DISTRICT COURT OF QUEENSLAND

CITATION:	*Tambovsoff v Budd* [2023] QDC 198
PARTIES:	**FAY MARGARET TAMBOVSOFF** (plaintiff) **v** **MATTHEW JAMES BUDD** (defendant)
FILE NO:	2294 of 2023
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	Brisbane District Court
DELIVERED ON:	3 November 2023
DELIVERED AT:	Brisbane
HEARING DATE:	18 – 20 October 2023
JUDGE:	Byrne KC DCJ
ORDER:	**1. The parties are to provide my associate with an agreed form of orders, including as to costs, consistent with these reasons by 4.00pm on 13 November 2023.** **2. In respect of any order on which agreement cannot be reached, the parties are to file and serve written submissions touching on those topics by 4.00pm on 13 November 2023. Those submissions are to be limited to 5 pages exclusive of any necessary attachments with a view to the issues in dispute being dealt with on the papers.** **3. Any reply to those submissions is to be filed and served by 4.00pm on 17 November 2023.** **4. Liberty to apply.**
CATCHWORDS:	EQUITY - GENERAL PRINCIPLES - NATURE OF EQUITABLE ESTATES AND INTERESTS - RESULTING TRUST - CONSTRUCTIVE TRUST - EQUITABLE CHARGE - EQUITABLE COMPENSATION – where the plaintiff provided money to her daughter and the defendant to facilitate the purchase of a block of land – where the property was registered solely in the defendant's name – where the plaintiff eventually commenced living in a granny flat on the

property with them – whether any agreement was reached as to the terms of living in the granny flat at that time - where the de facto relationship between the plaintiff's daughter and the defendant broke down – where the plaintiff continued to reside in the granny flat – where the value of the property has appreciated since purchase and had improvements made - where the defendant now wants to sell the property and the plaintiff asserts she has an equitable interest in the property – whether the provision of the money was merely a loan giving rise to a debt or whether the circumstances give rise to a constructive trust, a resulting trust, another equitable charge or allow for equitable compensation.

EQUITY - GENERAL PRINCIPLES – DEFENCES OF LACHES, ACQUIESENCE AND DELAY – where the defendant asserts that correspondence received for the plaintiff's solicitors seven years ago led him to believe that she claimed a debt in the original sum provided only – where the defendant asserts he has been prejudiced by delay and acquiescence - where the defendant holds the onus of proof – whether any of the defences are made out.

LEGISLATION: *Land Title Act 1994 (Qld)* ss 123, 129(2).
Limitations of Actions Act 1974 (Qld) s 10.

CASES: *Baburin v Baburin (No. 2)* [1991] 2 Qd R 240.
Baumgartner v Baumgartner (1987) 164 CLR 137.
Erlanger v New Sombrero Phosphate Co. (1878) 3 App Cas 1218.
Fysh v Page (1956) 96 CLR 233.
Gillespie & Ors v Gillespie [2013] QCA 99.
Muschinski v Dodds (1985) 160 CLR 583.
Orr v Ford (1989) 167 CLR 316.
Peterson v Hottes [2012] QCA 292.

COUNSEL: Mr. A.N.S. Skoien for the plaintiff.
Mr. M.A. Taylor for the defendant.

SOLICITORS: Clinton Mohr Lawyers for the plaintiff.
Ramsden Lawyers for the defendant.

Introduction

[1] The plaintiff and her adult son are presently living in one of two detached dwellings, colloquially known as a "granny flat", on land at Cedar Vale. The legal title to the land is held solely in the defendant's name. The plaintiff provided all the money which was used to purchase that land. As is all too common in cases of this nature, nothing was documented to reveal the parties' intentions at the time.

[2] The defendant was, at the time, the de facto partner of the plaintiff's daughter, Ms Yarde. That relationship has since dissolved and the defendant wants, or needs, to sell the property. There is a dispute as to the extent of the plaintiff's entitlements.

The Pleadings

[3] On 9 August 2023 the defendant filed an Originating Application in this Court against the plaintiff and her son seeking various orders, including an order for recovery of possession of the land.

[4] The following day, the plaintiff commenced proceedings only in her name by way of Claim and Statement of Claim in the Supreme Court against the defendant seeking, amongst other things, a declaration that the defendant held the property subject to a constructive trust in such shares as may be determined.

[5] On 21 August 2023 Rosengren DCJ ordered, *inter alia*, that the Supreme Court proceedings be transferred to this Court, that it and the defendant's Originating Application be consolidated into the one proceeding, that the Claim and the Statement of Claim by the plaintiff in the Supreme Court be treated as if it started the consolidated proceedings and provided a timetable for filing of material.

