

May v Costaras

I Daniele Phair solicitor for the
Appellant Certify this document
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Appellant's Written Submissions

1. These submissions of the appellant are filed in relation to his notice of appeal filed on 4 April 2025 and pursuant to the orders made on 11 June 2025.

The appeal

2. In these proceedings the appellant seeks to set aside the orders at Red 38 made by Lindsay J on 10 March 2025 (**Orders**) that were based upon the reasons at Red 42 handed down on 25 February 2025 (**Reasons**).
3. In the proceedings below the appellant was the plaintiff and the cross-defendant to a cross claim by the respondent.

Summary of key facts

4. In 2015 the appellant purchased a property located at 13-15 Water Ski Parade, Cumberland Reach (**Cumberland Reach property**) for \$630,000.
5. Between 2017 and early 2021, the appellant carried out some renovations to the Cumberland Reach property with the assistance of a friend who was a builder and of his cousin.

6. The appellant and respondent commenced a romantic relationship at the end of 2020. They were engaged to be married from January 2021 and lived together in the Cumberland Reach property from February or March 2021.
7. Further works were carried out to the Cumberland Reach property during the next twelve months. There was a dispute in the proceedings about what works were done and what was paid by each party towards those works. The respondent's evidence was that:
 - a. she paid \$52,325.55 towards the works but, as set out further below, of that amount \$5,110 was included based upon falsified entries in the respondent's credit card statements, and at least \$10,000 was reimbursed to the respondent; and
 - b. the appellant paid towards the works \$120,000 he received from an insurance payout, and a further \$97,000 by taking out a loan.
8. In February or March 2022, the appellant and respondent moved into a property the appellant had purchased at 166 Ann Street, Maryborough (**Ann St property**).
9. On 4 June 2022, the appellant exchanged contracts for the purchase solely in the appellant's name of a property located at 9 Scott Street, Maryborough (**Scott St property**).
10. At some point prior to settlement, and probably on 18 or 19 June 2022, there was a conversation, or conversations, between the appellant and respondent regarding the purchase of the Scott St property.
11. Following that conversation (or conversations), the contract was rescinded and a new contract was exchanged on 30 June 2022 pursuant to which the appellant and respondent purchased the Scott St property as joint tenants.
12. The settlement of the purchase of the Scott St property occurred on or about 11 July 2022.

13. The appellant provided all the funds for the purchase of the Scott St property (\$180,000) and paid the stamp duty and conveyancer's costs (a further \$6,030).
14. The appellant and respondent broke up only a matter of weeks after the purchase of the Scott St property and never married.
15. The respondent has not contributed to the costs of maintaining the Scott St property since it was acquired.
16. Within a few weeks of the breakdown of their relationship, the appellant asked the respondent to agree to removing her name from the title of the Scott St property, but the respondent refused. Thereafter the appellant commenced proceedings seeking a declaration that the respondent's legal interest in the Scott St property was held subject to a resulting or constructive trust in favour of the appellant.

Ground 1

13. At first instance the appellant's case was put primarily on the basis that the whole of the legal interest in the Scott St property was held subject to a resulting trust in favour of the appellant.
14. In that regard, because the appellant had paid the whole of the purchase price, there might ordinarily be a presumption that the appellant did not intend the respondent to take beneficially (ie. a purchase money resulting trust of the type considered in *Calverley v Green* (1984) 155 CLR 242). However, the appellant accepted at first instance, and accepts on appeal, that because the parties were engaged to be married there was a presumption of advancement - *Cong v Shen (No 3)* [2021] NSWSC 947 per Ward CJ in Eq (as her Honour then was) at [1630] and *Sharkey v Nissi* [2015] NSWSC 1266 per Robb J at [361], both citing *Bertei v Feher* [2000] WASCA 165 at [13] (per Kennedy J); and *Jenkins v Wynen* [1992] 1 Qd R 40 at 40–47.
15. However, as set out in the above decisions any such advancement is an *advancement conditional upon the marriage actually taking place*. If it does not then a resulting trust operates.

