

TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND

No 497 of 1990

CIVIL JURISDICTION

WHITE J

VICTORIA CLARISLE MARKS

Plaintiff

and

DAVID GEORGE BURLES

Defendant

BRISBANE

..DATE 24/05/94

JUDGMENT

HER HONOUR: The formal orders in this matter are a declaration that the defendant holds his interest in the proceeds of sale of the property known as lot 97 The Panorama, Tallai in trust for the plaintiff as to one quarter interest therein subject to all necessary adjustments for mortgage repayments, maintenance, improvements and occupation by the defendant from 9 December 1989 to that property. Further a declaration that the defendant holds the copper and the white household goods in trust for the plaintiff as to one quarter interest therein, the mirror and tools in trust for the plaintiff as to one half interest 20 therein, such goods being better described in Exhibit 2 and the reasons herein.

Further order that the plaintiff pay the defendant's costs of and incidental to the applications heard on 31 March and 9 May 1994 to be taxed.

I publish my reasons.

...

HER HONOUR: I further formally release the defendant from the undertakings which were given through his counsel on 31 March 1994.

...

HER HONOUR: With respect to the costs of and incidental to this action, it is clear that the plaintiff has succeeded in obtaining the declaration as to an entitlement to the property, the subject of her action. However, it is not as extensive as that which was sought, and both parties conducted the case very much on an all or nothing basis. There did not seem to be any middle ground between them apparent in the evidence which both of them gave and in the way in which the action was conducted. There are a number of findings in the judgment in which it will be plain that I preferred the evidence of Mr Burles to that of Mrs Marks, particularly with respect to their financial relationships. However, in conclusion I was of the view that it would have been unconscionable for the contribution of Mrs Marks not to be recognised in some fashion. It seems to me that whilst she has been successful then it has been in a much lesser percentage than she had sued for and it may well have precluded any sensible discussions for settlement.

In the exercise of my discretion - and I come to the view it is not appropriate to make use of the District Court scale, I should say, because the subject matter of the declarations was of a value beyond the jurisdiction of that Court - doing the best I can to reflect the approach which I took in the judgment I order that the defendant pay two thirds of the plaintiff's costs of and incidental to the action to be taxed.

Brisbane

Before Justice White

[Marks v Burles]

BETWEEN:

VICTORIA CLARISLE MARKS

Plaintiff

AND:

DAVID GEORGE BURLES

Defendant

REASONS FOR JUDGMENT - WHITE J.

Judgment delivered : 24/05/1994

CATCHWORDS:

DE FACTO RELATIONSHIP OF MANY YEARS - family home purchased in sole name of defendant who provided entire purchase moneys - extensive renovations - contribution as home-maker - entire proceeds of sale of that property utilised on another property in defendant's name - plaintiff's non-financial contribution - constructive trust - unconscionability.

Counsel: Mr T Kirk for the plaintiff

Mr R Bourke for the defendant

Solicitors: Phillipa Power & Associates for the plaintiff.

Thynne & Macartney as town agents for Primrose Couper Cronin & Rudkin for the defendant

Hearing 7, 8, 9, 10 December 1993

Date(s):

Brisbane

Before Justice White

[Marks v Burles]

BETWEEN:

VICTORIA CLARISLE MARKS

Plaintiff

AND:

DAVID GEORGE BURLES

Defendant

REASONS FOR JUDGMENT - WHITE J.

Judgment Delivered: 24/05/1994

The plaintiff seeks declarations that the defendant holds the proceeds of sale of a house property at Tallai on trust for her as to one-half share and that he holds certain chattels in the same fashion.

Briefly, the parties met in early 1979, were living together by August of that year in Victoria and had ceased to do so in Queensland in December 1989. The plaintiff ("Mrs Marks") asserts that at the commencement of their relationship it was the common intention of herself and the defendant ("Mr Burles") that they would enjoy the benefit of the capital and income of their resources to their own benefit in equal shares. To that end she has alleged that the parties pooled their respective capital and income resources towards normal household expenses and the acquisition, conservation and improvement of assets acquired in the course of the relationship. Mr Burles contends that there was no such common intention and that, in any event, Mrs Marks made no contribution to the acquisition, conservation or improvement of assets during the relationship.

There was considerable dispute as to when the relationship became one which could be described as a de facto relationship and when that relationship ended. Much

of that dispute was really a dispute about definition. There was disagreement, both on the pleadings and in evidence, as to the actual contributions, both of a physical and financial kind, made by the plaintiff to the acquisition, conservation and improvement of the properties which were acquired in the course of their relationship. Mr Burles described Mrs Marks' financial contribution to properties registered in his name at best as negligible and her physical contribution as minor, whilst Mrs Marks saw her efforts as equal to his contribution, both financial and physical. As is encountered so often in litigation of this type, the parties must recall events which occurred long ago, which recollection is necessarily distorted and obscured by the failed relationship.

The parties met in Melbourne in January 1979 and shortly thereafter commenced a social relationship. Mrs Marks had separated from her husband of some 11 years and had two sons, Robert and David, aged 10 and 7 years. Mr Burles had been separated from his wife for more than 10 years and had no children. Their social relationship developed during 1979 to the stage where Mrs Marks would regularly spend the weekend with Mr Burles at his home at 21 Longmore Street, St Kilda, from Friday evening to Monday morning, usually together with her sons.

At some earlier time Mr Burles, had arranged a holiday in Fiji with a male friend during September 1979. He said that Mrs Marks was to look after his house whilst he was away because he was unable to retain the services of his usual house sitter. He said that when he returned Mrs Marks informed him in some distress that the Brighton flat, which she rented, was no longer, available to her and, upon that catalyst, he agreed that she could stay with him with her sons at Longmore Street. Mrs Marks said that Mr Burles invited her and her sons to make their home with him prior to going to Fiji and that she did so before he left for his holidays. Mr Burles dated the commencement of the de facto relationship at June 1980 when they took up residence together in another house. It does seem a question of

definition and Mr Burles agrees that he and Mrs Marks did indeed commence co-habitation on a continuous basis after his return from Fiji at 21 Longmore Street. A postcard in which he expressed his love for her was sent from Fiji to Mrs Marks addressed to her at 21 Longmore Street. For the purposes of this litigation it really is of no consequence precisely when the continuous co-habitation commenced, but the dispute does throw some light on the relationship and the expectations and perceptions of the parties.

