
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : FREITAS DOS SANTOS -v- MOORE [No 2] [2022]
WASC 433

CORAM : ALLANSON J

HEARD : 28-30 NOVEMBER 2022

DELIVERED : 14 DECEMBER 2022

FILE NO/S : CIV 3052 of 2017

BETWEEN : ELSA MARIA FREITAS DOS SANTOS
Plaintiff

AND

KIM IVAN MOORE
First Named First Defendant

MIDORI MOORE
Second Named First Defendant

Catchwords:

Real property - Trusts - Where plaintiff and first defendant held property as joint tenants - Where property transferred to first and second defendants as joint tenants - Where plaintiff alleges her signature was forged on the transfer - Where plaintiff alleges defendants knew the signature was forged - Whether plaintiff proved forgery and knowledge of defendants - Whether defendants hold interest in property on constructive trust for the plaintiff

Trusts - Where plaintiff and first defendant purchased property in joint names during de facto relationship - Where plaintiff and first defendant jointly

borrowed funds for purchase secured by mortgage - Where first defendant claims he solely made mortgage repayments - Whether facts give rise to resulting trust

Legislation:

Transfer of Land Act 1893 (WA)

Limitation Act 1935 (WA)

Result:

Claim dismissed

Category: B

Representation:

Counsel:

Plaintiff : N W Marsh
First Named First Defendant : W Vogt
Second Named First Defendant : W Vogt

Solicitors:

Plaintiff : J K Legal
First Named First Defendant : Vogt Graham Lawyers
Second Named First Defendant : Vogt Graham Lawyers

Cases referred to in decision:

Bahr v Nicolay (No 2) [1988] HCA 16; (1988) 164 CLR 604
Bosanac v Commissioner of Taxation [2022] HCA 34
Breskvar v Wall [1971] HCA 70; (1971) 126 CLR 376
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Calverley v Green [1984] HCA 81; (1984) 155 CLR 242
Cassegrain v Cassegrain [2015] HCA 2; (2015) 254 CLR 425
Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89
Frazer v Walker [1967] AC 569
Helton v Allen [1940] HCA 20; (1940) 63 CLR 691
LHK Nominees Pty Ltd v Kenworthy [2002] WASC 291; (2002) 26 WAR 517

Palmer v Dolman [2005] NSWCA 361

ALLANSON J:

Introduction

1 The defendants are the registered proprietors of a property in
Thornlie. From 1996 to 1999, the plaintiff and the first defendant held
that property as joint tenants. The plaintiff claims that her signature
was forged on the instrument that transferred the property to the
defendants, and the defendants knew it was forged when they registered
the transfer. The plaintiff seeks a declaration that she has an interest in
the property that the defendants hold as constructive trustees.

2 The plaintiff first raised questions about the transfer of the
property in 2014, and only commenced proceedings in 2017. All
parties have been affected by the time that has elapsed from when the
events occurred. Evidence that might have assisted either party is no
longer available.

Background

3 The following background facts were not in dispute.

4 The plaintiff, Elsa Maria Freitas Dos Santos, and the first
defendant, Kim Ivan Moore, met in 1993, when she was about 17 years
old and he was about 22. They lived together in a de facto relationship
from 1994.

5 In 1996, the plaintiff and the first defendant purchased a house and
land in Thornlie, and were registered as proprietors of the property as
joint tenants. The purchase was financed by a loan from the University
Building Society, in the names of both the plaintiff and the first
defendant, with a term of 25 years. The loan was secured by a
mortgage to Keystart Loans Limited.¹

6 The relationship between the plaintiff and the first defendant
ended in 1997 and the plaintiff left the Thornlie home. I cannot find
precisely when, but she left in November at the latest.

7 The first defendant and the second defendant, Midori Moore, met
in May 1998 and married on 22 October 1998.² The second defendant
was then in Western Australia on a working holiday visa. She later
obtained a partner visa.

¹ See Exhibit 1, contract for sale dated 2 June 1996, and Exhibit 2, mortgage dated 3 July 1996.

² ts 122.

8 In 1999, the defendants refinanced the property with RAMS Home
Loans. The new loan was for \$75,100.³

9 On or about 12 August 1999, the defendants were registered as the
proprietors of the Thornlie property as joint tenants. The transfer of
land was signed by the first defendant as transferor and by each
defendant as transferees.⁴

10 The transfer bears a signature purporting to be that of the plaintiff
as transferee. The signature is witnessed.

11 The transfer showed a consideration of \$41,750.

12 No cash consideration was paid to the plaintiff.

13 The transfer does not show by whom it was lodged. The
defendants admit, however, that they caused it to be registered.⁵

14 The defendants made all payments on the mortgage between
August 1999 and March 2005, when they discharged the mortgage with
\$50,000 borrowed from the second defendant's father.⁶

The evidence

The witnesses

15 The plaintiff gave evidence and called one witness, her mother.

16 Both defendants gave evidence.

17 The defence also called Mr Victor Ward, whose name appears as
the witness to the plaintiff's signature, or purported signature, on the
transfer.

The documents

18 Only 19 documents were admitted as exhibits. The events in
question occurred between 23 and 25 years ago, and there are
limitations in the record of documents - some pages are missing, some
original documents are not available, and the quality of some
photocopies is poor.

