HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

THE TRUSTEES OF THE PROPERTY OF
JOHN DANIEL CUMMINS, A BANKRUPT APPELLANTS

AND

MARY ELIZABETH CUMMINS AND ANOR RESPONDENTS

The Trustees of the Property of John Daniel Cummins, A Bankrupt v Cummins [2006] HCA 6
7 March 2006
S286/2005

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 30 July 2004 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

B A J Coles QC with C R C Newlinds SC and P Kulevski for the appellants (instructed by Clayton Utz)

W Sofronoff QC with M A Ashhurst for the respondents (instructed by Russell and Company)

CATCHWORDS

The Trustees of the Property of John Daniel Cummins A Bankrupt v Cummins

Bankruptcy − Transfer to defeat creditors − Main purpose − Bankrupt transferred interest in matrimonial property to first respondent wife and transferred shares to second respondent − Whether evidence sufficient to permit inference that bankrupt's main purpose in transferring assets was to defeat or delay creditors − Whether main purpose of transfers to protect assets against future professional negligence suits − Whether transfer of assets void against trustee in bankruptcy − *Bankruptcy Act* 1966 (Cth), s 121(1)(b).

Evidence − Judicial notice − Bankrupt, a Queen's Counsel who maintained two sets of chambers, failed to lodge tax returns for about 45 years − Whether inference should be drawn that bankrupt had a taxable income at a level which gave rise to a liability to pay income tax − Whether income disclosed in later tax returns relevant to establish income from earlier period of time − Whether Australian Taxation Office a creditor of the bankrupt.

Trusts − Resulting trusts − Joint tenancy − Bankrupt and wife purchased land as joint tenants − Purchase money provided in unequal shares − Whether presumption of resulting trust applies such that property beneficially held in proportion to contributions − When appropriate point in time for determination of equitable interests in property − Bankrupt and wife in subsisting matrimonial relationship improved property subsequent to purchase by constructing matrimonial home − Whether evidence sufficient to rebut presumption of resulting trust − Whether transfer was of bankrupt's interest as joint tenant without any adjustment to allow for beneficial tenancy in common in unequal shares.

Bankruptcy Act 1966 (Cth), ss 6, 121.

1 GLEESON CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. The appellants ("the Trustees") were appointed by a resolution of creditors passed on 16 March 2001 to be trustees of the bankrupt estate of John Daniel Cummins. Mr Cummins had become bankrupt by force of s 55(4A) of the *Bankruptcy Act* 1966 (Cth) ("the Act") when the Official Receiver endorsed his debtor's petition dated 12 December 2000.

2 The statement of affairs disclosed that as at 30 January 2001 the assets of Mr Cummins totalled $259,614 and his liabilities to unsecured creditors $1,040,400. Of the gross receipts disclosed in the 1992-1999 income tax returns, the great bulk was derived from practice as a barrister. There was a public examination of Mr Cummins under s 81 of the Act held on 6 June 2001, but, in the litigation from which this appeal arises, he was not a party[1], and the Trustees could not use the transcript of what he had said at his examination[2].

The dramatis personae

3 Mr Cummins was admitted first as a solicitor in 1957 and practised at the New South Wales Bar after his admission in April 1961. He took silk in December 1980. At that time, appointments in New South Wales as Queen's Counsel were made by the Executive Council upon nomination by the Attorney-General, who, by convention, was advised by the President of the New South Wales Bar Association[3].

4 The first respondent, Mrs Cummins (formerly Mary Elizabeth Power), married Mr Cummins in 1964. They lived thereafter as husband and wife but, in February 2002, they had separated and by June 2002 proceedings were pending in the Family Court.

5 The second respondent ("Aymcopic") is the trustee of the Cummins Family Trust, the beneficiaries of which are Mrs Cummins and the four children

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1 Mr Cummins ceased to be a party by order of Sackville J on the first day of the trial: *Prentice v Cummins* (2002) 194 ALR 94 at 100; see also *Prentice v Cummins* (2002) 124 FCR 67 at 70.

2 See s 81(17)(a) of the Act.

3 See the remarks of Gleeson CJ upon the announcements on 10 December 1992 of appointments of Queen's Counsel: (1993) 67 *Australian Law Journal* 171.

of her marriage with Mr Cummins. Mr Cummins is not a beneficiary. The deed whereby Aymcopic became trustee of the Cummins Family Trust was executed on 24 August 1987, a week after Mr and Mrs Cummins each had acquired one share in Aymcopic which had been a "shelf" company.

The tax history of Mr Cummins

6 The largest creditor by far in the bankruptcy is the Commonwealth in the guise of the Australian Taxation Office ("the ATO"). This indebtedness of Mr Cummins followed the issue of assessments upon the lodgment on 14 February 2000 of income tax returns for the years ended 30 June 1992 to 30 June 1999 and the ATO had instituted proceedings to recover $955,672.92.

7 Before lodging these returns on 14 February 2000, Mr Cummins had not lodged any income tax return since about 1955. Section 208 of the *Income Tax Assessment Act* 1936 (Cth) ("the Assessment Act") stipulates that income tax when due and payable is a debt due to the Commonwealth, and s 222 provides for the imposition of additional tax, by way of penalty, upon a taxpayer who has failed to furnish a return[4]. Part XXIV of the *Taxation Laws Amendment Act* 1984 (Cth) had introduced into the *Taxation Administration Act* 1953 (Cth) detailed offence provisions[5] for failure to furnish returns when required under a taxation law. No default assessments under s 167 of the Assessment Act were made against Mr Cummins. The upshot was that, during the whole of the period in which he had practised as a barrister, Mr Cummins had paid no income tax.

8 Upon success in their appeal to this Court, the Trustees seek two declarations and consequential relief with respect to two transactions in August 1987 ("the August transactions"). The first declaration is that the transfer made on or about 26 August 1987 by Mr Cummins to Mrs Cummins of his legal and beneficial interest as joint tenant in the property at 77 Alexandra Street, Hunters Hill, a Sydney suburb, ("the Hunters Hill property") is void against the Trustees,

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4 Throughout this period, there was stipulated (with variations from Budget to Budget) a rather modest sum for the taxable income of resident individuals below which no tax was imposed. For example, under the terms of the 1988 Budget, no tax was imposed on a resident individual whose taxable income did not exceed $5,100: O'Grady and O'Rourke, *Ryan's Manual of the Law of Income Tax in Australia*, 7th ed (1989) at 14.

