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The beginning of the end of resulting trusts? – The High Court's judgement in *Bosanac v Commissioner of Taxation and Anor*

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The equitable presumptions of advancement and resulting trust were examined by the High Court of Australia in *Bosanac v Commissioner of Taxation* [2022] HCA 34; (2022) FLC 94-107 delivered on 12 October 2022. The High Court considered whether the presumption of advancement had been abolished and discussed the relevance of the two presumptions in modern society. Whilst all of the High Court agreed that the presumption of advancement was anachronistic, they held that it survived and the categories to which the presumption of advancement applied might even be expanded.

The High Court distinguished the facts in *Bosanac* from those in *Trustees of the property of Cummins (a bankrupt) v Cummins* (2006) 27 CLR 278; [2006] HCA 6 (*Cummins*), thus helpfully giving greater clarity to the High Court's reasons for the decision in that case. The High Court also discussed *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242, at 257-258; (1984) FLC 91-565 (Calverley). Less helpfully, the High Court whilst referring frequently to and relying upon *Calverley* for its discussion of equitable principles, did not clearly distinguish that case and the legal principles established in that case from the facts and findings in *Bosanac.*

It is clear from *Bosanac*, as in those earlier cases, that evidence of the facts and intentions of the parties carry more weight than the presumptions of resulting trust and advancement. Ultimately, the High Court in *Bosanac* did not rely upon either presumption, but held that the facts as found by the primary judge clearly established the parties' intentions.

Background facts

In 2006 Ms Bosanac purchased the former matrimonial home, the Dalkeith property, for $4.5 million in her sole name using loans for which Mr Bosanac was jointly liable. These loans were secured against the Dalkeith property and also properties they each solely owned. There was a history of each party keeping their property separate, save for allowing the other to use their property as security, as well as some joint bank accounts.

Mr Bosanac described himself as a "self-styled venture capitalist" and this was referred to in a loan application of the parties where he disclosed assets of $24 million and gross annual income of almost $400,000.

The Australian Taxation Office had a judgment debt against Mr Bosanac for over $9 million, which had been the subject of lengthy court proceedings. He lodged no tax returns between 2006 and 2013, and when his returns were eventually filed they were wrong.

The Bosanacs separated in 2013, but remained living in the Dalkeith property until mid-2015.

Definitions of the equitable principles

The relevant equitable principles, as explained by Kiefel CJ and Gleeson J (at [8]) are:

- Resulting trust — "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."

- Presumption of advancement — is an exception to the presumption of resulting trust so 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."

Importantly, the presumption of advancement has historically not applied to advances from a wife to a husband or in de facto or same sex relationships.

The “duelling” presumptions

If a person contributes to the purchase of a property, they may have a beneficial interest in the property which is greater than their legal interest. The person or persons with the legal interest hold the property by way of a resulting trust in favour of the contributing person. Having raised the presumption of resulting trust, the person with the legal interest, who stands to have their beneficial interest in the property diluted may be able to protect their position by raising the presumption of advancement. Once that presumption is raised, the person seeking to rely upon the presumption of resulting trust must present evidence to rebut the presumption of advancement in order to protect their claim to a beneficial interest which is greater than that registered on title.

Kiefel CJ and Gleeson J in *Bosanac* explained the operation of the competing or “duelling” presumptions (at [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 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": no resulting trust.” (footnote omitted)

As the High Court said in *Calverley* (at [55]):

> “The “presumption of advancement”, where it applies, means that the equitable interest is at home with the legal title, because there is no reason for assuming that any trust has arisen.”

Some members of the High Court in *Bosanac* expressed doubt as to whether the presumption of advancement was a presumption at all. For example, Kiefel CJ and Gleeson J said (at [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 assuming that a trust arose". At an evidentiary level, it is no more than a circumstance which may rebut the presumption of a resulting trust or prevent it from arising. It too may be rebutted by evidence of actual intention. “(footnotes omitted)

Gordon and Edelman JJ said that in modern relationships a resulting trust may never arise, meaning no equitable interests are created and grafted onto a legal interest. This suggests that there is also no room or no need for the presumption of advancement.

