[2004] WASC 266

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	SILVESTER -v- SANDS [2004] WASC 266
CORAM	**:**	EM HEENAN J
HEARD	**:**	23, 24 & 25 JULY, 6 & 7 AUGUST 2003
DELIVERED	**:**	13 DECEMBER 2004
FILE NO/S	**:**	CIV 2240 of 2000
BETWEEN	**:**	DAVID BRIAN SILVESTER Plaintiff AND JILLIAN KATHLEEN SANDS Defendant

Catchwords:

Trusts - Resulting trusts - Unmarried persons living together - Purchase of house in woman's name - Man also a borrower under mortgage - Woman pays deposit - Incomes pooled to repay mortgage and expenses - Substantial later repayment of mortgage by man - No express trust - Beneficial interests according to contributions - Effect of substantial contribution to mortgage repayment - Interest of woman's mother as third co-borrower under mortgage loan - No presumption of advancement - Sale of property - Equitable accounting for repairs and improvements - Liability for occupation rent

Legislation:

Property Law Act (1969), s 126

Result:

Order for sale, subject to prior opportunity for parties to purchase others' interest at valuation

Declare plaintiff to have a beneficial interest in land proportional to his contributions

Category: A

Representation:

Counsel:

Plaintiff	:	Mr T J Kavenagh
Defendant	:	In person

Solicitors:

Plaintiff	:	BHK Legal
Defendant	:	In person

Case(s) referred to in judgment(s):

Baumgartner v Baumgartner (1987) 164 CLR 137
Bennet v Bennet (1879) 10 Ch D 474
Biviano v Natoli (1998) 43 NSWLR 695
Bloch v Bloch (1981) 180 CLR 390
Brickwood v Young & Minister for Public Works (NSW) (1905) 2 CLR 387
Calverley v Green (1984) 155 CLR 242
Currie v Hamilton [1984] 1 NSWLR 687
Forgeard v Shanahan (1994) 35 NSWLR 206
In Re Gorman (a Bankrupt) [1990] 1 WLR 616
In Re Pavlou (a Bankrupt) [1993] 1 WLR 1046
Little v Little (1988) 15 NSWLR 43
Lloyd v Tedesco (2002) 25 WAR 360
Muschinski v Dodds (1985) 160 CLR 583
Napier v Public Trustee (WA) (1980) 55 ALJR 1
Noack v Noack [1959] VR 137
Oxley v Hiscock [2004] 3 All ER 703

Pickens v Metcalf & Marr [1932] NZLR 1278
Re Byrne (1906) 6 SR (NSW) 532
Ryan v Dries [2003] ANZ Conv R 47
Scott & Hansen v Pauly (1917) 24 CLR 274

Case(s) also cited:

Broughton v Snook (1938) 1 All ER 411

1 **EM HEENAN J**: The house and land situated at 26 Essex Street, Wembley, consists of a modest weatherboard home erected in about 1930 on 670 square metres of land. The formal land description is:

> "Portion of Perth Shire Location Ag and being Lot 526 on Plan 3232 (Sheet 4) and being the whole of the land comprised in Certificate of Title Volume 1699 Folio 289."

Jillian Kathleen Sands, the defendant, is the sole registered proprietor of an estate in fee simple in the land and became so registered on 3 December 1986.

2 The plaintiff, David Brian Silvester, alleges that he and the defendant lived together in a *de facto* relationship from about 1982 until 1993 and that they verbally agreed to purchase the property at 26 Essex Street for the sum of $60,000 for a total outlay payable at the date of purchase, including fees and duty, of $63,500. The plaintiff alleges that the defendant contributed $30,000 towards this total purchase price and that the balance was financed by a loan from the ANZ Savings Bank of $33,500 secured by first registered mortgage. The plaintiff pleads that he and the defendant were parties to this loan. The plaintiff also alleges that, before the property was purchased, he and the defendant verbally agreed that the property should be registered in the defendant's name alone but that he would acquire an equal interest in the property and that the purchase and the registration of the land in the sole name of the defendant took place on that basis. He further pleads that from the date of the purchase until 1993 he and the defendant lived together at the house and equally shared the mortgage loan repayments and all ancillary expenses.

3 It is also the plaintiff's case that, in about September 1988, he received a gift of $30,000 from his parents which he paid to the ANZ Savings Bank in reduction of the mortgage loan. Also, on or about 16 September 1998, at about the same time as the payment of this $30,000, the plaintiff and the defendant jointly applied to the ANZ Savings Bank successfully for an equity loan of $7,000 the proceeds of which were applied to pay for roof repairs to the house. The plaintiff also pleads that he contributed about $500 to the repayment of this equity loan before he and the defendant separated and he moved out in 1993.

4 On this basis the plaintiff claims that he is beneficially entitled to a half share in the house and land, due to the express agreement alleged. He also claims that his contribution of $30,000 to the ANZ Savings Bank loan and his regular contributions to the mortgage loan and equity loan repayments result in the defendant holding her legal interest on trust for

them both as tenants in common in equal shares. The claim for a beneficial interest is advanced by the plaintiff on the basis of an express trust or a resulting trust.

5 Additionally, the plaintiff contends that the defendant holds her interest in the land on trust for them both as tenants in common in equal shares because of a constructive trust. He contends that his financial contributions, comprising the $30,000 payment to the ANZ Bank mortgage and the other periodical contributions, were made in the belief and expectation that he had an interest in the property and has suffered a detriment which would render it unconscionable for the defendant to retain the entire legal interest. Consequently, the plaintiff seeks declarations to the effect that the defendant holds the land on trust for herself and for the plaintiff as tenants in common in equal shares or as tenants in common in shares proportional to their individual contributions. In addition, the plaintiff seeks declarations that he is entitled to a half share of the proceeds of the sale of the property, subject to the repayment of the loan and other costs of any sale, or a declaration that he is entitled to some other proportion of the proceeds of a sale. He seeks an order for the sale of the property and interest pursuant to s 32 of the *Supreme Court Act*.

6 The application for an order for the sale of the property is made in reliance on s 126 of the *Property Law Act 1969*. However, for the plaintiff to be able to insist upon an order for sale, in the absence of good reason to the contrary, he must establish that he has an interest in the land to the extent of a half share or upwards (*Property Law Act 1969*, s 126(1)). If he establishes an interest in the land to the extent of less than one half share the court may order a sale if satisfied that it would be for the benefit of the parties interested in the land. In either case, there is the alternative that the court may direct the land to be sold unless the defendant undertakes to purchase the share of the plaintiff in which case there may be a direction given for a valuation of the share of the plaintiff in the land (s 126(3)).

7 In opposing the plaintiff's claim, the defendant denies that there was a *de facto* relationship between the two of them and says that she and the plaintiff shared her accommodation from 1983 until late 1994 or early 1995. She pleads that the house and land was purchased in 1986 and denies that there was ever any agreement that the two of them would purchase the property together. She pleads that the total costs of acquisition, including the stamp duty and incidentals, were $61,467.91.

8 The defendant's case is that the purchase was financed by a loan of $33,500 borrowed from the ANZ Savings Bank, with the balance paid from her own funds. She admits that the plaintiff was a party to the loan from the Bank but says that the only reason for this was that as a low income earner she was unable to borrow funds and that the plaintiff, and her mother, were therefore to guarantee the loan as joint borrowers. She pleads that neither the plaintiff nor her mother was intended to, nor by virtue of that obligation did they, acquire any interest in the property. Further, the defendant denies that she and the plaintiff contributed equally to the loan repayments and ancillary expenses and says, instead, that she met all the expenses arising from the property during the time that they both lived there. In addition, she says that she continued to meet all the expenses arising from the property after the plaintiff left in 1994 or 1995. She does not admit the plaintiff's allegations about his contribution of $30,000 towards the repayment of the mortgage debt in 1988 and denies that he contributed about $500 to the repayment of the equity loan. She does, however, admit that a further $5,000 was advanced on the existing ANZ Savings Bank mortgage to obtain funds to carry out roof repairs.

9 The defendant accepts that she has refused to recognize any claim or demand by the plaintiff that he has an equal, or other, beneficial interest in the property. She denies the existence of any express, resulting or constructive trust and the allegations that the plaintiff has suffered detriment and that her conduct is unconscientious. Plainly, therefore, the basic issues are: whether or not there was any express agreement between the parties that the plaintiff should have a half or other beneficial interest in this land; or, whether, as a result of the plaintiff being a party to the original ANZ Savings Bank loan secured by mortgage over the property and/or by his periodic contributions to the repayments under that mortgage, in particular, his payment of $30,000 in reduction of the mortgage principal in September 1988, he acquired any beneficial interest in the land under the well-established doctrines explained in ***Calverley v Green*** (1984) 155 CLR 242 and ***Baumgartner v Baumgartner*** (1987) 164 CLR 137 or otherwise. Those issues can only be addressed after the history of the acquisition of this property, the arrangements made for its purchase by the parties and their mutual dealings have been determined.

The parties and their families

10 David Silvester was born on 20 February 1961 and was, accordingly, aged 25 years at the time 26 Essex Street was purchased. He holds a Bachelor of Arts degree in classics and a Diploma of Education from the University of Western Australia which he obtained in 1989 and 1993

respectively. Sadly, he suffers from chronic severe mental illness including severe depression and occasional bouts of a psychosis. For this condition he was admitted to a private hospital, Niola, at 61 Cambridge Street, Wembley, in about 1978 when he was aged 17. He remained at Niola for about four years until 1982. It was during this time that he met the defendant, Miss Jillian Sands, who was also a long-term patient at Niola. Fortunately, the plaintiff's condition responded to some extent to treatment and he was able to leave Niola in 1982 and from then on to live within the community with a reasonable degree of independence. However, he was not well enough to obtain or keep a regular occupation and was granted, and at all material times received, a disability pension from the Commonwealth Government. With encouragement, help and assistance, particularly from the defendant, he was later able to undertake and complete his degree and diploma courses at the University of Western Australia but he has never, so far, been able to obtain an occupational position commensurate with those qualifications. He is the youngest of four sons of Dr Richard Silvester PhD and Mrs Marion Silvester who have helped him greatly by making financial arrangements which assisted in the acquisition of the Essex Street property and which will be described in more detail later.

11 In May 1995, with the assistance of the University Legal Aid Scheme, David Silvester himself prepared and lodged a caveat against the title to the Essex Street property in which he claimed a beneficial estate in fee simple to one undivided half share. The defendant arranged to have another mortgage registered against the title in November 1995 and the caveat was lifted to allow this to be done. The plaintiff lodged a second caveat again claiming an estate in fee simple in one undivided half share in the property in October 1996. He has commenced these proceedings and been represented throughout by solicitors and counsel has appeared on his behalf at the trial.

12 The defendant, Jillian Kathleen Sands, is about six years older than the plaintiff. She had qualified as a nurse and had worked in that profession for some years. In addition to some savings from her income and a small inheritance from a relative she had been able to buy a vacant lot of land in Solander Road, Hillarys, which had been registered in her name as sole proprietor of an estate in fee simple free of encumbrances. Sadly, she too suffered from a chronic mental illness involving a catatonic disorder and various phobias for which she had been treated at Niola Hospital as an in-patient over a period of about four years when David Silvester was also an in-patient. She too made a reasonable, but not a complete, recovery and since 1982 has also been living in the community

independently. However, she has not been able to return to her profession as a nurse, nor has she been able to obtain employment. She also has been on a Commonwealth disability pension at all material times. Her mother, Mrs Margaret Lucy Sands, has helped her in a variety of ways over the years and is named as a co-borrower to the ANZ Savings Bank loan which is secured by the mortgage over 26 Essex Street registered at the date of purchase. Over the period from 1986 until about 1997 she has assisted her daughter by making payments to her of $150 or thereabouts every month. She is not a party to these proceedings and apparently makes no claim to any interest in, or charge over, the Essex Street property. The defendant said that her mother was aware of these proceedings but did not wish to be involved.

13 Although Miss Sands had been represented by solicitors during the initial stages of this litigation she appeared alone and unrepresented at the trial. Naturally enough, she had little knowledge or experience of legal proceedings or procedure and was unfamiliar with the formalities of giving evidence, cross-examining witnesses for the opposing party or of securing the production of relevant documentary material. At times she was quite overwhelmed by the proceedings and, at least on two occasions, appeared to become quite overcome, and abruptly fled from the courtroom in the midst of the trial. On these occasions the proceedings were adjourned while enquiries were made about the welfare of the defendant and her ability to continue. After one such episode I advised that she should seek and obtain medical advice, particularly with regard to her capacity to continue with the proceedings. The next morning she returned with a letter from a general medical practitioner whom she had consulted, reporting that:

> "While I find that she is a little stressed and somewhat overwhelmed by the court environment, I find that she is fit to continue representing herself in her current legal matter."

And, indeed, Miss Sands did so to reasonable effect. Despite her obvious disadvantages and some other examples of difficulty with the proceedings, I am satisfied that Miss Sands has been able to present her case with reasonable efficiency and completeness and that the essential history of what occurred has emerged. She has been able to give a clear account of her position which, quite shortly put, is that no matter what happened it was never intended that David Silvester should obtain any proprietary interest in Essex Street and that, in her view, he never did.

14 During the time when the plaintiff and the defendant were each patients at Niola they got to know one another and became friends. As

part of the environment within the hospital they were encouraged to support each other, and other patients, and they began to "relate" to each other. This relationship was obviously helpful to both of them and it seems that they became quite close. Indeed, the defendant said in evidence that while at the hospital she asked David to marry her.

15 In about 1982 the defendant had recovered sufficiently to leave Niola Hospital and she took a flat in a block of units at 79 Cambridge Street, West Leederville, which is close to the hospital. At or about the same time David Silvester also left the hospital and he, too, took a flat in the units 79 Cambridge Street, next door to the one occupied by the defendant. It seems that these moves to nearby flats were part of the recovery of the parties and their gradual re-establishment in the general community. However, the flat occupied by the plaintiff ceased to be available and he had to leave. By mutual decision he moved in with the defendant and they lived in her flat together until late 1985. They each characterise the ensuing relationship differently. David Silvester claims that he and the defendant lived together openly in a *de facto* relationship but the defendant denies that it was a "full relationship", preferring to characterise it as a supportive relationship in which they would counsel one another and she would help him deal with his anti-social behaviour. The two slept together, if not constantly, nevertheless regularly and continued to support and assist each other.