[6] The Claim and Statement of Claim were amended, by consent, at the commencement of the trial. In essence, the plaintiff claims:

(a) A declaration that the defendant holds the property subject to a constructive trust for the plaintiff and defendant in a 35% and 65% share respectively;

(b) Alternatively, a declaration that the defendant holds the property on a resulting trust for the plaintiff, subject to an equitable charge in favour of the defendant in certain amounts to reflect his contribution to the property;

(c) Alternatively, a declaration that the defendant holds the property on a resulting trust for the plaintiff and defendant in certain specified proportions;

(d) An order restraining the sale of the property pending trial;

(e) An order granting leave to lodge a caveat on the property under s 129(2) of the *Land Title Act 1994* (Qld);

(f) An order that if the property is not sold in six months, the defendant is to convey to the plaintiff such a legal interest in the property as reflects the plaintiff's equitable interest in it;

(g) Alternatively to (f), if the property is sold, an order for payment of the net proceeds to the plaintiff and defendant in such proportion as reflects their respective equitable interests in the property; and

(h) Any other appropriate order, including a declaration of an equitable charge or an order for equitable compensation.

[7] Due to the present circumstances of both parties, and in particular the defendant, it is desirable that these proceedings be determined relatively quickly. Predominantly for that reason, the plaintiff waived any necessity for the defendant to file a Defence responding to the last amended Claim and Statement of Claim. The fact that Porter KC, DCJ had ordered the filing of written openings, and that the defendant's written opening responded to the plaintiff's latest position, meant that an amended Defence was not necessary.

[8] In essence, the defendant asserts that the money was provided as an interest free loan. He denies the creation or an appropriate occasion to declare any form of trust. In fact, the appropriateness of any form of equitable relief is denied, and the defendant also relies on defences of laches, acquiescence, and delay. Although reliance was placed on s 10 of the *Limitation of Actions Act 1974*, that was abandoned.

[9] The defendant has acknowledged owing a debt of $180,000 but asserts that it has been partly offset by the amount he has paid, or effectively foregone, in rent, rates, water and utilities and electricity since the plaintiff started residing in the granny flat.

[10] Further, and by way of counterclaim, the defendant seeks an order for vacant possession of the property and damages for breach what is asserted to be an agreement reached between the plaintiff and defendant in 2012.

[11] The effect of the consolidation order of 21 August 2023 was that the son was not a party to the proceeding unless joined by the defendant in his defence and counterclaim. He did not do so, but contended the son was a party because he had been named on the defendant's Originating Application. I did not accept that was so. I was however satisfied that the son was aware of the proceedings and had elected not to participate. In the end result, the only orders that the defendant were seeking against the son were those concerning vacant possession, and an undertaking was given that in the event of success, no orders as to costs would be sought against him. Such an order can be fashioned regardless of the son's participation in the trial, and the matter proceeded in his absence and without him being named as a party.

Factual summary

[12] Although much of the factual detail is in dispute, it is against the following broad summary of undisputed facts that the disputes can be assessed.

[13] In July 2008 the defendant purchased a block of land at 8-12 Maggie Court, Cedar Vale ("the property"). The transfer was registered solely in his name on 11 July 2008. Although there is some dispute as to how it came about, the plaintiff, who is the mother of the defendant's then partner, provided $180,000 for the purchase. Some of that money was in fact used to re-finance a car loan by the defendant which was in turn put to the land purchase, but the parties have approached these

proceedings on the basis that the plaintiff's money wholly funded the purchase of the vacant land.

[14] By mid to late-2009 a residence ("the main dwelling") had been constructed on the property, and the defendant and his then partner lived in it with their children. Its construction had been financed by a $290,000 bank loan obtained by the defendant. In about early 2011 the plaintiff also commenced living in the main dwelling.

[15] By about mid-2012 a granny flat had been constructed on the property, which was funded by a $180,000 bank loan obtained by the defendant. It is only a matter of metres away from the main dwelling. The plaintiff then commenced living in the granny flat, and she continues living there to the present time. At the time of the commencement of proceedings, her son was also living in it. She treated it as her own and made some physical alterations and improvements to it over the years. She has paid little by way of contribution to utilities and the maintenance of the property. There was no written agreement at any time concerning this arrangement.

[16] The defendant's relationship with the plaintiff's daughter broke down in 2015, but the plaintiff continued to live in the granny flat.

[17] The defendant continued living in the main dwelling until about May 2023, at which time he commenced living with a new partner at a different address. He now wishes to sell the property to relieve some urgent financial stress that he is experiencing.

[18] It is agreed that the current improved value of the property is $850,000, of which $825,000 would be the anticipated clear proceeds of any sale. The unimproved value of the property is $405,000.

