HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN AND GLEESON JJ

BERNADETTE BOSANAC APPELLANT

AND

COMMISSIONER OF TAXATION & ANOR RESPONDENTS

Bosanac v Commissioner of Taxation
[2022] HCA 34
Date of Hearing: 16 August 2022
Date of Judgment: 12 October 2022
P9/2022

ORDER

1. *Leave to amend the Notice of Contention refused.*

2. *Appeal allowed.*

3. *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 that:*

   (a) the appeal be dismissed; and

   (b) the appellant pay the second respondent's costs.

On appeal from the Federal Court of Australia

Representation

N C Hutley SC with J E Hynes and T L Bagley for the appellant (instructed by Pier Paolo Parisi)

J O Hmelnitsky SC with D P Hume and J S Slack-Smith for the first respondent (instructed by Australian Government Solicitor)

R A Blow for the second respondent (instructed by Cove Legal) – submitting appearance

CATCHWORDS

Bosanac v Commissioner of Taxation

Trusts – Resulting trust – Presumption of resulting trust – Presumption of advancement – Where wife purchased property – Where purchase price paid from joint loans taken in names of wife and husband – Where security for joint loans from separately owned properties – Where title registered in name of wife only – Where husband never claimed interest in property – Where property matrimonial home – Where history of separate ownership of assets – Where presumption of advancement precludes presumption of resulting trust from arising – Whether presumption of resulting trust over one half of property in favour of husband – Whether objective intention of wife and husband for husband to have beneficial interest in property – Whether presumption of advancement remains part of general law of Australia.

Words and phrases – "beneficial interest in property", "benefit of another", "circumstance of fact", "circumstance of evidence", "inference", "intention", "objective intention to create a trust", "presumption of advancement", "presumption of fact", "presumption of law", "presumption of resulting trust", "proof of intention", "purchase money resulting trust", "relationship of husband and wife", "spouses", "strength of the presumptions".

1 KIEFEL CJ AND GLEESON J. This appeal concerns the purchase by Ms Bosanac of a residential property in Perth ("the Dalkeith property") in 2006. She and Mr Bosanac married in 1998. They separated in 2012 or 2013 but continued to reside together at the Dalkeith property until September 2015, when Mr Bosanac moved to a new residential address.

2 Ms Bosanac appears to have instigated the purchase of the Dalkeith property. In April 2006 she offered to purchase it for $4,500,000 subject to her obtaining approval for a loan of $3,000,000 from a bank. The offer was accepted in May 2006. The contract for sale required Ms Bosanac to pay a deposit of $250,000 within 30 days. The deposit was provided from an existing joint loan account in the names of Ms and Mr Bosanac.

3 In October 2006, Ms and Mr Bosanac applied for two loans in the sums of $1,000,000 and $3,500,000. The balance of the purchase price was paid from two loan accounts in their joint names, and after settlement the surplus funds in these accounts were paid into the joint loan account from which the deposit had been drawn. The Dalkeith property was registered in Ms Bosanac's name alone. Mr Bosanac has never claimed an interest in the property.

4 The securities required by the bank for the loans were mortgages over the Dalkeith property and three other properties – units at Mount Street and a property at Hardy Street. The unit at 10/41-43 Mount Street was owned by Mr Bosanac. Ms Bosanac owned the Hardy Street property. The Dalkeith and Hardy Street properties were used as securities again almost a year later when the loans were refinanced.

5 The primary judge in the Federal Court, McKerracher J, found that during the marriage Ms and Mr Bosanac shared some bank accounts, but had substantial assets which they held in their separate names. Mr Bosanac had a substantial share portfolio. There was evidence of the use of separately owned properties as security for joint loans. There is nothing to suggest they were used to acquire joint assets. His Honour said, "this does not appear to be an instance of a husband and wife sharing all of the matrimonial assets jointly, or pooling their shareholdings … [although] … some bank accounts were shared"[1].

6 Mr Bosanac was represented on this appeal, as he had been in the proceedings below, but he took no active part in it. Neither he nor Ms Bosanac gave evidence at the hearing before the primary judge.

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1 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 84 [57].

The reasoning below

7 The Commissioner is a creditor of Mr Bosanac. The primary judge noted that there was no suggestion that the Dalkeith property was registered in Ms Bosanac's name alone with a view to Mr Bosanac avoiding his commitments to his creditors. The Commissioner brought proceedings seeking a declaration of a resulting trust over the equity in one-half of the Dalkeith property, which is to say that Ms Bosanac held that interest in the property on trust for Mr Bosanac.

8 The Commissioner sought to take advantage of the law's presumption, known as a presumption of resulting trust, that a person who advances purchase monies for property, which is held in the name of another person, intends to have a beneficial interest in the property[2]. That presumption is subject to an exception that, in the case of purchases by a husband in the name of a wife, or a parent (or person who stands *in loco parentis*) in the name of a child, there is a presumption of advancement or, in other words, a presumption that the purchaser intended that the beneficial interest would pass with the legal interest[3]. The Commissioner contended that the presumption of advancement of a wife by her husband, which operates to preclude a resulting trust from arising, is no longer part of the law of Australia in relation to the matrimonial home following the decision of this Court in *Trustees of the Property of Cummins v Cummins*[4].

9 The primary judge dismissed the Commissioner's application[5]. His Honour held that the presumption of advancement in relation to the matrimonial home was not precluded by *Cummins*, and arose in Ms Bosanac's favour. The evidence did not support an inference that Mr Bosanac intended to have an interest in the Dalkeith property and the presumption of advancement stands unrebutted. In that regard, his Honour observed that at the time of the registration of the property in Ms Bosanac's name, Mr Bosanac was a sophisticated businessman, a "self-styled venture capitalist", who may be taken to have appreciated the significance of the name in which real property is held[6].

10 The Full Court (Kenny, Davies and Thawley JJ) took a different view. Their Honours held that the decision in *Cummins* did not qualify the presumption of

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2 *Calverley v Green* (1984) 155 CLR 242 at 246.

3 *Napier v Public Trustee (WA)* (1980) 55 ALJR 1 at 3; 32 ALR 153 at 158. See *Nelson v Nelson* (1995) 184 CLR 538 at 547-548.

4 (2006) 227 CLR 278 at 302-303 [71].

5 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74.

6 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 131 [231].

advancement, but the presumption is liable to be displaced or rebutted by evidence, including evidence of the nature of the particular transaction[7]. There were facts which tended strongly against the presumption and in favour of a trust being intended by both Ms and Mr Bosanac: Mr Bosanac assumed a substantial liability without acquiring any beneficial interest[8]; the Dalkeith property was intended to be the matrimonial home for the joint use and benefit of Ms and Mr Bosanac[9]; and the funds for the purchase came from joint borrowings[10]. The Full Court declared that Ms Bosanac holds 50 percent of her interest in the Dalkeith property on trust for Mr Bosanac.

11 Ms Bosanac appeals from the decision of the Full Court pursuant to a grant of special leave. Ms Bosanac contends that the Full Court should have found, as the primary judge did, that there was no basis to infer that Mr Bosanac had an intention to have a beneficial interest in the property.

The presumptions

12 A trust of a legal estate in property taken in the name of another is taken to "result" to the person who advances the purchase money[11]. The categories of resulting trust include trusts arising from A's payment for the conveyance of rights to B; the voluntary transfer of rights *inter vivos* from A to B; and the transfer of rights on a failed declared trust. The term "resulting trust" states a legal response to proved facts[12]. The presumption of a resulting trust developed by analogy from the rule of the common law that where a feoffment, or conveyance, is made without consideration, the feoffment results to the feoffer[13]. It arose from the common practice of the 15th to 17th centuries of those having fee simple estates in land to put them in use (the precursor to the trust) for themselves[14]. Because words of trust

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7 *Commissioner of Taxation v Bosanac* [2021] FCAFC 158 at [10]-[11].

8 *Commissioner of Taxation v Bosanac* [2021] FCAFC 158 at [15].

9 *Commissioner of Taxation v Bosanac* [2021] FCAFC 158 at [19].

10 *Commissioner of Taxation v Bosanac* [2021] FCAFC 158 at [20].

11 *Dyer v Dyer* (1788) 2 Cox 92 at 93 [30 ER 42 at 43].

12 Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 79.

13 *Dyer v Dyer* (1788) 2 Cox 92 at 93 [30 ER 42 at 43].

14 Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 79.

were not included on the face of the conveyance and because the transfers were gratuitous, the court supplied a presumption of a declaration to uses[15]. There were various advantages to the practice, including avoiding the hardship of feudal times, and avoiding escheat and forfeiture to the Crown in time of war, such as the Wars of the Roses[16].

13 The presumption can be rebutted by evidence from which it may be inferred that there was no intention on the part of the person providing the purchase money to have an interest in land (or other property) held on trust for him or her[17]. The presumption cannot prevail over the actual intention of the party paying the purchase price as established by the overall evidence[18], and where more than one person pays the purchase price, as here, regard is necessarily had to evidence of each of their intentions.

14 The presumption of advancement allows an inference as to intention to be drawn from the fact of certain relationships[19]. It applies to transfers of property from husband to wife and father to child, but in *Nelson v Nelson*[20] this Court accepted that there is no longer any basis for maintaining a distinction between a father and mother so far as concerns transfers of property to a child. Originally the relationships were considered by themselves sufficient to afford "good consideration" for the conveyance, but a rationale for the presumption has come to be found in the *prima facie* likelihood that a beneficial interest is intended in situations to which the presumption has been applied[21].

15 On one view, the presumption of advancement is not strictly a presumption at all. It may be better understood as providing "the absence of any reason for

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15 Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 80.

16 *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321 at 338 [110]-[112].

17 *Stewart Dawson & Co (Vict) Pty Ltd v Federal Commissioner of Taxation* (1933) 48 CLR 683 at 690; *Calverley v Green* (1984) 155 CLR 242 at 251; *Nelson v Nelson* (1995) 184 CLR 538 at 547.