16 The plaintiff's only income was his disability pension. The defendant's income was her own pension and monthly supplementations from her mother. The plaintiff's pension was transferred into the defendant's bank account and, as a result of the pooling of incomes, the rent, food and other expenses were all shared and no separate accounts were kept. Virtually all of the money went on living expenses. During this period David Silvester was attending university in the course of his Arts degree and was assisted and encouraged in these efforts by the defendant. No doubt it was necessary for him to spend money on food, travel and personal necessities but there is no evidence about exactly how this was done but any such spending can only have come from the pension moneys which he received and pooled with the defendant. There was no suggestion that he paid, or was asked to pay, any fixed or ascertainable amount to share the occupation of the Cambridge Street flat or for the couple's living expenses. All these were simply shared.

17 During his time at the Cambridge Street flat, either in 1984 or in 1985, David Silvester was given $20,000 by his father to enable him to purchase furniture, fittings, white goods and other utensils. He gratefully

accepted this money and used it to buy a variety of furniture and equipment, such as refrigerator, washing machine and the like. Miss Sands denies that David spent any money on this scale for equipping the flat or in buying furniture and says that she equipped the flat from her own funds. She says that if David had received this money from his father he must have spent it on his own living expenses, probably for university and other outgoings adding, that in her view, he was a notorious spendthrift and a poor manager of money.

18 It was David Silvester's evidence that the gift of $20,000 from his father was made to him in 1985 or 1986, after the pair had moved to Essex Street and was in response to a request which he made to his parents for assistance after making the move. He was not certain whether the money was deposited in his own account or in Ms Sands' account but says that the money was used for furniture, utensils, a motorcycle ($2,000), a refrigerator, bed and other utensils, but that the motorcycle was later sold and the proceeds of the sale were used for general living expenses. His father and mother each said that David came and asked for financial assistance from them in 1984 in order to help move into a cottage and set up house. His parents decided to give David the money and did so by drawing a cheque payable to him on their joint account at the University branch of the Bank of New South Wales.

19 There is no documentary record of this payment but I have no doubt that it was made and that, in all probability, the money was given shortly before or about the time that David and Jillian moved from the flat in Cambridge Street to rent the premises at 26 Essex Street. The defendant's evidence was that the payment was made while they were still living in the Cambridge Street flat and, strictly speaking, that may be correct. However, in my view the probabilities favour the conclusion that David Silvester sought his parent's financial assistance because of an impending move to Essex Street, involving as that did the occupation of larger premises with the need for more furniture and utensils. Accordingly, I prefer the plaintiff's account of when this transaction took place.

20 Nothing turns on the disputed versions about the use of this $20,000 in this case because the plaintiff does not suggest that it was applied towards the purchase of the Essex Street property or that he has any claim on that property because of it. Nor does he seek to recover any chattels or other property purchased with this money. Nevertheless, I find that Dr Silvester did make a gift of $20,000 to the plaintiff in about 1984/1985 and that much, if not all, of this money was spent on furniture, fittings,

equipment and other necessaries for the two parties to carry on living together.

21 Generally speaking, I considered the plaintiff and the defendant to be truthful witnesses doing their best to give an accurate account of the history and their mutual dealings without prevarication or elaboration. However, because of the time which had passed, the absence of contemporary records and, in the plaintiff's case, an apparent lack of concern for detail at the time events happened, their recall was not entirely reliable. In the case of the defendant, I am satisfied that she was trying to tell the truth as she believed it to be but that, in a number of important respects, her interpretation of events was affected by her sense of disappointment that, after so long and such great effort on her part to help him, the plaintiff had left her when she had always hoped that they would become married. The significance of her genuine and cherished hope that they would marry upon her recollection of events is a matter to which I shall return. I also found her to be fixed in the view that nothing which had occurred could possibly result in David Silvester having any claim over 26 Essex Street and that it had always been "my house".

The move to 26 Essex Street

22 In late 1985 both the plaintiff and the defendant decided to move from the flat at Cambridge Street and to rent a house which had then become available at 26 Essex Street, Wembley. The advantages in the move were that the rent was reasonable, there was more space available for the pair as the house contained two bedrooms, a dining room, a lounge room, a kitchen, a bathroom and a sleep-out, so they moved in in late 1985. According to the plaintiff, whose evidence on this I accept, they were both co-tenants and each signed the lease, although that document, like so many other documents in this case, was no longer available. They continued to sleep together and to pool funds for rent, food, clothing, phone bills, electricity, power and other costs. These arrangements continued for about 12 months but then the owners of the property came to the parties and explained that they wished to sell Essex Street and that they intended to put it on the market. This led David Silvester and Jillian Sands to consider whether or not they could secure the property for themselves because it was conveniently located and very suitable for their circumstances. The decision was made to buy the property, if possible, and attention then turned to how the asking price of $60,000 could be raised.

23 The defendant maintains that it was her decision to purchase Essex Street but it is clear that there were a number of steps in the process and that they were all taken in close co-operation and with the consultation and support of the plaintiff. I accept his evidence that the two approached the ANZ Bank to see if they could obtain a mortgage, but were unsuccessful because of their lack of employment and low incomes. I also accept the plaintiff's evidence that, because the defendant's father had been unwilling to give any financial assistance in the past, they had decided against approaching him but, instead, decided to seek financial assistance from his parents.

24 There is some conflict in the evidence over exactly who made the approach for financial assistance to Dr and Mrs Silvester and whether the defendant was present at the discussions. However, I consider that the most reliable version of events comes from the plaintiff's father, Dr Silvester, and from the plaintiff and, with some qualifications, it is their account of events which I accept. Either alone, or accompanied Miss Sands (nothing turns on the difference), David Silvester approached his parents and explained that he and the defendant were planning to purchase 26 Essex Street and needed to raise $30,000 as part of the purchase price in order to obtain a bank mortgage for the balance. Little, if any, detail was given to the plaintiff's parents about whether the property was to be purchased in joint names or in the name of one of the parties and the parents did not enquire because the real point of their son's approach was whether or not they could provide $30,000 towards the venture. The relationship between Dr and Mrs Silvester and their son and Miss Sands was, unfortunately, rather brittle and distant. For some reason, no doubt associated with his illness, the plaintiff had an unreasoning fear of the locality of his parent's home and, irrationally, was afraid to go there. Despite their financial support of their son in the past, Dr and Mrs Silvester did not visit the couple and, in fact, neither had ever been to Essex Street because, as Mrs Silvester said, they were not sure of the reception which they might get. It seems that, because of his illness, there was much misunderstanding by the plaintiff of his parents and of their position and there must have been a great deal of awkwardness in the past between them because of this.

25 At first Dr Silvester and the plaintiff's mother were completely opposed to their son's request for funds to assist in the acquisition of Essex Street, mainly based, it seems, on their recent gift of $20,000 to assist David and their natural sense of obligation towards their other three children. In the course of the discussions a suggestion was put forward that Dr and Mrs Silvester might lend the money desired on the security of

Miss Sands' block of land at Hillarys but they were not attracted by this proposal. It was then put to them that they should buy the Hillarys block from Miss Sands and the sale price could be used by her to finance, in part, the acquisition of Essex Street. Initially they refused as they had no use for such a block of land. After this refusal, however, Dr Silvester and his wife talked the matter over between themselves and later notified their son that they would agree to purchase the defendant's block at Hillarys. They had visited the area in the meantime and inspected the block and, although not much impressed with it, were willing to help out. In the event, they did purchase the Hillarys block from the defendant for a consideration of $25,000 and say that they paid an additional $5,000 as a gift towards the defendant because they knew that a total of $30,000 was needed to allow the purchase of Essex Street.

26 There is an issue about the sale by the defendant and the purchase by Mrs Silvester of the Hillarys block which must be mentioned. In the first place the defendant says that only $25,000 was paid to her by Mrs Silvester for her land at Hillarys. The transfer as registered shows the consideration to be $25,000, but I nevertheless accept the evidence of the plaintiff and both his parents that $30,000 was paid and that the additional $5,000 was treated by Dr and Mrs Silvester as a gift towards the defendant to assist in allowing the acquisition of 26 Essex Street. Strangely, and no doubt unfortunately, no legal advice was sought by any of the parties to this transaction and Dr and Mrs Silvester did not give any attention to how, or in whose name, the transaction was to be recorded. The defendant also asserted that the agreement reached between herself and Mrs Silvester in relation to the sale of the Hillarys block was that, although the property was to be transferred into Mrs Silvester's name, she would hold it so that if and when it was eventually re-sold the defendant would receive the benefit of any resulting profit. As events happened, Mrs Silvester had no use for the Hillarys block and was able to sell it to a third party for $35,000 in December 1986.

27 When the defendant learned later that the plaintiff's mother had sold the block at Hillarys she was very annoyed and asserted at the trial that this had been done in breach of an understanding that the property would be kept and that she would receive any profit in the event of a re-sale. Both Dr Silvester and Mrs Silvester absolutely rejected the suggestion that there had been any conditional arrangement for the purchase by Mrs Silvester of the Hillarys block; that there had ever been an agreement that any re-sale would only be effected with the defendant's consent; or that she was entitled to any share of the profits of a re-sale. I accept their evidence in this regard that the defendant's claim was completely out of

character with the unconditional purchase of the block and that this purchase was simply to provide the defendant with funds. I reject those assertions in the evidence of the defendant. I am satisfied that Miss Sands was sincere in her assertions about retaining some form of interest in the Hillarys block but I regard that as reconstruction and also a product of her deep personal belief that ownership of land, whether at Hillarys or at Essex Street, was a vital part of her plan to secure her future.

28 There are some contemporary records relating to the financial arrangements for the purchase of Essex Street which, because of their obvious reliability, are very significant. Exhibit 29 includes a photocopy of one page of an undated document which forms part of a statement of financial affairs signed by the defendant and the plaintiff in support of an application for a bank mortgage. This single page, of what was obviously originally a larger document, sets out, in tabular form, the average monthly income of the applicants and their commitments, first as stated by the applicants and secondly as assessed by the bank. Under the heading "Average Monthly Income" the applicants state the following:

"Board paid by family members (Mother)" $170

Invalid Pensions $304 per fortnight x 2 = $1,317

$1,487 per month

Less total monthly outgoings $ 825

Uncommitted monthly income $ 662"

The form for bank use showed that some unknown bank officer had revised these details and inserted the bank's assessment of the total monthly income as $1,400 and total monthly outgoings of $880, leaving an uncommitted monthly income of $520. Under the heading "Average Monthly Commitments" the details, as put forward by the two parties as applicants and then the revised assessment conducted by the bank were as follows:

"Commitments	Stated by Applicant	Bank Use
House repayments	$130	$190
Car Reg, Ins and running expenses	$ 60	$ 60
Rates-Council and Water	$ 30	$ 30

Fuel, light and Power	$ 40	$ 40
Living expenses (food, clothing & personal)	$400) $100)	$500
Other eg medical benefits, telephone (Tel and HBF)	$ 35	$ 60
Total monthly outgoings	$825*	$880"

(*This arithmetical error was left unexplained.)

29 There is also a land settlement statement from Tertiary Settlements Pty Ltd in relation to the moneys payable on completion for the purchase of 26 Essex Street. This is addressed by the settlement agency solely to the defendant Ms J K Sands at 26 Essex Street. Taking into account agreed alterations the particulars shown on the statement are:

"PURCHASE PRICE	$60,000.00	
Deposit Paid		$2,000.00
RATE ADJUSTMENTS AS AT 26/11/86 (Your proportion 216/365 days)		
...		
Metropolitan Water Authority 1986/87 - $345.84	204.66	
Stamp Duty on Offer and Acceptance	1,023.75	
Registration Fee on Transfer	35.00	
Settlement Costs	190.00	
Postage, Petties, Search Fee, Bank Cheque Fee, MWA & Land Tax Charges	14.50	
CHEQUES REQUIRED:		
Commissioner of State Taxation		1,023.75
BALANCE DUE TO SETTLE - payable by ANZ Bank at settlement		58,571.52*
	$61,467.91	$61,467.91"

(The balance due to settle of $58,571.52* shown in this statement is an overstatement because of the corrections which were made to the original

by the deletion of an obligation to contribute to the City of Perth Rates. Taking that adjustment into account, the necessary correction to the balance due at settlement produces a figure of $58,444.16, which, on the corrected figures, was the balance due from the ANZ Savings Bank.)

30 Exhibit 22 is the original Contract of Sale by way of Offer and Acceptance by which the defendant unconditionally agreed to purchase 26 Essex Street, Wembley, from the vendors for a purchase price of $60,000, of which $1,500 was allocated to chattels, payable by a deposit of $2,000 paid therewith and the balance on or before 26 November 1986. The chattels to which $1,500 of the purchase price was allocated comprised floor coverings, window treatments and light fittings. The offer was made by Ms J K Sands on 10 November 1986 and her signature was witnessed by Mr D Silvester on that date. It was accepted by the vendors on 17 November 1986.

31 Exhibit 7 is a letter from the ANZ Savings Bank dated 25 November 1986 addressed to Miss J K Sands & Mr D B Silvester at 26 Essex Street, Wembley, setting out the terms and conditions upon which their housing loan had been approved. The material provisions were:

> "Amount - Not to exceed $33,500
>
> Interest - Currently 15.5% calculated on daily balances and charged monthly to the loan account [but otherwise variable].
>
> Term - Not to exceed 25 years.
>
> Repayments - $443 a month by withdrawals from your Current Account/Access Account, with an automatic annual increase of 2.5%.
>
> Security - First Registered Mortgage over the property.
>
> Insurance - Policy must show ANZ Savings Bank as Mortgagee and be held by the Bank.
>
> Further to the above, the following applies:
>
> (1) Mrs M L Sands is to be a co-borrower.
>
> (2) Settlement will not be effected until approval of First Home Owners Assistance Scheme is confirmed in writing."

32 A formal transfer of the title of the land at 26 Essex Street from the vendors to the defendant, Jillian Kathleen Sands of 26 Essex Street, Wembley, Nurse, for a consideration of $60,000 of which $1,500 refers to chattels and dated 17 November 1986 was registered at the Land Titles Office on 3 December 1986. The transfer was signed by the defendant and witnessed by the plaintiff who recorded his address as 26 Essex Street, Wembley and his occupation as university student.

