HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

BETWEEN: **BERNADETTE BOSANAC**

Appellant

and

COMMISSIONER OF TAXATION

First Respondent

and

VLADO BOSANAC

Second Respondent

APPELLANT'S SUBMISSIONS IN REPLY

PART I: CERTIFICATION

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

PART II: SUBMISSIONS IN REPLY[1]

2 The Commissioner's Submissions (**RS**) advance a new core argument that the "presumption" of advancement ought to be abolished. The Commissioner is asking this Court to reform the law, not state it. The Court should not do so. Although the argument is limited to abolition in the context of husbands and wives, the logic of the Commissioner's argument would see the "presumption" erased entirely.

3 The Commissioner has not advanced a compelling reason to overturn centuries of legal doctrine that govern property rights. It is wrong to assume that no one would be affected by such a drastic change, and if the Commissioner had advanced this argument below the Appellant could have led evidence on that issue. While it is impossible to tell who will in fact be affected by such a change in the absence of evidence (contrary to RS [34]-[41]), a review of recent cases suggests that the harm will be felt by wives and children.

First issue: are there good reasons to overturn the "presumption"?

4 The Commissioner identifies three core reasons for overturning the "presumption": the lack of settled rationale; discriminatory and anachronistic aspects of the "presumption"; and the supposed forensic advantage that the "presumption" affords a husband.

5 **First**, the Commissioner says that the doctrine ought to be abolished because it lacks settled or accepted rationale. The same can be said of many important aspects of equity – the underpinning rationale for several doctrines has evolved over time and remains unsettled. The resulting trust is one such example[2]. Both the doctrine and its underpinning rationales have evolved over time (and have included the presumed declaration of trust and the presumed negative intention to gift). Another equitable doctrine without a settled rationale is equity's disregard of forms imposed by statute – while various lines of argument have been used in support of this, "*none is generally acceptable according to modern principles*"[3]. Judicial development of the law of

[1] Terms defined in the Appellant's Submissions of 31 May 2022 (**AS**) have the same meaning when used here.
[2] J Glover, "Re-Assessing Uses of Resulting Trust: Modern and Medieval Themes" (1999) 25 *Monash University Law Review* 110, 131.
[3] D Farinha, "Fraud and Formality: Relief in Equity from Acts of Parliament" (2018) 12 *J of Eq* 297, 317.

restitution has also increasingly emphasised substance over form, as the implied contract rationale has been rejected as a general explanation for restitutionary claims[4]. Meanwhile, the basis for relief for proprietary estoppel has shifted from the "*minimum equity*" basis towards the "*vindication of expectation*" rationale[5]. The evolution in the underlying rationales for these doctrines is hardly a sign that they lack utility or should be abolished – like the "presumption", each are bedrock components of equity.

6 **Second**, it may be accepted that the "presumption" would not have developed as it had if raised for the first time today: RS [31]. However, as explained in AS at [24], the same can be said of the "presumption" of resulting trust and both are "*interrelated*": *Nelson* at 548 (Deane and Gummow JJ); see also *Martin* at 303. The Commissioner would abolish one and keep the other but has not identified any "*proper settled or accepted rationale*" for equity assuming that a husband has declared a trust over his contributions to a property purchased in the name of his wife. The Commissioner has also not explained why abolition is to be preferred over other options – such as making the "presumption" gender neutral or expanding it to *de facto* couples.

7 **Third**, the Commissioner says that the doctrine provides a forensic advantage to a husband not available to a wife. As the cases in paragraphs 13 and 14 below demonstrate, the forensic advantage is commonly to the opposite effect.

Second issue: will anyone be affected by the Court abolishing the presumption?

8 The Commissioner says that this Court can infer that it is doubtful that "*a material number*" of people would be affected by this decision: RS at [36].

9 **First**, the Commissioner's argument invites the Court to speculate on the non-parties who would be affected by such a decision. As developed further below, this Court is at a substantial disadvantage to Parliament, in that beyond the idiosyncratic facts of this case – it has only assertion and speculation. There is substantial wisdom behind this Court's historical approach of deferring to Parliament on reform to the "presumption".

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[4] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 540 [63] and 552 [92] (Gummow J), cited in *Haxton v Equuscorp Pty Ltd* (2010) 28 VR 499 at 536–7 [184] (Dodds-Streeton JA, Ashley and Neave JJA agreeing); and *Nu Line Construction Group Pty Ltd v Fowler* [2014] NSWCA 51 at [10] (Basten JA) and [197] (Young AJA).

