

# SUPREME COURT OF QUEENSLAND

CITATION: *Harris v Thomas* [2018] QSC 300

PARTIES: **MAUREEN ELIZABETH HARRIS**  
(Plaintiff)  
v  
**CHRISTINE LEE THOMAS**  
(Defendant)

FILE NO: BS No 12614 of 2017

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 14 December 2018

DELIVERED AT: Brisbane

HEARING DATE: 20, 21 and 22 November 2018

JUDGE: Bowskill J

ORDER: **The amended originating application is dismissed.  
I will hear the parties as to costs.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – RESULTING TRUSTS – WHEN ARISING – PURCHASE IN ANOTHER’S NAME – where the plaintiff is the mother of the defendant – where the plaintiff provided money for the purchase of a unit on the Gold Coast, which was transferred into the name of the defendant upon completion – whether the presumption of a resulting trust, in favour of the person providing the purchase money, is rebutted by evidence of their actual intention

*Calverley v Green* (1984) 155 CLR 242  
*Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353  
*Napier v Public Trustee (Western Australia)* (1980) 32 ALR 153  
*Nelson v Nelson* (1995) 184 CLR 538  
*Shephard v Cartwright* [1955] AC 431

COUNSEL: C Jennings for the plaintiff  
DJ Morgan for the defendant

SOLICITORS: Nyst Legal for the plaintiff  
Hansons Lawyers for the defendant

## Introduction

- [1] The plaintiff, Maureen Harris, is the mother of the defendant, Christine Thomas. She also has a son, Tony Harris, who is not a party to this proceeding, but is central to the dispute.<sup>1</sup> In November 2013 Mrs Harris provided the money to buy a unit at Southport on the Gold Coast. The unit was purchased in Christine's name only. The unit was sold by Christine in May 2017, and she used the proceeds of sale to buy shares. In August and September 2017 Mrs Harris demanded the return of the money. Christine refused.
- [2] Mrs Harris commenced this proceeding to try to recover the money. The proceeding began with the filing of an originating application, seeking a freezing order. That order was made, by consent, in December 2017. On 6 March 2018 an order was made for the proceedings to continue as if started by claim. After an ordered mediation in April 2018 was unsuccessful, pleadings were filed and the matter proceeded to trial.
- [3] The issue in the case is whether Mrs Harris intended to give the money used to purchase the unit at Southport to her daughter as a gift, absolutely, on the basis that she would have no beneficial interest in the property; or whether she intended that although Christine would acquire the unit, and be the legal owner, Mrs Harris would nevertheless retain a beneficial interest in the property she had paid for.
- [4] The final relief which Mrs Harris seeks is, according to the amended originating application filed on 20 November 2018:
1. a declaration that the defendant holds the shares on trust for the plaintiff;
  2. an order that the defendant do all necessary acts to transfer the shares to the plaintiff; and
  3. further or alternatively, an order that the defendant pay to the plaintiff equitable damages for breach of trust and/or breach of fiduciary duty, with interest.
- [5] In order to determine the issues, it is necessary to refer in more detail to the surrounding factual circumstances. Relevantly though, I proceed on the basis that in so far as the central issue in the case is concerned – the intention of Mrs Harris at the time she provided the money to buy the unit – what is relevant and admissible is evidence of the acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction. Subsequent declarations are admissible only as admissions against interest.<sup>2</sup>

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<sup>1</sup> For ease of reading, and without intending any disrespect, in these reasons I will refer to the plaintiff as Mrs Harris, and the defendant and most of the other witnesses by their first names.

<sup>2</sup> *Shephard v Cartwright* [1955] AC 431 at 445; *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 at 365; *Calverley v Green* (1984) 155 CLR 242 at 262 and *Nelson v Nelson* (1995) 184 CLR 538 at 547-549.

- [6] There is no contention of an express trust, nor any allegation of undue influence having been brought to bear. The plaintiff relies upon the presumption of a resulting trust, arising from the fact that she provided the money to buy the unit. The defendant says that presumption is rebutted in this case, by evidence of the plaintiff's actual intention at the time, which the plaintiff disputes.

### **Factual circumstances**

- [7] Mrs Harris is 77 years old and suffers from a number of serious medical conditions. She has mobility issues, and requires assistance with some day to day tasks, but suffers no cognitive impairments, and was variously described as independent, strong willed and as someone who, "when she makes her mind up that's her mind made up".
- [8] Mrs Harris' husband of almost 50 years passed away in April 2013. They lived in a home they owned in Corrimal, New South Wales (near Wollongong). Not long after her husband died, Mrs Harris took steps to sell that home. She says that her son Tony carried out some renovations to the home, prior to it being sold. She eventually sold the home in late August 2013, for \$480,000. She received about \$330,000 after various expenses were paid. That was the only asset Mrs Harris had.
- [9] After selling her Corrimal house, in late September 2013 Mrs Harris moved up to live with her son, Tony, on the Gold Coast in Queensland.
- [10] Some of her family, including her sister, Josephine Costanzo, and her daughter, Christine, and friends, thought it was too soon; that it would have been better for her to wait before selling the home, and that she should not move away from where she had lived for a long time, close to her friends, family and familiar medical practitioners. From things Mrs Harris later told them, they formed the impression that Tony had unduly persuaded her to sell the house and move to Queensland with him.
- [11] Having moved to Queensland, Mrs Harris only stayed there for about two months. She went back to Corrimal on 1 November 2013.
- [12] But in that short period of time, she entered into a contract to buy a unit at Southport, jointly with her son, Tony. The contract was dated 22 October 2013. The purchase price was \$285,000. Mrs Harris paid the deposit of \$25,000.
- [13] In her affidavit, Mrs Harris says "[a]fter I moved to Queensland, I began looking for a property to purchase. I asked Tony to assist me with that process. I told Tony that I'd like to purchase something big enough that he, Marjane [Tony's wife] and I could live in" (at [34]). She says she found an advertisement online for a unit at Southport, which she then made an offer to purchase. She says that:

