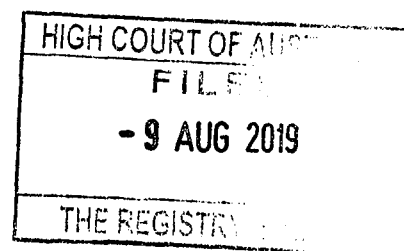


IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S216 of 2019

ON APPEAL FROM THE FULL COURT
OF THE FEDERAL COURT OF AUSTRALIA



BETWEEN:

**FRANZ BOENSCH AS TRUSTEE OF THE
BOENSCH TRUST**

Appellant

and:

SCOTT DARREN PASCOE

Respondent

APPELLANT'S CHRONOLOGY

Solicitor for the appellant:

John D Bingham Solicitor
Level 2
44 Miller Street
North Sydney NSW 2060

Telephone: 02 8045 2639
Fax: Not applicable
Email: jbingham@binghamlaw.com.au
Ref: John Bingham

PART I: CERTIFICATION FOR PUBLICATION ON THE INTERNET

1. We certify that this chronology is in a form suitable for publication on the internet.

PART II: PRINCIPAL EVENTS RELATING TO THE APPEAL

Date	Event	CAB or AFM ref.
May 1999	Mr Boensch and his wife, Mrs Sabine Boensch (“Mrs Boensch”), entered a matrimonial property settlement in the Family Court. Mrs Boensch agreed to transfer her joint interest in the family home at 255 Victoria Road, Rydalmere (“Rydalmere”) to Mr Boensch for \$50,000.	SC [11] (CAB 9); FC [16] (CAB 78)
23 Aug 1999	Mr and Mrs Boensch executed a memorandum of trust (“Memorandum of Trust”) as joint settlors which declared an express trust over Rydalmere (“the Trust”) for the joint benefit of their two children, Dominic and Stephanie Boensch, as its beneficiaries in equal shares. The Memorandum of Trust provided for the Trust to be confirmed at a later date by a deed to be prepared by a solicitor. Their execution of the Memorandum of Trust was witnessed by Justice of the Peace.	SC [12] (CAB 9); FC [17] (CAB 78); Memorandum of Trust (AFMB 29) SC [12] (CAB 9); FC [17] (CAB 78) SC [12] (CAB 9)
July 2003	Michael Costin obtained a judgment against Mr Boensch (“the judgment debt”). [The judgment debt is personal to Mr Boensch and quite unrelated to his conduct of the Trust.]	SC [14] (CAB 10); FC [18] (CAB 78)
Oct 2003	Mr Costin served a bankruptcy notice on Mr Boensch in reliance on the judgment debt.	SC [14] (CAB 10); FC [18] (CAB 78)

Date	Event	CAB or AFM ref.
18 Mar 2004	<p>Mr and Mrs Boensch, as joint settlors, entered a deed of trust (“the Deed of Trust”) with Mr Boensch, as the trustee of the Trust.</p> <p>The Deed of Trust was prepared by James Leong, their family solicitor. The Deed of Trust:</p> <p>(a) confirmed the Trust created on 23 August 1999 (including the beneficial interests in the trust property); (b) confirmed that an estate in fee simple in Rydalmere constituted the trust property; (c) named it “the Boensch Trust”, and; (d) otherwise added to the terms of the Trust.</p> <p>Mr Boensch was nominated the Appointor of the Trust. The Memorandum of Trust is annexed to the Deed of Trust as an aspect of its confirmation.</p>	<p>SC [15] and [16] (CAB 10); FC [19] (CAB 78)</p> <p>Deed of Trust (annexing the Memorandum of Trust) dated 18.3.04 (AFMB 31)</p>
21 Mar 2004	<p>Mr and Mrs Boensch executed a Memorandum of Transfer of the fee simple in Rydalmere to Mr Boensch but the Transfer was not registered because the mortgagee, State Bank of New South Wales, refused to consent to its registration at that time.</p>	<p>SC [17] (CAB 11); FC [19] (CAB 78);</p> <p>Memorandum of Transfer dated 21.3.04 (AFMB 47)</p>
29 Mar 2004	<p>The Memorandum of Trust was stamped with <i>ad valorem</i> duty. The Deed of Trust was stamped with nominal duty.</p>	<p>SC [13] (CAB 10)</p> <p>Memo of Trust; Deed of Trust (AFMB 59, 72)</p>
July 2005	<p>Mr Boensch (as trustee) lodged the Deed of Trust with the Memorandum of Trust and made a request that the Registrar-General record a caveat on Rydalmere pursuant to s. 82 of the <i>Real Property Act</i> forbidding the registration of any instruments not in accordance with the trusts in the Deed of Trust and annexed Memorandum of Trust.</p>	<p>SC [19] (CAB 11)</p> <p>Registrar-General’s Caveat dated 16.8.05 (AFMB 51)</p>