[5] *Sidhu v Van Dyke* (2014) 251 CLR 505; *Giumelli v Giumelli* (1999) 196 CLR 101.cf *Waltons Stores(Interstate) Ltd v Maher* (1988) 164 CLR 387; *Commonwealth v Verwayen* (1990) 170 CLR 394; and S Barkehall Thomas, "Proprietary Estoppel: Enforcing Expectations (Most of the Time)" (2014) 31 *J of Contract Law* 234.

It is not in the interests of justice to overturn centuries of established principle based on speculation as to what people do when organising their affairs.

10 **Second**, it is implausible to claim that no one has relied on the "presumption" of advancement in making decisions about their affairs. The doctrine has existed for centuries and will affect property transactions going back decades. It is simply not reasonable to infer that affairs have not been settled on the basis of the "presumption".

11 The Commissioner's speculation that the only people who stand to benefit from the "presumption" are husbands plotting to obtain an advantage from creditors is simply that – speculation[6]. The reasonable inference is that many people seek legal advice about property transactions, and that lawyers include in that advice an explanation of the effect of relevant legal concepts, including the "presumption" of advancement: cf *Cummins* at [73]. If a lawyer has told a couple that the effect of those doctrines is to give a wife beneficial and legal title, despite a husband's contributions, and that is consistent with the intention of the parties, there is no reason to assume that there would be any further documentation. Advice given decades ago is also unlikely to be updated today if this Court took the drastic step of abolishing the presumption – increasing the risk of prejudice to those who have settled their affairs on the basis of the presumption.

12 A review of recent decisions is inconsistent with the suggestion that few would be affected. The "presumption" is frequently considered in first instance decisions. These authorities show that the rule is hardly for the exclusive benefit of husbands at the expense of creditors.

13 One category of cases in which the presumption has applied is in resolving the competing claims of widows and adult children to an estate. For example, in *Bruce v Greentree* [2015] NSWSC 1611, the "presumption" applied in favour of a widow against claims of her children (cf [147]-[150]); in *Lakshmanan v Lakshmanan* [2011] NSWSC 1531 the "presumption" applied in favour of a widow against the claims of the deceased's children from his first marriage; and in *Cong v Shen (No 3)* [2021] NSWSC 947 at [1748] it was applied to at least one of the properties held by a widow against the claims of the deceased's children from his first marriage. The significance of the

[6] The speculation at RS [30] and [39] is even more strained here as Mr Bosanac and the Appellant separated.

presumption in these cases is to ensure that property that has been transferred to the wife does not remain available for the purpose of a family provision claim by the children.

14 Another category of cases involves disputes between parents and children. In *Koprivnjak v Koprivnjak* [2022] NSWSC 586, Peden J applied the "presumption" of advancement to a case involving a father and daughter. The father contributed to the purchase price of a property and the daughter was the registered proprietor. The father failed to rebut the "presumption" of advancement. In *Metzner v Metzner* [2021] NSWSC 1336, Rein J applied the "presumption" of advancement to a case involving parents purchasing property in their daughter's name. The parents failed to discharge their onus of rebutting the "presumption" of advancement, save to the extent of a life interest. In *Fernandez v Fernandez* [2020] WASC 356, a father purchased a house in his daughter's name. The Court found, at [21], that the "presumption" of advancement had not been displaced. Master Sanderson commented, at [9], that "*in a family situation such as this, it becomes readily apparent why the presumption of advancement operates. The prime question is this – why did the plaintiff buy the property? The answer, based on the presumption of advancement, is that he purchased it for the defendant and her sisters*".

15 Although each of these cases involves the application of the "presumption" in the context of a parent and child relationship, the logic of the Commissioner's argument would also be to abolish both. The underlying rationale for both "presumptions" is the same and there is no obvious reason to abolish one and preserve the other.

Third issue: does the change involve overturning established precedent?

16 Contrary to RS [42], the "presumption" was applied by this Court in the context of husbands and wives, actual or contemplated, in at least the following cases: *Wirth* at 238 (Dixon CJ), cf 241–242 (McTiernan J); *Drever* at 448 (Starke J), 451 (McTiernan J); and *Martin* at 298 (the Court). While it may be accepted that those decisions did not involve an attempt to challenge the "presumption", they are authority for its existence and application to the present facts.

17 In *Grubb v Commissioner of Taxes (Tas)* (1948) 79 CLR 412, the State claimed estate duty on a wife's proceeds of insurance, whose premiums were paid for by her husband, by arguing that the "presumption" of advancement was rebutted. Latham CJ concluded at 420 that the "presumption" had not been rebutted and McTiernan and Rich JJ agreed.