Asset Position at the Commencement of the Relationship

In August 1979 Mrs Marks worked on a part time basis as a spare parts driver, but was unable to recall how much she earned. She suggested \$200 per week, but I conclude that this was just a guess. She worked at various jobs apparently on a part time basis between then and 1985, but she put in no tax return until 1985 when she had opened a shop which operated at a loss and the only inference to be drawn was that she did not earn sufficient moneys to put her above the tax threshold. She received maintenance from her former husband for her sons, probably in total \$60 per week and her former husband was responsible for meeting all of his sons' health and education and sundry other expenses. Mrs Marks owned a motor vehicle and furniture and had an expectation of receiving around \$100,000 by way of property settlement. She said she had some small savings but was unable to specify how much this was. Mr Burles was employed as chief engineer at CSR. His income was not the subject of evidence, however, I have assumed that it was not insubstantial. He owned 21 Longmore Street subject to a loan of \$10,000. He owned a motor vehicle and furniture. Mr Burles' evidence was that he also had quite substantial cash assets, either immediately available or within a short time. This was challenged strenuously by Mr Kirk for Mrs Marks, but I accept that Mr Burles did have significant savings at the commencement of the relationship. Mr Burles was, and is, not an open man. He tended to answer questions put to him very literally, so that if counsel put a proposition to him that was not correct in every respect he

would firmly disagree without elaboration. Similarly, in evidence-in-chief his answers were monosyllabic and dogmatic. Towards the end of his oral evidence he appeared to recognise that he should explain why he could not agree with counsel's propositions and it then became plain how his thought processes operated.

This was in complete contrast to Mrs Marks who gave vague, often rambling answers to straightforward questions and who certainly seemed to reconstruct past events and states of mind by reference to a partly recalled conversation and to her present perception of what the relationship had been. She was a most unreliable historian and her concepts of ownership required elaboration. For example, she regarded a chattel as jointly purchased if she and Mr Burles were together when it was purchased, even though Mr Burles provided the money. Her explanation for dealing with a large sum of money in dispute between the parties at the end of the relationship (ex.19) suggests that she was either foolish or deceitful. This occurred after the conclusion of the relationship and needs to be judged in that light, but she was not without funds then and her conduct did not appear honest. She gave the impression of being a person governed by emotional responses to a situation without the tempering intervention of reason.

Mr Burles, I have concluded, was a reserved, rather secretive man where his own financial affairs were concerned. It is not at all surprising that he had accumulated moneys at the time that the parties began to live together. He had been separated from his wife for about 10 years, he had no children and apparently no other calls upon his income. He gave evidence, which I accept, that he had a number of unsecured loans out at high rates of interest. He admitted to a number of savings accounts in various financial institutions in variants of his own name. Exhibit 38 is a document prepared by Mr Burles showing his financial situation as at 18 April 1980, which indicates that he had cash on hand of about \$24,500, shares to the

value of \$20,000, investment loans of about \$30,000, and "other cash" of \$40,000. These assets were never disclosed to Mrs Marks. Mr Burles saw no reason to do so and regarded them as his own assets pre-dating the relationship and no part of it. Mrs Marks became aware of some part of these moneys when she acquired a box of papers belonging to Mr Burles from their last residence. I accept that Mr Burles did have substantial assets of the kind indicated above. Whilst I have described Mr Burles as reserved and secretive, my impression was that he would answer a question put to him truthfully but literally, and would never volunteer anything further. This certainly led to an initial conclusion that he was stubborn and less than truthful. However, on a consideration of the whole of the evidence, I generally prefer his account of the financial aspects of the relationship to that of Mrs Marks.

12 Deakin Street, St Kilda

Mr Burles entered into a contract for the purchase of 12 Deakin Street, St Kilda, on 13 February 1980 for \$93,500. This was, it seems, a substantial, but very run down, Edwardian house which had been divided into three flats. Mrs Marks said that she and Mr Burles had a conversation that 21 Longmore Street was too small for their joint needs, that Mr Burles said that he did not want children himself, but regarded Robert and David as his family and that they should purchase something larger and that that was how Deakin Street evolved. Mrs Marks said that she was then contributing her wage to their joint living expenses and had \$60 per week per child from her husband by way of child maintenance. She agreed that Mr Burles contributed \$95 per week towards the purchase of food. Mrs Marks was clearly mistaken in the amount of maintenance in view of the order of the Family Court made on 11 August 1981 and given the correspondence from her solicitors to her former husband. There was no evidence to support a submission that the payments were reduced upon the property settlement. I have concluded that she was

receiving at most, \$60 per week maintenance for her children.

Mrs Marks said that Mr Burles put to her that if she would contribute all of her wages to their joint living expenses, this would enable him to save for a deposit for the bigger house. Mr Burles denies this and said that he was quite able to finance it himself. I accept that. Mr Burles had the idea of purchasing a house in need of renovation and it may have been a discussion as to whether Mrs Marks was prepared to live in such a house that she now recalls. Mrs Marks said that she and Mr Burles spent some months perusing newspaper advertisements, driving and walking, looking for a suitable house and that together they found 12 Deakin Street and agreed that they would purchase it. Mr Burles said that he alone found 12 Deakin Street in answer to a newspaper advertisement, inspected it and offered to buy it for \$92,000 on 12 February 1979. That offer was refused by the owners and on 13 February 1979 Mr Burles made a further offer of \$93,500 which was accepted. It would appear that it was not until then that he showed the house to Mrs Marks and her boys.

A contract of sale for 21 Longmore Street was entered into in December 1979, which was not settled on the due date and by agreement the purchaser paid interest on the bridging finance obtained by Mr Burles for the purchase of Deakin Street until June 1980 when the contract for the sale of Longmore Street was settled.

Mrs Logan, a friend of Mrs Marks, who worked with her and who became a friend of them both, gave evidence of conversations at 21 Longmore Street concerning the purchase and renovation of 12 Deakin Street involving both of the parties. I accept that those conversations occurred, but after Mr Burles had made his offer to buy. The title to 12 Deakin Street was registered in the name of Mr Burles only. He provided the entire purchase price made up of a cash amount of \$24,500, proceeds from the sale of 21 Longmore Street of \$51,300, (via the bridging finance) a CSR loan of

\$12,000 and a bank loan of \$20,000, and paid legal fees of \$6,642.

Exhibit 30A is a document which Mr Burles prepared when he proposed to ask his bank manager for a loan to purchase Deakin Street. There was extensive cross examination in relation to this document. The date of 11 February 1980 at the top, the receipts dated 12 and 13 February 1980 respectively (exs.36 and 37) from the real estate agent for the two deposit sums of \$9,200 and \$150 do not sit easily with item 10 on the document indicating a purchase price of \$93,500. This is because Mr Burles said that he had offered \$92,000 on 12 February and the receipt for \$9,200 would confirm this, but that on the following day he offered \$93,500 which was accepted, hence the further receipt for \$150. I have concluded that the heading, including the date, was written on 11 February 1980 when Mr Burles was considering his finances in relation to the property and that other figures were added over the following days. Mr Burles suggested that this could have occurred. Exhibit 30A revealed that Mr Burles would tell the lending bank that he had \$24,500 available in cash, the proceeds from 21 Longmore Street, less the CSR loan over it, less estimated legal fees of about \$6,000, together with the need for a further CSR loan of \$12,000 and a bank loan of \$20,000. That gave him about \$13,000, for renovation. Mr Burles was challenged that if his cash asset position was as good as he maintained then he would not have needed a bank loan. He was asked why he did not disclose his total assets to the lending bank. His explanation was persuasive and consistent with my assessment of the cautious, almost secretive fashion in which he conducted his affairs. He said that he could obtain a cheap loan arranged through CSR of about \$12,000, that he was having the bridging finance paid for by the purchaser of 21 Longmore Street and that he needed only \$20,000 from the bank. He said that his experience was that it was unnecessary to disclose more than was needed to a bank if approaching it for a loan. He also knew from making approaches to the bank about the purchase of other houses