Date	Event	CAB or AFM ref.
July 2005	Mr Costin filed a creditor's petition seeking a sequestration order against Mr Boensch.	SC [19] (CAB 11)
17 Aug 2005	The Registrar-General registered a caveat on Rydalmere pursuant to Mr Boesch's request under s. 82 of the <i>Real Property Act</i> .	SC [19] ((CAB 11); FC [21] (CAB 79); Registrar-General's Caveat dated 17.8.05 (AFMB 57)
23 Aug 2005	A sequestration order was made against Mr Boensch on the application of Mr Costin. Mr Pascoe, a partner of Sims Partners, became the trustee of Mr Boensch's bankrupt estate, having signed a consent to act as his trustee under s. 156A(3) of the <i>Bankruptcy Act 1966</i> at the request of Ms Karen McLean ("Ms McLean"), who was Mr Costin's solicitor.	SC [20] (CAB 11); FC [21] (CAB 79); Notice of Appointment as Trustee in Bankruptcy (AFMB 115)
23 Aug 2005	Shortly after the sequestration order was made, and that same day, Mr Pascoe spoke with Ms McLean, in all probability face-to-face. During this meeting there was a discussion about a "purported trust" over Rydalmere, which Ms McLean had informed Mr Pascoe about [albeit there is no finding as to her source of this knowledge], and Ms McLean made reference to advice by Mr Jim Johnson, counsel for Mr Costin, given to her to the effect that "Jim says lay down to set aside".	SC [21] (CAB 12); FC [22] (CAB 79)
	Mr Pascoe said that Ms McLean had informed him that Mr Johnson believed that there were strong prospects of defeating the claim about the trust made by Mr Boensch and of having the trust set aside. Ms McLean used the phrase "lay down misère" with reference to the prospects of defeating Mr Boensch's trust claim.	SC [21] and [22] (CAB 12); FC [22] (CAB 79); Affidavit SD Pascoe 4.6.15 pars 16-17 (AFMB 488 at 489-490);

Date	Event	CAB or AFM ref.
23 Aug 2005	<p>Shortly after the meeting with Ms McLean and Mr Pascoe, Mr Moretti, his assistant, undertook a title search of Rydalmere.</p> <p>The search disclosed to Mr Pascoe that:</p> <p>(1) Mr and Mrs Boensch were the joint registered proprietors of Rydalmere;</p> <p>(2) a caveat was recorded by the Registrar-General giving due notice of the Trust.</p>	<p>SC [23] (CAB 12); FC [23] (CAB 79)</p> <p>Title search by Mr Moretti dated 23.8.05 (AFMB 87)</p>
24 Aug 2005	<p>Mr Pascoe and Mr Moretti held a long meeting in their office with Mr Boensch.</p> <p>During the meeting Mr Boensch produced to Mr Pascoe a [stamped] copy of the Memorandum of Trust and also (at least) the front page of the Deed of Trust.</p> <p>There was a discussion about the Trust and its establishment. Mr Boensch said Rydalmere was held on trust for his two children.</p>	<p>SC [24] (CAB 12); Affidavit of SD Pascoe 4.6.05 pars 20-21 (AFMB 488 at 491-493)</p>
25 Aug 2005	<p>Two days after the meeting with Ms McLean and the day after the meeting with Mr Boensch, Mr Pascoe arranged for a caveat over Rydalmere to be prepared by Ms McLean on his behalf. An employee of Mr Pascoe, a J.P., witnessed Ms McLean's verification of the caveat ("the caveat").</p> <p>Mr Pascoe and Mr Moretti had met with Ms McLean on two occasions on the day of lodgment of the caveat when Mr Pascoe gave his instructions to lodge the caveat.</p> <p>The caveat was lodged on 25 August 2005.</p> <p>The estate or interest claimed in the caveat was: "Legal interest pursuant to the <i>Bankruptcy Act 1966</i>". The basis for the claim was ss. 58(1)(a) and 156A(3) of the <i>Bankruptcy Act 1966</i>.</p>	<p>SC [25] and [26] (CAB 13); FC [24] and [26] (CAB 79, 80); Caveat AB721857 registered 26.8.05 (AFMB 117)</p> <p>SC [3] (CAB 7); FC [24] (CAB 80) Caveat AB721857 (AFMB 117)</p>