33 At the same time as the registration of that transfer, but as the next subsequent dealing, Mortgage No D373536 of the land to the Australia and New Zealand Savings Bank Ltd was also registered. This mortgage shows that the sole mortgagor is Jillian Kathleen Sands of 26 Essex Street, Wembley, Nurse. The mortgage is dated 21 November 1986 and was signed by the defendant in the presence of a named bank officer and is upon a standard form bank mortgage document. The mortgage document itself does not identify the amount of the loan or the loans advanced by the bank for which it is security but, instead, describes that the mortgage as:

> "In consideration of any loans or advances whether made on the signing hereof of that may hereafter be made at its discretion by the Bank to or for the Mortgagor and or to or for David Brian Silvester university student and Miss Jillian Kathleen Sands nurse both of 26 Essex Street, Wembley, and Mrs Margaret Lucy Sands of 10 Goldsmith Road, Claremont, home duties (hereinafter referred to as 'the Borrower') or at the request of either the Mortgagor or the Borrower by any means whatsoever and all of forbearance on the part of the Bank to immediately demand and sue for payment of any moneys now owing by the Mortgagor and or the Borrower to the Bank and or for other valuable consideration moving from the Bank to the Mortgagor and or the Borrower (as the Mortgagor doth hereby admit) the Mortgagor doth hereby covenant and agree with the Bank in the manner following that is to say:- ..... "

The mortgage instrument is indorsed by the State Taxation Office as follows:

> "WA Stamp Duty $87.50 paid - s 112V as a primary security (683(2)) for $35,000 - 28 Nov 1986."

34 The Land Titles Office documents also record that Transfer No D374035 of the defendant's block at Solander Road, Hillarys, to the

plaintiff's mother for the expressed consideration of $25,000 was registered on 3 December 1986.

35 As previously noted Miss Sands denied that Mrs Silvester paid her $30,000 at the sale of her Hillarys block and maintained that only the $25,000 recorded as the consideration on the transfer was paid to her. Although I have accepted the evidence of Dr and Mrs Silvester that $30,000 was paid to the defendant at this time it does not follow that the whole of the $30,000 was applied by Miss Sands to the purchase of 26 Essex Street. As the gift of the additional $5,000 to Miss Sands became her absolute property it is against the interest of the defendant to maintain that she only received and applied $25,000 from the sale of her block at Hillarys towards the purchase of Essex Street. Yet, if she had applied $30,000 to that purchase, as well as paying the deposit and or the stamp duty, the amount to be advanced by the Bank would have been significantly less than the $33,500 for which the mortgage loan was approved and, possibly, less than $30,000. There is no evidence of defaults in monthly mortgage repayments between December 1986 and September 1988 nor any suggestion of further borrowings by the parties on that loan during that period. Yet, in September 1988 after the payment of $30,000 had been paid in reduction of the mortgage loan there was still over $3,000 of principal outstanding. In my view this can only mean that the defendant paid less than $30,000 (excluding deposit and stamp duty) towards the purchase of Essex Street at settlement in December 1986. For that reason I can only conclude that the defendant paid $25,000 from the sale of the Hillarys block towards Essex Street and that the extra $5,000 must have been used for other purposes. Quite what those other purposes must have been was never investigated at the trial and, as it is only payments which go towards the acquisition of Essex Street which are material in this action, it is unnecessary to pursue the possibilities.

36 It was the evidence of the defendant, and not contested, that she had paid the $2,000 deposit at the time the offer for the purchase of 26 Essex Street was made and that the money came from her savings and inheritance previously mentioned. She says that she also paid the Stamp Duty of $1,023.75.

37 It therefore follows, and I find, that the total of the moneys required to effect the purchase of 26 Essex Street in the name of the defendant was $61,467.91 (as earlier set out) and that these moneys were provided as follows:

By the defendant	
Deposit	$2,000.00
Stamp Duty	$1,023.75
Part of the proceeds of the sale of the block at Solander Road, Hillarys (excluding the $5,000 gift from Dr and Mrs Silvester)	$25,000.00
	$28,023.75
By the plaintiff, the defendant and by the defendant's mother	
Loan from ANZ Savings Bank	$33,444.16
	$61,467.91

38 Consequently, at the date of the purchase of 26 Essex Street the total purchase price was contributed by the parties, and by the defendant's mother in different proportions. Because the plaintiff and the defendant were not married there is no presumption that the plaintiff's contribution to the purchase, through his role as a co-borrower of the ANZ Savings Bank loan, constituted a gift of that contribution to the defendant. Nor do I consider that there was, in these circumstances, any presumption of advancement which would lead to a conclusion that the defendant's mother's contribution as the other co-borrower of the ANZ Savings Bank loan constituted a gift to the defendant or, still less for that matter, to the plaintiff - ***Bennet v Bennet*** (1879) 10 Ch D 474; ***Scott & Hansen v Pauly*** (1917) 24 CLR 274 at 282 and ***Pickens v Metcalf & Marr*** [1932] NZLR 1278 cited with approval by Gibbs CJ in ***Calverley v Green*** (*supra*) at 247.

39 Accordingly, in the absence of an agreement between those contributing towards the purchase price that Miss Sands should hold the entire legal and beneficial interest in the property, the established rule is that the beneficial interest should be held by the contributors in proportion to their contributions to the purchase price - ***Calverly v Green*** (*supra*); ***Muschinski v Dodds*** (1985) 160 CLR 583 and ***Baumgartner v Baumgartner*** (*supra*) unless the facts warrant a conclusion that, in the case of the plaintiff or the defendant's mother, their contributions entitled them to no more than an equitable charge over the property to secure eventual repayment to them of their contributions, perhaps with interest - ***Baumgartner v Baumgartner*** (*supra*), ***Bloch v Bloch*** (1981) 180 CLR

390 and ***Napier v Public Trustee (WA)*** (1980) 55 ALJR 1. It is the measure of the parties' contributions to the purchase or acquisition cost of the property which usually determines their proportionate beneficial share - ***Calverly v Green*** (*supra*). This leaves the question of the significance of subsequent contributions to repayment of a mortgage loan in controversy because the primary rule is that these will not alter the extent of the proportionate beneficial interests determined by contributions to the purchase price. However, there are exceptions to this approach which will later require consideration - see per Gaudron J in ***Baumgartner v Baumgartner*** (*supra*) at 156.

40 There is some difference in authority over whether contributions to the purchase price are confined to the payments made by the parties only to the price paid to the vendor so excluding fees, disbursements and other incidental costs of completing the transaction such as stamp duty. In a resulting trust case between *de facto* couples, McClelland J treated the trust as extending to the value of all acquisition costs including the purchase price, incidental costs, fees and disbursements - ***Currie v Hamilton*** [1984] 1 NSWLR 687 at 691 but that decision was doubted and a contrary approach was taken by Bryson J in ***Little v Little*** (1988) 15 NSWLR 43 at 45 - 46 where his Honour said:

> "There is a directness about seeing and treating the purchase money as converted into a piece of land which is not equated by directness with which one could perceive other costs which must necessarily be incurred to achieve that result as converted or transmuted into the piece of land and beneficial interests in it. It does not seem to me that logic truly supports either a decision to include or a decision to exclude money spent, for example, on a duty stamp which under law must be paid for, and affixed to a conveyance as money which has been converted into land. There is a need for the law to fix limits as to the directness or remoteness of the relation, in time and otherwise, between an expenditure and the acquisition of land which it will recognize for the purposes of the law of resulting trusts. For Australian law it is established now that after completion and conveyance and after the resulting trust has come into existence moneys paid for mortgage principal and interest are not sufficiently directly related to the acquisition of the land to be counted for this purpose; this was established by authority in *Calverley v Green* ... ."

His Honour went on to conclude that what one gets for paying stamp duty is a stamp and not a piece of land. In making these observations Bryson J had earlier acknowledged that, in relation to contributions towards mortgage repayments, it had been established by ***Bloch v Bloch*** (*supra*) that if the parties actually intended at the time of acquisition that their beneficial interests should accord with their future contributions to repayments of mortgage moneys that intention would have effect.

41 However, despite these features, the view of McLelland J in ***Currie v Hamilton*** (*supra*) was preferred to that of Bryson J in ***Little v Little*** (*supra*) in the New South Wales Court of Appeal by Hodgson JA in ***Ryan v Dries*** [2003] ANZ Conv R 47 at [53] where his Honour said:

> "However, on balance consistently with McLelland J's view, I prefer the view that equity, dealing with presumed intentions and preferring substance to form, would have regard to the totality of the money which purchasers have in truth outlaid to obtain the property. This means that normally the proportions should be determined with reference to the proportions of payments for both the purchase price and the incidental expenses that had to be incurred in order to obtain the property ... "

Sheller and Giles JJA each also agreed in this view. I consider that I should follow the decision of ***Ryan v Dries*** (*supra*) and treat the cost of stamp duty and incidental fees in this case as part of the purchase price of 26 Essex Street.

42 For these reasons, therefore, I consider that the contributions towards the purchase price of 26 Essex Street at the date of purchase were:

<u>Defendant</u>:	
Deposit	$2,000.00
Stamp Duty	$1,023.75
Part of the proceeds of sale of Hillarys' block less the $5,000 gift	$25,000.00
Defendant, plaintiff and defendant's mother - each one third of the component of the mortgage advance required to complete at settlement.	

(One third each = $11,148.00)	$33,444.16
	$61,467.91

43 That the plaintiff, the defendant and the defendant's mother should each be treated as providing the balance of the purchase price financed by the bank mortgage in equal shares follows from the fact that each was jointly and severally liable to the bank under the loan which the mortgage secured because it was the proceeds of that loan made to them which was used for the balance of the purchase price - ***Calverley v Green*** (*supra*).

44 In this case the defendant seeks to dismiss the plaintiff's role as a co-borrower of the ANZ Savings Bank mortgage loan as nothing more than that of a guarantor and her mother's identical status as a formality demanded by the bank but being of no other significance. Equally, the plaintiff's submissions disregard the significance of the defendant's mother's role as a co-borrower but without identifying any basis for that contention. The fact that the defendant's mother did make a contribution to the purchase price in this fashion cannot be avoided but examination of this feature of the case must be deferred until later events following the purchase of 26 Essex Street.

45 After the registration of the transfer of the legal title to the defendant on 3 December 1986, the plaintiff and the defendant continued to live at 26 Essex Street and to pool their incomes and share all expenses. Because of complications which later developed in their mutual financial dealings it is necessary to describe just what the practical arrangements were from time to time.

46 From the time that he had been living with the defendant at the flat in Cambridge Street, and perhaps earlier, David Silvester had had a Town & Country passport savings account in his own name but no other bank or cheque account. Later he obtained a cheque account but there is no evidence of the transactions on this. His fortnightly Commonwealth disability pension was paid electronically into the Town & Country account. He would withdraw the pension funds and deposit them in Miss Sands' account and they would then, without differentiation, be used for general expenses. Each of the parties had a car and the plaintiff paid for his petrol and incidental expenses at university and elsewhere.

47 At this time Miss Sands also had an ANZ Bank cheque account with an associated EFTPOS card both in her name. It was to this account that the plaintiff transferred his pension payments. Although the plaintiff was not a co-signatory to Miss Sands' ANZ Bank account or EFTPOS card, he

had her authority to use her EFTPOS card for bills or drawings. She had divulged her PIN number for this account to him and, from time to time, he would use that facility for shopping and other expenditure. This was referred to by the parties as the defendant's ANZ Access account or current account. Later the defendant also had an account with the Westpac Banking Corporation Ltd but there has been no suggestion in the evidence that money from that account was used for the purchase of the property at Essex Street or for mortgage repayments. Miss Sands said that she also has a Visa card and Mastercard account but was not sure when she first obtained either but thought that it was only after the final separation in 1995 that she opened those accounts. Again, there is no suggestion that either of those credit card accounts was used in connection with payments for the property at Essex Street.

48 In August 1991 and again in February 1993, both the plaintiff and the defendant jointly borrowed money from the R & I Bank of Western Australia Ltd. The first R & I loan was for $5,000 principal together with finance charges for a total amount of $7,464. The principal advanced was to be paid to the plaintiff. The second R & I Bank loan of February 1993 was for an additional loan of $3,000 plus the repayment of the balance then owing on the first R & I Bank loan of $4,012.82 which, with finance charges, resulted in a debt due to that bank by both parties of $10,485.60. Each of those loans was secured by a mortgage of the Essex Street property granted by the defendant to the bank. In other words, although both parties were co-borrowers of each of those two loans and responsible accordingly to the bank, the defendant was the sole mortgagor.

49 Most of the bank statements or other records of these accounts have been lost or destroyed. The evidence was that many of the statements had been thrown out by the plaintiff at various stages while he was living at Essex Street. Efforts were made to secure production of the ANZ Bank records relating to the defendant's accounts and for the 1986 home loan, of which both parties and the defendant's mother were the borrowers, but an officer of the ANZ Bank, who responded to a subpoena for the production of these records, explained that none of the earlier records was available and that it was the policy of the bank to destroy all records more than seven years old. Apart from papers relating to the applications for the various loans and various instruments registered under the *Transfer of Land Act* there are very few financial records which have been produced in evidence. The exceptions are Exhibits 11 and 28 which are, respectively, statements for the ANZ Savings Bank home loan account for the joint housing loan to the plaintiff, the defendant and to Mrs Margaret Lucy Sands and statements for the ANZ Bank personal cheque account

for the defendant, Jillian Kathleen Sands, account No 423819309, but relating only to parts of the period under review.

The joint housing loan account - ANZ Savings Bank Ltd No 4238-05716

50 A series of bank statements for the ANZ Savings Bank account No 4238-05716 originally in the names of David Brian Silvester, Jillian Kathleen Sands and Margaret Lucy Sands and entitled "Joint Housing Loan" was tendered, dating from 11 May 1990, but with gaps, until 20 December 2001. The first notable feature is that the name of the account as recorded by the bank has changed over time. Originally in the name of the three borrowers, it continued in those names until at least 24 April 1995. There are then a number of monthly accounts missing but the next statement begins on 21 July 1995 and records the account solely in the name of Jillian Kathleen Sands as a home loan under the same number. The account continues in the defendant's sole name until 21 December 1999. From 21 December 1999 the account is recorded in the names of Jillian Kathleen Sands and Margaret Lucy Sands still as a home loan with the same number. The latest bank statement concludes on 20 December 2001 with the account recorded in the name of the defendant and her mother still as a home loan and with the same number. For the whole duration of the period from 11 May 1990 to 21 December 2002 (that is for those statements available) the account is in debit showing various balances due from time to time from the borrowers to the bank.

