SUPREME COURT OF QUEENSLAND

CITATION:	***Harith & Kanuth v Beale*** **[2003] QSC 411**
PARTIES:	**PAUL ANTONI HARITH** (First Plaintiff) and **ELIZABETH GAY KANUTH** (Second Plaintiff) v **JOHN BEALE** (Defendant)
FILE NO:	S55 of 2003 (Mackay) S163 of 2003 (Rockhampton)
DIVISION:	Trial Division
DELIVERED ON:	5 December 2003
DELIVERED AT:	Mackay
HEARING DATES:	15-18 September 2003
JUDGE:	Dutney J

ORDERS:

1. **Judgement for the defendant against the plaintiffs on the counter-claim in the sum of $31,929.03, together with interest of $2,926.83.**
2. **Declare that the defendant is entitled to a charge over the property Lot 24 on SP 123431 for that amount, ranking second behind the existing mortgage to Howard Mortgage Finance Pty Ltd.**
3. **The plaintiffs are restrained from granting any security over the property ranking in priority to the defendant's charge, other than the existing mortgage to Howard Mortgage Finance Pty Ltd, until such time as the amount due to the defendant is paid in full.**
4. **The defendant is to pay the plaintiff's costs of an incidental to the action up until 18 September 2003, other than costs reserved on 24 June 2003, 25 July 2003 and 12 September 2003, to be assessed on the standard basis.**
5. **The plaintiffs to pay the defendant's costs incurred since 18 September 2003 (if any) to be assessed on the standard basis.**

6. **No order in relation to the costs reserved on 24 June 2003.**
7. **The plaintiffs to pay the defendant's costs thrown away by the adjournment on 25 July 2003 to be assessed on an indemnity basis.**
8. **Declare that such costs include all legal costs and outlays incurred by the defendant up to and including 12 September 2003, except costs and outlays necessarily incurred for the drafting and filing of pleadings, complying with the defendant's obligations in relation to disclosure, costs reserved on 24 June 2003, attending mediation other than on 25 July 2003 and the interlocutory hearing in April 2003.**

CATCHWORDS: TRUSTS AND TRUSTEES – where defendant purchased property in own name – where moneys contributed by plaintiffs and defendant – where defendant borrowed moneys in own name to complete the transaction as trustee for the plaintiffs – whether defendant entitled to reimbursement for outgoings and time expended – where remuneration over and above outgoings contemplated by the plaintiffs

COSTS – INDEMNITY COSTS – where defendant asserted a beneficial interest in the property until last day of trial – whether plaintiffs entitled to their costs up to the last day of trial – whether plaintiffs entitled to costs on an indemnity basis because of the persistence of the claim for a beneficial interest in the property

COSTS – INDEMNITY COSTS – where June 2003 trial adjourned because plaintiffs unable to fund their legal representation - where solicitors and counsel for plaintiffs and defendant present at Court in Mackay - where defendant was ready to proceed – where defendant could not fund a trial as at September 2003

Trusts Act 1973 (Qld), s 101(1)
Stott v Milne (1884) 25 Ch D 710, cited

COUNSEL: PJ Flanagan for the plaintiffs
Defendant self represented

SOLICITORS: MBP Legal for the plaintiffs
Defendant self represented

[1] At the time of trial the defendant was the registered proprietor of land at Airlie Beach known as "Cool Palms". The property was more specifically identified as that land in the County of Herbert, Parish of Conway described as Lot 24 on SP123431, title reference 5028971.

[2] The land was mortgaged in favour of the Westpac Banking Corporation to secure a debt owed by the defendant and largely applied towards the purchase of the property.

[3] The plaintiffs were citizens of the United Kingdom holding Australian temporary residency visas from 5 December 2002.

[4] The primary relief claimed by the plaintiffs was a declaration that the defendant held the land in trust for them. Consequential orders were sought indemnifying the defendant for any expenses incurred by him as trustee and providing for payment of those amounts to him.

[5] The defendant's amended defence sought a declaration that he held the property on trust for himself and the plaintiffs in proportion to their respective expenditure or indebtedness in relation to the acquisition of the property. There was a counterclaim in the alternative for remuneration and expenses.