18 *Muschinski v Dodds* (1985) 160 CLR 583 at 612.

19 *Nelson v Nelson* (1995) 184 CLR 538 at 547.

20 (1995) 184 CLR 538 at 548-549, 576, 585-586, 601.

21 *Wirth v Wirth* (1956) 98 CLR 228 at 237.

assuming that a trust arose"[22]. At an evidentiary level, it is no more than a circumstance which may rebut the presumption of a resulting trust[23] or prevent it from arising[24]. It too may be rebutted by evidence of actual intention[25].

16 In the United Kingdom, s 199 of the *Equality Act 2010* (UK) is expressed to abolish the presumption of advancement on the basis that it involves unlawful discrimination, but it has not yet been brought into effect. The presumption therefore remains. It has been observed that it may not make much real difference to the relative positions of husbands and wives, since the approach in recent cases is to seek to determine the real intentions of the parties[26].

17 This Court's decision in *Nelson* reflects views about a more modern society. In that case, Dawson J[27] observed that there was no reason now to suppose that the probability of a parent intending to transfer a beneficial interest in property to a child is any the less the case with respect to a mother than a father. Toohey J pointed to current family law legislation respecting the obligation of parents to maintain children[28]. The decision in *Nelson* might be thought to raise the question whether, assuming the presumption of advancement is to be maintained, it should now apply to transfers of property not just from wife to husband, given the position that many wives now have respecting income and property, but also as between spouses more generally given the recognition by statute of de facto relationships in proceedings concerning property[29] and same-sex marriage[30].

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22 *Martin v Martin* (1959) 110 CLR 297 at 303; see also *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at 298 [55].

23 *Pettitt v Pettitt* [1970] AC 777 at 814.

24 *Wirth v Wirth* (1956) 98 CLR 228 at 237.

25 *Calverley v Green* (1984) 155 CLR 242 at 251.

26 McGhee and Elliott, *Snell's Equity*, 34th ed (2020) at [25-007].

27 *Nelson v Nelson* (1995) 184 CLR 538 at 575.

28 *Nelson v Nelson* (1995) 184 CLR 538 at 586.

29 *Family Law Act 1975* (Cth), ss 90SM and 90SS, inserted by *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth); compare *Calverley v Green* (1984) 155 CLR 242 at 260, referring to *Family Law Act 1975* (Cth), ss 79 and 80.

30 See *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

18 Important as these matters are, they were not in issue on this appeal and were not the subject of any argument. The question which arises on this appeal is common to both presumptions. It concerns the intention of Ms and Mr Bosanac when the property was registered in Ms Bosanac's name. And relevant to both presumptions is what weight they may now have.

The weight of the presumptions

19 The maintenance of either presumption, especially that of advancement, has been the subject of commentary and criticism. In *Calverley v Green*[31], Gibbs CJ pointed out that they do not always lead to a result which is what would be expected in ordinary human experience and gave as an example the circumstance of a woman making deposits of money for her niece and nephew. His Honour observed, with respect to the presumption of a resulting trust, that it would not usually be thought that the niece and nephew were to hold the monies on trust for her. In *Dullow v Dullow*[32], Hope JA (Kirby P and McHugh JA agreeing) expressed the view 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".

20 In *Calverley v Green*[33], Gibbs CJ considered that the principle on which the presumption of advancement rests was not "convincingly expounded in the earlier authorities". Lord Reid, in *Pettitt v Pettitt*[34], was of a similar view. His Lordship said that it was unclear how it first arose: either the judges who first applied it thought that husbands so commonly made gifts to their wives that they simply assumed it, or that wives' economic dependence made it necessary as a matter of public policy to give them this advantage. Lord Reid then observed that "[t]hese considerations have largely lost their force under present conditions, and, unless the law has lost all flexibility so that the courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished". This must surely be correct.

21 It is the concern of the courts to determine what was intended when property was purchased or transferred. It may once have been the case that evidence capable of rebutting the presumptions was not available. That is unlikely to be so today, especially in the context of dealings as between spouses where the relationship has

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31 (1984) 155 CLR 242 at 248-249.

32 (1985) 3 NSWLR 531 at 535.

33 (1984) 155 CLR 242 at 248.

34 [1970] AC 777 at 792-793.

been of sufficient length to permit a court to observe how the spouses have dealt with property as between themselves and managed their affairs. This evidence may take many forms, but it has always been understood that the strength of the presumptions will vary from case to case depending on the evidence.

22 The presumption of advancement, understandably, is especially weak today. In *Pettitt*, Lord Hodson[35] considered that when evidence is given it will not often happen that the presumption will have any decisive effect. In the same matter, Lord Upjohn considered that given both presumptions are but a mere circumstance of evidence, they may readily be rebutted by comparatively slight evidence[36].

The Notice of Contention and its amendment

23 The Commissioner, by Notice of Contention, contends that the Full Court was wrong to find, in effect, that 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 only, it is not to be inferred that each of the spouses would have a one-half interest in the property.

24 The Commissioner relies upon what was said in the reasons of this Court in *Cummins*[37] in support of the contention. There, after referring to the presumption of advancement, the Court said[38]:

> "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[39]:
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> > '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

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35 *Pettitt v Pettitt* [1970] AC 777 at 811.

36 *Pettitt v Pettitt* [1970] AC 777 at 814.

37 *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278.

38 *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at 302-303 [71].

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

> 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[40]:

> '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.'"

25 The Commissioner relies on the second statement as displacing or qualifying the presumption of advancement. But to give it that effect would be to elevate what Professor Scott said to a statement of principle or another presumption when there is nothing to suggest the Court was concerned to do so. Professor Scott was referring to a possible inference which might be drawn from particular circumstances. And it is noteworthy that the cases cited by him in his text in this connection were concerned with the exercise of the discretion in cases brought under the *Married Women's Property Act 1882* (UK) (45 & 46 Vict c 75).

26 Moreover, the Commissioner's contention does not have regard to the facts in *Cummins* and the issues with which the Court was dealing. *Cummins* concerned property which included the matrimonial home of Mr and Mrs Cummins. The title to it had originally been taken in their joint names. The importance of that fact is evident from the opening words of the paragraph which follows that relied upon by the Commissioner[41]:

> "That reasoning applies with added force in the present case where the title was taken in the joint names of the spouses."

27 The husband then transferred his legal and beneficial interest in the matrimonial home to his wife with the intention of placing it beyond the reach of his creditors, contrary to s 121(1)(b) of the *Bankruptcy Act 1966* (Cth). The Court was concerned to determine what interest the parties should be taken to have where the financial contributions were unequal. Hence the reference to the first passage from Professor Scott's work.

28 The holding in *Cummins* is that there was no occasion in that case for equity to fasten upon the registered interest held by joint tenants a trust obligation

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

41 *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at 303 [72].

representing differently proportionate interests as tenants in common[42]. The case turned on the actual intention of Mr and Mrs Cummins to hold the property jointly. In addition to the observations by Professor Scott, the Court also had regard to the particular circumstances of the case: that it might be assumed that Mr and Mrs Cummins' solicitor advised them about taking title as joint tenants rather than as tenants in common; and the "conventional basis of their dealings which treated the matrimonial home as beneficially owned equally"[43].

29 The Commissioner now seeks to further contend that this Court should conclude that the general law does not recognise a presumption of advancement in relation to a benefit provided by a husband to a wife. In effect the Commissioner asks this Court to abolish the presumption of advancement on the basis that it has no acceptable rationale, and is anomalous, anachronistic and discriminatory. It is the Commissioner's position that absent the operation of the presumption of advancement, it would follow that there was no basis upon which the presumption of a resulting trust is or could be refuted in this case.

30 The Commissioner needs leave to amend the Notice of Contention and to raise a question which has been dealt with by a majority of this Court in *Nelson*. In *Nelson*[44], Deane and Gummow JJ regarded the presumptions as interrelated and entrenched "land-marks" in the law of property. They said that "[m]any disputes have been resolved and transactions effected on that foundation". Their Honours cited with approval the reasons of Deane J in *Calverley v Green*[45] to this effect. Deane J there expressed the view that in the absence of knowledge as to what effect the abolition of the presumptions would have on existing entitlements, the better course is to leave any reform of this branch of the law to the legislature, a view with which McHugh J concurred in *Nelson*[46].

31 It is difficult to disagree with these views. But that is not to accept that the presumptions when applied will carry much weight. Much has changed with respect to the various ways in which spouses deal with property. When evidence of this kind is given, inferences to the contrary of the presumptions as to intention may readily be drawn.

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42 *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at 303 [72].

43 *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at 303 [73].

44 *Nelson v Nelson* (1995) 184 CLR 538 at 548.

45 (1984) 155 CLR 242 at 266.

46 *Nelson v Nelson* (1995) 184 CLR 538 at 602.

Proof of intention

32 The question of intention is entirely one of fact, and concerns the intention manifested by the person or persons who contributed funds towards the purchase of the property. In *Martin v Martin*[47], it was observed that for the most part it can be assumed that proof of intention will be made out by the circumstances. Reference was made[48] to what had been said by Cussen J in *Davies v The National Trustees Executors and Agency Co of Australasia Ltd*[49]:

> "It is impossible to try to arrange into certain sets of categories certain facts, and say beforehand they will or will not become decisive or immaterial. The attention must be kept steadily fixed on the one fact in issue – What was at the time the intention of the purchaser or transferor? Anything which is relevant to that issue is admissible."

33 Cussen J went on to say that evidence of that person's thinking at the time might be accepted, although it would be received "with caution". That circumstance does not arise for consideration in the present case. There is no direct evidence as to the intention of either Ms or Mr Bosanac. The question is what inference is to be drawn from the available facts and in particular the history of the parties' dealings with property.