51 It is possible to discern certain patterns in the available records of the ANZ housing loan. Over the period 11 May 1990 until 27 October 1995 the debit balance of the account slowly reduced from $9,714.29 to $7,491.24. During this period there are regular deposits to the credit of the account, initially at monthly intervals, in amounts of $127 increasing to $130 from February 1990 until June 1991. There is then a gap in the records from June 1991 until January 1993. From the latter date on there are regular fortnightly deposits to the credit of the account in amounts of $68 which continue until 21 November 1994. Thereafter, there is a pattern of fortnightly credits to the account of $71.68 until 24 April 1995. There is then another gap in the accounts from 24 April until 21 July 1995 but from 21 July until 6 November 1995 there is a pattern of fortnightly repayments of $34.80.

52 The available statements show that all the deposits made towards the reduction of the home loan account have been by periodic transfer from another account of J K Sands. Further, the pattern of transactions on the

account shows that most of the payments to the credit of the account were absorbed by interest payments and fees debited to the account by the bank so that the outstanding principal of the loan was only very slowly reduced and then just to a small extent.

53 From November 1995 onwards the pattern of transactions on the home loan account changed. These changes coincided with the alteration in the name of the account to Jillian Kathleen Sands alone. On 9 November 1995 there was an additional advance of $3,000 debited to the account, thereby increasing the balance owing to $10,365.87. A few days later, fees for the registration of a second mortgage were debited to the account. From then on monthly repayments of $105.14 were credited to the account until 1 April 1996 when a series of fortnightly credits of $52.57 began. This pattern continued until 26 May 2000 and, during that interval, the outstanding balance on the loan was reduced from $10,365.87 to $7,533.96.

54 On 29 May 2000 the account was debited in the amount of $30,400, as an additional advance, bringing the balance owing on that date to $37,897.53. Payments at the rate of $128.53 per month followed from then until 29 June 2000, when the monthly repayments increased to $132.51 and increased again on 18 September 2000 to $135.46.

55 On 12 October 2000 the home loan account was debited with an additional advance of $10,426.25 which, with interest, brought the balance outstanding to $48,293.20. There are then some missing statements for the period from October 2000 until June 2001, but from the latter date there begins a pattern of fortnightly repayments of $155.51 until 22 November 2001 when these reduce to $149.25. The latest statement shows the balance outstanding on the home loan at 20 December 2001 as being $47,256.34. By this point the account is recorded in the names of the defendant and her mother, her mother's name having reappeared on the statements for the period commencing 21 December 1999.

56 The statements show that they were posted to the borrowers or borrower at 26 Essex Street, Wembley, until May 1997 but from that time on they were posted to the defendant personally at 10 Goldsmith Road, Claremont, which, at the time, was her mother's address. However, the last statement for the period June to December 2001 is shown as having been posted to the defendant at 26 Essex Street.

57 Few conclusions can be drawn from the operations on the joint housing loan account, except to observe that over the period May 1990 until November 1995 there were regular repayments all made from another account of the defendant which reduced the outstanding principal from $9,714 to $7,491.24 by 27 October 1995. The latter date is after the time when the plaintiff finally separated from her and last departed from Essex Street. From then on the account has been maintained by changing periodical repayments which appear to have been only slightly greater than the interest accruing on the loan from time to time. Nevertheless, some small reductions in the principal outstanding were occurring by this process. The principal due on the loan was significantly increased by the following three advances:

- 9 November 1995 - $3,000.00
- 29 May 2000 - $30,400.00
- 12 October 2000 - $10,426.25

58 The uncontested evidence is that since the date of the final separation of the parties in 1995 all the repayments made on the housing loan were made by the defendant (perhaps with some assistance from her mother) and without any contribution from the plaintiff. It is also accepted that the three further advances made on the account from 9 November 1995 onwards (mentioned above) were all paid to the defendant for her own use.

The defendant's ANZ Bank personal cheque account - 4238-19309

59 Again, the available bank statements for the defendant's personal cheque account with the ANZ Bank (4238-19309) are limited and discontinuous. They comprise Exhibit 28 and run (with gaps) from 27 August 1993 until 12 September 1996. The account shows a series of many debits, most of which are for cheques for which details are not available. However, there is a regular pattern of debits, in various amounts to an account entitled "Silvester/Sands". These are recorded, as far as can be ascertained from the non-continuous record, at monthly intervals and, as far as comparisons can be made, coincide with the credits recorded in the joint housing loan account, although this pattern ceases by December 1995 after which it is not possible to discern a regular pattern of transfers or credits to the joint home loan account.

60 The evidence of the defendant was that there was no overdraft facility available to her on her cheque account, at least when the pair were

living together. The pattern of transactions on the cheque account shows that despite this, there were only ever small credit balances in the account - generally speaking from about $450 down to $20 or $30 and usually hovering around $100 with frequent episodes of the account going into debit for small amounts of up to $100 or thereabouts but usually for less than $50 overdrawn. Apart from the unidentifiable cheques debited to the account there are often cash withdrawals of small amounts from automatic teller machines at various metropolitan branches. The amounts of the cheques and other withdrawals debited to the account are, generally speaking, small and largely within the range of $25 to $50 but occasionally more or less.

61 The credits to the defendant's ANZ Bank cheque account are less frequent but show more of a pattern. There is a series of unidentified deposits beginning in August 1993 of $150, apparently at monthly intervals (although several of the monthly statements are missing). These reduce to monthly deposits of $100 from March 1995 but return to $150 in April 1995 and then fluctuate between $100 and $150 per month for most, but not all, months. There are also some larger deposits: $650 in August 1995 and there is a credit shown as a loan draw-down of $500 from Account 4238-05616 (the joint housing loan account) on 9 November 1995. In addition, there are occasional credits shown as being sourced from a credit card account indicating that at times the defendant sought to balance this account by drawing on other credit facilities. Generally speaking, the account reveals a pattern of transactions which suggest that the account operator had quite limited resources and was constantly struggling to keep the account in credit.

62 There is also another pattern of credits to the defendant's ANZ Bank cheque account shown as "Pension/Superannuation from DSS Pension". The first such credit of $326.80 is recorded on 12 January 1995 and thereafter a similar credit appears regularly at fortnightly intervals. This credit increases to $331.30 on 23 March 1995 and continues at that amount, again at fortnightly intervals. These fortnightly credits increase to $341.10 from 21 September 1995 and continue at that rate until 27 December 1995 after which there are many missing monthly statements until the record ceases on 12 September 1996.

63 Although these financial accounts are limited and, where available, begin well after September 1988, there is nothing in them to suggest that the defendant has been credited with anything more than her own pension/superannuation DSS entitlements. In other words there is no record, for the periods during which the accounts are available, of a

second pension being credited to her account. There are, however, the unidentified deposits to the credit of the defendant's cheque account running, with exceptions, generally at the rate of $150 per month, but sometimes more or less. While it is possible that these may constitute credits to the defendant's account made by the plaintiff from part of his own pension entitlements, I consider that it is more probable that they represent payments made to the defendant by her mother intended to assist and supplement her daughter's income. The principal reason for this conclusion is that this pattern of deposits continues after October 1995, although rather more variably and intermittently, which I take to be after the time of the last separation. As the plaintiff said he made no payments to Miss Sand's account after the separation, I consider that it is more probable than not that the credits recorded after that date are from the same source as those before, meaning that they were probably all made by the defendant's mother, Mrs M L Sands. It was the defendant's evidence at the trial, and not contested by the plaintiff, that her mother assisted her by making her gifts of $150 a month from 1986 until 1997 and these bank records, admittedly only for a small part of that period, are consistent with that.

The $30,000 payment by the plaintiff

64 Following the purchase of 26 Essex Street the repayments on the home loan secured by the mortgage over the property were $443 per month. The only income of the plaintiff and the defendant was derived from the two disability pension entitlements and additional monthly assistance to the defendant of $150 from her mother. The amounts of the fortnightly pension payments during this period have not been clearly established but appear to have been of the order of $304 per week or slightly more (see Exhibit 29). The defendant's bank account shows that a regular pension payment of $326.80 was being received in January 1995 so the fortnightly pension from 1986 to 1988 must have been less than this. Even with the additional assistance from the defendant's mother, it is obvious that there can have been very little spare money for food, clothing and other necessities and that with neither of the parties working but each running a motor car and the plaintiff attending university, the financial position must have been very tight.

65 In the course of her evidence the defendant maintained that, with her mother's assistance, she could afford the mortgage repayments at this period, but I am satisfied that she could not have done so alone and that even with the plaintiff's pension the pair must have been scraping for money each month. Indeed, the evidence was that they experienced

difficulties in paying the larger annual accounts such as rates, electricity and telephone expenses and on occasions resorted to temporary borrowings from Cash Converters to cover these larger expenses. The interest on the home loan was running at 15.5 per cent and I accept the plaintiff's evidence that the parties were experiencing difficulty with the repayments and had a need to reduce the level of borrowing. In addition, the general state of repair of the house was poor and major work, later carried out on the roof, needed to be done. In this situation, the plaintiff and the defendant decided to approach the plaintiff's parents for money to pay off or reduce the mortgage debt.

66 There is some minor controversy about the details of what occurred but, in this regard, I accept the evidence of Dr Silvester and Mrs Silvester. Some time in late August or early September 1988 David Silvester and Jillian Sands arrived unannounced at Dr and Mrs Silvester's home. David Silvester explained, in the presence of the defendant, that they had many debts, that the interest rate on the mortgage was high and that they had come to see Dr and Mrs Silvester in the hope of obtaining $30,000 to clear the mortgage on the house. Dr and Mrs Silvester were initially much opposed to this request because they had provided substantial financial assistance for David in the past and because their sense of obligation to their other three sons inclined them to the view that David should not receive preferential treatment.

67 Dr and Mrs Silvester withdrew to the kitchen to discuss the proposal but somewhere in the course of the discussion with their visitors they explained that they had only recently assisted by buying Miss Sands' block at Hillarys but had recently resold this. The news that the Hillarys land had been resold without her knowledge or approval resulted in the defendant expressing significant resentment which led to unpleasantness. However, Dr and Mrs Silvester returned and explained to their son that if they made the payment to him for which he was asking it would have to be treated as being an advance payment in substitution for the inheritance which they would otherwise leave to him by their wills and that if this were done he would be excluded from their wills and that their estates would be divided between his brothers. This was accepted and the parents agreed to provide the money.

68 Clearly, it was an awkward situation for all concerned and the relationship between the parents and their son and the defendant suffered as a result. Possibly for that reason, the implementation of this arrangement was rather odd. A crossed cheque drawn by Dr and Mrs Silvester on their account at the Westpac Bank University branch, but

with the name of the payee left blank, was placed in an envelope and left in the letterbox at 26 Essex Street in early September 1988 without further communication from the plaintiff's parents. David Silvester showed the cheque to the defendant and she inserted his name as payee. The cheque was found in the letterbox about three days after the visit of the parties to the home of Dr and Mrs Silvester. The plaintiff himself deposited the cheque for $30,000 to the credit of Home Loan 4238005716 with the ANZ Savings Bank account. Much later, in February 1996, he obtained written confirmation from the bank of this payment (Exhibit 8).

69 Shortly afterwards, on 28 September 1988, Dr Silvester and Mrs Marion Silvester each made a new will revoking all earlier wills. The details of the new wills (exhibits 21 and 19 respectively) do not need to be set out in full. It is sufficient to say that the general residuary gifts in each will (in the event that the spouse did not survive) provided for the estate to be left equally to the three eldest sons (subject to a substitutionary gift of any deceased's brother's share to David) with the explanation that David had been omitted from the will because of financial provision which had been made for him during the lifetime of the testator. It was the evidence of Dr Silvester and Mrs Silvester that those wills had subsequently been revoked but no details of any subsequent or current wills were disclosed and there was certainly no need for any such disclosure.

70 There is no direct evidence of the amount of principal left outstanding on the home loan after this payment had been credited but the plaintiff's evidence was that there was about $3,000 then outstanding.

71 The defendant's evidence was that the balance on the home loan due to the ANZ Savings Bank after the $30,000 was paid into that account was about $2,000. Shortly afterwards, both the defendant and the plaintiff applied to the bank for an additional loan of $5,000 on the existing mortgage at 26 Essex Street, the proceeds of which were to be paid to Miss Sands' Access account 5899-71001 (see Exhibit 27B). This application was signed by both the plaintiff and the defendant (but not by the defendant's mother) and the advance was made so increasing the amount outstanding on the housing loan to something in the vicinity of $7,000 or $8,000.

72 The reason for this additional borrowing was to obtain funds to pay contractors for re-roofing the house at Essex Street. Part of the re-roofing contract is Exhibit 27A and is dated 28 December 1988. This document specifies the contract work to be undertaken on the roof of the Essex Street property to commence on 15 February 1989 for a total contract

price of $6,465. Regrettably, the single page of the exhibit is not the complete contract and it fails to identify the specified owner or owners but it does record that the contract price was paid in full. As there is no doubt that the new advance was made against the liability of the plaintiff and the defendant under the joint housing loan, I do not regard the lack of evidence about the identity of the owners on this contract as being of significance. The evidence of both the plaintiff and the defendant was that after this payment had been made the balance outstanding on the home loan was $7,000 or $8,000 but as the next bank record available beginning on 11 May 1990 shows the balance then due was $9,714.29 I consider it is more probable that there was more than $3,000 outstanding after the September 1988 payment of $30,000 and that the balance outstanding after the roofing advance was about $9,500 or more.

73 It is impossible to be precise about the amount left owing to the bank on the joint housing loan at this date but it is important that a finding be made about the extent of the liability at that stage. The probabilities are that the balance due in early 1989 was within the range of $8,500 to $10,500. Because of the lack of evidence of any other advances or repayment of principal on that mortgage between then and the first recorded balance in the bank statements available in May 1990 of $9,714, I consider that I should conclude that the indebtedness after the roof repairs in February 1998 must have been in the vicinity of $10,000.

74 Miss Sands refused to accept that the September 1988 payment of $30,000 towards the reduction of the home loan by the plaintiff either evidenced or effected any beneficial interest in the property by him. Although she said that she had never asked him for any rent while he was living with her at Essex Street, or for any fixed or ascertainable contribution towards living or occupation expenses, she did say that this $30,000 payment was a gift to her in lieu of rent for "looking after" David. At another point she asserted that the payment was made to her by Dr and Mrs Silvester in compensation for the loss of the opportunity to obtain a profit from a later resale of the Hillarys block, but I completely reject this together with the implied assertion that there was any restriction upon the absolute nature of the sale of the Hillarys land to Mrs Marion Silvester in 1986 or an obligation of any kind upon her to share any profit on a resale with the defendant. Similarly, I reject the defendant's evidence that the $30,000 payment was made as a gift to her for looking after David or for any other reason.