³ Exhibit 13.

⁴ Exhibit 3.

⁵ Substituted Statement of Claim [6], Re-Amended Defence [7].

⁶ ts 135.

19 The plaintiff tendered the contract for sale and mortgage relating
to the purchase of the Thornlie property in 1996.⁷

20 The defendants tendered bank statements from the first defendant's
account, and a University Building Society loan statement to show the
payments he made on the mortgage before the refinancing in 1999.

21 The defendants also tendered a letter to the first defendant from
the University Building Society, dated 2 December 1997, headed 'Deed
of Release'.⁸ The letter sets out what the University Building Society
required to be done if it was to release the plaintiff's liability to repay
the mortgage. Those requirements included a letter from the first
defendant requesting to stay on the mortgage; a letter from the plaintiff
requesting her name be taken off the mortgage; and financial
information from the first defendant.

22 The letter further advised:

Keystart Loans Limited grant approval for the Deed of Release based
on a submission prepared by University Building Society. To make this
submission we require details of monthly income and expenditure for
the person whose name will remain on the mortgage to confirm they
can meet the monthly repayments as per Keystart guidelines.

23 On the back of the letter, in handwriting which the first defendant
said is his mother's writing, there is the date '7-12-97', and a
'declaration' in these terms:

I Elsa Marie Dos Santos declare to have my name withdrawn from the
contract with Mr Kim Ivan Moore of 24 Crossford Street Thornlie
6108.

Yours sincerely.⁹

24 The defendants tendered a typewritten document, with the date
15 December 1997 inserted in handwriting; the first defendant said the
date was written by his mother. The document is a letter addressed to
the first defendant, by his full name, from 'Elsa Dos Santos,
5 Glenbawn Drive, South Lakes, WA 6164, (08) 9417 8128'. The first
paragraph is in the same terms as the handwritten document. There are
two additional paragraphs:

⁷ Exhibits 1 and 2.

⁸ Exhibit 11.

⁹ Exhibit 11.

ALLANSON J

Please keep me informed regarding the procedure involved to settle this matter.

Thank you for your time and I look forward to hearing from you soon.¹⁰

25 The document is signed over the name Elsa Dos Santos - the plaintiff disputes the signature.

26 The defendants tendered other documents related to the University Building Society loan, but they are not material to this decision.

27 Commencing in July 1997, there are documents addressed to the defendants from RAMS Home Loans, and from Marks Healy Sands who were acting as the solicitors for RAMS.

28 The first is a document headed Series 2 Better Home Loan Information, dated 29 June 1999 addressed to both defendants. It advises indicative terms upon which RAMS had approved the defendants' application for a home loan, subject to conditions. The loan amount was then \$74,000.¹¹

29 On 8 July 1999, Marks Healy Sands wrote to the first defendant advising that they had been instructed by RAMS Mortgage Corporation that the first defendant required a Transfer of Land to remove the plaintiff from the certificate of title and to include the second defendant on the title. The letter enclosed transfer of land documents with these instructions:

Please complete the Transfer by signing where indicated in the presence of an independent adult witness who must also sign and print his/her address and occupation. Even if the same witness is used he/she must sign each time they witness a signature. Once completed, please return the transfer to us.

If it is appropriate for you to do so, please also have Ms Dos Santos sign the transfer where indicated. If this is not appropriate please return the transfer to this office, with address details for Ms Dos Santos, and we will arrange for her to execute the transfer.

As the Transferee you are required to pay State government stamp duty on the Transfer of Land. As you are transferring a one-half interest in the property, stamp duty is assessed at 1.95% of one-half of the value of the property. Your property has been valued at \$83,500.00 and thus stamp duty is payable on a 'consideration' of \$41,750.00. Stamp duty is

¹⁰ Exhibit 6. I have not corrected any misspelling.

¹¹ Exhibit 13.

payable at this amount regardless of the actual 'consideration' for the transfer. We have prepared the transfer to reflect that the 'consideration' for the transfer is the sum of \$41,750.00. You may wish to consult with your accountant to confirm that this is appropriate.¹²

30 Only the first page of the letter of 8 July 1999 was tendered. The first defendant said he did not keep any other pages. The firm of Marks Healy Sands no longer practices. The first defendant said that in 2018 he received a letter notifying the defendants that a caveat had been placed on the property. He then approached the firm which took over the practice of Marks Healy Sands, but was told records dating back to 1999 had not been retained.

31 Marks Healy Sands also provided an invoice, dated 8 July 1999, for its professional charges including for 'preparing Transfer of Land documents; arranging execution of Transfer of Land; submitting Transfer of Land for State Taxation endorsement; attending to registration of Transfer of Land'.¹³

32 On 9 July 1999, Marks Healy Sands wrote again to the defendants regarding the preparation of security documents to secure advances of up to \$75,100.¹⁴ The letter emphasised that Marks Healy Sands were acting as solicitors for the mortgagee and not permitted to witness the documents.

33 The critical document is the transfer document dated 12 August 1999.¹⁵ The duty stamp is also dated 12 August 1999.

34 The copy in evidence is a photocopy. Most of it is clearly legible, but in two places where it appears a stamp has been applied, the details stamped are not legible.