"Before signing the contract to purchase the Southport Property, I told Tony that, given that he had contributed to the renovations of my previous property, I wanted to purchase the Southport Property in our joint names. I

told Tony that in exchange for putting his name on the title, he and Marjane would live with me and he would be my registered carer. Tony agreed and offered to cover all outlays for the unit such as body corporate fees, electricity, water, rates and insurance payments.” (at [36])

- [14] In her affidavit, Mrs Harris says that in the beginning of November 2013 (so less than two weeks after signing the contract) she had a telephone call with Christine, who convinced her she should move back to Corrimal, and told her “Tony just wanted me to buy a property in Queensland so that he could take my money and he would ‘rip me off’. She advised me to terminate the contract and return to Corrimal to live with her and her daughter” (at [40]).
- [15] Mrs Harris says she trusted her daughter at the time and took her advice. She says she has a vague recollection of speaking with her solicitor, Jason Prismall, about the contract, but cannot recall the details (at [41]).
- [16] At the trial, both Mrs Harris and her son, Tony, seemed to equivocate, and effectively deny, that they had retained a solicitor to act for them in relation to the purchase of the Southport unit. They clearly did. The solicitor’s file, which was admitted into evidence without objection, records a number of interactions, both written and spoken, between them and the solicitor, Jason Prismall. I reject their oral evidence, given at the trial, to the contrary. Mrs Harris’ affidavit at [41] is also inconsistent with her oral evidence at trial that “I can’t remember having any solicitor when I purchased that house – that unit”.<sup>3</sup>
- [17] In the space of a few days, arrangements were made for Mrs Harris to go back to Corrimal. Her sister, Josephine, accompanied her on that trip, because Mrs Harris was not strong enough to travel on her own. They were able to negotiate with the seller of the unit, to effectively rescind the contract entered into with Mrs Harris and Tony, and enter into a new contract for Christine to buy the unit.
- [18] Christine’s evidence was that she and her brother had never got along well, and she was not happy about what she regarded as her brother convincing their mother to sell the Corrimal house just after their father had died, and moving to Queensland with him.<sup>4</sup> In terms of how she came to find out about the unit on the Gold Coast, Christine said she had been away on a cruise in October 2013. When she returned, on about 29 October,<sup>5</sup> she spoke to her mother’s friend, Edrie, who told her she had recently seen Mrs Harris (who had been brought down to Corrimal by Tony for the interment of her husband’s ashes, while Christine was on the cruise). According to Christine, Edrie told her that Mrs Harris had been upset and crying, saying she wanted to come back, that Tony “locks me up” and she should have listened to everyone (at [27]). Christine then rang her mother. In her affidavit, Christine said her mother told her in the phone

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<sup>3</sup> T 1-46.

<sup>4</sup> T 1-66.

<sup>5</sup> T 3-16.

conversation that “I want to come back. He [Tony] locks me up. My back is hurting and I’m not well” (at [28]). In cross-examination Christine acknowledged that her mother had not actually said to her that Tony “locks her up”; Christine had been told that by Edrie.<sup>6</sup> Although counsel for the plaintiff contended this was a reason to find Christine to be an unreliable witness. In my view, given the way in which Christine spoke about this in her oral evidence, I regard this as more likely the result of an error in the preparation of the affidavit, rather than a deliberate attempt to overstate the facts.

[19] In any event, Christine said she would arrange to get her mother back down to Corrimal as soon as she was feeling better. As she explained in her oral evidence, this conversation happened on the Tuesday (I infer, 29 October 2013). At this stage Christine did not know about her mother having purchased the unit.<sup>7</sup>

[20] Two days later, on the Thursday, Christine says she received a phone call from her Auntie Josie (Mrs Harris’ sister) who told her she should ring her mother. Christine did that, and says that in this conversation Mrs Harris told her “Tony tricked me. I bought a property up here. I didn’t know it. I thought I was just going to look at it” (at [30]-[33]).

[21] Christine said her first reaction was to tell her mother to call the real estate agent and tell them she was pulling out of the contract, referring to the cooling off period. Her mother rang back later to say the cooling off period had ended the day before and also that Tony’s name was on the contract. In her oral evidence Christine said the next thing she suggested was that her mother get Tony’s name off the contract, and proceed with the purchase in her name only, even if she had to pay money for that.<sup>8</sup>

[22] Mrs Harris’ sister, Josephine Costanzo (Josie) was in contact with Mrs Harris during the eight weeks she was in Queensland in late 2013 and says Mrs Harris was upset and crying all the time and complaining that she felt she had been manipulated by her son (at [4]). Mrs Costanzo said Mrs Harris told her she had unknowingly purchased a residential unit in Queensland with her son Tony, saying “I thought I was only signing to rent the property, but it was a contract to buy” (at [6]). Mrs Costanzo said:

“In late October 2013, I received upsetting phone calls from [Mrs Harris]. She was crying non-stop saying she did not wish to live with her son Tony any more as the living conditions and way of life weren’t as he had promised. [Mrs Harris] told me: ‘He locks me in the unit and goes out. He says to me: this is for your own safety.’” (at [7])

[23] In response to that Mrs Costanzo telephoned Christine, and told her that Mrs Harris was upset. Christine then made arrangements for Mrs Costanzo to go and pick Mrs Harris up from Southport, and travel back to Corrimal with her. This was on 1 November

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<sup>6</sup> T 1-71 to 1-72.

<sup>7</sup> T 1-71.

<sup>8</sup> T 1-68 to 1-69.