5 ss 8B-8H.

pursuant to s 121 of the Act. The Hunters Hill property is land registered under the provisions of the *Real Property Act* 1900 (NSW). The second declaration is that the transfer of 6,000 shares in Counsel's Chambers Ltd ("the Shares") made by Mr Cummins to Aymcopic on or about 26 August 1987 is void as against the Trustees, again pursuant to s 121 of the Act. The Shares entitled Mr Cummins to occupancy of a double room on a floor of barristers' chambers in Wentworth Chambers in Phillip Street, Sydney.

9 In addition to his chambers in Phillip Street, Mr Cummins maintained chambers at Parramatta. In 1986 he acquired for $30,000 units in the Barristers Chambers Parramatta Unit Trust. These formed part of the bankrupt estate and ultimately were sold by the Trustees for $100,000. Mr Cummins had intended in 1987 to transfer these units to Aymcopic by way of gift, but his instructions to his solicitor were not implemented.

10 The documents to give effect to the August transactions were prepared by Mr Harris, a solicitor practising as "B C Harris & Co". Mr Harris did not give evidence but his file notes and some of his correspondence with Mr Cummins respecting the August transactions were in evidence. None of the other participants in the August transactions gave evidence respecting them. Mrs Cummins gave evidence but upon what were then other live issues. Little of the documentary evidence was in dispute; the principal area for debate at all stages of the litigation has been the nature of the inferences to be drawn from that evidence.

The Federal Court litigation

11 Upon application made by the Trustees to the Federal Court in 2001 and heard by Sackville J, they obtained declarations in the terms described above and consequential relief. His Honour gave detailed reasons for judgment on 24 September 2003[6]. Sackville J had earlier, on 5 December 2002, rejected a "no case" submission made by the respondents in respect of the Trustees' s 121 applications regarding the Hunters Hill property and the Shares. His Honour proceeded upon the footing provided by his earlier decision in *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd*[7]

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6 *Prentice v Cummins* (2003) 134 FCR 449.

7 (2000) 169 ALR 344 at 356-357.

that the Federal Court Rules[8] authorised the entertainment of "no case" submissions. Sackville J gave detailed reasons upon the "no case" submission[9]. We shall refer to the two sets of reasons in order of their delivery and respectively as "the first judgment" and "the second judgment".

12 An appeal to the Full Court of the Federal Court by Mrs Cummins and Aymcopic was successful. The Full Court (Carr and Lander JJ; Tamberlin J dissenting)[10] set aside the final orders made by Sackville J, including the declaratory and consequential relief, and ordered in place thereof that the application by the Trustees be dismissed. Hence the reinstatement of those orders which is sought on the appeal by the Trustees to this Court.

The August transactions

13 The Hunters Hill property had been purchased in 1970 and the title was taken by Mr and Mrs Cummins as joint tenants. They were registered as proprietors on 10 August 1970. The solicitors acting for the purchasers were Messrs J P Grogan and Co. The property so acquired was then vacant land. A dwelling was erected on it shortly thereafter which served as their matrimonial home.

14 Sackville J found that Mrs Cummins had contributed 65.8 per cent of the purchase price of $31,000; in the Full Court, further allowance was made in Mrs Cummins' favour for the whole of the deposit she provided, raising her contribution to 76.3 per cent. In the second judgment, Sackville J held that any presumption of resulting trust in shares proportionate to the respective contributions of Mr and Mrs Cummins had been rebutted, and that in 1970 they had shared the intention to acquire the Hunters Hill property as joint tenants, legally and beneficially[11]. It was the disposition in favour of Mrs Cummins, made in August 1987 by severance of that joint beneficial interest of

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8 Order 35 r 1 empowers the Federal Court, at any stage of proceedings and on application of any party, to "pronounce such judgment or make such order as the nature of the case requires".

9 *Prentice v Cummins* (2002) 124 FCR 67.

10 *Cummins v Trustees of the Property of Cummins (a bankrupt)* (2004) 209 ALR 521.

11 (2003) 134 FCR 449 at 469.

Mr Cummins, which s 121 of the Act rendered an ineffective subtraction from his bankrupt estate. The disposition being void against the Trustees by operation of s 121, the upshot would be that the joint tenancy was severed by the bankruptcy of Mr Cummins[12].

15 Given the conclusion by the majority of the Full Court that the case for the Trustees under s 121 failed, it was unnecessary for their Honours to go on to consider the resulting trust issue. However, they did so and differed from Sackville J, holding that the presumption of a resulting trust to reflect the contributions to the purchase price in 1970 had not been rebutted[13]. In this Court, the first respondent supports that conclusion and the Trustees challenge it.

16 The contract and transfer in respect of the interest of Mr Cummins as joint tenant in the Hunters Hill property were executed on the same day, 26 August 1987. A valuation had been obtained by Mr Harris on account of Mr and Mrs Cummins for the stated purpose of "stamp duty assessment", and the five bedroom residence was valued at $410,500. The price was stated in the contract and transfer to be one-half of this sum, namely $205,250, and the transfer included an acknowledgment by Mr Cummins that he had received that consideration.

17 It was, however, common ground before Sackville J that Mrs Cummins did not pay the purchase price or any part of it. She did pay *ad valorem* stamp duty on the contract and provided the $300 for payment of the valuer's fee. The transfer was registered and Mrs Cummins thereby became registered proprietor of an estate in fee simple in the Hunters Hill property.

18 The Hunters Hill property was sold after the bankruptcy and by agreement between the parties. The share of the net proceeds of sale for which Mrs Cummins was obliged by the orders of Sackville J to account to the Trustees was $1,064,417.82 with accrued interest.

19 The transfer of the Shares to Aymcopic, also executed on 26 August 1987, had recited payment of consideration of $360,000 paid by Aymcopic. Sackville J found that it had been the intention of the parties that the two transactions effected on 26 August were to be completed together. Again, it was common

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12 *Re Francis* (1988) 82 ALR 335 at 339.

13 (2004) 209 ALR 521 at 549.

ground that Aymcopic did not pay any part of the purchase price. (It will be necessary later in these reasons to revert to the significance of the absence of payment both by Aymcopic and Mrs Cummins.) The funds to meet the stamp duty on the transfer were provided by Mrs Cummins. The Shares were registered in the name of Aymcopic in December 1987.