35 The transfer is signed by the first defendant as transferor and by both defendants as transferees. The defendants' signatures are witnessed. The first defendant said they signed before a Justice of the Peace.¹⁶ The witness appears to have applied a stamp with their details. This is the first place where the document is not legible.

¹² Exhibit 14. Underlining in original.

¹³ Exhibit 15.

¹⁴ Exhibit 16.

¹⁵ Exhibit 3.

¹⁶ ts 130.

36 The signature alleged to be that of the plaintiff appears above that
of the first defendant as transferee, next to the initials 'EMFD' and a
cross. There is also a cross next to the place for the witness' signature.

37 The signature is witnessed. Immediately below the witness'
signature are the words: 'V. Ward CD', followed by an address and the
occupation 'security officer'. Those words are in block capitals. No
evidence was given about who wrote them. They are obviously not in
the first defendant's hand.

38 The transfer states a consideration of \$41,750. The stamp duty
was \$815.

39 There is no evidence about who lodged the transfer, although
attending to registration was one of the matters included in the invoice
from Marks Healy Sands. The copy of the transfer has the outline of a
stamp in the box for recording who lodged the instrument, but the
details cannot be read.

40 The last document relating to the RAMS finance is a letter dated
13 August 1999, addressed to the second defendant advising that the
loan was settled on 12 August 1999 and providing details of interest
rate and repayments.¹⁷ Again, only the first page of the letter was
available.

The plaintiff's case

41 The plaintiff's pleaded case is that she did not sign the transfer and
that:

- (1) when the defendants executed the transfer they knew that no
'actual agreement' had been entered into with her for the transfer
of her interest;
- (2) the defendants knew that her signature was forged when they
executed the transfer;
- (3) before they signed the transfer, the defendants did not contact
her or inform her of their intention to sign and lodge the
transfer;
- (4) the defendants did not seek her approval or consent to sign and
lodge the transfer;

¹⁷ Exhibit 19.

- (5) at no time did the defendants offer to, or pay, the consideration of \$41,750 that was shown on the transfer;
- (6) the defendants did not advise her that they had become the registered proprietors of the property.¹⁸

42 The plaintiff pleaded that the defendants caused the transfer to be lodged and became the registered proprietors of the property.¹⁹

43 The plaintiff did not allege that either defendant forged her signature, or that it was forged by someone acting with their authority. Nor did she plead facts from which the defendants would be imputed to have the knowledge of someone who knew the signature was not genuine. Her case is that they knew the signature was forged or were wilfully blind to whether it was.

44 The plaintiff says that she first became aware the property was registered in the names of the defendants in 2014.

45 On those facts, the plaintiff claims that the defendants hold her interest in the property as constructive trustees.

The plaintiff's evidence

46 The plaintiff gave evidence and called one witness, her mother.

47 The plaintiff said that she left the relationship with the first defendant because she 'wasn't quite happy with the lifestyle'.²⁰ She said that she stayed at her mother's house for about a month and then moved into a house in Girrawheen.²¹

48 Soon after separating from the first defendant, the plaintiff began a relationship with a Malcolm Ward. The relationship lasted for about four years.

49 The plaintiff was adamant that she did not want further contact with the first defendant, that she was hiding from him, and that she had no contact with him, by letter, telephone, or in person, from when she left the Thornlie house in 1997 before solicitors wrote to him on her behalf in 2014. She said she was 'traumatised' by the lifestyle they led, and was mentally fragile, but gave no further detail, other than that she

¹⁸ Substituted Statement of Claim [5].

¹⁹ Substituted Statement of Claim [6].

²⁰ ts 60.

²¹ ts 60.

had been 'controlled in a relationship', and she 'wasn't in the headspace'. In cross examination she referred, very generally to 'mental abuse and lifestyle choices'.²² When asked if that state of mind continued up until 2011, the plaintiff simply said she needed time to recover and was not ready.²³

50 In 2011, the plaintiff's brother died and she took on the responsibility for his four children. She described one of the children as suffering from MS and autism.²⁴

51 In 2014, the plaintiff engaged lawyers to do a title search to find out if her name was still on the title.²⁵ The plaintiff said it was then that she became aware of the transfer in 1999;²⁶ although she also said the lawyers did the search and 'confirmed what I told them'.²⁷ She was not asked what she meant by that.

52 The lawyers sent a demand to the defendants. The plaintiff did not take the matter further in 2014 because she did not have the money to pursue it.²⁸

53 In 2017, she engaged her present lawyer and brought these proceedings.

54 The plaintiff was definite in her evidence that the signature on the transfer document was not hers.²⁹ She also denied that the letter purportedly written by her to the first defendant in December 1997 bore her signature.³⁰

55 Specifically, the plaintiff denied ever meeting the first defendant at her mother's house, saying that, after their separation, she stayed only a short time with her mother and then lived in Girrawheen.

56 The plaintiff's mother, Maria Drusilla de Freitas Santos, testified that the first defendant came to her house looking for the plaintiff on one occasion, at about the end of 1997. She said she met him at the front door and told him that her daughter no longer lived there, and was

²² ts 60, 76, 78, 89.

²³ ts 89.

²⁴ ts 88.

²⁵ ts 60 - 61.