2013.<sup>9</sup> Mrs Costanzo described Mrs Harris as appearing upset, frail and in poor physical health on that day. After arriving in Corrimal, Mrs Costanzo stayed with Mrs Harris for a few days at Christine's home (at [11]-[12]).

- [24] Matthew Costanzo, Mrs Costanzo's son, who was living with her in Queensland in 2013, drove Mrs Harris and Mrs Costanzo to the airport at Coolangatta on the day they flew back down to New South Wales. He said it was a very tense situation when he went to collect Mrs Harris from Tony's house. He said Mrs Harris was very upset, and "Tony was not friendly, but quite intimidating" (at [13]-[14]).
- [25] In her affidavit, Mrs Harris denies she said the things Christine recalls of the conversation and says "it was my intention to buy the Southport Property jointly with Tony".<sup>10</sup> The appropriate finding to be made here is complicated. On the one hand, I prefer the evidence of Christine, supported as it is by the evidence of Mrs Costanzo, whose evidence I accept. Mrs Costanzo impressed as an honest and reliable witness. She was clearly close to her sister, Mrs Harris, at the time of these events. She has no interest in taking a particular side in this dispute; in fact, it would not be unreasonable to think her loyalties would favour her sister. But she impressed as someone simply telling the truth as she recalled it. However, it is also somewhat difficult to accept that Mrs Harris did not know she was entering into a contract to buy a unit, with her son Tony. She signed the contract; she dealt with the real estate agent and the solicitor; she paid a deposit of \$25,000. On balance, I find that Mrs Harris did know that she had entered into a contract to buy the unit, but told Christine and Mrs Costanzo that she did not realise, because she was ashamed or embarrassed to admit what had happened. It seems clear she regretted entering into the contract almost immediately. It is not necessary for me to form any concluded views about whether she was manipulated by Tony.
- [26] Mrs Harris says in her affidavit that she informed her son, Tony, of her decision to go back to Corrimal, and that "Tony suggested that I go ahead with the purchase and sell the property as an investment" (at [42]). That is at odds with the evidence of Christine, Mrs Costanzo and Matthew Costanzo, and even the evidence of her son, Tony, who said, of the day when Mrs Costanzo and Matthew came to pick Mrs Harris up to take her home that he was "Quiet. I sat on the lounge when they came and I never said anything to anyone, because I was still in shock that she was going because I had no idea anything was wrong".<sup>11</sup> Mrs Harris also contradicted that in her oral evidence, in which she said "Tony didn't even know I was moving back home until the day I moved", "We did not have a conversation".<sup>12</sup>
- [27] I regret to say that I find myself questioning much of what appears in Mrs Harris' affidavit, because of its inconsistency with the evidence of other, independent

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<sup>9</sup> Affidavit of Christine Thomas at [36]-[40].

<sup>10</sup> Second affidavit of Mrs Harris at [10].

<sup>11</sup> T 1-36.

<sup>12</sup> T 1-48.

witnesses, about events at the relevant time. What emerged at the trial, from the whole of the evidence, was that Mrs Harris' affections had shifted quite considerably, from her daughter in late 2013, to her son, in late 2017. There is a considerable concern in this case that much of what Mrs Harris says in her affidavit about her intentions regarding the Southport unit in October and November 2013 is not the truth. Whether that is due to her own choice, reflecting her shifting affections; or driven by her son, as suggested by Christine, I do not know. Mrs Harris was certainly adamant in the manner in which she gave her evidence before the court, and did not present as someone whose will was overborne.

[28] After coming back down to Corrimal, Mrs Harris lived with Christine and her daughter, Tayla, until February 2015, at which point she moved into a flat near Christine.

[29] On the Monday after travelling back down to Corrimal, 4 November 2013, there was a dinner at Christine's house, at which Mrs Harris, Christine, Mrs Costanzo and Christine's son, Jacob, were present. As recorded in Christine's affidavit at [45]-[47]:

“During that dinner [Mrs Harris] said to me: ‘I rang the solicitor today and told them I wanted the contract changed and to purchase the property in your name solely. I don't want Tony or his wife getting any of it when I die.’

I said: ‘Are you sure? You're in poor health now, but it doesn't mean you're going to die anytime soon. Are you sure this is what you want to do?’

She said: ‘I want you to have the money so that you can buy the property, it's for you and my grandchildren, and I don't want Tony and Marjane to inherit anything after what he has done. He manipulated and tricked me and has taken advantage of me so close after your father's death and I was not thinking straight. I'm giving you the money this is yours and my grandchildren's inheritance, I don't have a Will and I don't expect to have anything left to leave anyone. I know you will do the right thing.’”<sup>13</sup>

[30] In her oral evidence, Christine referred to her mother saying, at the time of giving her the property that she (Christine) would do the right thing, and said “me doing the right thing was to help my mother while she was still alive”.<sup>14</sup>

[31] Jacob Harris, who was at the dinner, gave evidence in his affidavit that Mrs Harris (his grandmother) said (at [11] and [12]):

“I've been a mess up there and Tony misled me into purchasing a unit. He got me to sign documents at the solicitor's office saying that it was only so that we can look at a house, but it was actually a contract to buy.”

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<sup>13</sup> See also T 1-75.

<sup>14</sup> T 1-93.

And

“I’m going to have it put in your name Christine. I don’t want Tony or his wife getting any of it. I’ve told my lawyer this morning to put it in your name.”

