HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY
BETWEEN:

BERNADETTE BOSANAC
Appellant

and

COMMISSIONER OF TAXATION
First Respondent

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VLADO BOSANAC
Second Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II: OUTLINE OF ORAL SUBMISSIONS

Notice of Contention Grounds 3 and 4: the Court should find that the 'presumption of advancement', in general or in respect of transfers between husband and wife, does not form part of the general law of Australia

1. **The nature of the presumptions and inferences in issue: *Cummins v Cummins* (2006) 227 CLR 278 (JBA 677); *Calverley v Green* (1984) 155 CLR 242 (JBA 123)**. There are four presumptions and inferences. (1) If A holds legal title, the "prima facie" position is that the equitable title is at home with the legal title. (2) If B wholly or partially contributed to A's acquisition of the legal title, equity presumes that A holds on resulting trust for B, in proportion to B's contribution. (3) If A and B are in a particular relationship (eg wife-husband), there is a presumption of advancement: equity infers that B intended an advance, and that inference displaces the presumption of resulting trust. (4) If A and B are wife and husband and each contributed to the purchase, there is an "inference" or "presumption" that joint beneficial title, with a right of survivorship, was intended. This fourth inference reflects the notion that parties to a legally-recognised, lifelong commitment intend assets to be held jointly for their lives, and then held by the survivor. This inference does not discriminate between husband and wife, or between heterosexual and same-sex marriage.

2. **The rule has no satisfactory rationale: RS[1] [16]-[29]**. The oldest authorities recognising the principle in respect of husband-wife transfers locate its rationale in the incapacity of a wife to hold on trust for her husband: *Kingdon v Bridges* (1680) 2 Vern 67; 23 ER 653 at 653 (JBA 1026); *Back v Andrew* (1690) 2 Vern 120; 23 ER 687 at 687 (JBA 774); RS [16]-[18]. Various other rationales have been proposed: RS [22]. None is satisfactory: RS [24]-[29]. No rationale, ancient or modern, both explains and justifies the presumption as it exists today. This is not a case of "evolving" rationales (cf Reply [5]); it is a case of absence of rationale. The position in respect of the presumption of advancement is different from the position in respect of the presumption of resulting trust (cf Reply [6]): the latter is not anachronistic or discriminatory, and is based on the presumed intention of the parties: FC[2] [3] (CAB 94-95).

3. **The rule is fundamentally discriminatory: RS [30]-[31]**. It applies to transfers from husband to wife, but not to other spousal transfers. It gives one party to a marriage a forensic

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1 First Respondent's Submissions dated 28 June 2022.
2 *Commissioner of Taxation v Bosanac* [2021] FCAFC 158.

advantage which the other party does not have. The rule is contrary to the principle of equality before the law, and norms prohibiting discrimination on the grounds of sex, sexual orientation and marital status: *Sex Discrimination Act 1984* (Cth) (JBA 39). The solution to discrimination is not to extend a rule that has no rationale: cf Reply [6]. The rule even if extended would still be anomalous.

4. **Asserted "reliance interests" do not warrant the maintenance of the rule: RS [34]-[41]**. The rule is an evidentiary presumption, not a rule of substantive law: *Masson v Parsons* (2019) 266 CLR 554 at [69] (JBA 345). It is not a rule of property: cf RS [3], [20]. The "effect" of the rule is not that a wife has property (cf Reply [11]). The concern is only with those persons who have "relied" on the presumption, not those persons who believe they own (or do not own) property. The concern is with persons who have (a) turned their mind to the presumption itself at the time of transfer or purchase *and* (b) having done so, have elected not to take any other steps that would evidence the intention of the donor because they believe that reliance on the presumption will be sufficient to establish the relevant intention. That is likely to be a vanishingly small class of husbands and wives. A likely larger class of persons who have "relied" on the principle is the class of husbands who wish to defeat creditors and, for that reason, have not recorded any evidence of the relevant intention: RS [39]. Where it is intended that property pass, a person who has turned their mind to the presumption *and* intends to make a gift (such as in the example in Reply [11]), they can procure evidence to support the conclusion that a gift was intended.

5. **This Court has applied the principle, but has never ruled on its soundness: RS [42]-[50]**. The issue is not whether the principle has been "applied" in cases (cf Reply [13]), but whether individuals have relied on it to structure their affairs *before* it fell to be applied. The High Court has applied the principle on a number of occasions (RS [42]-[50]; Reply [16]-[19]), but its correctness has been assumed. Those cases need not be overruled: *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at [28] (JBA 99). The "age" of a rule does not necessarily make it more sound, or less amenable to correction by this Court: *PGA v R* (2012) 245 CLR 355 at [24] (JBA 498).

6. **That Parliaments have not "overturned" the rule does not warrant this Court staying its hand: RS [33]; cf Reply [23]-[27]**. The rule was created by the courts, and can be abolished by them: *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at [54] (JBA 106). No single Parliament has the competence to abolish the principle.

7. **The *John* factors: RS [51]**. If it be necessary to consider the *John* factors, they are satisfied. The rule does not rest on a principle carefully worked out in a significant succession of cases. It rests on no principle at all. The rule is wrong is significant respects.

The rule has been overtaken by subsequent developments. Previous decisions should be overruled to the extent necessary.

8. **Leave to take the point should be given**. The point is a pure point of law. The Appellant says that, had the point been taken, she could have led evidence on whether the rule should be maintained: Reply [3]. If the Appellant wishes to lead evidence of "legislative fact" relevant to the development of the common law, she can do so now, and has elected not to.

The Appeal and Notice of Contentions Grounds 1 and 2: Mr Bosanac intended to retain a beneficial interest proportionate to his contribution to the purchase

9. **An intention to retain a beneficial interest can be inferred from the circumstances: RS [55]-[57]**. The presumption can be rebutted by showing on the whole of the evidence, including evidence of subsequent dealings, that there was no intention to advance: RS [56]-[57]. In the case of married couples, the Court will readily infer that a matrimonial home to which both parties have contributed was intended to be owned jointly with a right of survivorship. The fact that both respondents could have given evidence on this issue but chose not to makes the inference more readily drawn.

10. **The property being acquired for the joint use and benefit of a married couple supports the inference: RS [59]-[69]**. The property was acquired to be the matrimonial home of Mr and Ms Bosanac, and they both contributed to the purchase price. Those facts alone were sufficient to support the inference that Mr Bosanac intended to maintain a beneficial interest: *Cummins* at [71]-[72] (JBA 701-702); RS [60]-[61]. Additional facts also supported the inference: Mr Bosanac used the property to secure his borrowings for his share trading and he continued to live there after the separation: RS [58].

11. Therefore, the Full Court did not err in inferring that Mr Bosanac intended to retain a beneficial interest: RS [58]; FC 27 (CAB 103).

James Hmelnitsky SC David Hume Jonathon Slack-Smith

Dated: 15 August 2022