in need of renovation that the bank would be interested in the funds available for renovation. He had earlier approached his bank about a housing loan and had an appraisal of his furniture. At the foot of ex. 30A Mr Burles had noted under the heading "assets" two cars \$4,500, furniture \$40,000, grandfather clock \$5,000, tools \$1,000. He agreed that at that time he owned only one car, the other being a work vehicle and that Mrs Marks owned a motor vehicle. It was implied that he had included her furniture in the figure of \$40,000, but apart from trundle beds for the boys, all her furniture was in store and I accept that he had no real consciousness of its worth having seen it only on visits to her flat in Brighton.

I have concluded then that Mr Burles was financially able to purchase 12 Deakin Street, St Kilda without need to call upon Mrs Marks to contribute her wage for his domestic support so that he could save for a deposit or meet loan repayments. It may well have been that there were conversations between them to the effect that they would not dine out as frequently as before in order to save because the renovations to 12 Deakin Street were clearly going to be extensive and expensive.

The parties and Mrs Marks' sons continued to reside at 21 Longmore Street whilst 12 Deakin Street was made habitable and they moved in in June 1980. During this time, which Mrs Marks put at four months, she said that they all worked hard at removing rubbish from the property into industrial bins, that they took up carpets and lino, stripped wallpaper and washed down walls. Mrs Marks said that over the following months she sanded a bathroom floor, rubbed down and varnished a bathroom cupboard, painted walls and skirtings, cleaned paint off windows, acid washed bricks, mowed lawns, pruned trees, planted and laid bluestone bricks on a patio, and mixed mortar. She said that she contributed financially to the improvement of Deakin Street by Contributing some \$11,730 to the purchase of some furniture and to the renovation of the kitchen in mid 1982. About \$2,700 was for the kitchen. This occurred

after her property settlement and withdrawals from her account at that time in those sums have been verified by Mr Calabro, chartered accountant, who gave evidence at the trial although there are no receipts or invoices.

Mr Burles' evidence was that he had access to the property prior to settlement in May for a couple of weeks and that they moved in some six weeks later. Mr Burles said that there were a lot of contractors in the house in the first six weeks and until about October or November 1980, by which time the major, renovation work was completed. The contractors included a painter, who painted the whole house, an electrician to rewire the house and a plumber to re-pipe the house. According to Mr Burles about 95 per cent of the renovation work was done by outside contractors and he himself did the remaining 5 per cent, although he conceded that Mrs Marks did mix one batch of mortar, may have tried to remove paint from one window and did assist to remove some of the wallpaper. He disagreed that she did any sanding of the bathroom floor, acid washing of bricks in the kitchen or regular gardening work. It emerged in evidence that Mrs Marks touched up scuff marks on the skirtings and marks on the walls from time to time after the house had been professionally painted. Mr Braim, a school friend of Robert Marks since 1982, gave evidence recalling seeing all the family engaged in preparing David Marks' room for painting, probably some time after 1984 when he said that he tended to be a regular visitor to the house. He said that he saw Mrs Marks washing and preparing walls for painting. This was very likely the reworking and touching up after the original painting contractor, had painted the house in 1980, but if not, it is immaterial, as I accept that Mrs Marks did some work of this kind.

Mr James, a chiropractor from Melbourne, who had treated Mrs Marks' back condition over a number of years, recalled visiting Deakin Street and being told by Mrs Marks that she had been laying bluestone edging to a patio. Mrs Logan described Mrs Marks as a hard worker, who kept a beautiful home. The impression gained through Mrs Marks'

cross-examination and the evidence-in-chief of Mr Burles was that he regarded her as having made little or no contribution to the home that was established at 12 Deakin Street. However, in cross-examination he said of her:

"Is it your evidence before Her Honour that Vicky really did very little, hardly anything, on any of the properties? -- A lot of housework, and she was a hard worker in the housework and the other properties she did what was required, book work.

Book work? -- Book work, ran - picked up things for us, errands and there were no complaints. No complaints? -- No.

Are you saying then in terms of the way that Vicky and yourself organised your energies, the efforts that you were both able to expend, you have absolutely no complaint about her work, whatever it might have been that she was doing? -- Yes, in Harvey Lane stuff ...

In the totality of the period of time that you were together and the efforts that Vicky was able to expend during that period, do I understand you to say irrespective of what work had to be done Vicky was a hard worker? -- Why Your Honour I would have to answer that in my own way.

Certainly, I didn't --- ? --- Vicky did everything that I expected her to do. I didn't expect all this heavy lifting, which she didn't do, and I would never have expected it. She was very able with the Harvey Lane stuff that she was given and there is no dispute on that."

(t/s 209-210).

This response demonstrates Mr Burles literal approach to answering questions and his refusal to be drawn into generalisations. He said that he spent about \$104,000 on the renovations at 12 Deakin Street from his salary until 1982 when he was retrenched from CSR, from his retrenchment money of \$64,000 and from his savings. It was suggested that he could not have utilised his retrenchment moneys to pay the contractors as he had indicated in cross-examination, because he said that all the major contracting

work was completed by the end of 1980 and certainly within two years of moving in to Deakin Street and those retrenchment moneys would not have been received until August 1982. At whatever stage those moneys were utilised I accept that Mr Burles put his moneys into the renovations of 12 Deakin Street and that they amounted to about \$104,000. It was unlikely that Mrs Marks made any financial contribution and indeed it was not suggested on her behalf that she did so, except for the kitchen, since she worked only part time on a very modest remuneration for a few years and did not make any tax return for this period. From 1984 to mid 1988 she either ran her shop, which operated at a loss, or was not in remunerative, employment at all.

Mr Burles said that he laid and built a patio, put on some roof tiles, laid a new lawn and erected, a hills hoist clothes line and, the implication from the evidence is that he generally did handyman work throughout the house.

The conclusion to which I have come is that Mrs Marks has overstated her contribution to the physically hard work of the renovation of 12 Deakin Street. She clearly contributed much, to the joint venture of their life together making the home a pleasant place in which to live. 12 Deakin Street was a large house and, as its former status was restored, they were clearly both proud of it and had people to stay and entertained. Mr Burles contributed his money and skills and time as a handyman as well as participating in the domestic unit. Although Mr Burles cannot recall Mrs Marks' financial contribution to the kitchen, in the absence of any other explanation for the disbursement of those moneys I will accept that those sums went into the improvement of the house although some was for furniture which might well have gone to Queensland in due course.

