SUPREME COURT OF QUEENSLAND

CITATION:	*Donaghue v Donaghue & Anor* [2015] QSC 54
PARTIES:	**MICHAEL FRANCIS DONAGHUE** (plaintiff) **v** **CAITLIN BRIDIE DONAGHUE** (first defendant) **STEVEN PAULETTO** (second defendant)
FILE NO/S:	SC No 4166 of 2013
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 March 2015
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2015; 11 March 2015; 12 March 2015
JUDGE:	Philip McMurdo J
ORDER:	**It is declared that the land at 112 Shorncliffe Parade, Shorncliffe, described as Lot 4 on RP 4561, County of Stanley, Parish of Nundah, Title Reference 11441145, is held by the defendants upon a constructive trust for the plaintiff, upon condition that the plaintiff meets all expenses and liabilities of the acquisition and ownership of the house, including the payment of any money falling due to the Commonwealth Bank of Australia under the loan made by it to the defendants.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – dispute over the nature of an agreement - where the plaintiff claimed he asked the first defendant (his daughter) to obtain a loan on his behalf to discharge his existing mortgage on the house – where the first defendant acted on behalf of the second defendant – where the defendants obtained a loan and the plaintiff's land was transferred to them and registered in their names – where the parties signed a document in the standard form of a contract for the sale of land which did not record the entirety of what was agreed by the parties and contained none of the critical terms contended by the plaintiff – construing intention of the parties – intention of the plaintiff to the knowledge of the

defendants – whether the plaintiff was to retain a beneficial interest in the land – whether the defendants were in all respects the owners of the land

CONTRACTS – CONVEYANCING – FROM CONTRACT TO COMPLETION – dispute over the nature of an agreement - where the parties signed a document in the standard form of a contract for the sale of land which did not record the entirety of what was agreed by the parties and contained none of the critical terms contended by the plaintiff – construing intention of the parties – intention of the plaintiff to the knowledge of the defendants – whether the plaintiff was to retain a beneficial interest in the land – whether the defendants were in all respects the owners of the land

EQUITY- TRUSTS AND TRUSTEES – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – GENERALLY – where the plaintiff claimed he asked the first defendant to obtain a loan on his behalf to discharge his existing mortgage on the house – where the defendants obtained a loan and the plaintiff's land was transferred to them and registered in their names – where the plaintiff claimed he only transferred the house to the defendants as security for his obligation to see that the debt they incurred was repaid and that upon repayment of the loan, the house would be reconveyed to him – where the defendants claimed the transaction was a sale of land on its face at a heavily discounted price and that they were in all respects the owners of the house – where the plaintiff made all loan repayments and payment of other expenses associated with the house following the transfer - whether the plaintiff relied on an expectation as to his present and future entitlement to the house and its proceeds - where it would be a "species of equitable fraud" for the defendants to insist upon their absolute title to the house

EQUITY- TRUSTS AND TRUSTEES – IMPLIED TRUSTS – RESULTING TRUSTS – WHEN ARISING – where the plaintiff submitted the house was held on a resulting trust because the conveyance of it was for a false consideration – whether the presumption of advancement was rebutted

ESTOPPEL – ESTOPPEL BY CONDUCT – PROPRIETARY ESTOPPEL where the defendants claimed the transaction was a sale of land on its face at a heavily discounted price and that they were in all respects the owners of the house – where it would be a "species of equitable fraud" for the defendants to insist upon their absolute title to the house

EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS, AND WEIGHT AND SUFFICIENCY OF EVIDENCE – GENERALLY – CREDIBILITY AND WEIGHT – PARTY'S

FAILURE TO GIVE OR CALL EVIDENCE – whether a *Jones v Dunkel* inference should be drawn from the plaintiff's not leading evidence from his solicitor – whether communications between the plaintiff and solicitor would be privileged – whether privilege was lost or waived – whether the solicitor acted for all parties in a transaction for the sale of land – where the rule in *Jones v Dunkel* did not apply

EVIDENCE – FACTS EXCLUDED FROM PROOF – ON GROUNDS OF PRIVILEGE – PROFESSIONAL CONFIDENCE – LEGAL PROFESSION – COMMUNICATIONS – whether a *Jones v Dunkel* inference should be drawn from the plaintiff's not leading evidence from his solicitor – whether communications between the plaintiff and solicitor would be privileged – whether privilege was lost or waived – whether the solicitor acted for all parties in a transaction for the sale of land – where the rule in *Jones v Dunkel* did not apply*Giumelli v Giumelli* (1999) 196 CLR 101
Jones v Dunkel (1959) 101 CLR 298
Riches v Hogben [1985] 2 Qd R 292
Standard Chartered Bank of Australia Ltd v Antico (1993) 36 NSWLR 87
Wirth v Wirth (1956) 98 CLR 228

COUNSEL: A R Lonergan for the plaintiff
D Williams for the first and second defendants

SOLICITORS: Watt & Severin Lawyers for the plaintiff
McInnes Wilson for the first and second defendants

[1] This is a dispute about the ownership of a house at Shorncliffe in which the plaintiff, Mr Donaghue, has lived since 1999. But in 2012 he transferred the registered ownership to his daughter, who is the first defendant and to whom I will refer as Ms Castner, and to the second defendant who had been her de facto partner.