16. For the above reasons, the type of resulting trust in this case was not a purchase money resulting trust, but the type of resulting trust found to exist in *Jenkins v Wynen*.
17. The resulting trust was also put on an alternative basis, being that even if the respondent's evidence as to the critical conversation on 18 or 19 June 2022 was accepted, it was an advancement conditional upon the renovation of the Scott St property actually proceeding. Because it did not, then even on the respondent's evidence the legal interests were subject to a resulting trust similar to that found in *Jenkins v Wynen*.
18. To the extent that the Reasons contain an explanation for rejecting the existence of either of the above types of resulting trust, it appears to be limited to that at [16] (Red 47E). In relation to the findings in that paragraph:
 - a. his Honour erred by finding that the dispute was not to be determined by reference to whether there were presumptions of a resulting trust or of advancement (Red 47F). The primary basis upon which the appellant's case was put necessarily required his Honour to consider such issues in order to determine the claim;
 - b. while his Honour was obviously correct to say that the particular facts of a case govern its outcome, his Honour nevertheless needed to consider the appellant's resulting trust case once there had been a determination of the facts. His Honour did not do so – after noting the facts in issue and making determinations in relation to those facts (Red 73), his Honour did not then return in the reasons to consider the resulting trust case; and
 - c. it is not clear to the appellant what is meant by the finding that the presumptions 'must be taken to have been rebutted' (Red 47H). The appellant submitted that the relevant presumption was one of advancement (albeit conditional advancement). If that presumption was taken to have been rebutted, then the remaining presumption would be that the appellant did not intend the respondent to take beneficially (ie. a purchase money resulting trust). Accordingly, if that finding was correct (ie. that the presumption of advancement was rebutted) then it would follow that the legal interests

were subject to a purchase money resulting trust and the respondent had no beneficial interest.

19. The only circumstance in which a resulting trust would not arise would be if the appellant was found to have intended to make an immediate grant of a beneficial interest to the respondent that was not conditional upon a marriage subsequently occurring and/or the Scott St property being renovated.
20. In that regard, while his Honour made a finding at [106] (Red 72M) as to the reasons why the appellant had agreed to the respondent taking a legal interest, there was no finding:
 - a. that the appellant had intended that the respondent would immediately receive a beneficial interest of some proportion of the property (whatever that might have been); nor
 - b. that the grant was not conditional upon a marriage taking place and/or the property being renovated by the parties.
21. If that submission is not accepted and there were findings to the above effect, then they should not have been made because:
 - a. on the appellant's evidence the respondent was granted a legal interest because she was going to be his wife, whereas on the respondent's evidence she was granted a legal interest because she had agreed to help the appellant renovate *the Scott St property*. No matter which party's evidence was accepted, that would not lead to a conclusion that the respondent was granted a legal interest based on assistance she had already provided with works on *the Cumberland Reach property*;
 - b. for the reasons set out below and in the appellant's closing submissions below at [5]-[6] (particularly that the respondent's evidence was inconsistent with the contemporaneous written records), the respondent's evidence should not have been accepted.

22. For the reasons set out above, the Court should have held that the whole of the respondent's legal interest was held subject to a resulting trust in favour of the appellant.

Grounds 2 & 3

23. The key finding in the Reasons is that at [125] (Red 77O) as to a constructive trust. That paragraph does not make clear whether the constructive trust in question was one based upon a common intention or one based on a failed joint endeavour. While the paragraph should obviously be read in the context of the preceding paragraphs:

- a. the finding at [117] (Red 75P) suggests that the constructive trust was one based upon a failed joint endeavour; but
- b. the finding at [106] (Red 72L) – particularly the last sentence – suggests that the constructive trust in question was one based upon a common intention constructive trust.

24. The appellant considers that the better view of the constructive trust found is that it was a constructive trust based upon a failed joint endeavour, notwithstanding the reference to a common intention at [106] (Red 72L). However, if the constructive trust was in fact a common intention constructive trust then the common intention should not have been found to have been held by either party for the reasons set out in paragraph 21 of these submissions.

Grounds 4 to 6

25. To the extent that the finding at [125] was as to a failed joint endeavour constructive trust, then the extent and nature of the joint endeavour in question is obviously important.
26. In that regard, the finding at [117] regarding the joint endeavour does not make clear whether it was a joint endeavour to acquire and develop only the Scott St property, or a joint endeavour that also included the development of the Cumberland Reach property. However, the observations at [11] (Red 46E), [103] (Red 70U) and the taking into account of

contributions to the 'common wealth' at [120]-[121] (Red 76) might suggest that the joint endeavour found was one of broad scope that included all 'relationship-focused activities'.

27. Whatever the extent and nature of the joint endeavour:

- a. if the joint endeavour was one limited to the acquisition and development of the Scott St property, then only contributions to that acquisition and development should have been taken into account; or
- b. if the joint endeavour was in respect of all relationship-focused activities, then it was necessary to take into account the appellant's contributions to the acquisition and development of the Cumberland Reach property, as well as his contributions to all the other relationship-focused activities.