²⁶ ts 85.

²⁷ ts 88.

²⁸ ts 62 - 63.

²⁹ ts 63 - 64.

³⁰ ts 72; Exhibit 6.

living with her new boyfriend. She did not know the address. Ms Santos denied the first defendant came on any other occasion.

57 It is unlikely that Ms Santos' evidence about the visit she described is accurate, at least as to when it occurred. She said that the first defendant told her that he was then happily married, which is more than improbable within a month of his separation from the plaintiff.³¹

58 I do not doubt that Ms Santos was attempting to tell the truth, but it can be difficult to remember events, over 20 years later, when there was no reason to believe that they were significant at the time.

The defendants' case

59 The defence pleading is a Re-Amended Defence, amended by consent on the first day of trial. The late amendment was to introduce a limitation defence.

60 The defendants pleaded that the plaintiff has no interest in the property: that she made no contribution towards the purchase of the property, the mortgage repayments, or household expenditure, and that she is presumed to hold her legal interest in the property on a resulting trust for the first defendant.³²

61 The defendants pleaded that, by letter dated 15 December 1997, the plaintiff requested a release from the mortgage over the property.³³

62 The defendants pleaded that, in mid-1999, the first defendant met the plaintiff and told her he was now in a position for the plaintiff's name to be removed from the mortgage. The plaintiff agreed she would sign any document necessary to remove herself from the mortgage.³⁴

63 In about June 1999, the first defendant sought to refinance the property and approached RAMS Home Loans.³⁵

64 On 29 June 1999, RAMS advised indicative terms on which it had approved an application for a home loan to the defendants for a total amount of \$74,000.³⁶

³¹ ts 96.

³² Re-Amended Defendant [5(a)].

³³ Re-Amended Defence [5(b)].

³⁴ Re-Amended Defence [5(a)] - [5(d)].

³⁵ Re-Amended Defence [7A(e)].

³⁶ Exhibit 13.

65 On 8 July 1999, the first defendant received a letter from the firm of Marks Healy Sands, solicitors acting for RAMS. The letter advised the first defendant that RAMS required a transfer of land to remove the plaintiff from the Certificate of Title and to include Ms Moore on the title. The solicitors enclosed the transfer and instructions for signing it. I have set them out in detail earlier.³⁷

66 The letter further advised that stamp duty was payable on the value of a one half interest in the property, regardless of the actual consideration. The transfer was prepared with consideration of \$41,750 shown.

67 The defendants say that, in July, they executed the transfer before a Justice of the Peace and returned it to the solicitors to arrange execution by the plaintiff.³⁸

68 On 27 July 1999, after hearing nothing from her, the first defendant met the plaintiff. At that meeting the plaintiff said that she had recently received the transfer and would sign it.³⁹

69 The defendants admit that they caused the transfer to be registered.⁴⁰

70 The defendants deny the allegations made in [5] of the Substituted Statement of Claim. They say that they did not forge the plaintiff's signature on the transfer, and deny that they knew the signature was forged.

The defendants' evidence

71 The first defendant said that when he and the plaintiff began their relationship they initially lived with his mother, and then were house sitting. It was while they were house sitting that they purchased the Thornlie property.⁴¹

72 The first defendant said that because they were house sitting without rent, he was able to save the deposit and said that he paid the whole of the deposit of \$2000.⁴² He said that he would rather have had the loan in his name alone, but the bank wanted the second signature

³⁷ Re-Amended Defence [5(c)] and Exhibit 14.

³⁸ Re-Amended Defence [5(d)], [5(e)], [7(b)].

³⁹ Re-Amended Defence [7A(f)] - [7A(g)].

⁴⁰ Re-Amended Defence [7].

⁴¹ ts 103, 105.

⁴² ts 107, 139.

and, as he put it, the plaintiff was his girlfriend at the time and 'she was helping me to get a house'.⁴³

73 The first defendant said that the plaintiff did not contribute to the mortgage or bills or rates, and he did not ask for rent or board, although she might have helped out a little bit with food.⁴⁴

74 The first defendant said his relationship with the plaintiff 'fell apart' in mid-1997. He said 'she gave up her apprenticeship as a plumber and she wanted to get out of the mortgage and leave'.⁴⁵ The plaintiff did stay for a bit longer until possibly October or November and then she moved out. At first she moved to her mother's house.

75 The first defendant said the plaintiff told him she wanted to get off the mortgage and he contacted the bank about what he needed to do.⁴⁶ The University Building Society sent him the letter dated 2 December 1997. He took the letter to the plaintiff at her mother's house and showed her where it said that they needed a letter from her requesting her name be taken off the mortgage. He asked the plaintiff if she could write a letter, and she asked what she should write. The first defendant did not know, so he took the letter back home to his mother and asked her what the plaintiff should write and that is how the 'declaration' was written on the back of Exhibit 11.⁴⁷ The first defendant said he asked his mother to help because she was a lot smarter and her English was a lot better than his.⁴⁸

76 After the first defendant showed the plaintiff what his mother had written, she typed it up, added a few lines of her own, and signed it. His mother later dated it.⁴⁹ The first defendant saw the plaintiff sign the letter. The typed letter in evidence was a copy.