20 The Shares also were sold. The proceeds of sale for which Aymcopic was obliged by the orders of Sackville J to account to the Trustees was $405,882.73 and $120,010, each with interest, in respect of two parcels of 4,000 and 2,000 of the Shares.

Section 121 of the Act

21 Section 121, in its present form, was substituted for the previous s 121 by the *Bankruptcy Legislation Amendment Act* 1996 (Cth)[14]. The 1996 legislation had its genesis in the Harmer Report, published in 1988[15].

22 As originally enacted in 1966, s 121 rendered void as against the trustee in bankruptcy "a disposition of property ... with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who acted in good faith" (s 121(1)). Protection was given to the title or interest of a person purchasing or acquiring property "in good faith and for valuable consideration" (s 121(2)). Section 121 had had no immediate counterpart in the *Bankruptcy Act* 1924 (Cth). Its provenance lay rather in the Elizabethan Statute of Fraudulent Dispositions[16], which in New South Wales is represented by s 37A of the *Conveyancing Act* 1919 (NSW) ("the Conveyancing Act").

23 The current form of s 121 is more broadly drawn than the earlier s 121. Distinctions between the two provisions were explained by Sackville J in the first

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14 Sched 1, Item 208, with application to bankruptcies for which the date of the bankruptcy is on or after 16 December 1996 (Sched 1, Item 457).

15 Australia, The Law Reform Commission, *General Insolvency Inquiry*, Report No 45.

16 13 Eliz 1 c 5 (1570). See *Cannane v J Cannane Pty Ltd (In liq)* (1998) 192 CLR 557 at 573-574 [37]-[40], 588-589 [85]-[88]; *R v Dunwoody* (2004) 212 ALR 103 at 131-132.

judgment[17], and it is unnecessary to refer further to them here. So far as presently material, s 121 states:

> "(1) A transfer of property by a person who later becomes a bankrupt (the ***transferor***) to another person (the ***transferee***) is void against the trustee in the transferor's bankruptcy if:
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> (a) the property would probably have become part of the transferor's estate and would probably have been available to creditors if the property had not been transferred; and
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> (b) the transferor's main purpose in making the transfer was:
>
> (i) to prevent the transferred property from becoming divisible among the transferor's creditors; or
>
> (ii) to hinder or delay the process of making property available for division among the transferor's creditors.
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> (2) The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (1)(b) if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent.
>
> (3) Subsection (2) does not limit the ways of establishing the transferor's main purpose in making a transfer.
>
> (4) Despite subsection (1), a transfer of property is not void against the trustee if:
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> (a) the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and
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> (b) the transferee did not know that the transferor's main purpose in making the transfer was the purpose described in paragraph (1)(b); and

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17 (2002) 124 FCR 67 at 88-91.

(c) the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.

(5) The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee."[18]

24 The term "property" means real or personal property of every description and includes "any estate, interest or profit ... arising out of or incident to any such real or personal property" (s 5(1)). For the purposes of s 121, the "market value" of property transferred is the market value of property at the time of its transfer (s 121(9)). That sub-section also states that "a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person"[19]. Section 121(8) protects the rights of a person who acquired property from the transferee both in good faith and for at least the market value of the property.

The issues

25 Comprehensive pleadings were filed. It is important to note that the Defence did not place any reliance upon par (a) of s 121(4) of the Act. Neither respondent asserted that in respect of either the sale of the Shares or the transfer of the interest of Mr Cummins in the Hunters Hill property, consideration had been given which "was at least as valuable as the market value of the property" (s 121(4)(a)). It followed that there was no occasion in the relief granted by Sackville J for the operation of the refund provision in s 121(5).

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18 Certain matters have no value as consideration for the purposes of s 121(4) and (5). The transferee's promise to marry or to become de facto spouse of the transferor, and the transferee's love or affection for the transferor do not suffice. Neither does the fact that the transferee is related to the transferor, nor, if the transferee is the spouse or de facto spouse of the transferor, does the making of a deed by the transferee in favour of the transferor. These exclusions are found in s 121(6).

19 It is not contended by the respondents that the transfer in August 1987 of the interest of Mr Cummins in the Hunters Hill property could not answer the description of a "transfer of property" for the purposes of s 121 of the Act; cf *Anderson v Peldan* [2005] FCA 1179.

26 As indicated earlier in these reasons, the case for the Trustees for the most part was documentary. The respondents elected to call no evidence on the Trustees' claims respecting the Hunters Hill property and the Shares[20]. Upon the appeal to this Court, the respondents accepted in their oral submissions that the case had been conducted on the conventional basis that the transfers had been voluntary.

27 In that forensic setting, there were two questions for the primary judge concerning the operation of s 121 which remained live issues on the appeal to this Court. One was whether at the time of the August transactions the Commonwealth (treated as indistinguishable from the ATO and the Commissioner of Taxation) was a "creditor" of Mr Cummins within the sense of s 121. The other was whether the Court was to draw the inference that Mr Cummins, in making the transfers in August 1987, had the "main purpose" required by s 121(1)(b) of the Act. Was that purpose to prevent the property becoming divisible among his creditors or to hinder or delay the process of making property available for division among his creditors? Sackville J found that such inferences were available and should be drawn. His Honour accordingly decided both issues in favour of the Trustees.

"Creditors"

28 Section 121(1)(b) of the Act speaks of the transfer of property being divisible "among the transferor's creditors". Section 6 states:

> "A reference in this Act to an intent to defraud the creditors of a person or to defeat or delay the creditors of a person shall be read as including an intent to defraud, or to defeat or delay, any one or more of those creditors."

Section 6 addressed the terms of s 121 in its previous incarnation; the section then used the phrase "with intent to defraud creditors". However, the need to rewrite s 6 in the light of the current text of s 121 appears to have been overlooked. Section 6 does retain some operation. Counsel for the respondents pointed to the use in s 266 of the phrase "with intent to defraud his or her creditors". That section creates an offence where, to put it shortly, there is with the necessary intent a disposition or charging of property by a person who becomes or has become bankrupt.

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20 (2003) 134 FCR 449 at 455.

29 Whatever may be the operation retained by s 6, there was no substantial controversy between the parties to the present appeal that in an appropriate case it was enough that one or more of the creditors of the transferor was the object of the main purpose spoken of in s 121(1)(b).