34 In *Stewart Dawson & Co (Vict) Pty Ltd v Federal Commissioner of Taxation*[50], the transferor was not *in loco parentis* to his granddaughter to whom he transferred shares, so the presumption of advancement did not arise. The question was whether he intended her to hold them on trust for him, as might be presumed in the first instance. Regard was had by Dixon J to the evidence of their relationship, what the transferor had already paid on her behalf, and the provisions the transferor made for his family generally. From these facts a strong inference was drawn that he meant to give her the shares absolutely[51].

35 There was a history of Ms and Mr Bosanac holding their substantial real and other property in their own names. Consistently with this, it was evidently the desire of Ms Bosanac to purchase the Dalkeith property and have it registered in

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47 (1959) 110 CLR 297 at 304.

48 *Martin v Martin* (1959) 110 CLR 297 at 304.

49 [1912] VLR 397 at 403.

50 (1933) 48 CLR 683.

51 *Stewart Dawson & Co (Vict) Pty Ltd v Federal Commissioner of Taxation* (1933) 48 CLR 683 at 691-692.

her name alone. She was the moving party. These facts alone are sufficient to rebut any presumption that her interest in the property was attributable to the relationship of husband and wife and his intention to benefit her.

36 The Dalkeith property was never registered in Mr Bosanac's name. There was no transfer of the property from Mr Bosanac to Ms Bosanac. He did not advance all the monies for the purchase of the Dalkeith property. Ms and Mr Bosanac were both parties to the loan agreements and both were liable to repay the loans. This may be thought to raise a question as to whether they intended that the property be held jointly. This explains the Commissioner's claim for a one-half interest in the property.

37 Some of the factors identified by the Full Court as relevant to the question of whether it was intended by Ms and Mr Bosanac that the property be owned jointly and that a one-half interest in the property be held on behalf of Mr Bosanac do not provide a strong foundation for any inference as to intention. In many of the decided cases the purchase monies were borrowed[52], and little can in any event be drawn from this fact. It may be accepted that the Dalkeith property was to be the matrimonial home in which both spouses would reside and which they both would enjoy, but the Full Court did not suggest that that fact alone was sufficient for a conclusion as to intention. Moreover, this was not the first time that Ms and Mr Bosanac had shared a matrimonial home which was registered in the name of one only of them. At the time of the purchase of the Dalkeith property they resided in one of the units owned by Mr Bosanac.

38 The remaining factor alluded to by the Full Court is that Mr Bosanac made a substantial borrowing without a corresponding benefit being received. The loans were used to pay the purchase price, including the deposit, and he used some of his property to secure the loans.

39 There was a history of the use of the properties held by each of Ms and Mr Bosanac in their own names as security for joint loans. That is what occurred when the Dalkeith property was purchased. There was no evidence of the use of joint loans to acquire property which was then jointly held. Indeed, apart from some shared bank accounts there does not appear to have been any substantial property in which Ms and Mr Bosanac had a joint interest.

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52 *Stewart Dawson & Co (Vict) Pty Ltd v Federal Commissioner of Taxation* (1933) 48 CLR 683; *Martin v Martin* (1959) 110 CLR 297 at 300; *Calverley v Green* (1984) 155 CLR 242 at 251.

40 In some cases, an inference may be drawn that spouses intended to hold real property jointly and for the rule as to survivorship to apply[53]. It will depend upon the evidence as to the parties' dealings. This is not such a case. There is nothing in the history of Ms and Mr Bosanac's dealings with property to suggest an intention that any substantial property was to be held jointly. The inference to be drawn in the present case is that, in being a party to the loan accounts and using his property as security for them, Mr Bosanac intended to facilitate his wife's purchase of the Dalkeith property, which was to be held in her name. This is consistent with the history of their dealings.

41 There was further evidence before the primary judge of a subsequent dealing with the loan accounts over the Dalkeith property, or rather loan accounts which resulted from refinancing. The new loans continued to be secured by that property together with property owned individually. A portion of the loans was used by Mr Bosanac for his share trading. Ms Bosanac permitted this course. It may be assumed for present purposes that evidence of subsequent dealings of this kind is admissible[54], as the primary judge held. The history of the spouses' dealings with property might suggest a use of property to secure joint loans which might benefit either or both of them, but it does not support an inference that either intended that property be held jointly. As the primary judge found, the "considerable evidence" was of separate ownership of property[55].

42 The finding by the primary judge that Mr Bosanac was a sophisticated businessman who must have appreciated the significance of property being held in Ms Bosanac's name is not unimportant. His Honour was correct to conclude that that understanding did not support an inference that Mr Bosanac intended to have a beneficial interest in the Dalkeith property.

Orders

43 Leave to amend the Notice of Contention should be refused. The appeal should be allowed. The orders of the Full Court of the Federal Court of Australia made on 31 August 2021 and 31 January 2022 should be set aside and, in their place, there be orders that the appeal be dismissed and the appellant below pay the

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53 *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at 301-302 [68].

54 See *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at 300 [65].

55 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 131 [228].

costs of the second respondent. The parties are agreed that there be no order for the costs incurred in this Court.

44 GAGELER J. In *Hepworth v Hepworth*[56], Windeyer J made the point that "[a]n intention, proved or presumed, that a trust should exist is at the base of every trust". The intention to which his Honour referred is an objectively manifested intention that property be held in whole or in part for the benefit of another[57]. His Honour observed that "spouses, living together, may express their intention clearly enough one to another without resorting to the language of conveyancers" and that "[t]hus it sometimes happens that property which is held in the name of one spouse but which they enjoy together, belongs beneficially to both jointly or in common".

45 The Commissioner of Taxation says that is what has happened in the present case. The appellant, Ms Bosanac, is the sole registered proprietor under the *Transfer of Land Act 1893* (WA) of a residential property at Dalkeith. Ms Bosanac purchased the property using funds drawn from loan accounts in respect of which she was jointly and severally liable with her husband, Mr Bosanac. From the time of its purchase and for nearly a decade afterwards, Mr Bosanac and Ms Bosanac lived in the property as their matrimonial home.

46 The Commissioner is a creditor of Mr Bosanac. In a proceeding commenced in the Federal Court of Australia against Mr Bosanac and Ms Bosanac, the Commissioner sought a declaration that Ms Bosanac holds half of the Dalkeith property on trust for Mr Bosanac. No issue seems to have been taken as to the standing of the Commissioner to seek that declaration[58]. Neither Mr Bosanac nor Ms Bosanac gave evidence in the proceeding.

47 The Commissioner was unsuccessful at first instance[59] but was successful on appeal to the Full Court[60]. Ms Bosanac now appeals, by special leave, from the decision of the Full Court.

48 Like other members of this Court, I consider that the appeal must be allowed.

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56 (1963) 110 CLR 309 at 317.

57 See *Byrnes v Kendle* (2011) 243 CLR 253 at 275 [58]-[60], 286-290 [105]-[115]; *Gissing v Gissing* [1971] AC 886 at 906.

58 cf *Sarkis v Deputy Commissioner of Taxation* (2005) 59 ATR 33 at 41-42 [20]-[21].

59 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74.

60 *Commissioner of Taxation v Bosanac* [2021] FCAFC 158; *Commissioner of Taxation v Bosanac [No 2]* [2022] FCAFC 5.

The Commissioner's claim

49 The Commissioner's claim that Ms Bosanac holds half of the Dalkeith property on trust was made in the shadow of s 34 of the *Property Law Act 1969* (WA). Section 34(1), which derives from s 7 of the *Statute of Frauds 1677* (Eng), provides that no "interest in land" can be created or disposed of except by writing signed by or on behalf of the person creating or conveying that interest and that a declaration of trust of an interest in land must be "manifested and proved by writing". Section 34(2), which derives from s 8 of the *Statute of Frauds*, provides that the section "does not affect the creation or operation of resulting, implied or constructive trusts".

50 The Commissioner based his claim on the existence of a resulting trust presumed to have arisen from the circumstance that Mr Bosanac contributed equally with Ms Bosanac to her purchase of the Dalkeith property.

51 The presumption on which the Commissioner based that claim is an ancient presumption of equity. The presumption arises where property was purchased by one or more persons using funds contributed in whole or in part by one or more others[61]. Unless there was consideration for the contribution, the presumption is that everyone concerned in the purchase transaction intended the property to be held at and from the time of purchase for the benefit of the contributors as tenants in common in proportion to their respective contributions. The presumed trust is sometimes referred to as a "purchase money resulting trust"[62].

52 The problem for the Commissioner was that the presumption of a purchase money resulting trust was met in the circumstance of Mr Bosanac having contributed to Ms Bosanac's purchase of the Dalkeith property by a similarly ancient counter-presumption of equity. The counter-presumption arises where a contributor and a purchaser were in a recognised category of relationship. The archetypal category is where the contributor was a husband and the purchaser was his wife. The counter-presumption is that the contributor and the purchaser intended the contribution to the purchase price to have been made and received as a gift, for the purchaser's "advancement".

53 Where other indications of intention are equal, or at least equivocal, the counter-presumption is a complete answer to the presumption. The zero-sum result

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61 See Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 212-215 [12-10].

62 See Scott, Fratcher and Ascher, *Scott and Ascher on Trusts*, 5th ed (2009), vol 6, §43.1 at 2924-2931.

is "the absence of any reason for assuming that a trust arose or in other words that the equitable right is not at home with the legal title"[63]: no resulting trust.

Duelling presumptions

54 Needing to contend in Ms Bosanac's appeal with the stand-off between the presumption of a purchase money resulting trust and the counter-presumption of advancement, the Commissioner advances two innovative contentions. The principal contention is that the time has come for the counter-presumption of advancement to be abandoned as a doctrine of equity. The alternative contention is that the counter-presumption ought now to be trumped by an inference which ought to be recognised to arise where a husband and a wife each contribute to the purchase by one of them of a matrimonial home. The Commissioner contends that the husband and the wife ought to be presumed to intend each to have a one-half beneficial interest.