77 The first defendant compiled the other information requested by the building society, but when he took it to them he understood that there was not enough equity in the property to release the plaintiff from the mortgage unless she could be replaced.⁵⁰

⁴³ ts 138, 139.

⁴⁴ ts 113.

⁴⁵ ts 114.

⁴⁶ ts 114.

⁴⁷ ts 115. This was one occasion where an original document was admitted into evidence.

⁴⁸ ts 140.

⁴⁹ ts 117.

⁵⁰ ts 121.

78 The first and second defendants met in March 1998. She stayed with him and they later formed a relationship.⁵¹ In 1999, the second defendant's original visa was coming to an end, and there was some involvement with an investigation by the Department of Immigration while the second defendant applied for a partner visa.

79 The first defendant and second defendant discussed buying a property together because it would help their case with immigration and also because 'it is the right thing to do'.⁵² The first defendant was still making all the payments on the original loan (at an interest rate of 10.5%). The second defendant was able to obtain a job and, in April, May or June, the first defendant went to see the plaintiff to tell her that the defendants wanted to buy a property together. He saw the plaintiff at her mother's house. The first defendant said 'I did not know Elsa's phone number or location. I could only ever meet her at her mum's house. Sometimes it was an arranged meeting because I would see her mum and tell her, "Can I see Elsa?" And she would let Elsa know. And then Elsa would come over to her mum's house and we would meet up'.⁵³

80 The first defendant told the plaintiff that he was married and that his wife would be willing to take over the loan. The plaintiff asked if there was any money in it. He told her that he would be willing to sell the house and buy a new house with the second defendant, but that there was still a lot of debt owing on the property, and if it was put on the market it could take several months to sell, there would be real estate and other fees, and he would want her to pay half. The plaintiff would get half of any profit, but would have to bear half of any losses.⁵⁴

81 The plaintiff said she would sign transfer papers. There was no agreement that she would be paid anything for her interest in the property.⁵⁵

82 On 7 July 1999, the first defendant received a phone call from the plaintiff enquiring about 'signing off the mortgage' as she had not received any paperwork.⁵⁶

⁵¹ ts 122.

⁵² ts 123.

⁵³ ts 124.

⁵⁴ ts 125.

⁵⁵ ts 125.

⁵⁶ ts 127.

83 The first defendant received the transfer paper enclosed in a letter from Marks Healy Sands on 8 July 1999. After receiving the transfer paper, the defendants signed it in front of a Justice of the Peace and returned it by post to Marks Healy Sands, with a letter advising the address of the plaintiff's mother.⁵⁷ The first defendant did not keep a copy of that letter, and did not keep a copy of the part-signed transfer.⁵⁸ He denied the proposition put to him in cross examination that the document he returned to the solicitors had a signature of the plaintiff as transferee.⁵⁹

84 The first defendant was cross examined about why on this occasion he did not himself take the document around to the plaintiff. He answered, quite plausibly, that it did not make sense for him to do that because the plaintiff's signature required a witness and he could not witness it, so it was easier to let the solicitors look after it.⁶⁰

85 On 9 July 1999, the defendants received another letter from Marks Healy Sands enclosing the mortgage document, which they signed and returned.⁶¹ They then waited several weeks without hearing anything.

86 On 27 July 1999, the first defendant went to see the plaintiff at her mother's house because he had no phone number or other contact address for her. He asked the plaintiff if she had received any documents for signing and she told him she had just received them. The first defendant asked the plaintiff if she could sign them and send them back to Marks Healy Sands.⁶²

87 On 6 August 1999, the first defendant received a letter from the University Building Society, addressed to the first defendant and the plaintiff, advising him that the loan had been discharged.⁶³

88 On 13 August 1999, the second defendant received a letter from RAMS advising that the loan had been approved and had settled for \$75,100 on 12 August 1999.⁶⁴

89 The defendants continued to pay the loan until 2005 when it was discharged with the loan from the second defendant's father.⁶⁵

⁵⁷ ts 130 - 131.

⁵⁸ ts 132.

⁵⁹ ts 164.

⁶⁰ ts 162.

⁶¹ ts 133.

⁶² ts 134, 164

⁶³ ts 134. Exhibit 7.

⁶⁴ Exhibit 19.

90 The first defendant first heard of any question about the signature
on the transfer in 2014, when he received a letter from Go to Court
Lawyers demanding that he pay the plaintiff \$200,000 within seven
days.⁶⁶

91 The second defendant also gave evidence. Although an interpreter
was initially sworn, the witness had a good command of English and
did not require that assistance. The interpreter was released before
cross examination.

92 The second defendant's evidence added little to the narrative. It
supported the evidence of the first defendant, to the extent that the
second defendant was involved in matters.

93 Importantly, the second defendant said that, after the transfer
document was signed before a Justice of the Peace, it was posted to
Marks Healy Sands.⁶⁷ In cross examination, she said that the transfer
form had not been signed by the plaintiff when it was returned.⁶⁸

94 The last of the witnesses was Victor Ward, whose name and
details appeared on the transfer form as the witness to the plaintiff's
signature.

