HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 16 Aug 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	P9/2022
File Title:	Bosanac v. Commissioner of Taxation & Anor
Registry:	Perth
Document filed:	Form 27F - Appellant's Outline of oral argument
Filing party:	Appellant
Date filed:	16 Aug 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

BETWEEN: **BERNADETTE BOSANAC**

Appellant

And

COMMISSIONER OF TAXATION

First Respondent

VLADO BOSANAC

Second Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I: Suitable for publication

1 This submission is in a form suitable for publication on the internet.

Part II: Outline of oral argument

2 The core facts. These come from the primary judgment at Core Appeal Book (**CAB**) Tab 1 Pages 19-22, J [38]-[58]. Mr and Ms Bosanac were married in 1998 and separated in 2012/2013. On 27 April 2006, Ms Bosanac offered to purchase the Dalkeith property. The security included the Dalkeith property, but also property owned separately by Mr and Ms Bosanac (**Respondent's Further Book at 11**).

3 During the marriage, Mr and Ms Bosanac kept their substantial assets in separate names: J [57] (**CAB Tab 1 Page 22**). After the purchase, Ms Bosanac permitted Mr Bosanac to use the property as security: J [215]-[218] (**CAB Tab 1 Page 76-77**) - as "*he was my husband and I had no reason not to trust him*" at [217]. Neither Mr nor Ms Bosanac gave evidence. There was no direct evidence of their intention.

4 The Full Court's reasons. The Full Court relied on the fact that Mr Bosanac borrowed money to contribute to the matrimonial home to infer that Mr Bosanac intended to declare a trust: FC [15], [16], [21], [22], [27] (**CAB Tab 4 Page 101, 103**).

5 The logical error in the Full Court's reasons. It is circular. It assumes borrowed contributions are different to cash contributions. They are not.

6 The Full Court's reasons were contrary to authority:

(a) There is no difference between husband/wife and parent/child: *Stewart Dawson* (1933) 48 CLR 683 at 690 (Joint Book of Authorities (**A**) **Vol 3 Tab 26 Page 642**; *Martin v Martin* (1959) 110 CLR 297 at 304 (**A Vol 2 Tab 19 Page 304**)).

(b) The "presumption" is a 'landmark', no longer the subject of argument: *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 at 364 (**A Vol 2 Tab 14 Page 177)**. It is "*not to be frittered away by nice refinements*": *Wirth v Wirth* (1956) 98 CLR 228 at 241 (**A Vol 3 Tab 29 Page 717**), quoting *Finch v Finch* (1808) 33 ER 671 at 674 (Lord Eldon)).

(c) The "presumption" is a "well-entrenched" landmark in the law of property that should not be disregarded by judicial decision as Deane J said in *Calverley v Green* (1984) 155 CLR 242 at 266 (citing Eyre L.C.B., *Dyer v. Dyer* (92))" (**A Vol 2 Tab 12 Page 147)**. In *Nelson v Nelson* (1995) 184 CLR 538 (**A Vol 2 Tab 22)**, each of McHugh J (CLR 602/Page 455), Deane and Gummow JJ (CLR 548/Page 401) and Toohey J (CLR 584/Page 437) adopted Deane J's statement from *Calverley.*

(d) The "presumption" has been applied where advances were borrowed: *Martin* at 300 (**A Vol 2 Tab 19 Page 300**); *Stewart Dawson* at 691-692 (**A Vol 3 Tab 26 Pages 643-644**), *Calverley* at 251 (**A Vol 2 Tab 12 Page 132**).

The Notice of Contention

7 Grounds 1 and 2. These grounds have been significantly watered down: see RS [64]. The grounds remain problematic - the significance of joint contributions and matrimonial property is unclear. Their ability to rebut the presumption by allowing universal inferences of intention is based on mere assertion. The primary judge held that nothing in the work of Professor Scott indicated an abolition of the "presumption". The Full Court observed that the Commissioner's argument created a new presumption in itself which would then need to be rebutted**:** FC [10] **(CAB Tab 4 Page 97).**

8 Grounds 3 and 4. These grounds make the extraordinary call for the abolition of the "presumption". Although the Notice of Contention is limited to abolition between husbands and wives, the Respondent's submissions at RS [13] go further and seek to

abolish the "presumption" generally. The Commissioner needs leave to amend the notice of contention and to reopen/reargue at least *Nelson* (**A Vol 2 Tab 22)** which confirmed that the "presumption" was not to be disregarded by judicial decision – McHugh J (CLR 602/Page 455), Deane and Gummow JJ (CLR 548/Page 401) and Toohey J (CLR 584/Page 437).

9 First, the "presumption" is an ancient and recognised doctrine and none of the factors from *John v Commissioner of Taxation* (1989) 166 CLR 417 at 438–440 (**A Vol 2 Pages 282-283**) support abolishing the doctrine. Second, the Courts have had recent occasion to apply the "presumption" and nothing about the results of these cases suggests that the doctrine is failing – see Reply Submissions at [13]-[14]. Third, the "presumption" has been consistently applied by the Courts. Fourth, any abolition or change is a matter that is properly left to Parliament: McHugh J in *Nelson* (Page 455/CLR 602).

10 The various legislative examples provided in the first volume of the authorities bundle show that different legislative bodies have taken very different approaches when they have modified these presumptions – for example: *Property (Relationships) Act 1976* (NZ) s 4, *Law Reform (Miscel Provisions) (Northern Ireland) Order 2005* art 16 (**A Vol 1 Page 26**). *De Facto Relationships* (Report No 36, Jun 1983) at [10.18] (**A Vol 6 Page 1537**). The law reform bodies that have considered the question have noted the need for caution when affecting property rights and transactions: South Australian Law Reform Institute's report '*Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia'* (Report No 15, Dec 2020), at [10.4.10] (**A Vol 6 Page 1551**).

11 Relief. The Appellant seeks the relief in orders 1 and 2 of the Notice of Appeal. She no longer seeks order 3, as the parties have agreed that there will be no order as to costs in the High Court.

Noel Hutley
02 8257 2599
nhutley@stjames.net.au