The Commissioner’s case

The Commissioner of Taxation (Commissioner) claimed that Ms Bosanac held 50% of the Dalkeith property in her sole name by way of a resulting trust in favour of Mr Bosanac. The Commissioner argued that the presumption of advancement by a husband in favour of his wife, which operates to preclude a resulting trust from arising, was “anachronistic” and was no longer part of the law in Australia.

The Commissioner relied heavily on the following passage from the High Court in *Cummins*:

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

The Commissioner contended that its position was supported by *Cummins.*

Litigation history

The Bosanacs have a lengthy litigation history, including Mr Bosanac unsuccessfully taking the Commissioner to the High Court in 2019 (*Bosanac v Commissioner of Taxation* [2019] HCA 41; (2019) 374 ALR 425), seeking writs of certiorari and mandamus in relation to the jurisdiction of the Federal Court to hear taxation appeals.

The dispute which culminated in the 2022 High Court judgment commenced in the Federal Court of Australia and was reported as *Commissioner of Taxation v Bosanac (No 7)* [2021] FCA 249; (2021) 390 ALR 74, with the Commissioner unsuccessfully seeking a declaration that Ms Bosanac held half of the Dalkeith property on trust for Mr Bosanac. Neither of the Bosanacs gave evidence as to the circumstances of the purchase of the Dalkeith property. Mr Bosanac gave no evidence at all.

Justice McKerracher took the approach that might have been expected on the basis of earlier authorities such as *Calverley* and *Cummins.* He determined that a resulting trust arose in Mr Bosanac's favour, but a presumption of advancement arose in favour of Ms Bosanac. The presumption of advancement was not rebutted by the Commissioner as there was insufficient evidence of Mr Bosanac's intention to retain a beneficial interest in the Dalkeith property. Therefore, Mr Bosanac held no interest in the Dalkeith property. McKerracher J explained his approach (at [96]-[97]:

> "First, however, it is convenient to reiterate the core relevant facts that are not in dispute. There is no dispute that the Bosanacs were married at the time of purchasing the Dalkeith Property. It is also not disputed, and it is established on the Commissioner's evidence, that the purpose of the purchase was to acquire a matrimonial home and the Bosanacs lived together at the Dalkeith Property in fulfilment of that purpose for a number of years before separating. Further, by entering into a joint loan agreement, the Bosanacs each contributed half of the purchase price of the Dalkeith Property however, Ms Bosanac is, and has been since the time of the purchase, the sole registered proprietor.
>
> It is not disputed that, absent the fact of the Bosanacs' marriage, the core facts stated above would clearly give rise to a presumption of a resulting trust in favour of Mr Bosanac to the extent of a one-half interest in the Dalkeith Property (equal to the proportion of his contribution to the purchase price). However, the Bosanacs were married at the time of the purchase, a fact that Ms Bosanac says enlivens the 'presumption' of advancement and prevents the presumption of a resulting trust from arising at all. The Commissioner contends that the only reason the 'presumption' of advancement does not arise in this case is because

> the purchase in question was of the matrimonial home. It is said that historically, the basis for the 'presumption' of advancement was the natural obligation of a husband towards a wife… The 'modern' justification, he says, is that there is a *prima facie* probability that a beneficial interest was intended to be transferred by a husband to a wife. But in the case of the matrimonial home, a property clearly purchased for the use and enjoyment of both spouses, that justification for the 'presumption' of advancement cannot hold, and the better inference has to be that Mr Bosanac intended to enjoy the benefit of his contribution. Accordingly, the presumption of a resulting trust should not be disturbed."

His Honour considered whether *Cummins* precluded the presumption of advancement from arising where the transaction involves the matrimonial home, and held that it did not.