York Street, St Kilda

As mentioned, on 11 August 1981 Mrs Marks and her former husband entered into an agreement pursuant to the provisions of the Family Law Act whereby Mr Marks agreed to

pay her an amount of \$125,000. \$97,000 was paid on 19 September 1981, \$10,000 on 4 March 1982 and \$16,000 on 20 July 1982. It seems that the balance paid for legal costs. Mrs Marks gave some \$10,000 to her sons and banked the balance. After some discussion with Mr Burles it was decided that she would use those funds to purchase a home in her own name. They looked for a suitable property together and ultimately a house at York Street was located by Mrs Marks who wished to purchase it. Mr Burles attended the auction and bid on her behalf. The property was purchased in January 1982 in the name of the plaintiff and settled in about March that year. It was a house that required extensive renovations, which Mr Burles said that he did, and that Mrs Marks did some minor work. It was painted and carpeted by outside contractors. It was - financed by Mrs Marks advancing \$60,000 from her property settlement moneys and borrowing \$20,000 for the balance of the purchase price. The property was rented. Mrs Marks serviced the loan on the York Street property herself until about October 1982. The minutes of the meeting of Harvey Lane Pty Ltd of 15 October 1982, (ex.22) relating to the York Street property (with which I shall deal below) are as follows:

"[Mrs Marks stated] that she owned the property, but could no longer keep up the cost of meeting the mortgage and maintenance. She stated that she was running in the red on this property, but would hardly show any gain if she sold at present. V.M. [Mrs Marks] offered the property to Harvey Lane hereinafter referred to as the company, to run for her on a 12 month trial. The company would pay all expenses on the property, and keep any profits for the company during the agreed period. It was agreed that V.M. would retain the right to sell the property at any time subject to any tenancy agreement on the property in force at the time. V.M. agreed to the property being rented out by the company during the agreed period providing the company agreed to make good any damage caused by the tenants [sic]. The company agreed to make good any damage referred to above. The company agreed to take over the operations of running the property, including being responsible for all operating costs and noted that V.M. agrees to the company retaining

any profits during the period of 12 months. All parties then agreed to the period being from Monday, 18 October 1982 for calendar months."

Those minutes were signed as true and correct by Mrs Marks who was the company secretary and who, it can be presumed, prepared those minutes. It was not suggested in cross-examination otherwise.

The property at York Street was sold in April 1983 for \$63,951. Those funds were deposited in the Burles Marks Family Trust and were credited to her loan account.

Harvey Lane Pty Ltd

Harvey Lane Pty Ltd ("Harvey Lane") was acquired in about June 1982 as the trustee of the Burles Marks Family Trust which was set up on 7 July 1982. Mr Burles said that at about the time when the parties moved into 12 Deakin Street there was some discussion about the future course of their relationship. Mrs Marks does not disagree that such conversations took place from time to time, although she has a different recollection of what was said. I do not understand Mr Burles' evidence to be that this took place in one conversation and it seems most likely that he and Mrs Marks had discussions on this topic over a period of time. Mr Burles' evidence was that he said that they would not marry, that there would be no children or other children brought into the relationship, that if Mrs Marks got a divorce settlement from her first husband that she would purchase a home for herself with that money and that Mr Burles would retain a house of his own in which they would both live; that Mrs Marks would have no financial input into that property and that he would do it up at his own expense. Mr Burles said that he proposed that they would form a trust company into which he and Mrs Marks would put shared money for investment purposes and that the proceeds would be used to finance and contribute towards the running of any household which they jointly had; that if Mrs Marks did buy a home and rented it, the rent from that property would go to subsidise the upkeep of herself

and her sons. Mr Burles said that Mrs Marks made it a condition of their continued relationship that he obtain a divorce from his wife from whom he had been separated for some 10 to 12 years. She also asked him to revoke a will that he had in favour of his then wife. Mr Burles said that he had informed Mrs Marks that whilst his property agreement with his wife had been made on a very friendly basis, the property had been split "fifty-fifty" and he did not wish to go through that again - carving up his assets for a second time.

Mrs Marks' recollection is somewhat different. She said that Mr Burles told her that he thought of her as his wife and her sons as his family, that whatever they had was jointly held half each.

Mrs Marks said that Mr Burles had proposed to her at one time. She was not asked why she had not accepted. She said that he had given her two rings one of which she regarded as a wedding ring. Mr Burles denied that he proposed marriage and denied that he had given her a wedding ring, but agreed that he had given her two rings which she wore.

There seems little doubt that Mr Burles and Mrs Marks presented themselves to the world as husband and wife. There are a number of commercial birthday cards and Christmas cards in evidence given by Mr Burles to Mrs Marks and which have printed on them "To my Wife". The evidence of those called on behalf of Mrs Marks was to the effect that they were a good team, that they operated as an effective family unit which included Mrs Marks' sons, who generally called Mr Burles, "Dad". I do not take Mr Burles to be denying the nature of their relationship. His concern was to demonstrate that from his point of view they had reached an agreement whereby he would purchase a property (Deakin Street) and renovate it and that it would be his asset, but that should she wish, they would both live in it and make it the family home and that she should purchase, a property in her name with her settlement money in which she

could live if she chose. If she did not, then the rent from that property would be utilised as a contribution towards her living expenses and those of her sons.

Having seen and heard the witnesses to which I have referred earlier, I have concluded that more probably than not the arrangement which Mr Burles sought to impose on their relationship was to some extent understood by Mrs Marks, but that she being a person, it seemed to me, more governed by her emotions than her reason, tended to disregard what he said and to substitute her own notion of the relationship which she saw as a complete sharing of their lives including their property, joint and several. By the end of the relationship, however, Mrs Marks tended to assume that what was in her name, even though held on trust for them both, could be regarded as hers exclusively, and I refer to the proceeds of sale of the Park Lane unit to which reference will be made below.

As to the establishment of Harvey Lane, Mrs Marks said in evidence that the Burles Marks Family Trust was largely established to receive the funds of her divorce settlement after the property at York Street had been sold. Further on in her evidence-in-chief she said that it was to be a vehicle for receiving her settlement money. Neither of those explanations are supported by the objective evidence as to dates. A perusal of Mr Calabro's Report (ex.3) in which the trust documents are analysed, shows that it operated much as Mr Burles said was agreed. Mr Kirk made much of the York Street property being "taken over" by the trust at the instigation of Mr Burles. A reference to the minutes which I have set out above clearly demonstrates that that was not so. Mr Kirk submitted that when the proceeds of the sale of York Street were made available to the trust it signified an intention to move away from any agreement that each party would independently own residential property. I accept that Mrs Marks wanted to participate in commercial ventures through the medium of the trust and freely made the York Street moneys available to that end. The idea of maintaining separate property was

kept alive upon the acquisition of the Eildon Road flats to which I shall turn below.

