VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO W61/2014

CATCHWORDS

CO-OWNERSHIP – Part IV of the *Property Law Act 1958* – Constructive trust – Joint purchasers of property – Whether one co-owner held his interest on constructive trust – Whether there should be an adjustment of a co-owner's interest in land to take into account amounts payable by co-owners to each other during the period of co-ownership – Whether there should be an order that one co-owner pay compensation equivalent to rent as a result of another co-owner being excluded from occupation.

APPLICANT	George Trakas
FIRST RESPONDENT	Kiki Aravopoulos
SECOND RESPONDENT	George Aravopoulos
THIRD RESPONDENT	Commonwealth Bank of Australia (ACN: 123 123 124)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	24, 25 and 26 February 2016
LAST DATE FOR FILING WRITTEN SUBMISSIONS	16 March 2016
DATE OF ORDER	19 April 2016
CITATION	Trakas v Aravopoulos (Building and Property) [2016] VCAT 592

ORDER

1. I find and declare that the Applicant's beneficial interest in and to the estate in fee simple of the land comprised in Certificate of Title Volume 8696, Folio 545, being Unit 1, 36 Power Street, Hawthorn in the State of Victoria (**'the Property'**) is held on trust for the benefit of the First and Second Respondents jointly.

2. Pursuant to s 233 of the *Property Law Act 1958* and upon being satisfied that it is fair to do so, the respective rights of the Applicant and First and Second Respondents in and to the Property are to be adjusted so that the First and Second Respondents shall hold the whole

of the interests in and to the Property as tenants in common in equal shares.

3. Costs reserved.

4. BY **6 May 2016**, the parties may file minutes of consent orders giving effect to these orders and any ancillary orders sought.

5. **If by 6 May 2016 the parties are unable to agree on consent orders, then I direct the Principal Registrar to list this proceeding for a further directions hearing before Senior Member Riegler, at which time the Tribunal will hear submissions as to the form of orders to be made having regard to these orders - allow 2 hours.**

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr M Hume of counsel
For the First and Second Respondents	Mr J D McKay of counsel
For the Third Respondent	Excused from appearance

REASONS

INTRODUCTION

1. The Applicant and the First and Second Respondents are co-owners of a residential property located in Hawthorn (**'the Property'**). They each hold a one third legal interest in the Property as tenants in common. The Third Respondent holds a registered mortgage over the Property. It has been joined as a party to the proceeding because its interests may be affected by the outcome of the proceeding. However, it has played little part in the proceeding and was given leave to be excused from further participation in the hearing of this proceeding.

2. The Applicant initiated this proceeding, seeking an order under s 225 of the *Property Law Act 1958* (**'the Act'**) that the Property be sold and that the proceeds of sale be divided equally between the parties. He also seeks an order under s 233 of that Act that compensation be paid to him of an amount equivalent to rent - by reason of him being excluded from occupation of the Property.

3. The First and Second Respondents oppose any sale of the Property. They contend that the Applicant's legal interest in the Property is held on trust for their benefit or the benefit of one of them. By their counterclaim, they seek orders under ss 230 and 233 of the Act, varying the entitlements of the Applicant and the First and Second Respondents, so that title over the Property becomes vested in their names or name only.

BACKGROUND

4. The genesis of this property dispute is tied to the breakdown of a de-facto relationship between the Applicant and the First Respondent. That relationship first existed between 1995 and 1998, during which time the First Respondent intermittently lived with the Applicant in a property occupied by the Applicant. During those years, the relationship, from all accounts, seems to have been somewhat volatile and in 1998, the Applicant and the First Respondent separated.

5. In June 1999, the First Respondent contacted the Applicant, with a view to reconcile. However, at that time the Applicant had formed a new relationship with another person. Nevertheless, over the ensuing months, the First Respondent and the Applicant continued to communicate and eventually met.

6. During the course of one of these meetings, the First Respondent told the Applicant that she had jointly purchased a property located in Heidelberg with her brother - the Second Respondent (**'the Heidelberg Property'**). She also told the Applicant that her father had gifted $120,000 to her and her brother in order to purchase the Heidelberg Property. She said that her father was willing to further assist in the purchase of another

property, for the benefit of her and or her brother, the Second Respondent.

7. Although the parties each have differing accounts of what occurred after those initial meetings, it is common ground that on 29 August 1999, the Applicant and the First Respondent attended an auction of the Property and that the First Respondent ultimately succeeded in purchasing the Property for a contract price of $166,000.

8. The Applicant did not sign, nor was he named as a party to that sale contract. The sale contract only named the First Respondent as purchaser, although it also stated "and/or nominee".