[6] The defendant, Mr Beale, represented himself at the trial. The fact that Mr Beale was unrepresented made it difficult at times to understand precisely what issue he was pursuing. His ability to lead evidence to support his propositions was also limited. His being unrepresented and the reasons for it will become relevant when I deal with costs. In any event, it was apparent to me at an early stage of the trial that the defendant was not in fact asserting any beneficial interest in the property. When Mr Beale gave evidence I asked him directly what it was he was asserting as his entitlement and he confirmed that he was seeking reimbursement for his expenditure in time and money, including discharge of his indebtedness to Westpac.[1]

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[1] See transcript page 292.1 to page 293.23.

[7] In the light of this, and responding to submissions concerning the urgent need to re-finance the property, I made orders at the conclusion of the hearing declaring the property to be held on trust for the plaintiffs but restraining the plaintiffs from dealing with the property other than by mortgaging it in favour of Howard Mortgage Finance Pty Ltd for an amount not exceeding $750,000.

[8] The remaining issue was the amount, if any, for which Mr Beale was entitled to be indemnified.

[9] There are two potential bases on which Mr Beale might be entitled to be paid a sum of money. The first is as reimbursement for actual expenses incurred. This entitlement is not disputed by the plaintiffs in relation to expenses incurred before 5 December, 2002 when the plaintiffs obtained their residency visas. The second is by way of remuneration for work done as either agent or trustee.

[10] The court has power under s 101(1) of the *Trusts Act 1973* to authorise any person to charge such remuneration for the person's services as trustee as the court may think fit. The plaintiffs submit that I should not make any order under this section for these reasons. First, no trust arose until the land was transferred to the defendant on 30 October, 2002. Second, until this time any efforts put in by the defendant were either because of his long standing friendship with the female plaintiff or for his own purposes. In considering this submission I will need to consider the background facts.

[11] Until late in 2002 the plaintiffs, who were husband and wife, were ordinarily resident in West Palm Beach, Florida, USA. They both held United Kingdom passports. In September 1999 they visited the Whitsunday area in North Queensland and stayed with the defendant. Mr Beale and Ms Kanuth, the female plaintiff, had been friends for about twenty-seven years.

[12] The plaintiffs operated a business in West Palm Beach known as GK Tile & Design.

[13] The plaintiffs were captivated by the Whitsundays and expressed a desire to acquire property and settle in or near Airlie Beach. One of the properties they looked at was "Cool Palms".

[14] In about November 2000 Mr Beale telephoned Ms Kanuth and told her that "Cool Palms" was for sale.

[15] Mr Harith then flew to Airlie Beach to inspect the property.

[16] A deed of option was negotiated with the vendor, a Mr Moscato. Under the deed the plaintiffs were required to pay an option fee of $97,500 within 30 days of execution. The option was required to be exercised within twelve months of the option fee being paid. The option was assignable and if the option was exercised the fee would be deducted from the purchase price of $975,000. In the event that the option was not exercised the option fee would be forfeited. The purchase price of $975,000 was to be divided between land and chattels pursuant to separate contracts attached to the deed of option. The division was artificial and presumably designed to benefit Mr Moscato. In 2002 when the plaintiffs were experiencing financial difficulties Mr Beale tried to extricate them from the difficulty by persuading Mr Moscato to settle the contracts separately. He was unsuccessful. Nothing in the end turns on the fact of two contracts. Mr Beale earned a commission of $10,000 from Mr Moscato for introducing the plaintiffs and this fact was known to all parties even before the documents were signed.

[17] The plaintiffs sent the option fee to the defendant and it was paid on 17 November 2000. The defendant received the commission of $10,000 from the vendor which was paid out of the option fee. The plaintiffs also sent a further $1000 to the defendant to be applied to transaction costs.

[18] On 1 July 2001, Mr Harith, the male plaintiff, sent a letter to Mr Beale by facsimile stating in part:

> "This fax is to confirm our contract starting as of today, the 1st July, 2001.
>
> As agreed you will provide security and maintenance for our property at, Cool Palms Estate, Mandalay Road, Airlie Beach.
>
> This contract shall be in force for a period of 5 (five) years and will be renegotiated after this term. You will receive, as agreed, $23,000 AUS per annum for your services."[2]

[19] Mr Beale responded on 15 July 2001, as appears from the facsimile heading markings, stating that he "did not hold [the plaintiffs] to any agreement written or verbal relating to any matter past or present".[3]

[20] In about March 2001, Mr Harith was injured in a motor vehicle accident in Florida. Plans to visit Airlie Beach were cancelled. Instead, Mr Beale visited the plaintiffs in Florida.