28. In relation to the contributions allegedly made by the respondent to the renovation or repair of Cumberland Reach, the only findings are those at [120] (as to non-financial contributions) and at [121] (in relation to financial contributions) (Red 76).

29. In relation to the financial contributions, and the finding that they were 'in excess of \$50,000 or thereabouts' (Red 76M), the respondent's evidence was that she had contributed \$52,325.55 but:

- a. that figure included the amounts the subject of what his Honour found were 'patently falsified entries' in the respondent's credit card statements. If the correct amounts are included (rather than the amounts of the patently falsified entries), then the respondent made financial contributions of at most \$47,185.55;
- b. no explanation is provided in the Reasons for failing to exclude the amounts the subject of the patently falsified entries;
- c. while the precise amount of the reimbursements was in dispute, it was common ground between the parties that the respondent was reimbursed by the appellant in

respect of a number of the amounts she alleged she spent on assisting with the renovation of Cumberland Reach. On the appellant's evidence the respondent was reimbursed \$10,300 whereas on the respondent's evidence the amount of the reimbursement was \$10,000;

- d. no findings were made regarding the extent of the reimbursements of the respondent. It is unclear if they were overlooked or if there was instead some reason why they were not taken into account. The appellant is unaware of any basis upon which they could properly not have been taken into account, and the respondent has never offered any such basis; and
 - e. most of the remaining financial contributions were in dispute and no findings were made even in the most general terms as to any of them. That absence of reasons is particularly stark given the appellant's closing submissions below at [21]-[22] (MFI P11), particularly in relation to the respondent's evidence during cross-examination that she could not recall what any of the amounts that made up the \$52,325.55/\$47,185.55 were actually spent on (T163.49 and T164.22-39)
30. Given the above, the finding that the respondent's financial contributions were in excess of \$50,000 was clearly wrong and inconsistent even with the view of the evidence most favourable to the respondent.
31. Whatever the financial contributions to the joint venture by the respondent, there was no evidence, and no finding, that they had created any relevant benefit that it would be unconscionable for the appellant to have retained. In particular, there was no evidence that any works carried out during 2021 had improved the value of the Cumberland Reach property, or in some way enabled the purchase of the Scott St property. (The lack of that evidence would also have been fatal to the respondent's estoppel claim based on the alleged conversation that if the respondent helped with the renovation of the Cumberland Reach property, the appellant would pay her half the profits from the renovation.)

32. As set out above, even if there were some contributions by the respondent that had created a benefit to the appellant, it would still be necessary to take into account the appellant's own contributions to the joint endeavour. Those contributions would at least include:
- a. the \$630,000 the appellant had paid for the Cumberland Reach property (plus interest or indexation from 2015);
 - b. the amounts of \$97,000 and \$120,000 the appellant had contributed towards works on the Cumberland Reach property;
 - c. the \$186,100 the appellant had paid to acquire the Scott St property.

Ground 7

33. Given the matters set out above, if the constructive trust was one based on a failed joint endeavour that encompassed all relationship-focused activities, then the apportionment of two-thirds/one third was manifestly unjust. Any apportionment of interests based on the respective contributions to such a joint endeavour should have resulted in an apportionment of more than 95% to the appellant.
34. In any event, the facts of this case were similar to those considered in *Muschinski v Dodds* (1985) 160 CLR 583 (save that in this case, *no* contributions were made by the respondent to the acquisition of the Scott St property). Accordingly, equity required the repayment of the amount contributed by the appellant to the purchase of the Scott St property before there was any apportionment of the residue - *Muschinski v Dodds* (1985) 160 CLR 583 at 623 per Deane J.

Ground 8

35. The contemporaneous written records in this case were primarily the text messages between the parties included in Exhibit P8. They provided important context to the conversation(s) between the parties on 18 or 19 June 2022 that resulted in the respondent receiving a legal interest in the Scott St property.

36. In particular, as noted in the appellant's closing submissions below at [5]-[6], at the time the relevant conversations occurred the text messages revealed that the parties were in dispute and the appellant had asked the respondent to move out. In those circumstances, the appellant's account of the conversation in question (which included professions of love by the respondent and a commitment to the relationship) was inherently more plausible than the respondent's (which included only a conversation about the potential renovation of the Scott St property).
37. The finding in the Reasons at [108]-[110] did not just fail to give sufficient weight to the contemporaneous written records relied upon by the appellant, but appears not to have considered them at all. That is an error that would permit the Court in the appeal to substitute its own findings as to the relevant conversation, and to find that the relevant conversation was at least in similar terms to that set out in the appellant's affidavit affirmed 27 April 2023 at [24].

