"Joint endeavour" constructive trust - Joudo v Joudo

Conveyancing and Property

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"JOINT ENDEAVOUR" CONSTRUCTIVE TRUST – JOUDO v JOUDO

Once a key legal remedy in disputes between de facto partners,[1] the "joint endeavour" constructive trust serves also as a mechanism for determining an underlying beneficial interest in land and associated rectification in a broader range of relationships. In October 2024, the New South Wales Court of Appeal handed down its decision in *Joudo v Joudo*[2] (*Joudo*) upholding the trial judge's finding of a beneficial interest in land held by the non-legal owners, the legal owner's brother and sister-in-law. Following another 2024 decision involving siblings, *McKinlay v Woods* (*McKinlay*),[3] *Joudo* recognises the character of the mutual benefit necessary to underpin a declaration of a joint endeavour. In doing so, it contributes to a more nuanced understanding of the intention necessary to secure equitable relief.

The Facts

The Joudos were a very close extended family who shared sometimes crowded accommodation. When Ronnie and Marie Joudo (the respondents) sought to purchase land some 40 minutes' drive away from Ronnie's siblings and mother, his sister Ravina Joudo (the appellant) offered to buy land close by.[4] She borrowed money secured by a mortgage to fund the purchase and construction of a home, on the understanding that Ronnie and Marie would contribute by assisting in construction, paying utilities and maintaining the property. They would live there with their three children.

Between 2011 and 2023, Ronnie and Marie made substantial contributions to the house construction and landscaping, as well as paying for utilities as agreed, and contributing some mortgage repayments. Unfortunately, the parties' relationship broke down in 2021 and Ravina issued an eviction notice, claiming outstanding rent from Ronnie and Marie. The dispute came before Pike J in the New South Wales Supreme Court[5] where Ravina argued that there was a tenancy, and Ronnie and Marie sought a declaration of a constructive trust to protect their beneficial interest arising from a joint endeavour. Ronnie and Marie were successful, and Ravina appealed.

Intention as to Joint Endeavour

The overarching task for a court in applications for a declaration of a beneficial interest in land is to characterise the relationship between the parties. Ravina argued in this case that the relationship was one of landlord and tenant while Ronnie and Marie maintained that they were equitable co-owners with Ravina. The key to characterising the relationship as the latter lies in the existence of a joint endeavour, the purchase of a property, and the premature termination of the joint endeavour such that one party is left with a legal interest that they had not been intended to enjoy.[6] A joint endeavour thus necessarily requires intention. At the very least, the intention is negative:[7] that there is no intention that the claimant's contribution is to be enjoyed by the legal estate-holder. This intention is revealed by retrospective examination of the parties' actions.[8] After all, it was "hardly likely that if she had only been

[1] See, eg, *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

[2] *Joudo v Joudo* [2024] NSWCA 258.

[3] *McKinlay v Woods* [2024] NSWCA 122. See also *Hellenic Property Holdings Pty Ltd v Makaritis* [2025] NSWCA 13.

[4] As did Bell CJ in the judgment, the parties are here referred to by their forenames.

[5] *Joudo v Joudo* [2024] NSWSC 232.

[6] *Joudo v Joudo* [2024] NSWCA 258, [32], citing *Woods v McKinlay (No 2)* [2021] NSWSC 1510, [231].

[7] *Woods v McKinlay (No 2)* [2021] NSWSC 1510, [248].