[2] On the face of things, that transfer was made pursuant to a contract of sale between the parties, for which the agreed price was $380,000. It is common ground that the parties all appreciated that this was very much less than the true value of the house. Indeed, a valuation which was obtained for the purposes of stamp duty on the conveyance said that the house was worth $1.2 million. And it is admitted that the house has a current value of $950,000. There have been no improvements to it since its transfer to the defendants.

[3] Mr Donaghue's case is that notwithstanding the transfer, he retained a beneficial interest.

[4] At all times the house has remained in the possession of Mr Donaghue. He has made payments equivalent to $650 per week to the Commonwealth Bank ("CBA") which lent the defendants $400,000 for this purchase. From time to time, he has fallen a little behind that rate of $650 per week. Nevertheless, his payments to the bank (and his

payments alone for the defendants have paid nothing towards their mortgage debt on this property) have paid the interest on this loan as well as more than $31,000 towards the principal. Mr Donaghue has also made some payments for rates and other expenses in relation to the house.

[5] The evidence also shows that some other expenses associated with the house have been met by the defendants. But it is not demonstrated that these were expenses for which payments requested of the plaintiff and which he refused to make.

[6] As the defendants accept, Mr Donaghue transferred his house at a time when he was in financial difficulty. He had defaulted in paying his own mortgage debt on this house and the mortgagee had obtained a judgment for the recovery of possession. Unless that mortgagee could be paid, Mr Donaghue was facing eviction in late April 2012. It is common ground that in that circumstance he approached Ms Castner with a proposal. It is there that the respective cases part company.

The respective cases

[7] Mr Donaghue says that he asked Ms Castner to borrow an amount which would discharge his existing mortgage. He says that this was to be a loan which she would obtain effectively on his behalf. He says that he first spoke to her about this somewhere between 2 and 9 March 2012. She says that their first discussion was on 9 March. The precise date is immaterial.

[8] His proposal was that through her, he would refinance his existing loan on the house. Subsequently, there were several conversations between them as a result of which he retained solicitors and she approached the CBA through her finance broker. During these discussions, he says he came to understand that it would be necessary for "the equity I had in the property" to be used to secure a loan to her, which meant that there had to be a transfer of the property to her.[1] Subsequently, he saw that the second defendant, Mr Pauletto, was also to be involved in the transaction. Mr Donaghue's solicitor prepared a contract in the REIQ form for the sale by him to them of the house, initially for a price of $390,000. Two days later, on 4 April 2012, the draft contract document was amended to show the price as $380,000.

[9] The effect of Mr Donaghue's case is that the land was transferred to Ms Castner and Mr Pauletto only so that they could borrow sufficient funds to pay out his existing mortgage. That was a loan which they would obtain simply for his benefit. That is why he proceeded to make all of the payments to the CBA after the loan was drawn down and the house was transferred. The agreement or understanding reached between Mr Donaghue and his daughter, who was acting also on behalf of Mr Pauletto, was that upon repayment of the loan by the CBA, the house would be reconveyed to him.

[10] Another way of describing the effect of the agreement or understanding for which Mr Donaghue contends is that he transferred the house to them only as security for his obligation to see that the debt which they had incurred to the CBA was repaid.

[11] The defendants' case is that this transaction was simply a sale, as the REIQ form of contract on its face recorded. Ms Castner's evidence is that Mr Donaghue offered to

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sell the property to her at this heavily discounted price and that she accepted. Subsequently, there were difficulties in her obtaining a loan from the CBA without the participation of Mr Pauletto. Therefore, he was included in the transaction. Consequently, the house is in all respects the property of Ms Castner and Mr Pauletto.

[12] As to the fact that it is Mr Donaghue who has made all payments to the CBA, Ms Castner and Mr Pauletto explained these payments as rental paid by him to them. On Ms Castner's evidence, there was no particular negotiation or even discussion about what the rental should be. She says that Mr Pauletto calculated an amount which would have to be paid to the CBA and that this was converted to a weekly figure which she believes she communicated to Mr Donaghue by an SMS message (which she cannot retrieve).

[13] Mr Donaghue's case has been pleaded by reference to several alternative legal bases. He says that there is a resulting trust in his favour. Alternatively, he seeks a declaration that there is a constructive trust by which the land is held for him or in part for him. He pleads an estoppel, in that he was made to believe by his conversations with his daughter that the property would be re-transferred to him on payment of the CBA debt, and that he acted in reliance upon that expectation by making the payments which he did. And he pleads a case in contract, namely that the parties agreed that the property would be re-transferred upon payment of the CBA debt. Ultimately, the contractual case was abandoned by the plaintiff's counsel.

The dispute arises

[14] Settlement of this transaction was effected on 20 April 2012. The CBA lent $400,000 to the defendants, of which $368,786.15 was paid to Mr Donaghue's mortgagee in full discharge of that debt. The balance of the CBA loan was credited to an account of the defendants.

