

Trusts and Unjust Enrichment

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"These men ask for just the same thing, fairness, and fairness only. This, so far as in my power, they, and all others, shall have." - Abraham Lincoln

Resulting Trusts

One equitable principle which can affect the beneficial interests in property of parties to a de facto relationship is the resulting trust. In general terms, a resulting trust arises: "... where the legal title to property is vested in someone other than the person who provided the money."

For example, where one party provides the whole of the purchase price of property, and the legal title is registered in the name of another party, or in the names of both parties, there is a presumption of law that the purchaser did not intend the other party to take their legal title beneficially, and there is said to be a resulting trust in favour of the purchaser.

Similarly, where both parties provide the purchase price, and the legal title is registered in the name of one party only, there is presumption of a resulting trust in favour of the other party. Alternatively, if the legal title is registered in the names of both parties, but the parties contributed the purchase price in unequal shares, there is a presumption that the property is held by the parties in trust for each other as tenants in common according to the proportion of the purchase price contributed by each party. As Deane J has put it:

"... where two or more persons advance the purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the property upon resulting trust in favour of those who provided the purchase price in the shares in which they provided it."

Because the presumption of a resulting trust in these situations is based on the presumed intention of the parties, it is subject to contrary evidence of the actual intention of the party or parties advancing the purchase price. As Deane J has observed:

"... the presumption operates by reference to the presumed intention of the party whose contribution exceeds his or her proportionate share; it cannot prevail over the actual intention of that party as established by the ... evidence."

In *Calverley v Green* (1984) 155 CLR 242, a de facto couple who had lived together for about 10 years purchased a residential property which was subsequently registered in both their names. The purchase price was made up of a deposit paid by Mr Calverley out of his own funds and money secured by a mortgage under which he and Miss Green were jointly and severally liable to make repayments.

In effect, Miss Green contributed \$9000 and Mr Calverley contributed \$18,000. In these circumstances, the question for the High Court was whether there was evidence of the actual intention of the parties which could rebut the presumption that: "... *the property was held upon resulting trust for themselves in shares corresponding to their respective contributions to the purchase price.*" In other words, was there evidence which could establish that Miss Green was intended to have a beneficial interest which corresponded with her legal interest as a joint tenant.

In the result, it was held that there was no such evidence. As Deane J observed:

"The evidence ... discloses no adequate grounds for an inference ... that either intended that the beneficial interest in the property should be otherwise than according to their respective contributions to the actual purchase price.

It is apparent that the resulting trust as a remedial mechanism is limited in two ways.

First, the intention of the purchaser at the time of purchase is regarded as decisive. Secondly, only direct financial contributions to the property in question are taken into account.

An example of the first limitation is provided by the case of *Muschinski v Dodds* (1985) 160 CLR 583. In that case, a de facto couple who had lived together for about 3 years purchased a property which was registered in both their names as tenants in common in equal shares. Mrs Muschinski provided the whole of the purchase price of the property. The parties had intended to renovate a dilapidated cottage which was on the property and construct another dwelling. Mr Dodds was to assist in the renovations and pay for the new dwelling when he received the proceeds of a divorce settlement. However, these plans were never carried out and the parties separated four years later.

The High Court agreed with the conclusions reached by the trial judge and the Court of Appeal that the evidence established that, at the time of purchase, Mrs Muschinski intended to give Mr Dodds an immediate beneficial interest.

This was sufficient to rebut the presumption of a resulting trust which would otherwise arise. As Mason J put it:

"The evidence ... supports the finding that the common intention of the parties was that each should enjoy, from the time of purchase, an immediate and unconditional legal and beneficial one-half interest in the property. ... Accordingly there is no scope for a resulting trust."

However, Mrs Muschinski was not denied a remedy, because the High Court accepted that, in the circumstances, it was appropriate to impose a constructive trust on the respective legal interests of the parties. As a result, Mrs Muschinski and Mr Dodds were to hold their legal interests as tenants in common on trust to repay to each other their respective contributions, with the residue to be divided into equal shares.

Constructive Trusts

One important distinction between resulting trusts and constructive trusts, is that the latter is imposed by a court regardless of the presumed or actual intention of the parties. As Powell J in *Lipman v Lipman* (1989) 13 Fam LR 1 at 19 has observed:

"... whereas express and resulting trusts are founded on the intention, be it express or presumed, of the parties, constructive trusts are imposed without regard to the intention of the parties to satisfy the demands of justice."

However, the courts are not free to impose constructive trusts according to what Deane J has described as: "... *idiosyncratic notions of fairness and justice*."