75 The probabilities are overwhelming and I have no doubt that the sole purpose of the gift from Dr and Mrs Silvester to their son of this $30,000

was to enable him to repay the home loan and to secure for himself and the defendant relief from the financial pressures which they had been suffering. More to the point, I conclude that the use by the plaintiff of this gift to him from his parents was to repay principal owing under the mortgage in order to secure the position of himself and the defendant as occupants of the home and to relieve their financial pressures.

76 There is no evidence of any discussion with Mrs Margaret Sands, the defendant's mother, about this $30,000 repayment or the effects which it would have upon her liability to the ANZ Savings Bank under the joint home loan. While there is no evidence on the point, it seems to be a probable inference that Mrs Sands would have eventually learned about this. Whether that is so or not there is no suggestion that there was, or that there should have been, any change to her general habit of making monthly payments of $150 or thereabouts to her daughter. Rather, the evidence is that these continued until 1997. I consider that this indicates that the payments which had been, and which continued to be, made by Mrs Margaret Sands to her daughter were intended as gifts for her financial assistance rather than as the recognition, or discharge, of any concurrent liability which Mrs Margaret Sands was under to repay or to contribute to the repayment of the joint home loan.

The separations between the plaintiff and the defendant

77 The plaintiff says that in mid-1992 he left 26 Essex Street and rented a flat in the Wembley Downs/Herdsman area for about six months but then moved back and resumed living with the defendant. During this separation the plaintiff continued to make his regular monthly instalments in reduction of the R & I Bank "Easy Loan" which was secured by a second mortgage over the Essex Street property but he did not contribute to the general living expenses nor, I infer, to the ANZ Savings Bank home loan repayment. Upon his return to Essex Street after the separation the plaintiff says that he continued to share expenses and contribute to the overall costs of living. The pair continued to live together for about six months but the plaintiff says that he then left again but returned at about Christmas 1992 or early January 1993. According to the plaintiff the third, and final, separation occurred sometime in mid-1993.

78 However, the defendant puts the final separation as occurring later, in about mid-1995, but she says that during the period between 1990 and 1994 the plaintiff rented a flat at Herdsman's and moved between Essex Street and that flat on numerous occasions over about a year.

79 While I accept the plaintiff as a truthful witness, I consider that his recollection of dates is unreliable and that it is probable that there was a series of separations throughout 1993 and 1994 with the plaintiff living during those absences at a flat in Herdsman and that the final separation occurred in or about May 1995. It is also evident from the defendant's evidence that the plaintiff was experiencing a deterioration in his illness during this period and was not coping well and on occasions was quite ill. He moved into a separate room at Essex Street. He attempted some home improvement projects in the garden, including an attempt to dig a pool and build a pergola, but mishandled these, left them unfinished and was coping very poorly. There is also evidence that he was morose and unable to eat regularly and when he did became nauseous. He was described as becoming moody. All this behaviour is consistent with his diagnosed illness and I do not consider that he has a reliable recollection of the details or the times of what happened during this period.

80 It is of particular significance that the names on the joint home loan account at the ANZ Savings Bank were changed to that of the defendant solely by 21 July 1995, having been in the joint names of the three borrowers in the last bank statement before then dated 27 April 1995. I therefore conclude that the final separation occurred some time between 27 April and 21 July 1995. This is also consistent with the evidence of the defendant that, at the time of separation, the plaintiff asked for the Essex Street property to be sold and to be paid half the proceeds. The first caveat claiming an undivided one half share interest in the property lodged by the plaintiff was dated 22 May 1995 pointing to the probability that the separation occurred shortly beforehand.

81 The plaintiff said that after separation he agreed with the defendant that she would pay off the ANZ Savings Bank home loan and that he would take over the sole responsibility for, and pay off, the R & I Bank loan secured by the second mortgage. According to the plaintiff, the balance outstanding on the R & I Bank loan at this time (mid-1993) was a little less than $10,000 and the amount due to the ANZ Savings Bank on the joint home loan account at 30 June 1993 was $9,463.49. That is the correct figure for the balance due on the ANZ Savings Bank home loan account at that date but, as explained, I do not accept that the final separation occurred then. Taking the separation as occurring on 22 May 1995 (the date of the first caveat and supporting statutory declaration where the plaintiff gives his address as being 19 Boronia Avenue, Nedlands, and refers to the *de facto* relationship as lasting until 1994), the balance outstanding on the joint home loan account at 23 May 1995 was $7,781.84 (Exhibit 11). However, I conclude that it is unlikely that the

plaintiff maintained the arrangement of contributing his pension to the defendant and pooling all their resources to share living and accommodation expenses after the commencement of the six month separation in 1994.

82 Although the evidence is sparse I prefer to conclude that from about mid-1994 the plaintiff effectively took over the responsibility for the R & I Bank loan and that the defendant was left, in practice, with the sole responsibility for the ANZ Savings Bank home loan. Therefore, for present purposes, the amounts outstanding on those loans in mid-1994 are of more significance. The bank statements establish that at 30 June 1994 the balance outstanding on the joint home loan account was $8,577.78. There is no direct evidence as to the amount then due on the R & I Bank "Easy Loan" but it is dated 8 February 1993 and was for a total amount of $10,485.60, including credit charges, repayable by equal monthly instalments. A copy of the document (Exhibit 10) tendered does not show the amount or duration of the instalments required, nor is there any evidence to establish that all instalments had been paid up until the date of separation, although I infer that the loan was not in default or, otherwise, the lending bank would probably have taken default action. The plaintiff's evidence was that the monthly instalments on this account were $124.40 although no documentary evidence was produced to confirm that. Nevertheless, taking that figure and assuming that regular payments had been made until June 1994, the balance then outstanding would have been approximately $8,500 which I consider is the best estimate which the evidence will allow.

83 Accordingly, although entirely by coincidence, the amounts outstanding under both the ANZ Savings Bank joint home loan and the R & I Bank Easy loan in June 1994 were very nearly the same - that is about $8,500. I also conclude that the plaintiff made no significant contribution to the repayment of the ANZ Savings Bank joint home loan after June 1994 and that the defendant made no contribution to the repayment of the R & I Bank "Easy Loan" after June 1994 or possibly earlier.

84 I accept the evidence of the plaintiff that, when final separation did occur, the financial arrangements were left on the basis that he would take over the full responsibility for the R & I Bank loan and that Miss Sands would take over the full responsibility for the ANZ Savings Bank home loan and that is, in effect, what subsequently happened.

Other combined borrowings by both parties

85 In addition to borrowing further on the ANZ Savings Bank joint home loan to finance the reconstruction of the roof at 26 Essex Street, the plaintiff and the defendant both borrowed jointly for other purposes and secured those loans by mortgages over the property.

86 On 7 August 1991 the plaintiff and the defendant jointly applied to the plaintiff's bank - R & I Bank of Western Australia Ltd - for an "Easy Loan" contract for an advance of $5,000. The loan was approved and, with credit charges over five years, the total amount repayable was $7,464 by equal monthly instalments. The loan was to be secured by a consumer mortgage registered over the land at 26 Essex Street (see Exhibit 9). A mortgage under the *Transfer of Land Act* to secure that loan was duly executed by the defendant in favour of the bank and registered against her title on 13 August 1991 (Mortgage E679537). This noted the existing mortgage in favour of the ANZ Savings Bank on the home loan (D 373536) as the sole prior encumbrance.

87 The explanation given for this loan by the plaintiff in evidence was that, despite making the $30,000 repayment on the mortgage in September 1988, both he and the defendant were experiencing further financial difficulties by mid-1991. According to him they went to the ANZ Bank to enquire whether a further advance on the home loan could be made on the basis of the equity in the house but the bank was not willing to make an advance. He therefore approached his own bank and found that he could obtain accommodation on a consumer loan or "Easy Loan" although, of course, the interest rate was high. According to him the money was used for general living expenses.

88 However, the defendant maintained that the R& I Bank loan was obtained in order to allow David Silvester to purchase a block of land in the country town of Trayning which was something he particularly wanted. No reason was advanced in the evidence as to why the plaintiff wanted a block at Trayning or what use for it was ever contemplated but it is clear that he did purchase a town block in Glass Street, Trayning, and that the title to this was registered in his name as the sole proprietor on 9 August 1991 (see Exhibit 24). According to the defendant, the purchase price of this land was about $2,000 and the amount of the loan obtained from the R & I Bank for the purpose was $3,000. There is no other evidence upon which a finding can be made about the cost of the Trayning land or the use to which the $5,000 borrowed from the R& I Bank was put. The Trayning land was eventually sold by the plaintiff in 1997 but,

again, there is no direct evidence of the selling price. The defendant said that it had been sold for $600 and that the entire venture had been a failure and another example of the plaintiff's financial improvidence. How the defendant would know the selling price of the Trayning land in 1997, years after the final separation had occurred, was not disclosed and I do not accept her evidence on this point as being reliable about the actual sale price but this is of no significance in this litigation.

89 I consider that the $5,000 principal raised by this 1991 loan from the R & I Bank was probably used in part for the purchase of the land at Trayning for the plaintiff and also in part to defray general living expenses and associated debts incurred by both parties to that date. More to the point, I conclude that none of the proceeds was used to reduce the ANZ Savings Bank joint home loan or was applied to increase the capital value of the house and land at 26 Essex Street.

90 Following this borrowing it became necessary for the parties to meet the monthly repayments under this R & I Bank loan as an additional regular expense. There is no direct evidence about how this was done but I consider that the repayments were treated, up until the time of the lengthy separation in mid-1993, as part of the general household expenses. It is possible that the regular payments were made largely, if not entirely, by the plaintiff although the evidence does not allow a positive finding to be made in this regard. However, even if that did occur with the consequent result that the plaintiff's contributions to the repayment of the ANZ Savings Bank home loan were diminished, I do not regard that as significant because both loan liabilities were treated as joint responsibilities and, indeed, in my view part of the R & I Bank loan proceeds had been applied for the reduction of the parties' joint debts.

91 By February 1993 the parties were again experiencing financial difficulties and sought to refinance the R & I Bank loan over an extended period. Accordingly, they both again approached the R & I Bank on 8 February 1993 for a further joint loan of $3,000 and to finance the balance outstanding of the earlier R & I Bank loan then standing at $4,112.82, so seeking overall financial accommodation of $7,162.82 including fees. The bank agreed and offered another "Easy Loan" contract which, with credit charges of $3,322.78 resulted in a total amount financed of $10,485.60. The application was in the names of both the plaintiff and the defendant as borrowers and was to be secured by a registered consumer mortgage against the title to 26 Essex Street in the name of the defendant. The defendant also was named as a guarantor of the loan and both signed as borrowers. Mortgage No 469013 dated

9 February 1993 granted by the defendant over her interest in 26 Essex Street in favour of the R & I Bank was duly registered on 18 February 1993. The earlier mortgage of the property to the R & I Bank (E679537) was discharged on the same day and the 1993 mortgage listed, as the sole prior encumbrance, Mortgage D373536 being the mortgage to the ANZ Savings Bank to secure the joint home loan.

92 For David Silvester and Jillian Sands the practical effects of this second R & I Bank loan were: that they obtained a loan principal of $3,000; their liability under the first R & I Bank loan was paid out; and they were then liable to repay the R & I Bank $10,485.60 over time by instalments. There is no evidence about the application of this $3,000 derived from the second R & I Bank loan. There are bank records for the joint ANZ Savings Bank home loan covering the period 22 January 1993 to the end of 1993 but these do not disclose any deposits to the credit of that account other than regular fortnightly repayments of $68.00. The statements for Miss Sands' personal ANZ cheque account for that period are missing. However, neither of the parties has suggested that any part of this second R & I Bank loan was used to reduce the principal outstanding on the joint housing loan account or to carry out any work which effected an increase in the capital value of the house and land at Essex Street. In those circumstances I can only conclude that this loan money was also used for general living expenses and debts which the parties had each incurred. As noted later in these reasons, the plaintiff himself met the monthly instalments under the second loan to the R & I Bank during the lengthy separation over the last six months of 1994 and after the final separation in mid-1995.

Increases in the liability under the ANZ Savings Bank Ltd home loan after separation

93 Over the period from the final separation in May 1995 until trial the defendant has, herself, negotiated further loans from the ANZ Savings Bank on the security of the original mortgage. The plaintiff has not been asked to join in or authorise these additional borrowings and has not done so despite his liability under the original housing loan. Only in relation to the last of these was the defendant's mother, Mrs Margaret Lucy Sands, requested to authorise the additional advance and, upon doing so, had her name reinserted as one of two borrowers on the bank statements for that loan, notwithstanding that there was no alteration made to the terms of the original mortgage or loan contract. The details of these other advances have already been recorded but, for convenience, I repeat them in summary form as follows:

- 7 November 1995 $3,000.00
- 29 May 2000 $30,400.00
- 12 October 2000 $10,426.25

There was no evidence of the exact amount of the liability under the joint home loan to the ANZ Savings Bank at the date of trial. The latest outstanding balance proved was $47,256.34 owing at 20 December 2001. Any increases or reductions in the amount owing since then will not be due to any receipts or payments by the plaintiff.

Claim of an express trust

94 The first claim by the plaintiff in this action is that, at the time 26 Essex Street was purchased, the parties agreed that the beneficial interest in the property should be held equally between them. This must fail.

95 The plaintiff's evidence was that when the opportunity to purchase Essex Street arose in November 1986 he and the defendant discussed the prospect of buying the property together, that they both enquired about the possibility of obtaining a mortgage from the ANZ Bank and, eventually, approached Dr and Mrs Silvester for assistance which led to Mrs Silvester purchasing the defendant's block at Hillarys as described. I have no doubt that the decision to buy the property was fully discussed in this way and was embarked upon by the parties together in the expectation that they would both continue to live at Essex Street and would contribute to the repayments on any loan. The plaintiff's explanation for the land being registered in the defendant's name alone was that she had contributed the proceeds of the sale of the Hillarys block to the purchase and he was naturally inclined to trust her and to comply with her wish to be a land owner. He explained that this was his first relationship and that he was of a generous and trusting disposition. He regarded himself and the defendant as refugees from society together, sharing everything, and he claims that he was assured by her that he would always get a half share.

