FEDERAL COURT OF AUSTRALIA

Micheletto (Trustee), in the matter of the El-Debel (Bankrupt) v El-Debel [2020] FCA 1031

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| File number: | NSD 1972 of 2019 |
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| Judge: | **GLEESON J** |
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| Date of judgment: | 23 July 2020 |
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| Catchwords: | **BANKRUPTCY** – application by trustees in bankruptcy for declarations pursuant to s 31 of the *Bankruptcy Act 1966* (Cth) (**Act**) – whether bankrupt had beneficial interests in four properties which vested in the trustees in bankruptcy pursuant to s 58(1)(a) of the Act - where bankrupt made financial contributions to the purchase of four real properties – where legal title to properties variously held by family members and related company – whether intention was for bankrupt to retain beneficial interest in properties – bankrupt found to hold beneficial interests in properties in various proportions giving rise to proprietary interests held by trustees for the benefit of the bankrupt’s creditors  **TRUSTS** – resulting and constructive trusts – whether presumption of resulting trust arose where bankrupt made financial contributions to the purchase of four real properties – where legal title to properties variously held by family members and related company – whether intention was for bankrupt to retain beneficial interest in properties – whether *Jones v Dunkel* inference should be drawn in relation to failure to call respondents as witnesses – bankrupt found to hold beneficial interests in properties in various proportions reflecting financial contributions to acquisition by operation of resulting trust |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 31, 58, 116, 121 |
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| Cases cited: | *Black Uhlans Incorporated v New South Wales Crime Commission* [2002] NSWSC 1060  *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242  *Carter v Brine* [2015] SASC 204  *Cooper v Hobbs* [2013] NSWCA 70  *Derek Rowan Andrew as Trustee for Estate of Colin George Ward (Deceased) v Zant Pty Ltd* [2004] FCA 1716  *Foundas v Arambatzis* [2020] NSWCA 47  *Jain v Amit Laundry Pty Ltd* [2019] NSWCA 20  *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298  *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361  *Lucas v Lucas* [2018] NSWSC 962  *Staatz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq) (No 3)* [2019] FCA 924; 138 ACSR 231  *Tonna v Mendonca* [2019] NSWSC 1849  *Trkulja v Markovic* [2015] VSCA 298; (2015) 49 VR 402  *Varma v Varma* [2010] NSWSC 786 |
|  |  |
| Date of hearing: | 4 – 6 February 2020 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 237 |
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| Solicitor for the Applicants: | ERA Legal |
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| Counsel for the First, Second, Third and Fifth Respondents: | D Allen |
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| Solicitor for the First, Second, Third and Fifth Respondents: | Avondale Lawyers |
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| Counsel for the Fourth Respondent: | F Corsaro SC |
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| Solicitor for the Fourth Respondent: | Darby Jones Lawyers |

ORDERS

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|  | | NSD 1972 of 2019 |
| IN THE MATTER OF THE BANKRUPT ESTATE OF BACHAR EL-DEBEL | | |
| BETWEEN: | FABIAN KANE MICHELETTO IN HIS CAPACITY AS JOINT AND SEVERAL TRUSTEE IN BANKRUPTCY OF THE ESTATE OF BACHAR EL-DEBEL  First Applicant  MICHAEL CARRAFA IN HIS CAPACITY AS JOINT AND SEVERAL TRUSTEE IN BANKRUPTCY OF THE ESTATE OF BACHAR EL-DEBEL  Second Applicant | |
| AND: | BACHAR EL-DEBEL  First Respondent  FATME EL-DEBEL  Second Respondent  RONIA AYAD (and others named in the Schedule)  Third Respondent | |

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| JUDGE: | GLEESON J |
| DATE OF ORDER: | 23 July 2020 |

THE COURT ORDERS THAT:

1. The parties endeavour to agree on and file agreed draft final orders giving effect to these reasons by Monday 3 August 2020.
2. In the event that the parties are unable to agree, the proceeding be listed for argument as to final orders on Wednesday 12 August 2020 at 10:15 am, or such other date as is convenient to the Court and the parties.
3. Liberty to apply on 48 hours’ notice.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GLEESON J:

1. The applicants, the **trustees** in bankruptcy of the bankrupt estate of the first respondent (**bankrupt**), seek relief under the *Bankruptcy Act 1966* (Cth) (**Act**) in connection with the following four parcels of land:
2. 20/71-75 Meredith Street, Bankstown, New South Wales being the whole of the land contained in Certificate of Title with folio identifier 20/SP34386 (**Bankstown property**) ;
3. 7 Booragul Street, Beverly Hills, New South Wales being the whole of the land contained in Certificate of Title with folio identifier 888/13705 (**Beverly Hills property**);
4. 1/49 and 5/49 Stanley Street, Peakhurst, New South Wales being the whole of the land contained in Certificates of Title with folio identifiers 1/SP81460 and 5/SP81460 (**Peakhurst properties** and, respectively, the **first** and **second Peakhurst properties**).
5. The trustees contend that the bankrupt made financial contributions to the purchase of these properties, giving rise to proprietary interests held by the trustees for the benefit of the bankrupt’s creditors.
6. Originally, the trustees sought declarations pursuant to s 31(f) of the Act that each of the four parcels of land is property divisible among the creditors of the bankrupt pursuant to s 116 of the Act and vested in the trustees pursuant to s 58 of the Act. In closing submissions, the trustees amended their claims to cover the following interests:
7. the whole beneficial interest in the Bankstown property;
8. the whole beneficial interest in the Beverly Hills property;
9. a 50% interest in the first Peakhurst property; and
10. a 43% interest in the second Peakhurst property.
11. By s 31(f) of the Act, in exercising jurisdiction under the Act, the Court is required to hear and determine in open Court, applications for or against the title of the trustee to any property within the meaning of the Act.
12. By s 116(1)(a), subject to the Act, all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy is property divisible amongst the creditors of the bankrupt. By s 116(2)(a), s 116(1) does not extend to property held by the bankrupt in trust for another person.
13. By s 58(1)(a) of the Act, subject to the Act, where a debtor becomes a bankrupt, the property of the bankrupt, not being after-acquired property, vests, relevantly, in a registered trustee who becomes the trustee of the estate of the bankrupt by virtue of s 156A.

# Trustees’ case

1. The trustees’ case starts with events in early 2015.
2. On 14 April 2015, a judgment was entered against the bankrupt in District Court of New South Wales proceedings in the sum of $583,490.57. The Court’s record of the judgment notes that a controlling trustee had been appointed that morning and the bankrupt’s solicitor was granted leave to withdraw from the proceeding.
3. The trustees contend that, by early 2015, the bankrupt was in financial trouble. In response to that situation, according to the trustees, the bankrupt hatched a plan to conceal his assets from his creditors. The plan was said to involve four elements, which may be summarised as follows:
4. The bankrupt would divest himself of his legal interest comprising a 1/100 share in the Bankstown property.
5. He would remove himself from involvement with the Fallow Investments Trust (**Trust**), a trust operated by the fourth respondent (**Fallow**), including by fabricating documents consistent with that aim.
6. He would cause his mother, the second respondent, Fatme El-Debel (**Mrs El-Debel**), to borrow money secured by the Bankstown property so that he could buy the Beverly Hills property in the name of the third respondent, Ronia Ayad (**Ms Ayad**).
7. He would “install” other people to operate the company through which he conducted his business as an electrician and use his children’s bank accounts to conceal cash generated by that business.
8. According to the trustees, by the first three elements of this plan, the bankrupt attempted to conceal his beneficial interests in each of the four properties.
9. I accept that the bankrupt formed a plan to conceal his assets in early 2015. This was a plan that he shared with, at least, Ms Ayad. The plan was reflected in an email sent on 19 March 2015 by the bankrupt to his accountant, Mr Rajani, and copied to Ms Ayad. The email stated:

Sorry for the delay, was waiting on Legal advice on how to proceed

As discussed in the emails below

…

Also as discussed, confirming this will make us invisible to anyone searching for my properties

We will move everything back to my wife once we have completed everything, probably 3 months maximum

…

1. The “emails below” make it clear that the bankrupt was seeking to change his relationship with Fallow. At the time, Fallow held the legal title to the Peakhurst properties. I infer that, by the changes (which involved removing the bankrupt as a director and shareholder of Fallow), the bankrupt sought to conceal his interests in the Peakhurst properties.
2. Surprisingly, in the light of his December 2015 bankruptcy, in September 2015, the bankrupt seemed to have contemplated a return of his assets, writing to Mr Rajani:

I am now in the process of preparing to transfer my interests in Fallow Investments back to myself or my wife.

What do we need to do to start the ball rolling ??

1. This later email supports the finding that the bankrupt had earlier executed a plan to conceal his “interests in Fallow Investments”.
2. Consistent with the trustees’ case, the bankrupt took steps, between March and May 2015, to transfer the legal title in the Bankstown property from the bankrupt and Mrs El-Debel to Mrs El-Debel alone. This transaction led to the following immediate consequences:
3. Arrangements were made with the real estate agent who managed rental of the property to record that the property was now “in Mrs El-Debel’s name”, as Ms Ayad put it in her communication to the real estate agent on 5 May 2015. Previously, the bankrupt and Ms Ayad had been identified as the landlord of the property. Rental income from the property, which had been paid into an account opened in the name of a child of the bankrupt as late as 31 March 2015, commenced to be paid into an account opened in the name of Mrs El-Debel.
4. Loan funds obtained, ostensibly by Mrs El-Debel, were used to refinance the loan previously obtained to purchase the Bankstown property, and to obtain approximately $200,000 which later contributed to the purchase price for the Beverly Hills property.
5. I also accept that the bankrupt’s plan extended to acquiring the Beverly Hills property while concealing his interest in that property by procuring Ms Ayad to hold the legal title to the property. That conclusion is supported by the steps taken during May 2015 to acquire the Beverly Hills property and by Ms Ayad’s destruction of documents concerning the acquisition of the property.
6. As explained below, I accept that the bankrupt was the sole beneficial owner of both the Bankstown property and had a 90% beneficial interest in the Beverly Hills property at the commencement of his bankruptcy. I also accept that the bankrupt held interests in the Peakhurst properties at the commencement of his bankruptcy, as claimed by the trustees.

# Background facts

## Bankrupt

1. The bankrupt is an electrician by trade and is 43 years of age. He was previously made a bankrupt on 9 July 2004 and discharged from bankruptcy on 19 November 2007.
2. The bankrupt is the son of Mrs El-Debel and is or has been the de facto spouse of Ms Ayad. Together, the bankrupt and Ms Ayad have four children.
3. On 1 December 2015, a sequestration order was made against the estate of the bankrupt and the trustees were appointed the joint and several trustees in bankruptcy of the bankrupt’s estate.
4. The 2015 bankruptcy was preceded by a personal insolvency agreement entered into by the bankrupt on 13 April 2015, under Part X of the Act. The agreement identified Aaron Lucan as controlling trustee.
5. In his report to creditors dated 15 May 2015, Mr Lucan stated that the bankrupt attributed his insolvency to adverse legal action relating to liabilities due to guarantees. The debts related largely to guarantees entered into as a director of TPS Group Pty Ltd (**TPS Group**) and 3 Phase Pty Ltd (**3 Phase**), both of which were then in liquidation. Mr Lucan’s investigations indicated that costs associated with defending legal proceedings and the outcome of those proceedings were the “main cause of bankruptcy”.
6. The bankrupt also:
7. is or was a director and shareholder of Fallow. Until 29 December 2015, the bankrupt was a signatory to Fallow’s bank account styled “Business Transaction Account” with the Commonwealth Bank of Australia (**CBA**);
8. since 15 September 2014 has been a signatory to operate the bank account styled “Business Transaction Account” with the CBA held by the fifth respondent (**Jacgab**).
9. was a director and shareholder of Lelebad Pty Ltd, a company that is now de-registered (**Lelebad**);
10. was the sole director, secretary and shareholder of 3 Phase, a company that is now de-registered;
11. was a director, the secretary and the sole shareholder of TPS Group, a company that is now also de-registered;
12. was employed by TPS Group Services Pty Ltd (**TPS Group Services**), a company registered on 29 July 2014. The evidence included an employment agreement between TPS Group Services and the bankrupt dated 1 October 2014. A search dated 30 October 2019 shows that the bankrupt’s contractor licence is the sole “associated licence” in respect of this company, and that the bankrupt is the sole “nominated supervisor” in respect of the company.
13. The bankrupt did not give evidence. However, the evidence in the proceeding included a transcript of evidence given by him at a public examination on 24 June 2019 as well as various documents that appear on their face to be communications from him and other records of communications between the bankrupt and various third parties. During his public examination, the bankrupt gave evidence that he had lied on several occasions, ultimately claiming “I’m an habitual liar, I guess”.

