SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2013 0129

FRANK MAINIERI

First Appellant

- and -

GELSOMINA COMANDE

Second Appellant

v

RITA CIRILLO

Respondent

JUDGES:	NETTLE AP and HANSEN and SANTAMARIA JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	2 September 2014
DATE OF JUDGMENT:	17 September 2014
MEDIUM NEUTRAL CITATION:	[2014] VSCA 227
JUDGMENT APPEALED FROM:	[2013] VSC 399 (Randall AsJ)

CONTRACT – Parol – Oral agreement for elderly mother to sell home, apply net proceeds of sale in reduction of mortgage over son's home and live with son in his and partner's home indefinitely – Subsequent instrument in writing embodying some terms of oral agreement – Whether evidence of oral agreement admissible – Whether parties' intention that written instrument be sole repository of agreement – Whether oral agreement constituted collateral warranty – *Niesmann v Collingridge* (1921) 29 CLR 177; *Mihaljevic v Eiffel Tower Motors Pty Ltd* [1973] VR 545, applied.

EQUITY – Constructive trust – Equitable lien or charge – Relationship between mother and son and partner breaking down – Continued cohabitation no longer practicable – Whether son's and partner's land subject to constructive trust in favour of mother – Whether mother entitled to equitable lien or charge to secure repayment of money – *Morris v Morris* (1982) 1 NSWLR 61, applied; *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137, referred to.

COSTS – Indemnity principle – Conditional costs agreement – Party's obligation to pay solicitor's fees subject to condition precedent – Whether order for costs in favour of party infringed indemnity principle – *Wentworth v Rogers* (2006) 66 NSWLR 474; *King v King* [2012] QCA 31, considered; *L M Investment Management Ltd (Administrators Appointed) v The Member of the L M Management Performance Fund* [2014] QSC 54, referred to – *Legal Profession Act 2004* (Vic), s 3.4.27.

APPEARANCES:	Counsel	Solicitors
For the Appellants	Mr P L Ehrlich	R D Silverstein
For the Respondent	Dr J S Glover	Clayton Utz

NETTLE JA
HANSEN JA
SANTAMARIA JA:

1 This is an appeal from a judgment given in the Commercial and Equity Division whereby it was declared that the appellants' home was impressed with a constructive trust in favour of the respondent.

The facts

2 In brief substance, the first appellant ('Mr Mainieri') and the second appellant ('Ms Comande') lived together as man and wife. The respondent ('Mrs Cirillo') is Mr Mainieri's mother. In order to assist Mr Mainieri and Ms Comande ('the appellants') with a pressing debt secured by mortgage over their home, Mrs Cirillo sold her home and contributed $240,000 of the proceeds of sale to the appellants to be applied in reduction of their mortgage. In turn, they undertook to permit Mrs Cirillo to live with them indefinitely in their home and that they would take care of her. After Mrs Cirillo sold her home, the proceeds had been applied in reduction of the appellants' mortgage, and she had moved in with the appellants, the relationship broke down irretrievably and continued cohabitation became impracticable. But, when Mrs Cirillo asked for her money back, the appellants refused. They claimed that it was an out and out gift and that they were not obliged to repay it.

3 Mrs Cirillo instituted a proceeding claiming that she was entitled to a constructive trust over the appellants' home to the extent of her contribution to its cost of acquisition (in effect, a share proportionate to the amount of her money which was applied in reduction of the mortgage) or, alternatively, to a right of repayment with an equitable charge or lien as security for repayment. In the further alternative, she sought damages at law for repudiation of agreement.

4 The principal basis of her claim in equity was that it was a term of her arrangement with the appellants that, if she sold her home and contributed $240,000 of the proceeds of sale to them, they would apply the proceeds in reduction of their

mortgage and thereafter permit her to live with them in their home indefinitely. In that way, it was said, there was constituted a 'joint relationship or endeavour' relative to the appellants' home which, as a consequence of the breakdown in relations, came to an end. Thus, by analogy with cases involving a fundamental breakdown in a domestic relationship in the nature of marriage where each partner has made a contribution to the acquisition of relationship property, and each partner is thus entitled in equity to a proportionate share or interest in the property,[1] it was contended that, upon Mrs Cirillo's joint relationship or endeavour with the appellants coming to an end, Mrs Cirillo became entitled in equity to a proportionate share or interest in the appellants' home or, alternatively, an equitable lien or charge.

The judgment below

5 The judge found (and the finding is not disputed) that, after the parties had discussed the terms on which Mrs Cirillo would hand over the proceeds of sale of her home, Mr Mainieri took Mrs Cirillo to a solicitor (whom Mr Mainieri had previously consulted on his own behalf) to draw up a formal agreement. In due course, the solicitor drafted a form of agreement, which the parties executed, that provided as follows:

> A. In consideration of the gift of $240,000 by the Donor [Mrs Cirillo] to the Donees [the appellants] the Donees hereby agree to look after and take care of the Donor for the rest of her lifetime in a manner that is just and appropriate in all the circumstances.
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> B. The Donees agree to allow the Donor to reside in their home at [address in Coburg] or any other principle place of residence they may own free of rental or any other charges.

6 The appellants claimed below that the document ('the written instrument') was the sole repository of their agreement with Mrs Cirillo and that, because it said nothing as to how the 'gift' of $240,000 would be applied - in particular, did not require the appellants to apply the $240,000 in reduction of their mortgage - the case was distinguishable from the domestic relationship cases in a manner which meant

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1 *Muschinski v Dodds* (1985) 160 CLR 583, 620; *Baumgartner v Baumgartner* (1987) 164 CLR 137, 147–8.

that Mrs Cirillo was not entitled to any interest in their house.