The Commissioner appealed to the Full Court of the Federal Court in *The Commissioner of Taxation v Bosanac* [2021] FCAFC 158 and was successful. The Full Court declared that Ms Bosanac held 50% of her interest in the Dalkeith property by way of a resulting trust for Ms Bosanac as:

- The Bosanacs bought the property for their joint use;
- The Bosanacs intended the property to be their matrimonial home;
- The deposit of $250,000 was paid from a joint loan account; and
- The balance of the purchase price of $4.5 million was borrowed jointly.

In relation to the consequences of Mr Bosanac not giving evidence before the primary judge as to his intentions at the time of the purchase, the Full Court held that a finding could still be made regarding his intentions and the presumption of advancement was rebutted.

The Full Court said further, in finding that the presumption of advancement was rebutted (at [22]):

> "It seems to us that, taken together, these fundamental facts tend strongly against the application of the presumption of advancement here. Rather, the objective facts together with the inferences properly drawn from those facts, lead to the conclusion that Mr Bosanac did not intend that his contribution to the purchase of their matrimonial home at Dalkeith be by way of gift to Ms Bosanac for her 'advancement'. Rather, it should be inferred from the facts as found that both he and Ms Bosanac intended that Mr Bosanac would have a 50% beneficial interest in the Dalkeith Property."

The Full Court acknowledged that subsequent events were not directly probative of the intentions of the Bosanacs at the time of the purchase of the Dalkeith property, but still found it to be relevant that Mr Bosanac later used the Dalkeith property to secure borrowings of $3.6 million, a significant portion of which he used to pursue share-trading activities. The Full Court said that this subsequent use of the Dalkeith property supported the inference the Full Court drew from the circumstances surrounding the purchase, that at the time of purchase, the Bosanacs intended that the Dalkeith property would be available to benefit both of them, notwithstanding that it was registered only in Ms Bosanac's name.

The Full Court did not consider that much, if anything, could be drawn from the fact that each of the Bosanacs had other assets in their separate ownership. Nor did the use of separately owned properties as security for joint loans, apart from the matrimonial home, weaken the conclusion it reached as that conclusion was based on the evidence and the facts relating to the purchase of the Dalkeith property itself.

The Full Court considered that the primary judge should not have excluded from consideration the fact that Mr Bosanac assumed a substantial liability in relation to the acquisition of the parties' matrimonial home. McKerracher J had compared the facts to *Calverley* and said there was no evidence, unlike in *Calverley*, that the bank required Mr Bosanac to be on the mortgage, and this was an even more important point than it was in *Calverley* as the Dalkeith property was purchased

only in Ms Bosanac's name. The countervailing argument of the Commissioner was that not being on the title whilst assuming a very substantial liability should support the inference Mr Bosanac did not intend to gift his contribution to the purchase price to Ms Bosanac. The Full Court agreed with the Commissioner.

Ms Bosanac sought special leave to appeal to the High Court in *Bosanac v Commissioner of Taxation & Anor* [2022] HCATrans 63 and leave was granted in *Bosanac v The Commissioner of Taxation for the Commonwealth of Australia; Bosanac v The Commissioner of Taxation for the Commonwealth of Australia* [2020] HCASL 140.

Existence and relevance of the "duelling" presumptions

The High Court considered whether the presumption of advancement still applied in Australia. Kiefel CJ and Gleeson J described the presumption of advancement (at [22]) as "especially weak today", said that it may readily be rebutted by comparatively slight evidence" and agreed (at [29]), [31]) with the Commissioner's position that it was "anomalous, anachronic and discriminatory."

Justice Gageler considered that the Commissioner's argument that the presumption of advancement (at [55]) was "anachronistic" and "discriminatory" had some force, and that the presumption of a resulting trust (at [56]) was "the root anachronism, perpetuating expectations of a segment of society with late medieval England."

