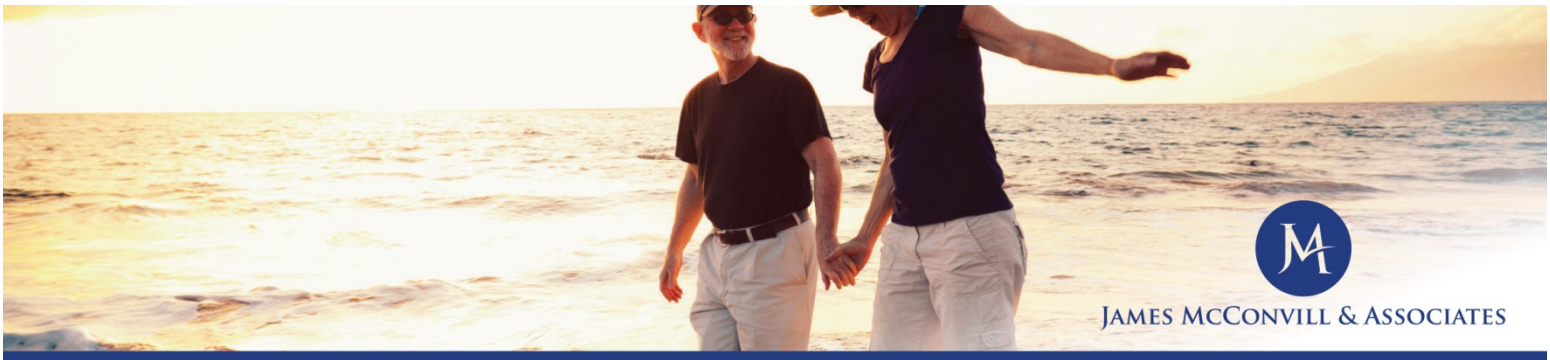


Breaches of Contract and Marriage: Which Gifts You Must Return?

New South Wales Supreme Court determines who is the rightful owner of an engagement ring upon the breakdown of a relationship

BACKGROUND

In the recent case of *Toh v Su* [2017] NSWLC 10, Mr Toh (the plaintiff) and Ms Su (the defendant) were introduced by a mutual friend in 2015. The parties started going out together and decided to marry. On about 17 October 2015 they opened joint bank accounts. On about 25 October they went to a jewellery store and the plaintiff bought a diamond engagement ring for $15,500, a male wedding band for $500 and a female wedding band for $800. The plaintiff and defendant had also bought a number of other gifts (including jewellery, a handbag, and an iPhone) for each other from their own and joint bank accounts.

The parties decided to split up. When the parties split up they agreed that "*everything that belongs to each party will be returned to each party*". The former couple began dividing up what they had bought each other. The plaintiff asked for the return of the engagement ring, the wedding bands, and a number of the other gifts back. The defendant refused.

The plaintiff commenced proceedings in the Local Court of NSW, seeking the return of the engagement ring on the basis that it was a conditional gift, the return of the wedding bands on the basis that they were his property and his ex-fiancée was holding them on bailment, and finally the return of various gifts because of the agreement that "*everything will be returned to each party*".