30 The question then arises whether the creditor or creditors spoken of in the section must have that status at the time of the transfer. In *P T Garuda Indonesia Ltd v Grellman*[21], a case upon s 121 in its previous form, the Full Court of the Federal Court rejected a submission that the class of creditors referred to is limited to those who at the time of the disposition in question have claims of a nature which then would be susceptible to proof under s 82 of the Act[22].

31 In *R v Dunwoody*, an appeal against convictions under s 266 of the Act, McPherson JA said[23]:

> "It is true that statutory enactments of this kind consistently refer to defrauding or deceiving 'creditors'; but the course of judicial decision over the centuries shows that this expression is not to be confined to its limited and technical sense of a person to whom a debt is presently due and owing."

Section 40(1)(c) stipulates as an act of bankruptcy the departure from or remaining out of Australia of a person "with intent to defeat or delay his or her creditors". Of that expression, in *Barton v Deputy Federal Commissioner of Taxation*[24], Stephen J treated as sufficient for the commission of that act of bankruptcy "awareness of an impending liability" or "some impending indebtedness". In support of that conclusion, his Honour referred to decisions construing the Elizabethan statute and s 37A of the Conveyancing Act.

32 In the light of authorities such as these, there was no real dispute in the present appeal that, if the other elements of s 121 were made out, the

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21 (1992) 35 FCR 515 at 526.

22 cf *Coventry v Charter Pacific Corporation Ltd* (2005) 80 ALJR 132; 222 ALR 202.

23 (2004) 212 ALR 103 at 132.

24 (1974) 131 CLR 370 at 374.

Commonwealth, represented by the ATO, was a creditor for the purposes of the section. Given the further proposition that the section may be satisfied in the absence of a plurality of such creditors, it is unnecessary to consider a further point. This concerns whether an apprehension of actions for professional negligence against a barrister such as Mr Cummins and the taking of action with the main purpose of preventing the transfer of property becoming divisible among that class of potential plaintiffs could satisfy the section.

33 However, on the appeal to this Court, the respondents restated the submission that no inference should be drawn as to the level of receipts by Mr Cummins in the period preceding the August transactions. The proposition appeared to be that his "tax liability" did not exist, or was in such a low range as to make it implausible that this provided his "main purpose". With that contention it will be necessary to deal further in these reasons.

"Main purpose"

34 What had been required for the Trustees to succeed at trial was that the circumstances appearing in the evidence gave rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability, that, in making the August transactions, Mr Cummins had the "main purpose" required by the statute[25]. Further, counsel for the Trustees accepted that, in determining the inferences to be drawn from the primary facts, regard was to be had to the seriousness of the allegations made against Mr Cummins (although he was not a party) and the gravity of the consequences of findings adverse to him[26]. Reference was made to the well-known judgment of Dixon J in *Briginshaw v Briginshaw*[27].

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25 See *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 per Dixon, Williams, Webb, Fullagar and Kitto JJ; *Luxton v Vines* (1952) 85 CLR 352 at 358 per Dixon, Fullagar and Kitto JJ; *Jones v Dunkel* (1959) 101 CLR 298 at 304-305 per Dixon CJ, 310 per Menzies J, 318-319 per Windeyer J; *Girlock (Sales) Pty Ltd v Hurrell* (1982) 149 CLR 155 at 161-162 per Stephen J, 168 per Mason J; *Anikin v Sierra* (2004) 79 ALJR 452 at 459-460 [45]-[46] per Gleeson CJ, Gummow, Kirby and Hayne JJ; 211 ALR 621 at 631.

26 (2002) 124 FCR 67 at 95.

27 (1938) 60 CLR 336 at 361-362.

35 The circumstances, taken together, which satisfied the primary judge that Mr Cummins had the requisite "main purpose" were identified by his Honour in the first judgment as follows[28]:

> "
> - [Mr Cummins] was well aware in August 1987 that he had incurred very substantial liabilities to [the ATO], contingent only on [the ATO] issuing assessments in respect of past income years;
> - [Mr Cummins] was well aware at that time that [the ATO] would issue assessments once [his] longstanding tax delinquency became known, an event that could occur at any time;
> - [Mr Cummins] divested himself voluntarily of virtually all his substantial assets in August 1987;
> - in any event, the assets retained by [Mr Cummins] were not sufficient to meet his taxation liabilities, if [the ATO] decided to issue assessments; and
> - [Mr Cummins] saw the transfers as increasing the chances that his assets would be protected from any claims made by [the ATO]."

36 Particular items of evidence impressed the primary judge. The notes of the solicitor, Mr Harris, at the time of the August transactions showed that he had paid attention to s 121 of the Act (which then spoke of "intent to defraud creditors") and to s 37A of the Conveyancing Act. Documentary evidence in part emanating from Mrs Cummins' bank referred to assets being in her name for reasons to do with her husband's occupation.

37 Sackville J did not infer that Mr Harris was privy to the information that his client had not put in tax returns. But his Honour concluded that it was very likely that Mr Harris discussed with his client the legal perils that the August transactions might encounter, and that Mr Cummins would have seen these perils in a special light. Sackville J said[29]:

> "It is clear that [Mr Harris] directed his attention to the effect on the proposed transactions of ss 120 and 121 of [the Act]. It is also clear

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28 (2002) 124 FCR 67 at 100.

29 (2002) 124 FCR 67 at 100.

> enough that [Mr Harris] recommended that the transfers should record that the expressed consideration had actually been received, because he thought (rightly or wrongly) that this would increase the chances that the transactions would survive subsequent scrutiny if challenged under the relevant legislation. (His notes say that 'Mary *must* be a purchaser' and a letter written by him 10 years after the events suggests that he thought in 1987 that if the transfers were for an expressed consideration and [Mr Cummins] subsequently forgave the indebtedness, the transfers would not constitute 'settlements' for the purposes of [the Act], s 120.)" (original emphasis)

38 Mr Cummins was a gentleman of the turf. At one stage he was a member of the Committee of the Australian Jockey Club and records later assembled by an accountant, Mr Morelli, in connection with preparation of the income tax returns for 1992-1999, showed items of significant expenditure in betting and the maintenance of race horses. It may be, though the reasoning of Sackville J did not rely upon the point, that it was to be inferred that the expenditure on turf interests pre-dated 1992, and was an element in the manner of living enjoyed by Mr Cummins at the time of the August transactions.