[19] The plaintiff and the defendant made differing contributions to the improved value of the property at different times. The calculations between the parties differ in some details, but in any event the calculations suggest that the plaintiff's contribution to the overall current value is between about 35%[1] and 37%[2].

[20] The plaintiff has not received, nor sought, any interest payments on the money provided. Also, it is common ground that she did not pay any outgoings while she resided on the property such as for rent, water, electricity or property maintenance until at least 2019. The plaintiff asserts that it was at this time that the defendant first asked for a contribution, which she says she regularly made. She does not quantify how much she paid in total, whereas the defendant asserts that she paid irregularly and provided only about $1,000 in total. No records were kept by either party.

[21] After the defendant and Ms Yarde separated in 2015, the defendant testified that:

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1 As calculated by the plaintiff.
2 As calculated by the defendant.

> "*After you'd split with Nicole, what was the first interaction you had in that period, in terms of resolving how Fay's contribution to the house would be dealt with? --- Just short and simple, do you want to continue living here? I don't have a problem. Continue on how things are going. She agreed*."[3]

[22] That evidence was not challenged in the course of cross-examination, However, the plaintiff, in her affidavit relied on by way of evidence-in-chief, asserted that there was no such discussion.[4]

[23] In 2016 the defendant decided he would sell the property, and subsequently put it on the market in 2017. His decision caused the preparation of a mortgage by the plaintiff's solicitors, for execution by the defendant. He declined to do so. His solicitor's written response acknowledged the plaintiff's payment of $180,000 stating "*such amount was not to be secured by way of mortgage nor to accrue interest*". The defendant proposed repayment upon sale of the property, or by way of refinancing the property if possible. Reference was also made to "*the amount owed*". Additionally, they advised that the defendant had executed a will which contained the following clause:

> "*I give the sum of one hundred and eighty thousand ($180,000.00) to my ex-partner's mother FAY MARGARET TAMBOVSOFF absolutely. This gift is made in repayment of an interest-free and unsecured loan advanced from the said FAY MARGARET TAMBOVSOFF in or about December 2007 and should I have repaid all of this loan after the date of this will then this gift shall fail.*"

[24] The defendant later informed the plaintiff's solicitors that he was unable to refinance the property.

[25] In 2016, a property settlement was reached between the defendant and Ms Yarde. The defendant testified that it included an allowance for the equitable interest the defendant acknowledged Ms Yarde had in the property. This was not the subject of pleadings, and he was not cross-examined on it to any real extent.

[26] In or about March 2023 the defendant notified the plaintiff that he intended to sell the property. He, and his now partner, moved out of the property in or about May 2023. He continued to make loan repayments until August 2023, at which time his lender afforded him a hardship disposition until November 2023.

[27] On or about 8 June 2023 the defendant issued a written demand for the plaintiff to vacate the property by 8 August 2023. She has not vacated, and her son also still resides there. The plaintiff has testified that she has approximately one-quarter of her belongings packed up. She did not make any attempt to find rental accommodation until about September 2023, and then through a cousin who has a

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3 Ts 2-19, ll 33-36.

4 Affidavit of Fay Margaret Tambovsoff dated 25 August 2023, paragraph 57.

computer. She now intends to move into rental accommodation with the son who is presently living with her, and who is currently looking for somewhere for them to live.

[28] There are many factual disputes in the evidence. Only a few need to be resolved. They are:

1. What was the initial nature of the payment by the plaintiff to the defendant, and the understanding between them?

2. Did the nature of the payment and the understanding between the parties change upon the plaintiff moving into the granny flat in 2012?

3. Did the nature of the payment and the understanding between them change on the breakdown of the relationship between the defendant and Ms Yarde?

Some initial observations

[29] Some of the events in question occurred up to 16 years ago. Perfect memories of undocumented events that long ago cannot be expected. An innocuous example will suffice.

[30] The defendant contends that he used $30,000 of the money to refinance his car loan, and that he put the $30,000 provided under the refinancing arrangement to the land purchase. He says that angered the plaintiff and he was required to return the balance of $150,000 prior to settlement. He asserts that that money was again returned to him by the plaintiff to effect settlement. The plaintiff denies any knowledge of any of that. However, the exhibits show a refinancing approval dated 7 July 2008[5] for $30,000 and a deposit receipt for $150,000 from the plaintiff's account dated 1 July 2008[6]. As noted earlier, the title vested in the defendant on 11 July 2008.

[31] Those dates are closely placed. As the documentary evidence tends to support the defendant's recollection I accept that it is substantially accurate in that respect. That finding itself is of no great consequence except insofar as it bears on an overall assessment of the parties' reliability, if at all.