## Mrs El-Debel

1. Mrs El-Debel:
2. was born on 21 September 1945; and
3. since about 1997, has been a pensioner.
4. The bankrupt is one of Mrs El-Debel’s nine children.
5. Mrs El-Debel migrated to Australia from Lebanon in 1977 with her husband. He died in 1989 and thereafter, according to Mrs El-Debel, she commenced working as a seamstress. According to the bankrupt, he was unaware that she had ever worked since her migration to Australia, except to help out with bookkeeping and paperwork for companies of which the bankrupt was a director.
6. Mrs El-Debel gave evidence of various investments in real estate, including the 1990 purchase of a property in Tempe for about $130,000.
7. In 1991, Mrs El-Debel inherited two investment units in Lebanon on the death of her father.
8. Also in 1991, Mrs El-Debel obtained a $40,000 loan using the Tempe property as security. She gifted the loan proceeds to her two daughters.
9. In 1993, Mrs El-Debel sold the Tempe property and received net proceeds from the sale of $80,202.77.
10. In 1993, Mrs El-Debel purchased a property in Leumeah for $114,000 which she sold for $120,000 in 1998 to her son Abdul (also referred to as Majid). Mrs El-Debel claimed that this sale involved a gift to Abdul of about $50,000 by reference to the value of the property in 1998.
11. In about 2001, Mrs El-Debel loaned $100,000 to her son Sammy to purchase a Subway franchise.
12. Mrs El-Debel’s evidence in cross-examination was that she had very few expenses as her family provided for all of her needs including by shopping for her and by giving her amounts of cash. This has been the case since at least the purchase of the Bankstown property at the beginning of 2004.

## Ms Ayad

1. The trustees contended that Ms Ayad is the de facto spouse of the bankrupt. It is not necessary to make a finding as to their present relationship.
2. The parties agree that the bankrupt and Ms Ayad have never married. They have had four children together, born since about 2005.
3. On various occasions, the bankrupt has identified Ms Ayad as his wife, for example, in a statement of affairs dated 5 November 2004.
4. In February 2015, Mr Rajani, an accountant providing services to the bankrupt, sent him an email which identified Ms Ayad as the bankrupt’s wife.
5. In September 2015, the bankrupt also referred to Ms Ayad as his wife in the emails to Mr Rajani referred to in [11] and [13] above.

## Fallow

1. Fallow was incorporated as a company on 15 August 2011, shortly before it became the registered proprietor of the first Peakhurst property.
2. One of the bankrupt’s brothers, Bassam El-Debel (**Bassam**), has been a director of Fallow since 15 August 2011.
3. There are no minutes of meetings of the directors of Fallow and almost no company records.
4. According to an Australian Securities and Investments Commission (**ASIC**) search dated 17 September 2018, the bankrupt was a director of Fallow from 15 August 2011 to 1 October 2014.
5. According to ASIC records, when the bankrupt ceased to be a director of Fallow in October 2014, he was replaced by Omar Rima. This change was the action that the bankrupt apparently expected would achieve the result that “this will make us invisible to anyone searching for my properties”. That appears from the March 2015 email referred to at [11] above, which sets out Mr Rima’s name, date and place of birth, residential address and states: “This took place about 7 months ago”. The bankrupt provided Mr Rima’s details in answer to an email from Mr Rajani which specified “the details I will require to remove you as an officeholder and replace you with your wife (same for the shareholdings)”.
6. A creditor listing for 3 Phase shows that Mr Rima was an employee of that company.
7. The ASIC search shows that there are 100 issued shares in Fallow. It states that Mr Rima owns 50 shares beneficially, while Bassam owns 50 shares non-beneficially. The search records that the bankrupt previously owned 50 shares in Fallow non-beneficially. The transfer of shares to Mr Rima was recorded on 13 April 2015 (the same date as the Part X proposal).
8. According to Bassam, Fallow was registered as a company on his instructions to Mr Rajani, for the purposes of conducting itself as trustee of a family discretionary trust.
9. The evidence included two versions of a document entitled “Fallow Investments Trust”: one apparently in the possession of Avondale Lawyers (who acted for Fallow in about February 2016) and one produced by Mr Rajani in response to an examination summons.
10. Bassam identified the latter as the Fallow Investments trust deed. This document is dated 15 August 2011 and stamped on 13 September 2011. The appointor is Bassam and the settlor is Mr Rajani. The named income beneficiaries in the trust deed are Bassam and the bankrupt. This copy of the trust deed is unsigned.
11. The other version is signed. It is substantially the same as the trust deed produced by Mr Rajani, but the named income beneficiaries are different, particularly in that the bankrupt is not a named beneficiary.
12. On the basis of the trust deed produced by Mr Rajani, I am satisfied that on about 15 August 2011, the Trust was created and that Fallow became the trustee of the Trust. The Trust was established as a discretionary trust so that Fallow could hold the legal title to one or more properties as trustee of the Trust.
13. In closing submissions, the trustees contended that the Trust was a sham. That case was not pleaded and, as senior counsel for Fallow, Mr Corsaro SC, submitted, was not put to Bassam. Ultimately, senior counsel for the trustees, Mr Pesman SC, clarified that it was not necessary to the trustees’ case that the Trust be a sham. Mr Pesman SC noted that Fallow pleaded that the Peakhurst properties are held on trust as a defence to the trustees’ claim that the properties are held on a resulting trust by virtue of the bankrupt’s provision of the purchase price in each case, with the intention that the bankrupt would retain the beneficial interest in the properties.
14. Fallow says that the bankrupt ceased to be a beneficiary of the Trust on 30 September 2014. The evidence included a document entitled “Notice of Cessation” signed by both the bankrupt and Bassam and dated 30 September 2014. By the notice, the bankrupt declared his intention to be removed as beneficiary “from the Fallows Investments Trust dated 15 August 2011”. The notice is stated to be given in accordance with cl 22(b) of the Trust instrument. Bassam states in the notice that he authorises and consents to the removal of the bankrupt as a beneficiary “from the Fallows Investment Trust dated 15 August 2011”. By cl 22(b), each version of the trust deed provides for a beneficiary to remove themselves as a beneficiary of the trust.
15. The date of the “Notice of Cessation” corresponds with the cessation of the bankrupt’s directorship of Fallow according to ASIC records.
16. I accept that the bankrupt ceased to be a beneficiary of the Trust prior to the appointment of Mr Lucan as his controlling trustee.

## Jacgab

1. Jacgab was registered as a company on 29 July 2014. Initially, the company was wholly owned by Ms Ayad. On 19 May 2015, ASIC was notified of the transfer of the shareholding to Mr Rima. On 13 November 2019, ASIC was notified of the transfer of the shareholding from Mr Rima to Ms Ayad.
2. Mr Rima was a director of Jacgab from 29 July 2014 to 26 April 2017.
3. According to ASIC’s records, for a single day on 29 July 2014, Ms Ayad was a joint director of Jacgab. In her defence, Ms Ayad said that she did not consent to that appointment. Since 26 April 2017, Ms Ayad has been recorded in ASIC’s records as the sole director and secretary of Jacgab.
4. A CBA bank account was opened in the name of Jacgab on 15 September 2014. Ms Ayad and the bankrupt were nominated as signatories to the account. On the application form, Ms Ayad nominates herself as a director of Jacgab and the form is accompanied by a company search which shows Ms Ayad as a director of Jacgab since 29 July 2014. The form is marked with the following notation: “Chq’s in the name of TPS Group Services to be accepted as deposits”.
5. At her public examination on 2 September 2019, Ms Ayad said that she was familiar with Jacgab. However, when asked what the company currently does, Ms Ayad said she was “[n]ot sure”. Ms Ayad could not recall why she had transferred her shares in Jacgab to Mr Rima.
6. Later in her public examination, Ms Ayad said that Jacgab was “married together” with TPS Group Services. She was surprised to learn that TPS Group Services had no bank account, saying “I do have an account”. However, Ms Ayad said she would not be surprised to learn that this account was in the name of Jacgab. Ms Ayad then said “Jacgab is also my – mine”.
7. When asked why TPS Group Services uses Jacgab’s bank account for its business, Ms Ayad said “I don’t know. It’s just – I just used it, and I just got into a habit of using it some time”.

## Other companies related to bankrupt

### Lelebad

1. Lelebad was registered as a company on 1 October 1997 and was deregistered on 12 December 2010. A liquidator was appointed to wind up Lelebad on 6 March 2009. The bankrupt was a director of Lelebad throughout the life of the company and held one or two issued shares in the company. In his public examination, the bankrupt agreed that he was the controlling mind of Lelebad.
2. According to his 2004 statement of affairs, the bankrupt operated a business called “Three Phase Services”, which was owned by Lelebad. According to the statement, the business operated from 1 January 1998. There is no particular reason to doubt the truthfulness of these two statements and, accordingly, I accept them.

### 3 Phase

1. The company 3 Phase was registered on 8 February 2008, shortly after the bankrupt was discharged from his first bankruptcy. Administrators were appointed to the company on 11 September 2012, after a winding up application was filed on 31 July 2012. A liquidator was appointed to wind up the company on 11 October 2012. According to an ASIC search dated 4 January 2016, the bankrupt was the sole director and secretary of 3 Phase from the time of its registration to the date of the search, and the sole shareholder of the company.
2. In October 2012, administrators appointed to 3 Phase recorded the following in their report to creditors:

… [T]he Company was making a number of loan repayments each month. The Administrators have been advised by the Director that these payments were made in respect to loans held in the Director’s personal name and not the Company which he contends was part of his employment agreement with the Company.

### TPS Group

1. TPS Group was registered as a company on 21 August 2012, shortly after winding up proceedings were commenced against 3 Phase on 31 July 2012. According to an ASIC search dated 4 January 2016, the bankrupt was a director and the secretary of TPS Group from 21 August 2012 and the sole shareholder of the company. A liquidator was appointed to TPS Group on 10 September 2014.

### TPS Group Services

1. TPS Group Services was registered as a company on 29 July 2014.
2. At her public examination, Ms Ayad stated her occupation as “I own a company, TPS Group Services”. Ms Ayad owns all of the shares in TPS Group Services. Initially, those shares were owned by Jacgab. On 8 March 2017, ASIC was notified of the transfer of the shareholding from Jacgab to Ms Ayad. On 16 May 2017, ASIC was notified of the transfer of the shareholding from Ms Ayad to Sammy El-Debel, one of the bankrupt’s other brothers. On 1 February 2018, ASIC was notified of the transfer of the shareholding back to Ms Ayad, and on 7 March 2019, of the transfer of the shares back to Jacgab.
3. As noted above, the bankrupt was employed by TPS Group Services from about October 2019 until at least April 2019.
4. Ms Ayad has had minimal formal education, and has not completed the High School Certificate. At the public examination, Ms Ayad gave the following evidence:

EXAMINER: After you left school, what did you do? Did you go and do a TAFE course?