The remedy of a constructive trust is only available to prevent assertions of beneficial ownership which are contrary to equitable principle. In *Muschinski v Dodds*, the High Court considered a case which was primarily concerned with direct financial contributions to the property in question. If Mrs Muschinski had not clearly evinced an intention to give Mr Dodds a beneficial half interest, a just

result could otherwise have been reached by applying the presumption of a resulting trust.

In the later case of *Baumgartner v Baumgartner* (1987) 164 CLR 137, the High Court considered a more common situation in which the resources of a de facto couple had been pooled to meet their ongoing expenses.

Leo and Frances Baumgartner were in a de facto relationship for about 6 years. During that time, Frances changed her name by deed poll and they had a child. However, they never married. After they had cohabited for about a year in a home unit in Cabramatta, Leo Baumgartner bought a block of land at a place called Leumeah. The property was registered in his name only. A year later the Cabramatta home unit was sold and the parties moved into rented accommodation, pending completion of the construction of a house on the Leumeah property. During the period of their cohabitation the parties pooled their resources. Frances gave Leo her pay packets. Leo paid their accommodation and other living expenses. The aggregate earnings contributed to the pooled resources were estimated at about \$90 000 during the period of cohabitation. About 55% of this sum was contributed by Leo, and about 45% by Frances. By the time the parties relationship ended the Leumeah property was valued at about \$70 000.

In these circumstances, the High Court held that a constructive trust should be imposed on Leo's legal interest in the Leumeah property. Mason CJ, Wilson and Deane JJ reached that conclusion by applying the principle identified by Deane J in *Muschinski's* case, namely that in the circumstances of the joint relationship established by the parties it was unconscionable for Leo to assert, after the relationship failed, that he had the sole beneficial interest in the Leumeah property. Mason CJ, Wilson and Deane JJ described the financial arrangements which had been adopted by Leo and Frances in the following terms:

"... the parties pooled their earnings with a view to meeting all the expenses and outgoings arising from their living together as a family. The individual contributions of each party were not allocated to a particular category or particular categories of outgoings. The pool of earnings was used to pay outgoings associated with accommodation - mortgage instalments on the unit at Cabramatta and the property at Leumeah - as well as other living expenses."

Having noted that Leo and Frances had been in a long-term stable relationship, for the purposes of which the Leumeah property had been acquired, the

Leumeah house planned, built, moved into, and made a home, Mason CJ, Wilson and Deane JJ observed that:

"In this situation it is proper to regard the arrangement for the pooling of earnings as one which was designed to ensure that their earnings would be expended for the purposes of their joint relationship and for their mutual security and benefit."

It was this finding which provided the basis for the imposition of a constructive trust, on the ground that what Deane J had referred to in Muschinski's case as the "substratum of [the] joint relationship or endeavour" had failed. As Mason CJ, Wilson and Deane JJ stated that conclusion:

"This case is ... one in which the parties have pooled their earnings for the purposes of their joint relationship, one of the purposes of that relationship being to secure accommodation for themselves and their child. Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of the furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship. In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed in part through the pooled funds, is his sole property ... amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent."

Where a court imposes a constructive trust, the second stage is to determine the terms of the trust. In Baumgartner's case Mason CJ, Wilson & Deane JJ suggested that where parties have lived together for a significant period of time during which they have pooled their resources and efforts to establish a joint home:

"... there is much to be said for the view that they should share the beneficial ownership equally as tenants in common, subject to an adjustment to avoid any injustice which would result if account were not taken of the disparity between the worth of their individual contributions either financially or in kind."

In that case, it was held that the differences in contribution between the parties could not be regarded as "relatively insignificant" and therefore the beneficial interests of the parties were declared in the proportions 55% to Leo and 45% to Frances. In addition, "in the interests of justice" other adjustments were required, such as Leo being given a credit for the net proceeds of the sale of his home unit in Cabramatta, which were put towards the purchase of the Leumeah property, subject to an appropriate deduction for mortgage payments which had been made on the unit from pooled resources.

It is clear from Baumgartner's case that, in appropriate circumstances, indirect financial contributions to the purchase of property can provide the basis for the imposition of a constructive trust. There are also indications that direct, and perhaps indirect, non-financial contributions to property may be taken into account. For example, Mason CJ, Wilson and Deane JJ referred to "contributions, financial and otherwise" and "individual contributions either financially or in kind" and Gaudron J suggested that in the context of a domestic relationship, non-financial contributions might have to be taken into account. In Muschinski's case, Deane J had referred to the need to take account of: "... a practical equation between direct contributions in money or labour and indirect contributions in other forms such as support, home- making and family care."