[8] *Woods v McKinlay (No 2)* [2021] NSWSC 1510, [260], citing *Muschinski v Dodds* (1985) 160 CLR 583.

a tenant and nothing more she would have continued with such an unfavourable arrangement for almost two decades afterwards".[9]

In *Joudo*, as is common in familial contexts,[10] there was no definitive evidence of an express joint endeavour,[11] so the Court turned to the facts to ascertain its existence. It found that the respondents had contributed substantively to the construction of the house, landscaping, and driveway, and had made some $60,000 of mortgage contributions. In total, they contributed $160,760.30, relative to Ravina's total contribution of $173,250.23.[12]

That the contributions were material, and financial, both spoke to the existence of a joint endeavour necessary to establish a constructive trust. The parties had behaved in accordance with such a joint endeavour, including in the knowledge that Ravina did not initially have the funds to have completed construction – the parties could only have achieved the purchase through a joint endeavour. Although at some later stage Ravina had asked Ronnie and Marie to contribute mortgage payments, this too was entirely consonant with the joint endeavour alleged. Indeed, the Court observed that the scope of the parties' understanding might change from time to time without nullifying the joint endeavour.[13]

"Mutual Material Wealth" as Criterion for Joint Endeavour

The appellant denied that a joint endeavour had been formed, citing *Lloyd v Tedesco*,[14] which held that a joint endeavour must involve advancing the parties' "mutual material wealth".[15] Although the Court of Appeal upheld the original decision in rejecting this argument, it warrants some discussion.

Joudo affirms the decision in *McKinlay*[16] that, in turn, had distinguished *Lloyd*. While both *Joudo* and *McKinlay* involved disputes between siblings, *Lloyd* sought to resolve a dispute between de facto spouses. Parker J at first instance in *McKinlay* explained that cases of de facto relationships involved taking account of "indirect and non-financial contributions made by the homemaker".[17] Courts were therefore "concerned to reject the idea that merely by forming a de facto domestic relationship, one party to the relationship would become entitled … to a share … in assets subsequently acquired by the other".[18] The Court of Appeal in *McKinlay* agreed.[19]

In other words, in an inquiry as to the nature of de facto parties' legal relationship, the *Lloyd* proposition effectively made a presumption about parties' contributions arising from their ascribed relationship as de facto spouses and therefore imposed, as an additional requirement for finding a joint endeavour, an intentional and deliberate purpose of advancing the parties' mutual material wealth.[20]

In *Woods v McKinlay (No 2)*, Parker J found that there was "no reason in principle for any such limitation", and that the *Muschinski* doctrine "is not based on any affirmative intention to share the property".[21] Yet the

[9] *Woods v McKinlay (No 2)* [2021] NSWSC 1510, [167].

[10] See, eg, *McKinlay v Woods* [2024] NSWCA 122, [12].

[11] Ronnie and Marie had accepted Ravina's proposal but "there was no formality to their acceptance of it". *Joudo v Joudo* [2024] NSWCA 258, [15].

[12] *Joudo v Joudo* [2024] NSWCA 258, [22]–[23].

[13] *Joudo v Joudo* [2024] NSWCA 258, [32], citing *Woods v McKinlay (No 2)* [2021] NSWSC 1510, [231]; *Makaritis v Makaritis (No 2)* [2022] NSWSC 1690, [164].

[14] *Lloyd v Tedesco* (2002) 25 WAR 360.

[15] *Joudo v Joudo* [2024] NSWCA 258, [39].

[16] *McKinlay v Woods* [2024] NSWCA 122.

[17] *Woods v McKinlay (No 2)* [2021] NSWSC 1510, [245].

[18] *Woods v McKinlay (No 2)* [2021] NSWSC 1510, [245].

[19] *McKinlay v Woods* [2024] NSWCA 122, [105].

[20] *Joudo v Joudo* [2024] NSWCA 258, [39], citing *Lloyd v Tedesco* (2002) 25 WAR 360, [15]–[16].

[21] *Woods v McKinlay (No 2)* [2021] NSWSC 1510, [248], referring to *Muschinski v Dodds* (1985) 160 CLR 583.

judgment distinguishes the de facto cases from the sibling cases,[22] such that the requirement of 'mutual material wealth' in de facto cases is not obviously disturbed. On appeal in *McKinlay* the Court also distinguished *Lloyd*, finding that the *Lloyd* "qualification is inapplicable to the *financial* contributions made" in that case.[23]

In *Joudo*, Ravina's counsel seized the opportunity presented by the "mutual material wealth" element to deny a joint endeavour. The Court responded in three ways.