MS AYAD: I’ve always been involved in business – family businesses. So since then I’ve been involved in family businesses and my entire family is in construction – and friends. So I’ve always been helping out in business.

…

EXAMINER: All you friends and family are involved?

MS AYAD: My family and friends are involved in business and construction, and I’ve always helped out.

1. Although she professed ownership of TPS Group Services as her occupation, Ms Ayad did not know the gross turnover of the business to the nearest $100,000.00, did not know whether the company had a financial controller and did not know whether TPS Group Services had a bank overdraft facility. Ms Ayad also said that she did not recall how she came to be the owner of TPS Group Services. When asked whether the letters “TPS” signified “Three Phase Services”, Ms Ayad gave the following evidence:

EXAMINER: And do the initials TPS stand for Three Phase Services?

MS AYAD: Not that I – no. That’s just my…

EXAMINER: How did you make the name TPS up?

MS AYAD: TPS. I just came up with it.

EXAMINER: You just plucked three random letters…?

MS AYAD: Yes.

EXAMINER: …out of the atmosphere…

MS AYAD: Yes.

EXAMINER:…and called it TPS?

MS AYAD: Yes.

1. This evidence and Ms Ayad’s evidence concerning Jacgab and TPS Group Services strongly suggests that Ms Ayad was pretending to have knowledge of Jacgab and TPS Group Services, when her knowledge was superficial at best. In the light of the other companies and businesses associated with the bankrupt that had the names “Three Phase Services”, 3 Phase and TPS Group, Ms Ayad’s claim that she made up the name TPS was a blatant lie, intended to conceal or minimise the connection between the bankrupt and TPS Group Services.
2. The evidence also suggests that Ms Ayad was co-opted by the bankrupt to accept formal roles in relation to Jacgab and TPS Group Services, without having much or any substantive involvement. As Ms Ayad volunteered twice, her role was “helping out”. This role is consistent with the trustees’ case that Ms Ayad subsequently acquired the legal title to the Beverly Hills property for the bankrupt in order to conceal his beneficial interest.

# Legal framework for trustees’ case

1. The trustees contended that the four properties were held on trust for the bankrupt at the time of his bankruptcy, to the extent set out above, by reason of his contributions to the purchase of each property.
2. The trustees acknowledged that the burden of proof lies upon them to show that the relevant properties vested in them as a result of the bankruptcy: *Derek Rowan Andrew as Trustee for Estate of Colin George Ward (Deceased) v Zant Pty Ltd* [2004] FCA 1716 (***Zant***)at [20]. However, where all the facts concerning the transactions by which the four properties were purchased are within the knowledge of one or more of the respondents, a “very slight degree of proof should be sufficient to shift that burden”: *Zant* at [20], citing *Re Trautwein; Richardson v Trautwein* (1944) 14 ABC 61 at 75and *Michael v Thompson* (1894) 20 VLR 548 at 552*.*

## Resulting trusts

1. The trustees acknowledged the initial presumption that the beneficial ownership of real property is held in accordance with the legal title: *Foundas v Arambatzis* [2020] NSWCA 47 (***Foundas***) at [47].
2. The trustees’ case is that a presumption of resulting trust arose when the bankrupt provided part or all of the purchase price for each of the four relevant properties. The law as to the existence of a resulting trust was explained in *Black Uhlans Incorporated v New South Wales Crime Commission* [2002] NSWSC 1060 (***Black Uhlans***) at [128] and following. The following propositions are of relevance in this case:
3. A presumption of resulting trust arises where one person provides the purchase price of property, which is conveyed into the name of another person: *Black Uhlans* at [129].
4. Where property is transferred by one person into the name of another without consideration, and where a purchaser pays the vendor and directs him to transfer the property into the name of another person without consideration passing from that person, there is a presumption that the transferee holds the property upon trust for the purchaser: *Black Uhlans* at [134], citing *Napier v Public Trustee (Western Australia)* (1980) 32 ALR 153 at 158.
5. In deciding whether a presumption of resulting trust has been rebutted, the Court must reach a conclusion on the whole of the evidence. Conduct which may be taken into account could include who took occupation and control of the property, who paid periodical outgoings on the property, who received any rent from the property and who paid income tax on any rent received from the property. However, to the extent that such conduct did not occur so immediately thereafter as to constitute a part of the transaction, it may only be taken into account to the extent that it constitutes an admission: *Black Uhlans* at [138].
6. The presumption of a resulting trust may be rebutted by evidence which manifests an intention to the contrary: *Black**Uhlans* at [137], but “should not … give way to slight circumstances”: *Black Uhlans* at [140].
7. Where two or more persons advance the purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the property upon resulting trust in favour of those who provided the purchase price in the shares in which they provided it: *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242 (***Calverley***) at 266-267 (Deane J); *Black Uhlans* at [145] and [146]; *Foundas* at [48-50].
8. The extent of the beneficial interest of the parties, arising by reason of a resulting trust, must be determined at the time when the property was purchased and the trust created: *Black Uhlans* at [141]. See also *Jain v Amit Laundry* [2019] NSWCA 20 (***Jain***)at[89(3)] (Beazley P).
9. If part of the purchase price is provided by being borrowed on mortgage, the presumption of resulting trust is applied by treating the monies raised on mortgage as a contribution by the person who is liable to repay that money. This particular application of the presumption, like any other, can be rebutted if there is evidence that the parties had some other intention at the time the property was acquired**:** *Black**Uhlans* at [142]. See also *Jain* at [89(5)]; [97].
10. The rationale for the existence of a resulting trust depends upon presumptions about the intention of the person who provides part of the purchase price for property, when title is taken in the name of another, not on the intention of anyone else: *Black**Uhlans* at [148]. The presumptions may be displaced by evidence of a contrary intention common to all contributors to a purchase price: *Jain* at [89(6)]. Common intention is ordinarily to be inferred from what parties do or say, not from their uncommunicated state of mind: *Jain* at [89(7)].
11. For the purpose of applying the presumption of resulting trust, the “purchase price” includes incidental costs, fees and disbursements involved in the acquisition of the property (such as stamp duty, legal costs, bank charges and registration fees): *Black**Uhlans* at [144].
12. In *Tonna v Mendonca* [2019] NSWSC 1849 at [465] to [468], Ward CJ in Eq said:

465 … [T]he presumption of a resulting trust is thus a presumption as to a declaration of trust, premised on a presumed intention to create an equitable (beneficial) interest in the acquired property in someone other than, or in addition to, the person in whom legal title is vested; and that once the primary fact giving rise to the presumption is established (for example, that one or more persons has or have provided part or all of the purchase price but the legal title has been vested in another), the burden falls on the party disputing the existence of a resulting trust to rebut the presumed fact on the balance of probabilities (see *Ryan v Ryan* [2012] NSWSC 636 (*Ryan v Ryan*) at [57]; *Weige v Cupton Pty Ltd* [2012] NSWCA 414 (*Weige v Cupton*) at [46]). Where that party fails to rebut the presumption, the court “upon consideration of all circumstances presumes there was a declaration [of trust], either by wording or writing, though the plain and direct proof thereof be not extant” (*Cook v Fountain* (1818) 36 ER 984 at 987).

466 Thus, as I said in *Amit Laundry*, the presumption of resulting trust is the “starting point of a factual enquiry” about the intention of the party (or parties) who provided the funds for the purchase in question (*Black Uhlans* at [136]; *Dyer v Dyer* (1788) 2 Cox Eq Cas 92; (1788) 30 ER 42 at 43; *Fowkes v Pascoe* (1875) LR 10 Ch App 343 (*Fowkes v Pascoe*) at 352; *Re Kerrigan; Ex parte Jones* (1946) 47 SR (NSW) 76 at 83), the presumption operating “to place the burden of proof [on the party disputing the trust], if there be a paucity of evidence bearing upon such a relevant matter as the intention of the party who provided the funds for the purchase” (*Nelson v Nelson* (1995) 184 CLR 538 at 547; [1995] HCA 25 (Deane and Gummow JJ)).

467 The search for the intention of the relevant party (or parties) intention is as to proof of a “definite” not “nebulous” intention (*Weige v Cupton* at [46]; referring to *Drever v Drever* [1936] ALR 446 at 450 (Dixon J)); the “objective, or manifest, intention ... is not a subjective, uncommunicated intention but it is to be inferred from what the parties do or say” (*Anderson v McPherson (No 2)* [2012] WASC 19 at [156] (Edelman J, citing *Calverley* at 261 (Mason and Brennan JJ))). The relevant intention is to be found as at the date of purchase (or immediately thereafter) (*Calverley* at 251(Gibbs CJ); and at 262 (Mason and Brennan JJ)), although evidence of later acts and declarations are admissible (as admissions against interest) against the party who made them (*Black Uhlans* at [138] (Campbell J, as his Honour then was)).

468 Establishing on the balance of probabilities that a contribution of the requisite character has been made is a “factual precondition” to a successful assertion that there is a presumption of resulting trust (*Hamed v Elddin* [2016] NSWCA 9 at [23] (Meagher and Gleeson JJA, Sackville AJA); *Elddin v Hamed* (No 2) [2015] NSWSC 654 at [83] (Button J); see also, *Ong v Lottwo Pty Ltd (in liq)* (2013) 116 SASR 280; [2013] SASCFC 57 (*Ong v Lottwo*) at [40] (Nicholson J, with whom Kourakis CJ and Stanley J agreed)). It is essential that the alleged contribution bears the character of purchase moneys (*Calverley* at 246 (Gibbs CJ); see also, *Ong v Lottwo* at [28]-[30]).

1. In *Staatz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq) (No 3)* [2019] FCA 924; 138 ACSR 231 at [129], Derrington J said, relevantly:

… In the usual course, a resulting trust does not arise in relation to property acquired prior to the contribution of funds by the person who seeks the imposition of the trust because the property in question does not represent trust money: *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 (*Bishopsgate*). The discharge of a mortgage over property is not regarded as part payment of the purchase price and no inference of a trust usually arises: *Calverley v Green* at 257-258 per Mason and Brennan JJ … .

1. In *Lucas v Lucas* [2018] NSWSC 962 at [159], Sackville AJA considered the manner in which the discharge of a mortgage may alter the beneficial interests of persons interested in property. His Honour said:

The general principle is that a contribution to the purchase price of a property for the purposes of the law of resulting trusts must be made prior to the acquisition of the property. Thus payments in reduction of a mortgage debt are not usually relevant in determining the payer’s equitable interest in the property, although it may be relevant on an equitable accounting. If the parties intend to acquire land free from a mortgage, as distinct from acquiring title to land subject to a mortgage, the contributions made to discharge the mortgage can be taken into account in determining the parties’ respective beneficial interests. Mortgage payments therefore may be considered when quantifying the parties’ interests under a resulting trust of a mortgage free investment. However, this will rarely be the case when the property is acquired as a home for one or both parties to live in. (citations omitted)

## Constructive trusts

1. Conduct after the acquisition of title might provide a basis for someone who has made contributions to payment of mortgage instalments to claim a proprietary interest on the basis, relevantly, of a constructive trust: *Black Uhlans* at [143].
2. In *Varma v Varma* [2010] NSWSC 786 at [497], Ward J (as her Honour then was) stated:

The remedy of a constructive trust is an equitable response to make good various equitable claims, is not confined to the circumstances of breach of fiduciary duty (albeit it is commonly a breach of this duty, that a constructive trust responds to; … and can arise as a response to a claim based on promissory estoppel … . Indeed, it has been recognised that there is no reason to deny the availability of a constructive trust in any case where some principle of law or equity calls for the imposition upon the legal owner of property, regardless of actual or presumed agreement or intention, of the obligation to hold or apply the property for the benefit of another … . (citations omitted)

# Witnesses

## Mrs El-Debel

1. Mrs El-Debel was not a reliable witness. In her affidavit sworn for this proceeding two weeks prior to the hearing, Mrs El-Debel acknowledged that her memory has been somewhat affected by a stroke and that she relies on the assistance of documents. Despite this acknowledgement, Mrs El-Debel gave quite a detailed account of relevant events, including evidence that a solicitor’s file note was not an accurate record of her instructions.
2. In the witness box, Mrs El-Debel sought to portray herself as simultaneously forgetful and reliable, saying:

So I’m an old lady. I’m really forgetful. I forget things most of the time but I remember exactly what happened.