[32] I found the plaintiff to be an unsophisticated but honest witness who tried to answer all questions asked to the best of her ability. However, she was also a little garrulous. On occasion she exhibited obvious confusion in her demeanour, and also expressed that confusion on occasion. Overall, I find her to be honest, but there are reasons to examine aspects of the reliability of some of her evidence.

[33] Ms Yarde, the plaintiff's daughter, was clearly nervous and largely responded with monosyllabic answers. I consider her to be an honest witness, but again the reliability of her recollections is necessarily affected by the passage of time.

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5 Exhibit 4, p 521.
6 Exhibit 3, pp 103-104.

[34] The defendant appeared quite guarded in nearly all of his responses. He obviously struggled with what he saw was the complexity of the questioning, from both Counsel, at times and some allowance should be made for that. While he is obviously accurate in some of his recollections, there are aspects which I cannot accept as being honest and reliable. An example will assist.

[35] In cross-examination, he was initially adamant that he was unaware that the funds provided by the plaintiff were as a result of the sale of her own house some time earlier. Knowing that the source of the money provided would affect the plaintiff's ability to purchase property in her own right in the future has obvious relevance in a case involving equitable principles. When taken to an affidavit affirmed by the defendant a little over two months prior to the date of cross-examination which attested to the opposite proposition, the defendant agreed that his earlier testimony was incorrect. He could not explain why he had given that earlier testimony.[7] This is a tangible example of the unreliability that on occasion permeated the defendant's testimony.

[36] Ms Schofield was, in my view, the most obviously reliable of the witnesses. Perhaps this is because her testimony dealt with only a few matters, and that they were in the comparatively recent past. I have little hesitation in accepting her evidence.

[37] It should be noted that the above observations are made, essentially, on the basis of cross-examination only. Consistent with the orders of Rosengren DCJ, almost all of the evidence-in-chief was adduced by way of affidavit.

What was the initial nature of the payment by the plaintiff to the defendant, and the understanding between them?

[38] I am satisfied that at the time the plaintiff provided the $180,000, neither she, the defendant or Ms Yarde had given any real thought to the legal effect of what was happening. The money was given by the plaintiff to "help out"; that is, the money was to be used to purchase the land and was to help her daughter and the defendant to get into the property market.

[39] I accept there was a general expectation that the plaintiff would, in return for the provision of that stake, reside in a granny flat on the property at some stage in the future which construction would be funded by the defendant and/or her daughter ("the joint venture"). It is, in my view, improbable that the plaintiff would simply gift up to three-quarters of the net proceeds of the recent sale of her house, or even loan it without some form of return on that money, without some ability to accommodate her housing needs in the future. This is consistent with all three inspecting houses for sale, some of which had granny flats attached. She was at stage in her life when these issues often gain prominence.

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7 Ts 2-34, ll 18-28.

[40] The imprecise terms on which the money was provided means that I accept that words to the effect "*we'll sort that out later*" as alleged by the defendant, were likely to have been said but I cannot determine in what context, and hence nor what prompted a response to that effect.

[41] The imprecise nature of the arrangements means there is an issue as to whether the expectation was that a granny flat would be built at the same time as the main dwelling, or later. However, given the defendant initially applied for a loan to fund only the construction of the main dwelling, it seems likely that it was to be in the staged process as the plaintiff testified. Also, it does not appear that the plaintiff was in a particular rush to live on the property; it was two or more years after the provision of the money and over a year after the main dwelling was constructed before she deemed the living arrangements with her mother and uncle, and then subsequently a friend, as being untenable. This, it seems to me, is consistent with an agreement to build the housing on the land in stages.

[42] For that reason, it is unlikely that there were ever building plans perused which had a granny flat attached to the main dwelling. Ms Yarde must be mistaken about this event. Notably, no plans of that nature were produced in evidence. It is quite possible that such a design was spoken of, but I do not accept the plans were perused. Notably however, the plaintiff only asserts that she was told about these plans, not that she ever saw them. That is quite possible.

[43] It must be accepted that some of the evidence tends to suggest the money was provided merely as a loan. For example, prior to lunch on the day of her testimony, the plaintiff orally testified that the defendant and her daughter "*were always going to pay me back*".[8] However, she qualified that by saying that was what she was told by the solicitors, presumably in 2016.[9] She then testified that they didn't "*dwell on that as much*" when the money was provided in 2008. After the luncheon break, she testified that she could not be sure that they had agreed about the money being returnable, but was sure that "*it was about the house and granny flat*".[10] Although she was unable to explain what she meant by that in re-examination, in context it must have meant the agreement, at or about the time the money was provided, encompassed something to do with the house and granny flat.