9. At the conclusion of the auction, the Applicant provided a personal cheque for the deposit of $16,600, which was handed to the selling agent. However, that personal cheque was ultimately not banked because it was replaced with another cheque from the First and Second Respondents' father on the following Monday.

10. According to the Applicant, that cheque was replaced because the father had agreed to gift $27,000 towards the purchase of the Property. He recounts the events leading up to the purchase of the Property as follows:

> 11. I took an active role in sourcing the properties. We looked at quite a few properties together in South Yarra, Toorak, and Hawthorn. Once we came across the Hawthorn property, the First Respondent and I went to speak to the agent involved and made him an offer.
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> 12. The offer was not accepted by the owner. The property went to auction. During the auction itself I assisted the respondent with the bidding.
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> ...
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> 15. I was a party to the contract of sale because the First Respondent specifically wanted us to purchase the property together.
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> 16. After we were successful at the auction, I wrote a check [sic] for $16,600.00, 10% of the value of the property. Everyone - the First and Second respondent and their father, knew I was doing this. This amount was the required deposit. I didn't request that this deposit cheque be replaced by the First Respondent, the Second Respondent or their father, because I wasn't going to 'hold' the father to the gift.
>
> 17. After the auction the First Respondent went home to tell her father about the news. Later that day she told me by phone that her father would honour his contribution, his gift, to the property as previously promised. In this phone call I spoke to

the Second Respondent, who directly expressed an interest in being made a party to the purchase.

18. The first business day after the purchase, the First and Second Respondents' father, honoured his gift to the relationship. I accepted the inclusion of the Second Respondent due to the father's request…

19. After the gift of $27,000.00 or so was paid by the father, the balance of the purchase price of $158,500.00, was borrowed by us from the Commonwealth Bank. In order for this loan to be obtained I had to provide a guarantee for the loan. I was able to provide a guarantee because I had a number of other properties at the time. None of the other purchasers had the amount of property that I had to offer as security.

11. The First Respondent disputes ever mentioning that her father was willing to gift $27,000 to her and the Applicant. In her affidavit, adopted as her evidence in this proceeding, she states that she had dinner with the Applicant on the evening of 28 August 1999. During the course of that dinner she told the Applicant that she had seen a billboard earlier that day advertising a unit in Hawthorn for sale by auction on the following day. She states:

16. … I said that I wanted to attend the auction and bid on the Property. I told Trakas that I would be bidding both for myself and my brother, who could not attend the auction because he would be at work. The property to which I was referring was the unit that is the subject of this proceeding …

12. According to the First Respondent, she and the Applicant spent the night together on the evening of 28 August 1999, following which she formed the view that the relationship between her and the Applicant had been reconciled. In her affidavit, she states:

17. As the evening progressed, things went well, and I could feel my connection with Trakas renewing…

18. Trakas confessed that he was unhappy in his existing relationship. He told me he was seeing another woman, who had a child. I knew of this woman, named Nikki, because during my previous relationship with Trakas, Nikki had been Trakis' best friends 'casual' girlfriend. The impression I got from Trakis was that the relationship was not a long-term relationship.

19. … During our conversations, Trakas repeatedly used words to the effect that he wanted to break up with his existing partner and renew his relationship with me.

13. The First Respondent said that re-establishing her relationship with the Applicant ultimately led to the both of them purchasing the Property on the following day. She states:

> 20. Trakas told me his place in Richmond was in the process of being renovated for sale before the bank foreclosed on it. Trakas said that he wanted to move in with me and live together again. I indicated to Trakas that I loved this idea. Trakas said that we could start looking for a new place immediately. He asked me a number of questions about the Property, and seemed very interested in the prospect of purchasing it.
>
> 21. I told Trakas that the CBA lending manager had said George and I had enough equity in the Heidelberg Property and should purchase another property to expand our portfolio. I told Trakas my father would be willing to assist George and I to purchase another property. Trakas seemed very fond of the idea, and spoke very seriously about how we could purchase a property for us to live in...
>
> 22. Trakas said that he wanted to live together with me at the property we would purchase. He said he wanted to return to a serious and committed relationship.
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> ...
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> 26. Again, Trakas emphatically assured me that he would break up with his existing partner, that he loved me, and that he wanted to live together with me. Trakas' words left me with the firm impression that he was committed to a long-term relationship which would lead to marriage and spending our future together.
>
> ...
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> 28. Trakas and I attended the auction for the Property that day. In all the intensity of the previous day and evening, I had not made any proper arrangements in relation to the potential purchase.
>
> 29. In particular, I had neglected to contact George to make sure that he was willing to be a co-purchaser of the Property. I also did not inform my father I was attending the auction, nor made sure he was willing to advance the deposit money if I was the successful bidder.
>
> 30. It dawned upon me that the rapid development (or redevelopment) of my relationship with Trakas could create a problem. I had not told my family about me resuming my

relationship with Trakas, and there was animosity between my family and Trakas as a result of our previous relationship.