Gordon and Edelman JJ also described the resulting trust (at [95]) as being "anachronistic", and suggested that this might inform the weight given to it. Their Honours emphasised (at [103]) the resulting trust as having a "now weak nature". Their Honours agreed with Deane J in *Calverley* that the presumption of resulting trust evolved in feudal times and belonged to a period when the majority of adults had disabilities which hindered their ownership of property. Their Honours considered that the category of resulting trust concerned in the appeal was only (at [94]) "those trusts that arise by objective intention", but then they somewhat tautologically relied upon objective intention to avoid consideration as to whether a resulting trust arose.

Despite their negative views about the two presumptions, all members of the High Court agreed that the principles still existed. Kiefel CJ and Gleeson J confirmed (at [30]) that both equitable principles were "interrelated and entrenched "land-marks" in the law of property." Gageler J said (at [58]):

> "For better or for worse, the weight of history is too great for a redesign of that magnitude now to be undertaken judicially."

He then said (at [60]) that they are "here to stay." Gordon and Edelman JJ said (at [95]) that the presumption of resulting trust was "too well entrenched" to be discarded by a judge, and agreed with Kiefel CJ and Gleeson and Gageler JJ that it could only be abolished by legisltive reform. Gordon and Edelman JJ said (at [98]):

> "Acknowledging that it is too late to abolish it, 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."

After refusing to accept that the presumption had been abolished by the High Court in *Cummins*, Kiefel CJ and Gleeson J raised the question (at [17]) as to whether the presumption of advancement should be expanded to transfers from wives to husbands and between heterosexual and same sex de facto couples and same sex married couples. Their Honours considered the question of expansion to be an important one, but it was not an issue in the appeal and was not the subject of any argument. Gageler J went even further, and expressed a strong view that the categories of relationships to which the presumption of advancement had been held to apply were inconsistent

and discriminatory, but concluded (at [59]) that this was a reason not to abandon the presumption but to consider "an appropriate case expansion of those categories."

The above views might suggest that the High Court in *Bosanac* would apply the presumption, but they seemed determined to reach their decision without doing so, which probably confirmed their attitude to the presumptions.

Evidence vs presumptions

In *Calverley,* Gibbs CJ said (at [9]) that both the presumption of advancement, and the presumption of a resulting trust, "may be rebutted by evidence of the actual intention of the purchaser at the time of the purchase". Kiefel CJ and Gleeson J confirmed this in *Bosanac* and agreed that *Cummins* was decided on the basis of the evidence of the Cummins' intentions rather than relying upon equitable principles. Gageler J said (at [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."

Gordon and Edelman JJ looked at case law on actual intention, referred (at [103]) to the objective facts determining the position and significance (if any) of the presumption of a resulting trust, and said further (at [105]):

> "The presumption of resulting trust … arises if there be a paucity of evidence as to an intention to declare a trust. 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. 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." [footnotes omitted]

Their Honours confirmed (at [104]) that "no additional probative force should be attributed to a so-called presumption when there is evidence to the contrary."

Conclusion of the High Court

All members of the High Court, in three separate judgments, found that the parties intended Ms Bosanac to be the sole beneficial owner of the property. There was no reason to apply either presumption, as the High Court agreed with the findings of the trial judge that there was "considerable evidence" of the parties' intentions to separately own property both throughout their relationship and with respect to the Dalkeith property in particular. The fact that the Dalkeith property was their matrimonial home was not considered to be relevant, as at the time of the purchase the Bosanacs had occupied a property belonging to Mr Bosanac as their matrimonial home.

The evidence was so strong that there was no requirement to look at the presumptions. Kiefel CJ and Gleeson J said (at [13]):

> "The presumption cannot prevail over the actual intention of the party paying the purchase price as established by the overall evidence."

This statement of the law was consistent with *Calverley* (at [9]) per Gibbs CJ, but Gibbs CJ looked at the intentions of the parties to rebut the presumption). Kiefel CJ and Gleeson J (and the other members of the High Court in *Bosanac*) looked at the parties' intentions first and did not proceed further.