[44] That the money was not provided merely as a loan is consistent with the testimony of Ms Yarde, who said there was no "*formal arrangement*" to that effect. While she did testify there was a discussion about having to sell the house to give the plaintiff her money back, it is unclear when that occurred in the chronology of events.[11]

[45] The solicitors' correspondence issued in 2016 also speaks in terms consistent with the money being a loan and of a debt owing. The defendant has submitted that I

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8 Ts 1-34, ll 36-47.
9 Ts 1-34, l 49 to 1-35 l 9.
10 Ts 1-42.
11 Ts 1-62.

should infer that the correspondence was written in those terms because of the instructions provided by the plaintiff. I don't consider that inference to be properly drawn.

[46] The caveat lodged at the same time as some of the correspondence asserts the plaintiff's equitable interests in the property.[12] The better inference is that instructions were given consistent with the plaintiff's current assertions, but an election was made to pursue the quantum advanced in order to finalise the matter. The correspondence does not necessarily point to the money being a loan or a debt due, as opposed to that description being an expedient method of seeking to settle the dispute. In light of that inference being open, I will not draw the inference adverse to the plaintiff.

[47] I accept Ms Schofield's evidence that in or about September or October 2022 the plaintiff told her that she had lent the defendant $180,000 to buy the property, that she was concerned that she would not get her money back and that she did not mention anything about having an interest in the property or a right to live there indefinitely, contrary to the plaintiff's denials of any such conversation. The basis of the denial was that the plaintiff said she would not have discussed her financial affairs with Ms Schofield. Notwithstanding that, I found Ms Schofield an honest and reliable witness and I felt that the plaintiff was sufficiently garrulous to accept that she did say what is attributed to her.

[48] However, in my view, that conversation adds no real weight to the submission that the monies were in fact a loan. As earlier noted, the plaintiff is not a sophisticated person. I am sure that the niceties of the distinctions between a loan and an equitable interest in land were not at the forefront of her thoughts during that conversation. Her use of the term such as "*lent*" must be seen in that context, and against the background of that terminology having been used by her solicitors in the correspondence in 2016, and no doubt in discussions with her also at that time. I consider it to be just an assertion that she provided the defendant with the money used to purchase the land; a matter not in issue.

Did the nature of the payment and the understanding between the parties change upon the plaintiff moving into the granny flat in 2012?

[49] The defendant contends that when the construction of the granny flat was partly completed, and so in late-2011 or in early to mid-2012, it was agreed between he and the plaintiff that she could live in it with the defendant paying all the occupation costs,[13] and when the property was sold the value of those payments would be deducted from the debt of $180,000. The plaintiff denies there was any such agreement.

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12 Exhibit 3, p 276.

13 This is a compendious term intended to reflect matters such as loan repayments, rates, water and utilities, electricity and property maintenance.

[50] I accept that there was no such agreement. Such an agreement is inconsistent with the basis on which I have found that the money was initially provided. Of course, it is possible for the initial agreement to be varied as part of the continuing joint venture, but there are other reasons why I do not accept there was such a variation.

[51] First, there was no such agreement in place, or even proposed, when the plaintiff was living in the main dwelling. Such an arrangement might have been expected to have at least been proposed if the object was to reduce the debt owing.

[52] Second, Ms Yarde denies there was any such arrangement.

[53] Thirdly, the defendant's evidence was inconsistent on this account, asserting that the "loan" had been partly repaid by the construction of the granny flat,[14] even though he had not earlier made any such assertion.

[54] Fourthly, there was no water or electricity meters attached solely to the granny flat from which accounts could be kept.

[55] Fifthly, the defendant did not keep any records at all of what he paid in occupation costs, nor apparently what he had received, as one might expect if this were to be off-set against the quantum of the money purportedly loaned. His explanation for how he intended to later reconcile these amounts was unconvincing.

[56] Sixthly, the receipt of some payments for those costs since 2019 is inconsistent with the arrangement being that they would be deducted on the sale of the property.

[57] Lastly, there is no written assertion of any such agreement, including in the defendant's solicitor's letters of 2016 where he acknowledged a debt of $180,000 until an email from his solicitors dated 14 October 2016. His attempt in cross-examination to claim that the clause of the will recited at paragraph 23 herein was clearly contrived, and his Counsel's disavowal of any reliance on that evidence in the course of his oral submissions was sensible.

[58] Given my finding that there was no such agreement, the defendant's claim for damages for breach of the agreement cannot succeed.

Did the nature of the payment and the understanding between the parties change on the breakdown of the relationship between the defendant and Ms Yarde?

[59] The passage of the defendant's testimony extracted at paragraph 21 above is to the effect that it did not. The plaintiff denies that there was any such discussion but, equally, asserts that things continued in the same manner as before the separation. Accordingly, I find there was no change brought about by the breakdown in that relationship. It is unnecessary to determine if the conversation happened or not.