LEGAL ISSUE

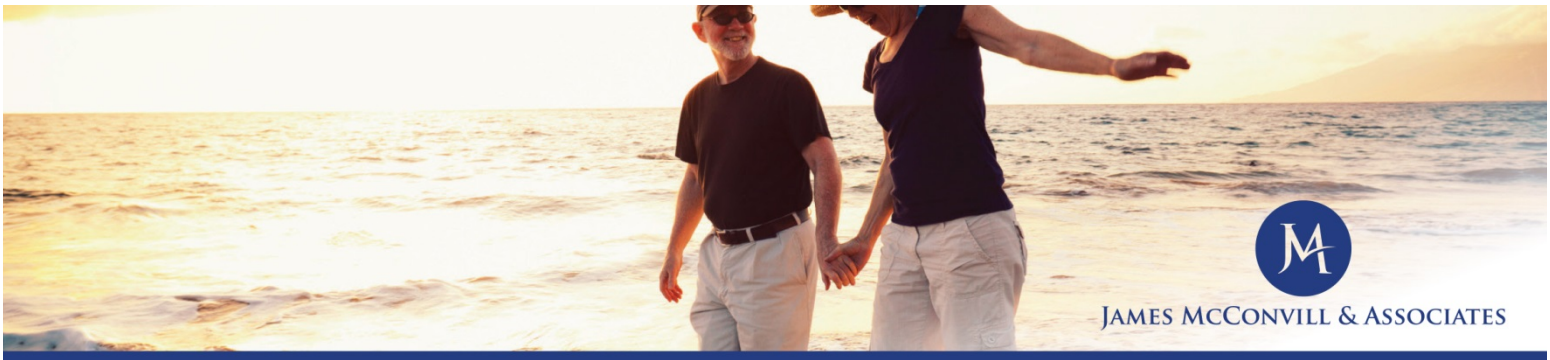
The legal question before the court was one of conditional gifts – that is, what happens where somebody gives you a gift that is conditional on you doing something, and you fail to do it. What makes the case unusual was that the purported condition in this case was marriage, and the gift was an engagement ring.

THE ENGAGEMENT RING

The first question was whether an engagement ring is a conditional gift that is to be returned in the event that the parties fail to get married. The court noted that the answer to this question is still unresolved.

Magistrate Brender referred to the old English authority of *Cohen v Seller* [1926] 1 KB 536 (*Cohen*), which held that where an engagement ring is given by one person to another, there is an implied condition that the ring is to be returned if the engagement is broken off. The law was that an engagement ring: "*retained the character of a pledge or something to bind the bargain or contract to marry and was given on the understanding the party who breaks the contract must return it.*"

The Magistrate noted that the *Marriage Act* abolished the right to recover damages for a breach of promise to marry, but the *Marriage Act* expressly does not affect an action for recovery of gifts given in contemplation of marriage. Magistrate Brender also noted that since the passage of the *Family Law Act* the concept of fault with respect to divorce had been



abolished. Therefore, the question of who actually breaks a contract with respect to a marriage is one that is not relevant at law.

Ultimately, the question before the Court was whether *Cohen* remains good law with respect to these modern developments.

RECENT AUTHORITIES ON THE ENGAGEMENT RING

The Court noted that *Cohen* has been applied as recently as 2007 by the Supreme Court of NSW in *Papathanaspoulos v Vacopoulos*. In that case, the principles from *Cohen* were used to find in favour of a man who had proposed to a woman. The woman rejected his proposal and proceeded to throw the engagement ring into the garbage. The Court held in that case that based on *Cohen,* if she had not intended to fulfil the condition of the gift of the ring (getting married), the woman should have returned the ring to her suitor.

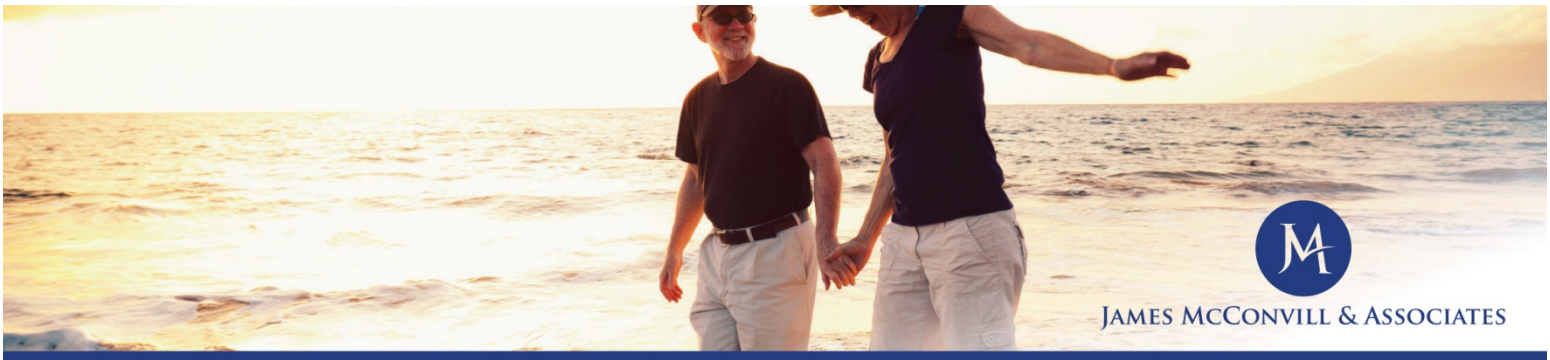
The Court also considered the case of *Public Trustee v Kukulu* (1990) 14 Fam LR 97 in which the Court of Appeal referred to s111A of the Family Law Act and decided that not only did it abolish the cause of action of breach of promise to marry, but also any indirect enforcement of such a promise by operation of promissory estoppel.

