SUPREME COURT OF QUEENSLAND

CITATION:	*Chung v Dunn* [2012] QCA 350
PARTIES:	**HEAN KOK CHUNG (AKA JOHN CHUNG)** (appellant) **v** **JAMES ROYSTON DUNN** (respondent)
FILE NO/S:	Appeal No 6778 of 2012 DC No 460 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	11 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13 November 2012
JUDGES:	Holmes and White JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The orders made below be set aside.** **3. The appellant pay the respondent the sum of $192,671.89.** **4. The appellant's counterclaim be dismissed.** **5. The real property situated at 60 Licuala Drive, North Tamborine in the State of Queensland, more particularly described as Lot 27 on RP 140912 County Ward Parish Tamborine, Title Reference 15376083 is hereby charged in favour of the respondent to secure the payment of the said sum of $192,671.89.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – COMMON INTENTION – where the respondent sought a declaration that he had an equitable interest in real property owned by the appellant, pursuant to a joint venture agreement between the appellant and the respondent for the acquisition and renovation of the property – where judgment was entered in favour of the respondent and a declaration made that the appellant held his interest in the real property on constructive trust for the respondent – where the appellant appeals the judgment on the ground that there was no joint venture agreement – whether the appeal should be allowed

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – DAMAGES EXCESSIVE – where the appellant contends the sum of damages awarded by the trial judge included amounts which were not part of the joint venture agreement – whether the damages award was excessive

COUNSEL: N M Cooke for the appellant
L A Jurth for the respondent

SOLICITORS: Rostron Carlyle Solicitors for the appellant
Saunders Downing Hely Solicitors for the respondent

[1] **HOLMES JA:** I agree with the reasons of Boddice J and the orders he proposes.

[2] **WHITE JA**: I have read the reasons for judgment of Boddice J. I agree with those reasons and the orders proposed by his Honour.

[3] **BODDICE J:** By claim filed in the District Court of Queensland, the respondent sought a declaration that he had an equitable interest in real property owned by the appellant, pursuant to a joint venture agreement between the appellant and the respondent for the acquisition and renovation of the property. The respondent also claimed damages in an amount equivalent to his interest in that property.

[4] On 11 July 2012, judgment was entered in favour of the respondent in the sum of $259,071.89. Declarations were also made that the appellant held his interest in real property situated at 60 Licuala Drive, North Tamborine, in the State of Queensland ("the property") on constructive trust for the respondent, to the extent of that judgment sum and costs, and that the property was charged in favour of the respondent to secure the payment of that sum. The appellant was also ordered to pay the respondent's costs of and incidental to the proceeding, on an indemnity basis.

[5] The appellant appeals the whole of that judgment. His grounds of appeal, whilst numerous, centre upon the trial judge's finding that there was an oral agreement between the appellant and the respondent for an equal division of profits derived from the purchase, renovation and subsequent sale of the property. At issue on the appeal are the terms of any such agreement, the bases for the finding of a constructive trust, and the quantum of the judgment sum.

Background

[6] The appellant and the respondent have been friends since about 1993. They met when the respondent worked as a personal trainer for the appellant's then wife. The respondent subsequently became good friends with the appellant and his family.

[7] The respondent was born in Scotland and moved to Australia in 1980. By that time, he had acquired experience in building, cabinetmaking and antique restoration.

[8] The property was purchased in the name of the appellant's brother in April 2002 for $172,000. After that purchase, the respondent moved on to the property and lived there between 2002 and late 2005. Various renovations were undertaken to the property during this time.

[9] In November 2005, a transfer of the property from the appellant's brother to the appellant was prepared. It was not registered until 28 June 2006. Stamp duty was paid on or about 12 January 2006.

[10] The respondent moved out of the property in late 2005. Thereafter, the property was rented out by the appellant. It was agreed at the hearing that the rental income equated to $400 per week from 1 January 2006 until the date of the hearing.

Claim

[11] The respondent claimed that his entitlement to relief arose as a consequence of an oral agreement entered into between the appellant and the respondent in or about early 2002. The respondent gave evidence that he and the appellant inspected the property together. Whilst there, the following conversation took place:

> "… John says, 'Look, I'd like to buy it', you know, 'but it's a small house.' He says, 'Could you build an extension on that?', and I says, 'Yeah, not a problem.', so then we looked at things and John then said, 'Okay so if I buy it and you build the extension would that be okay?' I says, 'Yeah, we can do that.' I says, 'But I've got - not got any money. I'm at uni.' I was … I said, 'I haven't got any money. I'm going to uni.', and John says, 'That's okay.' He says, 'I'll pay cash for the house, and he says, 'and I'll buy the materials and you provide the labour and we'll split it 50/50.', and I says, 'Fine by me.'"

[12] The respondent said that was the agreement entered into between them. In response to a question by the trial judge as to what was to be split 50/50, the respondent replied "profit". The respondent said it was always agreed that the appellant would get back whatever he had paid for the property, and that the appellant would provide the materials for the renovations and the respondent would provide the labour. They would split 50/50 whatever was left after the appellant had been repaid the purchase price.