Ground 9

38. As referred to above, certain expenses the respondent claimed in her affidavit evidence to have paid in respect of Cumberland Reach were based on credit card statements annexed to the affidavit that were different to those subsequently produced by her solicitors. In particular, in the version of the credit card statements annexed to the affidavit, five entries had apparently been altered. Those entries were:
- a. an amount of \$299.15 paid on 10 August 2021 was changed to \$2,299.15;
 - b. an amount of \$160 also paid on 10 August 2021 was changed to \$860;
 - c. an amount of \$43.63 paid on 30 September 2021 was changed to \$483.63;
 - d. an amount of \$110.20 paid on 13 October 2021 was changed to \$1,110.20; and
 - e. an amount of \$121.24 paid on 18 January 2022 was changed to \$1,121.24.

39. The obvious inference, and the finding sought by the appellant, was not just that the credit card statements had been altered, but that it was the respondent who had altered them in a dishonest attempt to mislead the Court.
40. In the Reasons his Honour accepted at [97] (Red 69T) that the credit card statements had been altered, but stopped short of finding who had altered them or whether it was done by the respondent in a dishonest attempt to mislead the Court.
41. Given the respondent was unable to offer any explanation in cross-examination as to how the credit card statements were altered unless she altered them (T176.29 and T177.27), his Honour should have held that the respondent had altered the credit card statements, and done so in a dishonest attempt to mislead the Court.
42. If those findings had been made, it would not have been appropriate to assess the respondent's credit based primarily on the observations of the respondent in the witness box, as his Honour did at [98] (Red 69X). That would in turn have affected the findings made both in relation to the key conversations around the time the Scott St property was purchased, and in relation to the contributions (if any) made towards the Cumberland Reach property.

Disposition of the appeal

43. The appropriate orders depend upon which of the grounds of appeal are upheld.
44. If Ground 1 is upheld, then the appropriate orders are those set out in the Notice of Appeal (which include in order 4 an order for restitution of an amount paid to the respondent on 2 April 2025 as her one-third share of the rent received in respect of the Scott St property).
45. However, the appellant recognises that those orders would not dispose of the respondent's cross claim, particularly her claim to an equitable interest in the Cumberland Reach property. Accordingly, unless the Court of Appeal determines that the evidence does not establish the payment by the respondent of any amounts towards the works on the Cumberland Reach property that created a benefit to the appellant, that cross claim would need to be remitted

for redetermination, including consideration of what contributions, if any, were made by the respondent towards those works.

46. If Ground 1 is not upheld and the Court instead upholds some of the grounds in relation to the form of the constructive trust and consequential orders, then the appropriate orders would depend upon which grounds are upheld (and the extent of any redetermination of the facts).

19 June 2025

A handwritten signature in black ink, appearing to read 'B Phillips', with a horizontal line drawn through the middle of the letters.

Benjamin Phillips

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May v Costaras

Appellant's Rule 51.36(2) Statement

1. The appellant challenges the finding in the Reasons at [108].
2. The finding should have been that the relevant conversation (being a conversation that happened on 18 June 2022 or in the morning of 19 June 2022) was at least in similar terms to that set out in the appellant's affidavit affirmed 27 April 2023 at [24].
3. The conversation occurred after the appellant had sent the text messages on the first six pages of Exhibit P8, including the text message at 12.32pm on 13 June 2022 (**13 June message**) in which the appellant asked the respondent to move out.
4. The content of the conversation must have been such as to address the various concerns set out in the preceding text messages, and to cause the appellant to send the text message at 8.27am on 19 June 2022 (which was affectionate and suggested the parties had resolved their differences).
5. Only the appellant's version of the conversation would have addressed those concerns and caused the appellant to send the 13 June message. Neither the conversation set out in the respondent's affidavit affirmed 2 November 2023 at [129], nor that at [136] are conversations that are likely to have occurred when the parties were in the middle of a dispute about whether the respondent had been lying to the appellant and whether she really loved him.
6. If they had actually occurred, the respondent's versions of the conversations are also likely to have been ones included in her earlier affidavit affirmed 12 May 2023.