The objective facts were found to be inconsistent with an intention by Ms Bosanac to declare a trust in favour of Mr Bosanac as to 50% of her interest in the Dalkeith property. A consideration of whether a presumption of resulting trust arose was not required as the evidence supported that Mr Bosanac had no equitable interest in the Dalkeith property.

Although Kiefel CJ and Gleeson J found that the facts were sufficient to rebut any presumption that Ms Bosanc's interest in the property was attributable to the relationship of husband and wife and Mr Bosanac's intention to benefit her, like the other members of the Court, they did not determine the case by considering whether the presumption of resulting trust was rebutted by the presumption of advancement.

Gageler J said (at [71]-[77] that he was going further than the primary judge, but considered that the primary judge's findings of primary facts supported 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 to be the sole legal and beneficial owner of the Dalkeith property. The primary facts supporting that inference (footnotes omitted) were:

- 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";

- 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, they appear to have kept their substantial assets in separate names";

- There was "considerable evidence" of "the use of separately owned properties as security for joint loans". Using funds for the purchase of the Dalkeith property 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;

- "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". 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 secured further borrowing against the Dalkeith property for the purposes of conducting his share trading";

- "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.";

- Ms Bosanac was the sole contracting party for the purchase of the Dalkeith property: she made the offer which was accepted by the vendor. … 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." (as was the case in *Calverley*).

The inference drawn by Gageler J was that Ms Bosanac intended to benefit Mr Bosanac, not by giving him an equitable interest in the Dalkeith property, but by allowing him to obtain a loan secured on the Dalkeith property to conduct share trading.

Gordon and Edelman JJ set out the limited circumstances in which a presumption of resulting trust should be considered, saying (at [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."

According to their Honours, this factual inquiry had three dimensions:

- Where objective intentions are sufficient to establish a trust or express trust is created rather than a resulting trust;
- Where objective facts weakly establish an objective intention inconsistent with a declaration of trust, no presumption of resulting trust arises;
- Where the objective facts are neutral, truly equivocal, non-existent or uninformative as to the objective intention of the parties, an inference can be drawn of a declaration of trust by the provider of part of the purchase price and it is this weak inference which is the case the defendant has to meet.

By adopting this approach, there will be only very rare circumstances when there is a need to consider whether the presumption of a resulting trust has arisen.

The High Court drew inferences which were different to those drawn by the Full Court of the Federal Court, and was critical of the Full Court for placing any weight on the assumption of a joint liability and considering events which occurred after the purchase. The High Court held that the assumption of a joint liability did not, of itself, establish that Mr Bosanac held an objective intention to declare a trust in his favour in relation to part of the Dalkeith property. Kiefel CJ and Gleeson J said (at [37]) "little can… be drawn from this fact." The High Court determined that there was no reason to apply either presumption, as although there was no direct evidence of the Bosanacs' intentions, the objective facts were clear, as was the inference to be drawn from the facts as to the Bosanacs' intentions.

What happened in *Cummins*?

The Commissioner in *Bosanac* argued that the extinction of the presumption of advancement was confirmed by the High Court in *Cummins.*

Mr and Mrs Cummins bought the land which became their matrimonial home, the Hunters Hill property, in 1970 as joint tenants. In 1987, Mr Cummins entered into a contract with Mrs Cummins to sell his interest as joint tenant of the Hunters Hill Property to her. The price was said to be $205,250, being half the value attributed to the Hunters Hill property by a registered valuer. Mr Cummins transferred his interest and acknowledged that he had received the consideration of $205,250. Mrs Cummins did not, however, pay the purchase price or any part of it. Nonetheless, she paid the stamp duty on the contract and transfer and the valuer's fees.

In 2000, Mr Cummins, a Queen's Counsel, who had not submitted a tax return for 45 years went bankrupt and shortly afterwards he and his wife separated. Mr Cummins' trustee in bankruptcy argued that the 2000 transfer was void under s 121 *Bankruptcy Act 1966* (Cth) (BA) as a transfer to defeat creditors.