Since Baumgartner's case the lower courts have attempted to delineate the limits of the principles which it established. In *Hibberson v George* (1989) 12 Fam LR 725, it was recognised that parties may "pool their resources" without paying funds into a joint bank account, and that it may be sufficient that one party uses earnings: "... for the benefit of the joint relationship." In *Miller v Sutherland*, it was recognised that there may be a "pooling of resources" where no funds are contributed, but labour is expended. In that case, the plaintiff's father, a builder, had expended considerable unpaid time, on his daughter's behalf, renovating the property in which she and the defendant subsequently lived. Cohen J concluded that:

"... there was a pooling of labour by or on behalf of both parties and the contribution of money for materials by the defendant. The clearly implied intention of the parties was to use that labour and money for the purpose of providing a home for both parties and increasing its value for the legal owner, the defendant. In those circumstances it would ... be unconscionable of the defendant to deny to the plaintiff an equitable interest in the house and accordingly a constructive trust will arise."

In *Lipman v Lipman*,(ibid) it was considered unconscionable for a man to deny his de facto wife a beneficial interest in his assets where she had worked long hours in his business to assist him to get established, and applied substantially the whole of her own income towards meeting household expenses.

Unjust enrichment

Unjust enrichment is based on the premise that one party should not unjustly benefit at the other party's expense. Until 2007 it was thought that this was an expanding area of the law and there was speculation that the test for unjust enrichment might be expanded to include a subjective test as well as an objective test.

It is apparent however from the recent decision of the High Court in *Farah Constructions Pty Ltd -v- Say-Dee Pty Ltd [2007] HCA 22* that the categories of unjust enrichment are not to be extended to include actions that subjectively could be considered unfair or unconscionable.

The High Court decision made it clear that the reasoning of the Court of Appeal of the Supreme Court of New South Wales was wrong and not to be applied in subsequent cases.

The previous and long standing authority High Court authority was determined in 1987 with the decision of *Pavey & Matthews v Paul [1987] 162 CLR 221* . That decision was groundbreaking as it acknowledged that unjust enrichment encompassed an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff.

The facts of the *Pavey & Matthews* case were quite straightforward and illustrate, with clarity, a claim in unjust enrichment.

A licensed builder performed building work following conversations with the owner over a six month period to the effect that that he would perform the work and be paid reasonable remuneration. The builder performed the work and the other party accepted the work, however there was no written contract between the parties. On completion of the work, the owner disputed the reasonableness of the amount the builder charged for the work.

The builder could not enforce the contract by the normal avenue of the Builders Licensing Act 1971 (NSW) because the Act required a written contract between the parties before the contract could be enforced.

Hence the builder made a claim for the monies owed on a quantum meruit basis meaning "for a reasonable sum."

The Court held that an action to claim a quantum meruit rested on a claim based on the principle of unjust enrichment. The principle of unjust enrichment arose from the acceptance of the benefits accrued from the performance of the builder of the unenforceable oral contract.

Generally, the remedy available under an unjust enrichment will only be available when a contract has been set aside for breach, frustration or, as was the case in *Pavey & Matthews*, the contract was unenforceable.

Subsequent cases since the seminal decision in *Pavey & Matthews* have enunciated the following factors when applying the remedy of unjust enrichment:

- a. The defendant was enriched;
- b. The defendant's enrichment was at the plaintiff's expense; and
- c. The enrichment was unjust (according to defined categories developed in the cases).

Determining whether the enrichment of the defendant at the plaintiff's expense was unjust requires consideration of the defined categories of unjust enrichment recognised by previous cases. The most common form of unjust enrichment is payment by mistake or money paid for a consideration that has failed.

The recent High Court decision of *Farah Constructions* confirmed that whether an enrichment is unjust depends on the existence of a qualifying or vitiating factor falling into a particular category for example mistake, duress or illegality. In *Farah Constructions*, the High Court made it clear that unjust enrichment was not to be determined by a subjective evaluation of what was unfair or unconscionable.

The case before the High Court was an appeal of the decision of the Court of Appeal of the Supreme Court of New South Wales that applied the concept of unjust enrichment to recipient liability for a breach of a fiduciary duty. The Court of Appeal held that such a situation could lead to restitution based on the unjust enrichment of a party.

In *Farah Constructions* the recipient of the benefit that arose was unaware that there was a fiduciary duty owed to another party. However, the Court of Appeal held that the lack of notice of the party did not mean that the concept of unjust enrichment could not be applied.

The High Court held that the decision of the Court of Appeal was a grave error. In denouncing the decision of the Court of Appeal, the High Court stated that the

areas in which the concept of unjust enrichment apply are specific and long-established. The High Court then rejected the decision of the Court of Appeal that liability for breach of a fiduciary duty was an area in which unjust enrichment applied.

There are a number of Family Law decisions but a useful case setting out the requirements for trusts is:

CIERPIATKA v CIERPIATKA and CIERPIATKA (1999) DFC ¶ 95-222

A handwritten signature in cursive script that reads "Richard Maurice".

Richard Maurice