[21] A further option period of one year was negotiated with the vendor. The second option fee of $97,500 was provided by the plaintiffs to Mr Beale and paid to the vendor in early November, 2001.

[22] Shortly after this the plaintiffs suffered financial problems. The tile business got into difficulties and was shut down and the assets realised.

[23] At some time in 2002, the vendor became dissatisfied with the contractual arrangements and threatened not to honour the contract. Mr Beale engaged solicitors to protect the plaintiffs' rights.

[24] In June 2002 the plaintiffs sold their Florida home. On 5 June 2002 $299,983 was sent to Mr Beale. The house was sold for less than the amount the plaintiffs had hoped to obtain. As a result of this and the closure of their business they had insufficient of their own money to complete the sale. Despite this, on 31 August 2001 a further $128,764 was transferred to Mr

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2 Exhibit 3, document 14.
3 Exhibit 3, document 15.

Beale. To this point the plaintiffs had transferred a total of $624,732 to Mr Beale.

[25] In Mr Harith's affidavit he refers to a conversation he had with Mr Beale in May 2002 relating to a prohibition on foreigners owning real property in Australia. There are many conversations set out in the affidavits of both plaintiffs. Curious as to the reason why their recollections of past conversations in their written material were identical I asked each of the plaintiffs about this. Both freely admitted that what they set out as verbatim conversation was in fact the result of their discussing their recollections of events and agreeing on a form of words which was then set out as verbatim conversation. While I do not regard this as having been done by either plaintiff with any improper intention, I am doubtful whether the end result is likely to be anything more than the conversion of a collective recollection of the gist of each conversation into a form of words that might have been used. I do not think they can be relied upon as actual conversation. This was confirmed by their vagueness as to conversation in their oral evidence.

[26] The exact terms of the conversation referred to in the preceding paragraph was relevant to a debate during the course of the trial as to whether or not Mr Beale ever informed the plaintiffs of the need for Foreign Investment Review Board ("FIRB") approval for their purchase.

[27] In the conversation of May 2002 recounted by Mr Harith in his affidavit, he refers to the prohibition identified by Mr Beale as relating to the need to have the correct visa. Mr Beale claimed in evidence that in June 2002 he was told of the need for FIRB approval by the solicitor he had engaged in relation to the transaction, Mr Mawson of Hope & Associates. Mr Beale said that he then telephoned the plaintiffs to advise them. The plaintiffs did not recall being told of the need for FIRB approval. They were entirely unaware at that time of the existence of FIRB. Despite the difference in dates I think it is likely both sides were talking about the same conversation. Neither side had any real knowledge or understanding of the concept of FIRB approval. It is thus likely that while Mr Beale may have believed he had passed on what he had been

advised by his solicitor he did not do so in terms that the plaintiffs understood. In any event I do not think much turns on it.

[28] On 1 January 2002, the plaintiffs wrote to the defendant in these terms:

> "Gay and I have decided that due to your extra workload and the fact that you have done such a sterling job at Cool Palms, we would like to recognise this with an increase to your salary from the original agreement of $23,000 AUS per annum to $33,000 AUS which would equal $2,750 per month. This new contract is to start on 1 February 2002 and replace the last contract between us and is intended to run fort the full duration of 5 (five) years, unless we renegotiate in the future."

[29] Again Mr Beale appears to have responded saying:

> "This fax is to confirm I do not hold you to any agreement written or verbal relating to any matter past or present."

[30] Although in light of the response to the purported agreement no claim could have been based on it, the offer of the increased salary at a time when the property had not even been purchased is indicative of the fact that the work involved in acquiring Cool Palms was greater than had been anticipated and that the plaintiffs recognised that the defendant had at least a moral entitlement to some recompense. No evidence was given about the offered contract but the recognition that heavy demands were being placed on Mr Beale is also evident in e-mails sent to him by Ms Kanuth.[4] I consider it to be a reasonable inference that the increase in the offer was an attempt to recompense Mr Beale's efforts. At the date of the offer, however, Mr Beale was still prepared to attend to matters on the plaintiffs' behalf out of friendship.