55 In support of the principal contention, the Commissioner argues with some force that perpetuation of a presumption that a husband's contribution to the purchase of property by his wife is intended as a gift is not only anachronistic but is also discriminatory given that equity has in the past set its face against recognising corresponding presumptions that a wife's contribution to a purchase by her husband is intended as a gift[64] and that a contribution by one de-facto partner to a purchase by another is intended as a gift[65]. The discrimination is exacerbated when comparison is made to a contribution by one same-sex marriage partner to a purchase by the other.

56 Needing to rely on the presumption of a purchase money resulting trust, however, the Commissioner draws back from arguing that abandonment of the counter-presumption of advancement should be accompanied by abandonment or modification of the presumption of a resulting trust. Yet, as Hope JA pointed out in *Dullow v Dullow*[66], the presumption of a resulting trust rather than the counter-presumption of advancement is the root anachronism, perpetuating expectations of a segment of society within late medieval England.

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63 *Martin v Martin* (1959) 110 CLR 297 at 303. See also *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at 298 [55].

64 See *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at 298 [55], citing *Calverley v Green* (1984) 155 CLR 242 at 268.

65 See *Calverley v Green* (1984) 155 CLR 242 at 260, 264.

66 (1985) 3 NSWLR 531 at 535. See also *Nelson v Nelson* (1995) 184 CLR 538 at 602; *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321 at 339 [114].

57 Were the doctrines of equity to be redesigned to accord with the societal expectations of contemporary Australia, the default position would be that a purchaser of property would be assumed to be its sole legal and beneficial owner. That would be so whether or not someone else might have contributed to the purchase price. For the purchaser to hold the whole or some part of the beneficial interest in the property on trust for a contributor to the purchase price would require proof of an actual intention to create a trust. There would be no presumption of a resulting trust and there would accordingly be no occasion for a counter-presumption of advancement.

58 For better or for worse, the weight of history is too great for a redesign of that magnitude now to be undertaken judicially. This Court in *Charles Marshall Pty Ltd v Grimsley*[67] adopted the description by Eyre CB in *Dyer v Dyer*[68] of the presumption and counter-presumption as "landmarks" in the law and said then that the applicable law could "no longer be the subject of argument". That view was repeated by Deane J in *Calverley v Green*[69] and by Deane and Gummow JJ in *Nelson v Nelson*[70]. Their Honours emphasised in the last of those cases that many disputes have been resolved and transactions effected based on the presumption and counter-presumption. They also explained that modern equivalents of ss 7 and 8 of the *Statute of Frauds*, of which s 34 of the *Property Law Act* is just one of many examples, assume their continuing operation.

59 Evaluated by contemporary standards, the categories of relationships seen in the past to attract or not to attract the counter-presumption of advancement are inconsistent and discriminatory. That provides reason, consistent with equitable principle, to consider in an appropriate case expansion of those categories[71]. It provides no reason to bolster the anachronistic presumption of a resulting trust by abandoning the counter-presumption altogether.

60 Unless and until they are together reappraised as an exercise in law reform and abolished or modified by legislation, the presumption of a resulting trust and the counter-presumption of advancement are here to stay. The Commissioner's contention that the counter-presumption of advancement should alone be abandoned as a doctrine of equity must be rejected.

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67 (1956) 95 CLR 353 at 364.

68 (1788) 2 Cox Eq Cas 92 at 98 [30 ER 42 at 46].

69 (1984) 155 CLR 242 at 266.

70 (1995) 184 CLR 538 at 547-549.

71 See *Wirth v Wirth* (1956) 98 CLR 228 at 238; *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at 302 [69].

61 The Commissioner argues that his alternative contention – that the counter-presumption of advancement should give way to an inference of equality where a husband and a wife each contribute to the purchase by one of them of a matrimonial home – is supported by observations about common practices in spousal relationships in the then current edition of Professor Scott's treatise on the law of trusts[72] quoted in *Trustees of the Property of Cummins v Cummins*[73]. The observations were not expressed in the treatise in the form of a presumption and were not said in *Cummins* to give rise to a presumption. The context for mentioning the observations in *Cummins* was that a husband and a wife had contributed unequally to the purchase of a matrimonial home of which they became registered proprietors as joint tenants. The observations were seen to be consistent with the drawing in the circumstances of that case of an inference of fact that the husband and the wife intended there to be no disconformity between their beneficial interests and their legal interests as joint tenants, with the result that there was "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"[74].

62 The Commissioner's invitation to recognise a standardised inference arising where a husband and a wife each contribute to the purchase by one of them of a matrimonial home is in effect an invitation to create a counter-counter-presumption. The invitation must be declined. Stereotypes are best avoided. Old ones die hard. New ones should not be created judicially. Whatever might have been thought in the past, we must nowadays accept that families, even happy families, are not all alike.

63 Instead of inventing another equitable presumption, conformation of the beneficial ownership of property acquired in a familial context to contemporary expectations is better pursued by paying close attention to the content and manner of operation of the existing presumptions. That is a topic to which remarkable acuity was brought in Australia in progressive and complementary reasons for judgment authored or co-authored by Cussen J[75], Isaacs J[76], Jordan CJ[77],

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72 Scott and Fratcher, *The Law of Trusts*, 4th ed (1989), vol 5, §443 at 197-198, §454 at 239.

73 (2006) 227 CLR 278 at 302-303 [71].

74 (2006) 227 CLR 278 at 303 [72]. See also at 303 [73].

75 *Davies v The National Trustees Executors and Agency Co of Australasia Ltd* [1912] VLR 397 at 401-402.

76 *Scott v Pauly* (1917) 24 CLR 274 at 282.

77 *In re Kerrigan; Ex parte Jones* (1946) 47 SR (NSW) 76 at 81-83.

Dixon CJ[78], Gibbs CJ[79] and Deane J[80] over the course of the last century. The principles that emerge from their combined consideration of the topic can, I think, be summarised in the following terms.

64 The presumption of a resulting trust is a presumption of fact, functionally akin to a civil onus of proof. The presumption will yield to an actual intention to the contrary found on the balance of probabilities as an inference drawn from the totality of the evidence. The weight to be given to the fact of a contribution having been made to the purchase price in drawing an inference as to actual intention will vary according to the totality of the circumstances of the case.

65 The counter-presumption of advancement is not really a presumption at all. The existence of a relationship within a category recognised as triggering the counter-presumption is no more than a "circumstance of evidence"[81]. Considered alone, the circumstance of such a relationship is enough to negative the presumption which arises from the bare fact of contribution to the purchase price. However, the circumstance of such a relationship will not be considered alone if other evidence going to intention is adduced and will then simply be weighed in the overall evidentiary mix.

66 Whether any, and if so what, inference is then to be drawn about the actual intention of the contributor and the purchaser falls to be determined as an ordinary question of fact on the balance of probabilities. "It is the intention of the parties in such cases that must control, and what that intention was may be proved by the same quantum or degree of evidence required to establish any other fact upon which a judicial tribunal is authorized to act."[82] Just as the standard of proof of

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78 *Stewart Dawson & Co (Vict) Pty Ltd v Federal Commissioner of Taxation* (1933) 48 CLR 683 at 689-691; *Russell v Scott* (1936) 55 CLR 440 at 451-453; *Drever v Drever* [1936] Argus LR 446 at 450; *Wirth v Wirth* (1956) 98 CLR 228 at 237; *Martin v Martin* (1959) 110 CLR 297 at 304-305.

79 *Napier v Public Trustee (WA)* (1980) 55 ALJR 1 at 2; 32 ALR 153 at 154-155; *Calverley v Green* (1984) 155 CLR 242 at 247-248.

80 *Calverley v Green* (1984) 155 CLR 242 at 265-267, 270-271; *Muschinski v Dodds* (1985) 160 CLR 583 at 612; *Nelson v Nelson* (1995) 184 CLR 538 at 547-549.

81 *Dyer v Dyer* (1788) 2 Cox Eq Cas 92 at 93-94 [30 ER 42 at 43]. Compare Glister, "Is There a Presumption of Advancement?" (2011) 33 *Sydney Law Review* 39.

82 *Hartley v Hartley* (1917) 117 NE 69 at 73, quoted in Scott and Fratcher, *The Law of Trusts*, 4th ed (1989), vol 5, §443 at 196 and *Damberg v Damberg* [2001] NSWCA 87 at [44]. See also Glister, "Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement" (2010) 73 *Modern Law Review* 807 at

intention is the ordinary civil standard, there are no special rules about proving intention. No predetermined weight is to be given either to the fact of a contribution having been made or to the categorisation of the relationship between the parties. The significance of each of those circumstances falls to be assessed within the totality of the circumstances of the case.

67 Where evidence relevant to intention is adduced, the presumption and the counter-presumption are therefore of practical significance only in rare cases where the totality of the evidence is incapable of supporting the drawing of an inference, one way or the other, on the balance of probabilities about what contributors and purchasers actually intended when they participated in the purchase transaction.

The present case

68 The primary judge did not consider that the primary facts revealed by the evidence adduced in the proceeding supported an inference that Mr Bosanac intended to retain a beneficial interest in the Dalkeith property, with the consequence that "[t]he 'presumption' of advancement stands unrebutted"[83]. If the evidence were truly incapable of founding an inference on the balance of probabilities as to the actual intention of Mr Bosanac and Ms Bosanac when participating in the purchase of the Dalkeith property, that would indeed have been the consequence that followed.

69 Taking a different view of whether an inference was available to be drawn from the primary facts, the Full Court concluded "that at the time of the purchase Mr Bosanac and Ms Bosanac intended that Mr Bosanac would have a 50% beneficial interest in the property that was to be their matrimonial home"[84].