7 Notwithstanding the appellants' objection, however, the judge admitted evidence of the prior oral arrangement or understanding between the parties that the proceeds of sale of Mrs Cirillo's home would be applied in reduction of the appellants' mortgage. His Honour said that he did so on two bases:

> I am prepared to allow the admission of the conversations on two distinct and independent bases. Firstly, the parties agree (although they disagree on the substance) that conversations occurred from late 2007 with respect to the sale of the Lalor unit [Mrs Cirillo's home] and the application of the proceeds. The property was put on the market. A contract of sale was entered into in June 2008. In the absence of that evidence, the terse wording of the August Document [the instrument in writing] has no context and on its face cannot have [been] intended to encompass all the terms and processes discussed by the parties. Nor does it properly reflect the conduct of Mrs Cirillo in acting to her detriment in selling the Lalor unit and subsequently applying the proceeds in reduction of the mortgage. Accordingly, I accept that the Agreement between the parties was partly oral and partly written. The oral part is as contended for by Mrs Cirillo [('first basis')].
>
> Alternatively, I conclude that the use of the word 'gift' in the August Document leads to ambiguity in that, as conceded by the defendants, it cannot possibly refer to an intention to provide a gift when the advance is dependent upon the stated consideration. In those circumstances I am entitled to admit evidence of the earlier conversations and conduct to construe the word 'gift' used in the context of the August Document. I conclude that the evidence of the prior discussions and conduct is also admissible to conclude that the parties intended that the meaning of the word 'gift' used in the August Document was a payment towards the reduction of the mortgage secured on the Budds Street property [('second basis')].
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> I do not accept that reference to the oral part of the Agreement permits an inconsistency or variation. Reference to the conversations gives meaning to the arrangement between the parties in circumstances where, in isolation, the use of the word 'gift' in the August Document is nonsensical. Construing that word consistently with what had been agreed between the parties is consistent with the wider agreement and is, in any event, not inconsistent so as to constitute a variation when the defendants' concede there could not have been a gift as that word is used in the August Document.[2]

8 As the judge noted,[3] it was conceded that, if the evidence of prior oral arrangement were admissible on either of those bases, a proprietary interest of the kind claimed by Mrs Cirillo would be established. Accordingly, his Honour gave

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2 *Cirillo v Mainieri & Anor* [2013] VSC 399, [91]–[93] (Reasons)

3 Reasons, [73].

judgment for Mrs Cirillo.

Grounds of appeal

9 The appellants contend that the judge erred in admitting evidence of the prior oral arrangement on the first basis because it is apparent that the parties intended the written instrument to be the sole repository of their agreement; and they contend that the judge erred in admitting evidence of the prior oral arrangement on the second basis because the terms of the oral arrangement contradicted or were otherwise inconsistent with the terms of the written instrument and, therefore, the evidence should have been excluded in accordance with the parol evidence rule.

10 Mrs Cirillo resists those contentions and seeks to uphold the judgment on the basis of the judge's reasoning. Alternatively, pursuant to a notice of contention, she argues that the judgment should be upheld on the basis that, whether or not the evidence of prior oral arrangement was admissible at law as evidence of a term of the parties' agreement, it was admissible in equity to show that there was a joint relationship or endeavour whereby she contributed her money to reduce the mortgage secured over the appellants' home; that the joint endeavour or relationship thereafter failed; and that, in those circumstances, she was entitled in equity to the relief which she sought.

11 The appellants reply that it is not open to Mrs Cirillo to advance the latter argument because, they say, it was not the way in which she pleaded or conducted her case at trial and because it is obvious or at least cannot be gainsaid that the appellants might have conducted their case differently if the point had been taken at trial.

Grounds 1, 2 and 3: Parol evidence rule

12 With respect, we agree with the judge, although for partially different reasons, that evidence of the prior oral arrangement was admissible at law.

13 Whether or not an instrument in writing is intended to be the sole repository of a legally binding agreement is to be determined objectively, in the first place on the basis of the contents of the instrument itself.[4] Accordingly, where a document is complete on its face and does not purport to be a record of only some of the terms of the agreement, it will be treated as the sole repository of agreement unless it is established by evidence dehors the document that it was not intended to contain all of the terms.[5] In this case, the judge found, and we agree, that the evidence of events which preceded the execution of the instrument in writing strongly implied that it was not intended to contain all of the terms of the parties' agreement:

> The August Document [the instrument in writing] had been compiled almost a year after it was first entertained that the [Mrs Cirilllo's] property should be sold and the sale proceeds applied. The August Document is a very rudimentary document: it recites a gift, it set out that there would be a residency but it did not set out the consequences of breaches, nor did it set out any other rights. There had been evidence from all the witnesses that it had been contemplated that Mrs Cirillo might eventually need the care afforded by a nursing home. This was something obviously which had been discussed and prayed upon the parties' minds. However, the August Document did not address such an eventuality. Mrs Cirillo put [her] unit on the market after discussions with Frank and Gelsomina. Mrs Cirillo continued to present [her] unit for sale after contemplating withdrawing the same, and after further discussion with Frank and Gelsomina. Mrs Cirillo entered into the contract of sale for [Mrs Cirillo's] unit at a time when it is common ground that the purchase of other accommodation was not contemplated. The August Document does not recite these events. It is open to conclude that there was a completed agreement prior to the execution of the August Document. In the circumstances, it is almost inescapable that the parties intended that their agreement encompassed something more than what is set out in the August Document.[6]

14 Counsel for the appellants contended that the judge's analysis was deficient in failing to deal with a passage of Mrs Cirillo's evidence which, in counsel's

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4 *L G Thorne & Co Pty Ltd v Thomas Borthwick & Sons (Australasia) Ltd* (1955) 56 SR (NSW) 81, 91 (Roper CJ in Equity) cf, 94 (Heron J); *Equuscorp Pty Ltd v Glangallan Investments Pty Ltd* (2004) 218 CLR 471, 484 [36] (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ); Seddon and Ellinghouse, *Cheshire and Fifoot's Law of Contract* (LexisNexis Butterworths, 9th Aust ed, 2006), [10.5].