Mrs Cummins disagreed, but also argued that even if the transfer was void, she beneficially owned a portion of the bankrupt's legal interest in the home by way of a resulting trust arising from her greater contributions to the purchase costs. She argued that rather than the parties holding the property as joint tenants they held it on a resulting trust as tenants in common in unequal shares. It was common ground that following *Calverley* the mortgage was to be treated as a joint contribution by Mr and Mrs Cummins to the purchase price. Mrs Cummins did not say that Mr Cummins had no entitlements, but that she was entitled to a greater proportion being approximately 76% of the property, and Mr

Cummins was entitled to approximately 24%. She argued that Mr Cummins held his legal joint tenancy interest on a resulting trust for Mrs Cummins and himself in those proportions.

The applicability of the presumption of advancement to the advance by Mrs Cummins of part of the legal title to Mr Cummins was not considered as the High Court accepted that the presumption of advancement did not apply to a transfer from a wife to a husband.

The timing of the transfer was held by the High Court to be relevant as it was made when the husband was not lodging tax returns. The transfer was found to be void under s 121 BA, meaning that the transfer by Mr Cummins of his interest as a joint tenant was reversed, so the High Court had to next consider Mrs Cummins' argument that there was a resulting trust in her favour of approximately 24% of the property.

The High Court plurality relied upon the passage (which the Commissioner later relied on in *Bosanac*) and is quoted above, which includes a passage from the work of Professor Scott. The High Court said (at [72]) that this reasoning applied:

> "with added force in the present case where the title was taken in the joint names of the spouses. There is no occasion for equity to fasten upon the registered interest held by the joint tenants a trust obligation representing differently proportionate interests as tenants in common."

The High Court rejected Mrs Cummins' arguments that equity should override the joint tenancy which was formerly registered on the title. The case for equity not to intervene through the doctrine of resulting trust was, the High Court said (at [73]-[74]) strengthened by the particular circumstances of the case:

- Solicitors acted for Mr and Mrs Cummins in the original purchase in 1970. It was unrealistic to suggest that their solicitor did not at any point advise his clients on the significance of taking title as joint tenants rather than as tenants in common;
- The use of the valuation obtained in 1987 to fix the purchase price for the acquisition by Mrs Cummins of Mr Cummins' interest was consistent "with the conventional basis of their dealings which treated the matrimonial home as beneficially owned equally";
- The funding of the building operations which were necessary for the use of the previously vacant land as the matrimonial home. While there was no finding to this effect by the primary judge, there was force in the submission to the High Court by counsel for the trustees that the likely sources of funds for the building operations were the joint borrowing on the mortgage, supplemented by the joint proceeds of the sale of the property the Cummins previously held as joint tenants.

The High Court said (at [58]) there was also force in the submission that had Mrs Cummins believed she already held more than a 50% interest in the home, that she would not have paid stamp duty on the whole of Mr Cummins' half interest when it was transferred to her in 1987.

How did the High Court in Bosanac distinguish *Cummins*?

The High Court in *Bosanac* distinguished *Cummins*. Gordon and Edelman JJ (at [114]) said that "the objective facts in that case established that the intention of both parties was that they would hold the property jointly" despite the greater financial contributions to the purchase price made by Mrs Cummins. Mr Cummins was registered as a joint proprietor when the Baulkham Hills property was purchased, whereas Mr Bosanac never had a legal interest in the Dalkeith property.

Furthermore, the transfer in *Cummins* occurred when the husband was not lodging tax returns. By contrast, there was no question at the time of the purchase of the property by Ms Bosanac that Mr Bosanac was in a solid financial position, which meant that it could not be inferred that the Dalkeith property was bought in the sole name of Ms Bosanac so that Mr Bosanac could avoid creditors. By contrast, the transfer from Mr Cummins to Mrs Cummins was set aside under s 121 BA and Mrs

Cummins was unsuccessful in establishing a resulting trust in her favour of a tenancy in common in unequal shares. Therefore, the joint tenancy which was established when they purchased the Baulkham Hills property stood.