70 I agree with the Full Court that the evidence supported the drawing of an inference on the balance of probabilities as to the actual intention of Mr Bosanac and Ms Bosanac when participating in the purchase of the Dalkeith property. However, I disagree as to the appropriate inference to be drawn.

71 Going further than the primary judge, I consider that his findings of primary fact support the drawing of an inference on the balance of probabilities of an intention on the part of Mr Bosanac and Ms Bosanac that Ms Bosanac was alone

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808-809. Compare Scott, Fratcher and Ascher, *Scott and Ascher on Trusts*, 5th ed (2009), vol 6, §43.4 and §43.12.

83 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 131 [230].

84 *Commissioner of Taxation v Bosanac* [2021] FCAFC 158 at [27].

to be the legal and beneficial owner of the Dalkeith property. The primary facts supporting that inference are as follows.

72 First, Mr Bosanac was a "sophisticated businessman" who "must be taken to have appreciated that the name in which real property is held is of significant consequence in almost all situations"[85].

73 Second, "it can safely be said this does not appear to be an instance of a husband and wife sharing all of the matrimonial assets jointly". To the contrary, although there were shared bank accounts, "Mr and Ms Bosanac appear to have kept their substantial assets in separate names"[86]. Mr Bosanac alone "held a substantial share portfolio"[87]. At the time of the purchase of the Dalkeith property, Mr Bosanac was the sole registered owner of two other properties, including one in which he and Ms Bosanac were then living[88], and Ms Bosanac was the sole registered owner of another property[89].

74 Third, there was "considerable evidence" of "the use of separately owned properties as security for joint loans"[90]. The fact that the funds used for the purchase of the Dalkeith property were drawn from loan accounts for which Mr Bosanac and Ms Bosanac were jointly and severally liable and were secured by mortgages over the three other properties held separately by Mr Bosanac and Ms Bosanac fitted that pattern.

75 That pattern of individual property ownership and joint borrowing leaves me unable to share the Full Court's view of it being "less probable than not ... 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"[91]. It also leaves me unable to agree with the Full Court's view that some significance should be attached to the fact that Mr Bosanac subsequently

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85 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 131 [231].

86 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 84 [57].

87 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 129 [223].

88 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 83 [43].

89 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 130 [226].

90 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 131 [228].

91 *Commissioner of Taxation v Bosanac* [2021] FCAFC 158 at [21].

secured further borrowing against the Dalkeith property for the purposes of conducting his share trading[92].

76 Finally, and most importantly, there are the circumstances of the particular purchase transaction. To concentrate on the actions and inferred intention of Mr Bosanac, as did the Full Court, is to downplay the actions and inferred intention of Ms Bosanac. This is not a case in which it could be said that property was "purchased by" one person "in the name of" another[93].

77 Ms Bosanac was the sole contracting party for the purchase of the Dalkeith property: she made the offer which was accepted by the vendor[94]. To complete the purchase, Ms Bosanac chose to expose herself to liability for repayment of the loans which she and Mr Bosanac took out and to the risk of default on those loans[95]. There is no reason to think that she was put up to the purchase by Mr Bosanac or that she was required to become a party to the loan agreements in order for Mr Bosanac to obtain finance[96].

Disposition

78 I agree with the orders proposed by Kiefel CJ and Gleeson J.

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92 *Commissioner of Taxation v Bosanac* [2021] FCAFC 158 at [23].

93 cf *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 at 364-365; *Wirth v Wirth* (1956) 98 CLR 228 at 235.

94 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 82 [38].

95 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 83 [41]-[42].

96 *Commissioner of Taxation v Bosanac [No 7]* (2021) 390 ALR 74 at 129 [222].

79 GORDON AND EDELMAN JJ. The first respondent, the Commissioner of Taxation, sought a declaration that the appellant, Ms Bosanac, holds 50 per cent of her interest in a property owned by her in Philip Road, Dalkeith, Western Australia ("the Dalkeith property") on trust for her husband. Her husband, the second respondent, Mr Bosanac, is a debtor of the Commissioner. The Federal Court of Australia (McKerracher J) dismissed the Commissioner's application. The Full Court of the Federal Court (Kenny, Davies and Thawley JJ) allowed the Commissioner's appeal and granted him a declaration that Ms Bosanac holds 50 per cent of her interest in the Dalkeith property on trust for Mr Bosanac.

80 Ms Bosanac was granted special leave to appeal. For the reasons that follow, the appeal should be allowed. These reasons will address the facts and the principles relating to the presumption of resulting trust and the so-called "presumption" of advancement. The reasons will then turn to explain that Ms and Mr Bosanac's conduct at the time of the acquisition of the Dalkeith property – the objective facts – establishes that their objective intention was inconsistent with a declaration of trust in favour of Mr Bosanac as to 50 per cent of Ms Bosanac's interest in the Dalkeith property. The presumption of resulting trust does not arise. No resulting trust was created.

Facts

81 The core facts were established by affidavit evidence filed by the Commissioner.

82 Ms and Mr Bosanac were married in 1998.

83 In May 2006, Ms Bosanac contracted to buy the Dalkeith property for $4.5 million, subject to her obtaining approval for a loan of $3 million from Westpac Banking Corporation. The deposit of $250,000 was paid from a pre-existing joint loan account Ms Bosanac held with Mr Bosanac.

84 Subsequently, Ms and Mr Bosanac jointly applied for two new loans from Westpac totalling $4.5 million for the predominant purpose of purchasing the Dalkeith property. Ms and Mr Bosanac were each liable for the full amount of the loans; each was liable to repay $1 million plus interest in four months and to repay a further $3.5 million plus interest in one year. If neither Ms Bosanac nor Mr Bosanac made those repayments, Westpac could serve a notice on both of them which, if not complied with, would have entitled it to take possession of and sell not only the Dalkeith property, which was encumbered by a first registered mortgage in favour of Westpac, but also three other properties which were provided as security for the loans, at least one of which was held by Ms Bosanac in her own name. Ms and Mr Bosanac moved into the Dalkeith property as their matrimonial home in late 2006.

85 Ms Bosanac was the sole registered proprietor of the Dalkeith property. There was no suggestion in this Court, or in the Courts below, that the Dalkeith property was registered in Ms Bosanac's name for the purpose of Mr Bosanac avoiding creditors. And there was no suggestion that Westpac required both Ms and Mr Bosanac to sign the loans to obtain the finance or, given that they did in fact both sign the loans, that Westpac sought to require the Dalkeith property to be registered in joint names[97].

86 The evidence disclosed that when Ms Bosanac purchased the Dalkeith property, there was a disparity in wealth and employment between Ms and Mr Bosanac. There was also considerable evidence of separate ownership of assets. Mr Bosanac, a "self-styled venture capitalist", was a wealthy and "sophisticated businessman". In the loan applications, he disclosed that he held substantial assets in his own name, including shares with a cash value in excess of $24 million and cash reserves. He disclosed no property assets. His gross annual income was listed as $388,401, and he disclosed liabilities of $120,000 in other instalment loans and a $15,130 line of credit. He did not disclose any liabilities related to real property. The Commissioner led evidence at trial as to Mr Bosanac's ownership of at least two properties, one of which was used as security for the loans. However, McKerracher J made no findings as to that evidence, instead holding that the evidence did not disclose the precise ownership of those properties.

87 In the loan applications Ms Bosanac listed her occupation as "home duties". She had an annual gross income of $56,900, and held approximately $94,000 in cash at bank and at least two properties of which she was or would become the sole registered proprietor – the Dalkeith property and a property in Hardy Street, which were both provided as security for the loans. Prior to obtaining funding from Westpac to acquire the Dalkeith property, Ms Bosanac had listed total property assets of approximately $8.8 million with property related liabilities of about $5.5 million. She had no other loans or lines of credit.

88 The initial Westpac funding was short term. In 2007, Westpac offered Ms and Mr Bosanac two further loans secured by the existing mortgages over the Dalkeith property and the Hardy Street property (both owned by Ms Bosanac) – a Rocket Investment Loan of $2 million and a Rocket Repay Home Loan of $1.6 million. Both loan offers listed the predominant purpose as "Refinance of Existing Home Loan".

89 An inference available to be drawn from the facts at the time Ms Bosanac acquired the Dalkeith property is that Mr Bosanac facilitated Ms Bosanac's acquisition of that property by assisting in paying the deposit and entering into the

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97 cf *Calverley v Green* (1984) 155 CLR 242 at 251.

joint loans for the purpose of funding the purchase. A further inference available to be drawn from the facts at the time Ms Bosanac acquired the Dalkeith property is that Mr Bosanac intended that Ms Bosanac's rights in the Dalkeith property would be used later to benefit him, which they were. The Rocket Investment Loan was used by Mr Bosanac to conduct share trading.

90 In 2012 or 2013, Ms and Mr Bosanac separated, but they continued living together at the Dalkeith property until about mid-2015 and did not divorce at that time.

91 Mr Bosanac did not give evidence at trial.

Resulting trusts

92 Delivering the judgment of the Supreme Court of Canada in *Kerr v Baranow*[98], Cromwell J observed that "there is not much one can say about resulting trusts without a well-grounded fear of contradiction. There is debate about how they should be classified and how they arise, let alone about many of the finer points". One source of difficulty is the description of the trust as "resulting". As Birks observed, "[i]f the traditional classification of trusts simply contradistinguished express and constructive trusts, there would be no further complications"[99].

93 Like a constructive trust, which arises by operation of law[100], a resulting trust sometimes describes a trust in favour of a transferor that is imposed independently of the manifested intention of the transferor to create a trust. But, like an express trust, which arises due to objective or manifested intention to create a trust[101], a resulting trust sometimes describes a trust that was objectively intended by the transferor of property. These disparate categories are treated alike as "resulting" trusts merely by the pattern of their effect. From the Latin, *resalire* or

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98 [2011] 1 SCR 269 at 286 [16]. See also *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321 at 335-337 [89]-[103].