95 Mr Ward had lived at the address shown on the transfer form for
32 years, and lived there in 1999.⁶⁹ He is currently retired, but in 1999
was a part-time security officer.⁷⁰ Mr Ward was registered as a
commissioner for declarations since 1979. He said that he did not have
much call to act as a commissioner for declarations. If he was asked, it
was generally at his home or at someone else's home, and usually for
people that he knew.⁷¹

96 Mr Ward knew the plaintiff in 1999, when she was living with his
son, Malcolm. He could definitely recall meeting her on one occasion
and perhaps on a second. One occasion was around about 1999.⁷²

97 Mr Ward did not know either defendant.

⁶⁵ ts 135.

⁶⁶ ts 166.

⁶⁷ ts 184.

⁶⁸ ts 198.

⁶⁹ ts 200.

⁷⁰ ts 201.

⁷¹ ts 201.

⁷² ts 203

98 When shown the transfer document, Mr Ward agreed that the details as to the address and occupation were correct, and the signature looked similar to his. But he thought there were some variations in the signature, and could not say for sure whether it was his signature. He could not recall signing the document.⁷³

Indefeasibility of the defendants' title

99 The defendants did not plead indefeasibility of title, although both parties opened and conducted the trial on the basis that it was an issue.

100 Section 68(1) of the *Transfer of Land Act 1893* provides:

Notwithstanding the existence in any other person of any estate or interest ... which but for this Act might be held ... to have priority the proprietor of land or of any estate or interest in land under the operation of this Act shall except in case of fraud hold the same subject to such encumbrances as may be notified on the registered certificate of title for the land; but absolutely free from all other encumbrances whatsoever ...

101 'Encumbrances' is defined in s 4(1), and includes 'all prior estates interests rights claims and demands which can or may be had made or set up in to upon or in respect of the land ...'.

102 By virtue of s 68, upon registration, the defendants' title as registered proprietors was immediately indefeasible,⁷⁴ subject to the exceptions for which the Act provides. The relevant exception is fraud. The plaintiff accepted that she must establish fraud or the defendants' title is free of any interest she may claim.

103 The onus of proving fraud is on the plaintiff.⁷⁵ To show fraud, she must show actual fraud, personal dishonesty or moral turpitude.⁷⁶ The fraud must be 'brought home' to the defendants, as those persons whose registered title is impeached, or to their agents. If the fraud is of an agent, the questions are what was the scope of the agent's authority, whether the agent's knowledge of the fraud is to be imputed to the principal, and whether defendants were knowingly involved in the dishonest conduct.⁷⁷

⁷³ ts 205.

⁷⁴ *Frazer v Walker* [1967] AC 569, 580 - 581; *Breskvar v Wall* [1971] HCA 70; (1971) 126 CLR 376.

⁷⁵ *LHK Nominees Pty Ltd v Kenworthy* [2002] WASC 291; (2002) 26 WAR 517 [218], [277].

⁷⁶ *Bahr v Nicolay (No 2)* [1988] HCA 16; (1988) 164 CLR 604, 614; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 [192].

⁷⁷ *Cassegrain v Cassegrain* [2015] HCA 2; (2015) 254 CLR 425 [40].

Findings

104 So much time has passed since the events leading to this action that the memory of the witnesses must be affected. I have not started from the position that the court should simply place little reliance on oral recollection. But I have assessed what the witnesses have said against the inherent probabilities of events occurring in the way described, and by reference to what can be established from the documents.

A resulting trust

105 The first issue, chronologically, is the defendants' contention that the plaintiff held her interest in the property on a resulting trust for the first defendant.

106 The defendants rely on the presumption that, although the first defendant and the plaintiff appear on the title as joint tenants, the property is held in trust for themselves as tenants in common in the proportions in which they contributed the purchase money. The presumption of a resulting trust can be rebutted by evidence from which it may be inferred that there was no intention on the part of the party providing the purchase money that an interest in the property be held on trust for them. The actual intention of the parties is to be determined as an ordinary question of fact on the balance of probabilities.⁷⁸

107 It was not in dispute that the property was purchased in joint names of the plaintiff and the first defendant during the course of an ongoing de facto relationship. The property was purchased as the couple's home. There was a dispute about whether the plaintiff contributed financially to the purchase. The first defendant said, in effect, that he provided the deposit from his savings, and paid the mortgage payments. The plaintiff said that she gave the majority of her weekly earnings to the first defendant, and provided \$1000 (half of the deposit) in cash.⁷⁹

108 The property was almost entirely funded by a loan in which the plaintiff and first defendant were the borrowers. It is not now necessary to resolve the dispute about the deposit.

109 The defendants submitted that the court should have regard to the contributions made by the first defendant to the payment of the

⁷⁸ *Bosanac v Commissioner of Taxation* [2022] HCA 34 [66].

⁷⁹ ts 58.

mortgage in finding whether there was a resulting trust in his favour. In that submission, they must confront the decision of the High Court in *Calverley v Green*.⁸⁰ The beneficial interests of the parties by reason of a resulting trust must be determined at the time the property was purchased and the trust created.⁸¹ I am not satisfied that the first defendant paid the purchase price alone. Both parties contributed to the purchase of the property by jointly borrowing funds, and then mortgaged the property to secure the performance of their obligation to repay the principle. The defendants submitted that the reasoning in *Calverley v Green* has come under scrutiny in recent years, but, as I understand it, it remains the law.