Date	Event	CAB or AFM ref.
25 Aug 2005	<p>Mr Pascoe’s reasons for lodging the caveat, as stated in his evidence, were as follows:</p> <ul style="list-style-type: none"> (a) it was Mr Pascoe’s usual practice to lodge a caveat early in his administration where the bankrupt was the registered proprietor of land; (b) in accordance with Mr Pascoe’s usual practice, he believed that, as a trustee in bankruptcy, he had an interest in the land which would support a caveat; (c) Mr Pascoe had no recollection as to whether he had ever actually turned his mind to whether lodging the caveat over Rydalmere was a good idea; (d) Mr Pascoe did not accept that he did not formulate in his own mind whether he had a caveatable interest in Rydalmere; he merely could not remember; (e) Mr Pascoe asserted an honest belief that he had a caveatable interest in Rydalmere when the caveat was lodged; (f) Mr Pascoe understood that whatever interest the bankrupt had at the date of the bankruptcy in the land was the interest that vested in him as the trustee; (g) Mr Pascoe said that it was usual that the caveats that he lodged claimed an interest in the land by virtue of the <i>Bankruptcy Act</i>; (h) Mr Pascoe said the form of words used in the caveat in the present case was “a relatively standard form of wording used in caveats lodged in my name”; (i) Mr Pascoe said he did not think that he should depart from his usual practice; (j) Mr Pascoe said that, following his first 	<p>SC [27], [28] and [29] (CAB 13, 14); FC [27] [28] (CAB 80); Affidavit SD Pascoe 4 June 2014 pars 26-30 (AFMB 487 at 494-495)</p>

Date	Event	CAB or AFM ref.
	<p>meeting with Mr Boensch, he was not satisfied about Mr Boensch's claims of a trust and suspected that it may be a claim made as a means of putting the land beyond the reach of his creditors; and</p> <p>(k) Mr Pascoe said the instructions for the lodgment of the caveat were given in accordance with his "usual practice" of lodging caveats (as addressed above).</p>	
25 Aug 2005	<p>The Full Court found, as the proper interpretation of the interest in Rydalmere claimed in the caveat:</p>	
	<p>(a) that "Mr Pascoe did not claim a right of indemnity in the Caveat"; and</p>	FC [142] (CAB 111)
	<p>(b) that "it is true that a right of indemnity is not claimed in the Caveat".</p>	FC [158] (CAB 114)
	<p>The Full Court also found that the primary judge did not find that Mr Pascoe had any right of indemnity and that Mr Pascoe did not pursue any claim for a right of indemnity because he ultimately came to the view that such a right (if one existed) was likely to have little value to Mr Boensch's creditors.</p>	<p>FC [150] (CAB 112); SC [86] (CAB 29); FC [153] (CAB 112); Affidavit SD Pascoe 4.6.15 at par 199(a) (AFMB 515)</p>
25 Aug 2005	<p>The caveat was lodged promptly by Mr Pascoe even though he had not yet received official notification of his appointment as Mr Boensch's trustee in bankruptcy from Insolvency and Trustee Service Australia ("ITSA"), which he received only after its lodgment.</p>	<p>SC [30] (CAB 14) ITSA's Notification of Appointment as Trustee in Bankruptcy (AFMB 115)</p>
25 Aug 2005	<p>Mr Pascoe conceded in oral evidence that, when the caveat was lodged, he had no reason to believe, one way or the other,</p>	<p>SC [30] (CAB 14); FC [28] (CAB 80)</p>