Why didn't *Calverley & Green* assist the Commissioner*?*

The question arises as to why the assumption of a joint liability under the mortgage did not give Mr Bosanac an interest in the Dalkeith property, as was held by the High Court in *Calverley,* which principle was followed in *Cummins*.

In *Calverley,* Miss Green was held to be entitled to one-third of the Baulkham Hills property which the parties had purchased as joint proprietors. Her cash contribution to the purchase price was smaller than that made by Mr Calverley, but her entitlements were increased due to her joint liability under the mortgage even though she had not made any of the mortgage payments. The intentions of the parties at the time of the purchase were relevant to their equitable interests, and their later differing contributions to the mortgage did not change this. The presumption of advancement was held not to apply, as the parties were in a de facto relationship.

The High Court in *Bosanac* referred frequently to *Calverley*, but did not apply the often referred to principle which assisted Miss Green to establish a resulting trust, namely that she assumed joint liability for the mortgage. McKerracher J distinguished the facts in *Bosanac* from those in *Caverley* on the basis that the bank required Miss Green to be a party to the mortgage, whereas the bank in *Bosanac* did not require Mr Bosanac to be. The primary judge found that Miss Green was registered as a joint proprietor because of the bank's requirements. This distinction is not easy to understand. Both Miss Green and Mr Bosanac assumed joint and several liability for a mortgage. In Mr Bosanac's case he did not receive the benefit of being on legal title to compensate him for that liability and risk, whereas Miss Green did. The issue of the joint assumption of a mortgage liability did not feature significantly in the High Court judgment. The point was made by the High Court, in addition to the point made by McKerracher J, that the evidence did not show that the Bosanacs had assumed joint liabilities to acquire property which was then jointly held. Both points appear to be glosses on *Calverley* which narrow a long-accepted legal principle.

McKerracher J, at first instance, as well as the Full Court of the Federal Court, appeared to follow the approach taken in *Calverley* and considered whether there was a resulting trust, then whether the presumption of advancement arose, and then whether that presumption was rebutted. The approach apparently taken by the High Court in *Bosanac* differed. The inferences drawn from the objective facts were said to establish the parties' objective intentions, which meant that the application of the presumptions to the facts did not need to be considered at all.

Although not discussed by the High Court in *Bosanac, Calverley* must be read and applied carefully, as the parties in *Calverley* were in a de facto relationship. A distinction was made by the High Court in *Calverley* between de facto relationships and married relationships. Arguably, if it was heard by the High Court today Miss Green may have retained her 50% joint tenancy interest (as Mr Cummins did), either with a claim under the *Family Law Act 1975* (Cth) (FLA) or under the presumption of advancement. The social acceptance of de facto relationships at the time Calverley was decided is not the same as it is now, and Mason and Brennan JJ said (at [11]) that the distinction between the two types of relationship was supported by the rights given to married couples under the FLA (which rights have since been expanded to de facto heterosexual couples and other relationships). Given the state of the law in 1984, the two presumptions might be said to have been more important back then to enable the interests of the parties in de facto relationships to be protected.

However, even in 1984 there was some disquiet about the distinction. Gibbs CJ, dissenting on this point, considered that the presumption of advancement should apply to de facto relationships of some permanence as well as to married relationships. Murphy J wholly dissented, upholding the legal title as reflecting the parties' interests. He also said (at [2]) that resulting trusts "are

inappropriate to our times, and are opposed to a rational evaluation of property cases arising out of personal relationships."

Murphy J's view that equitable doctrines can change and become extinct was confirmed by Mason and Deane JJ who said (at [10]):

> "The doctrines of equity are not ossified in history."

In relation to the presumption of advancement in particular, Gibbs CJ said (at [7]) that that it was wrong:

> "… to treat the established categories as frozen in time."