Consideration

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14 Ts 2-46, ll 8-22.

A constructive or resulting trust?

[60] Given my factual findings, I am satisfied that the plaintiff and the defendant entered into an agreement, a joint venture, whereby in exchange for the plaintiff providing $180,000, she would be entitled to live on the property in a granny flat when constructed without payment of rent and other occupation costs. Over time, the joint venture evolved to a position which included a recognition that events may transpire that would require the refund of the money, such as a need to fund, or partly fund, her entry into a nursing home. For that reason, the recognition that the money might be withdrawn does not make the agreement a loan agreement, but it would constitute a dissolution of the joint venture. The sale of the property by the defendant would have the same effect.

[61] For that reason, I find that there was no clear agreement concerning the length of time the plaintiff was entitled to occupy the property. It may well be that in the plaintiff's mind it was an entitlement for the rest of her life, but I am not satisfied that that was ever actually discussed or agreed. I consider it highly unlikely that the defendant would allow himself to be physically shackled to a woman he described as having a volatile relationship with, for the indeterminate period which is the rest of her life.

[62] The defendant submits that even if a joint enterprise or common intention were found - what I have referred to as a joint venture - it broke down in 2015 with the dissolution of the relationship between the defendant and Ms Yarde. That cannot be accepted.

[63] The joint venture was concerned with the right to reside on the property as against the legal title to the property held by the defendant. Although it was created at a time when the defendant and Ms Yarde were in a relationship, and when the defendant concedes Ms Yarde thereby had a beneficial interest in the property, it at all times was a right enforceable the defendant's legal interest.

[64] In any event, the defendant's indication in 2015 that he was happy for the residential arrangement to continue suggests that he considered the joint venture to be ongoing.

[65] The principles concerning the creation or recognition of both constructive and resulting trusts are well understood.[15]

[66] In my view, but subject to the determination of the pleaded defences, a constructive trust should be imposed. The event which removed the substratum of the joint venture without attributable blame was the service on the plaintiff of the written demand to vacate the property. While the need for vacant possession so as to facilitate the sale of the property can in part be traced back to the breakdown of his

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15 *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Swettenham v Wild* [2005] QCA 264; *Peterson v Hottes* [2012] QCA 292.

relationship with Ms Yarde, the joint venture existed past that point in time, for reasons already given.

[67] As the defendant accepts, the plaintiff provided the ability for the defendant to enter into the property market. The property has considerably appreciated in value since then, and he would not be able to enjoy the benefits of that increased value without her provision of the initial stake.

[68] On the defendant's case, the amount owed is no more than the initial stake of $180,000. As in broadly similar cases, the unconscionability which arises is the defendant's claim to retain the whole of the benefit of the assessed value of the property without any allowance that the plaintiff contributed the whole amount for the initial purchase of the vacant land, interest free, which purchase undoubtedly assisted with securing the loan for the construction of the main dwelling.[16] Further, the imposition of a constructive trust guards against the plaintiff suffering the loss of value of money caused by inflationary effects over the last 16 years.[17]

[69] In the circumstances, it is appropriate that a constructive trust be imposed regardless of whatever the parties' intentions were. However, in my view, to apportion the respective beneficial interests in the proportions contended for by the plaintiff would be inequitable from the position of the defendant, even though they are less than he submits is calculated on a contribution basis. While it can be broadly accepted without resort to financial records that foregoing interest can effectively be compensated for by the payment of the occupation costs, the inequity is based in the defendant was paying the whole of the loan repayments where the plaintiff has an equitable interest in roughly a third of the value of the property.

[70] It is not in dispute that he borrowed $290,000 at some time between mid-2008 and late 2009 for the construction of the main dwelling and a further loan of $180,000 in mid-2011 for the construction of the granny flat.[18] There is no evidence before this Court as to the value of the loan repayments over that time, but it would be inequitable to not recognise in some manner the role those payments, effectively on the plaintiff's behalf, have had in allowing the property to remain in their joint beneficial hands, and to appreciate in value over time. It is common knowledge that interest rates have fluctuated over that time, and no precise calculation can, or should, be attempted. I consider it should be generally recognised by reducing the beneficial interest I would have found the plaintiff held from 35% to 30%.

[71] Given those findings, it is unnecessary to consider the need or appropriateness for a declaration as to a resulting trust. I do however observe that, due to the imprecision in the actual agreement at the time the money was provided and for the other forgoing reasons, the presumption of advancement has not been displaced and, subject to the determination of the defences pleaded, a resulting trust then would

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16 See for example *Swettenham v Wild*, *supra* at [43].
17 Peterson v Hottes, supra at [37].
18 Affidavit of Matthew James Budd dated 9 August 2023, paragraphs 16(a) and 19.

have arisen. Any declaration would have reflected the parties' beneficial interests as referred to above.