Date	Event	CAB or AFM ref.
	whether Mr Boensch was insolvent when the Trust was established on 23 August 1999, some six years before his appointment.	
25 Aug 2005	Mr Pascoe conceded in oral evidence that there was no suggestion of any imminent transfer of Rydalmere although he did believe that he had to act quickly to lodge a caveat because there may be unknown circumstances which could affect the land.	SC [30] (CAB 14); FC [28] (CAB 80)
23 Sept 2005	Mr Stephen Mullette, solicitor for Mr Boensch, wrote to Mr Pascoe and informed him that Rydalmere was held on trust for the Boensch children, enclosed copies of the Trust documents and said “that the property does not fall within the divisible property in the bankruptcy and the trustee’s interest will not support the caveat lodged on title”, and he requested the removal of the caveat (this was the first request to remove it).	SC [37] (CAB 16); FC [36] (CAB 82); letter dated 23.9.05 (AFMB 147)
30 Sept 2005	In reply to two letters from Mr James Leong of J. P. Leong & Co., the solicitors acting for Mrs Boensch, requesting that Mr Pascoe cooperate with her in having a new trustee appointed to the Trust, Mr Pascoe stated that, in his opinion, the trustee in bankruptcy does not take over the Trust, and so that he declined to assist with the request made by Mr Leong.	SC [38] (CAB 17); FC [37] (CAB 82); letter dated 29.9.05 letter dated 30.9.05 (AFMB 151, 153); letter dated 30.9.05 (AFMB 165)
31 Oct 2005	Mr Mullette once again wrote to Mr Pascoe and requested that he remove the caveat and offered to provide certified copies of the Trust documents and permit the inspection of the original Trust documents held at his office.	SC [45] (CAB 19); FC [44] (CAB 84); letter dated 31.10.05 (AFMB 215)

Date	Event	CAB or AFM ref.
	This was the second request to remove the caveat made on behalf of Mr Boensch.	
9 Nov 2005	Mr Mullette sent Mr Pascoe certified copies of the Trust documents and made the originals available for inspection at his office.	SC [46] (CAB 19); FC [45] (CAB 84); letter dated 9.11.05 (AFMB 225)
15 Nov 2005	Mr Mullette wrote to Mr Pascoe. He took issue with concerns that Mr Pascoe had expressed in his report to creditors on the eve of the first meeting of creditors of Mr Boensch's estate. Mr Mullette stated that there was no evidence of a fraud or sham committed in respect of the Memorandum of Trust and made a further request to withdraw the caveat.	SC [48] (CAB 19); FC [47] (CAB 85); letter dated 15.11.05 (AFMB 251)
	This was the third request to Mr Pascoe to remove the caveat although it is the first request that is pleaded in the Statement of Claim (" <i>The first request</i> ")	SC [48], [49] (CAB 19, 20); FC [48] (CAB 85); Statement of Claim [10]-[14] (AFMB 5)
16 Nov 2005	First meeting of creditors of Mr Boensch was held. Mr Pascoe said in his evidence that, some time prior to this first meeting, he formed the view that, even if Mr Boensch's trust claims were valid, Mr Boensch was likely to have a trustee's right of indemnity out of trust assets. [However, he gave no evidence of any basis in fact for his belief as to this likelihood].	SC [50] (CAB 20); FC [49] and [144] (CAB 85 and 111)
Mid-Nov 2005	Mr Pascoe sought a positive finding in the Full Court that he not only had an honest belief that he <i>might</i> well have a right of indemnity by mid-November 2005, but that he had reasonable grounds for that belief as from that date.	FC [157] (CAB 114); Notice of Contention filed 5 April 2017 in the FCAFC (CAB 68)