96 The defendant, on the other hand, maintains that it was her decision to purchase the property and it was always intended that it should be in her name. It is quite evident that she regarded herself, perhaps justifiably, as the better financial manager. I consider that while the defendant indicated that the plaintiff could always live there and expected that their relationship would continue she was always hoping that they would marry and regarded her "ownership" of the house as her security until the

occasion when they would, as she hoped, marry. It is quite evident that the defendant is deeply disappointed that the plaintiff did not marry her and eventually left, with her saying that he became cruel and acted like an enemy rather than a friend. Unfortunately, the situation has been complicated by the illness which each party has suffered and from consequent misunderstandings. However, this is not a case about the cause of the breakdown in the relationship between the parties, nor one in which the outcome depends in any way upon the conduct of either party leading to that breakdown. It is simply a question of ascertaining the proprietary rights which exist and, in particular, whether the plaintiff has any proprietary claim to the property and if so the extent of this.

97 In my view the situation which arose in 1986 when the property was purchased was that the decision to acquire the property was jointly taken and taken on the basis that the defendant would provide the proceeds of the sale of her property at Hillarys, that she and the plaintiff would jointly borrow upon a mortgage over the property for the balance of the purchase price and would, from their combined incomes, make the mortgage repayments and meet other expenses associated with the property. Because of the larger financial contribution which the defendant was then making I find that the plaintiff accepted that the property should be registered in her name and agreed that they would both continue to live there as *de facto* partners contributing to the mortgage repayments. Insofar as there was any express agreement, I am satisfied that that is as far as it went.

98 The result, in my opinion, is that there was never any express agreement that the plaintiff should have a one undivided half share as a beneficial interest in the property. Rather, I consider that there was no express agreement about the entitlement to the beneficial interest in the property and that, in these circumstances the result was that the beneficial interest was held by them in proportion to their contributions to the purchase price - ***Calverley v Green*** (*supra*).

99 The position of the defendant's mother as co-borrower does not seem to have been properly addressed at the time or, indeed, at all throughout these proceedings. It seems that she became an equal co-borrower under the ANZ Savings Bank joint home loan at the insistence of the bank but that both the plaintiff and the defendant, and for that matter Mrs Margaret Sands herself, regarded her role as no more than that of a guarantor. But that was not the legal effect of the arrangements which were implemented. As a co-borrower she was a contributor to the purchase price and in my view, from then until September 1988 and after, held a beneficial interest

in the property proportional to her share of contribution to the purchase price.

100 In practical terms this meant that from the date of purchase of 26 Essex Street in November 1986 of the total purchase price of $61,468 the beneficial interest was held in proportion to the contributions made towards the payment of that sum by the plaintiff, the defendant and Mrs Margaret Lucy Sands as follows:

Defendant - 28,024/61,468 share

Plus one third of the liability under the ANZ Savings Bank mortgage, that is a 11,148/61,468 share

Plaintiff - a 11,148/61,468 share

Mrs Margaret Lucy Sands - a 11,148/61,468 share

101 I accept that from December 1986 until September 1988 the monthly mortgage repayments were made by periodical transfers from the defendant's ANZ Bank cheque account, but that this was a result of the pooling of the combined sources of income of the plaintiff and the defendant and the sharing of this obligation together with all other accommodation and living expenses without differentiation or apportionment. The defendant's funds were also supplemented by regular monthly gifts from her mother as described but I am satisfied that these were not calculated with reference to, or treated as payments for, her liability under the joint home loan. Rather, I accept that these were gifts made by the defendant's mother intended for her general use and assistance and were part of her mother's efforts to assist the defendant financially as best she could from time to time but without obligation to do so.

102 This leaves the question of what was to happen if the plaintiff and the defendant could not meet the mortgage repayments and the defendant's mother was called upon to meet her legal liability to do so under the bank loan. I find that this potentiality was never addressed or contemplated by any of the three borrowers because it was always their intention that the mortgage repayments would be met by the plaintiff and the defendant. Had Mrs Margaret Sands been called upon to meet that liability personally I consider that both the plaintiff and the defendant would have regarded themselves as being under an obligation, if they could, to indemnify her for any discharge of that obligation. I also consider that, had the parties addressed the issue, they would have treated

the situation as being that, when they eventually succeeded in discharging the whole of the balance of the home mortgage loan by payments from their own resources over time, they would themselves obtain the whole of the beneficial interest in Essex Street to the exclusion of the defendant's mother.

103 Although I did not have the benefit of any argument or submissions in this regard, I am inclined to the view that the beneficial interest which is derived by Mrs Margaret Lucy Sands as the result of her being one of the three co-borrowers to the home loan, was, as between those three borrowers an interest which secured the right of indemnity which I have concluded she had against the plaintiff and/or the defendant in the event that she was ever called upon to discharge her liability to the bank under the joint home loan. Again, on this basis, her beneficial interest in the property at Essex Street and her right to seek an indemnity from both the plaintiff and the defendant would terminate if and when, as was expected, the plaintiff and the defendant fully discharged that loan to the bank. Until that happened, or, until there were developments or agreement which would alter the position, Mrs Margaret Sands continued to have a beneficial interest in the property proportional to her contribution as identified.

104 The fact that from December 1986 until September 1988 the plaintiff and the defendant themselves met the mortgage loan repayments and, in the process, achieved a small reduction in the principal outstanding did not of itself alter the beneficial interests arising from the initial contributions at the date of purchase.

105 The general rule is that the repayment of mortgage instalments are not contributions to the purchase price and, as such, do not affect the extent of the beneficial interests of the parties arising from the contributions which they severally made to the purchase price at the date of acquisition. In ***Calverley v Green*** (*supra*), Gibbs CJ said at 252:

> "The extent of the beneficial interests of the respective parties must be determined at the time when the property was purchased and the trust created. The fact that the mortgage debt was repaid by the appellant is therefore not relevant in determining the extent of the interests of the parties in the land, although it may be relevant on an equitable accounting between the parties."

and, at 263, Mason and Brennan JJ said:

> "The Court of Appeal correctly took the time of the acquisition of the Baulkham Hills property as the material time for determining the beneficial interests of the parties ...
>
> ...
>
> In some cases it is possible to treat the concurrence of one party with the other's payment of the mortgage instalments as an admission of the former's exclusive interest, but the circumstance attending the payment of mortgage instalments is no more than one of the relevant facts."

having earlier said, at 257:

> "The property was purchased on the basis that the purchasers should pay it off over twenty years, a basis familiar to many home buyers. It is understandable but erroneous to regard the payment of mortgage instalments as payment of the purchase price of a home. The purchase price is what is paid in order to acquire the property; the mortgage instalments are paid to the lender from whom the money to pay some or all of the purchase price is borrowed ... The payments of instalments under the mortgage was not a payment of the purchase price but a payment towards securing the release of the charge which the parties created over the property purchased."

106 Nevertheless, it is also clear that in certain circumstances the payment of mortgage instalments may be relevant when determining the extent of the beneficial interests of the contributors. In ***Baumgartner v Baumgartner*** (*supra*) the situation was that the two parties to a *de facto* relationship pooled their incomes for living expenses, including mortgage repayments, but made unequal contributions to that fund. On moving to a second home, the purchase price of that home was provided entirely by mortgages taken out and advances made by the man alone but, while living in the home, the mortgage repayments were met out of the fund of pooled incomes to which the unequal contributions had been made. Despite the fact that the purchase price had been wholly provided by the man, the court concluded that, on an equitable accounting between the parties, the woman had an interest which reflected her contributions to the funds used to repay the mortgage. Of this situation Gaudron J said at 156:

> "The utilization of the fund for the making of mortgage repayments should be viewed in the context that in this country homes are commonly acquired by means of *crédit foncier*

> arrangements. Under these arrangements 'equity' in the home is accumulated over time with the gradual reduction of the mortgage debt by regular repayments apportioned to both principal and interest. Where a fund (which is the property of the contributors thereto) is used for the acquisition in this manner of 'equity' in an asset, it is unconscionable for one only of the contributors to that fund to assert ownership of that asset to the exclusion of any interest in the other contributor(s). That situation is properly remedied by the imposition of a constructive trust.
>
> Where a constructive trust is imposed by reason of the utilisation of a joint fund to acquire 'equity' in an asset, the terms of the trust will necessarily need to be fashioned to take account of contributions made other than from the joint fund. On occasions it may be sufficient to treat the contributions to mortgage repayments as if they were contributions to the consideration for the purchase of the asset, and to fashion the terms of the constructive trust along the same lines applicable to a resulting trust so that the beneficial interest is held in tenancy-in-common in shares proportionate to the total contributions made towards the acquisition of 'equity' in the asset. However, other considerations may also be relevant. For example, in the context of domestic relationships it is relevant to inquire whether the asset was acquired for the purposes of the relationship, and whether non-financial contribution should be taken into account."

107 I observe at this point that this is not a case which, in my opinion, the outcome is affected by "non-financial contributions", nor was it submitted by the parties that this should be so. The observations made in ***Lloyd v Tedesco*** (2002) 25 WAR 360 are, in this respect, apposite although it is important to note that in that case it was accepted that an equitable interest in a property occupied by a *de facto* couple could, in particular circumstances, be established where the parties had intentionally or deliberately entered into a joint endeavour which had, as a material purpose, the aim of adding to the parties' material wealth for their mutual benefit.

108 In ***Bloch v Bloch*** (*supra*) recognition, for the purpose of measuring the beneficial interest, was given to contributions made to mortgage repayments by a party who had also made a contribution to the acquisition of the property in question.

109 The decision in ***Bloch v Bloch*** has attracted some academic criticism - see Hardingham and Neave: "Australian Family Property Law" (1984) Law Book Co at [638] - [652]. But the decision was accepted in ***Calverley v Green*** (*supra*) as applying in situations where the intention of the parties is to acquire the title to the land eventually free of the mortgage liability rather than subject to the mortgage. It was also accepted in ***Calverley v Green*** (*supra*) that the extent of the equitable interests arising from varying contributions to the purchase price of a property might alter after the purchase by agreement between the contributors. At 262 - 263 Mason and Brennan JJ said:

> "As there was no agreement made after the purchase to alter the equitable interests acquired when the property was purchased, payments made under the mortgage work no alteration in those interests. This case cannot be likened to *Bloch v Bloch* (*supra*) where the relevant property which the parties intended to acquire was seen to be not the title to the land subject to the mortgage but the land freed of the mortgage (per Brennan J at 402). In such a case the price paid to free the land of mortgage as well as the price paid for the title to the land itself must be taken into account in determining the parties' beneficial interests. Mortgage payments may quantify the parties' interests under a resulting trust of a property acquired as a mortgage-free investment, but they would rarely quantify the interests of parties under a resulting trust of house property acquired as a home to live in. If it is right to regard the payment of the mortgage instalments as having been made by the defendant out of his own funds and on his own account - that is, if he made those payments not intending the plaintiff ultimately to have the benefit of those payments - the defendant may be entitled to contribution from the plaintiff for her share of the payments and to an equitable charge to secure the making of her contribution."

110 Their Honours also expressly accepted that in certain circumstances a different beneficial interest might be asserted under a constructive trust arising after the transaction of purchase was closed and overriding the beneficial interests then acquired, but that had not been raised in ***Calverley v Green*** (cf 263). The passage in ***Bloch v Bloch*** (*supra*) referred to by their Honours in the judgment of Brennan J is at (1981) 180 CLR 402 where his Honour said:

> "The inference to be drawn from the facts of the present case is that the parties intended their respective beneficial interests to

> be proportionate to the contributions made to acquire the land and to free it of any encumbrance. The agreement by the son that the parents should have one-third of the proceeds of the land is both supportive of this inference and the best evidence of the proportion of the contributions made by the parties and of their respective beneficial interests in the asset."

111 Applying these principles to the present case, I consider that when the plaintiff and the defendant discussed the purchase of 26 Essex Street in November 1986 and then proceeded to make the purchase as described but in the defendant's name financed, in part, by the joint home loan, the intention was to acquire eventually an unencumbered estate in fee simple for the benefit of both of them and to the exclusion of the defendant's mother. Notwithstanding that, during the life of the mortgage, the defendant's mother would have an equitable interest in the property to the extent of her concurrent obligation under the housing loan even if, as the parties no doubt hoped, the mother would never be called upon the make any payments to the mortgagee. It is for this reason that I prefer to characterise the mother's beneficial interest deriving from her concurrent obligation as one of the co-borrowers as being held by her to secure the right of indemnity already mentioned but terminating if and when the mortgage debt was fully repaid.

112 This commitment by the plaintiff and the defendant for the purchase of 26 Essex Street financed in the way it was, in my view comes within the description of a joint endeavour having, as a material purpose, the aim of adding to the parties' material wealth for their mutual benefit described in ***Lloyd v Tedesco*** (*supra*). There appears to be no doubt that in purchasing 26 Essex Street in 1986 the intention of both the plaintiff and the defendant was to secure eventually full unencumbered ownership of the property after the joint housing loan had eventually been repaid over time by the plaintiff and the defendant themselves.

113 It is in this setting that the significance of the payment of $30,000 in reduction of the mortgage effected by the plaintiff in September 1988 must be considered. This large payment was of a character quite different from the regular monthly repayments due under the mortgage, both in magnitude and composition. In the latter respect it was clearly designed to reduce and had the effect of reducing the principal outstanding under the joint housing loan secured by the mortgage and was not a payment intended or applied for the discharge of interest accruing due on the housing loan. In every sense, therefore, it was a capital payment and one designed, and having the effect of increasing, substantially the "equity" in

the home in the sense described by Gaudron J in ***Baumgartner v Baumgartner*** (supra). For that reason alone I consider that it can and should be regarded as a contribution by the plaintiff towards the acquisition of the property and by doing so varying the beneficial interests which had existed up to that point arising from the contributions made to the purchase price.

114 Of course, it is possible that the $30,000 payment could have been of a different character. If it had been a gift from the plaintiff to the defendant then, of course, there would be no alteration to the beneficial interest. There is no presumption of advancement between the parties in these circumstances, and even if there were, I am satisfied on the evidence that it was not the intention for the plaintiff to make a gift of this contribution to the defendant but, rather, it was his intention that it should serve to accelerate achievement of the original joint intention of acquiring an unencumbered title in the Essex Street property for the mutual benefit of himself and the plaintiff.