[15] By January 2013, the present dispute had arisen. On 8 January, Ms Castner sent an email, with the concurrence of Mr Pauletto, in which she asked Mr Donaghue to pay them $36,500 upon the basis that this was the total of what they had spent in connection with the acquisition or ownership of the house beyond the loan amount of $400,000. I accept that Mr Donaghue took steps to borrow that sum in order to pay it to them. On 22 February 2013, he emailed them saying that he had arranged a loan but that he needed a letter outlining the calculation of the sum of $36,500 so that his lender could pay that sum to them. In that same email, Mr Donaghue made statements about the position between the parties and their respective entitlements to the house. The immediate response was an email from Mr Pauletto, copied to Ms Castner, which rejected those contentions. It rejected any suggestion that Mr Donaghue should have any role in a sale of the house and, in particular, any dealings with the real estate agent who by this stage had been retained by the defendants. This email asserted that the defendants were in all respects the owners of the house.

[16] Mr Donaghue then lodged a caveat and commenced this proceeding.

The evidence

[17] There were three witnesses at this trial, namely the parties. There were markedly conflicting versions given by Mr Donaghue and Ms Castner, corresponding with their respective cases, as to their discussions which led to the transfer. Mr Pauletto was not involved in any of those discussions. Mr Donaghue argues that the agreement for which he contends was made by Ms Castner also as Mr Pauletto's agent. There is no case pleaded or argued by Mr Pauletto to dispute that agency, if Mr Donaghue otherwise proves his case. Mr Pauletto's evidence is that his understanding of the transaction was according to what Ms Castner told him and according to the documents which recorded it. That evidence was challenged upon the basis that he must have understood and intended the position to be as Mr Donaghue contends was the true agreement.

[18] In essence then the questions are what did the parties intend, or at least what did Mr Donaghue intend to the knowledge of the defendants? These are to be answered by reference to their oral evidence, the documentary evidence and an assessment of the relative probabilities on the competing versions.

[19] The starting point is that the parties did sign a document in the standard form of a contract for the sale of land, which contains none of the critical terms for which Mr Donaghue contends. And this was a document prepared by Mr Donaghue's solicitor, to whom Mr Donaghue wrote on 9 March 2012. In that letter, he began by describing his financial difficulties leading to his being in default under his mortgage. But he then wrote:

> "My daughter Caitlin Donaghue who works for PWC is arranging for a loan with the CTB to pay out the full amount required. This might take a few weeks due to the valuations, etc so it is my request that an approach be made to [his mortgagee] to delay any further action until the loan can be paid out in full. … I would like to also engage you in any conveyancing action required as a consequence of Caitlin's purchase of the property."

This letter provides some support for the defendants' case that as early as 9 March 2012, the proposal was for the house to be transferred to her, rather than that emerging later as Mr Donaghue recalled. On the other hand, it refers to her arranging a loan "to pay out the full amount required" by his mortgagee, which could be considered to be consistent with his case.

[20] The solicitors engaged by Mr Donaghue were given limited instructions, as appears from their letter to him on 26 April 2012. This was six days after completion of the purported sale of the house, when the CBA had paid out Mr Donaghue's existing mortgage and had paid the balance of its loan to an account of the defendants. The solicitors then wrote to Mr Donaghue as follows:

> "We refer to the above and confirm your instructions were to negotiate with GE Mortgage Solutions an extension of time to payout and finalise the debt.
>
> We further confirm your instructions to sell the property to Caitlin Donaghue and Steven Pauletto in an amount of $380,000.00. We confirm the parties signed a Contract of Sale on 5 April with settlement effected on 20 April 2012.
>
> We confirm your instructions that Caitlin, Steven and yourself will discuss and arrange the tenancy agreements and repayment details.

> …
>
> CBA will now attend to the registration of the Release of Mortgage and Transfer of the property.
>
> We have been advised by Gadens Lawyers that the eviction has been cancelled and the matter is now at an end."

This letter strongly indicates that the solicitors' retainer was limited to negotiations with the existing mortgagee and the conveyance of the house and that they were not retained to advise upon and prepare documentation which would record the full agreement or understanding of the parties. Rather, the parties were to "discuss and arrange the tenancy agreements and repayment details". The submissions for the defendants sought support from that evidence because of its reference to a tenancy. On the other hand, it also referred to "repayment details", which would not be something to be discussed if Mr Donaghue was not to be involved in any "repayment".

[21] It was submitted for the defendants that a *Jones v Dunkel*[2] inference should be drawn from the plaintiff's not leading evidence from his then solicitor. The communications between them, of course, would be privileged subject to perhaps two possible qualifications. The first, which was suggested by counsel for the defendants, was that the solicitor was acting for all parties in the transaction. But that finding is not open on the evidence. The solicitors sought and obtained the defendants' authority to sign the transfer document on their behalf. However, in the letter of 5 April 2012 to the defendants, the solicitor expressed that she was acting only on behalf of Mr Donaghue, as was confirmed in the defendants' email to the solicitor on 16 April 2012. There is a question also as to whether Mr Donaghue's privilege has been waived, so that it would not provide an explanation for his failure to lead evidence from the solicitor. But an argument of waiver of privilege was not developed by counsel for the defendants. Absent a waiver of the privilege, the rule in *Jones v Dunkel* does not apply in this circumstance.[3] In any case, the inference which could be drawn is only that the solicitor's evidence would not have assisted Mr Donaghue's case. It could not be inferred that it would have damaged it. And because it appears that the solicitors were given but limited instructions, it should not be inferred that they were given a full account by Mr Donaghue of the parties' intentions, as he understood them to be, for the future ownership of the house.