110 There is no dispute that, after the relationship broke down in 1997, the first defendant was solely responsible for the loan until the second defendant was included as a party to the mortgage in 1999. The fact that the plaintiff did not contribute to the mortgage after 1997 may be relevant in the consideration of what is equitable between the parties should there be an adjustment of property interests. But it does not affect the question of intention at the time of purchase.

Did the plaintiff ask to be released from the mortgage

111 The plaintiff and the first defendant separated in 1997. The plaintiff left in about November.

112 The first defendant said they discussed the plaintiff's wish to have her name taken off the mortgage.⁸² He contacted the University Building Society and asked how that could be done.

113 The letter from the University Building Society, dated 2 December 1997, does not establish whether the request for the plaintiff to be released from the mortgage came from her, or from the first defendant alone.

114 The plaintiff and her mother both denied any occasion when the first defendant came to the mother's house and saw the plaintiff. I did not find the plaintiff's mother to be a convincing witness.

115 The plaintiff denied the signature on the letter is hers. She also said her name was not correct (referring only to Elsa Dos Santos), and

⁸⁰ *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242.

⁸¹ *Calverley v Green* 252, 262.

⁸² ts 114.

the letter had her mother's address and not hers. She said the phone number on the letter was not known to her.

116 The family name 'Dos Santos' rather than 'Freitas Dos Santos' is used in the letter sent by the University Building Society. The use of the mother's address is not significant. The first defendant testified that he saw the plaintiff sign the letter.

117 There is a direct contradiction between the first defendant and the plaintiff about whether he saw the plaintiff at her mother's house on this and other occasions. The plaintiff denied any contact of any kind with the first defendant after she left the relationship. The first defendant gave more detailed evidence of occasions when they met.

118 It is not a contradiction that can be resolved by consideration of the witnesses' demeanour or any inconsistencies in their evidence. And it all relates to events that occurred (or did not occur) between 23 and 25 years ago. It is possible (even likely) that the first defendant would be wrong in details after more than 20 years, but could still be telling the truth that meetings occurred and agreements were made.

119 Ultimately, I have only been able to resolve the controversies between the parties on the essential material facts. To some extent, from those findings I can infer what has more likely occurred leading up to the signing of the transfer. But in the case of the December 1997 letter, I am left uncertain as to where the truth lies.

120 One fact that does emerge from the evidence about the release from the University Building Society loan and mortgage is the first defendant's complete lack of sophistication in his approach to the problem. Whether or not the plaintiff signed the letter, its preparation was apparently beyond the first defendant and it was drafted by his mother. It is a poorly worded and a clumsy attempt to meet the building society's requirements.

The transfer

121 The first question is whether the plaintiff's signature on the transfer was forged. The only direct evidence is that of the plaintiff, who denies that it is her signature.

122 The plaintiff does not plead that her signature was forged by either defendant, or by someone acting with their authority. Her case is that the defendants knew the signature was forged.

123 Assuming that the transfer was not signed by the plaintiff, the
issue is whether the defendants knew that she had not signed it.

124 The onus of proof is on the plaintiff to prove the defendants'
knowledge. That fact must be proved to the reasonable satisfaction of
the court; that is, the court 'must feel an actual persuasion of its
occurrence or existence'.⁸³ In considering whether I am satisfied, I have
regard to the serious nature of the allegation.

125 The signature alleged to be that of the plaintiff appears above that
of the first defendant as transferee, which may be more consistent with
her signing first, but is far from conclusive. The signature is in the
place marked 'EMFD' and a cross. There is no evidence about who and
when those marks were put there. The first defendant was not asked
why he signed in the lower signature place.

126 The signature is witnessed, and the identity of the purported
witness is significant.

127 Victor Ward, commissioner of declarations, of the address and
occupation shown on the transfer is the father of Malcolm Ward, who
was living with the plaintiff at the time the transfer was signed.

128 The plaintiff said that Mr Ward was 'possibly' Malcolm's father,
and that she met Mr Ward 'maybe two, maybe three times'.⁸⁴ Because
the plaintiff was speaking of events 20 years earlier, I infer nothing
from her failure to remember Mr Ward from his name and address.

129 Mr Ward remembered he had met the plaintiff on one or two
occasions, and she had once been to his home. Mr Ward could not say
that the signature on the document was his, and had no recollection of
witnessing a signature for the plaintiff, or ever witnessing a transfer of
land document.

130 The evidence about the signature must be assessed in light of its
inherent probabilities in the context of the objectively established facts.

131 First, Mr Ward and the defendants did not know each other. Each
gave evidence to that effect, and there is no contrary evidence.⁸⁵

⁸³ *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, 361; *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691, 712.

⁸⁴ ts 65.

⁸⁵ ts 136.

132 Second, the defendants say that they executed the transfer and returned it to Marks Healy Sands for the solicitors to arrange execution by the plaintiff. There is no objective evidence that they did, but it is consistent with the instructions in the letter of 8 July 1999.