…

It’s because everything that’s happening is just too much for me. It was big shock for me, what happened and, yes, it’s just too much.

1. Mrs El-Debel’s evidence in the witness box concerning the Bankstown property conflicted with her affidavit evidence, in respects suggesting that she was not a truthful witness. In her affidavit, Mrs El-Debel explained that she had approached the bankrupt to assist her with buying the Bankstown property in 2003, and had satisfied herself that she could afford to service a loan over the property from rental income. As she put it, “I would be positively geared from the start”. Mrs El-Debel recounted a conversation with the bankrupt in including words to the effect “I will be making all the repayments. The rent will cover everything. [You’re] only on the loan documents to help get the finance I need”.
2. In cross-examination, when asked whether she herself worked out how much rent she would need to charge, Mrs El-Debel stated “400”. This figure corresponded with her affidavit evidence. When asked how much she thought the repayments were going to be, Mrs El-Debel stated “Between 1300 and 1200. No more”. These figures also broadly corresponded with her affidavit evidence. However, when asked how the loan repayments were actually made, Mrs El-Debel made no reference to the expected rental income. The transcript records relevantly:

MR PESMAN:…[H]ow did you make those repayments through the life of the loan?

INTERPRETER: So it’s – it’s part of our culture whenever come – anyone comes to our house, whenever my children come to our house, they bring – bring me shopping, bring me everything I need. I didn’t go shopping at all. And whenever I have visitors they always put money in my hand. They always give me cash. That’s part of our culture.

1. Mrs El-Debel maintained this evidence in the following passage:

COURT: … Mrs El-Debel, you said earlier that before making the purchase of the property you calculated that you would have loan repayments of $1200 to $1300 per month to be paid on the loan for the Bankstown property; is that right?

INTERPRETER: Yes, correct.

COURT: Are you saying that you expected to be able to make those payments from cash gifts that would be brought by people to your house over the life of the loan?

INTERPRETER: Yes, of course. Whatever I receive as gifts I put towards this property.

COURT: So, I just want to make sure that I understand, before you bought the house you thought that you would be able to afford the loan repayments by various people coming to your house and giving you gifts; is that right?

MRS EL-DEBEL: Yes.

INTERPRETER: It’s because I receive – I always receive cash gifts, so I thought the best thing is to put it towards a property.

COURT: So that’s what you thought would happen…

MRS EL-DEBEL: Yes.

COURT: …before you bought – and, in fact, that’s what happened; is that right?

MRS EL-DEBEL: Yes. Sorry, if I call anyone, if I need rentals in 2000, 5000, my granddaughters, because my father is 70 – 70, and everyone coming to my place not come in free.

COURT: And I just want to make sure I do understand what you’re saying. So are you saying that every month from the time that you bought the property one or more people would bring this cash and then you would take it to the bank and deposit it to make the loan repayment?

INTERPRETER: Yes.

1. Not only was this evidence inconsistent with the earlier evidence that Mrs El-Debel had determined her capacity to service the loan to acquire the Bankstown property by reference to expected rentals, it is also inconsistent with the available bank statements concerning how payments on the loan were actually made. It is also fanciful to think that Mrs El-Debel would have decided to buy the Bankstown property on the basis of her expectation of cash gifts from family members.
2. Mrs El-Debel reiterated this unlikely version of events in the following exchange:

MR PESMAN: And your pension isn’t enough money for you to pay this mortgage and for the rest of your expenses; is it?

INTERPRETER: It’s not true because I don’t have any expenses; my children buy everything for me.

MR PESMAN: All right. But you haven’t been paying this mortgage from the pension; have you?

INTERPRETER: Of course not. It is from my children and from …

MRS EL-DEBEL: Grandchildren …

MR PESMAN: All right.

MRS EL-DEBEL: My nephew.

1. Mrs El-Debel also suggested that the apparent inconsistency between her evidence and the available bank statements was explicable by the fact that she gave her cash gifts to the bankrupt for depositing into the loan account relating to the Bankstown property. The following exchange took place:

MR PESMAN: … Now, were you giving your son, when he was making the repayments for you, the amount that was required by the bank or were you making extra payments?

INTERPRETER: I always gave him more. Whatever money I had with me, I gave it to him and asked him to put it towards these repayments.

MR PESMAN: All right. So that would be different amounts each time; is that right?

INTERPRETER: Of course.

1. When referred to bank statements which indicated fortnightly deposits of $2,900 over a period of about seven months, and asked to explain the apparent discrepancy between this and her evidence, Mrs El-Debel said:

INTERPRETER: So I gave him the money. It was cash, and he put it in his way.

1. There was then the following exchange:

MR PESMAN: Are you seriously saying to her Honour that, every two weeks, you gave Bachar exactly $2900 in cash to put into this home loan?

INTERPRETER: So whatever money I gave him, he used to deposit that money. I’m not a computer. I can’t remember exactly the amount.

MR PESMAN: Are you seriously saying to her Honour that, every two weeks, you gave Bachar $2900 to put into the home loan? You’re lying, now, aren’t you, Mrs El-Debel?

INTERPRETER: No, I’m not lying.

MR PESMAN: And from August 2009, that amount increased to $3200 every fortnight. Do you recall that?

INTERPRETER: So whatever money I received, my pension payments for my 10 children, I put it towards these payments.

MR PESMAN: Are you seriously saying to her Honour that your children were giving you $6400 a month every month for six years to put into this mortgage?

INTERPRETER: Big family. Is all – is very good income. Everyone come in, ask. No one coming in and out, 500, 700, 1000. My grandchildren is very good payment too.

1. This evidence involved deliberate obfuscation on Mrs El-Debel’s part. There is no credible evidence that Mrs El-Debel gave the bankrupt amounts in the order of $6,400 per month for several years from cash gifts and her pension. This evidence reveals that Mrs El-Debel was not frank about the extent of her knowledge concerning the regular payments made into the loan account relating to the Bankstown property.
2. Mrs El-Debel’s affidavit also contained details which cast doubt on its reliability. The affidavit was sworn with the assistance of an interpreter, consistent with Mrs El-Debel’s evidence that her English is limited. Having regard to her evidence concerning her memory and her life history, the affidavit is unusually detailed in some respects. In particular, Mrs El-Debel stated in her affidavit:

Bachar was placed under a controlling trustee on or about 14 April 2015. He attempted without success to enter into a Part X agreement with a controlling trustee now know[n] to me as Mr Aaron Lucan of Worrells.

1. The affidavit did not explain what Mrs El-Debel understood by the terms “controlling trustee” or “Part X arrangement”, or how she came to recall the appointment of the controlling trustee on 14 April 2015 or whether that evidence was given by reference to documents. When the paragraph was translated to Mrs El-Debel in cross-examination, there was obvious confusion concerning the proper translation. When asked who was her son’s controlling trustee in 2015, Mrs El-Debel said that she did not know. I was not satisfied that Mrs El-Debel’s affidavit evidence set out above reflected her own recollection of events or that Mrs El-Debel understood the terms “controlling trustee” and “Part X arrangement”.
2. Another matter that caused me concern about the reliability of Mrs El-Debel’s evidence was her statement, in her affidavit that, to the best of her recollection, Bassam had repaid her “the initial amount” which she claimed to have lent Fallow in August 2011. In her affidavit, Mrs El-Debel stated:

57. In 2011 My son Bassam approached me and asked to borrow funds from me, at the time he said to me, words or words to the effect of:

BASSAM: Hi mum, I’m in need of a loan for my company. I can repay you back shortly.

ME: How much do you need?

BASSAM: As much as you can?

ME: I will check and let you know.

58. As the unit continued to be rented the returns were steady and the rental income would cover the loan repayments, on this basis I was confident in lending the money.

59. On or about 17 August 2011 I advance the sum of $78,723.81.

60. To the best of my recollection the initial amount was repaid, however I do not recall receiving any interest repayments.

1. The amount of $78,675.21 was withdrawn from funds in an account in the names of the bankrupt and Mrs El-Debel and was applied to the purchase of the first Peakhurst property.
2. In cross-examination, the following exchange took place concerning this loan:

MR PESMAN: Has the loan you say you made to Bassam been repaid?

INTERPRETER: Not all of them.

MR PESMAN: Well, how much has been repaid?

INTERPRETER: So he gave me some payments. I don’t know exactly how much. I leave it all to him and his conscience.

MR PESMAN: Right. When did he make these repayments?

INTERPRETER: So whenever he could he would give me payments, but I didn’t calculate exactly how much he gave me.

MRS EL-DEBEL: Because I trust him. I trust him.

1. This evidence was inconsistent with the recollection of repayment recorded Mrs El-Debel’s affidavit. When further questioned about this, Mrs El-Debel’s evidence was no clearer:

COURT: But you say now that you left it to his conscience to repay, and that is a different thing from recalling that the initial amount was repaid. Do you agree with me that those things are different?

INTERPRETER: Yes, that’s right, I do trust him. It’s just that’s my money, that’s my right, and I have to ask for that money.

COURT: It seems to me, from what you’ve said in the witness box today, that you don’t recall that the full amount was repaid, because you don’t know exactly how much he paid and you left it to his conscience. Is that fair?

INTERPRETER: So maybe he recorded these amounts. Sometimes he gives me money, sometimes he takes, sometimes he gives, sometimes he takes. So it’s like this all the time. Maybe he have – he has some records. I don’t know.

COURT: I’m focussing on your affidavit, Mrs El-Debel. It seems to me that when you said that your recollection was that the initial amount was repaid, you must have been wrong to say that.

INTERPRETER: That he didn’t pay me the whole amount – the full amount?

COURT: The precise words that you used were:

*To the best of my recollection, the initial amount was repaid.*

What I’m saying to you is that that must…

THE INTERPRETER: But there’s still the interest, which means that the amount wasn’t paid fully.

…

COURT: But, Mrs El-Debel, I thought you said earlier this afternoon, when you were asked how much was repaid, you didn’t know exactly.

INTERPRETER: Under stress, under a lot of stress, yes, I can’t take any more.