[22] Although the terms of the contract document support the defendants' case, they do not of themselves put paid to the plaintiff's case. Even on the defendants' case, the entirety of what was agreed was not recorded by this document. On either case, Mr Donaghue was to remain in possession of the house, inconsistently with the provision in the contract document for possession to be given to the purchasers on settlement: cl 5.3. On the defendants' case, Mr Donaghue was to remain in possession as a tenant, paying a certain rental. The intention that he would remain in possession, they each acknowledged in their evidence, was essential to the agreement which they say was in fact made. When asked to explain why, in her or his view at the time, Mr Donaghue was transferring his house for a consideration which was a small fraction of its value,

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2 (1959) 101 CLR 298.

3 *Standard Chartered Bank of Australia Ltd v Antico* (1993) 36 NSWLR 87, 93-95.

each answered to the effect that Mr Donaghue was motivated by a desire to avoid being made to leave his house.

[23] Although Mr Donaghue remained in possession, neither side says that there was an agreement by which he would do so for a fixed or minimum period. The effect of the evidence of each of the defendants is that Mr Donaghue could have been required to leave at any time, although they were prepared to allow him to stay as long as he met all of the expenses of the ownership of the house and the mortgage payments. That seems hardly to be the security of a residence for which, they suggest, he was prepared to transfer the house at such a discounted price. But the present point is that the effect of the defendants' case is that the true agreement or understanding was not recorded by the contract document.

[24] At this point, it is necessary to discuss some other facts and circumstances existing as at the time of the transfer as well as events which post-dated it. As to the latter category, they will be considered to ascertain the intentions of the parties at the time of the transfer.

[25] In April 2012, Mr Donaghue was aged in his early 60s. He has had a working life in the electricity industry and also in the Australian Army, where he is still under contract to serve as a Colonel. As at March 2012, he had been a widower for about eight years. He had several adult children, including Ms Castner. There is no indication that he was particularly close to her: indeed some of the cross-examination of him suggested that their relationship had been very problematical at times.

[26] Ms Castner was then in her late 30s. She had been in a de facto relationship with Mr Pauletto for some years until December 2011, when he left the house in Brisbane which together they had occupied with their two young children. Ms Castner said that Mr Donaghue was aware of this separation by reason of his visits to the house to see the children.

[27] Each of the defendants works in the field of information technology. Ms Castner does not have any particular academic qualification. Mr Pauletto has a Bachelor of Commerce. He is the older of the two by a few years. The defendants have not recommenced their relationship but they have remained financially associated. In particular, they continue to own together that house in Brisbane and to maintain a joint bank account.

[28] At the time of this transaction, the defendants also owned an apartment in Potts Point where she had lived for some time. He had also owned another property, which he said he had purchased from his parents, but which had been recently sold providing some $60,000 or $70,000 in clear funds. They had borrowed about $500,000 to purchase their Brisbane house.

[29] Mr Donaghue was certainly under immediate pressure to avoid being dispossessed and a sale by his mortgagee. I infer that he was concerned that this would result in something of a fire sale. For some time, he had been trying to sell the house and had had it listed with a local real estate agent.

[30] As I have mentioned, there were no dealings directly between Mr Donaghue and Mr Pauletto. Mr Pauletto was introduced to the proposed transaction not long before it

was effected. That resulted from Ms Castner being informed by her finance broker that the CBA would not lend only to her, because of some unpaid loans in her credit history. The CBA was the mortgagee of their Brisbane house.

[31] The defendants seek support from the terms in which Ms Castner wrote to the finance broker about the proposed transaction. On 9 March, she emailed the broker saying that she had "been presented with an opportunity to purchase a considerably grand slice of real estate" because her "father is currently selling his property in Shorncliffe … and has given me the opportunity to buy the property at significantly less value to that of the current market or listed price of $1.2 million". She added that she "would be looking to purchase the property for around 400k" and asked what information the broker would require to make "the assessment". That email is certainly consistent with the defendants' case. The broker seems to have had some association with CBA: her emails described her as "the authorised representative of Commonwealth Bank". Quite possibly Ms Castner believed that it would promote the prospects of obtaining a loan from the CBA to represent that this was a particularly advantageous transaction which it would be asked to finance.

[32] On 27 March 2012, the broker emailed Ms Castner to advise her that the loan application would have to be submitted in the names of both defendants. Mr Pauletto promptly agreed. A few days later the draft contract of sale was prepared showing them both as purchasers. After an amendment of the price, as already mentioned, the contract document was signed, providing for settlement being on or before 18 April 2012 or before "the eviction date" if earlier.