39 At trial, counsel for the respondents identified several possible explanations of the August transactions. One was that Mr Cummins had sought to alleviate what in 1987 were matrimonial difficulties. Another was a wish to provide for his wife and children. (Hence, perhaps, the absence of a plea of market value consideration under s 121(4)(a) of the Act.) The primary judge described the first explanation as no more than unsupported speculation and, as to the second, a desire by Mr Cummins to benefit his family played no more than a minor part in the decision-making process; in any event, it was consistent with a main purpose of defeating or delaying the creditors of Mr Cummins[30].

40 With respect to the second explanation, some reference should be made, by way of contrast, to *Williams v Lloyd*[31]. In that case, both the bankrupt and his wife had died at the time of the hearing of applications to set aside various transactions upon grounds including the Elizabethan statute and s 37A of the Conveyancing Act. Evidence, however, was given by two of the bankrupt's adult children. The applications succeeded at first instance but an appeal to this Court

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30 (2002) 124 FCR 67 at 101.

31 (1934) 50 CLR 341.

was successful. Dixon J described the source of the impugned dispositions as the persuasions of the wife of the bankrupt. These were directed not to protecting the property of the husband against future creditors, but to withdrawing capital from apprehended improvident hazardous investments[32]. His Honour also remarked that at the time of the dispositions the bankrupt had been "in a perfectly sound financial position" with "nothing to fear"[33].

41 The third hypothesis to explain the August transactions was a concern that, given what was on 26 August 1987 the pending appeal to this Court in what became *Giannarelli v Wraith*[34], the law relating to the liability of counsel in negligence might be changed, and a desire of Mr Cummins to avoid his assets being at risk if a future client sued him for in-court work[35]. Sackville J questioned whether such a "main purpose" would not in any event answer s 121(1)(b) of the Act[36]. He concluded that protection against such claims had been seen by Mr Cummins as but a "side benefit" of the transfers in question, and held that Mr Cummins' "main purpose in transferring his assets was being to prevent the assets being divisible among his creditors, specifically [the ATO]"[37].

42 Sackville J put to one side, as being made too late in the course of the litigation, the contention of the Trustees that it was significant support for their case that, on 2 April 1987, the Senate had rejected for the second time the Australia Card Bill 1987, which would have provided a precursor to the present compulsory tax file number system, and that the government of the day, whose bill it had been, had been returned at a general election held on 11 July 1987[38]. Thereafter, the tax file number system was introduced by the *Taxation Laws Amendment (Tax File Numbers) Act* 1988 (Cth) and commenced on 1 January 1989.

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32 (1934) 50 CLR 341 at 372.

33 (1934) 50 CLR 341 at 372.

34 (1988) 165 CLR 543. Special leave was granted on 14 August 1987.

35 (2002) 124 FCR 67 at 101.

36 (2002) 124 FCR 67 at 102.

37 (2002) 124 FCR 67 at 102.

38 (2002) 124 FCR 67 at 86.

The Full Court

43 The majority in the Full Court displaced the reasoning and conclusions of the primary judge, but erred in doing so, so that, subject to the outcome on the resulting trust issue, the appeal to this Court by the Trustees must succeed.

44 The Full Court said that "there was no evidence that during the years before 1987 ... [Mr Cummins'] taxable income was at a level which gave rise to an obligation to pay tax"[39]. Reference has been made earlier in these reasons to the rather modest sums above which such an obligation arose. Their Honours expressed their ultimate conclusion as follows[40]:

> "There is nothing in the evidence to suggest that in 1987 [Mr Cummins] anticipated being unmasked as a person who had not filed income tax returns for many, many years. On the contrary, the pattern of not filing income tax returns continued for another 12 years until Mr Harris referred [Mr Cummins] to Mr Morelli for the purpose of preparing and lodging the returns."

Their Honours added[41]:

> "On the evidence, the only thing special about 1987 was the *Giannarelli* litigation."

45 Earlier in their joint reasons, the majority discounted the treatment by Sackville J of the appointment of Mr Cummins to the rank of senior counsel as recognition of his professional attainments and expertise and its use as an indicator of his derivation of substantial income. There was nothing in their view to "permit the jump from the significance of the appointment as a senior counsel to an assumption about even the approximate level of [Mr Cummins'] taxable income"[42]. The majority also remarked[43]:

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39 (2004) 209 ALR 521 at 535-536.

40 (2004) 209 ALR 521 at 542.

41 (2004) 209 ALR 521 at 542.

42 (2004) 209 ALR 521 at 538.

43 (2004) 209 ALR 521 at 538.

> "It might well be expected that, on average, a barrister who had been in practice for 22 years, including 6 years as senior counsel, would have enjoyed a large taxable income. But, in our opinion, [the Trustees] needed to adduce some evidence (albeit slight) of the likely level of taxable income which this particular barrister enjoyed, that is did he fit the stereotype average? Or even, was it likely that he did?"

46 The force of the first sentence is not diminished by the following two sentences. It was entirely appropriate for Sackville J to have placed the significance he did upon the duration of Mr Cummins' practice at the bar, particularly as senior counsel. The circumstances that must have attended his taking silk in 1980 have been referred to earlier in these reasons. It is in the highest degree unlikely that a junior counsel with an insubstantial practice would obtain a favourable recommendation by the President of the New South Wales Bar Association to the New South Wales Attorney-General. It is also unlikely that a senior counsel with a meagre practice would be able to maintain two sets of chambers, one being generous accommodation in Phillip Street.

47 The majority in the Full Court also emphasised that the purchase of the Shares and the units, relating to the two sets of chambers maintained by Mr Cummins, may have been funded by loan moneys[44]. That could have been the case but, if so, Mr Cummins would have needed the means to service the indebtedness.

48 As was pointed out in the course of argument in this Court, the competing possibilities seem to have been that, rather than relying upon receipts from his practice, Mr Cummins had been supported for many years by Mrs Cummins. As to that, there was no evidence from Mrs Cummins. Another possibility might have been that Mr Cummins was sustained by resort to capital. But that would only raise the further question as to why it should be assumed that that was not income-producing capital.

49 The majority in the Full Court also accepted criticism by the present respondents of the use by Sackville J of the figures of gross receipts and net business income shown in the returns eventually filed for the years 1992-1999. The respondents appeared to have persuaded the majority in the Full Court that it

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44 (2004) 209 ALR 521 at 537.

was an inference of equal probability that in respect of the years 1987 and earlier the net taxable income of Mr Cummins had been below the taxable threshold[45].