[13] The respondent said the property was purchased in the name of the appellant's brother as the appellant was at that time in the midst of divorcing his wife. The appellant told him because of the divorce he could not put the property in his name. The appellant said they could "put it in Patrick's name". Patrick was the appellant's brother. The respondent replied "Well, that's okay by me because I'm on Austudy at uni anyway." The respondent said he trusted the appellant's brother. In 2006, the property was transferred to the appellant's name.

[14] The appellant denied any oral agreement had been entered into with the respondent. The appellant contended his brother purchased the property. Any renovation work performed by the respondent was undertaken by him in recognition that the respondent lived rent free at the property after its purchase, not as a consequence of any agreement to share any profit made upon the sale of the property. The appellant said he purchased the property in late 2005 from his brother.

[15] The appellant accepted he and the respondent had inspected the property together in 2002, and that both thought it would be a good investment, but denied there was any agreement to purchase the property. The appellant said that, on the trip back to Southport, the respondent had said, in casual conversation that if the appellant

purchased the property the respondent could take care of it for him. The appellant later rang his brother and suggested he look at the property with a view to purchasing it. There were no further discussions with the respondent about the purchase of the property.

Judgment

[16] The trial judge found that, although the property was purchased in the name of the appellant's brother in April 2002, it was, in truth, purchased by the appellant pursuant to an oral agreement entered into between the appellant and the respondent. The trial judge found that after the purchase of the property, the respondent moved onto the property, lived there, renovated and extended the house and did much work in the garden.

[17] The trial judge concluded that the preponderance of evidence supported the respondent's claim, and that a constructive trust existed in terms of the oral agreement. The trial judge also found that it would be unconscionable for the appellant to deny the respondent's equitable interest in the property, having regard to the efforts expended by the respondent in renovating, extending and improving the property. The trial judge accepted there was a common intention between the appellant and the respondent that the respondent should have an interest in the property, in reliance upon which the respondent had suffered detriment.

[18] In assessing the damages, the trial judge accepted figures contained in the respondent's revised schedule of damages which were "not challenged".[1] That revised schedule included claims for 50 per cent of the rent earned by the appellant when the property was tenanted after the respondent left the property.

Notice of appeal

[19] The respondent contended the appellant's notice of appeal was vexatious as it did not seek to challenge any findings of fact made by the trial judge.

[20] The notice of appeal is deficient in some respects. However, it is not vexatious. The grounds pleaded adequately raise the issues to be determined, namely, the terms of any agreement between the appellant and respondent, and the relief the respondent is entitled to pursuant to any such agreement.

Discussion

[21] In his reasons for judgment, the trial judge expressly believed the respondent and accepted his evidence, and expressly disbelieved the appellant and the appellant's brother. The trial judge considered their evidence "quite fanciful and contrary to the evidence of the plaintiff's witnesses and to written statements about the plaintiff's interest which both have made." The trial judge also noted they were making up their evidence as they went along and that the approach they contended for was "quite unrealistic and divorced from the preponderance of the evidence."

[22] These express findings as to the credit and reliability of the respondent, and as to the lack of credit and reliability of the appellant, are not the subject of challenge on appeal.[2] Accordingly, this Court must proceed on the basis the respondent's

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1 AB 429 at [83].

2 T 1-3/23.

evidence is to be accepted and the appellant's evidence to the contrary is to be rejected.

Was there any agreement?

[23] Whilst the trial judge quoted extensive sections of the evidence led at trial, there was little analysis in the judgment of the extent to which that evidence supported the agreement as pleaded by the respondent. There were also no specific findings as to the precise terms of the agreement entered into between the appellant and the respondent. Instead, there were general references to "the joint venture agreement" between the parties.

[24] The expression "joint venture agreement" specifically comes from the respondent's amended statement of claim. Paragraph 2 pleads:

> "By a joint venture agreement made in or about January - February 2002 the Plaintiff agreed with the defendant to enter into a joint venture to acquire the Land, renovate and extend the improvements constructed on the Land (herein called 'the Renovation') and to sell the Land and share equally in any profits made on the resale of the Land (herein called 'the joint venture agreement'), full particulars whereof are contained in paragraphs 2.1 and 2.3 of the Plaintiff's Answers to the Defendant's Request for Particulars dated 17 March 2008 (herein called 'the Particulars')."

[25] The respondent's answers to the appellant's request for particulars alleged that the joint venture agreement was agreed orally in conversations between the appellant and the respondent which took place in or about January – February 2002, either at the land or at the respondent's residence in Southport.

[26] In paragraph 3 of the amended statement of claim, the respondent pleaded that the express or, alternatively, implied terms of the joint venture agreement included that the appellant would pay for the cost of all building materials and third party tradesmen or labour used in the renovation, that the appellant would reimburse the respondent for any out of pocket expenses incurred by him in respect of the renovation or alternatively the land, and that during the renovation the respondent would reside upon the land as its caretaker on a rent free basis.