Further, the essential reasoning for the rule in *Cohen* as emphasised by McPherson SPJ in *Jenkins*, is that the ring is not recoverable by the donor if he was the one "in breach of the promise to marry". It was a conditional gift, the condition being that the innocent party may keep the ring in the event of the marriage not occurring. That is because the party deemed to be in breach of contract loses "the deposit". If the concept of breach of a promise to marry is no longer applicable, and that in the Court's view based on s 111A and its essential philosophy, which is furthered by the no fault provisions of the *Family Law Act*, there is arguably no room for the operation of the rule as to recovery in the event the marriage does not proceed. In that event, the law would be that the gift of the ring is simply an unconditional gift.

Magistrate Brender decided not to apply *Cohen*. The Magistrate noted that to apply it treats the ring as a "deposit" to a "contract" that is breached by one party. This is against the "*essential philosophy*" of the developments in the *Marriage Act* and the *Family Law Act*. It is also not consonant with modern ideas. A gift of an engagement ring should be now seen, like other gifts, as given absolutely. Many gifts are given in happy times and with optimism. Sometimes that optimism is borne out, sometimes it is not.

The Court added that if *Cohen* does still apply in New South Wales at this time, then on the analysis in *Papathanaspoulos v Vacopoulos* the defendant is entitled to keep the ring because she did not refuse to fulfil the condition of the gift. On Justice Smart's analysis she had a legal justification in not carrying out her promise of marriage, namely that the plaintiff repudiated the agreement by refusing to marry her. Further, within the language of *Ikeuchi v Liu*, there was no termination "initiated by the donee or by mutual consent". It was terminated by the donor.

The Court thereby refused to order the return of the engagement ring.



OTHER GIFTS

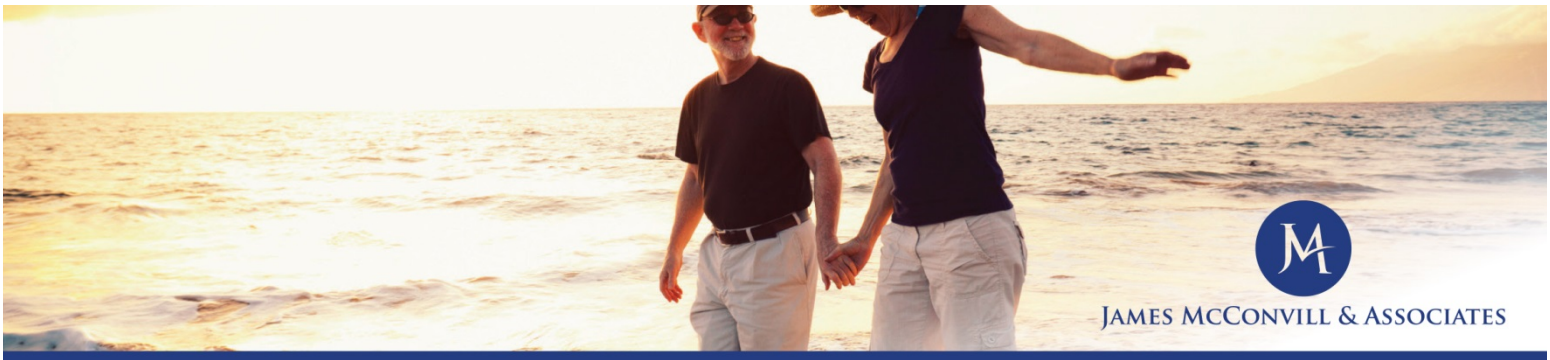
The next issue was whether or not there was a contract constituted by the words "*everything that belongs to each party will be returned to each party"*, and what was its scope. The Court found there was no enforceable agreement to return the gift items, for three reasons.