50 It was well within the application of accepted principle for Sackville J to have approached the matter in the way he did. In the joint judgment of five members of this Court in *Kizbeau Pty Ltd v W G & B Pty Ltd*[46], authorities were collected upon an analogous point to that considered by Sackville J. The takings of a business subsequent to purchase are generally admissible to prove the value of the business at the date of purchase. The state of affairs disclosed in the returns for the period commencing 1992 was not so remote as to be incapable of throwing light on the level of receipts from Mr Cummins' earlier practice as senior counsel[47].

51 As to the significance attached by the majority in the Full Court to the *Giannarelli* litigation, Tamberlin J in his dissenting judgment remarked[48]:

> "It would be most unusual to take the significant decision to commit to a divesting of major assets before the decision of the High Court on a special leave application, when that decision may have brought an end to the question of barristers in-court immunity by refusal of leave. At the time when the steps were taken to effect the transfer of assets by [Mr Cummins], the decision of the Victorian Full Court, following a well-settled line of authority, was in effect a unanimous decision rejecting the proposition that barristers did not have in-court immunity. In my view, the likelihood is that the existence of the *Giannarelli* litigation focused the attention of [Mr Cummins] on the need to protect his assets from pursuit by the Commissioner in the light of his decisions over the preceding [3]5 years not to lodge any tax returns."

We agree with Tamberlin J.

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45 (2004) 209 ALR 521 at 538.

46 (1995) 184 CLR 281 at 291.

47 cf *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187 at 194.

48 (2004) 209 ALR 521 at 560.

Jones v Dunkel[49]

52 The primary judge reached his conclusions as to the existence of the main purpose required by s 121(1)(b) of the Act without drawing adverse inferences against the respondents by reason of their failure to adduce evidence[50]. His Honour went on to indicate that he would have more readily inferred from the absence of evidence from Mr Cummins that his main purpose in effecting the transfers was to prevent the transferred assets from becoming divisible amongst his creditors[51].

53 In this Court, the Trustees sought to strengthen their case by inviting the Court to draw such an inference and to do so by application of the principles generally associated with *Jones v Dunkel*. That, in turn, invited debate as to the applicability of the reasoning in that case to a situation where there had been a "no case" submission coupled with an election not to call evidence. The respondents challenged the conclusion by the primary judge that, while the inference is not available against a party making a no case submission when the party is not put to its election, it is available when the party has elected to adduce no evidence in its case[52].

54 It is unnecessary to embark upon that matter. Sackville J did not err in putting his conclusion on its primary basis, unassisted by *Jones v Dunkel*, and the majority in the Full Court erred in upsetting that conclusion. There remains one issue, which stands apart.

The ownership of the Hunters Hill property

55 The generally accepted principles in this field, affirmed for Australia by *Calverley v Green*[53], were expressed as follows in that case by Gibbs CJ[54]:

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49 (1959) 101 CLR 298.

50 (2002) 124 FCR 67 at 103.

51 (2002) 124 FCR 67 at 103-104.

52 cf *Protean (Holdings) Ltd (Receivers and Managers Appointed) v American Home Assurance Co* [1985] VR 187 at 215 per Young CJ.

53 (1984) 155 CLR 242.

54 (1984) 155 CLR 242 at 246-247.

> "[I]f two persons have contributed the purchase money in unequal shares, and the property is purchased in their joint names, there is, again in the absence of a relationship that gives rise to a presumption of advancement, a presumption that the property is held by the purchasers in trust for themselves as tenants in common in the proportions in which they contributed the purchase money".

Further, the presumption of advancement of a wife by the husband has not been matched by a presumption of advancement of the husband by the wife[55]. The "presumption of advancement", where it applies, means that the equitable interest is at home with the legal title, because there is no reason for assuming that any trust has arisen[56].

56 The subject-matter of the August transactions with respect to the Hunters Hill property was identified in the transfer as "all that the [sic] interest of the Transferor as joint tenant of and in the land above described". The following remarks by Professor Butt in his work, *Land Law*, are in point[57]:

> "Strictly speaking, joint tenants do not have proportionate shares in the land. However, a joint tenant is regarded as having a *potential* share in the land commensurate with that of the other joint tenants. Where there are two joint tenants, that potential share is one-half; where there are three joint tenants, it is one-third; and so on. This potential share the joint tenant can deal with unilaterally during his or her lifetime."

Hence the significance of the valuation which was obtained and the identification in the transfer of a consideration of $205,250, being one-half of the valuation.

57 What was there to conclude in August 1987 that the face of the register did not represent the full state of the ownership of the Hunters Hill property, and that the ownership as joint tenants was at odds with, and subjected to, the beneficial ownership established by trust law?

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55 *Calverley v Green* (1984) 155 CLR 242 at 268 per Deane J.

56 *Calverley v Green* (1984) 155 CLR 242 at 267 per Deane J.

57 4th ed (2001) at 222 (footnote omitted).

58 No part of the purchase price of $205,250 was paid by Mrs Cummins and the August 1987 transfer was voluntary, as explained earlier in these reasons. However, Mrs Cummins did pay the *ad valorem* stamp duty on the contract and the valuer's fee. There is force in the submission for the Trustees that it is unlikely these steps would have been taken by Mrs Cummins and that the August transaction with respect to the Hunters Hill property would have been cast in the way that it was had she believed that she already held approximately a two-thirds beneficial interest. At all events, these matters suggest that in August 1987 the parties were proceeding on the conventional basis that the equitable estate was at home with the registered estate of joint tenancy[58]. There is no necessary inconsistency between this conventional basis as to the nature of the ownership being dealt with in August 1987 and the later conventional basis on which the litigation was conducted, namely that the consideration stipulated was not paid and that the property interest, ascertained as just described, was being dealt with on a voluntary basis.

59 It is important for a consideration of the issues concerning the operation, if any, of the principles respecting resulting trusts that the registered title was that of joint tenants rather than tenants in common. The severance effected in August 1987 had the effect of putting to an end the incident of survivorship.