[31] In August 2002 it was decided that Mr Beale would attempt to obtain finance in Australia for the balance of the purchase money for Cool Palms. The plaintiffs were asked for financial records, such as recent tax returns, to support a loan but none were provided other than some share certificates of

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[4] Eg see exhibit 3, document 40 dated 17 July, 2002: "Hope all this hasn't put you right off us, John … I like the challenge but to expect you to for our sake is expecting too much … I value our friendship too much to let this come between us so please say when it does not feel 'right' anymore!".

indeterminate worth and a promissory note by an Alexander Kanuth promising to pay Gay Kanuth USD540,000. Again, there is nothing to indicate whether this had any value.

[32] Mr Beale did go to Westpac and enquire as to the likelihood of the plaintiffs being advanced the necessary money but was told that without financial details it could not be considered.

[33] After further discussions with the plaintiffs it was agreed that Mr Beale would be nominated as purchaser under the contract and purchase the property in his own name.

[34] The plaintiffs gave evidence that they initially did not like the idea of Mr Beale borrowing and purchasing the property on their behalf. They discussed the matter later, independently of Mr Beale, and decided they would take him up on his offer. The plaintiffs telephoned Mr Beale and told him. They said at trial that they would have been able to finance the project from America by borrowing from wealthy friends.

[35] Evidence was given by a Mr Porath who said he had loaned the plaintiffs USD50,000 to make an option payment on the property. He said he would have loaned a further USD200,000 if asked. A Mr Skelly also gave evidence. He said that he had loaned money to the plaintiffs twice during 2003. I do not accept that it would have been as easy as was made out by the plaintiffs to borrow from their American friends. The two witnesses struck me as astute business men. It is unlikely they would have parted with large amounts of money without fully understanding the transaction. Any investigation would have revealed the need for FIRB approval. The American friends would have been likely to require security, especially since the plaintiffs have no apparent capacity to repay a significant loan without selling all or part of the property. In the end, the suggestion by Mr Beale seemed easier and more certain and that was the reason it was accepted. Mr Beale did not put any undue pressure on the plaintiffs to accept his offer of assistance. In the end result, FIRB approval was never obtained. FIRB was informed of the purchase after

settlement. After representations from the plaintiffs' solicitors, Treasury agreed to take no action provided certain conditions and restrictions were complied with.

[36] Mr Beale made formal application for a loan from Westpac in October 2002. Approval was given for a loan of $410,000 on 24 October 2002. The application was put on a rezoning, subdivision and sale basis because Mr Beale's income and assets would not otherwise have supported the loan. The loan was to be repaid from sales of subdivided residential blocks. In December 2002 Mr Beale applied for a further loan of $125,000 for subdivision costs. He had originally told the bank he would meet these costs himself but in his second loan application he said that he had spent the money paying a debt to his former de facto. The original loan was sufficient to meet two years borrowing costs in addition to settling the purchase.

[37] Mr Mohr of PMM Lawyers was engaged to complete the transaction and give advice concerning Mr Moscato's threats to renege.

[38] At the time the option to acquire the land was signed the land was zoned "Church and Religious Facilities". An application to rezone the land was required for it to be used for residential purposes. By a letter from the Whitsunday Shire Council to Mr Beale dated 8 August, 2002 the council indicated its support for rezoning, subject to a "Material Change of Use (Impact Assessment)". The letter formed part of the material supplied to the bank by Mr Beale in support of his application for finance.

[39] When the plaintiffs arrived in Australia in December 2002 the friendship between them and the defendant quickly soured. Primarily this was as a result of the financial arrangements between them. The defendant continued with steps towards subdivision. His stated objective was to protect his position as borrower from Westpac. He also said, and I accept, that he believed that by selling part of the land the Westpac debt could be cleared leaving the plaintiffs in possession of some of the better part of the land, but debt free. He also had hopes that he might finish up with an allotment himself. When asked to

transfer the land to the plaintiffs he said he would do so only on payment of a sum variously stated to be between $850,000 and $1 million. This was inclusive of the Westpac borrowing and was thought by Mr Beale to represent a refund of his expenditure and recompense for his time. The plaintiffs were not told of Mr Beale's belief. Mr Beale simply said that they would have to buy the property from him for the stated amount.

[40] The account set out above is an abbreviated account of all the steps leading to the ultimate acquisition of the property. What it demonstrates for present purposes is that the transaction was not straight forward. It involved a great deal of time and effort on the part of Mr Beale particularly once the plaintiffs discovered they were not in a position to pay cash for the land from their own resources. The ultimate reluctance of the vendor to settle was also a complicating factor.