A perusal of the general ledger sheets for Harvey Lane for the period 1 July 1985 to 30 June 1987 shows that throughout that period Mrs Marks' loan account was charged with one half of the costs associated with the running of 12 Deakin Street, namely, gas, electricity, telephone and rates. There are no charges relating to maintenance or renovation work at 12 Deakin Street paid for by Harvey Lane. This seems to me to be consistent with the agreement advanced by Mr Burles.

When York Street was sold those funds were deposited in Harvey Lane and credited to Mrs Marks' loan account. Mr Burles said that at that time he was considering purchasing another property to renovate and Mrs Marks was interested in participating in this venture.

A property at Dalgety Street was purchased in April 1982 and settled in June 1982. It was financed by a Mr and Mrs Brazda, Mrs Marks and Mr Burles. The Marks/Burles half share was transferred to Harvey Lane when the trust was established in July 1992 and the respective contributions were credited to their respective loan accounts. Mr Burles said that the property was dirty but liveable and was rentable. Painting work was done on the property. Mrs Marks said that she did some minor work in relation to that property, which Mr Burles was unable to recall. It was sold in February 1985 at a profit to the trust of \$29,741.

Mr Burles said that he found 27 Eildon Road as an investment property and it was bought in February 1983. It consisted of four flats. It was sound but dirty and needed new kitchens. By this stage Mr Burles had been retrenched from CSR and he said that he did most of the renovation work on that property, but some was done by Mrs Marks. It was purchased for \$107,000 by Harvey Lane. Those flats were strata titled and gradually sold. At the time of purchase Mr Burles said that Mrs Marks said that she would look upon the front flat as her home and he indicated that he would

regard the back flat as his and that they could have a communicating door. Mrs Marks does not recall this conversation; It does seem consistent with the idea that Mr Burles wished her to have her own separate property to which she could have recourse should they no longer continue to reside together. When the flats were sold, the funds were paid into Harvey Lane.

In 1984 Harvey Lane purchased a block of 30 apartments known as Parkville Inn Apartments with Mr and Mrs Brazda. The purchase price for the property was \$500,000 which was funded totally by a bank and, as far as Harvey Lane's borrowing was concerned, was secured by 12 Deakin Street, St Kilda. There was work to be done on those apartments and Mr Burles said that the physical work was mostly done by Mr Brazda and himself. In that year it seems that Mr Burles joined the RAAF. Mr Burles thought that Mrs Marks' contribution was minor. Her evidence was that the caretaker of those apartments was old and sick and that she was regularly involved in checking the apartments and arranging for laundry to be done and generally assisting him. I have no, doubt that she did attend at the apartments and did the kind of work which she indicated. She was a person whom all witnesses, including Mr Burles, agreed was a hard worker. In 1986 the trust's interest in the Parkville Inn Apartments was sold resulting in a profit of \$68,950.

By February 1987 Mr Burles said that he was looking for investment properties and he came across a property in South Yarra. He made a minimal deposit so that he could then return with a cheque for the full deposit. He went back to Deakin Street and told Mrs Marks and they both looked at the property. After receiving advice from accountants that property, unit 8, 27 Park Lane, South Yarra, was purchased in Mrs Marks' name for \$275,000. The purchase price of that unit was funded from the sale of the Eildon Road flats and a deed of trust was executed to the effect that it was held by Mrs Marks on trust as to equal shares for Mrs Marks and Mr Burles. The loan moneys were secured by 12 Deakin Street. The Park Lane property was

eventually sold in May 1989 and the net proceeds were \$415,735. This was after relations between Mr Burles and Mrs Marks had deteriorated and most of the proceeds of sale were put in a joint trust account in Nerang, the balance being paid to Mrs Marks.

The arrangement was that moneys could be drawn from the account if both Mrs Marks and Mr Burles signed. Each had drawn \$100,000 on one occasion and some smaller sums thereafter. Both had attended at the bank and signed in the presence of the bank manager in order to do this. Mrs Marks attended at the bank subsequently and withdrew \$130,000 with only her signature and without the knowledge or consent of Mr Burles. She sent that money to the United States of America in the form of a cheque in favour of her son, Robert. As a consequence Mr Burles and the Westpac Bank sought to recover those funds from Mrs Marks. Ambrose J made an order on 23 October 1990 that Mrs Marks return those funds, to be held pending the outcome of this litigation. It appears that on 3 June 1992 the present action came on for hearing but Mrs Marks sought an adjournment of her action. The counter-claim was heard in which Mr Burles claimed one-half of the remaining Park Lane funds. Dowsett J ordered that the amount of \$112,193.61 together with accretions be paid to Mr Burles from the funds held pursuant to the order of Ambrose J. The proceeds of sale of the Park Lane unit have been divided equally between the parties and both have paid capital gains tax. Mr Kirk submitted that this demonstrated a departure from the agreement in that property in Mrs Marks' name was not regarded as "her" property. It was clearly never intended by either of them to be so regarded, as the deed of trust showed. Her tax return for the year ended 30 June 1989 described the Park Lane unit as her former residence, which was clearly not so. It must be supposed that the decision to purchase the Park Lane unit in Mrs Marks' name was to the joint benefit of the parties for tax minimisation reasons.

The trust has not been wound up and it would appear that in addition to Mr Burles and Mrs Marks, the beneficiaries of the trust are Mrs Marks two sons.

In order to complete the picture of the assets of Harvey Lane I should mention that in about March, 1981 Mr Burles purchased some land at Mallacoota for \$24,000. He sold that land for \$32,000 subsequently which was paid into Harvey Lane.

The accounts of Harvey Lane were scrutinised carefully by Mr Kirk. Mrs Marks' loan account consistently stood at a much higher figure than that of Mr Burles. Those figures are set out at p.15 of the report of Mr Calabro (ex.3). When its activities as a vehicle for Mr Burles' and Mrs Marks' joint investments came to an end the profits were split equally between them. Mr Kirk submitted that this was inequitable. The Burles' Marks Family Trust proceeded upon an agreed basis that the parties would invest their several moneys as they wished into Harvey Lane, that it would be used to finance the living expenses of them as a family unit, each of Mrs Marks and Mr Burles bearing 50 per cent of those expenses. Mr Burles contributed considerable time and effort and skill in effecting renovations and repairs to those properties together, where relevant, with Mr Brazda. Mrs Marks does not deny this. I accept that it was agreed that the profit was to be shared equally between the parties and that is what has occurred. Mrs Marks does not seek any order in relation to Harvey Lane itself.

The Panorama

During 1987 Mr Burles and Mrs Marks came to the conclusion that the Melbourne climate was insufficiently agreeable and they came to Queensland to look at properties with a view to moving to Queensland to live. Mr Burles was still employed by the RAAF. They were shown the land near Tallai and Mr Burles, said that he decided to purchase the land with a view to building a house on it. The purchase price was \$152,500. There is disagreement as to what occurred upon the signing of the contract in the real

estate agent's office. Mrs Marks maintains that she expected that the purchase of the property would be in both their names and that she was distressed when Mr Burles directed the real estate agent not to include her name on the contract and had something of an altercation with him immediately following. Mr Burles' evidence was that it was always his intention that that land would be in his name; that it would be financed from the sale proceeds of Deakin Street, that there was never any misapprehension between them or him and the real estate agent as to whose name the contract was to be in and that there was no altercation.