[33] I have already mentioned the disposition of the CBA's loan of $400,000 on the settlement date. Significantly, what was paid to or for the benefit of Mr Donaghue was less than the agreed price. Most significantly, neither of the defendants was able to explain satisfactorily why the contract price was not paid in full. That tells against the defendants' case. Mr Pauletto claimed that he was unaware that the contract price had not been paid in full until this trial. However, that testimony was inconsistent with his email of 8 January 2013, which is discussed below, in which he made a calculation according to what he said was his understanding that $368,000 had been paid to the former mortgagee. In any case, Mr Pauletto impressed me as commercially literate and sufficiently alert to his own finances that he would know how much of the CBA loan of $400,000 had gone to the former mortgagee and how much had gone into his bank account. And if he did not advert to the fact that what was paid to or for the benefit of Mr Donaghue was less than the stated price of $380,000, the likely explanation is that that price was immaterial because it was to have no ultimate effect on the parties' positions.

[34] Because the vendor and one of the purchasers were father and daughter, independent evidence of the value of the house had to be obtained for the purpose of paying duty on the transfer. As I have mentioned, that resulted in an assessment of the value at $1.2 million. Consequently, stamp duty was assessed and paid by the defendants in the sum of $48,675 on the transfer. This amount, when added to the amount which was paid to Mr Donaghue's mortgagee, exceeded the $400,000 which the defendants had borrowed.

[35] The CBA lent on a variable interest basis. The initial monthly payment of principal and interest which it required, as notified by it when approving the loan on 10 April 2012,

was $2,585. This was the equivalent of $31,020 per annum or $596 per week. Mr Donaghue says that he understood that $620 per week was needed to cover the payments to the CBA but that he increased this to $650 per week in order to ensure that the defendants were not out of pocket. The evidence of each of the defendants is that Mr Pauletto calculated the required amount at $650 which Ms Castner communicated to Mr Donaghue. On either version, it was agreed that it was Mr Donaghue who was to make the mortgage payments. He proceeded to do so by payments, most commonly in an amount of $1,300 (two times $650) which he made directly to the bank. The payments are alleged in an annexure to his pleading which is admitted. By the time of the email from the defendants to him of 8 January 2013, he had paid $19,700 which indicates that he was then about $4,000 behind a rate of $650 per week.

[36] I mentioned that Mr Donaghue had listed the property for sale with a local real estate agent. He had reappointed the agent on 4 February 2012 for a period ending on a date in April 2012.

[37] After the house was transferred, Ms Castner said that almost immediately she dealt with the same agent with a view to selling the house. Mr Pauletto agreed that the agent had some informal engagement by them prior to a formal appointment of that agent by them in October 2012. By that appointment, the agent was engaged by the defendants to look for a buyer at a price of $1.3 million.

[38] It thereby appears from the defendants' evidence that they considered that they were free to sell the house, at which point they could expect Mr Donaghue to vacate it. But to an extent, that is consistent also with his case. He does not claim that it was agreed that he could stay for any fixed period or that some extended period of notice was required before he would have to leave. On his evidence, he was looking to have the property sold. Indeed, when the communications between the parties became acrimonious in January 2013, one of the demands made by Mr Pauletto was that Mr Donaghue have no dealings with the real estate agent such that the defendants would "solely decide upon any sale procedures or details". Of course on his case, the decision to sell at a certain price would have been his decision.

[39] Mr Donaghue made some other payments towards the house apart from those which he made to the CBA. They are set out in Annexure A to his pleading and are admitted. They include some payments for rates, the last of which was in March 2013. There were also payments made to tradesmen for gardening and pest control. In all respects, he attended to the day to day maintenance of the house.

[40] In cross-examination, Mr Pauletto said that there was no agreement that Mr Donaghue was to pay the rates. But he conceded that he forwarded a rate notice to Mr Donaghue on one occasion which he explained on the basis that "we were low on cash flow".[4] That provides no satisfactory explanation for sending the notice to Mr Donaghue, an act which was inconsistent with the defendants' present case. It is consistent with Mr Donaghue's case, that the property was to remain beneficially his and that he would meet the expenses of its ownership.

[41] As I have mentioned, the dispute arose in January 2013. It is evidenced firstly by the email to Mr Donaghue of 8 January 2013 from Ms Castner. That attached an email to

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her from Mr Pauletto. In his email, he set out a short calculation which resulted in a bottom line reading "Total Out Of Pocket = $36,500". That calculation began with the amount of the CBA loan: $400,000. From this he deducted an amount of $383,000 described as "settlement", resulting in $17,000 as "Shorncliffe loan remainder". The amount of $383,000, of course, did not correspond with either the agreed price, according to the REIQ form of contract, or what had been paid on settlement which was approximately $368,000. The explanation emerged in the course of Mr Pauletto's evidence, when he claimed that he had added an amount of $15,000 or so to what had been paid on settlement because (he said) this was the amount of an overdue debt owing by Ms Castner prior to the transfer and which the CBA had required to be repaid. I am not satisfied that this was how Mr Pauletto did arrive at the amount of $383,000 which he wrote in his email. There is no evidence as to the amount of that other debt or indeed that it was paid from the settlement proceeds, the balance of which was paid by the CBA to the defendants.

[42] Mr Pauletto's calculation continued with items for "stamp duty" ($49,000), "solicitor" ($1,500), "rates" ($1,500 and a further amount of $470), "water/sewer" ($180) and "insurance" ($765). Those amounts were totalled at $53,500. Deducting the "Shorncliffe loan remainder" of $17,000 resulted in the "out of pocket" of $36,500.