[41] Mr Beale's position was that he was happy to do whatever was required in Australia out of friendship until it became necessary for him to accept nomination as purchaser. This was in August 2002. Even before this time I accept that it was also apparent to the plaintiffs that the work required of the defendant was such as justified proper remuneration, as evidenced by their offer to increase the amount they offered to pay him for "security and maintenance" by $10,000 per year for five years.

[42] Mr Beale's evidence was that he earned his living as a buyer and seller of real estate. He also had a kayak business but it is not clear to me whether this was still operating in 2002. Mr Beale gave evidence of at least one real estate transaction he could not pursue as a result of committing his time and assets to the purchase of Cool Palms. On Mr Beale's evidence, the resultant loss could have been up to about $30,000[5]. In all the circumstances it seems to me that the defendant is entitled to something over and above his out of pocket expenses.

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[5] See transcript page 257.18-32 and page 300.10-15.

[43] Because he was unrepresented at the trial I gave the defendant an opportunity to prepare a written submission setting out what he claimed to be entitled to. The document subsequently prepared looks to have been prepared with legal advice. I am satisfied having spent four days in court with the defendant during the trial that he would not have been able to prepare such a document without such assistance. In response the plaintiffs prepared written submissions in reply. Their submission in reply annexes valuations and a letter from a caretaker with remuneration rates for such services. These documents were not in evidence at the trial and no opportunity has been given to the defendant to address them. I propose to ignore them apart from commenting that the work Mr Beale did for the plaintiffs was not caretaker work. The only valuation evidence at trial was from Mr Beale who said that he had received an offer for the property of $1.65 million which was still open. The plaintiffs did not seek to lead any valuation evidence at trial. Likewise, there is a volume of other factual material in the plaintiffs' submission not supported by evidence at the trial. I propose to ignore anything unsupported by evidence.

[44] The defendant's pleading at trial set out in four schedules what the defendant alleged he did and spent. Schedule A lists the activities performed prior to settlement. Schedule C sets out the activities performed after settlement. Schedules B and D set out costs allegedly incurred before and after settlement respectively.

[45] The evidence addressed schedules B and D directly. Schedules A and C were not expressly referred to but the activities in them were covered to a large extent in a less formal way. Except for an alleged conversation in which Mr Beale said he told Mr Harith in advance of his coming to Australia to live that the plaintiffs would have to buy the property from him on their arrival in Australia I accept that the defendant did do generally what he said he did to facilitate the transaction.

[46] As I have already indicated I am of the view that it is appropriate in this case to make an order under s 101(1) of the *Trusts Act*. The plaintiffs submit that I

cannot make such an order prior to Mr Beale becoming the registered proprietor of the land on 1 November 2002. I consider that the defendant became trustee of the plaintiffs' beneficial interest in the option agreement from the time of the nomination of him as purchaser in August 2002. At that time the corpus of the trust was represented by the chose in action being the rights pursuant to the option agreement. Prior to becoming trustee it is submitted that the defendant could only be entitled to remuneration as agent or by way of restitution. Before August 2002 the defendant had been prepared to assist without reward. The great bulk of Mr Beale's time and effort post dated August 2002. In any event, in my view an implied right to remuneration can be inferred from the facts of the particular case.[6] In particular there is evidence that the plaintiffs considered themselves bound by a moral obligation to remunerate the plaintiff. The offer of an additional $10,000 per year for 5 years suggests that at least in early 2002 the plaintiffs regarded the value of the obligation as somewhere around $50,000. The female plaintiff offered to remunerate the defendant in kind by providing interior decorating advice for future developments by him. While these offers did not result in any express agreement it is in my view easy to imply a term to provide some appropriate remuneration. Such a term is not inconsistent with any express term of the trust. The defendant, himself on several occasions said in evidence that after mid 2002 when it became apparent that the transaction would be more difficult he expected such remuneration in some form.