Whilst I accept that Mrs Marks was probably upset that the property was not in both names, I do not accept that Mr Burles ever led the real estate agent to understand that it was to be in joint names. It is quite possible that Mrs Marks mentioned something of her distress to Mr Burles but that he regarded it as a matter of no significance.

Mr Burles determined to build a house on that land and in due course and plans were drawn up by himself and a man named Schofield. It should be remembered that Mr Burles was an engineer and, according to Mrs Marks members of his family were architects and he was conversant with the drawing of plans. Mr Burles denies that Mrs Marks had any input into the plans or the selection of decor. I do not accept this. Evidence from Mrs Logan was that plans were set out at 12 Deakin Street and were the subject of much joint discussion and, as far as outsiders were concerned, it was seen as a joint enterprise.

The house at 12 Deakin Street, St Kilda was sold in September 1987 for \$472,000. The family moved to rented accommodation at Nerang towards the end of that year. There is again some disagreement as to the details of the move to Queensland and how long Mrs Marks stayed in Melbourne. It is unnecessary for me to resolve those matters.

The land at Tallai was extensive and the planned house was a large one. Mrs Marks said that she contributed to its establishment in that she helped to choose tiles and other

decoration, that she cleaned through the property after the original builders were sacked and helped to clean off estapol which had been dropped onto the floors. She also said that she assisted in establishing gardens, involving the spreading of seed near the dam and the planting of fruit trees. She adds that her sons and their friend chopped firewood and cut a path to the boundary of the property. Mr Burles denies all of this. Mr Braim visited the family in about mid-1988 during Expo and recalls the property as being a concrete slab and again visited at the end of 1988 and in January, 1989 when the house was complete except for the finishing touches. On his first visit he observed Mr Burles and Mrs Marks going off to purchase some tiles and on his subsequent visit he saw Mrs Marks doing some planting. His impression was that the family was still operating as a unit and that the relationship between Mrs Marks and Mr Burles was "normal" together with Mr Burles' relationship with Robert and David Burles.

Mr Burles maintained a running account of figures for the cost of the improvements to the land at Tallai - which amounted to \$323,950 - which exhausted - the profits from 12 Deakin Street and that is now accepted by Mrs Marks.

It seems likely that at the time of this trial in December, 1993 Mr Burles had entered into a contract for the sale of the Panorama for \$580,000. He did not disclose this. Settlement on that contract took place on 28 February, 1994. Mr Burles would no doubt say that no one asked him and it is not his practice to volunteer information unnecessarily. At settlement Mr Burles directed that one-half of the net proceeds of sale, the calculations for which are set out in para.8 of his affidavit filed on 18 April 1984, being \$274,785, were deposited with a Sydney based mortgage manager to await the outcome of this action.

The relationship between the parties, it seems, began to deteriorate towards the end of 1988. By mid-1989 they were occupying separate parts of the house and Mrs Marks

had ceased to provide housekeeping services to Mr Burles. She was then working part-time in a dress shop in Surfers Paradise. On 9 December, 1989 Mrs Marks was informed at her place of work that the locks had been changed on the house at Tallai and that she was not to return, that her pet had been put in kennels, her chattels into storage and her personal possessions were handed to her.

The Law

The parties are not in disagreement as to the principles to be applied. Both Mr Bourke for Mr Burles and Mr Kirk agree that those principles can be discerned particularly from the High Court decisions of Muschinski v. Dodds (1986) 160 CLR 583 and Baumgartner v Baumgartner (1987) 164 CLR 137. Mr Bourke drew my attention to Booth v. Beresford (1993) 17 Fam. LR 147, a case with many similarities to the present, but it does no more than apply those principles.

Mrs Marks pleaded that there was a common intention between herself and Mr Burles when their relationship commenced, which was articulated either at 21 Longmore Street or at the time when 12 Deakin Street was acquired that they would share everything that was acquired in the course of their relationship equally. That common intention has been denied by Mr Burles. Mrs Marks has asserted that it would be unconscionable of Mr Burles to deny her a one-half share of the proceeds of the property 12 Deakin Street, traced into the Panorama and its sale proceeds, because of the contributions which she has made to the acquisition and improvement of those properties but particularly 12 Deakin Street.

The circumstances in which a constructive trust will be found to exist where there have been contributions to a home in which parties have cohabited without marriage have given rise to certain principles which have now been well established by the High Court in the cases to which I have referred. In Muschinski v. Dodds, Deane J, with whom Mason J (as his Honour then was) agreed, stated at p.615, after

analysing the origin and evolution of the constructive trust:-

"The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles: ... Viewed as a remedy, the function of the constructive trust is not to render superfluous, but to reflect and enforce, the principles of the law of equity.

Thus it is that there is no place in the law of this country for the notion of 'a constructive trust of a new model' which, '[b]y whatever name it is described ... is ... imposed by law whenever justice and good conscience' (in the sense of 'fairness' or what 'was fair') 'require it': per Lord Denning M.R., Eves v Eves [1975] 1 WLR 1338, at pp. 1341, 1342; [1975] 3 All ER 768, at pp 771, 772; and Hussey v. Palmer [1972] 1 WLR 1286 at pp 1289-1290; [1972] 3 All ER 744, at p.747. Under the law of this country - as, I venture to think, under the present law of England (cf. Burns v. Burns [1984] Ch 317) - proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion (cf. Wirth v. Wirth (1956) 98 CLR, at pp. 232, 247, subjective views about which party 'ought to win' (cf. Maudsley, 'Constructive Trusts', Northern Ireland Legal Quarterly, vol. 28 (1977), p. 123, esp. at pp. 123, 137, 139-140 and 'the formless void of individual moral opinion'; cf. Carly v. Farrelly [1975] 1 NZLR 356 at p. 367; Avondale Printers & Stationers Ltd v. Haggie [1979] 2 NZLR 124, at p. 154. Long before Lord Seldon's anachronism identifying the Chancellor's foot as the measure of Chancery relief, undefined notions of 'justice' and what was 'fair' had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law. The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other: cf. Hepworth v. Hepworth (1963) 110 CLR 309, at

pp. 317-318. Such equitable relief by way of constructive trust will only properly be available if applicable principles of the law of equity require that the person in whom the ownership of property is vested should hold it to the use or for the benefit of another. That is not to say that general motions of fairness and justice have become irrelevant to the content and application of equity. They remain relevant to the traditional equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules, or principles of modern equity: cf., e.g., Legione v. Hateley (1983) 152 CLR 406, at p. 444; Commercial Bank of Australia Ltd v. Amadio (1983) 151 CLR 447, at pp. 461-464, 474-475."