99 Birks, *Unjust Enrichment*, 2nd ed (2005) at 304.

100 *Muschinski v Dodds* (1985) 160 CLR 583 at 613-614, 617; *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 147-148. See also *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 228 [13-01].

101 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 605 [34], citing *Walker v Corboy* (1990) 19 NSWLR 382; *Byrnes v Kendle* (2011) 243 CLR 253 at 286-290 [102]-[114].

resultare, the equitable interest is said to "jump back" to the settlor or those taking through the settlor[102].

94 Examples of resulting trusts that have been held to arise by operation of law, irrespective of any objective intention to create a trust, are trusts that arise upon the failure of an express trust[103] or by a transfer of a person's legal rights without their consent or knowledge[104]. Examples of resulting trusts that arise from objective intention to create a trust are trusts that arise in favour of a transferor of property ("voluntary conveyance resulting trust") or a contributor of purchase money ("purchase money resulting trust")[105]. This appeal concerns only this latter category of resulting trust, namely those trusts that arise by objective intention.

Presumption of resulting trust

95 The "presumption of resulting trust" is a presumption that a resulting trust arises in the two circumstances where resulting trusts arise by objective intention. The presumption has been described as anachronistic[106]. As explained below, that description is correct. But although the anachronistic nature of the

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102 Chambers, *Resulting Trusts* (1997) at 4, referring to Birks, *An Introduction to the Law of Restitution*, rev ed (1989) at 60; Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 72. cf *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 205-206 [12-01]; *Anderson* (2012) 8 ASTLR 321 at 335-336 [90]-[91], citing *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 463, *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 606 [30] and *Peldan v Anderson* (2006) 227 CLR 471 at 485 [37].

103 See, eg, *In re Gillingham Bus Disaster Fund* [1958] Ch 300 at 310; *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 at 312-314; *In re Vandervell's Trusts [No 2]* [1974] Ch 269 at 288-293; *DKLR* (1982) 149 CLR 431 at 459-460; *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 at 1412.

104 *El Ajou v Dollar Land Holdings Plc* [1993] 3 All ER 717 at 734; *Evans v European Bank Ltd* (2004) 61 NSWLR 75 at 99-100 [111]-[114]. See also Chambers, *Resulting Trusts* (1997) at 118, discussing *Black v S Freedman & Co* (1910) 12 CLR 105 at 110.

105 See Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 73.

106 *Dullow v Dullow* (1985) 3 NSWLR 531 at 535; *Anderson* (2012) 8 ASTLR 321 at 339 [115]. See also *Pettitt v Pettitt* [1970] AC 777 at 824; *Calverley* (1984) 155 CLR 242 at 264-265, 266; *Brown v Brown* (1993) 31 NSWLR 582 at 595; *Nelson v Nelson* (1995) 184 CLR 538 at 602.

presumption of resulting trust may inform its weight, the presumption is "too well entrenched as [a] 'land-mark[]' in the law of property to be simply discarded by judicial decision"[107]. Where it has been recognised to exist, transactions have been undertaken, and disputes resolved, on the basis of the presumption. And Parliament has recognised the resulting trust, with an appreciation of the circumstances of the presumption, as an exception to statutory formality requirements[108], relevantly in this case by s 34(2) of the *Property Law Act 1969* (WA).

96 For present purposes, it is enough to recognise that the so-called presumption of resulting trust developed in feudal times as a way to circumvent forfeiture (because land could only be left to heirs and not by will and if there was no heir it was forfeited ("escheated") to the feudal lord[109]) and to deal with the vicissitudes of war[110]. Between the 15th and 17th centuries a practice developed whereby owners of land conveyed ("feoffed") their land gratuitously to others to the "use" of themselves; these were called "feoffments to the use of the feoffor" – or a "declaration of use"[111]. In these conveyances it was not usual to include words of trust or "use" on the face of the conveyance; but the practice was so common that courts of equity began to apply a "presumption" of declaration of use[112] or, as we now refer to it, a "presumption of resulting trust".

97 As Deane J explained in *Calverley v Green*[113], the presumption of resulting trust "evolved in times when a majority of adults laboured under restrictions and disabilities in respect of the ownership and protection of property and when it may

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107 *Calverley* (1984) 155 CLR 242 at 266 (citation omitted), quoting *Dyer v Dyer* (1788) 2 Cox Eq Cas 92 at 94 [30 ER 42 at 43]. See also *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 at 364; *Nelson* (1995) 184 CLR 538 at 548, 584, 602.

108 See *Property Law Act 1969* (WA), s 34(1).

109 Nettle, "Trust and Commerce in Historical Perspective" (2021) 15 *Journal of Equity* 2 at 8.

110 *Lloyd v Spillet* (1740) 2 Atk 148 at 150 [26 ER 493 at 494]; *Dullow* (1985) 3 NSWLR 531 at 535; *Anderson* (2012) 8 ASTLR 321 at 338 [110]; Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 79-80.

111 Chambers, *Resulting Trusts* (1997) at 16-17, 19-20; *Dyer* (1788) 2 Cox Eq Cas 92 at 93 [30 ER 42 at 43]; *Anderson* (2012) 8 ASTLR 321 at 338 [109].

112 *Dullow* (1985) 3 NSWLR 531 at 535; *Anderson* (2012) 8 ASTLR 321 at 338 [113]; Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 79-80; Ong, *Trusts Law in Australia*, 5th ed (2018) at 455.

113 (1984) 155 CLR 242 at 265-266.

have been wrong to assume that the fact that property was caused to be transferred into the legal ownership of a person without any express qualifying limitation was a prima facie indication of an intention that [they] should own it". But as his Honour acknowledged[114], "[e]ven in those times however, there was much to be said for the view that, except where [it] served the same function as a civil onus of proof and operated to resolve a factual contest in circumstances where the relevant evidence was either uninformative or truly equivocal, the worth of [the] presumption[] was at best debatable".

98 That statement applies with greater force today[115]. In modern times, the presumption has been applied to personalty[116] as well as realty. Acknowledging that it is too late to abolish it[117], the presumption of resulting trust should be recognised as a weak presumption given that the circumstances justifying it have changed so much since the foundations of the presumption in the 15th century[118].

Presumption of fact or law?

99 There are arguably what are loosely described as two types of presumptions – a presumption of fact or an evidentiary presumption, and a presumption of law[119]. A presumption of fact is no more than a traditional inference based on logic and common sense which a tribunal of fact *ordinarily*

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114 *Calverley* (1984) 155 CLR 242 at 266. See also 264-265.

115 *Dullow* (1985) 3 NSWLR 531 at 535; *Brown* (1993) 31 NSWLR 582 at 595; *Nelson* (1995) 184 CLR 538 at 602; *Anderson* (2012) 8 ASTLR 321 at 339 [114].

116 See *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 212 [12-10], citing *The Venture* [1908] P 218 and *Bateman Television Ltd v Bateman* [1971] NZLR 453.

117 *Calverley* (1984) 155 CLR 242 at 266, quoting *Dyer* (1788) 2 Cox Eq Cas 92 at 94 [30 ER 42 at 43]. See also *Charles Marshall* (1956) 95 CLR 353 at 364; *Nelson* (1995) 184 CLR 538 at 548, 584, 602.

118 See *Calverley* (1984) 155 CLR 242 at 265-266.

119 *Masson v Parsons* (2019) 266 CLR 554 at 575-576 [32]; *Federal Commissioner of Taxation v Carter* (2022) 96 ALJR 325 at 332 [29], 335 [42]; 399 ALR 521 at 528, 532; cf Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 339; Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905), vol 4 at 3533 §2491; Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 76; *Cross on Evidence*, 13th Aust ed (2021) at 383 [7255].

draws from basic facts[120]. Absent evidence either way, "a particular state of affairs is accepted as fact because it is ordinary and universal experience that, save perhaps in extraordinary situations, it is always so"[121]. Put differently, absent another explanation, a presumption of fact arises from facts which, from common experience, so obviously suggest a particular state of affairs that they give rise to an inference to that effect, or an assumption that the only explanation is that suggested by the objective facts[122]. It arises and may operate in the absence of evidence to the contrary. However, a presumption of fact falls short of being a presumption in the proper legal sense[123]: it *may* permit an inference to be drawn upon proof of the basic fact; it does not necessarily attach any legal consequence[124].

100 On the other hand, a presumption of law is a rule of law which, in the absence of other, contrary evidence, attaches a legal consequence to one evidentiary fact[125]. Unlike a presumption of fact, in the absence of other evidence a presumption of law *requires* that the inference be drawn[126].

101 The use of the term "presumption" to describe both presumptions of fact and presumptions of law has been criticised[127]. Regardless of the validity of the

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120 *Masson* (2019) 266 CLR 554 at 575-576 [32].

121 *R v Falconer* (1990) 171 CLR 30 at 83. See also *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 213; *Calverley* (1984) 155 CLR 242 at 264; *Weissensteiner v The Queen* (1993) 178 CLR 217 at 242-243; *Thorne v Kennedy* (2017) 263 CLR 85 at 101 [34]; *Carter* (2022) 96 ALJR 325 at 335 [43]; 399 ALR 521 at 532.

122 *Weissensteiner* (1993) 178 CLR 217 at 243.

123 Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 339; Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905), vol 4 at 3533 §2491; Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 76.

124 See *Cross on Evidence*, 13th Aust ed (2021) at 383 [7255], 384 [7260].

125 Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905), vol 4 at 3534 §2491.

126 *Cross on Evidence*, 13th Aust ed (2021) at 384 [7260], 384-385 [7265]-[7270].