[47] Even though schedules A and C were not expressly addressed in evidence and no time was put on the activities contained in them, I am satisfied that the evidence supports a finding that the defendant performed all or most of those services. The defendant's submission calculates the total time spent before settlement in the order of 56 days if a day is counted as 8 hours. Obviously there is a lot of time in that which is not properly capable of being claimed. An 8 day trip to Miami is a ready example. In any event there is no evidence of the time spent. Submissions were made by the defendant that remuneration should be calculated on a commission basis. That seems to me to be quite

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6 See Halsbury's Laws of Australia, Volume 1(2), paragraph 15-205.

inappropriate. Considering the matters to which I referred in the previous paragraph I consider a proper remuneration would be a global sum of $25,000 for the pre-settlement work carried out. For the post settlement work there is some dispute. Until Westpac was paid out I consider it was appropriate for the defendant to continue to undertake preliminary work towards subdivisional approval so that the terms of the loan could be met. I also consider that until such time as his liability for the Westpac advance was secured the defendant was justified in refusing to transfer the land to the plaintiffs. While there was almost immediate disagreement between the plaintiffs and the defendant over his continued trusteeship no offer was made by the plaintiffs prior to 10 March 2003 which would have released the defendant from the obligation he incurred as trustee to Westpac.[7]

[48] Post settlement, I consider the work legitimately performed by the defendant would be properly remunerated by a payment of $1,500.

[49] The expenses in Schedule B all relate to travelling. They are not a large sum totalling only $5,081.84. They comprise:

- a trip to Hope & Associates in Mackay;
- Hope & Associates costs for the option and the caveat;
- two visits to Westpac
- a visit to Mr Mohr; and
- a visit to Mr Beale's accountant in Melbourne to get advice.

Bearing in mind the value of the transaction and its importance to the plaintiffs I do not consider the costs incurred to be unreasonable. They are all for the plaintiffs' benefit. In relation to Mr Mohr, he expressed in evidence a strong preference for seeing Mr Beale personally. I would allow the amounts claimed.

[50] The expenses claimed in schedule D of the counterclaim were all admitted as legitimate except the trip to Brisbane to see Mr Mohr and the costs of obtaining residential occupancy approval and rezoning approval. The trip to

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[7] See exhibit 3, documents 55 and 56.

see Mr Mohr on this occasion, in my view, was for the purpose of Mr Beale receiving advice on his own position and entitlement as trustee and not for the purposes of the trust. I disallow the cost of that trip. The approval costs were necessary to enable the property to be lawfully used for residential purposes and to comply with the basis on which the bank loan was given. In any event, a substantial part of the work to which this claim relates in fact pre-dated settlement and included the work required to obtain the letter from the council which was submitted to the bank to obtain the loan. At least in February 2002 the plaintiffs were considering subdivision as a means of financing the purchase.[8] When the plaintiffs finally determined to retain the whole property is unclear. I would therefore allow the whole sum. The post-settlement expenses therefore total $13,059.34.

[51] The balance of the figures claimed are not controversial except for a claim for phone calls made in the defendant's written submissions. Since the submission is unsupported by evidence apart from a 42 minute call to Florida shown on exhibit 35 and charged at $7.75 I can not consider anything other than that amount.

[52] The defendant has contributed a sum of $55,280.10 from his own money to the acquisition of the property which sum is not disputed. The defendant has drawn from the Westpac loan funds, for his own purposes, a total of $68,000. This is made up of two withdrawals of $15,000 on 10 January 2003 and 30 January 2003; $5,000 on 12 March 2003; $30,000 on 31 March 2003 and $3,000 on 17 March 2003. These amounts have been repaid by the plaintiffs to Westpac as part of the loan repayment. In the result the defendant is entitled to the following:

Schedule A claim	25,000.00
Schedule B claim	5,081.84
Schedule C claim	1,500.00
Schedule D claim	13,059.34
Telephone	7.75
Direct contribution to purchase	55,280.10

[8] See exhibit 3, document 29.

Total	99,929.03
Less drawn from Westpac loan	68,000.00
Amount due	31,929.03

[53] As a consequence of Mr Beale's expenditure of this net amount of cost and outlay the plaintiffs acquired the property, Cool Palms. The defendant would have an equitable lien over the property for that net amount.[9] In my view the defendant's charge would rank behind the present mortgage to Howard Mortgage Finance Pty Ltd which replaces the Westpac mortgage taken out by the defendant. It would rank ahead of any mortgage not yet registered and intended to secure the plaintiffs' legal fees.

[54] My order at trial in relation to the transfer of the property has been carried into effect. It is not necessary to make any further order in that respect. The following additional orders are made:

1. I give judgement for the defendant on the counterclaim in the sum of $31,929.03 together with interest at 10% from 1 January 2003 until judgement, which I calculate as 11 months and $2,926.83.
2. I declare that the defendant is entitled to a charge over the property Lot 24 on SP 123431 for that amount ranking second behind the existing mortgage to Howard Mortgage Finance Pty Ltd.
3. The plaintiffs are restrained from granting any security over the property, other than the existing mortgage to Howard Mortgage Finance Pty Ltd and ranking in priority to the defendant's charge until such time as the amount due to the defendant is paid in full.