1. Mrs El-Debel’s evidence was inconsistent with Bassam’s evidence, which was to the effect that the loan was repaid in kind.
2. It is also inconsistent with an agreement dated 1 October 2019 (that is, made after the public examinations) which purports to record a loan of $78,723.81 from Mrs El-Debel to Fallow. That document suggests that the loan had not been repaid by the date of the agreement because it contains a repayment date of 17 August 2026 and it provides for repayment in full at the end of the term. Clause 4 provides that “[s]hould the Borrower wish to pay the said Advance prior to the end of the term, they are at liberty to do so provided that the said interest is also payable at the time”.
3. In her affidavit evidence Mrs El-Debel stated that, after the bankrupt’s bankruptcy was extended, she “requested that Bassam as the director of Fallow Investments acknowledge the loan advanced to the company in 2011”. However, in cross-examination, when asked if she was familiar with a company called Fallow Investment Proprietary Limited, Mrs El-Debel answered “no”. Having regard to the evidence of Mrs El-Debel’s general dependence upon her family and the claim that the loan had been repaid, I do not accept that Mrs El-Debel was truthful in her evidence that she requested an acknowledgement of a loan to Fallow.
4. Having regard to the various deficiencies identified above, I do not accept Mrs El-Debel’s evidence unless it is corroborated by reliable evidence.

## Bassam El-Debel

1. I was also not satisfied that Bassam was a reliable witness, for the following reasons.
2. Firstly, he has not diligently kept books and records for either Fallow, or the Trust, despite his position as director of Fallow. In particular, Bassam kept no trust accounts and no minutes of meetings. At his public examination on 25 June 2019, Bassam said that he did not know where the original of the trust deed for the Trust was held. Bassam’s acknowledgement that “more could have been done by way of maintaining a better form of books and records” is an understatement. There is almost no documentary evidence to support Bassam’s assertions about transactions and other matters involving Fallow and the Trust, in particular, alleged loans to Fallow and the circumstances in which the bankrupt ceased to be a beneficiary of the Trust.
3. Bassam gave evidence to the effect that loans to Fallow had been repaid in amounts that were uncertain and, apparently, undocumented. For example, he gave the following evidence:

MR PESMAN: …You say you made a loan to Fallow of an amount we’re not very sure about at the moment. Has that loan been repaid?

BASSAM: Not in its entirety, no.

MR PESMAN: Well, how do you know how much is still outstanding?

BASSAM: I don’t.

MR PESMAN: So how do you know if it has been paid or not?

BASSAM: Well, because when it comes time to making sure that it gets repaid I would sit down and I would go through all the books, sit down with my accountant, get all bank documents.

MR PESMAN: What books are you going to go through?

BASSAM: Whatever my accountant holds – in general speak.

MR PESMAN: What books are going to go through?

BASSAM: In general speak. I would go through whatever documents are available for me to ascertain what moneys have been paid. And that’s how I would determine what has and hasn’t been paid yet.

1. Plainly, Bassam was either unable or unwilling to give reliable evidence in answer to Mr Pesman SC’s questions.
2. Secondly, Bassam did not show a clear understanding of the nature of the relevant trust arrangement. For example, his evidence was that the appointer (himself in the case of the Trust) had the power to distribute trust funds, although that power is vested in the trustee. Bassam also gave evidence that his understanding of a discretionary trust was that he could distribute the trust funds to anyone he liked. He also acknowledged that he did not know the difference between legal and beneficial ownership, which is a key concept in relation to a trust.
3. Thirdly, Bassam gave evidence that there had been distributions from the Trust which had not been recorded and that there are no other documents for the Trust other than the two versions of the trust deed and the “Notice of Cessation” document. I infer that the Trust has not lodged income tax returns despite presumably earning income from which the distributions have been made.
4. Fourthly, Bassam gave affidavit evidence that a substantial portion of the purchase price for the first Peakhurst property (an amount of about $425,324.79) was lent by him to Fallow from either his personal accounts or accounts associated with him, but did not provide bank statements to verify this claim, or records of Fallow to support the existence of the loan.
5. Fifthly, Bassam’s affidavit evidence referred to a loan of $78,675.21 to Fallow from Mrs El-Debel which Bassam said had since been repaid, save as a claim for interest payable being made by Mrs El-Debel.
6. In cross-examination, when asked when the loan was repaid, there was the following exchange:

BASSAM: The – the loan has been repaid over the years, basically doing – renovating her bathroom, renovating the bathroom at Bankstown, doing other things for her.

MR PESMAN: Right. So it didn’t involve giving her money?

BASSAM: No.

1. When asked how he worked out that the value of those services was equal to $78,675.21, Bassam said:

Because there was a list of payments that was given to me Mr Panopoulos that needed to be made. And so I just said to her “If you can make these payments, that would be appreciated” and they added up to that amount.

1. Mr Panopoulos was a legal practitioner with the firm Alphonse & Associates who provided legal services to the bankrupt from time to time.
2. Whatever Bassam’s answer might mean, the evidence that the loan had been repaid in kind is inconsistent with Mrs El-Debel’s evidence, as well as with the 1 October 2019 agreement referred to above. In cross-examination, Bassam stated that he had not seen that document before conceding, after identifying his signature, that he had seen the first three pages of the agreement (but not the three page schedule). Bassam said that he did not read the 1 October 2019 agreement before signing it and that it was produced to him by his mother. If that is the case, in the absence of any other reasonable explanation, the likelihood is that the agreement was procured by the bankrupt and given by the bankrupt to Mrs El-Debel.
3. Sixthly, Bassam’s evidence that he prepared the 30 September 2014 “Notice of Cessation” after asking a couple of a friends and doing some research online, including its reference to cl 22(b) of the trust deed, is not credible in the light of his evidence at the public examination that he probably had not seen the trust deed for about eight years, and his general lack of diligence in keeping records of decisions concerning the Trust.
4. Seventhly, Bassam’s evidence of a conversation with the bankrupt on 30 September 2014, telling him “You’re out of Fallow”, is not credible in the light of the following evidence:
5. The February-March 2015 and September 2015 emails from the bankrupt to Mr Rajani in which the bankrupt proposes his replacement by Mr Rima as director and shareholder of Fallow and his subsequent process of transferring his “interests in Fallow Investments back to myself or my wife”.
6. A purported minute of a meeting of the directors of Fallow, dated 1 October 2014 in handwriting, signed by the bankrupt and obtained from Mr Rajani. The production of this document by Mr Rajani is consistent with a conclusion that the change of directorship was documented by Mr Rajani and the bankrupt in early 2015 and the minute was back-dated.
7. The “Change of Company Details” form in connection with the bankrupt’s cessation as director and Mr Rima’s appointment as director of Fallow on 1 October 2014, lodged by Papandreas Rajani & Co Pty Ltd, and signed by Bassam on 10 April 2015. Bassam’s evidence that the “Change of Company Details” form was lodged six months after the asserted 1 October 2014 changes because of an oversight on his part is inconsistent with the email exchange between the bankrupt and Mr Rajani, from which it is readily inferred that the form was lodged as a consequence of their interaction.
8. A withdrawal voucher showing that the bankrupt and Bassam signed a withdrawal voucher to withdraw $75,000 from Fallow’s bank account on 17 August 2015.
9. A form signed by Bassam and dated 29 December 2015, by which the bankrupt was removed as a signatory to Fallow’s bank account only after his bankruptcy on 1 December 2015.
10. The letter dated 5 February 2016 from Avondale Lawyers, then acting on behalf of Fallow, to SV Partners (the trustees’ firm) which, I accept, was not written on the instructions of Bassam. The only reasonable inference is that the letter was written on the instructions of the bankrupt.
11. Accordingly, as with Mrs El-Debel, I have generally not accepted Bassam’s evidence unless it is corroborated by reliable evidence.

## Witnesses not called

1. Neither the bankrupt nor Ms Ayad gave evidence to this Court.
2. The unexplained failure by a party to call a witness may, in appropriate circumstances, support an inference that the uncalled evidence would not have assisted the party’s case: *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 at 308 per Kitto J, 312 per Menzies J and 320-321 per Windeyer J.
3. Further, the failure to call a witness may also permit the court to draw with greater confidence any inference that is unfavourable to the party that failed to call the witness, if that inference is open on the evidence and the uncalled witness appears to be in a position to cast light on whether the inference should be drawn: *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361, 384–385 at [63].
4. Where the absent witness is a party, an adverse inference may be more readily drawn against that party: *Trkulja v Markovic* [2015] VSCA 298; (2015) 49 VR 402 (***Trkulja***) at [94], citing the following passage from *Chong v CC Containers Pty Ltd* [2015] VSCA 137 at [212]:

In *Dilosa v Latec Finance Pty Ltd [No 2]*, Street J recognised that where the absent witness is a party then considerable importance may well attach to the inference that nothing which the party could say would assist his or her case. As Gleeson CJ said in *Azzopardi*, the judgments in *Weissensteine*r recognise that the inference that may be drawn from the silence of a party to civil litigation may be significant. Santow J drew such an inference in *ASIC v Adler* because the parties who were available and not called had a personal involvement in the transactions in question. Where a party elects not to give evidence ‘the court is entitled to be bold’. As Heydon, Crennan and Bell JJ stated in *Kuhl v Zurich Financial Services Australia Ltd*, the rule has a particular application where it is the party which is the uncalled witness and may permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn.

1. At [95] and [96] of *Trkulja*, Kyrou and Kaye JJA and Ginnane AJA said:

95 Further, where the absent witness or party is the only person capable of giving evidence on a particular issue in dispute, his or her failure to enter the witness box may attain a particular significance. It has been said that, although the silence of one party cannot fill the place of actual evidence on an issue, it may serve to resolve a doubt or an ambiguity, especially where the facts are peculiarly within the knowledge of the silent party. In these circumstances, a failure to call or give evidence may have more than ordinary significance.

96 However, there are a number of limitations to the application of the rule in *Jones v Dunkel*. Relevantly for the purposes of this appeal, the rule does not permit an inference that the evidence not called by a party would have been adverse to the party. The rule also does not enable the absence of a witness to make up for any deficiency in a party’s evidence. The rule will not support an adverse inference unless the evidence otherwise provides a basis on which that unfavourable inference can be drawn. It has therefore been said that the rule cannot be employed to fill gaps in the evidence, or to convert conjecture and suspicion into inference.

1. In this case, I have no hesitation in drawing any inference adverse to the bankrupt or Ms Ayad that may be available by reason of their respective failures to give evidence. The bankrupt’s failure to give evidence permits the court to draw, with greater confidence, the inferences drawn below concerning his beneficial ownership in relation to each of the four properties. Ms Ayad’s failure to give evidence permits the Court to draw, with greater confidence, the inference that she holds the Beverly Hills property substantially on trust for the bankrupt.
2. The trustees also submitted that the Court should draw appropriate inferences from the failure of the respondents to call Mr Panopoulos, Mr Rajani and Mr Rima as witnesses. There was no evidence that any of these individuals were not available to give evidence themselves. The parties did not address the issue of whether the rule in *Jones v Dunkel*  may not apply to the failure to call Mr Panopoulos where relevant evidence may be protected by legal professional privilege: *Cooper v Hobbs* [2013] NSWCA 70 at [58] and following.