60 The dislike by equity of survivorship and of what Deane J described as "the gamble of the tontine"[59] was the expression of its preference for proportionate carriage of benefit and burden; equity reacted against the operation of chance to produce a result at odds with proportionate distribution between claimants. In *Corin v Patton*[60], Deane J said that there were two aspects of joint tenancy which attracted the operation of overriding equitable doctrine, based upon notions of good conscience and actual or presumed intention. They were[61]:

> "(i) the equality of the interests of joint tenants, regardless of intention or contribution, in the undivided rights constituting ownership of the relevant

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58 See *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 244-245.

59 *Corin v Patton* (1990) 169 CLR 540 at 573.

60 (1990) 169 CLR 540.

61 (1990) 169 CLR 540 at 573.

property, and (ii) the right of accretion by survivorship until there is a sole owner of the whole".

Deane J added[62]:

> "Where legal joint tenancy persists, severance in equity must involve the creation of some distinct beneficial interests, that is to say, the creation of a trust for the joint tenants themselves as tenants in common in equal shares or for different beneficiaries or beneficial shares."

61 In *Malayan Credit Ltd v Jack Chia-MPH Ltd*[63], Lord Brightman, in delivering the advice of the Privy Council, considered an argument that, in the absence of an expressed agreement, persons who take as joint tenants at law hold as tenants in common in equity only in three classes of case. The first was the provision of purchase money in unequal shares, where the beneficial interest is held to reflect those unequal shares; the second, security taken jointly by parties who advance the loan moneys in unequal shares; and the third, partnership property[64]. The Privy Council held that the circumstances in which, in the absence of express agreement, equity may presume joint tenants at law to be tenants in common in equity of the beneficial interest of property were not limited in this way.

62 In the circumstances of *Malayan Credit*, the Privy Council inferred from "[a]ll the circumstances"[65] that, since the commencement of a lease of property for the business purposes of the joint lessees, they had held beneficial interests in the lease as tenants in common in unequal shares representing the distinct and differing areas of the leased premises they occupied. Upon the sale of the leasehold premises, the net proceeds were to be divided not equally but in accordance with these proportions. This manifested the precept that among merchants the right of survivorship has no place[66].

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62 (1990) 169 CLR 540 at 573.

63 [1986] AC 549 at 559-560.

64 See *Snell's Equity*, 31st ed (2005) at 103-104; *White and Tudor's Leading Cases in Equity*, 9th ed (1928), vol 2 at 881-893.

65 [1986] AC 549 at 561.

66 *Buckley v Barber* (1851) 6 Exch 164 at 179 per Parke B [155 ER 498 at 504].

63 Among the features taken into account in *Malayan Credit*[67] as pointing in equity unmistakably towards a tenancy in common in unequal shares were the facts that, after the grant of the lease, the parties had paid stamp duties and survey fees in the same unequal shares and that the rental service charges had been paid in the same way.

64 In *Malayan Credit*, there was, of course, no scope for any "competing" presumption of advancement seen in family relations cases. In *Charles Marshall Pty Ltd v Grimsley*[68], and subsequently in *Calverley v Green*[69], this Court was concerned with family dealings in property: shares in the first case and improved land in the second case.

65 In *Charles Marshall*, the plaintiffs were daughters of the donor and the Court said that the presumption of an intention of advancement, that they be made beneficial as well as legal owners of the shares, might be rebutted by evidence manifesting a contrary intention. Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ said of the rebuttal of presumptions by manifestation of a contrary intention[70]:

> "Apart from admissions the only evidence that is relevant and admissible comprises the acts and declarations of the parties before or at the time of the purchase (in this case before or at the time of the acquisition of the shares by allotment) or *so immediately thereafter as to constitute a part of the transaction*." (emphasis added)

However, as *Malayan Credit*[71] illustrates, whilst evidence of subsequent statements of intention, not being admissions against interest, are inadmissible, evidence of facts as to subsequent dealings and of surrounding circumstances of the transaction may be received[72].

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67 [1986] AC 549 at 561.

68 (1956) 95 CLR 353.

69 (1984) 155 CLR 242.

70 (1956) 95 CLR 353 at 365.

71 [1986] AC 549 at 559-560.

72 *White and Tudor's Leading Cases in Equity*, 9th ed (1928), vol 2 at 882.

66 What then was the "transaction" to which attention must be directed in determining whether, subsequent admissions or conventional assumptions or arrangements apart, the registered title to the Hunters Hill property acquired by Mr and Mrs Cummins was not at variance with an equitable title? The Hunters Hill property, at the time of their registration as joint proprietors on 10 August 1970, was vacant land. The purchase moneys were contributed, as explained earlier in these reasons, in the proportions 76.3 per cent (Mrs Cummins) and 23.7 per cent (Mr Cummins). A mortgage over the Hunters Hill property executed by Mr and Mrs Cummins in favour of the Commonwealth Savings Bank of Australia on 16 July 1971 secured an advance to them jointly of $8,000 on a covenant that they would erect and complete within six months of that date a dwelling house at a cost of not less than $33,500. The tax return by Mrs Cummins for the year ended 30 June 1971 but lodged by her tax agent in 1972 showed the Hunters Hill property as her place of residence.

67 The "transaction" to which attention must be directed, in the sense given in *Charles Marshall* respecting the principles of resulting trusts, is a composite of the purchase of the Hunters Hill property followed by construction of a dwelling house occupied as the matrimonial home for many years preceding the August transactions. The relevant facts bearing upon, and helping to explain, the nature of the joint title taken on registration on 10 August 1970 include the other elements in that composite. To fix merely upon the unequal proportions in which the purchase moneys were provided for the calculation of the beneficial interests in the improved property which was dealt with subsequently in August 1987 would produce a distorted and artificial result, at odds with practical and economic realities[73]. Looked at in this way, this is not a case which requires consideration of the authorities where an equitable lien or charge secures expenditure on improvements made but no beneficial interest in the land is conferred[74].

68 *Calverley v Green* concerned the beneficial ownership of an improved property acquired as joint tenants by a man and a woman who had lived together for about 10 years as husband and wife. The decision of this Court was that the presumption that they held the registered title in trust for themselves in shares proportionate to their contributions was not rebutted by the circumstances of the

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73 cf the remarks of Lord Diplock in *Gissing v Gissing* [1971] AC 886 at 906.