Laches, delay, and acquiescence

[72] The factual essence of the submission concerning these defences is that the plaintiff's solicitor's correspondence in 2016 to the defendant's solicitors did not make any assertion as to a greater right than the stated $180,000 debt, that there was no indication of an asserted greater right in the next seven years and, in those circumstances, it would be unconscionable to allow the plaintiff to succeed. Further, it is argued that the failure to notify the defendant of this asserted right inevitably affected the settlement between he and Ms Yarde in 2016 to the defendant's detriment and also that due to the delay in the assertion of that right the defendant has been denied the opportunity to obtain bank statements from his financial institution to place into evidence.

[73] The test to be applied is whether "*the plaintiff has, by his inaction and standing by, placed the defendant or a third party in a situation in which it would be inequitable and unreasonable 'to place him if the remedy were afterwards to be asserted'*".[19] The availability of a defence of laches and what will suffice to make it good depends on all the circumstances at hand, and involves the balancing of the equities concerning anyone involved in the matter.[20] It has been observed that the defence requires consideration as to whether there are "*circumstances where inaction or standing by (with knowledge) by a plaintiff over a substantial period of time assumes an aggravated character in that it will, if the plaintiff is granted the relief he seeks, give rise to clear and unfair prejudice to the defendant or a third party*".[21]

[74] Delay in itself will rarely suffice.[22] The defendant submits he would be prejudiced if his rights were now adjusted after he settled his arrangements with Ms Yarde on the understanding that he held the whole interest in the property, subject only to a debt of $180,000 , and the unconscionability of allowing the plaintiff's claim when she stood by and allowed him to have that belief for a period of about seven years. He also asserts that had he been aware of this claim earlier he would be likely to have been able to obtain his bank statements which are now unable to be obtained where they reach back further than six years. The defendant bears the onus of proving the defences.

[75] Dealing first with the bank statement issue, it is true that the defendant's evidence is that he could not obtain those statements for a period greater than six years. The only issue in dispute that the bank records may have assisted with was who was the genesis of the payment for the plaintiff's car in October 2014. It is an issue of little moment and need not be resolved. There seems to be little, if any, other issue

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19 *Orr v Ford* (1989) 167 CLR 316, 341 (citation and footnote omitted).

20 *Gillespie & Ors v Gillespie* [2013] QCA 99 [81] citing *Erlanger v New Sombrero Phosphate Co.* (1878) 3 App Cas 1218, 1279 to 1280 and *Fysh v Page* (1956) 96 CLR 233, 243-244.

21 Orr v Ford, supra at 341.

22 *Baburin v Baburin (No. 2)* [1991] 2 Qd R 240, 244.

remaining in dispute that would require resort to those bank statements. This does not assist the defendant.

[76] Dealing with the settlement with Ms Yarde, the only evidence of this is a broad assertion of a settlement by the defendant. Although, presumably, the settlement was conducted at least in recognition of a debt of $180,000 owing, there are no details of how any liability was apportioned, nor how any contributions as between he and Ms Yarde were apportioned. In my view, the defendant fails to establish the relevant prejudice on this basis.

[77] As to the basis asserting acquiescence and delay, the plaintiff testified that she would have been content if the defendant had repaid the $180,000 in 2016, but he did not, and prices have risen since then (inferentially referring to the costs to buy or rent other premises) and she had incurred costs in pursuing the issue.[23] She also testified that she was happy to live in the granny flat with nothing happening, and "*nothing has happened until now*".[24] There is independent support for that position.

[78] As referred to at paragraph 21 above, at some stage after the defendant's separation from Ms Yarde in 2015 the defendant, on his account, asked the plaintiff if she was content to continue on the same basis as had been occurring. That basis, as I have found, was the joint venture. Whether he in fact asked that question or not, which is denied by the plaintiff, things did continue on that same basis apart from a flurry of solicitors' correspondence and, on the plaintiff's account, regular contributions to water and electricity bills since 2019. On the defendant's account the contributions to these were irregular. Nonetheless, there was a continuation of the joint venture, and the solicitor's letters in 2016 could not reasonably have led the defendant to believe otherwise.[25] Certainly his evidence did not establish a changed belief based on the correspondence.

[79] Further, this is not a case where there is said to have been a substantial alteration of the defendant's position occurring under a belief that he held a whole interest in the property and thereby made substantial improvements to it.[26]

[80] While it obviously would have been preferable for the plaintiff's position to be more clearly articulated in the 2016 correspondence, it does not seem to me to be unconscionable to allow the enforcement of her equitable interest in the property. On the other hand, it would be unconscionable to deny her the appropriate beneficial interest.