5 *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60, 71 (Knox CJ); *Maybury v Atlantic Union Oil Co Ltd* (1953) 89 CLR 507, 517; *Spunwill Pty Ltd v BAB Pty Ltd* (1994) 36 NSWLR 290, 299; *Branir v Owston (No 2) Pty Ltd* (2001) 117 FCR 424, 508–9 [288]–[293] (Allsop J); *Nicolazzo v Harb* (2009) 22 VR 220,234–5 [88]–[90] (Dodds-Streeton JA).

6 Reasons, [83] (citations omitted).

submission, was fatal to any notion of the parties having reached a concluded agreement or consensus prior to execution of the written instrument. That evidence was as follows:

> COUNSEL: The evidence of your son will also be that it was you who asked to see a solicitor to document the gift that you wished to make to him. That is correct, isn't it? --- (Through Interpreter) I never said to my son or daughter in law that I will give this money from the proceeds to them.
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> COUNSEL: That wasn't the question I asked. Is it correct that you asked to see a solicitor to document the transaction that you entered into with your son and daughter in law? --- I replied. I replied to my daughter in law. She said to me, 'Look, our word is enough, should be enough.' 'No', I said, because I had been tricked maybe more than once before. I wanted to see a solicitor about this.
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> COUNSEL: Why did you say you had been tricked once before. Who had you been tricked by? --- By them, by them with regard to the unit in Thomastown. I haven't said it before but I am saying it now.

15 Counsel argued that it necessarily precluded the possibility of the parties having reached a consensus or agreement before execution of the written instrument because it showed that Mrs Cirillo so much distrusted the appellants that she was not prepared to bind herself to any kind of arrangement unless and until it had been reduced to writing. It followed in counsel's submission that the written instrument ought properly to have been characterised as belonging to the third class of contract identified in *Masters v Cameron*[7] and, therefore, as the sole repository of the agreement; and, in turn, as counsel would have it, that rendered the judge's finding that the parties' agreement was partly oral and only partly in writing wholly untenable.

16 We do not accept the argument. Although the evidence in question may have shown that Mrs Cirillo was reticent about handing over her money until the appellants' agreement to house her and keep her had been reduced to writing, it does not follow that there was not a binding agreement or consensus between her and the appellants before they executed the written instrument. In effect, for the reasons which the judge gave, we think the better view of the evidence is that

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7 (1954) 91 CLR 353, 361; applying *Rossiter v Miller* (1878) 3 App Cas 1124, 1151.

Mrs Cirillo's insistence upon execution of the written instrument and the appellant's concurrence in that requirement made it a condition of Mrs Cirillo's obligation to pay over her money that the written instrument first be executed. But that did not make their agreement conditional on fulfilment of that requirement. To adopt and adapt the words of Rich and Starke JJ in *Niesmann v Collingridge*[8] - which served as the paradigm for the second class of contract identified in *Masters v Cameron*[9] - the provision for payment of the money on signing the written instrument was not a mere expression of the desire of the parties as to the manner in which the transaction already agreed to would go through; nor was it a condition of their agreement. It was a term of their bargain. Mrs Cirillo could not be compelled to pay over her money until the written instrument had been executed. That was a condition of her obligation to pay. But when she and the appellants had concluded their oral agreement, the necessary implication was that each of them would then sign an instrument in writing, in accordance with their agreement, embodying the appellants' obligation to keep and care for Mrs Cirillo as well as her obligation to pay them.

17 Counsel for the appellants further contended that the judge's finding that the agreement was partly oral and partly in writing flew in the face of evidence that, once the solicitor had prepared the written instrument, he sent it out under cover of a letter dated 12 August 2008 stating:

> We refer to the above matter and enclose herewith Agreement as per your instructions for signature by all parties and return.

18 As we understood that part of counsel's submission, it was that, because the solicitor's letter did not refer to any agreement for the appellants to apply the proceeds of sale of Mrs Cirillo's home in reduction of the appellants' mortgage, and because the solicitor was not called to say whether his instructions included anything about a prior oral agreement, it was to be inferred that the solicitor had

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8 (1921) 29 CLR 177, 184–5.

9 (1954) 91 CLR 353, 361.

been instructed that the written instrument was to be the entire embodiment of the parties' agreement.

19 The difficulty with that submission, as the judge found, is that the solicitor was really the appellants' solicitor and it was the appellants as opposed to Mrs Cirillo who gave him his instructions:

> Mrs Cirillo gave evidence that Frank took her to see Mr Bertoli. She could not remember whether Gelsomina also attended. She said that she did not speak to Mr Bertoli about the Agreement. She further said that Frank or Frank and Gelsomina talked to Mr Bertoli and she just signed the papers. Mr Bertoli prepared an agreement which had been organised by Frank or Frank and Gelsomina. Although Mrs Cirillo was cross-examined about whose idea it was to seek out Mr Bertoli to draw up a document, Mrs Cirillo was not challenged as to what happened at Mr Bertoli's office, nor did either Frank or Gelsomina put forward a version of events at the office which contradicted Mrs Cirillo's evidence.
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> The Agreement was posted back to Mrs Cirillo under cover of a letter from Mr Bertoli dated 12 August 2008. That letter included:
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> > We also confirm our advices that future circumstances may change which would make this Agreement unenforceable.
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> > We also confirm the above advice was given to you by Mr Bertoli in conference on 6th August, 2008 and you specifically instructed him to prepare the Agreement and to pay Mr Manieri and Ms Comande the sum of $240,000 from the proceeds of your property at 2/32 David Street, Lalor.
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> The Agreement was subsequently signed by Mrs Cirillo and dated 20 August 2008. It was urged upon me that I should draw an inference arising from Mrs Cirillo's failure to call Mr Bertoli with respect to what was discussed on 6 August 2008. However, given that I accept Mrs Cirillo's version of events at that conference, I decline to draw any inference as Frank could have easily given evidence about what was said or occurred, if such evidence might have assisted him.[10]

20 In any event, there is no inconsistency between an instruction to a solicitor to document the appellants' oral commitment to house and keep Mrs Cirillo and their undocumented oral agreement to apply the proceeds of sale of Mrs Cirillo's home in reduction of their mortgage.[11] In effect, it is really the same point as we made in

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[10] Reasons, [47]–[49].