[27] Whilst the trial judge did not make any specific finding as to the terms of the agreement entered into between the appellant and the respondent, the trial judge expressly found that "the preponderance of the evidence amply supports the plaintiff's claim."[3] Further, the trial judge expressly found a constructive trust exists "in terms of the JVA."[4]

[28] In context, that finding must relate to the agreement pleaded by the respondent in his amended statement of claim. That agreement was an oral agreement entered into between the appellant and the respondent in or about early 2002, to the effect that the appellant would pay the purchase price of the property and the cost of any renovations, with the respondent to physically undertake those renovations. The agreement further provided that, upon completion of the renovations, the property would be sold and, after payment back to the appellant of the purchase price, the profit would be split 50/50.

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3 AB 428 at [76].

4 Ibid.

[29] The agreement, as pleaded, was specific and precise. The trial judge found that such an agreement had been entered into between the appellant and the respondent. A review of the evidence given at trial amply supported such a finding, particularly having regard to the findings as to the credit and reliability of the respondent.

Did a constructive trust arise?

[30] The appellant contended that a constructive trust could not arise, as the property was purchased by the appellant's brother, who was not a party to the proceeding. It was submitted that in those circumstances the respondent was not entitled to the relief ordered by the trial judge.

[31] This submission misconceives the effect of the trial judge's findings. Those findings included a finding that whilst the property was purchased in the name of the appellant's brother, it was, in truth, purchased by the appellant. That finding of fact, which is not challenged on appeal, means that whatever may have been the legal title to the property between 2002 and late 2005, the property was always beneficially owned by the appellant. There is no impediment to the trial judge's finding that a constructive trust arose in all the circumstances.

[32] Again, the trial judge's finding on this aspect was amply supported by the evidence.

[33] However, the entitlement by way of constructive trust related to the respondent's share of the profit. There was no entitlement to an interest in the title to the property. That being so, there is substance in the appellant's contention that the finding of the trial judge did not support the making of a declaration that the appellant holds his interest in the property on constructive trust for the respondent, to the extent of the damages award. The declaration that the appellant holds all of his right, title or interest in the property on constructive trust for the respondent to the extent of the judgment sum ought to be set aside.

[34] The second declaration made by the trial judge provided the respondent with security in respect of his entitlement to recover, as equitable compensation, the amount representing his entitlement to 50 per cent of the profit on the sale of the renovated property. The second declaration is a proper use of the equitable jurisdiction.

Damages

[35] The appellant contends that in the event this Court upholds the trial judge's finding of the existence of an agreement, and of a constructive trust in the respondent's favour, the judgment ought to be varied, as the sum awarded by the trial judge included amounts which were not part of the agreement.

[36] The agreement as found by the trial judge gave the respondent an entitlement to 50 per cent of the profit made on resale of the property. Having regard to the circumstances, that figure was properly determined by having regard to the value of the property at the time of termination of the agreement.

[37] The trial judge's calculation of the amount of damages to be awarded to the respondent was made in accordance with a revised schedule of damages tendered at the conclusion of the evidence.

[38] The respondent did not lead any specific evidence in support of the contents of the revised schedule of damages. It was also not the subject of any specific evidence by the appellant. It is, no doubt, against that background that the trial judge referred to the revised schedule of damages as being "unchallenged."

[39] That schedule included a claim to a half share in rental income received when the property was rented between 1 January 2006 to 10 May 2012. That sum was awarded by the trial judge. However, the agreement pleaded by the respondent, and as found by the trial judge, contained no terms to the effect that the respondent was entitled to a share of rental income should the property be rented by the appellant.

[40] The respondent contends that such a term was not referred to in the agreement, as the agreement was that the respondent would live on the property whilst it was renovated and the property would then be sold. The respondent submits that in those circumstances a term is properly to be implied that a sharing of the profit would include any rental income achieved in the event the property was tenanted by a third party.

[41] The respondent's submission cannot be accepted in the circumstances of this case. The agreement entered into between the appellant and the respondent was one in which the appellant was providing the financial resources and the respondent was providing the physical resources. There is no reason why, in those circumstances, a term should be implied which would provide for the respondent to receive a financial benefit other than sharing, equally, the profit made on the property after deduction of the purchase price. There is also no good reason why such a conclusion should flow in equity. The appellant provided the funds, and was responsible for any mortgage.

[42] Having found that the terms of the agreement entered into between the appellant and the respondent were as pleaded by the respondent, there was no basis for the trial judge to conclude that the damages to which the respondent was entitled included a half share in the rental income. The amount of damages awarded to the respondent should be reduced by $66,400.

Conclusion

[43] The appellant has established that the judgment sum ought to be reduced, and that the first declaration ought to be set aside. To that extent, the appeal should be allowed.

[44] I would order:

1. The appeal be allowed.
2. The orders made below be set aside.
3. The appellant pay the respondent the sum of $192,671.89.
4. The appellant's counterclaim be dismissed.
5. The real property situated at 60 Licuala Drive, North Tamborine in the State of Queensland, more particularly described as Lot 27 on RP 140912 County Ward Parish Tamborine, Title Reference 15376083 is hereby charged in favour of the respondent to secure the payment of the said sum of $192,671.89.