- [32] In his oral evidence Jacob repeated that he recalled Mrs Harris saying “that she was extremely unhappy with what he’s [Tony] done with her, how she felt betrayed, ripped off by him and how she really didn’t want anything to do with him after what he’d done” and that she said “she wanted the money to be placed into mum’s name, to protect her future, my – myself and my sister’s future, and for Tony not to receive anything after what he had done.”<sup>15</sup>
- [33] Mrs Costanzo’s evidence about what was said at this dinner was (at [14]-[19]) along the following lines:<sup>16</sup>

“... [Mrs Harris] stated: ‘I spoke to my lawyer this morning. I’m getting out of the contract to buy the unit and I’ve told him it’s to be purchased in Christine’s name alone. I’m giving Christine the money to purchase the property.’

I was taken aback by this and said to [Mrs Harris]: ‘Are you sure this is what you want to do?’

It appeared to me that [Christine] was also surprised by [Mrs Harris]’ proposal.

In spite of other suggestions we put to [Mrs Harris] and our asking her if she was sure about this, [Mrs Harris] insisted: ‘This is what I want to do. I’m upset with Tony and I want to protect Christine after I die. I don’t want Tony or his wife to get any of it.’

It seemed to me that this is what [Mrs Harris] was intent on doing.

[Mrs Harris] went on to say: ‘I know Christine will do the right thing by all and I’m very sorry for what I have put her through. I should never have listened to Tony and let him take advantage of me.’”<sup>17</sup>

- [34] Mrs Costanzo was definite that Mrs Harris said she wanted to give Christine the money to buy the unit, and she didn’t want Tony and his wife to get anything.

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<sup>15</sup> See also at T 2-29 to 2-30.

<sup>16</sup> T 2-42.

<sup>17</sup> See also at T 2-39 to 2-40 and 2-42.

- [35] In her affidavit, Mrs Harris denies she said these things at the dinner.<sup>18</sup> For the same reasons as I have given above, I prefer the evidence of Mrs Costanzo to that of Mrs Harris. Christine and Jacob's evidence is consistent with that of Mrs Costanzo.
- [36] Christine's daughter, Tayla Harris, was not at the dinner. But she lived with her mother and her grandmother (Mrs Harris) in Corrimal from the time Mrs Harris returned in November 2013, for about a 15 month period. She said when Mrs Harris arrived, she looked frail and unwell. Tayla's evidence was that she could recall occasions when Mrs Harris said to her, in passing comments, things like "I gave your mother the property in Queensland. I want you to be looked after when I'm gone. I don't want your Uncle Tony to have anything to do with it because he's – the way he's treated me in the past".<sup>19</sup> Mrs Harris denies this in her affidavit. Given its consistency with the evidence of Mrs Costanzo, I accept Tayla's evidence about this.
- [37] Further evidence of Mrs Harris' intentions was given by Susan McMurtrie, who is the daughter of Edrie Thorne, an old friend of Mrs Harris, from Corrimal. She describes herself as a friend of the family for many years, having been friends with Christine since she was in kindergarten. Although that was submitted as a reason to doubt the reliability of her evidence, I do not accept that. I did not form the view that Susan was giving evidence simply to support Christine, regardless of the truth. She, like Mrs Costanzo, was a compelling witness and, having regard to the evidence overall, I accept what she said as truthful and reliable.
- [38] Susan recalled a conversation with Mrs Harris, at the time she was selling her Corrimal home, after the death of her husband, in which she said "I think you're rushing into this and you should take it more slowly". They were at the dining room table in Mrs Harris' Corrimal home. Susan recalled Mrs Harris saying to her "I know. But I have no choice. I've been pushed into this. I'm too scared to tell Tony that this isn't what I want". Susan said to her "But you do have choices".<sup>20</sup> She said she remembers this conversation clearly because she was very upset about it.<sup>21</sup>
- [39] The next time she saw Mrs Harris was a few days after she had returned from Queensland. She recalled being on the verandah of her parents' house, with her parents, Edrie and Noel Thorne, and Mrs Harris. She described Mrs Harris as looking extremely frail, hunched over and using a walking frame, which she had not before. Susan says her mother, Edrie, told her during that conversation, in the presence of Mrs Harris, that Mrs Harris had asked Edrie to take her to the bank that day so that she could transfer money to a solicitor's account for the purchase of a unit in the name of Christine.<sup>22</sup> That was a matter of dispute elsewhere in the evidence, with Mrs Harris saying Christine took her to the bank, and Christine denying that. To the extent it

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<sup>18</sup> Second affidavit of Mrs Harris at [11], [35]-[36] and [45].

<sup>19</sup> Affidavit of Tayla Thomas at [5], [9]-[10]; her oral evidence at T 2-24 (quoted).

<sup>20</sup> Affidavit of Susan McMurtrie at [2]-[4]; T 2-8 to 2-9.

<sup>21</sup> T 2-9 and 2-10.

<sup>22</sup> See also at T 2-5.

matters, I prefer Christine's evidence to that of Mrs Harris, given the concerns I have expressed elsewhere about the reliability of parts of Mrs Harris' evidence.

- [40] Of the conversation on the verandah, in which Mrs Harris said she was purchasing a unit in Christine's name, Susan says, at [11]-[14] and [16] of her affidavit:

“I said to [Mrs Harris]: ‘Why are you doing that?’ I was a close lifelong friend of [Christine], but I thought it was a stupid idea and I told [Mrs Harris] that's what I thought.

In reply, [Mrs Harris] said to me: ‘That's the way I want it. So Tony and Marjan ... can't get their hands on anything.’

I said to her: ‘But there are other ways of doing it. You can take care of that sort of thing with your will.’

I recall that I also suggested to [Mrs Harris] in that conversation that it would be better to at least buy the property with her name on it together with Christine's. [Mrs Harris] rejected this idea as well.

...

However, despite my suggestions to her, [Mrs Harris] insisted saying: ‘It's how I want it.’ She was quite firm about it.”

