-823. In *Gissing*, Lord Reid remained steadfast in his view (at 897) but Lord Diplock acceded to the majority view (at 904).

[32] Citing *Pettitt*, 804, 806, 810-811, 813, 822; and *Gissing*, 897, 989, 900, 902, 906.

67 These decisions should be understood in their context. The *Matrimonial Causes Act* 1973 (UK)[33] was introduced three years after. Prior to that, the English courts were clearly attempting to address the lack of an effective mechanism to fairly distribute property between divorcing parties. That is not a policy concern that would motivate this court to adopt the same approach. The *Family Law Act* 1975 (Cth) is more than capable of providing such a mechanism for divorcing parties in Australia. It bears repeating that it is a creditor who seeks equity's assistance here.

PART VII: ORDERS SOUGHT BY THE APPELLANT

68 The Appellant seeks the following orders:

1. Appeal allowed.
2. Set aside the orders of the Full Court of the Federal Court of Australia made on 31 August 2021, and 31 January 2022, and in their place order:
    1. The appeal be dismissed.
    2. The appellant pay the costs of the second respondent, to be assessed if not agreed.
3. The First Respondent pay the Appellant's costs of the application for special leave and the appeal to this Court.

PART VIII: TIME REQUIRED FOR PRESENTATION OF ORAL ARGUMENT

69 The estimated time for the Appellant's submissions in chief, and reply, is 2.0 hours.

Dated: 31 May 2022

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[33] Which by s 24 allowed for the redistribution of property between parties.