74 See *Giumelli v Giumelli* (1999) 196 CLR 101 at 119-120 [31]-[32].

case. Mason and Brennan JJ[75] referred to the statement by Lord Upjohn in *Pettitt v Pettitt*[76] that, where spouses contribute to the acquisition of a property then, in the absence of contrary evidence, it is to be taken that they intended to be joint beneficial owners. Their Honours said that Lord Upjohn's remarks reflected the notion that both spouses may contribute to the purchase of assets through their marriage "as they often do nowadays"[77] and that they would wish those assets to be enjoyed together for their joint lives and by the survivor when they were separated by death. However, Mason and Brennan JJ considered such an inference to be appropriate only between parties to a lifetime relationship, being the exclusive union for life undertaken by both spouses to a valid marriage, though defeasible and oftentimes defeated[78].

69 It is unnecessary for the purposes of the present case to express any concluded view as to the perception by Mason and Brennan JJ of the particular and exclusive significance to be attached to the status of marriage in this field of legal, particularly equitable, discourse. It is enough to note that, as Dixon CJ observed 50 years ago in *Wirth v Wirth*[79], in this field, as elsewhere, rigidity is not a characteristic of doctrines of equity. The reasoning of the Privy Council in *Malayan Credit*[80] is an example of that lack of rigidity.

70 In the present case, Sackville J referred in the second judgment to the operation of statute law to produce divergent outcomes in particular classes of case[81]. In particular, his Honour referred to the regimes established by the *Family Law Act* 1975 (Cth), s 79, and, in New South Wales, by the *Property (Relationships) Act* 1984 (NSW)[82]. The New South Wales statute provides for

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75 (1984) 155 CLR 242 at 259.

76 [1970] AC 777 at 815.

77 (1984) 155 CLR 242 at 259.

78 (1984) 155 CLR 242 at 259.

79 (1956) 98 CLR 228 at 238.

80 [1986] AC 549.

81 (2003) 134 FCR 449 at 462-463.

82 See also *Property Law Act* 1958 (Vic), Pt IX; *Property Law Act* 1974 (Q), Pt 19; *De Facto Relationships Act* (NT); *Domestic Relationships Act* 1994 (ACT);

(Footnote continues on next page)

the declaration of title or rights in respect of property held by either party to a "domestic relationship". That term is broadly defined in s 5 as extending beyond the already broad definition of "*de facto* relationship" in s 4. The extent to which these statutory innovations may bear upon further development of the principles of equity is a matter for another day[83].

71 The present case concerns the traditional matrimonial relationship. Here, the following view expressed in the present edition of Professor Scott's work respecting beneficial ownership of the matrimonial home should be accepted[84]:

> "It is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labor to the various expenses of the household. It is often a matter of chance whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase."

To that may be added the statement in the same work[85]:

> "Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, it may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them." (footnote omitted)

72 That reasoning applies with added force in the present case where the title was taken in the joint names of the spouses. There is no occasion for equity to fasten upon the registered interest held by the joint tenants a trust obligation representing differently proportionate interests as tenants in common. The subsistence of the matrimonial relationship, as Mason and Brennan JJ

De Facto Relationships Act 1996 (SA); *Family Court Act* 1997 (WA), Pt 5A; *Relationships Act* 2003 (Tas).

83 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 59-63 [18]-[28].

84 *The Law of Trusts*, 4th ed (1989), vol 5, §454 at 239.

85 *The Law of Trusts*, 4th ed (1989), vol 5, §443 at 197-198.

emphasised in *Calverley v Green*[86], supports the choice of joint tenancy with the prospect of survivorship. That answers one of the two concerns of equity, indicated by Deane J in *Corin v Patton*[87], which founds a presumed intention in favour of tenancy in common. The range of financial considerations and accidental circumstances in the matrimonial relationship referred to by Professor Scott answers the second concern of equity, namely the disproportion between quantum of beneficial ownership and contribution to the acquisition of the matrimonial home.

73 In the present litigation, the case for the disinclination of equity to intervene through the doctrines of resulting trusts to displace the incidents of the registered title as joint tenants of the Hunters Hill property is strengthened by further regard to the particular circumstances. Solicitors acted for Mr and Mrs Cummins on the purchase in 1970. The conveyance was not uneventful. The contract was dated 14 April 1970 and was settled on 27 July 1970, but only after the issue by the solicitors for the vendor on 10 July of a notice to complete. It is unrealistic to suggest that the solicitor for the purchasers, Mr and Mrs Cummins, did not at any point advise his clients on the significance of taking title as joint tenants rather than as tenants in common. Secondly, use of the valuation obtained in 1987 to fix what was shown as the purchase price for the acquisition by Mrs Cummins of the interest of her husband is consistent, as already indicated, with the conventional basis of their dealings which treated the matrimonial home as beneficially owned equally.

74 Finally, there is the question of the funding of the building operations which were necessary for the use of the previously vacant land as the matrimonial home. Reference is made earlier in these reasons to the treatment of the purchase of the unimproved land and the subsequent building operations as the one transaction for the purpose of considering the principles respecting resulting trusts. Since October 1967, Mr and Mrs Cummins had owned as joint tenants a property at 12A Ferdinand Street, Hunters Hill. This was sold in December 1971. The proceeds of that sale were paid on 22 December 1971 into a bank account styled "John Daniel Cummins and Mrs Mary Elizabeth Cummins Fully Drawn Loan Account". Sackville J held that in these circumstances it appeared likely that the net proceeds of sale of the Ferdinand Street property had been paid to Mr and Mrs Cummins jointly. While there was no finding to this

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86 (1984) 155 CLR 242 at 259.

87 (1990) 169 CLR 540 at 573.

effect by the primary judge, there is force in the submission in this Court by counsel for the Trustees that the likely source of funds for the building operations were, first, the joint borrowing of $8,000 on the mortgage to the Commonwealth Savings Bank of Australia, supplemented after December 1971 by the joint proceeds of the sale of the other property.

75 Sackville J correctly concluded in the second judgment that the subject of the disposition in 1987 was that which appeared on the transfer, namely the interest of Mr Cummins as joint tenant of the Hunters Hill property, without any displacement to allow for a beneficial tenancy in common in shares, of which the larger was that of Mrs Cummins[88].

Conclusion and orders

76 The result is that the Trustees have succeeded in this Court on the grounds dealing both with s 121 of the Act and the beneficial ownership of the Hunters Hill property. The appeal should be allowed with costs. The orders of the Full Court should be set aside and in place thereof the appeal to that Court should be dismissed with costs. These orders will have the effect of reinstating the orders made by Sackville J on 24 October 2003.

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88 (2003) 134 FCR 449 at 470.