[11] *De Lassalle v Guildford* [1901] 2 KB 215, 222-3 (A L Smith MR); *Ling v The Commonwealth of Australia* (1994) 51 FCR 88. 99; cf *Computer World (Victoria) Pty Ltd v Internet Centre of Excellence 2000 Pty Ltd* [2006] FCA 752, [21].

relation to the second class of contract identified in *Masters v Cameron*.[12]

21 Furthermore, as counsel for the respondent submitted in the alternative, even if the written instrument were regarded as the sole repository of agreement, evidence is admissible to prove a collateral warranty given by one party in consideration of the other party's entry into the agreement; provided of course that the collateral warranty is promissory and not inconsistent with the terms of agreement.[13] In our view, the appellants' oral statement that they would apply the proceeds of sale of Mrs Cirillo's home in reduction of their mortgage is properly to be seen as a collateral warranty.

22 Perhaps it might be said that their statements were statements of intention as opposed to a contractual promise.[14] But the distinction is a fine one and in each case the question depends upon analysis of all the circumstances of the case. Statements of intention can be treated as promises where, as here, they are precise, relate to a critical matter, and upon an examination of all the circumstances are seen to have induced a party to enter into a principal agreement.[15] The relevant principles were summarised by Gillard J in *Mihaljevic v Eiffel Tower Motors Pty Ltd*,[16] as follows:

> First, to establish that a statement made during the course of negotiation was promissory or contractual in character, proof of a common intention of the parties to impose a contractual obligation on the person making the statement is essential. Secondly, it is unnecessary that the statement must contain an express form of words. It is sufficient if in the context the words used import the requisite meaning to impose on the person making the statement a contractual obligation by way of promise or guarantee. Thirdly, whether a statement was intended to be contractual or not must be determined objectively in the light of the whole of the circumstances. Fourthly, whether an *animus contrahendi* exists is a question of fact and can only be determined by looking at all the circumstances attending the transaction. Fifthly, in the process of drawing such conclusion, the tribunal of fact is not entitled to draw any inference contrary to the express terms of any written contract made between the parties. Sixthly, it is easier to draw an inference that a warranty was intended where the person making the statement of the condition or quality of an article has a personal knowledge thereof and the person to whom the statement is made is, to the

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12 (1954) 91 CLR 353, 361.

13 *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133, 139 and 147; *Maybury v Atlantic Union Oil Co Ltd* (1953) 89 CLR 507, 517; JJ *Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435, 442.

14 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 61 (Gibbs CJ).

15 *Ballantyne v Phillott* (1961) 105 CLR 379, 396–7 (Menzies J); cf *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 63.

16 [1973] VR 545, 555.

> knowledge of both parties, ignorant of the condition or quality of the article and is relying on the first party's knowledge. Finally, in order to determine whether such intention be inferred I was and still am of opinion that the method suggested by Lord Denning, MR, in *Oscar Chess, Ltd v Williams*[17] and *Hornal v Neuberger Products, Ltd*[18] is the most useful way to arrive at a decision. His Lordship said: 'If an intelligent bystander would reasonably infer that a warranty was intended, that would suffice even though neither party in fact had it in mind.'

23 Looking at the matter objectively in accordance with those principles, it appears to us that the parties did intend the appellants to be subject to a binding obligation to apply Mrs Cirillo's money in reduction of the appellants' mortgage. On the facts as found, the appellants' mortgagor was pressing for payment to such an extent that, unless the mortgage obligation were reduced, the appellants might well have lost their home.[19] Axiomatically, the preservation of the appellants' home was critical to their arrangement with Mrs Cirillo that she sell her home and come and live with them. In those circumstances, it is hard to suppose that Mrs Cirillo would have entered into the instrument in writing unless the appellants had assured her that her money would go in reduction of their mortgage. Hence, the intelligent bystander would draw the reasonable inference that a warranty was intended.[20]

Grounds 4 to 6: Ambiguity

24 In case it matters, we should say that we respectfully disagree with the judge that the ambiguity arising from use of the word 'gift' in the written instrument enabled the instrument to be construed as subjecting the appellants to an obligation to apply Mrs Cirillo's money in reduction of their mortgage. It is apparent from the face of the document that the 'gift' was not intended to be a gift. It was a payment *in consideration of* the appellants' promise that Mrs Cirillo could live with them and they would take care of her. If so, wherein lies the ambiguity? Possibly, the incongruity of referring to the payment as a 'gift' entitled the judge to consider the surrounding

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17 [1957] 1 All ER 325, 328.

18 [1956] 3 All ER 970, 972.

19 Reasons, [36].

20 *De Lasalle v Guildford* [1901] 2 KB 215, 222-3 (AL Smith MR); *Harris v Sydney Glass and Tile Co* (1905) 2 CLR 227, 237–8 (Griffith CJ); *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR, 133, 139 (Knox CJ); *Maybury v Atlantic Union Oil Co Ltd* (1953) 89 CLR 507, 513 (Taylor J) and 517 (Dixon CJ, Fullagar and Taylor JJ).

circumstances as a means of resolving any residual uncertainty.[21] But, even so, we think it goes too far to say that 'gift' can thus be seen as denoting a payment made in consideration not only of the promises identified in the written instrument but also of an undertaking by the appellants' to pay the money in reduction of the mortgage. According to the natural and ordinary meaning of the written instrument, it provides exhaustively for the consideration for the payment. To construe 'gift' as adding an additional consideration would be inconsistent with that provision,[22] and that would be in breach of the parol evidence rule.[23]

25 That said, however, it remains that there is no necessary inconsistency as between the written instrument and a further oral term of the parties' agreement that the appellants should apply the proceeds of sale of Mrs Cirillo's home in reduction of their mortgage;[24] and in our view there is certainly no inconsistency as between the written instrument and the kind of collateral warranty to which we have referred to enter into the written instrument in consideration of the appellants' promise to apply the money in reduction of the mortgage. The latter does not contradict the written instrument and, as we have said, it may reasonably be inferred that, without it, the written instrument would not have been entered into.