- [41] She reiterated in her oral evidence that Mrs Harris “was certain”, “she wanted it solely – the – for Christine to have it and that was it. Yep. So Tony and his wife couldn't get any of it”.<sup>23</sup> Although, again, Mrs Harris denied this conversation occurred,<sup>24</sup> for the reasons already given I accept Susan's evidence.
- [42] Susan's mother, Mrs Edrie Thorn did not give evidence at the trial. She was said to be 75 years of age, and lives in Wollongong. She was reluctant to give evidence as she did not want to get involved in other people's family affairs. Quite fairly and reasonably, no *Jones v Dunkel* point was taken by counsel for the plaintiff about this.
- [43] The day after the 4 November 2013 dinner, Christine contacted Jason (Prismall), the solicitor from Conveyancing Solicitors who had acted for her mother and Tony in relation to the purchase of the Southport unit.
- [44] That solicitor has since passed away. The solicitors' file relating to the purchase of the Southport unit was obtained, however, and tendered into evidence without objection.<sup>25</sup>

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<sup>23</sup> T 2-11.

<sup>24</sup> Second affidavit of Mrs Harris at [23].

<sup>25</sup> See s 92(1)(a) and (2)(a) of the *Evidence Act 1977* (Qld) (admissibility of documentary evidence, where the maker of the statement contained in the document had personal knowledge of the matters in the document, and could have given oral evidence of the facts contained in the document, but is dead).

The file includes file notes, accepted to have been made by the solicitor, Jason Prismall, which were relied upon as supporting the defence in this proceeding.

- [45] There is a file note which appears to record telephone attendances on Maureen Harris and Tony Harris on 1 November 2013 (which is the Friday on which Mrs Harris flew back down to New South Wales with her sister). This note records, on the first page:

“Spoke to Maureen Harris

Moving back to NSW

[*following arrow up the page*] Advised she would lose \$25K and seller can re-sell and sue for short fall on damages – maybe another \$25K and legal costs

[*unclear*] She was under duress when she signed the contract

[Aware of the cooling off period when she signed contract.

No email address

Liked the place, thought she liked Qld but she doesn’t and wants to go back to NSW.”

- [46] Mrs Harris said she didn’t know if she had spoken to a solicitor, and specifically denied that she had the above conversation. As discussed above, I reject as unreliable her assertions that she had not engaged a solicitor to assist with the purchase of the unit. I also reject as unreliable her denial of this conversation (or the effect of it).

- [47] The second page of the note records a telephone attendance with Anthony Harris:

“Explained the position to Anthony that if they terminate the unconditional contract that they would lose \$25K deposit and also liable for any loss seller suffers on a resale and the seller’s legal expenses. Tony is going to speak to his mother over the weekend and will call back with instructions on Monday.”<sup>26</sup>

- [48] A further file note appears on a copy of an email sent on 4 November 2013 (the day of the dinner referred to above) from an administrative assistant with Conveyancing Solicitors to Jason Prismall, which states that:

“Lauren [sic, Maureen] Harris’s daughter (Kris) called and wants you to call her back ... regarding her brother trying to rip off her mother and she wants to know what is happening.”

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<sup>26</sup> Exhibit 1, at pp 804-805.

- [49] There is handwriting on the copy of this email, referring to a telephone attendance on 4 November 2013 on Christine. There is also a note which says:

“Spoke to Maureen

Daughter is to [be] the sole purchaser”<sup>27</sup>

- [50] That same day Mr Prismall wrote a letter to the solicitor for the seller saying “[d]ue to family issues, we have been instructed to request that your clients enter into a Deed of Rescission contemporaneously with a new Contract on the same terms and conditions save that the existing Buyers be replaced with Christine Lee Thomas”.<sup>28</sup>

- [51] A separate file note, dated 4 November 2013, records a telephone attendance with Ross Flowers, who was the real estate agent Mrs Harris had dealt with. This note records:

“He will speak to the solicitor for the seller and the seller but does not see this will be a problem. Thought something may be wrong.”<sup>29</sup>

- [52] Another file note, also dated 4 November 2013, records a telephone attendance with Anthony Harris. This note records:

“Confirmed mother wanted to proceed with contract in daughter’s [name] only

He does not want [anything] to do with it and is ok to sign a Deed of Rescission

He is in NSW at the moment buying a BMW motor cycle”<sup>30</sup>

- [53] Tony denied the contents of this conversation. I infer the first line of this note is a reference to the solicitor confirming that matter, not Tony.

- [54] The weight of this evidence is affected by the inability of the plaintiff’s counsel to cross-examine the solicitor about the contents of his conversations as recorded in the file notes. However, having regard to the other evidence which I accept, the solicitor’s file notes do support the finding that it was Mrs Harris’ intention that Christine would be the sole purchaser of the unit; and that the reason that transaction came about was that Mrs Harris wanted to get out of the contract she had entered into jointly with Tony, and wanted to avoid losing the \$25,000 deposit and potentially becoming liable for any shortfall in the purchase price on a resale. Although Mrs Harris denied she was advised of those risks in a conversation with the solicitor, she did acknowledge that she was generally aware of that.<sup>31</sup>

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<sup>27</sup> Exhibit 1, at p 723.

<sup>28</sup> Exhibit 1, at p 727.

<sup>29</sup> Exhibit 1, at p 729.

<sup>30</sup> Exhibit 1, at p 734.

<sup>31</sup> T 1-48.