127 Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 339; Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905),

distinction and the criticisms, no additional probative force should be attributed to a so-called presumption when there is evidence to the contrary[128]. Wigmore explained it in these terms[129]:

> "[T]he peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule ... It is therefore a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary. For example, if death be the issue, and the fact of absence for seven years unheard from be conceded, but the opponent offers evidence that the absentee, before leaving, proclaimed his intention of staying away for ten years, until a prosecution for crime was barred, this satisfies the opponent's duty of producing evidence, removing the rule of law; and when the case goes to the jury, they are at liberty to give any probative force they think fit to the fact of absence for seven years unheard from. It is not weighed down with any artificial additional probative effect; they may estimate it for just such intrinsic effect as it seems to have under all the circumstances."

102 That is, once evidence is adduced to address the issue in dispute, the presumption has no "superadded weight"[130]. Once that evidence is led, "*even weak evidence* ... must prevail if there is not other evidence to counterbalance it"; the presumption only arises where the evidence is evenly balanced and the court is unable to make a decision[131]. As Deane J explained in

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vol 4 at 3533 §2491; Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 76; *Cross on Evidence*, 13th Aust ed (2021) at 383 [7255].

128 Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 339; Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905), vol 4 at 3533 §2491; *Cross on Evidence*, 13th Aust ed (2021) at 386-387 [7280].

129 Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905), vol 4 at 3534-3535 §2491 (emphasis in original, footnotes omitted).

130 *Cross on Evidence*, 13th Aust ed (2021) at 386 [7280].

131 *S v S* [1972] AC 24 at 41 (emphasis added), quoted in *Cross on Evidence*, 13th Aust ed (2021) at 386-387 [7280]. See *Pettitt* [1970] AC 777 at 814.

Calverley[132] in relation to the presumption of resulting trust, the presumption "serve[s] the same function as a civil onus of proof [by] operat[ing] to resolve a factual contest in circumstances where the relevant evidence [is] either uninformative or truly equivocal". Or, as Lord Upjohn said in *Vandervell v Inland Revenue Commissioners*[133], "the so-called presumption of a resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution".

103 Whether it is classified as a presumption of fact[134] or a presumption of law[135], and although described as "entrenched"[136], given the now weak nature of the presumption of resulting trust, the objective facts determine its position and significance (if any).

Presumption of resulting trust – what is presumed and when and how does the presumption arise?

104 Two immediate questions arise – when and how does a presumption of resulting trust arise and what is presumed? Relevantly in the case of "voluntary conveyance resulting trusts" and "purchase money resulting trusts", what is presumed is a declaration of trust by the person who either transfers property, or pays the whole or part of the purchase price of it[137]. But whether that is presumed – whether that inference is drawn – depends on issues of evidence and proof of a resulting trust. And in answering those questions, it is necessary to address the matters raised by Deane J in *Calverley*.

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132 (1984) 155 CLR 242 at 266.

133 [1967] 2 AC 291 at 313.

134 See *Pettitt* [1970] AC 777 at 823; Chambers, *Resulting Trusts* (1997) at 11; cf Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 101.

135 Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 101.

136 *Calverley* (1984) 155 CLR 242 at 266, citing *Dyer* (1788) 2 Cox Eq Cas 92 at 94 [30 ER 42 at 43]. See also *Charles Marshall* (1956) 95 CLR 353 at 364; *Nelson* (1995) 184 CLR 538 at 548, 584, 602.

137 *Anderson* (2012) 8 ASTLR 321 at 337-338 [106]; Swadling, "Explaining Resulting Trusts" (2008) 124 *Law Quarterly Review* 72 at 79-80, 85-94; cf Chambers, *Resulting Trusts* (1997) at 20-27.

105 The presumption of resulting trust – the standardised inference that allocates the onus of proof – serves the same function as a civil onus of proof and operates to resolve a factual contest when the relevant evidence is "uninformative or truly equivocal"[138]. It arises if there be a paucity of evidence as to an intention to declare a trust[139]. Put in different terms, where the presumption arises, the existence of a resulting trust is an *inference drawn* in the *absence of evidence* when, for example, a purchaser of property causes it to be transferred to another or when a person contributes to the purchase of property which is registered in the name of another[140]. But such an inference – of resulting trust – cannot arise where a plaintiff has led evidence that tends to establish an objective intention or the lack of an objective intention to create a trust[141].

106 As a resulting trust is an *inference drawn* in the *absence of evidence*, it is necessary to start with the objective facts. It is a factual inquiry. The question may be framed in these terms: what were the parties' words or conduct at the time of the transaction or so immediately thereafter as to constitute part of the transaction – the objective facts[142]?

107 There are three dimensions to that factual inquiry.

108 Where the objective facts based on evidence led by the plaintiff tend to establish an objective intention that a provider of part of the purchase price would hold an equitable interest as to a particular proportion of a particular property, there will be an express trust which satisfies the three certainties of intention, subject and object[143]. That is the case that the defendant has to meet. There is no need for a presumption of resulting trust to shift the onus of proof. The presumption of resulting trust does not arise. It is unnecessary.

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138 *Calverley* (1984) 155 CLR 242 at 266.

139 *Nelson* (1995) 184 CLR 538 at 547.

140 *Pettitt* [1970] AC 777 at 823; *Calverley* (1984) 155 CLR 242 at 264.

141 *Muschinski* (1985) 160 CLR 583 at 612. See also *Vandervell* [1967] 2 AC 291 at 313; *Pettitt* [1970] AC 777 at 815.

142 *Calverley* (1984) 155 CLR 242 at 262. See also *Charles Marshall* (1956) 95 CLR 353 at 365, quoting *Shephard v Cartwright* [1955] AC 431 at 445, in turn quoting *Snell's Equity*, 24th ed (1954) at 153.

143 *Kauter v Hilton* (1953) 90 CLR 86 at 97; *Associated Alloys* (2000) 202 CLR 588 at 604 [29]; *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 at 71 [7].

109 On the other hand, where the objective facts based on evidence led by the plaintiff tend to establish, even weakly[144], an objective intention inconsistent with a declaration of trust, then there will be no case for the defendant to meet. Again, the presumption of resulting trust will not arise[145]. In this circumstance, the fact that there is a spousal relationship is one of the objective facts: at best it merely reinforces, and is not determinative of, the objective intention of the parties established by the objective facts.

110 Where, however, the objective facts based on evidence led by the plaintiff are neutral, truly equivocal, non-existent or uninformative as to the objective intention of the parties, then, consistent with the *weak* presumption of resulting trust, an inference can be drawn of a declaration of trust by the provider of part of the purchase price[146]. That weak inference will be the case that the defendant has to meet.

111 As Lord Diplock said in *Pettitt v Pettitt*[147], the presumption is an example of the courts' technique of:

> "imputing an intention to a person *wherever* the intention with which an act is done affects its legal consequences and *the evidence does not disclose what was the actual intention with which [they] did it*. ... [The presumption is] not immutable. A presumption of fact is no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn *in the absence of any evidence to the contrary*".

With the qualification that these references to "actual intention" must be understood as the objective manifestation of intention, the presumption of resulting trust "cannot prevail over the *actual intention* of that party as established by the

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144 *S v S* [1972] AC 24 at 41, quoted in *Cross on Evidence*, 13th Aust ed (2021) at 386-387 [7280]. See *Pettitt* [1970] AC 777 at 814.

145 *Pettitt* [1970] AC 777 at 815, 823; *Muschinski* (1985) 160 CLR 583 at 612; *Goodman v Gallant* [1986] Fam 106 at 110-111.

146 *Pettitt* [1970] AC 777 at 815, 823; *S v S* [1972] AC 24 at 41, quoted in *Cross on Evidence*, 13th Aust ed (2021) at 387 [7280]; *Calverley* (1984) 155 CLR 242 at 266; *Muschinski* (1985) 160 CLR 583 at 612; *Goodman* [1986] Fam 106 at 110-111; *Nelson* (1995) 184 CLR 538 at 547.

147 [1970] AC 777 at 823 (emphasis added). See also *Calverley* (1984) 155 CLR 242 at 264.

overall evidence"[148]; it will "operate to place the burden of proof, *if there be a paucity of evidence* bearing upon such a relevant matter as the intention of the party who provided the funds for the purchase"[149]. As has been explained, the first step is the objective factual inquiry of ascertaining the parties' words or conduct at the time of the transaction or so immediately thereafter as to constitute part of the transaction.

112 If there is a spousal relationship, that relationship is a circumstance of fact in which the presumption of resulting trust does not arise – that circumstance of fact is sometimes referred to as the "presumption of advancement"[150]. It will be necessary to address this so-called presumption below.

113 There is also an important temporal dimension to the factual inquiry. The objective intention of the parties is determined at the *time* when the trust was purportedly created[151] – here, when the property in issue was purchased. Apart from admissions against interest, the only evidence relevant and admissible as to the parties' objective intention is their acts and declarations before or at the time of the transaction or "so immediately [thereafter] as to constitute a part of the transaction"[152]. Subsequent events and conduct are otherwise not admissible[153].

"Presumption" of advancement

114 As the result in this appeal does not depend on the "presumption" of advancement, the Commissioner should be refused leave to amend his notice of contention to contend that the "presumption" of advancement should be abolished. The following matters, however, should be stated.

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148 *Muschinski* (1985) 160 CLR 583 at 612 (emphasis added). See also *Vandervell* [1967] 2 AC 291 at 313; *Pettitt* [1970] AC 777 at 815.

149 *Nelson* (1995) 184 CLR 538 at 547 (emphasis added).

150 *Wirth v Wirth* (1956) 98 CLR 228 at 237; *Martin v Martin* (1959) 110 CLR 297 at 303; *Pettitt* [1970] AC 777 at 814; *Calverley* (1984) 155 CLR 242 at 247, 256, 265, 267; *Nelson* (1995) 184 CLR 538 at 548-549, 586, 601.

151 *Calverley* (1984) 155 CLR 242 at 252, 262.