First, the Court did not think the brief exchange of words was intended to have contractual force.

It was a domestic setting, in which an inference against intention to have binding agreements can arise. It was put by the plaintiff that the presumption (of fact) against an intention to contract was inapplicable, despite the domestic setting, because the context was the property of parties ending their relationship (see *Merritt v Merritt* [1970] 1 WLR 1211). The Court accepted that can be an exception to the presumption against intention to contract in such circumstances, but that only meant that there was no presumption either way (*Merritt* at 1214D), and the question was ultimately one of objective intention. The Court found there was no intention to contract. It was a domestic, emotional setting. The plaintiff suggested they should both give back things belonging to the other. The defendant said "ok". It was not intended to affect legal rights to retain completed gifts if a party wished to do that.

Second, there was no real content or consideration to the agreement – they were already obliged to do that. The plain meaning of the words was that it related solely to items that *belonged* to the other party. Items that have been unconditionally gifted by one party to another do not belong to the person who purchased them – they belong to the person to whom they were given. The agreement if it existed does not extend to items which were given by the plaintiff to the defendant during the relationship. The objective meaning of the words used did not constitute an intention to agree to give back completed gifts.

It was put that the defendant's demand that the plaintiff take off his shoes and give them to her was part of the contract or was post contractual conduct which somehow shed light on the meaning of the contract. The Court did not agree. The Court illustrated that those words were said in a heightened emotional state by a woman who was very upset at having her engagement broken off by the plaintiff. She was not entitled to have those shoes back because they were gifts made by her; however he gave them back to her because she asked him to. He wanted her out of his life and was in conflict avoidance at that time. He did not want to see her again. He may have felt a little guilty for breaking off the engagement 10 days before the wedding. Those considerations also explained why he permitted the removal of the wallet and items that had been given to him by her parents and items which had been given from her parents to his parents. They had nothing to do with the contract which the Court found if it existed, was constituted by the words only.



County Securities Pty Ltd v Challenger Group Holdings Pty Ltd [2008] NSWCA 193 does not require a contrary result. The Court stated that conduct can form part of a contract. However, here the Court found the contract was constituted by the words used. The plaintiff's emotional demand cannot change the objective meaning of the words. If the contract was constituted by words only, post contractual conduct has no part to play in these circumstances (c.f. *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407, which held that the legitimate use of subsequent conduct to construe written agreements was very limited. For example, it can be used as probative of surrounding circumstances at the time the contract was made). Here, the agreement was oral but the legitimate use of later subsequent conduct was similarly limited. The Court did not accept that post contractual conduct here assisted in determining the subject matter of the contract or that it constituted any admission. It was irrelevant.

The Court held that none of the other gifts were to be returned.

THE WEDDING BANDS

The wedding bands are in a different category. The plaintiff purchased those in contemplation of the marriage and with a view to them being exchanged at the ceremony. He gave them to her for safe keeping as a bailee. He paid for them and in the Court's view they remained his property and they should be returned to him. They were his property and he did not intend to give them away to her when he asked her to keep them prior to their trip to China. There was no exploration of or argument about any religious concept that the wedding band given by one party to another must be the donor's property.