Date	Event	CAB or AFM ref.
	<p>However, the Full Court held that that was not the finding made by the primary judge and there was no Notice of Contention filed raising that issue on appeal to the Full Court.</p> <p>The Full Court found that the primary judge probably had in mind Mr Pascoe's insolvency report dated 29 May 2009, where the mortgage payments are mentioned, in selecting the date "by May 2009 at the latest" as the date when Mr Pascoe first believed that he might well have a right of indemnity in Rydalmere, if the Trust over it was later found to be valid.</p>	<p>FC [157] (CAB 114)</p> <p>FC [157] (CAB 114)</p>
30 Nov 2005	<p>Messrs Pascoe and Moretti attended at Mr Mullette's office and inspected the original Trust documents [but they made no complaints about the documents].</p>	<p>SC [52] (CAB 20); FC [51] (CAB 85)</p>
21 Feb 2006	<p>Mr Boensch sent an email to Mr Pascoe, to which he attached a signed statement answering questions asked by Mr Pascoe. The statement included details of a "mutually beneficial arrangement", under which most of Mr Boensch's living expenses were provided by the Trust, and stated his accommodation was at the mercy of the Trust and, in return, that he provided a form of security for the Trust.</p>	<p>SC [56] (CAB 21); FC [54] and [143] (CAB 86 and 111); email dated 21.2.06 (AFMB 265)</p>
22 Feb 2006	<p>Mr Pascoe sent Mr Boensch a letter seeking information about this "mutually beneficial arrangement" in respect of the payment of outgoings on the Rydalmere property.</p>	<p>SC [51] (CAB 20); FC [55] (CAB 86); letter dated 22.6.06 (AFMB 269)</p>

Date	Event	CAB or AFM ref.
23 Feb 2006	Mr Boensch responded by stating that the “mutually beneficial arrangement” only concerned one room which he occupied, it was of a standard that could not be let and that the mutual benefit was that he had a roof over his head and that the Trust property had the appearance of being occupied.	SC [51] (CAB 20); FC [55] (CAB 86); letter dated 23.2.06 (AFMB 271)
10 Dec 2007	Mr Malcolm Wright, of Wright Commercial Lawyers, who was now acting for Mr Boensch, wrote to Ms McLean, the solicitor who had lodged the caveat for Mr Pascoe, a date which is four days after the dismissal of Mr Pascoe’s challenge to the validity of the constitution of the Trust as a sham or as an imperfect gift. Mr Wright requested the removal of the caveat. This was the fourth request to remove the caveat as a fact and the second request pleaded in the Statement of Claim (“ <i>The second request</i> ”).	SC [70]-[71] (CAB 25-26); FC [68] (CAB 89); <i>Pascoe v Boensch (No 6)</i> [2007] FMCA 2038; 6 ABC(NS) 360 (AFMB; 277); letter dated 10.12.07 (AFMB 293) SC [71] (CAB 26); FC [68] (CAB 89); Statement of Claim [15]-[19] (AFMB 6)
18 Aug 2008	Full Federal Court dismissed Mr Pascoe’s appeal against the decision of the Federal Magistrates Court upholding the validity of the constitution of the Trust and rejecting Mr Pascoe’s imperfect gift case on the Trust. Mr Wright then wrote to Ms McLean and requested removal of the caveat that day. This was the fifth request to remove the and the caveat as a fact and the third pleaded in the Statement of Claim (“ <i>The third request</i> ”).	<i>Pascoe v Boensch</i> [2008] FCAFC 147 (Finn, Dowsett and Edmonds JJ) SC [79]-[81] (CAB 27, 28); FC [75] (CAB 90); letter dated 18.8.08 (AFMB 313); Statement of Claim [20]-[23] (AFMB 7)
12 Mar 2009	The High Court dismissed on the papers Mr Pascoe’s application for special leave to appeal against the Full Federal Court decision upholding the creation of the Trust in 1999.	SC [129] (CAB 43); FC [142], [144], [156], [157] (CAB 111, 113); HCASL decision (AFMB 333)