[81] The defences of laches, acquiescence and delay must fail.

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23 Ts 1-41.

24 Ts 1-43, l 25.

25 Notably, pursuant to s. 123 of the *Land Titles Act 1994* (Qld), and given the definitions of "lodge" and "register" under that Act, the defendant should have been notified on lodgement, not registration, of the caveat. There is no evidence before me touching on this issue and so I do not act on the basis that he was then aware of the claim of a beneficial interest in the property.

26 cf *Orr v Ford*, supra.

Should a declaration of an equitable charge or equitable interest be made instead?

[82] The plaintiff sought, alternatively to the claims for a constructive or resulting trust, declarations for equitable charges or equitable compensation. Where, as I have concluded, the appropriate orders involved the recognition of the respective rights in the property as percentages thereof, and where the parties agree the property must be sold, it seems to me that the appropriate orders would be to recognise those interests by declarations of trust rather than by way of orders of equitable charges or equitable compensation. The reality is it can never be known with certainty what price will be achieved for the property.

[83] However, in the course of submissions it was suggested by the plaintiff that I could make findings and then allow the parties to consider those findings and formulate, hopefully by consent, orders giving effect to the reasons. It was suggested that it may be preferable to avoid the imposition of trusts or orders for the transfer of legal rights so as to avoid scenarios of trustees for sale of the property being appointed, and similar. There is merit in that. Accordingly, I will not make a conclusive order on these topics until the parties have had time to consider their positions in light of these findings.

Should orders in terms of paragraphs 2, 2A, 3 and 4 of the client Claim be made?

[84] The order sought in paragraph 2 would be redundant if made, and so it will not be.

[85] There was only little attention in submissions devoted to paragraphs 2A, 3 and 4 of the Claim. These paragraphs are directed towards the issue of facilitating the sale of the property – which both parties now acknowledge must be sold, and the defendant asserts urgently – and the protection of the plaintiff's interest under that sale were she to have an equitable interest in the property recognised.

[86] Given I am taking up the plaintiff's suggestion that reasons for factual findings be provided and the parties be given the opportunity to reach consensus on the appropriate orders or, if consensus is not reached, make further submissions as to the appropriate form of orders, these are issues that can be dealt with in that manner.

The defendant's claim for recent possession

[87] The defendant brings this counterclaim so as, he says, to effect the expeditious sale of the property and to facilitate the preparation of the property to maximise the sale price. This too is a matter that, after consideration of these reasons, can hopefully be the subject of agreed orders, or otherwise further submissions.

[88] However, given the apparent respective positions of the parties as evidenced by the course of cross-examination and submissions, it may be helpful if I give some indication of my preliminary views.

[89] Overall, Mr Anderson's evidence establishes that preparing, marketing and selling a property with tenants living in it is possible but may be problematic. Although the plaintiff is not a tenant in the sense he was referring to, her position is analogous to one for these purposes. In reality his evidence advanced the issue little more than common sense does.

[90] Given my finding that the plaintiff has a beneficial interest in the property as a percentage of the overall value, there is an incentive for her to do what she can to maximise the sale price. The difficulty however will usually arise from the difference of opinion as to how that can be properly achieved. Both parties agree that the property must be sold as soon as possible. The defendant contends that the need is urgent. In order to facilitate the early sale, in my view a definite line should be drawn in the sand by way of an order for vacant possession.

[91] While I am not suggesting that the plaintiff would act malevolently or with *mal fides* towards the defendant, I accept he should not be put in the position of having to prepare the property with the possibility of accusations being made about him, or those he engages for the purpose. Anyone who has renovated a property, or anyone who knows anyone who has, knows that the idea of painting and attending to "patch ups" around people still living in the premises has a far firmer footing in romanticism than in reality.

[92] The plaintiff was given a notice to vacate in June 2023, requiring vacant possession by August 2023. The plaintiff was at least on notice that she may have to vacate at that stage. She did nothing to find other accommodation until September 2023, which efforts have been apparently unsuccessful. However, it is unclear to me the extent to which those efforts were made. By the time of trial in October 2023 she was only one-quarter packed up, by her own estimate. It has now been another two weeks since the trial.

[93] In my view, she has had sufficient time to move or to at least have made more concerted efforts to find accommodation than it appears she has done. A relatively short timeframe is now appropriate to achieve the giving of vacant possession.

[94] Additionally, it is doubtful that it is appropriate that the defendant continue to pay for the water and electricity for the granny flat. This is a further justification for vacant possession being granted sooner rather than later.

Orders

[95] The parties will be invited to submit agreed orders, including as to costs, or in lieu thereof, written submissions as to the form of orders consistent with these reasons, and the issues of costs, with a view to those matters being determined on the papers.