First, as in *McKinlay*, so too did *Joudo* distinguish the case as involving siblings rather than parties in de facto relationships.[24] This appears to leave the mutual material wealth element in place in de facto relationship cases. Although *Joudo* found that the *Lloyd* proposition had "been rejected" in *McKinlay*,[25] the context is rather that the *Lloyd* proposition is limited to the circumstances of a de facto couple and is not a principle of general application.[26]

Second, again reflecting *McKinlay*, *Joudo* found that the respondents had, in any event, made "extensive *material* contributions".[27] By extension, in a de facto case, material contributions will also satisfy the threshold for finding a joint endeavour.

Finally, both *Joudo* and *McKinlay* identified close family relationships as motivating the joint endeavour. In *McKinlay*, the Court found "that [the legal owners] were behaving altruistically, obtaining a large loan and mortgaging their own property in order to provide a home to their sister and aunt and her children and pets which she could not otherwise afford".[28] Similarly, in *Joudo*, the "arrangement … was entered into for the common benefit of the parties, namely the maintenance of physical proximity of an historically very close family".[29] Admittedly, in both cases, familial ties accompanied mutual economic benefit.

Given the courts' acceptance of the familial relations in the sibling cases as a motivation for a joint endeavour, maintaining the *Lloyd* principle for de facto relationships might appear somewhat incongruent. Certainly, the court's role is to characterise the parties' relationship as a question of law. However, the *Lloyd* proposition appears grounded in a presumption that contributions in an intimate relationship are necessarily solely directed at love and affection rather than property. On the contrary, marriage and marriage-like relationships are intrinsically involved with property, homemaking, and the acquisition of wealth. This is both historically the case[30] and is also reflected in contemporary family law.

In the same way that familial love and affection might manifest as both in-kind and financial contributions, so too might spousal contributions to the household be understood as contributing to the family's prosperity that is reflected in the parties' beneficial ownership. It seems incongruous that the common law would have as its starting point an assumption that a spousal relationship does not involve a joint endeavour in terms of property.

Conclusion

Both *Joudo* and *McKinlay* reflect equity's response to the frequent informality of property acquisition in familial relationships. Courts resolve disputes between the legal and putative beneficial owners by ascertaining the relationship as one of a joint endeavour and distribute beneficial ownership accordingly.

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[22] *Woods v McKinlay (No 2)* [2021] NSWSC 1510, [247].

[23] *McKinlay v Woods* [2024] NSWCA 122, [105].

[24] *Joudo v Joudo* [2024] NSWCA 258, [41].

[25] *Joudo v Joudo* [2024] NSWCA 258, [43].

[26] Note *Joudo v Joudo* [2024] NSWCA 258, [44] which recognises that *Lloyd v Tedesco* (2002) 25 WAR 360 was distinguished.

[27] *Joudo v Joudo* [2024] NSWCA 258, [44] (emphasis in original).

[28] *McKinlay v Woods* [2024] NSWCA 122, [98].

[29] *Joudo v Joudo* [2024] NSWCA 258, [42].

[30] See observations by Kirby P (as he then was) in *Bryson v Bryant* (1992) 29 NSWLR 188, 195.

They do this with reference to the contributions of the parties as a means of ascertaining the intention as to a joint endeavour and thus beneficial ownership.

Joudo and *McKinlay* both distinguished the *Lloyd* proposition without expressly overturning it so that it appears to remain an element in de facto cases. And, as evidenced by argument in both *McKinlay* and *Joudo*, the proposition appears to remain at large. The principles espoused in both cases include recognition of familial bonds underlying a joint endeavour, the role of context and facts in otherwise messy and informal interactions, and the materiality of the parties' respective contributions in the circumstances. All of these might be appropriately applied also to de facto relationship cases, without differentiation, even as a court acknowledges the messy reality of spousal contributions within a family context. If so, the role of the *Lloyd* proposition in de facto cases appears to have lost currency, in which case it would be helpful to see it clearly dispensed with.

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