[43] Adopting that calculation, Ms Castner emailed Mr Donaghue on 8 January 2013 as follows:

> "Steven has broken the expenses down and has all the details on each of the transactions, the rates detailed below were the outstanding rates that were paid in the first month, as well as Sewer, Solicitor, Insurance and Stamp Duty.
>
> We had $40,000 in savings and used $36,500 for the purchase of Shorncliffe, we currently don't have savings, we don't go on holidays and we live week to week on our pay.
>
> We have also been hit with land tax, given the combination of properties has taken us both above the threshold, this will cost us an additional 3000 (1500 for each of us).
>
> You have had discussions in front of me about purchasing a new car, if you are proposing to get finance, I would like to recover our savings that we used to purchase Shorncliffe above and the loan taken out with CBA."

[44] It can be seen at once that this email is quite inconsistent with the defendants' case and is consistent with the plaintiff's case. What was sought by the defendants was a payment to reimburse them for their expenses in relation to the acquisition and ownership of the house to the extent that those expenses had exceeded the amount which they had borrowed from the bank. If, as the defendants maintained, they had simply purchased this house and become in all respects its owners, they had no claim to be reimbursed in this way. Their case is that Mr Donaghue was to pay rental. But that was in an amount which Mr Pauletto had calculated and which had been communicated to Mr Donaghue before settlement and to which he had not objected. The defendants' case is not that he was to pay rental in whatever amount or amounts were required to see that they were not at all out of pocket for owning this house.

[45] In their evidence, the defendants sought to explain this email of 8 January 2013 in this way. By this stage they were becoming very concerned about what they anticipated would be another episode of financial irresponsibility on the part of Mr Donaghue. He had recently become engaged to be married and, they say, was making statements about expensive of jewellery which he intended to buy as well as statements about an expensive car for which he was about to borrow. Such was their concern that he would not meet his rent commitment of $650 per week, they decided to make this claim to the end of obtaining an amount which would provide a buffer against future defaults in the payment of rent. It can be seen that this requested amount of $36,500 represented more than 56 weeks of rent. But their evidence was that they thought that they might need as much as a year to evict him.

[46] When asked to explain why they had not set out those concerns in the email, but instead had asked for this money upon quite a different basis, Mr Pauletto said that they feared that if they were candid with him, this would immediately provoke a default in paying the rent.

[47] I do not accept their explanation of this email. Although, as I have already noted, he had fallen about $4,000 behind in paying the equivalent of $650 per week, his performance overall had not been such as should have caused them any concern as to his financial intentions. And there is only their word for the suggested facts of his new extravagance. The email does mention his plan to purchase a new car but nothing more.

[48] Further, their explanation is inconsistent with a subsequent email of Mr Pauletto, dated 22 February 2013. This email was particularly direct and acrimonious, yet it had no reference to the amount of $36,500 being sought as security for a year's rental. Instead, the amount of $36,500 was again put as what was necessary to ensure that the defendants were not out of pocket.

[49] That email from Mr Pauletto was in response to Mr Donaghue's email to the defendants of the same day, to which I have already referred and in which he advised that he had arranged a loan to pay that amount of $36,500. Mr Donaghue's evidence that he had arranged that loan was not challenged. Mr Donaghue there wrote:

> "The property has been on the market for the whole period with response appropriate to the real estate situation in Australia at the moment. There has been no perceived need to this point in time to change those arrangements. The relationship between myself and the real estate agent … [has] been very amicable at all times and nothing that has been said to me would indicate any change in that relationship.
>
> I am aware that other complications with regards to your splitting of assets have recently occurred. I have no intention of engaging in that debate. Should there appear to be further [miss] (sic) understandings it might be best if we deal with this with the help of appropriate solicitors.
>
> I await your reply with a statement of the amount owing so that the arrangements already made can be finalised."

It was in response to those statements about the real estate agent that Mr Pauletto wrote in his email of 22 February that the agent had been instructed not to contact

Mr Donaghue and that the defendants would solely decide upon any sale procedures or details.

[50] The tax returns of each defendant for the years ended 30 June 2012 and 30 June 2013 are in evidence. In each case they show payments made by Mr Donaghue as income in the nature of rental received. However, they were each submitted in October 2013, after the commencement of this proceeding. The 2012 returns were amended returns. The amendments were to include the subject house as a rental property of the tax payers. Before the case was commenced, their 2012 returns had not declared this income as rent. Ms Castner's explanation was to say only that it was Mr Pauletto who effectively prepared the instructions to the tax agent. Mr Pauletto's explanation for the non-inclusion of this rental in the 2012 returns, as originally filed, was quite unsatisfactory. He appeared to say that he had delayed in deciding how his ownership of this house should be represented to the Australian Tax Office, because he was deciding upon which of his various properties should be represented to be his principal place of residence for the purpose of being exempted from capital gains tax.[5] That explanation hardly enhances his credibility.