## Destruction of documents by Ms Ayad

1. At her public examination, Ms Ayad gave evidence that she had recently attended upon the offices of Alphonse & Associates to collect a legal file in relation to the purchase of the Beverly Hills property. She said that she had produced to the Court all documents in her possession in relation to that purchase. When asked whether she had produced the entire legal file, Ms Ayad answered “Well – well, everything that I have. Yes”. Ms Ayad admitted that she had destroyed documents from the file, but claimed that she did not remember which documents saying “I didn’t choose. I didn’t choose. I was angry at the time”. Ms Ayad said that she tore up documents and threw them in the bin.
2. It transpired that the law firm had electronic copies of its files (or at least parts of them) and, in due course, the trustees obtained access to four file notes dated respectively 12 March 2015, 7 April 2015, 23 April 2015 and 25 May 2015. These were:
3. the file note referred to at [150] below, concerning ownership of the Bankstown property;
4. the file note referred to at [170] below, recording a call from Mrs El-Debel’s daughter, purportedly on behalf of Mrs El-Debel, giving Alphonse & Associates instructions to hold proceeds from the transfer of the Bankstown property on trust and not to give them to the bankrupt and Ms Ayad;
5. a file note of 23 April 2015 which refers to phone calls from Mrs El-Debel and Ms Ayad (identified as Mrs El-Debel’s daughter-in-law) in relation to the transfer of the Bankstown property, with Ms Ayad confirming that she wanted the cheque in her (Ms Ayad’s) name; and
6. the file note referred to at [214] below, in which Mrs El-Debel instructed Alphonse & Associates that the bankrupt had bought a property at auction, being the Beverly Hills property.
7. At a public examination on 2 August 2019, Mr Panopoulos gave evidence that Ms Ayad had attended his office on 9 July 2019. Ms Ayad had taken files including one or more files in relation to the Bankstown property, including files that were 15 or 16 years old. This appears to have been a further instance of Ms Ayad “helping out” the bankrupt.
8. The trustees submitted that the Court should infer that the documents which were destroyed by Ms Ayad included documents evidencing the source of funds used to acquire the various properties, on the basis of a further inference that documents of that description would have been contained in the files. I accept that the deliberate destruction of documents may be evidence of a consciousness of guilt and, more particularly, evidence of Ms Ayad’s desire to conceal documents that might contradict her asserted claim to beneficial ownership of the Beverly Hills property and to assist the bankrupt by concealing documents unfavourable to him. It is significant that Ms Ayad apparently destroyed a file note which stated that the bankrupt had bought the Beverly Hills property. Otherwise, I am not persuaded that the destruction of documents by Ms Ayad, reprehensible as it was, materially advances the trustees’ case because it is a matter of speculation whether the destruction extended to documents adverse to the respondents’ case that were unable to be retrieved from electronic files.

# Bankrupt’s interest in Bankstown property

## Legal ownership

1. From about 15 January 2004 to 4 May 2015, the legal title to the Bankstown property was held by the bankrupt and Mrs El-Debel as tenants in common with Mrs El-Debel holding a 99/100 share of the property and the bankrupt holding a 1/100 share.
2. This acquisition occurred about six months before the start of the bankrupt’s first bankruptcy.
3. Since about 4 May 2015, Mrs El-Debel has been the sole registered proprietor of the Bankstown property. That change occurred about seven months before the bankrupt’s current bankruptcy, within months of the bankrupt consulting Mr Rajani with the aim of making himself and Ms Ayad “invisible to anyone searching for my properties” and shortly after the authorisation by the bankrupt of Mr Lucan as controlling trustee.

## Contributions to purchase of property in January 2004

1. The bankrupt’s evidence at his public examination was that it was his idea for him and his mother to purchase the Bankstown property. He explained that he came up with this idea because he owned nothing, he was “hopeless” and he needed his mother’s assistance to get into the property market.
2. This evidence is all the more credible in the context of the bankrupt’s subsequent bankruptcy in July 2004.
3. I accept that the Bankstown property was purchased on the initiative of the bankrupt, and not on the initiative of Mrs El-Debel as she claimed.
4. The evidence included a letter from Metledge and Thompson Solicitors dated 9 September 2003 to Mrs El-Debel concerning the release to Mrs El-Debel of a deposit in the connection with her attempted purchase of a property at Lakemba. The respondents, apart from Farrow, contended that this letter supported Mrs El-Debel’s claim that she was the initiator of the proposal to purchase the Bankstown property.
5. The bankrupt’s admission is more credible than Mrs El-Debel’s evidence on the subject, particularly having regard to Mrs El-Debel’s restricted income as a pensioner. The Metledge and Thompson letter is equally consistent with Mrs El-Debel providing the bankrupt (or another family member) with “assistance” to enter the property market.
6. The Bankstown property was purchased for $258,000 of which $206,400 was paid by funds obtained from the Commonwealth Bank of Australia (**CBA**) by the bankrupt jointly with Mrs El-Debel. The account for the loan was numbered xxxxxxxx2800 (**joint Bankstown loan account**).
7. Also at that time, the bankrupt and his mother were named as the joint mortgagors on a first registered mortgage to the CBA over the Bankstown property.
8. At his public examination, the bankrupt claimed that the money to purchase the property came entirely from his mother.
9. The trustees ultimately accepted that they could not demonstrate to the contrary, except to the extent that the property was purchased with funds borrowed from the CBA pursuant to a loan obtained jointly by the bankrupt and his mother.
10. However, in his November 2004 statement of affairs, made by the bankrupt in connection with his 2004 bankruptcy, the bankrupt stated that, on 12 December 2003, his mother had lent him $60,000.00. If the statement is to be believed, it is consistent with a conclusion that funds used to purchase the property apart from the joint Bankstown loan were, in fact, loaned to the bankrupt by Mrs El-Debel and, accordingly, were contributed to the purchase price by the bankrupt. In the statement of affairs, the bankrupt also stated that he had contributed $6,000 to an asset described as “unit”. In answer to the question “Who has the asset?”, the bankrupt identified his mother. This may be a conflicting piece of evidence concerning the amount of the bankrupt’s contribution to the purchase of the Bankstown property.
11. Whatever the true position about their respective contributions to the purchase price, the starting point is that the Bankstown property was purchased by the bankrupt and Mrs El-Debel as tenants in common on resulting trusts in favour of each of the bankrupt and Mrs El-Debel in accordance with those contributions, comprising Mrs El-Debel’s cash contributions (which was either a contribution on her own behalf or a contribution by the bankrupt, who had been loaned the funds by Mrs El-Debel), any cash contribution by the bankrupt and the joint contribution of the loan funds.

## Intention as to beneficial ownership of Bankstown property

1. The respondents (other than Fallow) contended that:
2. it was the mutual intention of the bankrupt and his mother that the bankrupt would be a tenant-in-common for the minimum amount required by the CBA and that the bankrupt “would not have the beneficial ownership of his tenancy-in-common and that he would hold his share for” Mrs El-Debel;
3. in the premises, it was the mutual intention of both the bankrupt and his mother that the bankrupt’s 1/100 share would be held on trust by the bankrupt for his mother; and
4. the trust was an express trust and, in the alternative, a constructive trust.
5. The only evidence suggesting that the CBA required the bankrupt to be a tenant-in-common for a minimum amount is the evidence of Mrs El-Debel. As explained above, I do not accept her evidence without corroboration and, in any event, this piece of evidence is not plausible in the absence of any explanation of how such a requirement might benefit the CBA. Accordingly, I do not accept that the legal title to the Bankstown property reflected any requirement of the CBA.
6. Without any other explanation for the basis on which the legal title was held by Mrs El-Debel and the bankrupt, I do not accept that it reflected a mutual intention as to the beneficial ownership of the property. Rather, the overall evidence suggests that it is reflective of a mutual intention to conceal the true intentions of the bankrupt and Mrs El-Debel as to beneficial ownership.
7. The evidence included admissions as to the beneficial ownership of the Bankstown property, that post-dated the acquisition of the property. These admissions, to the effect that the bankrupt was the sole beneficial owner of the property, are contained in a solicitor’s file note of a meeting on 12 March 2015 and in the bankrupt’s public examination.
8. In addition, there is evidence that is consistent with the admissions.
9. On 12 March 2015, a week before the bankrupt expressed his desire to “make us invisible to anyone searching for my properties”, the bankrupt and his mother attended a meeting with Mr Panopoulos. Mr Panopoulos’ file note of the meeting is one of the file notes that was destroyed by Ms Ayad, after she retrieved files from Mr Panopoulos on 9 July 2019. The file note recorded relevantly that:
10. Mrs El-Debel wanted the bankrupt to transfer his 1% share in the Bankstown property to her and the bankrupt had agreed.
11. Mrs El-Debel had obtained a loan approval for $320,000.
12. Mrs El-Debel owed about $116,000 “on the existing loan.
13. The balance of the proceeds from the new loan were to be paid into a new offset account for Mrs El-Debel.
14. These propositions suggest that Mrs El-Debel had a substantial beneficial interest in the property. However, the proposition that Mrs El-Debel owed about $116,000 was only a half truth, as the bankrupt was jointly liable for that debt.
15. On the figures in the file note, Mrs El-Debel could expect to receive about $204,000 from the new loan once the joint Bankstown loan was paid out.
16. The file note also recorded the following:

She was wants [sic] to pay/give her son $200,000. Seems to be payback for the amount he has contributed to the property. There was a discussion that she held the property in trust for him.Nothing seems to have been evidenced in writing at the time and they can’t recall signing any documents like a declaration of trust. Both parties agreed that the $200,000 will be paid/credited to RONIA AYAD (Bachar’s wife).