115 If the payment had been made without the knowledge, approval or ratification of the plaintiff it is possible that it may have given rise to nothing more than a charge over the property to secure eventual repayment of that principal to the plaintiff. But, again, I am satisfied that that is not the case in the present situation. The defendant actively participated in petitioning the plaintiff's parents for financial assistance which led to this gift and the application of the $30,000 towards the reduction of the mortgage debt was made with her knowledge and obvious approval. The only conclusion which I consider that can be drawn is that, with the defendant's knowledge and approval the plaintiff was substantially increasing his contribution towards the acquisition of the Essex Street property and, in the process, altering and increasing his beneficial interest. The fact that the defendant's mother, Mrs Margaret Sands, was not consulted about this step or her approval sought for the consequent reduction in the extent of her beneficial interest is only to be expected. This is entirely consistent with the treatment of her interest in the property as a co-borrower being, as between the three borrowers, to secure any right of indemnity which might arise if she were called upon to perform her legal obligations under that loan.

116 Earlier in these reasons I have set out the basis for my conclusion that, by making the $30,000 contribution to the reduction of the joint home loan in September 1988, the outstanding balance of that home loan was reduced to something slightly exceeding $3,500 and, of course, the property remained subject to the mortgage to secure that loan for which

all three borrowers remained individually responsible. There was no admissible evidence adduced at the trial to suggest that there had been any significant appreciation in the capital value of Essex Street between November 1986 and September 1988 although, of course, it is quite possible that this might have occurred. However, I do not consider that that possibility requires attention in this case because I am satisfied that the $30,000 contribution which the plaintiff made in September 1998 was never intended to be, or had the effect of being, a new purchase of an equitable interest in the property at the value at which it stood in September 1988. Rather, the intention and effect was that it would supplement the contribution which the plaintiff made to the acquisition of the property as at the date of purchase on the basis that the only outstanding obligation needed to effect the original object of the purchase was to discharge the whole of the mortgage debt and that this payment would achieve that result sooner rather than later.

117 The reduction of the mortgage principal achieved by the plaintiff's contribution of $30,000 to the repayment of the loan in September 1988 allowed both parties to proceed to engage a contractor to carry out the necessary roof replacement and repair and to finance this by an increase in the home loan facility by the bank to them (but apparently without recourse to, or approval by, Mrs Margaret Sands) of a further $5,000. As noted, the roof replacement and repair was duly completed at a cost of $6,465, that is, more than the amount approved for the extension of the home loan. But the bank was the only source of funds so I can only conclude that the bank agreed to advance the whole cost of the roof work. Expenditure on repairs, maintenance or improvements on a property will not increase the beneficial interest of the person or persons making the repairs or refurbishment unless it can be shown that an increase in the value of the property thereby resulted and, in that case, it is only the increase in the capital value, if that is less than the cost of the works, which will have an influence on the measure of the beneficial interest whether that is a designated or proportional share in the property as a whole or the subject of a charge over the property - ***Brickwood v Young & Minister for Public Works (NSW)*** (1905) 2 CLR 387; ***Re Byrne*** (1906) 6 SR (NSW) 532, and ***Noack v Noack*** [1959] VR 137 and the same principle applies in the case of beneficial co-interests - ***Ryan v Dries*** [2003] ANZ Conv R 47 (CA of NSW) and ***In Re Pavlou (a Bankrupt)*** [1993] 1 WLR 1046. But such a claim can only be vindicated in proceedings which involve compulsory sale or disposition of the property or otherwise determine the concurrent interests of the parties entitled.

118 There is little evidence in the present case to show that the work on the roof in 1989 effected an appreciation in the capital value of the property but the approach taken by both parties at the trial was that the expenditure was obviously necessary and an advantage to them both and this obviously reflected their readiness to extend the mortgage debt for this purpose at the time. In these circumstances I consider that I should treat the additional $6,470 as being wholly advanced by the bank on the home loan mortgage to finance the roof rebuilding as a capital improvement and part of the acquisition costs contributed by the parties in effect increasing the purchase price to $67,938 ($61,468 + $6,470).

119 Therefore, taking into account the effect of both the $30,000 contribution to the repayment of the mortgage principal by the plaintiff in September 1988 and the subsequent increase of the diminished mortgage balance by $6,470 for the roof rebuilding in February 1989 the allocation of the contributions towards the acquisition of the property by the parties must be revised. In doing so, it is also necessary to note my earlier finding that the amount then left outstanding under the home loan after those two transactions was in the vicinity of $10,000 for which the three borrowers remained responsible. This approach is consistent with that conclusion reached, as it was, by working backwards from the known home loan balance at 30 June 1994.

120 The position therefore was:

Revised costs of acquisition		$67,938
Direct financial contribution by defendant	$28,024	
Direct financial contribution by plaintiff	$30,000	
Outstanding liability under bank loan	$ 9,914*	
(Plaintiff, defendant and Mrs Margaret Sands equally responsible)		
		$67,938

(*This figure of $9,914 for the balance due on the home loan in February 1989 immediately after the cost of the roofing repairs had been paid, is the product of the arithmetical calculation based on all the known costs and capital contributions at that date. As it closely approximates the estimate of $10,000 for that balance made on the earlier approach I consider that it

is the figure which should be accepted as the balance due on the home loan at that time.)

121 The situation, therefore, in early 1989 was that both the plaintiff and the defendant, and Mrs Margaret Sands as well, remained liable to the ANZ Savings Bank on the home loan in the amount of about $9,914 so that their individual contributions arising from the ANZ Savings Bank have been reduced to $3,305. This left the aggregate contributions by the three parties as being:

(a) Defendant	$31,328
(b) Plaintiff	$33,305
(c) Mrs Margaret Lucy Sands	$ 3,305
	$67,938

Accordingly, I conclude that at this date and from then on the beneficial interests in the land were held by those three persons in those proportions.

122 The continuation of the mortgage instalment repayments which were made from 1988 until the cessation of the cohabitation after the initial separation in June 1993 was made from the pooled funds of the plaintiff and the defendant or, after the R & I Bank loans were incurred in a manner which reflected the equal pooling of resources for the discharge of those new liabilities as well, and consequently, does not alter the beneficial interests.

123 The fact that the capital outstanding on the loan was reduced slightly between 1989 and the final separation in about May 1994 does not, in my view, alter the position either. Not only was the outstanding principal due under the home loan slowly reducing but the principal due under the R & I Bank "Easy Loan" was also being repaid. The determination of the extent of the beneficial interest of the contributors to the acquisition of the property by the amount of their contributions establishes their shares or proportionate interests which will thereafter apply regardless of the amount outstanding under the home loan from time to time or the changing market value of the property. Had the position been reached that the debt due to the ANZ Savings Bank under the home loan had been fully repaid that would have terminated the equitable beneficial interest in the property held by Mrs Margaret Sands for the reasons already given.

The R & I Bank loan

124 The case presented by the plaintiff effectively involves the further proposition that, as a result of an arrangement reached between the parties at the time of separation in 1994 (or 1995 as I have found to be the date of final separation), the plaintiff took over the liability for the R & I Bank loan and the defendant assumed the sole responsibility for the repayment of housing loan, the outstanding balances on each in June 1994 being about $8,500 and for which both parties were equally liable. By doing so it was submitted that the plaintiff had fully discharged any further liability which he may have had to the defendant in respect of the home loan. As a matter of settling financial accounts between the plaintiff and the defendant one may accept that that is the case and indeed the fact that the parties have acted consistently since then on that basis is strong evidence that they have treated any mutual obligations to account to each other in respect of these two liabilities as being discharged for that reason.

125 I consider that I should accept that the parties have settled their mutual rights to account to each other in respect of their liabilities to these two creditors on this basis. However, that does not mean that this has effected any further variation in the extent of the beneficial interests held by them and Mrs Margaret Sands in 26 Essex Street. While there were mutual obligations for the plaintiff and the defendant to account to each other in respect of the liability outstanding under the second R & I Bank loan at the time of separation it remains the fact that none of the proceeds of either of the two R & I Bank loans was ever shown to have been applied towards the cost of 26 Essex Street or to the reduction of the principal on the home loan mortgage. Consequently, whatever the mutual liabilities between the parties may be arising from the R & I Bank loan, the existence of that loan and its discharge by the plaintiff has no significance upon the nature and extent of the parties' beneficial interests in the house and land.

Post May 1995/borrowings on the home loan by the defendant

126 The three subsequent advances by the ANZ Savings Bank Ltd to the defendant on the security of the home loan have already been noted. They have the effect of increasing the liability under that loan which stood at about $8,500 or less at the date of final separation to $47,256.34 by December 2001. Those are advances which were obtained and applied by the defendant for her own purposes which have not been shown to have been related to capital improvements on the house and land or for the reduction of the mortgage principal. As between all the co-owners of beneficial interests in the property, I consider that those liabilities must be

regarded as being drawn and chargeable against the defendant's beneficial interest in the land.

127 The consequence of this conclusion is that I should continue to treat the principal due under the home loan for which all beneficial owners remain equally responsible as being the $9,914 which I have concluded which was the approximate balance outstanding in February 1989.

128 As the property will need to be sold (unless the defendant is able to pay out the plaintiff the extent of his equitable interest at current date), I consider that the first $9,914 of the net sale proceeds should be charged equally against each of the parties' beneficial interests in the land and paid to the ANZ Savings Bank. The remaining balance of the net proceeds of a sale should be allocated between the parties and Mrs Margaret Lucy Sands as follows:

(a)	Plaintiff	a 31,328/67,938 share
(b)	Defendant	a 33,305/67,938 share
(c)	Mrs Margaret Lucy Sands	a 3,305/67,938 share
		67,938/67,938

129 The balance outstanding to the ANZ Savings Bank under the home loan should then be debited entirely to the defendant's interest in the property, reflecting the fact that it was borrowed by her and applied for her purposes.

130 Since the final separation in May 1995 the defendant continued to reside at 26 Essex Street for some time but later moved to other premises occasionally returning to Essex Street for periods which were never precisely established. Her evidence was, and I accept it, that since 1994 she has met all the mortgage repayments and other recurrent expenditure for rates, water use, electricity and so on in respect of the premises.

131 The defendant gave evidence that the premises have never been leased or rented and that she has derived no income in any other way arising from the use of the property over that time. She has, of course, had the benefit of the sole occupation of the home for those periods during which she lived there and she has had and retained the option of living there during periods when the property was vacant.

Accounting between parties

132 The foregoing examination of the contributions which the parties made to the acquisition of 26 Essex Street has resulted in findings which resolve the issues about the existence and extent of the beneficial interests of the contributors arising from the acquisition of the property. These will allow declarations to be made as to the extent of those interests and the shares in which the proceeds of any sale of the property should be distributed after allocations have been made for the outstanding balance on the ANZ Savings Bank loan. They do not, however, take into account changes in the pattern of repayments of the home loan or the discharge of other expenses associated with the ownership of the land which have occurred since David Silvester stopped making contributions at the time of the initial separation in 1994.

133 The evidence on both sides has been that since that separation the plaintiff did not contribute to the home loan repayments or to other expenditure associated with the property which, from that date on were met entirely by the defendant assisted to some extent by her mother. In evidence, the plaintiff said that he had stopped making such payments from mid-1993, the date which he said was the beginning of the first lengthy separation. However, I have concluded that the plaintiff is probably mistaken about the timing of that episode and the final separation occurred in about May 1995 and the initial separation in mid-1994. It is for that reason that I select the end of June 1994 as being the point at which the plaintiff ceased making contributions to the repayment of the home loan and other expenses associated with the maintenance and use of Essex Street.

134 This change in the pattern of the repayment of the home loan after June 1994 does not alter the extent of the beneficial interests in the property by the parties or by Mrs Margaret Sands. It does mean, however, that on an accounting between the co-owners of the beneficial interests there may be an adjustment necessary to recognize that the defendant (and Mrs Sands) paid greater shares of these expenses than their proportions of the beneficial interests in the property.

135 This aspect of this case is made difficult by the fact that, in the pleadings and at the trial the defendant has treated the additional payments which she claims to have made for the home loan repayments and other expenses such as rates, both before and after 1995, as confirmation of her assertion that she is entitled both to the legal interest and the entire beneficial interest in the property. There is no claim by way of set-off or

counterclaim by the defendant for any account to be taken for the effect of this alleged unequal expenditure and her case was not presented on the footing that, if contrary to the defendant's submission that she retained the entire legal and beneficial interest in the property, there was to be a determination recognizing that the plaintiff had an ascertainable beneficial interest then he should be charged with, or required to account in respect of, the home loan repayments and other expenditures such as rates which she met from 1994 onwards.

136 Despite this, the defendant did plead that at various times, and particularly after mid-1995, she and her mother paid all the home loan repayments and similar expenses in relation to the property and gave particulars of the actual or estimated expenditure so outlaid (see defence par 5 and Schedules "A" and "B"). There was evidence given by the defendant about some, but not all, of this expenditure. The expenditure so alleged comprises: home loan repayments; home insurance premiums; council rates; water rates; the cost of installation of underground power; and various repair and maintenance costs including lawn mowing, carpet cleaning and plumbing repairs. The total of the expenditure alleged to have been met by the defendant for the period mid-1995 to the end of 2001 is $20,462. By par 5 of the defence and Sch "A" the defendant alleges that she made all the home loan repayments during the period 1986 to 1994 and that she also paid all the home insurance premiums, council rates and that her mother paid all the water rates from 1986 to 1992 inclusive except that she herself made the payment for 1994. In respect of all this expenditure for the 1986 to 1994 period (except the home loan repayments), the alleged expenditure is estimated only with no proof being offered.

137 I have already concluded that on the basis of the evidence presented, all the household expenses, including the home loan repayments, were met from a pool of the incomes of the plaintiff and the defendant from before December 1986 until the beginning of the long separation in mid-1994. This conclusion is not altered by the fact that the home loan instalments were transferred from the defendant's ANZ cheque account month by month or fortnight by fortnight because the combination of the parties' incomes simply meant that all living and accommodation expenses were shared. While I appreciate that the defendant also maintains that she and/or her mother paid the council rates and water rates at all times up to and including mid-1994, there is no direct evidence to support this and that is not accepted by the plaintiff. If there is to be an account or other relief granted in respect of a balance due on the limited accounting that can be undertaken on the present evidence, I consider that there is an onus

upon the defendant to establish that she paid a disproportionate share of the expenses and, in relation to the period up until late June 1994, that burden of proof has not been discharged.

138 I do not regard the fact that there has been no pleaded set-off or counterclaim for an account or for allowances for expenditure on repairs, improvements or home loan repayments after June 1994 as fatal to the defendant's position in this respect. The claim which the plaintiff is asserting for a declaration as to the extent of his beneficial interest in 26 Essex Street and for other relief is a claim in equity and it follows that the plaintiff must be prepared to do equity and submit to terms which give effect to equitable interests or equities of the defendant. Furthermore, the plaintiff has expressly claimed by his prayer for relief as one alternative, a declaration that he is "entitled to [such] other share in the proceeds of the sale of the property as the court deems fit", so expressly raising the issue of a claim, not only to a share of a designated beneficial interest in the property but to such a monetary amount of the proceeds of sale as is justified in all the circumstances.