Costs

[55] Although it was apparent to me from the first day of the trial that the defendant was not in fact asserting any beneficial interest in the property that position was inconsistent with his pleadings. The plaintiffs were entitled to

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[9] *Stott v Milne* (1884) 25 Ch D 710.

approach the action on the basis of the pleadings. It was not until the last day of the hearing that the claimed beneficial interest was formally abandoned as a result of questions from me. Therefore the plaintiffs are entitled to their costs of the action up to 18 September 2003 being the final day of the trial, except for the costs reserved on 24 June 2003, 25 July 2003 and 12 September 2003 which I shall deal with separately. The plaintiffs should also have the costs reserved from the interlocutory application on 22 April 2003. The plaintiffs sought costs on an indemnity basis because of the defendant's persistence with the unsustainable claim for a beneficial interest in the property. While this is true and occupied a substantial portion of the time, it is also true that the plaintiffs lost on the other issue at trial which was whether the defendant was entitled to any net payment from the plaintiffs. While the amount the defendant recovered is less than he would have wished he was nonetheless successful. In terms of the costs, the awarding of standard costs adequately reflects the extent of the plaintiffs' success. The costs associated with the written submissions after the hearing concluded relate solely to the defendant's counterclaim on which he was successful. The plaintiffs opposed any payment by way of remuneration. Any costs incurred after 18 September 2003 should be paid by the plaintiffs on the standard basis.

[56] The adjournment of the trial on 24 June 2003 was by consent. I propose to make no order in relation to the costs thrown away by reason of the adjournment on that occasion.

[57] The adjournment of the trial on 25 July 2003 was solely as a result of the plaintiffs' stated inability to fund their legal representation for the trial notwithstanding the attendance in Mackay on that day of counsel, a solicitor from Sydney and a solicitor from the Sunshine Coast as well as a town agent. The defendant was ready for trial and represented by senior counsel. On 12 September 2003 an application was made before me in Brisbane to further adjourn the trial and for leave to the defendant's solicitors to withdraw because the defendant, having exhausted his financial resources in preparing for a trial in July, was not able to afford further representation. I ordered the trial to proceed notwithstanding Mr Beale's lack of representation because of a

risk deposed to by the plaintiffs that further delay in the matter might result in the property being lost. This was firstly because the plaintiffs would be in default of the conditions of their residency visas requiring them to establish a business, and for which they needed the property both as premises and security for working capital. Additionally, there was doubt whether Mr Beale could continue to service the mortgage, with the resultant risk of default under the Westpac loan. At the time of the July adjournment the plaintiffs had not disclosed the evidence they called at the trial that they had access to large sums of money on request from friends in America. If this evidence was true, I am left to wonder why the plaintiffs could not have availed themselves of that source of funds to conduct the trial in June. The result of the plaintiffs' successful application for an adjournment was, however, that the money spent by the defendant on legal representation up to July 2003 was entirely wasted apart from the pleadings which were in place at trial and the completion of disclosure. Ordinarily costs thrown away by an adjournment are limited because most of the work done carries forward to the next trial date. The party derives a benefit from the accumulation of knowledge about the case by his or her legal representatives. That was not the case here. Nothing learned by the solicitors or counsel about the case or done by way of preparation was of any use to the defendant in the circumstances where he was required at the last minute to represent himself. When the trial commenced the defendant did not even have his solicitors' file. The real cost to the defendant thrown away by the adjournment here was everything spent up to and including the date of the application for the adjournment in September other than costs of pleadings, disclosure and the costs of attending mediation other than on 25 July 2003, which mediation was hastily convened to try to salvage something from the waste of resources. I exclude costs of the interlocutory hearing in April 2003 to which the plaintiffs are properly entitled.

[58] Accordingly I order the plaintiffs to pay the defendant's costs thrown away by the adjournment on 25 July 2003 to be assessed on an indemnity basis. I declare that such costs include all legal costs and outlays incurred by the defendant up to and including 12 September 2003, except costs and outlays necessarily incurred for the drafting and filing of pleadings, complying with

the defendant's obligations in relation to disclosure, costs reserved on 24 June 2003, costs of attending mediation other than on 25 September 2003 and the interlocutory hearing in April 2003.