After discussing the appositeness of the analogy of the blameless failed joint venture, to the collapse of a personal relationship in the course of which property is acquired, his Honour observed at p.622:

"... any assessment of what would and would not constitute unconscionable conduct would obviously be greatly influenced by the special considerations applicable to a case where a husband and wife or persons living in a 'de facto' situation contribute, financially and in a variety of other ways, over a lengthy period to the establishment of a joint home. In the forefront of those special considerations there commonly lies a need to take account of a practical equation between direct contributions in money or labour and indirect contributions in other forms such as support, home-making and family care."

In Baumgartner, Mason CJ, Wilson and Deane JJ in considering Deane J's reasons for judgment in Muschinski observed at p.148:-

"His Honour pointed out that the constructive trust serves as a remedy which equity imposes regardless of actual or presumed agreement or intention 'to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle' (1985) 160 CLR, at p. 614: see also at p. 617. In rejecting the notion that a constructive trust will be imposed in accordance with idiosyncratic notions of what is just and fair his

Honour acknowledged that general notions of fairness and justice are relevant to the traditional concept of unconscionable conduct, this being a concept which underlies fundamental equitable concepts and doctrines, including the constructive trust (1985) 160 CLR, at p. 616."

The vehicle of Harvey Lane Pty Ltd and the Burles/Marks Family Trust allowed the parties to give expression to the commercial aspect of their relationship whilst at the same time providing for the living expenses of their personal relationship. There is, in my view, no basis on the evidence for importing that agreement into the acquisition and improvement of 12 Deakin Street so as to impose an obligation upon Mr Burles to hold that property on trust for both parties in equal shares.

However a further question arises for consideration, namely, whether it would be unconscionable for Mr Burles to retain the whole of the proceeds of 12 Deakin Street and, subsequently, the Panorama, in the circumstances:

- (a) that Mrs Marks did not retain a separate residence for herself, as was initially agreed, and her moneys, earmarked for that purpose, were utilised by the trust and its profits divided equally with Mr Burles and;
- (b) of Mrs Marks' contribution, in a very modest sum financially, to the improvement of 12 Deakin Street, and her considerable contribution as home-maker to that property, and her contribution to the development of the Panorama.

If to allow Mr Burles to retain the whole beneficial entitlement to that property would give him an undue advantage of a benefit derived at the expense of Mrs Marks in the special circumstances of the collapse of their joint relationship would be unconscionable, then the law imposes a constructive trust upon Mr Burles to hold the proceeds of the sale for the benefit of them both in proportions which appropriately represent their individual contributions

either financially or in kind. Even though the High Court was moved to recognise a non-financial contribution to the joint enterprise of a relationship there has by no means been an importation of the principles of the Family Law Act.

Mr Burles received the contribution which Mrs Marks made to the development of 12 Deakin Street as the family home. She was, it seems an exemplary house-keeper and to that extent it can be taken that she enhanced the value of that house. She made a financial contribution to that enterprise in that she paid half the running costs of their living together through her interest in Harvey Lane. She made some small direct financial contribution, as I have found, to the establishment of the renovated kitchen and made herself available to attend at hardware stores and the like at Mr Burles' request to obtain materials that were used in the renovation of 12 Deakin Street as well as the Harvey Lane properties. Mr Burles' financial contribution to 12 Deakin Street was such as to be regarded for all practical purposes as the whole of the direct financial contribution. The parties cohabited in 12 Deakin Street for 7 years and, relying upon the accounts of Mr Braim, Mrs Logan, Mr James and Mr Hall it was a very successful home, due in no small measure to the efforts of Mrs Marks.

The development of the Panorama land was, I find, largely due to the physical and organisational efforts of Mr, Burles, - this was not the area where Mrs Marks "shone" in the relationship, but it seems that the joint enterprise was still "on foot" until the end of 1988.

The other circumstance to consider is Mrs Marks' failure to retain her own separate residence as agreed and the consequential benefit to Harvey Lane and thus to Mr Burles. It should be recalled that I have found that Mrs Marks was not induced by, any representation of Mr Burles to put her moneys into Harvey Lane. Further I recognise that Mr Burles made a more significant contribution to the physical and planning aspects of the renovation and

maintenance aspects of some of those investment properties. However, Mr Calabro's analysis of their respective loan accounts shows that when the trust was established Mrs Marks contributed Some \$116,025 (largely her divorce settlement moneys) and Mr Burles \$52,354. By 30 June 1986 her loan account stood at \$142,973 and his at \$59,265. As I have mentioned the final division was in equal shares.

I have concluded that those circumstances make it unconscionable for Mr Burles to retain the whole of the sale proceeds of the Panorama property. The contributions which Mrs Marks made when measured against those of Mr Burles do not suggest that equity is equality. I find it quite impossible to calculate the appropriate interest which Mrs Marks has in any arithmetical fashion. Taking into account the findings which I have made I consider that the constructive trust which is to be imposed should declare the beneficial interests of the parties in the proportions 25 per cent to Mrs Marks and 75 per cent to Mr Burles. Adjustments will need to be made to take account of Mr Burles maintenance to the Panorama since December 1989 subject to off-setting any benefit enjoyed by him through occupation and use of the property after the relationship came to an end. If the parties are unable to agree on these figures then it will be necessary for the Court to make an order. It is to be hoped that this will be unnecessary and that their legal advisers will assist to bring this litigation to as least expensive an end as possible.

It is necessary to deal with the furniture and chattels claimed by Mrs Marks.

Furniture

Mrs Marks claims that she and Mr Burles purchased from, their joint resources various items of furniture and other chattels. A list, which has become ex.2, was annexed to the pleadings. Mrs Marks claims that at all times it was the common intention of the parties that they would share those items of furniture and chattels in equal shares and that the chattels in ex.2 were left at the Panorama.

Mr Burles gave evidence that a number of the items were not to be found at the Tallai property and he has no information about their whereabouts. No orders will be made in relation to those items. A few of the items were said to have been paid for by Harvey Lane and some are identified as having been paid for by one or other of Mrs Marks or Mr Burles.

Because the agreement with respect to Harvey Lane was that the profits would be shared jointly, I have concluded that where Harvey Lane was the source of the funds then the declaration sought should be made, but where I have concluded that the source of the funds was Mr Burles and that it was not a gift to Mrs Marks then such an order ought not to be made.

(i) Antique Chest of Drawers

Mrs Marks put this on her schedule as having been purchased jointly by herself and Mr Burles, that Mr Burles was the source of the funds and it was a gift from him to her. In cross-examination, Mrs Marks said that where she used the word "purchase" she meant that she and Mr Burles went together shopping for that item. Mr Burles denies that it was a gift and he wishes to retain it. I accept Mr Burles' evidence and no order will be made in relation to that chest of drawers.

(ii) Sewing Machine

This was purchased with funds from Mr Burles. Mrs Marks said that it was a gift to her so that she could learn to sew. Mr Burles denies that it was a gift and says that he uses it to do his own repairs. No declaration will be made as to the sewing machine.

(iii) Scuba Gear

There is a reference to scuba masks and snorkels and Mr Burles agrees that Mrs Marks may have all but one set which is his. It is unnecessary to make an order.