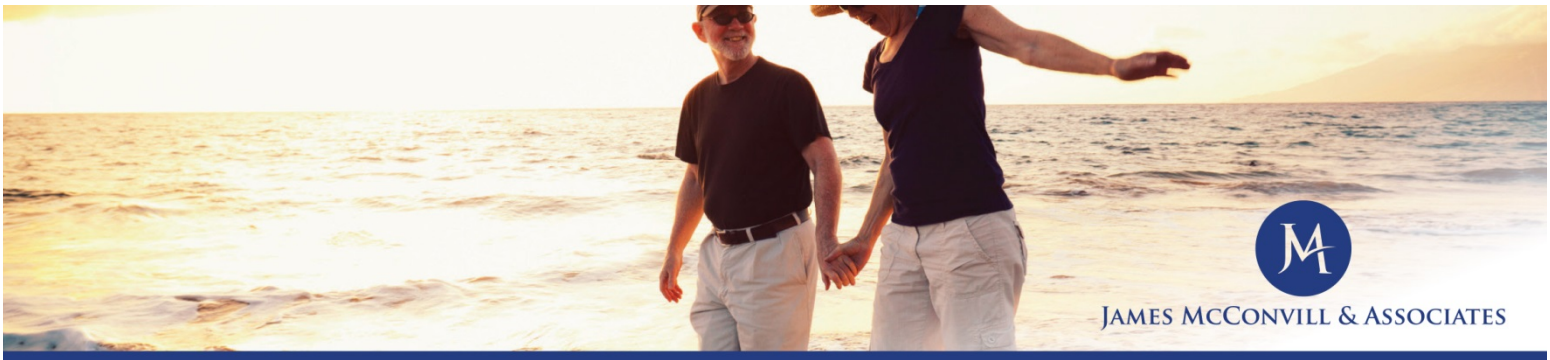
The Court ordered that the bands be returned.

THE BALANCE IN THE JOINT ACCOUNT

There was a partial agreement on this topic but an analysis was necessary because it was not fully resolved.

There was insufficient evidence to permit a full analysis of the transactions on the joint account and accordingly it was not possible to attempt to equalise the parties' overall contributions through that joint account. The Court accepted in general terms the plaintiff's evidence that he was out of pocket about $10,000 and the defendant's evidence that she would be out of pocket about $5,000 on the account. There was no detailed exploration of the joint account or the arrangements about who would be responsible for what expenses.

The defendant said that she put $1,000 into the bank account and used it to pay a deposit on the furniture. The evidence was that then the plaintiff put $2,640 into the joint account so that as between them he would be responsible for the cost of the furniture. $1,640 of that money was paid out for the balance price of the bedroom furniture. Then he removed a



large sum of money from the account which represented money that he had put in for wedding costs. He was probably quite entitled to do that. Then the defendant removed the balance of the account, which sum would have included the $1,000 left of the money that the plaintiff had put into the account representing the cost of the furniture. That had the effect of reimbursing the defendant her $1,000.

The account was then empty. When they cancelled the bedroom furniture purchase, she received $1,000 back directly from the store and $1,640 went back to the joint account.

The Court found that there was an agreement between them, express or to be implied, that he would contribute the full price into the joint account specifically for that purchase. The purchase did not go ahead and it is an implied term (as so obvious that it goes without saying) that he would get the money back. Therefore, he would be entitled to the $1,640 returned to the account. Following the hearing the parties agreed that the $1,640 has been resolved between them.

The plaintiff however sues for the $1,000 which was paid back to the defendant directly. The Court was satisfied she had been doubly reimbursed for her $1,000 contribution, so must pay him $1,000.

ORDERS

The defendant deliver to the plaintiff the two wedding bands and pay the plaintiff $1,000. The balance of the claim will be dismissed.

IMPLICATIONS OF JUDGMENT

This case is a reminder of the different categories of legal relationships that can be created through an exchange of property, and clarifies the entitlements of couples when they split up. That is, the fact that a ring was given in contemplation of a marriage does not give it a special status so as to elevate the protection the law provides, and the fact that a person might agree to something does not mean they have an intention to form a contractual relationship. The context in which a person has agreed to something (and in particular if it was in a domestic or commercial setting) may be a vital consideration.

Therefore, notwithstanding the emotionally charged times a person might find themselves in during the breakdown of a relationship, as far as property is concerned, the ordinary legal rules with respect to gifts, bailment, and contract apply. Care must be taken by all of those involved as to the type of legal relationships they are forming whilst they are creating, or breaking, personal ones.