[51] The submissions for the defendants criticise what was said to be a divergence from the plaintiff's pleaded case. In para 34 of the statement of claim, it was alleged that in telephone conversations between Mr Donaghue and Ms Castner before 4 April 2012, she said to him various things as to what would happen with the house and the financial arrangements between them. One of those things was that "upon repayment of the CBA loan by the Plaintiff, the Property would be reconveyed to the Plaintiff". But there was no allegation that she said that if the house was sold, the net proceeds would belong to him. For the defendants it is submitted that that element of the plaintiff's case arose only at the trial and that evidence was given in support of it only in the course of the cross-examination of Mr Donaghue. It was strongly argued that this discredits Mr Donaghue's case. However, this submission is unpersuasive because there is no substantial tension between the pleaded case and Mr Donaghue's evidence. The relevant part of his evidence was when he was being asked about whether he was concerned that Mr Pauletto was going to become the owner of the house. Mr Donaghue then answered:[6]

> "Only in the sense that the relationship was breaking up and I'd highlighted 12 months later that I didn't want to become collateral damage. But my - I suppose my assessment of what was actually happening was that refinancing was occurring so that we could put the place back on the market and have control over the sale of it and not have a fire sale of the property. So given the timeframe, you know, within the next 12 to 18 months that could have been resolved and the property would have been sold and paid out."

Mr Donaghue's evidence was as to his understanding rather than a purported recall of something which had been said. And that understanding would be a logical conclusion from the conversations which he had pleaded.

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5 T 2-65-66.
6 T 1-53.

[52] It was submitted that it was fatal to Mr Donaghue's case that he gave evidence that he did not have a direct discussion with his daughter in respect of the ownership of the property. This occurred during his cross-examination, when he was asked whether he had had any such discussions and he answered:[7]

> "[N]o, I don't have a direct discussion as it related to that, but … the issue of being able to raise the loan I was - it was indicated to me that there was - because of Caitlin being maxed out on her current mortgage arrangements, that I would need to be able to offer the equity I had in the property to secure that - to secure the loan. And to secure that loan meant that the equity I had would then be offered as part of that security."

[53] However, this passage of Mr Donaghue's evidence should not be read in isolation. His evidence was that he asked his daughter to "take out a loan for and on my behalf … to refinance the loan that I had …".[8] He asked her whether she was "willing to assist [him] in refinancing the loan on the Shorncliffe property".[9] And he said that there was no conversation by which he offered to sell the house to her for what was owed on his existing mortgage.[10]

[54] The fact that Mr Donaghue's evidence did not contain purported recollections of more precise discussions as to the beneficial ownership of the house and what should happen to the proceeds of its sale is not necessarily a reason for rejecting his case. Rather, it suggests at least that he has not deliberately constructed a version which would maximise his prospects of success.

[55] It was submitted for the defendants that it was improbable that they would agree to assist Mr Donaghue as he alleges was the mutual intention. They were not especially wealthy and had substantial borrowings on other properties. They were being asked to borrow a further $400,000 with no benefit to them. Moreover, they had separated in late 2011 making it unlikely that Mr Pauletto would agree to participate in this transaction for an open ended period with no provision being made for Mr Donaghue becoming unable to meet the mortgage payments. They are valid considerations. But if Ms Castner was minded to assist her father at a point of crisis in his financial position, the absence of a personal benefit to her may not have mattered. As for Mr Pauletto, the explanation for his participation may lie in the particular relationship which he then had or was meaning to have with Ms Castner. In some senses at least, their relationship was ongoing and close, as indicated by their co-ownership of property and their joint operation of at least one bank account.

[56] The defendants did not put themselves at any substantial risk by engaging in this transaction upon Mr Donaghue's version of it. They had the security of being the registered owners of a house worth perhaps three times the amount which they had borrowed. Both sides were meaning to have the house sold. There is no evidence that in March or April 2012, they considered that Mr Donaghue would be unable to meet the mortgage payments. Their asserted concern in that respect was not until the end of

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7 T 1-20-21.
8 T 1-17.
9 Ibid.
10 T 1-20.

2012 and not because of the insufficiency of his income but rather because of his supposedly recent extravagance.

[57] It is of some significance that there was no discussion between Mr Donaghue and Ms Castner which resembled a negotiation about a contract price. On her evidence, no particular figure was proposed by her father during the initial conversation, after which she immediately approached the CBA through the broker. The price was varied from one draft contract to another, without any apparent discussion.

[58] Overall, the version of Mr Donaghue is inherently more probable than that of the defendants. Clearly he was under financial pressure and wished to avoid a mortgagee's sale of his house. He wished to sell it with the benefit of more time. But on any view, the market value of the house was very much more than the amount which he owed to his mortgagee. He was not in such a desperate position that for the sake of avoiding having to vacate the house at that stage, he would effectively give away many hundreds of thousands of dollars. Nor was his relationship with his daughter such that might be thought that he would do that out of particular affection for her. Indeed, in her evidence she did not suggest that that was his motivation: rather she said that he wished to avoid the embarrassment of having to leave on the demands of a mortgagee. That may have concerned him. But it is quite unlikely that he was so influenced by that as to part with what I infer to be a good part of his accumulated wealth (the only other part being whatever equity he held in a rural property). It seems fanciful to suppose that Mr Donaghue intended to confer a benefit of some hundreds of thousands of dollars upon Mr Pauletto in circumstances where they had never had a close relationship, Mr Pauletto had separated from Mr Donaghue's daughter and there was no communication between them prior to the settlement of the transaction.