- [55] In her affidavit Mrs Harris says that Christine convinced her to “take Tony’s name off the contract”, as he was going to rip her off and take her money, and that she also said that if Mrs Harris purchased the unit in her sole name, she would be ineligible to continue to receive the aged care pension, so it would be better to have Christine’s name on the title. Mrs Harris also said that her daughter “said that the property, once purchased, would be my property and that she would help me sell the property and buy another property in Corrimal” (at [44]). Mrs Harris says she agreed to purchase the unit “jointly with her [Christine]” (at [45] and [48]). Somewhat confusingly, Mrs Harris says in her affidavit that “at this stage” (that is, at the time she moved back to Corrimal) she was planning on selling the Southport unit, but that Christine convinced her it was not a good time to sell, and they should rent it out instead (at [54]). She could not explain why she would have gone ahead with the purchase of the Southport unit, when she intended to sell it immediately, as opposed to buying something in Corrimal. The risk of losing the deposit may be the explanation, but Mrs Harris did not say this.
- [56] This is not a matter in which it is only Mrs Harris’ word against that of Christine. Christine’s version is supported by the independent evidence of Mrs Costanzo and Susan McMurtrie, in particular, and also the solicitor’s file notes (in relation to Christine being the sole purchaser). Whilst the weight of Christine’s evidence could be diminished on the basis of self-interest, and one could envisage Christine’s children, Jacob and Tayla, wanting to support their mother; as I have said above, objectively, I do not accept that as a reasonable explanation for Mrs Costanzo’s or Susan’s evidence. What Mrs Harris says about how the contract came to be entered into in Christine’s name only is inconsistent with what she said to Mrs Costanzo and Susan at the relevant time, and is also inconsistent with what appears in the solicitor’s file notes.
- [57] A Deed of Rescission was signed in early November 2013 by the seller, Mrs Harris and Tony, under which they agreed to terminate the 22 October 2013 contract, and transfer the deposit paid under that contract to the new contract to be entered into by Christine.
- [58] That new contract was also signed in early November 2013. It is not clear precisely on which date.<sup>32</sup> This contract named Christine only as the buyer. The balance of the purchase price, of \$260,000, was paid by Mrs Harris, by telegraphic transfer from a bank in Corrimal.<sup>33</sup> As mentioned above, there was a factual dispute about whether Christine had gone to the bank with her mother. For the plaintiff, reliance was placed on the description of the purpose of the transfer, on the transfer request form, as “money owing”. That was submitted to be a factor supporting the plaintiff’s contention, on the basis it was “money owing” by Christine. However, it could readily

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<sup>32</sup> There was some brief confusion, during closing submissions, about the date of the second contract, as it appears to still bear 22 October 2013, the date of the earlier contract Mrs Harris and Tony signed. Leave was given to recall Christine to clarify this. Both parties accepted it was an anomaly. It is clear the second contract was entered into on or about 5 November 2013 (the day the balance of the purchase price was paid).

<sup>33</sup> Exhibit 1, p 554.

be a reference to “money owing”, as the balance of the purchase price, to the seller. I do not find this document assists the determination of the issue in the case.

- [59] Christine became the registered owner of the unit around 19 November 2013. In January 2014 she says she declared the purchase to Centrelink, as she realised that the acquisition of the property by her, and receipt of rental income, would affect her entitlement to social security payments she was receiving (at [66]).
- [60] There was also evidence about subsequent events, later in time, variously relied upon in terms of demonstrating the intention of Mrs Harris at the time.
- [61] Mrs Harris’ nephew, Matthew Costanzo (one of Mrs Costanzo’s children), who lived with Mrs Harris for a period of time from November 2016, gave evidence that while he was living with Mrs Harris she rarely spoke to her son, Tony, and to his observation was not on good terms with him. This was on the basis that Tony’s name never really came up and there was never any interaction between him and his mother that Matthew was aware of.<sup>34</sup> This is consistent with Tony’s evidence, who said he did not see his mother from when she moved back to New South Wales in November 2013 until August 2017 (when he went down to see her, shortly after the phone call referred to in the next paragraph). Tony described speaking to his mother “spasmodically” on the phone in the intervening period.<sup>35</sup>
- [62] Matthew recalled Mrs Harris telephoning Tony in July 2017 for his birthday and said (at [10]-[12]):

“... after the call she was upset and said to me: ‘He wants money off me for helping fix up my house before it was sold. He wants me to get it to him somehow. He said he knows that the unit in Queensland has been sold.’

[Mrs Harris] continued and said to me: ‘I’m worried that he will find out that I gave the money to Christine so she could buy the property. I don’t have any money to give him.’

[Mrs Harris] further told me: ‘I gave my money to Christine after what Tony had done to me. I didn’t want him or his wife to get any of it. I wanted to make sure he couldn’t get at it. I want it all to go to Christine and her kids.’”

- [63] Matthew said in his oral evidence that he remembered the conversation “because of the way it affected my aunty at the time”, saying she was “pretty distraught... pretty upset”.<sup>36</sup>

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<sup>34</sup> T 2-16.

<sup>35</sup> T 1-20, 1-21 and 1-37.

<sup>36</sup> T 2-19.

- [64] Matthew was a less impressive witness, whose oral evidence at the trial gave me some cause for concern about the reliability of parts of his affidavit. However, I accept his evidence about this, having regard to the other evidence in the case which I have accepted.
- [65] Finally, there was the evidence of a telephone conversation on 25 August 2017. On this date, which was shortly before these proceedings were commenced (in November 2017) Mrs Harris and Tony made a plan to record a telephone conversation with Christine, I find, in order to collect evidence to use in the proposed proceedings.<sup>37</sup> Matthew Costanzo, who was still living with Mrs Harris at the time, recalled coming home from work on a day in August 2017 and seeing Mrs Harris and her son in the living room. Mrs Harris said they were going to give Christine a call. Tony said “It’s being recorded so we’ll need a bit of quiet”. Matthew went to his room, closed the door and put his headphones on. He did not hear any conversation.<sup>38</sup>
- [66] At the beginning of the conversation, at two points, Mrs Harris can be heard saying “do it now?”, which I infer is her speaking to Tony, and asking if she should raise the issue of the money now. In the course of the conversation<sup>39</sup> Mrs Harris makes reference to the unit, and it having been sold, and the money being invested (in a fixed term, or a “trust thing”, as Christine put it) and asks “how long before I can get the full amount?”. Christine says she can’t get it out, because it is invested and “I’m not pulling it out for you to bloody put through the pokies” (p 2). They argue about Tony, and whether Tony has been asking for money. Christine refers to Mrs Harris getting \$400 a month (from the investment).
- [67] Mrs Harris returns to the topic of getting the money out in a lump sum, and the following exchange occurs:<sup>40</sup>
- “MH:        yeah but you say that I can’t get me money in one lump sum  
 CLT:        no, I can’t  
 MH:        why?  
 CLT:        because its fucking being invested  
 MH:        yeah but it’s in your name!  
 CLT:        and?  
 MH:        well what if I die tomorrow?  
 CLT:        then there is no fucking problems then is there  
 MH:        oh yeah you and the kids get everything; and what if you died tomorrow