Date	Event	CAB or AFM ref.
29 May 2009	<p>An insolvency report was prepared by Mr Pascoe as trustee in bankruptcy. Mr Pascoe concluded that, even if Mr Boensch’s trust claims indeed were valid, “Mr Boensch might have a right of indemnity out of trust assets”. The primary judge found that there was evidence that Mr Boensch had made some of the payments to the mortgagee of Rydalmere after the establishment of the Trust and that he had paid some of the council rates on the property. The details of Mr Boensch’s “mutually beneficial arrangement” were found by the primary judge to be “somewhat obscure”.</p>	<p>SC [129] (CAB 43); FC [142], [144], [156] and [157] (CAB 111 and 113)</p>
29 May 2009	<p>The extent of any right of indemnity was still unclear to Mr Pascoe at this date. But Mr Pascoe ultimately came to the view, 3 months later [in response to a lapsing notice], that, even if there indeed was such a right or indemnity, it was likely to have little value.</p> <p>Mr Pascoe did not assert at trial that he had any belief in a possible right of indemnity in respect of Rydalmere before he drafted his insolvency report dated 29 May 2009.</p>	<p>FC [158] (CAB 114); Affidavit SD Pascoe 4.6.15 par 119(a) (AFMB 515)</p> <p>FC [158] (CAB 114)</p>
13 Aug 2009	<p>The Federal Magistrates Court summarily dismissed Mr Pascoe’s proceeding to set aside the Trust as a transaction that was entered by Mr and Mrs Boensch on 25 August 1999 with the intention of defeating <i>his</i> creditors within the meaning of s. 121 of the <i>Bankruptcy Act</i>.</p>	<p>SC [84] (CAB 28); FC [78] (CAB 91); <i>Pascoe v Boensch (No 9)</i> [2009] FMCA 769 (AFMB 335)</p>
25 Aug 2009	<p>Ms McLean was served with a lapsing notice for the caveat. Upon receipt of it, Ms McLean sought Mr Pascoe’s instructions to respond to it.</p>	<p>SC [84] and [85] (CAB 28, 29); FC [79] (CAB 91); email (AFMB 353)</p>

Date	Event	CAB or AFM ref.
8 Sept 2009	<p>Mr Pascoe responded to Ms McLean by email and instructed her to allow the caveat to lapse. Mr Pascoe told Ms McLean, and he also stated in his evidence at the trial, that he would allow the caveat to lapse for three reasons, namely:</p> <ul style="list-style-type: none"> (a) the Registrar-General's caveat remained registered on the title to the land; (b) Mr Pascoe knew that Mr Boensch would not be selling the property; and (c) any right of indemnity that Mr Pascoe held in the property (assuming that he ever held such a right) "would be of limited value" to Mr Boensch's creditors. 	<p>SC [85] (CAB 29); FC [79] and [80] (CAB 91); Affidavit of SD Pascoe 4 June 2014 pars 117-119 (AFMB 487 at 515)</p>
15 Sept 2009	The caveat lapsed under the lapsing notice.	<p>SC [88] (CAB 29); FC [82] (CAB 91)</p>
3 Nov 2009	The Federal Court dismissed an appeal against summary dismissal of Mr Pascoe's application to set aside the Trust under s. 120 of the <i>Bankruptcy Act</i> .	<p>SC [87] (CAB 29); FC the [81] (CAB 91); <i>Pascoe v Boensch</i> [2009] FCA 1240 (AFMB 391)</p>
24 May 2012	Mr Boensch filed his Statement of Claim in the Supreme Court of New South Wales under s. 74P(1) of the <i>Real Property Act</i> .	<p>Statement of Claim (AFMB 1)</p>
27 Mar 2013	Mr Pascoe filed his Defence.	Defence (AFMB 13)
15 May 2015	Bergin CJ in Eq. ordered separate questions to be determined on the question of liability under s. 74P(1) of the <i>Real Property Act</i> .	<p>Orders of Bergin CJ in Eq. for separate questions on liability (AFMB 19)</p>

9 August 2019



C. J. BEVAN

Tel: (02) 9235 3122 Fax: (02) 9233 7416
cjbevan@8wentworth.com.au
Counsel for the appellant



M. J. WELLS

Tel: (02) 8224 3000 Fax: (02) 9221 5386
mwells@7thfloor.com.au
Counsel for the appellant