The notice of contention

26 In case we are wrong about any of that, however, we should also say that we consider the evidence of the oral arrangement was admissible in any event in equity as proof of facts which, in the circumstances that obtained, rendered it against conscience that the appellants should retain the benefit of the reduction in their mortgage debt funded by Mrs Cirillo (and thus the consequent increase in their equity in their home) without accounting to her for her 'gift'. In substance, we

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21 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1983) 149 CLR 337, 350–2 (Mason J); *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604, 605 [3]–[4] (Gummow, Heydon and Bell JJ).

22 *Plenary Research Pty Ltd v Biosciences Research Centre Pty Ltd* [2013] VSCA 217,[53].

23 *LG Thorne & Co Pty Ltd v Thomas Borthwick & Sons (Australasia) Ltd* (1955) 56 SR (NSW) 81, 91.

24 Cf *Ling v The Commonwealth* (2006) 51 FCR 88, 99.

accept the argument advanced in Mrs Cirillo's notice of contention.

27 As the Privy Council said in *Chalmers v Pardoe,*[25] it is a general principle of equity that, where an owner of land has invited or expressly encouraged another person to expend money on part of the land on the faith of an assurance or promise that such part of the land will be made over to the person so expending the money, a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation and, if it turns out to be impracticable to effect the conveyance, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended.

28 The principle, which is calculated to guard against the unconscionability of a defendant departing from an assumption encouraged by the defendant on the faith of which a plaintiff has changed his or her position to their detriment,[26] is sometimes described in terms of *Dillwyn v Lewellan* estoppel.[27] But it is not limited to cases where one party has expended money on the land of another on the faith of an assurance that he or she will be granted an interest in the land. As McLelland J explained in *Morris v Morris,*[28] it is a broad conception of equity which is sufficiently flexible to apply in a great variety of situations, including where a plaintiff has laid out money on the property of another on the faith of an assurance that the plaintiff will be accorded an indefinite right of residence in the property. As McLelland J said, in the latter context the assurance of an indefinite right of residence is the operative equivalent of an assurance or promise to make over part of a defendant's land.

29 The range of remedies to which the principle gives rise is equally broad and flexible. Depending on the circumstances, it may appear that nothing less than the

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25 [1963] 1 WLR 677, 681–2.

26 *Sidhu v Van Dyke* (2014) 308 ALR 232, 243–4 [58]; *Australian Financial Services Pty Ltd v Hills Industries Ltd* (2014) 307 ALR 512, 539 [86]–[87] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

27 *Dillwyn v Llewelyn* (1862) 4 De G F & J 517; 45 ER 1285; *Sidhu v Van Dyke* (2014) 308 ALR 232, 235 [2] (French CJ, Kiefel, Bell, Gageler and Keane JJ.)

28 [1982] 1 NSWLR 61, 64.

imposition of a remedial constructive trust will suffice to satisfy the demands of justice and good conscience.[29] In other cases, as was observed in *Chalmers v Pardoe*,[30] a plaintiff who has expended money on the faith of such an assurance or understanding may instead be granted an equitable charge or lien for the amount so expended. It depends on the circumstances of what was promised or represented and on the plaintiff's change in position in reliance on the assumption thus created.[31] It may also be affected by the interests of third parties.[32]

30 In *Morris v Morris*,[33] the facts were not dissimilar to this case. A widower entered into an arrangement with his son and daughter-in-law to sell his home and apply the proceeds in extending their home to provide an apartment for him. After the apartment was constructed, the widower moved in but, a short time later, there was a breakdown in the marriage and the son and subsequently the widower had to depart. McLelland J found that it was not open to infer that the widower or his son or daughter in law intended to create a trust of the property or of a share of it in favour of the widower. Hence, there was not a legitimate basis to hold that the arrangement gave rise to an express or implied trust. But that did not preclude the imposition of a remedial constructive trust. Given all of the circumstances of the case, however, his Honour considered that the widower's equity could best be satisfied by an equitable charge over the property to secure the amount which he paid, together and interest computed from the commencement of proceedings.

31 Similarly, in this case, it is not open to infer the existence of an express or implied trust. Paragraph B of the written instrument contemplated that the appellants might move from time to time and, if they did, that Mrs Cirillo would be

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29 See for example, *Baumgartner v Baumgartner* (1987) 164 CLR 137, and more recently in another but related context: *Sidhu v Van Dyke* (2014) 308 ALR 232, 248–9 [79]–[86].

30 [1963] 1 WLR 677, 681-2.

31 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 172 [200].

32 Cf *Giumelli v Giumelli* (1999) 196 CLR 101, 125 [50] ((Gleeson CJ, McHugh, Gummow and Callinan JJ); and see Ward, *Constructive Trusts and Equitable Proprietary Relief: Insights from Estoppel,* in Bant and Bryan, *Principles of Proprietary Remedies* (Law Book Co, 2013) [10.60]–[10.90].

33 [1982] 1 NSWLR 61.

accommodated and cared for in their home for the time being. That implied the appellants were to have a degree of freedom in the disposition of their home which would be inconsistent with an express or implied trust in favour of Mrs Cirillo. But it was not inconsistent with the application of equitable principle in the manner applied in *Morris v Morris*.[34]

32 Specifically, as it appears to us on the evidence, Mrs Cirillo sold her home and laid out the proceeds of sale on the appellants' property by reducing the appellants' mortgage debt and thus increasing the appellants' equity in their property. She so acted on the faith of the appellants' assurance (whether or not it was a binding legal commitment) that she would be accorded an indefinite right of residence in their property and be cared for there. As a result of the breakdown in the relationship between Mrs Cirillo and the appellants, it became impracticable for her to continue to live with them and for them to take care of her. In view of the terms of the written instrument, it was not open to infer the existence of an express or implied trust in favour of Mrs Cirillo. But that did not necessarily preclude the imposition of an express constructive trust such as was ordered below. Having regard, however, to what was promised or represented to Mrs Cirillo, and the nature of the change in her position in reliance on the assumption thus created, she derived an equity which could best be satisfied by an equitable lien or charge over the property to secure the amount which she had paid together with interest.