These comments were not expressly picked up by the High Court in *Bosanac* to the extent that the High Court did not declare that the two equitable principles were no longer part of Australian law. However, instead they proposed an expansion of the categories in which a presumption of advancement arose, and, by reaching a decision without considering whether the presumptions applied to the particular facts, impliedly weakened the presumptions.

What next?

The High Court accepted that the equitable principles of resulting trust and presumption of advancement, although old and not well suited to modern times, still formed part of the law in Australia. Thus, the scope for the continued application of these principles to separated couples continues. Opportunities which may arise to rely upon them include:

- One spouse is bankrupt or will potentially be bankrupted. Does that spouse (or the trustee) have an equitable claim under a resulting trust which entitles them to an interest in a home registered in the sole name of the non-bankrupt spouse? Can the non-bankrupt spouse thwart the claim of a trustee that the bankrupt spouse is entitled under the presumption of advancement to an interest in the home?

- When relying upon the argument laid out by the High Court in *Stanford v Stanford* [2012] HCA 52; (2012) FLC 93-495 that the (legal and) equitable interests of the parties should be left to stand and not altered under s 79 or s 90SM FLA.

Furthermore, although failing to make any finding that the presumption of advancement applies to transfers from wives to husbands or between heterosexual and same sex de facto couples and same sex married couples, which would be a major development in the case law, the High Court opened the door to that argument.

Gageler J supported a redesign of the equitable principles (at [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."

However, such a redesign required, not judicial decision-making, but (at [60]) that "they are together reappraised as an exercise in law reform and abolished or modified by legislation." Kiefel CJ and Gleeson J agreed (at [30]) that "the better course is to leave any reform of this branch of the law to the legislature."

The High Court placed great weight on the past history of the parties' transactions. The history of a relationship rather than the parties' stated intentions in relation to a particular transaction may be more important. It seemed the High Court asked the question — The parties did not buy a property before in the sole name of one of the parties with the intention or effect that it was joint property of the parties, so why would this be different? The previous matrimonial home was owned solely by Mr Bosanac, but there is very little detail known about this.

Gageler J seemed to be expressing the views of the rest of the court that there was little, if any, point to either presumption when he said (at [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."

Conclusion

Despite expressing serious doubts as to the applicability of the equitable principles of resulting trust the presumption of advancement to present-day Australian society, the High Court of Australia in *Bosanac* confirmed their continued existence, and flagged the possible expansion of the presumption of advancement.

However, interestingly, the High Court did not apply either of these principles. This is notable in light of *Calverley* which was heavily relied upon by the High Court and has been seen as authority for the proposition that joint liability for a mortgage may raise a presumption of resulting trust. By contrast, the joint mortgage liability in *Bosanac* did not do so.

The High Court was dismissive of the Full Court's reasons for finding that the presumption of a resulting trust arose. It is difficult to understand how one court of experienced judges could interpret the facts one way and the High Court another, particularly when the primary judge found that the facts were sufficient to require him to consider whether a resulting trust arose.

It must be remembered that *Bosanac* was not decided on inferences, presumptions and trust principles, but on the grounds of the facts and the intentions of the parties at the time that the property was purchased, and the past history of their relationship. In most cases there will be evidence of this nature, meaning that resort to the presumptions will be rare. This raises the question as to why the court insisted on retaining these presumptions at all. Instead of finding the presumption of resulting trust arose, and proceeding to rebut that presumption by reference to actual intentions, the court looked at actual intentions first and saw no need to refer to either presumption.

The High Court took a different approach to the presumptions of resulting trust and presumptions of advancement than was taken in previous cases such as *Calverley*. Whilst expressing doubt about whether the presumptions were appropriate to the current world and saying they could not be abolished by judicial decision making, the High Court avoided applying them and narrowed the circumstances in which they would be considered. The High Court implicitly said the presumption of resulting trust did not exist but did not say so expressly. If the High Court, like the primary judge, had followed *Calverley*, the presumptions would have been looked at first but in *Bosanac* the intentions of the parties were looked at first.

October 2022