139 It is therefore necessary to examine the principles which apply to claims for an account or an allowance in respect of improvements, mortgage repayments, repairs and other like expenditure on property as between beneficial co-owners. These have been examined extensively in ***Ryan v Dries*** (*supra*) and in ***Oxley v Hiscock*** [2004] 3 All ER 703 CA although it may be that the current English approach gives greater recognition to non-pecuniary contributions than has been accepted in this country.

140 In an instance where the beneficial ownership of a property is shared between two people, either husband or wife, co-habitees or others, and one leaves, with the remaining co-owner continuing or taking over mortgage repayments and the responsibility for repairs and improvements, there can be an account taken in equity between those parties. For the paying party to recover an allowance for any appreciation in the value of the capital asset because of these outgoings it is necessary to prove that the expenditure has, in fact, produced an ascertainable increase in the capital value as, for example, in the case of a renovation which has enhanced the market value of a house or, in relation to the repayments of a mortgage where the repayments have effected an ascertainable reduction in the principal previously owing under the mortgage. In the absence of proof of an increase in capital value so caused, no recovery because of unrelated appreciation in value will be possible and the parties are left to hold the property, or share the proceeds of any sale, on the basis of their

established beneficial interests, usually, but not always, arising from the extent of their contributions towards the costs of its acquisition. Such a claim, where it exists, will only be available in certain designated proceedings which, include a partition suit or a claim for a compulsory sale or in other proceedings which involve a termination of the proprietary interests of the co-owners whether those interests be legal or beneficial.

141 Then there is the category of payments which do not directly enhance the capital value of the asset such as for the interest component under a mortgage or other outgoings necessary for the preservation of the property such as repairs, minor improvements and the payments of rates, taxes and other expenses deriving directly from ownership. Often there will be a situation where one of the co-beneficial owners vacates the premises and leaves the other in occupation who, staying on, through choice or necessity continues to meet the mortgage repayments, rates, taxes and other like expenditure. In that situation a remaining co-owner or co-beneficial owner may be entitled to recover a contribution, proportionate to the departed co-owner's beneficial interest in the property, to the mortgage repayments, rates, taxes and like expenditure but, in such cases, the person claiming a contribution or an account will be chargeable with an occupation rent in respect of the period in which he or she continued to enjoy sole possession of the premises - ***In Re Pavlou (a Bankrupt)*** (*supra*) at 1049 - 1050. In some cases a court may simply set-off the payment of expenditure by the continuing occupant against the occupation rent as a matter of convenience but a strict accounting can be demanded by the parties - ***In Re Gorman (a Bankrupt)*** [1990] 1 WLR 616 at 626. In this regard, Hodgson JA said in ***Ryan v Dries*** (*supra*) at [61]:

> "There seems little question about the broad principle applicable in this situation: a co-owner of property who has exercised the right to occupy the property is not liable to be charged with an occupation rent unless he or she (1) has excluded the other co-owner from occupation or (2) is claiming an allowance for expenditure in respect of the property: see *Luke v Luke* (1936) 36 SR(NSW) 310. If an allowance for expenditure is claimed, then, by reason of the maxim requiring the seeker of equity to do equity, the claimant can be charged with an occupation rent up to a limit of the amount allowed for the claim for expenditure: see *Teasdale v Sanderson* (1864) 33 Beav 534; 55 ER 476; *Brickwood v Young* (1905) 2 CLR 387."

See also ***Forgeard v Shanahan*** (1994) 35 NSWLR 206 per Meagher JA at 221 - 222 and ***Biviano v Natoli*** (1998) 43 NSWLR 695 CA per Beazley JA at 700 - 704.

142 On the evidence in the present case it is apparent that during the interval between June 1994 (when the plaintiff stopped making contributions to the home loan repayments and other expenditure) and October 1995 (when the defendant made a drawing on the mortgage for her own purposes), the mortgage principal was reduced from $8,577 to $7,491 effectively repaying $1,086 of principal. Since then, mortgage repayments have continued to be made by the defendant but in respect of a much larger mortgage debt because of the three advances which she has applied to her own purpose taking the balance in 2001 to more than $47,000. All that can be said is that the mortgage repayments which have since been made by the defendant have not resulted in any reduction of the principal due on that loan as it stood in October 1995 when she began to make other borrowings for her own purposes. There has been interest accruing on the balance of the debt as it stood in October 1995 which, no doubt, has been met by parts of the subsequent instalments paid by the defendant but this cannot be quantified in the evidence available and, is likely, in my view, to be only of modest dimension. In my view, the repayments which have been made since October 1995 should be treated as having been applied very largely in reduction of advances obtained and used solely for the defendant's benefit.

143 Among the other expenditure said to have been incurred by the defendant in respect of Essex Street from 1995 onwards are lawn mowing, gardening and minor repairs, in all totalling $3,236 (lawn mowing, gardener, carpet steam cleaning, taps, locks and side fence). No proof of these payments was offered and I am not able to make any finding that the amounts claimed or any other amounts were incurred in this respect. There is also a claim for $511, said to have been outlaid for underground power in 1999 but, again, there was no evidence to support that and this claim must share the same fate.

144 There was no evidence adduced or any submission to the effect that those items of expenditure effected any, or any ascertainable, appreciation in the capital value of Essex Street. In fact the valuation evidence was to the contrary in that the market value of the property was attributed as due solely to the land on the basis that the house and improvements were of such an age and condition that in the event of a sale they would almost certainly be demolished and a new home erected on the vacant site.

145 That leaves the defendant's plea that council rates (estimated at $1,637) and water rates (estimated at $1,875) and more since had been paid by herself or her mother during the period 1995 to 2001. There was no proof of the amounts of these payments, although I am prepared to infer that council rates and water rates were paid annually from time to time and, if not paid, would result in debts chargeable against the land. I therefore accept that the defendant, and possibly her mother, Mrs Margaret Sands, would have a claim against the plaintiff for a contribution to such proportions of that expenditure as are reflected by his proportionate beneficial interest in the land but this simply cannot be quantified.

146 Consequently, the defendant has shown a *prima facie* claim for an allowance for the reduction in the principal of the home loan was achieved by her payments between June 1994 and October 1995 ($1,086) and an arguable claim to a contribution, proportional to his beneficial interest, from the plaintiff to the council rates and water rates incurred since then. If appropriate, it would be possible to order an inquiry to ascertain the extent of this expenditure so that the amount due on such an account could be quantified.

147 Against this, however, the defendant remained in possession of Essex Street from June 1994 (during the separation), and then again after May 1995 for several years. She left the premises vacant for subsequent periods since then but has been in occupation at other times. For the whole of the period from May 1995 to the present she has been entitled to the possession of the premises. Because she seeks a contribution from the plaintiff to the expenses which I have identified in the preceding paragraph, I consider that she should be obliged to pay an occupation rent for some or all of that period after May 1995.

148 No claim in this respect was advanced by the plaintiff and there is no evidence upon which any acceptable estimate of a market rent for the premises could be based or upon which an assessment of mesne profits could be justified. However, the exclusive possession of the premises by the defendant has lasted for over nine years and any assessment of an occupation rent or mesne profits over that period, even at extremely modest rates, would very probably exceed the maximum which the defendant could advance as the balance due to her after an account for home loan repayments since June 1994 and for rates, taxes and insurance premiums paid on the premises. Therefore, in these particular circumstances, because of the absence of any formal claim, the extremely scant evidence available on the issues, and the high probability that a

claim for any balance due on an account would be extinguished by a charge against the defendant for an occupation rent, I consider that I should follow the precedent of simply setting the defendant's payments in this regard off against an occupational rent and leave it at that which is what I have decided to do. There does not appear to me to be any significant prejudice to either party in adopting this course and there is much to be said for bringing this litigation to an end and avoiding the effort and expense of further proceedings or investigations which are most unlikely to lead to any significant measure of relief in favour of the defendant against the plaintiff or vice versa.

Sale of Essex Street

149 In addition to seeking declarations as to the extent of his entitlement to a beneficial interest in the house and land at 26 Essex Street the plaintiff seeks orders that the property should be sold under the provisions of s 126 of the *Property Law Act (1969)* and for orders for the distribution of the proceeds of sale.

150 There is obviously a need to resolve this long-running impasse arising from the plaintiff's claim for an interest in the property and as I am satisfied that the plaintiff has demonstrated that he has a significant equitable interest in the property and as there is no prospect of it being used by himself and the defendant as a home for them both or for any other joint purpose, I consider that unless the plaintiff's claim can be satisfied by a money payment by the defendant or vice versa, the property will have to be sold and the proceeds of sale distributed in accordance with the declarations which I will make about the extent of the equitable interests and the liability of the parties to discharge the loan secured by the mortgage to the ANZ Savings Bank.

151 However, I consider that I should allow both the plaintiff and the defendant an the opportunity to purchase the interests of the others in the property by paying them out in cash for their proportion of the current market value of the property if willing and able to do so. On the evidence as it emerged at trial it seems most unlikely that either the plaintiff or the defendant would be able to raise the money to discharge the equitable interests of the others in the property but I consider that they should be granted a period of 90 days within which to explore that possibility and to make an unconditional offer to purchase the others' interests at an agreed or determined price. If no agreed price can be settled on by the parties but one is still willing and able to purchase the others' interests, I am prepared to order that a valuation of the current market value of the property be

undertaken in order to strike a price at which the outstanding interests can be purchased. However, failing this or any other solution it will be necessary for the property to be sold and the proceeds to be distributed in accordance with these reasons.

152 I note that the plaintiff sought interest under s 32 of the *Supreme Court Act (1935)* upon his claim. But there is no money judgment resulting in this case and no occasion to award interest. In any event the value of the land has been appreciating since 1995 and that capital growth will be realised when the property is sold or the plaintiff's interest purchased. In that case there is no basis to entertain any claim for interest under the Act.

153 I propose to deliver these reasons for judgment and adjourn motions for judgment to allow the parties to consider these reasons and to make further application, if so advised, for the precise declarations and orders which should be made to give effect to this decision or any other resolution of this action consistent with this decision or agreed by the parties.

154 In this case it has been necessary for me to consider the extent of the interest in the property held by Mrs Margaret Lucy Sands and the decision reached includes a conclusion that she retains a small equitable interest in the property to secure any right of indemnity which might arise. However, Mrs Sands is not a party to these proceedings and no claim to any interest on her behalf has been made or formally adjudicated upon. The conclusions which I have reached in relation to the position of Mrs Margaret Lucy Sands, therefore, are binding only upon the plaintiff and the defendant and not upon Mrs Sands. They must be accommodated by the plaintiff and the defendants, as it has been necessary to reach these conclusions in order to determine their rights as plaintiff and defendant.

Conclusion

155 For these reasons I consider that the court should order and declare that:

(1) The defendant, Jillian Kathleen Sands, is the registered proprietor of an estate in fee simple in the house and land situate at and known as 26 Essex Street, Wembley, but that the beneficial interest in that land is held by her for the following persons and in the following shares; namely

(a) for the plaintiff David Brian Silvester to the extent of a 33,305/67,938th share; and

(b) for the defendant Jillian Kathleen Sands to the extent of a 31,328/67,938th share;

(c) for Mrs Margaret Lucy Sands to the extent of a 3,305/67,938th share but that this share of Margaret Lucy Sands is held by her to secure a right of indemnity which she has against the plaintiff and the defendant for the recovery of any amounts which the said Margaret Lucy Sands may be required to pay to the ANZ Savings Bank in discharge or reduction of home loan No 4238-05716 from that Bank for which she is co-borrower with the plaintiff and the defendant and which is secured by mortgage No D373536 registered against that land but upon the repayment of the whole of the balance outstanding on that loan to the bank this interest on the said Margaret Lucy Sands shall be transferred to the plaintiff and the defendant, as between them in the proportions 33305:31328 respectively, thereby increasing their present beneficial interests to those extents.

(2) That the parties shall have 90 days from the date of this judgment within which either may purchase the interest of the other and of Margaret Mary Sands in the land at an agreed price, or, in the absence of agreement for a price to be determined by a valuation conducted in a manner approved by the court but, otherwise, upon terms requiring payment in cash of the agreed or determined purchase price within 28 days of the acceptance of the offer to purchase or the date of determination of the purchase price by any valuation approved by the court.

(3) The parties have liberty to apply for directions concerning any process of valuation of the house and land at 26 Essex Street necessary in order to lead to a sale of the interest of the plaintiff or the defendant at such a valuation or, generally, in relation to the terms of any sale.

(4) The amount required to repay the balance due to the ANZ Savings Bank in respect of mortgage D373536 registered upon the land to secure home loan No 4238-05716 owing by the plaintiff, the defendant and Mrs Margaret Lucy Sands shall, as between the plaintiff and the defendant, be chargeable against their beneficial interests in the land or the proceeds of any sale as follows:

(i) the amount of $9,914 shall be charged against the beneficial interests of the plaintiff and the defendant (to the exclusion of Margaret Lucy Sands) and as between them in the proportions 33305 as to 31328;

(ii) the balance of the indebtedness under the loan secured by that mortgage entirely against the interests of the defendant Jillian Kathleen Sands.

(5) Liability in respect of further encumbrances registered against the title to the land shall be met as follows:

(a) a liability to the R & I Bank of Western Australia Ltd under mortgage F113394 registered on 18 February 1993 shall be chargeable solely against the beneficial interest of the plaintiff;

(b) a liability under mortgage G32460 to the Australian and New Zealand Banking Group Ltd registered on 17 November 1995 shall be chargeable solely against the beneficial interest of the defendant.

(6) (a) In the event that there is no purchase by the plaintiff or by the defendant of the others' beneficial interests in the subject land within the 90 day period fixed by the court (or any longer period which may be approved) the whole of the land shall be sold and the net proceeds of the sale, after deduction of all proper sellings expenses and the discharge of registered encumbrances, shall be distributed between the plaintiff and the defendant in accordance with their beneficial interests as now declared by the court.

(b) In that event the plaintiff shall have the carriage of the sale which may be conducted by public auction or private sale through an agent or agents selected by the plaintiff (or in the case of objection by the defendant to be approved by the court) subject to such terms and condition as may be fixed on application to the court.

(7) There be liberty to the parties to apply.