33 Counsel for the appellants contended that it was not open to Mrs Cirillo to invoke equitable principle of the kind essayed in *Morris v Morris* because, in his submission, it was not the way in which Mrs Cirillo's case was pleaded or conducted below and it was impossible to suppose that the appellant might not have conducted their case differently if Mrs Cirillo had so pleaded and conducted her case below. In particular, counsel said, his cross-examination of Mrs Cirillo had been 'surgically targeted' to establish that there was not a binding prior oral agreement for Mrs Cirillo to sell her home and apply the proceeds in reduction of the appellants'

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34 [1982] 1 NSWLR 61.

mortgage. But, he said, if he had been aware that Mrs Cirillo intended to put her case on the basis of the equitable principle now invoked, he might well have conducted her cross-examination very differently. Asked how that might be so, he replied that, instead of confining his cross-examination to the issue of whether there was a legally binding oral agreement, he would have cross-examined with a view to establishing that there was not any form of prior oral arrangement, legal or informal.

34 We do not think there to be any substance in those contentions. Mrs Cirillo's statement of claim put her case on two distinct bases. The first, which was alleged in paragraphs 6, 9, 13, 14 and 15 of the pleading and in paragraph D of the prayer for relief, was a claim at law for damages for repudiation of a legally binding agreement constituted in part of the oral conversations which preceded execution of the written instrument and in part of the written instrument as executed. The second, which was alleged in paragraphs 8, 10, 11, 16, 17 and 18 of the pleading and in paragraphs A, B and C of the prayer for relief, was a claim in equity for declaration of remedial constructive trust or, alternatively, an equitable lien to secure repayment of the amount paid by Mrs Cirillo to the appellants. The latter was put on the basis that by reason of an *informal* agreement or arrangement constituted in part of the oral conversations which preceded execution of the instrument in writing, and possibly also in part by the instrument in writing, and further by Mrs Cirillo's actions in selling her home and paying the proceeds to the appellant's pursuant to the arrangement, there was constituted a 'joint relationship or endeavour' which, in the events that occurred (namely, the breakdown in relationship), had failed.

35 It is true that the equity thus claimed was referred to in the pleading only in terms of 'an equitable interest' (such as would warrant the imposition of a remedial constructive trust) and not also as a mere 'equity' (which would suffice to attract an equitable lien or charge).[35] But there was nothing misleading about the pleading. It made clear that a declaration of constructive trust and equitable lien or charge were sought in the alternative.

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[35] Cf *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liquidation)* (1965) 113 CLR 265, 276.

36 Similarly at trial, counsel for Mrs Cirillo put Mrs Cirillo's case perspicuously on both pleaded bases. It is clear from the transcript of counsel's final address[36] and it is confirmed in the judge's reasons, that counsel for Mrs Cirillo went to considerable lengths in developing the claim in equity for a declaration of remedial constructive trust, or alternatively an equitable lien or charge, on the basis of an 'informal property agreement' or 'informal property arrangement' which pre-dated execution of the written instrument or, alternatively, which was constituted in part of conversations which pre-dated the written instrument, in part by the written instrument and in part by what was done in pursuance or one or both. Thus, as the judge said in his reasons:

> Dr Glover [counsel for Mrs Cirillo] submitted:
>
> [Mrs Cirillo] asserts that she is entitled to have a constructive trust over the Budds Street house declared in her favour because of *the informal property agreement* she had with her son and his de facto spouse in respect of that house. In return for [Mrs Cirillo's] payment of $240,000 in reduction of the Budds Street house mortgage, the defendants promised that they would 'look after and take care' of her 'for the rest of her lifetime in a manner that was appropriate in all the circumstances'.
>
> *The informal property arrangement* dates from a time in 2007 when [Mrs Cirillo] was living at the Lalor unit with the defendants. [Mrs Cirillo's] evidence is that this was approximately October 2007.
>
> (a) The Lalor unit was eventually sold pursuant to the arrangement (or joint endeavour) in June 2008.
>
> (b) [The] plaintiff had substantially changed her position in reliance on the joint endeavour by June 2008. Her residence and largest asset had been sold.
>
> (c) [The] deposit paid on the sale of the Lalor unit was with Mr Bertoli [the solicitor acting on the sale and the solicitor who drew the August Document] or under his control after June 2008.
>
> (d) [There are] ambiguities as to who was instructing Mr Bertoli. He was acting for both sides. Frank eventually instructed Mr Bertoli as to the payment of the $240,000.
>
> [Mrs Cirillo] asserts an analogy between the present circumstances involving the return of property dedicated by the plaintiff to an abortive domestic relationship between herself and the defendants and the return of a partnership premium where a partnership terminates otherwise than through the contributor's fault. No fault on [Mrs Cirillo's] part has been alleged.

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[36] T.364.3–377.10.

> [Mrs Cirillo] denies any attributable blame for what occurred.
>
> On the Cirillo facts the plaintiff alleges a 'joint relationship or endeavour' arose from the coupling of the plaintiff's payment of $240,000 in reduction of the Budds Street mortgage with the Defendants' promise to accommodate the plaintiff in the Budds Street (or replacement) house and care for her for life. *Even if it is not found to be a term of a contract* between the parties, a joint relationship or endeavour including the mortgage payment is relied upon for inference of a constructive trust…
>
> …
>
> Dr Glover also submitted that *a remedial alternative to the imposition of constructive trust would be the imposition of an equitable lien to secure indebtedness* which is factually linked to the property over which the lien is to be impressed.
>
> …
>
> *The argument based upon the joint relationship or endeavour is primarily founded upon discussions and conduct leading up to the execution of the August Document, in the absence of the August Document or, in combination with the August Document.*
>
> Dr Glover, in seeking to draw a parallel with domestic arrangement cases, said:
>
> > *Even if it is not found to be a term of a contract* between the parties, the fact that [Mrs Cirillo's] $240,000 payment was, at the defendants' request, applied in the reduction of the defendants' mortgage is relied upon as an 'unjust factor' for the purposes of impressing a lien over the Budds Street house. In the event that the mortgage reduction evidence is rejected entirely, [Mrs Cirillo] asserts that the defendants' promise of ongoing accommodation and care at the Budds Street premises is a sufficient 'unjust factor' for the same purpose.[37]

37 In the event, the judge decided the case on the sole basis that, because evidence of the prior conversations was admissible at law (on one or other of the two bases earlier identified) and, because it was conceded that, if the evidence were admissible, Mrs Cirillo would be entitled to an equitable interest in the property, there should be judgment for Mrs Cirillo for the declaration of constructive trust which she sought.