152 *Charles Marshall* (1956) 95 CLR 353 at 365, quoting *Shephard* [1955] AC 431 at 445, in turn quoting *Snell's Equity*, 24th ed (1954) at 153; *Calverley* (1984) 155 CLR 242 at 262.

153 cf *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at 300 [65].

115 First, the "presumption" of advancement is not a "presumption" at all, but is, instead, one circumstance of fact in which the presumption of resulting trust does not arise[154]. In modern relationships, the fact is that in a relationship of close trust there may be no occasion to presume a resulting trust in favour of the person who provided part or all of the purchase price of a property, or gratuitously transferred a property, registered in the name of the other person. In such circumstances, no equitable interest is created and engrafted onto the legal interest[155].

116 Second, although the "presumption" of advancement has been described as entrenched[156], its rationale has not been consistently explained[157] and, no less importantly, it has long been recognised that the limited classes of relationships of close trust from which the "presumption" arises "may not accord with contemporaneous practices and modes of thought"[158]. Given the significance of a relationship of close trust in finding the objective facts, there may well be scope in the future to extend the "presumption" of advancement to a broader range of relationships, as was at least started in *Nelson v Nelson*[159], where the lack of any presumption of resulting trust in circumstances involving a transfer from a father to a child was extended to circumstances involving a transfer from a mother to a child. But the issue of any extension of the "presumption" of advancement does not arise on this appeal.

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154 *Wirth* (1956) 98 CLR 228 at 237; *Martin* (1959) 110 CLR 297 at 303; *Pettitt* [1970] AC 777 at 814; *Calverley* (1984) 155 CLR 242 at 247, 256, 265, 267.

155 See *DKLR* (1982) 149 CLR 431 at 463; *Linter Textiles* (2005) 220 CLR 592 at 606 [30]; *Peldan* (2006) 227 CLR 471 at 485 [37]; *Boensch v Pascoe* (2019) 268 CLR 593 at 599 [4]; *Carter* (2022) 96 ALJR 325 at 334 [41]; 399 ALR 521 at 531-532, quoting *Commissioner of State Revenue (WA) v Rojoda Pty Ltd* (2020) 268 CLR 281 at 307 [44], in turn citing *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 243 [38].

156 *Calverley* (1984) 155 CLR 242 at 266, quoting *Dyer* (1788) 2 Cox Eq Cas 92 at 94 [30 ER 42 at 43]. See also *Charles Marshall* (1956) 95 CLR 353 at 364; *Nelson* (1995) 184 CLR 538 at 548, 584, 602.

157 *Calverley* (1984) 155 CLR 242 at 248. See also *Wirth* (1956) 98 CLR 228 at 237; *Nelson* (1995) 184 CLR 538 at 575-576, 586.

158 *Nelson* (1995) 184 CLR 538 at 602. See also *Calverley* (1984) 155 CLR 242 at 265-266.

159 (1995) 184 CLR 538 at 548-549, 574-575, 585-586, 601.

Cummins not relevant

117 The Full Court held that the nature of the transaction in issue in this appeal – described incorrectly as Mr Bosanac "borrowing to acquire and gift a house" to Ms Bosanac – permitted "an inference as to intention consistent with the inference drawn in [*Trustees of the Property of Cummins v*] *Cummins*[160] at [71], in the second passage quoted from Professor Scott's work". It is necessary to set out the passage from *Cummins*. It read[161]:

> "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[162]:
>
> > '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[163]:
>
> > '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.'"

118 Although the Full Court rejected the Commissioner's submission that these passages qualified the "presumption" of advancement in the context of the matrimonial home, it nevertheless drew the inference referred to in the second statement extracted above. In this Court, the Commissioner sought to reagitate, by notice of contention, the submission rejected by the Full Court. With respect, reliance on those passages was an error. First, the starting point is the objective facts, not the so-called "inference drawn in *Cummins*". Second, and relatedly,

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160 (2006) 227 CLR 278.

161 *Cummins* (2006) 227 CLR 278 at 302-303 [71].

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

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

Mr Bosanac's borrowing did not, itself, establish that he held an objective intention to declare a trust in his favour in relation to part of the Dalkeith property. As has been seen, Mr Bosanac's borrowing was one – or really part of one – objective fact which was required to be considered in determining the objective intention of the parties at the time of the purchase of the Dalkeith property or so immediately thereafter as to constitute part of the transaction. It was not, and could not be, determinative.

119 Third, the passages in *Cummins* were obiter; the objective facts in that case established that the intention of both parties was that they would hold the property jointly[164].

120 Finally, and of primary significance, the two cases cited by Professor Scott in support of his second statement quoted in *Cummins* concerned a statutory discretion under s 17 of the *Married Women's Property Act 1882* (45 & 46 Vict c 75), which provided that in any question between husband and wife as to the title or possession of property, the court was to decide the matter as it thought fit[165]. In short, under that Act, "the question of contract, gift, or trust" was put to one side[166]. The second quoted statement from Professor Scott does not concern equity more generally or any equitable presumption.

Objective intention inconsistent with declaration of trust

121 The objective facts arising from the Commissioner's affidavit evidence – the parties' conduct at the time of the purchase of the Dalkeith property – do not permit an inference consistent with a declaration of trust. To the contrary, the inference to be drawn from the objective facts is that the parties' objective intention was inconsistent with a declaration of trust in favour of Mr Bosanac as to 50 per cent of Ms Bosanac's interest in the Dalkeith property. Accordingly, the presumption of resulting trust does not arise[167]. No equitable interest in favour of Mr Bosanac was created.

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164 *Cummins* (2006) 227 CLR 278 at 303 [73].

165 *Rimmer v Rimmer* [1953] 1 QB 63 at 70-71, 73, 76; *Fribance v Fribance [No 2]* [1957] 1 WLR 384 at 387; [1957] 1 All ER 357 at 359. See also *Cobb v Cobb* [1955] 1 WLR 731; [1955] 2 All ER 696; *Silver v Silver* [1958] 1 WLR 259 at 262-263; [1958] 1 All ER 523 at 525-526.

166 *Fribance* [1957] 1 WLR 384 at 387; [1957] 1 All ER 357 at 359.

167 *Pettitt* [1970] AC 777 at 815, 823; *Calverley* (1984) 155 CLR 242 at 267; *Muschinski* (1985) 160 CLR 583 at 612; *Goodman* [1986] Fam 106 at 110-111.

122 Ms and Mr Bosanac made the financial arrangements they did for the acquisition of the Dalkeith property recognising, intending and understanding that the Dalkeith property was Ms Bosanac's – not only was it acquired in her name and registered in her name, but it was her property. Recognition, intention and understanding are different words for expressing the inference that is to be drawn from all of the parties' conduct at the time the Dalkeith property was acquired – the objective facts – including the way in which they had arranged their overall financial affairs in the past.

123 In particular, Ms and Mr Bosanac held their substantial assets separately. Ms Bosanac contracted to purchase the Dalkeith property alone and the purchase contract required Ms Bosanac to acquire finance. Although there was no evidence that Westpac required the loans to be put in both names[168], the disparity in wealth and employment makes it unlikely that Ms Bosanac could have obtained or serviced the loans on her own. In that circumstance, and against the history of Ms and Mr Bosanac holding their substantial assets separately, the clear inference is that the parties' objective intention was that Mr Bosanac was doing no more than facilitating Ms Bosanac's acquisition of the Dalkeith property by assisting in paying the deposit and entering into the joint loans for the purpose of funding the purchase.

124 In addition, the Dalkeith property was transferred into Ms Bosanac's name and she was and remained its sole registered proprietor. There was nothing in the evidence to indicate that Ms and Mr Bosanac could not have jointly purchased the Dalkeith property, signed the contract together, and registered it in their joint names. There was no suggestion that Ms Bosanac contracted to purchase and did purchase the Dalkeith property in her name to assist her husband to avoid creditors.

125 Finally, the fact that Ms and Mr Bosanac were married at the time of the purchase of the Dalkeith property is not determinative: at best that fact merely reinforces the inference available from the other facts – that the parties' objective or manifested intention was for Mr Bosanac to facilitate the acquisition by Ms Bosanac of the Dalkeith property. The presumption of resulting trust does not arise. It has no role to play.

126 As has been observed, the Full Court reached the opposite conclusion. In short, it asked itself the wrong question. It did not start with the facts and ask – what were the parties' words or conduct at the time of the transaction or so

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168 cf *Calverley* (1984) 155 CLR 242 at 251.

immediately thereafter as to constitute part of the transaction[169]? It did not ask what those facts established as to the objective intention, if any, of the parties in relation to the acquisition of the Dalkeith property. Instead, the Full Court relied in particular on three facts it considered were conclusive of Mr Bosanac's intention that the Dalkeith property not be a "gift" to Ms Bosanac: that Ms and Mr Bosanac manifested an intention that the Dalkeith property be their matrimonial home; that the manifest purpose of the joint loans was to purchase the Dalkeith property; and that security for the loans was over four properties, including the Dalkeith property. With respect, those matters were not the entirety of the facts and, whether considered as part of the entirety of the facts or even alone, they were inconsistent with an objective intention to declare a trust in favour of Mr Bosanac as to 50 per cent of Ms Bosanac's interest in the Dalkeith property. Moreover, contrary to the view expressed by the Full Court, there is no qualitative difference between transferring a house and borrowing part of the purchase price. The nature of the borrowing does not permit an inference either way.

Conclusion and orders

127 For those reasons, the appeal should be allowed. We agree with the orders proposed by Kiefel CJ and Gleeson J.

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169 *Calverley* (1984) 155 CLR 242 at 262. See also *Charles Marshall* (1956) 95 CLR 353 at 365, quoting *Shephard* [1955] AC 431 at 445, in turn quoting *Snell's Equity*, 24th ed (1954) at 153.