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<sup>37</sup> See, eg, T 1-22.39 to 1-23.8 (evidence of Tony Harris) and at 1-53 to 1-54 (evidence of Mrs Harris).

<sup>38</sup> Second affidavit of Matthew Costanzo at [3]-[9].

<sup>39</sup> A recording of which is part of exhibit 1; with a transcript marked “B” for identification.

<sup>40</sup> MH is Mrs Harris. CLT is Christine. Differences from the transcript are based on what I heard when listening to the recording.

CLT: ah hold on, um me and the kids get everything? Do you think that one thing is going to your fucking son, do you honestly think? After what he has fucking done. You remember he is the one that put you in this situation and you fucking let him. So, you think I would hand over a fucking cent to him?

MH: probably not...<sup>41</sup>

[68] The conversation, and argument, continues, and a bit later the following exchange occurs:

“MH: well look anyway, are you saying I can’t get my money

CLT: no, you can’t get the \$300,000 its been fucking, what part of been invested can you not understand? ... what part can’t you understand?

MH: well what if you died, I’m not saying I want you to die but like say you have a car crash Chris, what happens to the money seen that’s in your name

CLT: because now it’s been written into my will okay and while you’re still alive it is still classed as your money, okay

MH: uh

CLT: yeah

MH: okay

CLT: that should clear everything, okay?

MH: right

CLT: but, but if you died, don’t think I’m giving your son a fucking thing because he cost you over \$400,000.00, caused a lot of fucking problems, everything could’ve been fine, okay

MH: yeah ...<sup>42</sup>

[69] In relation to the reference to Christine’s will, in cross-examination Christine denied that by saying that she was admitting it was her mother’s money. She said “I class it as my mother gave it to me that I wasn’t going to waste it while my mother was still alive. If I needed to use it to help my mother, it was there. If I had died, I put it in the will that the kids were to look after Mum.”<sup>43</sup> Christine’s evidence of the will was that it did not provide for her mother to get the money if she (Christine) died, but rather that if she died, it was for her children to look after her mother, to still provide for Mrs Harris.<sup>44</sup>

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<sup>41</sup> At p 4.

<sup>42</sup> At p 9.

<sup>43</sup> T 1-98 to 1-99.

<sup>44</sup> T 1-99.

[70] She said she could not now produce the will, as she tore it up “after all this happened”, saying she felt betrayed by her mother.<sup>45</sup>

[71] When the conversation with Christine comes to an end, the recording continues for a short time, and captures the following exchange between Mrs Harris and Tony:

“MH:                    That should do it. I don’t want her to get anything. I want you to get it all Tone. You’re the one that’s helped me the most.

TH:                    Alright lets see if this has recorded it

MH:                    Oh fuck, that was hard...

TH:                    It’s still recording...

MH:                    I want to question Matt.”<sup>46</sup>

[72] That last reference to “I want to question Matt”, I infer, is in relation to things Christine told her mother, during the conversation, that Matthew had told Christine, for example about Tony asking for money, for the work he had previously done on the house.

[73] Consistent with the principles referred to at the start of this judgment, evidence from the telephone conversation is only admissible on the question of what Mrs Harris’ intention was as at November 2013, to the extent it constitutes an admission against interest of either party. For the plaintiff, particular reliance was placed on the fact that Christine did not say, during this conversation, something like “what are you talking about? You gave me that money” and, also, on what Christine said about her will, which it was submitted ought to be taken as an admission that the money, and assets purchased with it (the unit, and then the shares) remained the property of her mother. On the other hand, Mrs Harris does not make any admissions against her interests in this case, in the telephone call, which is explicable by reason of the fact that she, and Tony, deliberately set up the phone call, to obtain evidence to use against Christine. For the defendant, particular reliance is placed on that fact, and Mrs Harris’ closing comments of “that should do it” etcetera, as detrimentally impacting Mrs Harris’ credibility. I accept that submission. I would regard the contents of the phone call as not reflecting well on Christine’s credibility, either, as it is clear she is not being candid with her mother about what she has done with the money, and her description of the terms of her will is not accurate. However, in so far as her comments about the will are relied upon as an admission contrary to her argument in this case, in my view they are equivocal: they could equally support the finding, which I have ultimately come to, that the money was a gift to Christine, to buy the unit, with a familial understanding that Christine would take care of her mother. The recorded telephone conversation does not cause me to form a different view about the evidence of intention from November 2013.

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<sup>45</sup> T 1-98.

<sup>46</sup> At p 14.