38 It is regrettable that his Honour did not also deal with Mrs Cirillo's alternative case that, whether or not evidence of the prior conversations were admissible at law,

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[37] Reasons, [61]–[67] (emphasis added).

it was admissible in equity to prove the *informal* agreement or arrangement pursuant to which she sold her home and paid the proceeds to the appellants to be applied in reduction of their mortgage. But, as we have said, counsel for Mrs Cirillo made clear in his pleadings and at trial that he put his case on both bases. In those circumstances, there is no reason why Mrs Cirillo should not now be entitled to rely on her notice of contention as an alternative basis for supporting the judgment below.

39 In the result, if the judgment below were not to be upheld on the basis of the agreement as found by the judge or the collateral warranty earlier identified, we would nonetheless uphold it, in substance, on the basis that Mrs Cirillo is entitled in equity to a lien or charge over the appellant's property to secure the repayment of her money with interest.

Form of relief

40 Regardless of the basis on which the judgement is to be upheld, we consider that Mrs Cirillo's equity is best satisfied by an equitable lien or charge to secure repayment of her money with interest. For the reasons earlier stated, we think that the declaration of constructive trust was excess to needs. It follows that the judge's orders should be varied to provide, in lieu of his Honour's declaration of constructive trust, for a lien or charge to secure repayment with interest.

Ground 7: Costs

41 Under Ground 7, counsel for the appellants sought leave[38] to argue that the judge erred in making an order for costs in favour of Mrs Cirillo. The argument was based on the fact that Mrs Cirillo was represented below under a *pro bono* scheme which it was said left her free of any obligation to pay costs. In those circumstances, counsel contended, the order for costs offended the indemnity principle.

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[38] *Supreme Court Act 1986*, s 17A(1)(b); *Arif v Etna* [1999] 2 VR 353, 378 [66]–[67] (Batt JA).

42 Counsel informed us that he had put the same argument before the judge below but that his Honour rejected it without providing reasons. If so, that is also regrettable. Although the issue is only one of costs, the argument involves an important point of principle and, therefore, the judge should have dealt with it appropriately with intelligible reasons. Failure to provide adequate reasons is not only an error of law[39] which is productive of a justified sense of grievance amongst litigants but also calculated to result in unnecessary and wasteful appeals. In this case, it means that the point must now be considered for the first time on appeal.

43 In broad terms, the indemnity principle is that, as between party and party, the party ordered to pay the other party's costs is obliged to pay only those costs which the other party is legally obliged to pay to his or her solicitor. In *Wentworth v Rogers,*[40] Basten JA distilled the essence of the matter as follows:

> [I]t is beyond dispute that the purpose of an adverse costs order is to compensate or partly indemnify one party to litigation (usually the successful party) for the legal costs incurred in the course of the proceedings. The [indemnity] principle does not require that the costs have been paid, but it does require that there be a legal liability to pay costs.[41]

44 In this case, the fees agreement between Mrs Cirillo and her solicitors relevantly provided that:

> **2. How we calculate what we charge you**
>
> 2.1 You will not have to pay us anything out of your own pocket for any of the work done by our lawyers on your matter (professional time).
>
> …
>
> **3. Issuing a bill for payment by another party**
>
> 3.1 We will only issue you with a bill for our professional time if one of the following things happens:

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39 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 281 (McHugh JA); *Oil Basins Ltd v BHP Ltd* (2007) 18 VR 346, 366 [55]; cf *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 270–1 [53].

40 (2006) 66 NSWLR 474.

41 Ibid, 504 [126]; see also *Kuek v Devflan Pty Ltd* (2011) 31 VR 264, 280 [59] (Hansen JA); *Shaw v Yarranova* [2011] VSCA 55 [28] (Redlich and Mandie JJA).

(a) a Court or other tribunal or statutory scheme orders another party to pay your legal costs; or

(b) the case is settled, and part of the settlement includes payment of your legal costs.

3.2 If one of these two things happens, we will issue a bill which includes our professional time and all disbursements which we have incurred in this matter. We will not ask you to pay any more under the bill than the amount recovered for legal costs in paragraph 3.1(a) or 3.1(b), even if that amount is less than the amount of our bill.

45 In effect, that means Mrs Cirillo's liability to pay her solicitors was contingent on a costs order being made in her favour (or the case being settled on terms which included the payment of her costs) but that her liability to pay costs became unconditional the instant that a costs order was made in her favour.

46 The question of whether a contingent liability to pay costs is sufficient for the purposes of the indemnity principle was considered, but not decided, in *Wentworth v Rogers*.[42] In considered obiter dicta, Santow JA and Basten JA expressed opposing views on the point while Hislop J expressly abstained from stating a view one way or other.

47 Santow JA said that, as the *Legal Profession Act 1987* (NSW)[43] now recognises conditional costs agreements of the kind where payment of costs is 'contingent on the successful outcome of the matter' and draws no distinction between such a contingency expressed as a condition precedent or subsequent, he was inclined to the view that the application of the indemnity principle should not depend on that distinction. His Honour continued:

> The general law governing the indemnity principle with its emphasis on flexibility is, in my opinion, quite capable of accommodating conditional fee agreements of this kind. It should do so recognising the importance of such agreements in promoting access to justice which may otherwise be unaffordable. The residual undertaking to pay, though qualified, strengthens the case for conformance with the indemnity principle. It is reasonable, not just in this ferocious litigation but more generally, to recognise in a costs agreement that the unsuccessful party who is subject to a costs order may delay or defeat recovery. Hence predicating payment on successful recovery

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42 (2006) 66 NSWLR 474.