18 The "presumption" has been applied in cases where parents contribute to property in their children's name(s), often without distinguishing between wives and children. In *Charles Marshall Pty Ltd* at 364, and in *Stewart Dawson* at 690-691, the "presumption" was applied to transfers from a father to his daughters. As recently as 1995, this Court expanded the "presumption" to transfers from a mother to child: *Nelson*[7]. In ***Napier*** *v Public Trustee (WA)* (1980) 55 ALJR 1 at 3, Aickin J (Mason, Murphy and Wilson JJ agreeing) accepted that the "presumption" of advancement applies where there is a transfer to a wife or a child. In *Crichton v Crichton* (1930) 43 CLR 536, the "presumption" applied to transfers from a husband to his wife and his son: at 553 (Rich J), 565–6 (Dixon J). In ***Bloch*** *v Bloch* (1981) 180 CLR 390, a son and his parents arranged, orally, to buy a block of flats in the son's name. The parents contributed about a third of the purchase price. Wilson J (with Gibbs CJ, Murphy and Aickin JJ agreeing) held that the "presumption" of advancement was rebutted (at 397).

19 Given the logic of the Commissioner's submissions, each of these cases would need to be overturned. There are several more decisions of this Court where the "presumption" was at least considered, or stated authoritatively. For instance: *Scott v Pauly* (1917) 24 CLR 274 at 281–2 (Isaacs J); *Russell v Scott* (1936) 55 CLR 440 at 451, 453 (Dixon and Evatt JJ); *Delehunt v Carmody* (1986) 161 CLR 464 at 472 (Gibbs CJ, with Wilson, Brennan, Deane and Dawson JJ agreeing); *Hepworth* at 312, 315, 319; *Napier* at 3; and *Calverley* at 247 (Gibbs CJ).

20 The Commissioner relies on the statement in ***Bell Lawyers*** *Pty Ltd v Pentelow* (2019) 269 CLR 333 at 353 [54] (Kiefel CJ, Bell, Keane and Gordon JJ) that "*[t]he Chorley exception is the result of judicial decision, and it is for this Court to determine whether it is to be recognised in Australia*": RS at [33]. In contrast to *Bell Lawyers*, this Court has repeatedly said that any change to the "presumption" should be left to Parliament: AS, at [12]. The reasons for that are clear – the "presumption" of advancement concerns property rights. The contrast with the principles of costs in *Chorley* could not be clearer.

21 This Court should exercise restraint in departing from its earlier decisions: *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 (Gibbs J), 602 (Stephen J), 620 (Aickin J); ***John*** *v Commissioner of Taxation* (1989) 166 CLR 417 at 438-440 (Mason

[7] *Nelson* at 548–9 (Deane and Gummow JJ), 586 (Toohey J), 601 (McHugh J). There was no longer a basis to distinguish between transfers from father to child and from mother to child.

CJ, Wilson, Dawson, Toohey, Gaudron JJ); and *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 596-597 [217]–[219] (Kirby J). None of the facts from *John* at 438–440 supports abolishing the doctrine. In particular, contrary to RS at [22] to [29], the "presumption" of advancement rests upon a principle carefully worked out in a significant succession of cases. The principle is clear – as between husband and wife there is no presumed resulting trust. Despite existing for centuries, there has been little dissent from this core principle. There are "*no differences in the reasoning*" in the application of that core principle, only when it comes to expanding the principle. Any lack of rationale is not the same as lack of principle.

Fourth issue: is abolishing the "presumption" consistent with equity's evolution?

22 While it may be accepted that a feature of equity is its "*evolutionary development*"[8], and its lack of "*rigidity*" (*Cummins*, at 302 [69]), equity generally evolves by expansion – creating new responses to new problems, not by abolishing settled property doctrines. The Appellant is not aware of a situation where this Court, rather than Parliament, has abolished an equitable doctrine. It refused to do so, for example, in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 (cf [18]-[22]). The Court has indicated the categories of relationships giving rise to the "presumption" of advancement "*are not ... finally settled or closed"*: *Calverley* at 268 (Deane J). The proper application of the "*evolutionary development*" of equity is the incremental change averted to by Deane J, not wholesale abolition.

Fifth issue: should the matter be left to Parliament?

23 This issue is well suited to Parliament. Parliament may inquire and seek submissions from the community, balance competing interests and, if necessary, legislate.