- [74] To complete the factual circumstances, the unit at Southport was rented out from then until May 2017. The rent received was paid to Christine, who also paid the expenses associated with owning the property. Some of the rent was paid to Mrs Harris, along with other money given by Christine to her mother from time to time.
- [75] In May 2017 Christine entered into a contract to sell the unit for \$380,000. That contract settled on 13 June 2017 and, after payment of various expenses, \$368,967.25 was deposited into Christine Thomas' bank account, being the net proceeds of the sale.
- [76] On about 14 July 2017 Christine used \$300,000 of that to purchase 3,620 Commonwealth Bank shares. According to exhibit 3, as at 12 November 2018 the shares were worth just under \$260,000.

### **Consideration**

- [77] The relevant principles are not controversial and may be simply stated.
- [78] Where property is purchased with the money of one person (A), but transferred by the seller on completion of the sale to a second person (B), it will be presumed as a matter of law (if no more is known) that the property is held by B in trust for A: B is the legal owner; A is the beneficial owner. This is known as a resulting trust. This is subject to the exception that where, for example, B is A's child, there is a presumption of advancement, so that B is taken to acquire the legal and beneficial ownership of the property. This is on the basis of an assumption, from the relationship between A and B, that A intended to give B both the legal and beneficial interest in the property. Both of those "presumptions" may be rebutted by evidence of A's actual intention.<sup>47</sup>
- [79] Mrs Harris, who provided the money to buy the Southport unit, relies upon the law relating to resulting trusts to contend that she became the beneficial owner of the unit, even though Christine was the legal owner. Christine does not seek to rely on the presumption of advancement. She contends that the presumption of a resulting trust is rebutted by the evidence of Mrs Harris' actual intention at the time she provided the money, which Christine says was to give the money to her to buy the unit, with the intention that she would hold the legal and beneficial title to it, in order to divest Mrs Harris of that asset, to prevent her son, Tony, gaining any entitlement to it.
- [80] On the evidence before the court, I am satisfied that Christine has discharged the onus on her of proving that it was her mother's intention to give the money to her to buy the Southport unit, absolutely. The evidence of Mrs Costanzo and Susan McMurtrie, in particular, supports the finding that Mrs Harris' intention at the time was to give the money to Christine, so that she could complete the purchase of the Southport unit, and in that way Mrs Harris could avoid losing the \$25,000 deposit. But also so that she could put that asset – the proceeds of sale of her former matrimonial home, now

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<sup>47</sup> See *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 at 365; *Napier v Public Trustee (Western Australia)* (1980) 32 ALR 153 at 158-159; *Calverley v Green* (1984) 155 CLR 242 at 246, 255-256 and 266-267.

converted into the Southport unit – out of the reach of Tony and his wife, who was at that time out of favour with Mrs Harris. There are two clear themes that emerge from the evidence which I have accepted: one, that Mrs Harris intended Christine to be the sole purchaser of the unit; and, two, that she wanted to ensure she had divested herself of her one substantial asset, so that Tony (and his wife) could not benefit from it after her death. The only way to achieve that, apart from a will, which Mrs Harris expressly disavowed, was to give it away.

- [81] Mrs Harris’ intention, I find, was to give the money to Christine, on the basis that, based on Mrs Harris’ affections at that time, she and the grandchildren would inherit it in any event. And by giving it to Christine then, Mrs Harris would avoid Tony and his wife benefitting from it.
- [82] Although I did initially during the trial find myself questioning the plausibility of the defence case, on the basis that it did not seem logical that Mrs Harris would give away her only asset, while she was still alive. But having carefully considered all of the evidence, I am satisfied that, as misplaced as others might consider her actions, there was a logic to Mrs Harris’s actions, given that, based on where her affections lay at the time, she was adamant that her son would receive nothing from her. Her way of making sure this was achieved was to give the money to her daughter, to buy the unit in her name, on the basis that she would become entitled to it eventually anyway, and to put her assets out of the reach of her son.
- [83] I am satisfied also that, in doing that, Mrs Harris had an expectation that Christine would “do the right thing”, in the sense of looking after her during her life. The evidence supports a finding that Christine was doing that, by providing her mother with money from time to time, and helping her out when necessary. The terms of Christine’s will, as she explained them, are also consistent with this. But the evidence does not support the conclusion that this went any higher than an expectation of familial assistance, such as to comprise an enforceable ancillary agreement. Counsel for the plaintiff did not contend otherwise.
- [84] The plaintiff’s claim for a declaration of trust, and ancillary orders, has not been made out. The application is dismissed.
- [85] This is a most unfortunate case, in which a fight about money has irreparably, it would seem, fractured a family, particularly the relationship between Mrs Harris and her daughter, Christine. It is a matter that would have best been resolved in a mediated context, in which a broader range of flexible outcomes could have been considered. As a matter of law, on the finding I have made regarding Mrs Harris’ intention as at November 2013, the outcome is all one way.
- [86] Given the amount of money and the value of the property involved, this proceeding ought to have been commenced in the District Court. The only reason it was commenced in this Court seems to be because of the initial application for a freezing order. Such an order is within the power of the District Court to make, “in any

proceedings in which jurisdiction is conferred” on it: see ss 68 and 69 of the *District Court of Queensland Act 1967* (Qld). This has been interpreted as limiting the District Court’s power to grant injunctive relief to cases in which there are first some proceedings for which jurisdiction is conferred on the court, on foot.<sup>48</sup> That could have been addressed in this case, by amending the originating application to demonstrate jurisdiction, and so attract the power to grant an injunction (or in this case a freezing order). Or alternatively, by applying to transfer the matter after the freezing order had been made. This is an academic enquiry now. It is a matter that may have affected any costs order had the plaintiff been successful. But as it is the defendant who has succeeded, and that party was brought to this court by the plaintiff, it would seem unfair to limit the costs recoverable. Nevertheless, I will hear from the parties as to this, after delivery of my reasons.

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<sup>48</sup> *Startune Pty Ltd v Ultra-Tune Systems (Aust) Pty Ltd* [1991] 1 Qd R 192 at 197.