133 The plaintiff relies on a prior inconsistent statement by the defendants that they gave the document to the plaintiff at her house, she took it inside, and brought it out signed. The first defendant agreed he made that statement, but said it was a 'sharp response I had made to a threatening letter from the lawyers'.⁸⁶ He said he had no legal assistance at that stage, he could not find any of his paperwork and was very stressed. He said it was a blurred memory, but wrong. I considered his explanation for the inconsistent statement - made 15 years after the event and in response to legal threat - was plausible.

134 Third, the plaintiff relies on an extraordinary coincidence that Mr Ward's name and details should be used in the witnessing. The use of his name and details by the defendants or by some third party acting on their behalf is inexplicable.

135 To find the facts contended for by the plaintiff, I would need to find one of these alternatives:

- (1) That, to the defendants' knowledge, someone forged the plaintiff's signature and contrived to have Mr Ward witness it;
- (2) That, to the defendants' knowledge, someone forged the signature of Mr Ward as witness to the plaintiff's forged signature.

136 None of those alternatives is likely. The defendants did not know about Mr Ward. The use of his name and details is not consistent with the defendants, or someone acting with or for them, arranging for the signing of the transfer by the plaintiff. It is more consistent with it being done by someone who knew of the plaintiff's relationship with Malcolm Ward, and knew Mr Ward's name, address, occupation, and appointment as a commissioner for declarations.

137 I have reservations about some of the first defendant's evidence, but I believe it is more likely that the defendants returned the transfer to Marks Healy Sands, for that firm or RAMS to arrange execution. And it has not been proved that either defendant saw the document after it

⁸⁶ ts 172.

was signed by the plaintiff. It is likely that the transfer was lodged by Marks Healy Sands - their invoice included registration as part of the services billed - so the defendants need not have ever seen it again.

138 I am not satisfied that it has been proved that he or the second defendant knew the plaintiff's signature on the transfer was forged.

139 The facts on which the plaintiff relies for the inference that the defendants were wilfully blind to whether the signature on the transfer was false are, first, that there was no agreement as alleged by the defendants, second, that there was no contract for sale between them, and third there was no consideration paid.

140 On consideration of all of the evidence, including my findings regarding the signing of the transfer, I believe it more likely that there was some antecedent agreement between the plaintiff and the first defendant.

141 The first defendant said that, in the period of around March to June 1999, he met the plaintiff, again at her mother's house and agreed to the transfer of the land and to be released from the loan. The plaintiff denies there was any meeting or any agreement.

142 There is no independent evidence about whether the meeting took place. The plaintiff points, properly, to the difficulty in the first defendant's account that he would turn up at her mother's house, not necessarily by prior arrangement, and she would be there. But, unless the defendants were, from the beginning, intending fraudulently to transfer the property into their names, without the knowledge and cooperation of the plaintiff, their conduct in contacting RAMS sometime in June 1999, and proceeding with the transfer and the new mortgage is inexplicable.

143 The circumstances of the transaction did not require there to be a contract of sale. The nature of the transaction was that the plaintiff was transferring her interest in the property to the defendants and, in consideration, being released from the obligations under the loan and mortgage to the University Building Society.

144 I draw no inference from the fact that the plaintiff was not paid the consideration shown on the transfer. The consideration of \$41,750 was an estimate of the value of a half interest for stamp duty purposes. The plaintiff had made no contribution to the mortgage since November

1997. The proprietors had only limited equity in the property, even if it was valued at \$83,500.

145 Finally, the plaintiff relied on the defendants' incentive to have the property transferred into their names, possibly including an incentive resulting from the desire to regularise the second defendant's visa status. First, the evidence suggests that the second defendant's visa had been resolved before June 1999. Second, it is true that the defendants had an incentive to have the property transferred to them. But that is not necessarily an incentive to do so dishonestly. The plaintiff also had an incentive to be released from a loan for the purchase of a property from which she then derived no benefit. At that time, about three years after the purchase, there would be little or no profit in a sale.

146 I also take into account that the plaintiff made no enquiry about either the loan or the property until 2014 when she first engaged solicitors. The plaintiff said the early period was due to her trauma from the lifestyle during the relationship with the first defendant. I can make no finding about that because she gave no detail. The plaintiff gave no evidence about anything in the period up to 2014, other than referring to the death of her brother in 2011, and the responsibility she then took on to care for his children. She did not explain at all why she took no action during such an extended period.

147 The standard of proof is applied on all of the facts found and at the final stage of the reasoning process.⁸⁷ It is also to be applied having regard to the serious nature of the allegations that the plaintiff makes. I cannot reconcile the plaintiff's case with objective facts - in particular, her inaction over a 15 year period, and the witness details on the transfer.

148 On all of the evidence, I am not satisfied that the plaintiff has proved the defendants had the required knowledge.

Limitation

149 In her opening written opening submissions, the plaintiff submitted that time to commence proceedings was extended by reason of concealed fraud.⁸⁸ The defendants amended their defence at trial, by consent, to plead the claim against them was barred by statute due to the passage of time.

⁸⁷ See, for example, *Palmer v Dolman* [2005] NSWCA 361 [41].

⁸⁸ *Limitation Act 1935* (WA), s 27.

ALLANSON J

150 The limitation issue does not arise where the plaintiff has not proved the fraud on which she relied.

Conclusion

151 The plaintiff has not established fraud on the part of either defendant. Her claim must be dismissed.