24 Parliament, unlike the courts, can legislate prospectively. The Court will not pronounce change prospectively[9], so any judicial disruption to the "presumption" of advancement will have an equal effect on transactions from 1968 and 2023. As the issue arises in the context of a breakdown in family relationships after a property transaction, there is often a long delay between the relevant transfer or purchase and the matter being litigated. By

[8] *Andrews v Australia New Zealand Banking Group Ltd* (2012) 247 CLR 205 at 233 [62], quoting Sir Anthony Mason, "The Impact of Equitable Doctrine on the Law of Contract" (1998) 27 *Anglo-American Law Review* 1, 3.
[9] *Bell Lawyers* at 353 [55] (Kiefel CJ, Bell, Keane and Gordon JJ), quoting *Ha v NSW* (1997) 189 CLR 465 at 503–504.

way of example, the property considered in *Bloch* was purchased in 1968. The case could just as easily have been decided today.

25 Parliament, unlike the courts, can consult widely. That has been the approach in most other jurisdictions where change has been affected: RS at [52]. Where that has happened, Parliament has consulted – for example, the Law Commission of England and Wales (**EWLC**) called for views on the "presumption" of advancement in December 2006[10]. In New Zealand, a 2019 Law Reform report considered whether to abolish the "presumption" and ultimately recommended against such a change[11].

26 Parliament, unlike the courts, can do more than simply abolish the "presumption". For instance, the Commissioner notes at [52] that the "presumption" of advancement was abolished between spouses in *Property (Relationships) Act 1976* (NZ), s 4, and Parliament took the further step of also abolishing the "presumption" of resulting trust: s 4(3)(a),(b). In Northern Ireland, as part of legislation to afford equal treatment between spouses, Parliament abolished the "presumption" on a prospective basis: *Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005* (NI), art 16(2).

27 In Australia, it is the State Parliaments that ought to decide this matter. At various times, their respective law reform bodies have considered the issue in the context of other matters. In 1983, the NSW Law Reform Commission decided not to recommend changes to the "presumption" of advancement such that it might cover *de facto* couples[12]. In 2020, the South Australian Law Reform Institute considered the role and operation of enduring powers of attorney in South Australia and concluded, in relation to the "presumption", that while there are valid criticisms, "*it should be looked at the same time as the presumption of a resulting trust. These are longstanding premises of property law and any decision to abolish the presumptions of a resulting trust and advancement is beyond the scope of this reference and would require further consideration and consultation*"[13]. This Court should not disrupt a State's property law where law reform bodies have noted the need for caution and consultation. The ALRC

[10] EWLC, "The Presumption of Advancement: Does it have any Effect in Practice?"; cf EWLC, *The Illegality Defence* (2010) at [1.22], [1.27].
[11] New Zealand Law Commission, *Review of the Property (Relationships) Act 1976* (Report No 143, Jun 2019).
[12] NSW Law Reform Commission, *De Facto Relationships* (Report No 36, Jun 1983) at [10.18].
[13] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, Dec 2020), at [10.4.10].

made a similar observation in response to calls to remove the presumption in the case of transfers to adult children, stating "*the ALRC is concerned that altering equitable doctrines may have broader ramifications outside the context of elder financial abuse*"[14].

Sixth issue: The "presumption" of advancement has not been rebutted

28 The Commissioner's alternative submission is that if the "presumption" of advancement is not abolished, it was rebutted as Mr Bosanac contributed to the purchase of property by taking out joint and several loans which were secured with the Dalkeith Property; and the property was acquired for the joint use and benefit of the couple (RS at [58]).

29 **First,** the moment that the Commissioner asks the Court to make of the fact that Mr Bosanac took a loan to finance the purchase of the Dalkeith Property mortgaged by the property itself is misplaced insofar as the matter can be relied upon as a reason to find that a gift was not intended (RS [70]-[78]). This argument (as well as the Full Court's reasoning) was a clear case of a frittering away of the "presumption" of advancement.

30 The decision of Gibbs CJ in *Calverley* considered that the appellant had no intention to confer a beneficial interest on the respondent because it was demonstrated that the property was put in joint names as the appellant "*experienced difficulty in obtaining finance*" (at 251). Quite clearly, this was why the respondent in *Calverley* came to hold her interest in the property; not because of some intended gift by the appellant (cf. RS [72]). The appellant having obtained a secured loan for the purchase was of itself irrelevant to the analysis as to whether the "presumption" had been rebutted.

31 The Commissioner's contention that Mr Bosanac retained an "*effective control*", such that there was no gift, is equally misplaced. The principles arising from the authorities (RS [73]) are not in dispute, however, they have no bearing on the question of whether the existence of a loan to finance a purchase demonstrates that a gift was not intended.