43 Which in relevant respects is identical to the *Legal Profession Act 2004* (Vic), s 3.4.27.

> is not unreasonable. In the words of Bramwell B this gives no unjustified bonus to the successful party nor does it impose any punishment on the losing one, so as to invoke the rationale behind the indemnity principle.[44]

48 In contrast, Basten JA said that, although the distinction might appear arbitrary, there were two reasons why a condition precedent would disentitle a party to an order for costs under the indemnity principle, whereas a condition subsequent would not:

> Although it may seem arbitrary to insist that, for the purposes of the indemnity principle, there must be a contractual entitlement to charge fees, subject to a condition subsequent, rather than an entitlement which arises as a result of a successful outcome, there are reasons why that is not so. First, as appears from the costs agreements presented in the present case, a successful outcome will usually involve not merely obtaining a costs order, but actual recovery of costs. It is not possible to make the existence of a right to charge dependent on recovery of the moneys from which the charges would be paid. That would be to take the circularity noted (at 500[111]supra) one step too far.
>
> Secondly, the existence of an immediate and on-going obligation is consistent with other aspects of the statutory scheme of fee regulation, including the disclosure obligations. Section 175 of the *Legal Profession Act* 1987 made the following provision:
>
> **175 Obligation to disclose to clients basis of costs**
>
> (1) A barrister or solicitor must disclose to a client in accordance with this Division the basis of the costs of legal services to be provided to the client by the barrister or solicitor.
>
> (2) The following matters are to be disclosed to the client:
>
> (a) the amount of the costs, if known,
>
> (b) if the amount of the costs is not known, the basis of calculating the costs,
>
> (c) the billing arrangement,
>
> (d) the client's rights under Division 6 in relation to a review of costs,
>
> (e) the client's rights under Division 4 to receive a bill of costs,
>
> (f) any other matter required to be disclosed by the regulations.
>
> There is also a statutory obligation to disclose estimated costs, where the actual amount is not disclosed pursuant to s 175: see s 177(1). That obligation

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[44] (2006) 66 NSWLR 474, 488 [54].

> is on-going and requires disclosure of 'any significant increase in that estimate': s 177(3).[45]

49 Subsequently, in *King v King*,[46] Chesterman JA said in obiter dicta that he preferred Basten JA's analysis for the reason that the distinction described by Basten JA was 'both real and substantial.' His Honour added:

> … It is more than a preference for one form of agreement over another. The circularity noted by his Honour [Basten JA], and described in para 6 of these reasons, shows when properly analysed that there is no obligation in the applicant to pay costs until a costs order is made and a costs order cannot be made until there is a liability in the successful litigant to pay his own lawyers' costs. Catch 22 it may be, but the reality is that the client's liability to pay his solicitors stands on a whirligig which moves beneath it, and cannot support the need for an indemnity.[47]

50 Similarly, White JA said in a very short judgment that he agreed with the reasons of Chesterman JA,[48] and presumably, therefore, his Honour agreed with Chesterman JA's preference for Basten JA's analysis. The third member of the court, Margaret Wilson AJA stated[49] that she did not wish to express any view on the circularity argument or the different views expressed by Santow and Basten JJA.[50]

51 Evidently, the weight of considered dicta favours the Basten JA view. Conscious as we are, however, of the importance of consistency among Australian intermediate courts of appeal, we agree with Santow JA that, as the *Legal Profession Act* now recognises conditional costs agreements of the kind where payment of costs is 'contingent on the successful outcome of the matter', and draws no distinction between such a contingency expressed as a condition precedent or subsequent, the application of the indemnity principle should not depend on that distinction. With all respect, we do not consider that either of the reasons identified by Basten JA as justifying the opposite view is persuasive.

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45 (2006) 66 NSWLR 474, 505 [133]–[135]

46 [2012] QCA 81.

47 Ibid, [13].

48 Ibid, [18].

49 Ibid, [19].

50 (2006) 66 NSWLR 474.

52 As to the first, although it may be that an obligation to pay fees which is conditional on the actual recovery of costs would not impose a sufficient obligation to warrant an order for costs in accordance with the indemnity principle, logically it does not follow that an obligation to pay costs which is conditional on obtaining a costs order ought not be regarded as sufficient. If concentration is confined to the latter situation, it would be remarkably arbitrary, and hence we think contrary to principle, if the law were that an order for costs may be made in favour of a party who, at the instant the order is made, is subject to a defeasible liability to pay costs; and yet an order for costs cannot equally be made in favour of a party who, at the instant the order is to be made, is at least contingently liable to pay costs and who, at the instant the order is made, becomes indefeasibly liable to pay them. To hold otherwise would be a triumph of form over substance.

53 As to the second reason, although we agree with respect that an ongoing unconditional obligation is consistent with other aspects of the statutory scheme of fee regulation, so too surely is an ongoing contingent obligation of a kind for which the Act expressly provides and which, for the reasons adumbrated by Santow JA, the law regards as just and socially desirable.[51] We add that we are fortified in that conclusion by the analysis recently undertaken by Mullins J in *LM Investment Management Ltd (Administrators Appointed) v The Members of the LM Managed Performance Fund*.[52]

54 On that basis, we shall grant leave to the appellants to argue Ground 7 but reject the argument.

Conclusion and orders

55 In the result, the appeal fails in substance. It will be necessary, however, to allow the appeal for the limited purpose of varying the orders made below. For the reasons earlier stated, we consider that, in all the circumstances of the case, the relief

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[51] Ibid 488 [54].

[52] [2014] QSC 54.

to which the Mrs Cirillo was entitled was an equitable lien or charge over the appellants' property to secure repayment of her money with interest. We shall hear counsel on the precise form of orders.

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