1. Mrs El-Debel’s affidavit evidence was that the file note was not an accurate record of her instructions and that she did not mention or use the word “trust”. I do not accept Mrs El-Debel’s evidence that the file note was not accurate. It is an independently created and apparently contemporaneous record of instructions given by Mrs El-Debel and the bankrupt for the apparent purpose of providing them with legal services.
2. The file note evidences admissions by the bankrupt and Mrs El-Debel that, at the time of the purchase of the Bankstown property, they each intended that Mrs El-Debel would hold her legal interest in the Bankstown property on trust for the bankrupt.
3. The bankrupt’s evidence in his public examination that the purchase of the Bankstown property was his idea because he owned nothing and that he wished to “get into the property market” are admissions of an intention on the bankrupt’s part to own the Bankstown property or, at least, to have a significant beneficial interest in the property.
4. The evidence that is consistent with the bankrupt’s beneficial ownership of the Bankstown property, to the exclusion of Mrs El-Debel, is the following:
5. In his 2004 statement of affairs, the bankrupt identified the Bankstown property as his residential address and answered “No” to the question “Is the property rented to tenants?”. This is evidence that the bankrupt was in possession of the property within a short time after its purchase.
6. There is a complete absence of documentary evidence that repayments of the joint Bankstown loan were made from Mrs El-Debel’s resources, whether from rental income earned by leasing the Bankstown property or family cash gifts to Mrs El-Debel, contrary to Mrs El-Debel’s claims, prior to the transfer of the property to Mrs El-Debel in 2015.
7. Two rental tenancy agreements and a “residential exclusive management agency agreement” which identified the landlord and the principal respectively as the bankrupt and Ms Ayad, and the receipt of rental incomes into an account opened in the name of one or two of the bankrupt’s children. By their defence, the respondents (apart from Fallow) contended that the bankrupt and Ms Ayad offered the property for rent as Mrs El-Debel’s agent. This claim is unsupported by documentary evidence that rentals were ultimately received by Mrs El-Debel.
8. The available evidence about the operation of the joint Bankstown loan account is consistent with a conclusion that, as between Mrs El-Debel and the bankrupt, the account was operated solely by the bankrupt for his purposes.
9. As to (4), Fallow submitted that the joint Bankstown loan account was operated by Mrs El-Debel. However, even Mrs El-Debel did not suggest that she personally either deposited into, or withdrew amounts from, the account. Her affidavit evidence was that she required the bankrupt to help her with “attending to the bank to make payments on the mortgage and in helping me to do all things online as I do not have internet nor understand online services”. Mrs El-Debel’s oral evidence was that the bankrupt did things on her behalf because she could not do those things herself. In cross-examination, Mrs El-Debel conceded that she knew the bankrupt was making withdrawals from the joint Bankstown loan account to fund his business.
10. I reject the suggestion that Mrs El-Debel operated the joint Bankstown loan account in any relevant sense, except on occasions recorded by evidence. An example is Mrs El-Debel’s execution of a “New Repayment Summary” dated 20 October 2006, referred to below, which requested the bank to make fortnightly repayments to the joint Bankstown loan account from an account in the name of Lelebad, a company of which the bankrupt was the controlling mind.
11. The trustees contended that the bankrupt was the sole contributor to repayments of the Bankstown loan over the period from the purchase of the property in December 2003 to 2 March 2015. That contention is consistent with the instructions given to the solicitors in March 2015 to the effect that the bankrupt had made substantial financial contributions to the acquisition of the property.
12. The records of payments made into the joint Bankstown loan account prior to 2009 are sketchy. However, in his public examination, the bankrupt said that it was “most likely” that Lelebad made the mortgage repayments for the property from when it was purchased until 2009. There is a CBA “Switch Loan Summary” dated 3 February 2005 which records the bankrupt requesting the bank to make fortnightly repayments of the joint Bankstown loan from an account xxxx5714 (**account 5714**), and evidence that this account was in the name of Lelebad. There is also the CBA “New Repayment Summary” signed by the bankrupt and Mrs El-Debel dated 20 October 2006 referred to above.
13. As to the period from 1 December 2008 to 2 March 2015, the trustees relied upon the following documents:
14. A CBA “New Repayment Summary” signed by the bankrupt and Mrs El-Debel dated 6 February 2009 which requested the bank to make fortnightly repayments of $2,900.00 from an account in the name of 3 Phase (**3 Phase account**).
15. A document described as “Reconciliation of mortgage repayments” for the joint Bankstown loan account. The document records 121 deposits over the period 12 January 2009 to 2 March 2015, totalling approximately $355,675.00. The deposits came from 3 Phase up to 15 October 2012 and thereafter from TPS Group until 2 September 2014, with a final two deposits from Jacgab in January and March 2015.
16. In the absence of evidence to the contrary, I infer that the deposits into the joint Bankstown loan account by Lelebad, 3 Phase, TPS Group and Jacgab were made on behalf of the bankrupt.
17. There was no evidence of debits from the joint Bankstown loan account prior to February 2009. Between February 2009 and August 2014, there were 14 withdrawals from the account, totalling $319,223.81. Of these, ten withdrawals comprised or included cash sums. Otherwise, the withdrawals comprised:
18. $50,000 credited to the Butler Superannuation Fund;
19. $31,000 paid to Modestie Australia Pty Ltd;
20. $78,723.81 used to purchase the first Peakhurst property;
21. $20,000 paid to Majid El-Debel;
22. $20,000 transferred to TPS Group on 22 August 2012; and
23. $10,000 transferred to 1-2-1 Physiocare.
24. In the absence of any evidence to the contrary, I infer that the withdrawals were made by the bankrupt for his personal or business purposes, reflecting the mutual understanding of the bankrupt and Mrs El-Debel that he was solely responsible for the joint Bankstown loan account.
25. On the whole of the evidence, I conclude that the mutual intention of the bankrupt and Mrs El-Debel, when they purchased the Bankstown property, was that Mrs El-Debel would hold her interest in the Bankstown property on trust for the bankrupt.
26. To the extent that it is not permissible to have regard to facts that post-date the purchase of the Bankstown property, on the basis that they are not admissions or the conduct did not occur so immediately thereafter as to constitute a part of the transaction, the other evidence is sufficient to support that conclusion. Without assistance from the parties as to the precise operation of the *Jones v Dunkel* inference in relation to the failure of the respondents to call Mr Panopoulos, I have not relied on that matter.

## Transfer of bankrupt’s legal interest in Bankstown property

1. On 13 April 2015, the bankrupt signed a statement of affairs in which he stated that on 7 April 2015 he had transferred his 1% share in the Bankstown property to Mrs El-Debel for $4,500. This statement was consistent with the transaction proposed to Mr Panopoulos on 12 March 2015 but, in fact, there was no such transfer at any time.
2. Instead, there was a different transaction involving the Bankstown property. Mr Panopoulos’ firm, Alphonse & Associates, acted on both sides of the transaction.
3. As previously noted, on 7 April 2015, Mrs El-Debel’s daughter, purportedly on behalf of Mrs El-Debel, called Alphonse & Associates to say that Mrs El-Debel did not want the funds that would become available from the proposed refinance of the Bankstown property “in the name of her son and daughter-in-law” but instead wanted the funds to be held by the solicitors “in trust”.
4. Alphonse & Associates’ 23 April 2015 file note indicates that the payout figure for the refinance would be $204,450.00.
5. Ultimately, the settlement of the refinance was scheduled to take place on 4 May 2015. Alphonse & Associates directed the CBA to make the following payments:
6. $4,500.00 to the bankrupt;
7. $1,168.53 to Metledge & Thompson Lawyers Pty Ltd; and
8. $198,569.14 to the Alphonse & Associates Trust Account (**Alphonse trust funds**).
9. In due course, payments were made in accordance with the solicitors’ directions. The joint Bankstown loan was refinanced with a loan to Mrs El-Debel in an amount of $320,600, and CBA established a loan account in the name of Mrs El-Debel for the Bankstown loan refinance.
10. A transfer dated 4 May 2015 provided that the bankrupt and Mrs El-Debel, as transferor, acknowledged receipt of consideration of $4,500.00 and transferred to Mrs El-Debel an estate in fee simple in relation to the Bankstown property.
11. Although this transaction affected the legal ownership of the property, I am not satisfied that it affected the beneficial ownership of the Bankstown property. The consideration (which was payable to the bankrupt and Mrs El-Debel jointly) was manifestly insufficient to transfer the bankrupt’s beneficial interest in the property to Mrs El-Debel.
12. The Bankstown property was “now in my Mother in laws name”, as Ms Ayad put it in an email to the managing agent for the property, sent on 4 May 2015.
13. Having regard to the timing of the transaction, it is most likely that it was part of the bankrupt’s efforts to render “invisible” his ownership of properties.

# Bankrupt’s interests in Peakhurst properties

## First Peakhurst property

### Legal ownership

1. Since about 26 August 2011, Fallow has held the legal title to the first Peakhurst property.

### Contributions to purchase of property

1. By email dated 6 May 2011, Alphonse & Associates wrote to Bassam and the bankrupt concerning “Your proposed purchase” of the first Peakhurst property. By email dated 7 May 2011, Bassam confirmed that “we can proceed”.
2. On about 16 May 2011, a contract for the sale of the first Peakhurst property for $560,000.00 was executed by the vendors (**Gindys**). The nominated purchasers were Bassam and the bankrupt.
3. Although Bassam gave affidavit evidence that he “decided to proceed with a trustee buying Unit 1”, he did not explain the circumstances in which he and the bankrupt entered into a contract to buy the first Peakhurst property without the use of a trust.
4. The trustees contended that the deposit for the purchase of the first Peakhurst property was paid to the vendors on about 17 May 2011 by the bankrupt using funds from the 3 Phase account.
5. Fallow says that 3 Phase provided funds for the deposit as a loan “on behalf of Fallow”. However, Fallow did not exist as at 17 May 2011. Accordingly, 3 Phase could not have acted on behalf of Fallow (and could not have lent funds to Fallow, if that is suggested) when it paid the deposit on about 17 May 2011. Therefore, I do not accept that the $56,000 deposit was paid pursuant to a loan to Fallow from 3 Phase.
6. Having regard to the evidence that 3 Phase made payments on behalf of the bankrupt as part of his employment arrangement with 3 Phase, I accept that the deposit of $56,000 paid by 3 Phase on 17 May 2011 was a contribution by the bankrupt to the purchase of the first Peakhurst property. In making this finding, I note that there was no documentation evidencing a loan from 3 Phase to the bankrupt, or from 3 Phase to the bankrupt and Bassam in connection with the $56,000 deposit.
7. On 11 August 2011, Alphonse & Associates wrote to the Gindys’ solicitors, Cassab & Associates, about a change to the purchasers’ details for the purchase. An email the same day from Alphonse & Associates to Bassam and the bankrupt suggests that the change had also been proposed at an earlier time. The evidence included a deed entitled “Deed of mutual rescission of contract” between the Gindys and Bassam and the bankrupt. Clause 6 provides that, simultaneous with this deed, the Gindys entered into a fresh contract for sale of land with Fallow for the first Peakhurst property.
8. This evidence is consistent with the creation of the Trust on around 15 August 2011.
9. By letter to Cassab & Associates dated 18 August 2011, Alphonse & Associates confirmed instructions from Bassam and the bankrupt that money paid as the deposit on the purchase of the first Peakhurst property was to be applied as the deposit for the purchase of that property by Fallow as trustee for the “Fallows Investments Trust”.
10. By email dated 17 August 2011 from Alphonse & Associates to Bassam and the bankrupt, Mr Panopoulos listed ten cheques to be provided for the settlement of the purchase of the first Peakhurst property. The email makes no reference to Fallow or the Trust.
11. Bassam noted that Fallow did not have “functional bank accounts” at the time of the purchase of the first Peakhurst property. Consequently, it was unable to provide cheques for completion of the purchase.
12. There are no documents which evidence Fallow’s ownership of any assets, including any cash, at the time of purchase of the first Peakhurst property. Nor are there any documents evidencing any loan by any person or company to Fallow in connection with the purchase of the property. In the 5 February 2016 letter from Avondale Lawyers, Fallow expressly denied that the bankrupt had ever loaned any money to Fallow.
13. Fallow accepts that $78,675.22 was paid towards the purchase of the first Peakhurst property from the joint Bankstown loan account.
14. I have previously rejected the evidence of Mrs El-Debel and Bassam that this amount was a loan to Fallow from Mrs El-Debel.
15. Having regard to my findings above concerning the operation of the joint Bankstown loan account, I conclude that the contribution of $78,675.22 to the purchase price came from the bankrupt.
16. It is agreed that on 18 August 2011, contracts were exchanged for the sale and purchase of the first Peakhurst property, between the Gindys as vendors and Fallow as purchaser for a price of $560,000. The contract for sale of land identifies Fallow as trustee for the Trust.
17. The settlement of the purchase occurred on the same day.
18. The largest cheque provided at the settlement was $450,000.00 in favour of Westpac Banking Corporation. The only evidence of the source of these funds was Bassam’s evidence that it came from him or accounts associated with him and was a loan to Fallow. In the absence of bank statements and records of Fallow to support this evidence, I do not accept it.
19. At his public examination, the bankrupt agreed that he had represented in a statement of assets and liabilities that he was the owner of factory units at Stanley St, Peakhurst. The bankrupt stated that this was a lie.
20. In my view, this representation is consistent with the most likely scenario, namely, that the bankrupt contributed the whole of the purchase price of the first Peakhurst property.

### Intention as to beneficial ownership of the first Peakhurst property

1. The trustees contended only that the bankrupt has a 50% interest in the property. This position is consistent with the evidence that the bankrupt and Bassam originally intended to purchase the property.
2. I conclude that, when he contributed the whole of the purchase of the first Peakhurst property, the bankrupt intended that Fallow would hold the property on a resulting trust in his favour as to 50% of the property. The only record to the contrary is the identification of Fallow as purchaser on behalf of the Trust on the contract for purchase of the property.
3. In the absence of contemporaneous documentary evidence of a different intention, such as a record of a decision of Fallow to acquire the first Peakhurst property as trustee of the Trust or a decision to borrow funds to acquire the property as trustee of the Trust or a declaration that the first Peakhurst property was held by Fallow as trustee of the Trust, I do not accept that Fallow acquired the property as trustee of the Trust or that the presumed resulting trust is displaced.
4. This conclusion is consistent with the bankrupt’s later development of the plan to take steps in relation to Fallow that would “make us invisible to anyone searching for my properties”. Again, without submissions from the parties as to the impact of legal professional privilege, I have not taken into account the respondents’ failure to call Mr Panopoulos, who acted on the purchase, in reaching this conclusion.