32 *Devoy v Devoy* (1857) 3 Sm & G 403; 65 ER 713 concerned a misapprehension by the plaintiff as to the legal effect of a transfer of stock to his wife and child. *Warren v Gurney* [1944] 2 All ER 472 concerned a displacement of the "presumption" where the father had retained the title deeds to property transferred to the appellant. In *Flourentzou v*

[14] ALRC, *Report 131: Elder Abuse – A National Legal Response (Final Report)* (May 2017), [6.72].

Spink [2019] NSWCA 315, the NSW Court of Appeal considered principles relevant to a conditional or absolute gift without any reference to borrowings to finance a gift. At [19], the Court referred to *Commissioner of Taxation v McPhail* (1968) 117 CLR 111, at 116, where Owen J clarified what would constitute a gift, saying "*to constitute a 'gift', it must appear that the property transferred was transferred voluntarily and not as the result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return*".

33 There was no condition placed upon the Appellant by Mr Bosanac in her receiving the full title of the Dalkeith Property. There was no evidence of any contractual obligation for Mr Bosanac to have acted in the way that he did, and no advantage of any kind was received by him from the Appellant in return. While the mortgagee may have had recourse to the Dalkeith Property in the event of a default, Mr Bosanac did not, as the Commissioner submits, retain any kind of "*effective control over his contribution*", and there was of course no evidence of Mr Bosanac's "*nebulous intention*" that the Commissioner refers to at RS [73].

34 The attempt at RS [76] to distinguish the authorities relied upon by the Appellant ignores that they simply represent instances of the Courts at least considering the "presumption" of advancement where borrowed funds are the source of the advancement. In none of the authorities was it ever suggested that the fact of there having been a contribution financed with borrowed funds would have displaced the "presumption". The position appears to be the same in overseas jurisdictions: see AS [43]. The Full Court's approach (like the RS, at [70]-[78]) ignores the reality that the vast majority of real property purchases are financed by borrowings secured by mortgages (see AS [46]). To stretch this everyday occurrence into something which gives rise to an intention to not make a gift is both without a legal basis and out-of-step with society. Whether or not borrowed funds are used is irrelevant to the critical question, being a person's "*definite intention*" to retain beneficial title[15].

35 **Second**, insofar as the Commissioner seeks to rely on the nature of the property being a matrimonial home as pointing towards an intention to not confer a beneficial interest (RS [59]-[69]), the Appellant reiterates her submissions at AS [52]-[67]. Specifically,

[15] *Damberg* at [44] (Heydon JA with Spigelman CJ and Sheller JA agreeing), citing *Drever* at 450 (Dixon J).

the primary judge at J [180] and [185] and the Full Court at [10] concluded that *Cummins* does not provide an exception to the "presumption" in the case of the matrimonial home. Contrary to the Commissioner's claims that High Court authority does not preclude reliance upon the nature of the property when drawing an inference that rebuts the "presumption" (at RS [69]), the classic statements of the "presumption" in *Wirth* (at 237–8) and *Martin* (at 303) have not been expressly rejected by the High Court (J [188]). Importantly, in cases like *Hepworth*, *Wirth* and *Martin*, the "presumption" was raised in relation to matrimonial homes (see AS [58]-[60]). Even if these cases involved different questions (RS at [65]-[68]), the nature of the property being a matrimonial home was not a rebutting factor (see AS [58]-[60]).

36 The Commissioner also argues that the purpose of the acquisition being to acquire a home for the joint use and benefit of the couple, supports the rebuttal of the "presumption" (at RS [64], [69]). But as the primary judge held at J [222], this fact does not ground an inference that Mr Bosanac intended to retain a beneficial interest. The Commissioner's arguments confuse questions of ownership and possession.

37 The Commissioner at RS [63] seeks to substantiate this submission using English cases *Rimmer v Rimmer* [1953] 1 QB 63 at 67 and *Fribance v Fribance* [1957] 1 WLR 384 at 387, as well as Canadian case *Sopow v Sopow* 15 DLR 2d 57 (BC 1958) at 60–1 which approved the English authorities. However, English courts have developed a different position on the operation of the "presumption" with respect to matrimonial property (AS [63]-[67]). While the Commissioner also relies on *Ebner v Official Trustee in Bankruptcy* (2003) 126 FCR 281 at 289 [20], that case involved personal property and did not involve any application of Australian authorities on the issue (J [170]).

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Noel Hutley
02 8257 2599
nhutley@stjames.net.au

Jack Hynes
02 8915 2138
hynes@selbornechambers.com.au

Thomas Bagley
02 8915 2142
hynes@selbornechambers.com.au