(iv) Copper

A copper was taken from 12 Deakin Street and polished. Mr Burles has it in his possession and wishes to retain it. It was part of the property of 12 Deakin Street. Mrs Marks is entitled to a quarter share of its value.

(v) Wind Surfer

A wind surfer belonging to David Marks was apparently left on the Tallai property and Mr Burles indicates that it may be collected. It is not appropriate that a declaration be made with respect to that property.

(vi) Bird Pictures and Basket

Mr Burles said that Mrs Marks may have three bird pictures which were in the bedroom and were a gift to Mrs Marks from a friend. He also says that she can have a Japanese basket made of cherry wood which was sourced from Harvey Lane funds. There is no need to make an order.

(vii) White Goods

The washing machine, drier, fridge and freezer were purchased for the Tallai property out of the funds from Deakin Street. I accept that they were not purchased from Harvey Lane funds. Mrs Marks is entitled to a quarter share in their value.

(viii) Bed

Mr Burles says that Mrs Marks can have the queen size waterbed which is not identified as being sourced by anyone.

(ix) Painting of Gum Trees

An Australian oil painting of gum trees was purchased with funds provided by Mr Burles. He wishes to keep it and no order will be made.

(x) Water Filter

Mr Burles has said that Mrs Marks can have a water filter which was purchased with funds provided by Harvey Lane. It is unnecessary to make any order.

(xi) Stamp Collection

Mr Burles' stamp collection was alleged by Mrs Marks to be worth \$2,000. Mr Burles' evidence was he started it when he was about 10 years old and that he sold that stamp collection for a small sum of money and has spent the proceeds. No claim can be made to that property.

(xii) Computer

Mrs Marks claims a share in a computer together with discs, copier, desk and chair. Mr Burles says that the computer became useless and he gave away the balance of the equipment associated with it. It is therefore not appropriate that it should be the subject of any order.

(xiii) Hall Stand and Victorian Credenza

Mrs Marks claims an interest in an antique hall stand which she values at \$900, purchased by them jointly with funds provided by Mr Burles as was the case with a Victorian credenza. Mr Burles wishes to retain both of those items and I make no order in relation to them.

(xiv) Mirror

Mrs Marks claims an interest in a gilt edged mirror which was one of two which were at 12 Deakin Street. One was sold with Deakin Street and the other brought to the house on the Tallai land. It was purchased with Harvey Lane funds and accordingly Mrs Marks is entitled to a half-share in its value.

Mrs Marks has suggested that there are tools which were acquired over the relationship to the value of about

\$5,000 and that Harvey Lane was the source of funds. Mr Burles says that she has overvalued those tools, that few of them are in working order except for the whipper snipper. They were purchased with funds from Harvey Lane and must be shared equally. In order to avoid any further disputes between these parties in relation to the tools I order that Mr Burles prepares two lists of approximately equal value of those tools which he still retains and that Mrs Marks be entitled to choose the tools from one of those lists which she may take on their value.

Previous Costs Orders

I must deal with two matters which were the subject of applications after the conclusion of the trial.

(a) Application of 31 March 1994

When the sale of the Panorama was learnt by Mrs Marks' solicitors (at what date is not clear from Miss Powers' affidavit) they sought information from Mr Burles' solicitors on 30 March 1994 as to full details of the sale including the price, where the moneys were held and the purchaser. They sought access to the documentation and what seems an informal assertion of an entitlement to security for costs. Listing of the matter for the following day in default of provision of those matters was threatened.

There was no injunctive order sought or made at the conclusion of the trial in relation to the Panorama property. The facsimile response of Mr Burles' solicitors informed Mrs Marks' solicitors that one half of the proceeds were held in trust pending the outcome of the trial and that Mr Burles did not propose to deal inappropriately with them.

Mrs Marks' solicitors listed the matter as one of urgency the following day seeking injunctive relief with respect to the whole of the proceeds of sale and other ancillary orders. Undertakings were offered by Mr Burles through his counsel not to deal with the one half share

held in trust which were accepted and Mrs Marks gave the usual undertaking as to damages.

In view of Mr Burles' solicitors' letter of 30 March 1994, at the very least further negotiations ought to have taken place before returning to court. It was essentially an unnecessary procedure to obtain what was forthcoming and Mrs Marks was not entitled to the breadth of orders sought. She must pay the costs of and incidental to the summons.

(b) Application of 9 May 1994

Mrs Marks' solicitors lodged a caveat on 31 March 1994 over land owned by Mr Burles at Toowoomba which was purchased with some of the proceeds of sale of the Panorama (one half remains lodged with the trustees in Sydney). Mr Burles became aware of this on receipt of the standard letter from the Titles Office dated 27 April 1994. By letter dated 3 May to Mrs Marks' solicitors Mr Burles sought to be relieved of his undertaking given on 31 March or for the removal of the caveat. Clearly Mrs Marks could not require both since she sought only a one half interest in the property. A demand was made for a withdrawal of the caveat by 3 p.m. that day under threat of application to Court. The response was that a particular solicitor was unavailable until later in the day.

Mr Burles' solicitors extended time to 10 a.m. the following day but Mrs Marks agreed to withdraw the caveat on terms not acceptable to Mr Burles and the application was filed returnable on 9 May. Mrs Marks through her solicitors' letter of 4 May agreed to withdraw the caveat unconditionally and the matter proceeded on 9 May solely on the question of costs. It was suggested by Mrs Marks' solicitor that until an affidavit sworn by Mr Burles setting out his undertaking was filed it was appropriate to maintain the caveat which was in place at the time of the hearing on 31 March but not disclosed to the Court. There was, no order requiring Mr Burles to swear an affidavit and his undertaking was received on 31 March. There was no justification for the caveat and it ought to have been

removed forthwith. It was unfortunate that the parties expended further money arguing about these costs. Although Mr Burles' solicitors were quick to brief counsel it was not inappropriate. Mrs Marks must pay the costs of and incidental to the notice of motion to remove the caveat.

The formal orders are:

1. A declaration that the defendant holds his interest in the proceeds of sale of the property known as Lot 97, the Panorama, Tallai in trust for the plaintiff as to a one quarter interest therein subject to all necessary adjustments for mortgage repayments, maintenance improvements and occupation by the defendant from 9 December 1989 to that property.
2. A declaration that the defendant holds -
 - (i) the copper and the white household goods, in trust for the plaintiff as to a one quarter interest therein;
 - (ii) the mirror and the tools in trust for the plaintiff as to one half interest therein;such goods being better described in ex.2 and the reasons herein;
3. That the defendant pay two-thirds of the plaintiff's costs of and incidental to the action to be taxed;
4. Liberty to apply on 2 days' notice in writing with respect to the working of orders 1 and 2;
5. That the plaintiff pay the defendant's costs of and incidental to the application made 31 March 1994 and 9 May 1994 to be taxed.

I will hear submissions as to costs.