[59] The fact that the contract price, according to the form of contract of sale, was not paid is telling. It strongly indicates that the true nature of the transaction was as Mr Donaghue says. The email of 8 January 2013 is also strongly indicative of the truth of the plaintiff's case. The fact that Mr Donaghue remained involved in attempts to sell the house is supportive of his case. There is no logical explanation for that conduct. It was argued that perhaps Mr Donaghue thought that if he could procure an advantageous sale of the house, he could appeal to his daughter's generosity by asking her for some of the proceeds. That is not a convincing explanation and is inconsistent with his email to the defendants of 22 February 2013 in which he asserted his right to deal with the real estate agent in an attempt to sell the house in circumstances where the relationship between the parties had become acrimonious.

[60] Further, it is difficult to accept that the parties agreed that the defendants would be free at any time to sell the house and require him to leave when they maintain that the purpose of the transaction was to allow him to stay in the house.

[61] In my conclusion, the mutual intention was as Mr Donaghue contends. He was to pay all expenses of outgoings including the mortgage payments. They were to borrow effectively for his benefit as long as they were fully reimbursed. Ms Castner did so, I infer, as a favour to him as he had asked of her. It is not so unlikely that she would do so in his circumstance of financial necessity and given the ongoing contact which it was to be expected, he would have with her and her children. I infer that Mr Pauletto agreed to assist her to this end, not because of his concern for Mr Donaghue, but because of his

ongoing financial and parental association with Ms Castner, notwithstanding their physical separation.

[62] I infer that the defendants, particularly Mr Pauletto, became frustrated with the passage of time as the property remained unsold and they were, on any view, out of pocket. It was at that point that Mr Pauletto and then Ms Castner saw fit to claim that they were in all respects the owners who could deal with the property without reference to Mr Donaghue.

[63] The question then is what relief should be granted to the plaintiff given these findings. The claim for a resulting trust is not persuasive. The argument for that relief went as follows. The transfer was expressed to be for a consideration of $380,000 but the specification of this consideration in the form of contract and in the transfer documents was false. Then by reference to *Wirth v Wirth*,[11] it was submitted that this house was held on a resulting trust because the conveyance of it was for a false consideration and that, in truth it was voluntary. Moreover, the presumption of advancement in so far as Ms Castner is concerned, was rebutted.

[64] Upon my findings, the consideration for the transfer was falsely stated. Nevertheless, there was consideration: the defendants paid out Mr Donaghue's mortgage. They did so upon the basis that he would see that they were not out of pocket from the transaction. Nevertheless, the conveyance to them was not voluntary.

[65] The true basis for the plaintiff's claim is that it was the intention of all parties that the house would not belong to the defendants beneficially, but that instead it would be held by them until their debt to the CBA was discharged (whether by another refinancing transaction effected by Mr Donaghue or from the proceeds of a sale). In effect, they held the house as security for his discharging the CBA debt and otherwise keeping them indemnified or reimbursed for any expense incurred in the acquisition or ownership of the house. The mutual intention was that this transaction would cost them nothing but that they would have no financial benefit from it. The loan to them from the CBA was not for their own investment but was, as Mr Donaghue described it, a loan obtained on his behalf.

[66] On the face of his expectation that the defendants would act accordingly, Mr Donaghue transferred the house to them and made the mortgage and other payments. In these circumstances, it would be, as McPherson J (as he then was) said in *Riches v Hogben*[12] "a species of equitable fraud" for the defendants to insist upon their apparently absolute title to the house.

[67] The plaintiff has thereby established that upon its transfer, the house became subject to a "common intention constructive trust" in his favour. That trust is founded upon the plaintiff's assumption and expectation as to his present and future entitlement to the house and its proceeds.[13] To the knowledge of the defendants, the plaintiff acted upon that assumption and expectation by transferring the house and making the payments to the CBA and otherwise.

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[11] (1956) 98 CLR 228, 236-237.
[12] [1985] 2 Qd R 292, 302.
[13] *Giumelli v Giumelli* (1999) 196 CLR 101, 111-113 [2]-[10].

[68] Therefore, there will be a declaration that the house which is the subject of the claim is held by the defendants upon a constructive trust for the plaintiff, upon condition that he meets all expenses and liabilities of the acquisition and ownership of the house including the payment of any money falling due to the CBA under the loan made by it to the defendants.

[69] Clearly, it is undesirable that the house remain under its present ownership. There will be an order appointing trustees for the sale of the house, with directions that they distribute the proceeds of sale first to the CBA in discharge of its mortgage, next to the costs and expenses of the sale, next to the defendants to reimburse them for any expenses incurred by them beyond their expenditure from the advance by the CBA of $400,000 and lastly, in payment of the balance of the proceeds to the plaintiff. I was asked by the defendants, in that event, to find that they have made payments as detailed in their written submissions. It is preferable not to limit their claim for reimbursement in that way. Possibly, there might have to be some further although small expenditure between now and the settlement of a sale. Should the trustees for sale have some doubt as to the extent to which they should reimburse the defendants, they could seek the advice of the court.