## Second Peakhurst property

### Legal ownership

1. Since about 12 March 2013, Fallow has held the legal title to the second Peakhurst property.

### Contributions to purchase of property

1. It is agreed that on about 29 January 2013, contracts were exchanged for the sale and purchase of the second Peakhurst property, between the Gindys as vendors and Fallow as purchaser, for a price of $400,000.
2. The evidence does not disclose the source of the deposit of $40,000 that was paid.
3. The following contributions, totalling $360,871.98, were made towards the purchase price of the second Peakhurst property from the following sources:
4. $50,000 from Fallow’s bank account;
5. $183,369.91 from Bassam; and
6. $127,502.07 from TPS Group.
7. The source of the funds in Fallow’s bank account was rents from the first Peakhurst property.
8. On the basis of my findings above, the rents were held by Fallow on trust for the bankrupt and Bassam in equal shares: *Carter v Brine* [2015] SASC 204 at [565]. Again, in the absence of any documentation of any loan from Bassam, TPS Group or the bankrupt to Fallow, I conclude that the identified contributions represent contributions by the bankrupt and Bassam to the purchase price of the second Peakhurst property. It is unnecessary to determine the precise arrangement between the bankrupt and TPS Group pursuant to which it provided funds for the bankrupt to contribute to the purchase price. On that basis, the bankrupt contributed $155,435.99/$360,871.98 = 43% of the identified contributions. In the absence of any evidence as to the source of the deposit, I infer that the deposit was contributed in the same proportions.
9. Thus, the starting point is that the second Peakhurst property was purchased on a resulting trust in favour of the bankrupt and Bassam in accordance with their respective contributions to the purchase price.

### Intention as to beneficial ownership of the second Peakhurst property

1. For the same reasons as given in relation to the first Peakhurst property, I do not accept that Fallow acquired the property as trustee of the Trust, or that the presumed resulting trusts in favour of the bankrupt and Bassam are displaced.
2. Accordingly, I conclude that the second Peakhurst property is held by Fallow on a resulting trust reflecting the bankrupt’s contributions to its purchase price.

## Rentals

1. As beneficial owners, *prima facie* the bankrupt and Bassam have been entitled to the rental income from the Peakhurst properties, since their acquisition, in the same proportions as their respective beneficial interests. There was no documentary evidence or any other evidence of any arrangement to displace the *prima facie* position.

# Bankrupt’s interest in Beverly Hills property

## Legal ownership

1. Since about 30 July 2015, Ms Ayad has held the legal title to the Beverly Hills property.

## Contributions to purchase of property

1. As noted earlier, Ms Ayad took the legal file for the purchase of this property and destroyed documents that were included in the file. However, an electronic copy of a file note from the files of Alphonse & Associates, dated 25 May 2015, records:

t/c from Mrs El-Debel. Advised her son bought a property at auction. She is aware they bought the property. She told me her son told her they [sic] property was $1,611,000.00. I said that was correct because the deposit required was $161,100.00. She said to give her son whatever he wants and whatever amount he needs.

t/c to Mrs El-Debel. She is aware the contract is in the name of Ronia Ayad only. She said that was okay.

1. Mrs El-Debel’s instructions to give the bankrupt “whatever he wants and whatever amount he needs” reflect the fact that the Alphonse trust funds were the bankrupt’s funds and that the bankrupt was seeking to purchase the Beverly Hills property, as Mrs El-Debel told someone at Alphonse & Associates.
2. The contract for sale of the Beverly Hills property is for a purchase price of $1,611,000.00. The named purchaser on the contract is Ms Ayad.
3. The respondents deny that the deposit for the Beverly Hills property and part of its stamp duty were paid from the Alphonse trust funds. They say that the deposit was obtained by Mrs El-Debel from the CBA and the repayment of the sum was secured on the Bankstown property.
4. The evidence included a document entitled “Deed Granting Charge” dated 1 October 2019, between Mrs El-Debel and Ms Ayad. The document includes an acknowledgement by Ms Ayad that the amount of $198,569.14 was advanced to her for the benefit of her children. In the absence of contemporaneous evidence, I do not accept that this amount was advanced to Ms Ayad, or to her for the benefit of her children.
5. By letter dated 22 August 2015 to Mrs El-Debel, Alphonse & Associates stated that the deposit of $161,100 was paid from the Alphonse trust funds and the balance of the funds were applied to part payment of stamp duty on the purchase. Specifically, the letter stated:

With respect to the money held in our trust account after your recent refinance please note the funds have all now been disbursed as per your previous instructions to assist your daughter-in-law with her purchase. Enclosed is our trust account statement.

Basically, an amount of $161,000.00 was used as a deposit by your daughter-in-law and the balance of $37,469.14 was used as part payment of stamp duty.

1. On the basis of that evidence, I find that the Alphonse trust funds of $198,569.14 were used to purchase the Beverly Hills property. Based on the 12 March 2015 file note, and the bankrupt’s sole operation of the joint Bankstown loan account, I find that the Alphonse trust funds belonged to the bankrupt and were a contribution by the bankrupt to the purchase of the Beverly Hills property. That conclusion is consistent with Mrs El-Debel’s statement, recorded in the 25 May 2015 file note, that the bankrupt had bought a property at auction. Notwithstanding that the 22 August 2015 letter refers to Ms Ayad’s purchase of the Beverly Hills property, in the absence of any evidence explaining the inconsistency between that letter and the 25 May 2015 file note, given the bankrupt’s expressed desire to make his ownership of properties “invisible” and the appointment of a controlling trustee in April 2015 and, finally, the destruction of the 25 May 2015 file note, I consider that the 25 May 2015 file note is more likely to accurately reflect the true intention of the bankrupt (as conveyed to Alphonse & Associates by Mrs El-Debel).
2. The balance of the purchase price was partly paid with a loan from the National Australia Bank Limited (**NAB**) in the amount of $1,288,800 obtained by Ms Ayad (**Beverly Hills loan**). Ms Ayad is named as the mortgagor in the first registered mortgage to NAB over the Beverly Hills property.
3. There was no evidence as to the source of funds for the remaining amount of $123,431.86. On the basis of the evidence that it was the bankrupt who had purchased the Beverly Hills property, and in the absence of any evidence from Ms Ayad that she contributed this amount, I find that the amount of $123,431.86 was a contribution by the bankrupt to the purchase of the Beverly Hills property.
4. On this information, the starting point is that Ms Ayad purchased the property on a resulting trust in favour of the bankrupt to the extent of his contribution to the purchase price, being $198,569.14 + $123,431.86 = $322,001/$1,611,000 or 20% of the property.

## Intentions as to beneficial ownership of property

1. The trustees argued that Ms Ayad obtained the NAB loan by making false statements about her income. The trustees noted that, based on her income tax returns, Ms Ayad was unable to service the loan repayments for the NAB loan and the money to repay the loan was intended to come from some source other than her actual income. Further, the evidence was that the loan repayments were mainly made by companies associated with the bankrupt. The trustees contended that these matters support a conclusion that Ms Ayad obtained the NAB loan on behalf of the bankrupt.
2. As to Ms Ayad’s income, her 2015 tax return recorded a taxable income of $84,162.
3. NAB’s records show that Ms Ayad had a gross monthly income of $16,306.75 and a net monthly income of $10,816.34. There is no evidence to support these figures. In the absence of any evidence from Ms Ayad, I accept that she provided the figures to NAB and, by reference to her 2015 tax return, that the figures were not based on Ms Ayad’s true income.
4. NAB’s records show that the “variable repayment” payable monthly under the loan was $7,243.91 (or $86,926.92 per annum). Again, on the available evidence and in the absence of evidence from Ms Ayad, I am satisfied that when she procured the NAB loan, Ms Ayad had no prospect of servicing the expected loan repayments from her own income and, accordingly, that the money to repay the loan was intended to come, in whole or in part, from some source other than her income.
5. Between 20 July 2015 and 28 November 2019, there have been 226 payments into the offset account for the NAB loan account totalling approximately $1,281,630.00. These comprised:
6. three payments totalling $136,900 from an account in the name of Ms Ayad in July 2015;
7. between 5 August 2015 and 13 April 2016, 25 payments from an account in the name of Jacgab; and
8. from 14 April 2016, 198 payments from various accounts but mostly from Jacgab or an account in the name of one of the bankrupt’s minor children, Jacob El-Debel.
9. In total, the payments comprised:
10. $177,730.00, apparently from Ms Ayad;
11. $672,200, apparently from Jacgab;
12. $425,700, apparently from Jacob El-Debel; and
13. $6,000 from an unknown source.
14. I accept that the pattern of actual payments into the NAB loan account, together with the finding that Ms Ayad did not have any prospect of servicing the loan without assistance when she made it, and the relationships between the bankrupt and Jacgab and Jacob El-Debel (from whom the vast majority of deposits were made), together support an inference that Ms Ayad entered into the loan on the basis that the bankrupt would procure the repayments of the loan and that the loan was entered into by Ms Ayad on his behalf.
15. In her defence, Ms Ayad expressly disavowed a partnership relationship with the bankrupt. At her public examination, Ms Ayad said that she was last in a relationship with the bankrupt “Many years ago – a few years ago now”. She agreed that she and the bankrupt had separated in 2005, and said that they had not been in a relationship since, although their separation is amicable. Ms Ayad also said that their relationship had always been “on and off” and was last “on” before 2015.
16. Whatever the precise nature of the relationship between the bankrupt and Ms Ayad, they were not married. There was no documentary evidence of any property settlement between the bankrupt and Ms Ayad following any termination of their spousal relationship.
17. The evidence of Ms Ayad’s roles in Jacgab and TPG Group Services suggests, around the time of the purchase of the Beverly Hills property, Ms Ayad acted as the bankrupt’s pawn to conceal his business affairs. The entry into the NAB loan by Ms Ayad on the bankrupt’s behalf is consistent with that role. There is no good reason to think that Ms Ayad’s interest in the property would be held on any terms other than those most favourable to the bankrupt. Subject to one matter, discussed below, in the context of the bankrupt’s financial difficulties in 2015, and his professed goal of invisibility, I infer that the mutual intention of the bankrupt and Ms Ayad at the time of the acquisition of the Beverly Hills property as that Ms Ayad’s interest in the property was held on trust for the bankrupt.
18. Although Ms Ayad has not made monthly loan repayments, she appears to have made several significant lump sum payments into the offset accounts. There are five relevant payments, as follows:
19. $100,000 on 27 July 2015;
20. $36,800 on 28 July 2015;
21. $20,000 on 5 April 2017;
22. $16,000 on 1 July 2019; and
23. $4,000 on 8 July 2019.
24. Having regard to the lump sum nature of the payments and, in the case of the earliest payments, their proximity to the completion of the purchase, I infer that the arrangement between the bankrupt and Ms Ayad included that she would have an interest in the Beverly Hills property reflecting her lump sum contributions.
25. On that basis, I conclude that Ms Ayad holds the Beverly Hills property on a resulting trust in the bankrupt’s favour as to 90% of the property.

# Conclusion

1. I will direct the parties to endeavour to agree on final orders giving effect to these reasons, including in relation to costs, failing which I will hear argument as to final orders.

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| I certify that the preceding two hundred and thirty-seven (237) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson. |

Associate:

Dated: 23 July 2020

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | NSD 1972 of 2019 |
| Respondents |  |
| Fourth Respondent: | FALLOW INVESTMENTS PTY LIMITED (ACN 152 664 741) |
| Fifth Respondent: | JACGAB PTY LTD (ACN 600 951 586) |