...

32. Similarly, my brother George had no idea that I had resumed my relationship with Trakas. George believed that Trakas had treated me very badly during our relationship. As such, I was also concerned that George would be very reluctant to be involved in any purchase with Trakas.

...

36. Trakas knew I had come to the auction unprepared. Trakas told me he could provide a personal cheque from his cheque-book he always kept in the car, saying it could be replaced by a cheque for the actual deposit two days later on the Monday. Trakas said that it was unlikely that we would be the successful bidders in any event, so there was little point creating a fuss that morning for no reason, and said that we could deal with George and my father later in the event we were successful.

37. As it turned out, I was the successful bidder. The selling agent took Trakas and I aside after the bidding, and I signed the contract of sale. The selling agent asked us how the deposit would be paid. I told the agent that I'd not come prepared as I had only seen the property the day before, did not think that I would be the successful bidder and did not have any way to pay the required 10% deposit that day. The agent told me that being a Saturday, it would be acceptable if I could give him a personal cheque for $1,000.00 to $2,000.00, and deliver a bank cheque to the agent's office on Monday for the actual 10% deposit in substitution of that cheque.

38. Trakas drew a cheque for that purpose and provided it to the agent. Trakas took me aside and told me that he did not have sufficient funds in his account and consequently the cheque he had provided would not clear. I was not concerned, however, as I was confident my father would arrange a bank cheque for the entire 10% deposit that Monday.

14. Irrespective of the parties differing accounts of what transpired prior to and immediately following the auction of the Property, it is common ground that at some point prior to settlement of the conveyance of the Property, the Applicant and the First and Second Respondents agreed that they would equally hold a legal and beneficial interest in the Property. Consequently, the *Transfer of Land* document was drawn and

executed showing each of those parties as being tenants in common in equal shares.

15. Settlement of the conveyance of the Property occurred in November 1999. In order to effect that settlement, the First and Second Respondents borrowed $155,000 from the Commonwealth Bank of Australia, which was secured by a mortgage granted by all three co-owners over the Property. Under that loan, the First and Second Respondents were named as borrowers and the Applicant was named as guarantor.

16. Although there is some dispute as to how often the Applicant stayed in the Property following settlement, it is generally accepted that the Applicant and the First Respondent cohabited the Property until July 2000, after which time the relationship between the Applicant and the First Respondent broke down and the Applicant vacated and removed all his belongings from the Property.

17. The Applicant says that he contributed to the purchase price and other costs associated with the Property during the period that he cohabited and for a short period thereafter. This is disputed by the First and Second Respondents, who say that he made no payments towards the purchase price or other costs associated with the Property.

18. The First and Second Respondents contend that subsequent correspondence from their solicitors is consistent with the position that they currently hold. In particular, by letter dated 28 September 2004, the First and Second Respondents requested the Applicant to sign a Transfer of Land, in which he was to transfer his legal interest in the Property to the First and Second Respondents. The consideration noted in the Transfer of Land was stated to be the *breakdown of a de facto relationship*.

19. The Transfer of Land was not executed by the Applicant. It appears that there was little or no communication between the parties for some years that followed. However, on 28 November 2010, the issue resurfaced when the Applicant and the Second Respondent coincidentally met at the Crown Casino. From all accounts, it appears that the Second Respondent confronted the Applicant, seeking an explanation why the Applicant would not transfer his beneficial interest in the Property to the First and Second Respondents. According to the Applicant, the Second Respondent assaulted the Applicant. Consequently, the Applicant sought the assistance of security personnel, who then escorted the Second Respondent from the premises. That incident then led to the Applicant making a statement with the police and eventually obtaining a restraining order against the Second Respondent.

20. It appears that this incident then prompted further correspondence. In particular by letter dated 28 February 2011 from the First and Second Respondents' solicitors to the solicitors acting on behalf of the Applicant, the First and Second Respondents again sought to obtain the

Applicant's consent to transfer his legal interest to them. That letter stated, in part:

> ... Our clients insist that your client did not pay anything by way of consideration to be a proprietor of this property and that it was because of Ms Aravopoulos' insistence due to the fact that she had a relationship with Mr Trakas, which she believed was to be a long-term relationship which would probably have ended up in marriage and for that reason, she wanted Mr Trakas on title as well.
>
> We have instructions that this relationship has been broken down for a number of years and since that time our client has attempted to have Mr Trakas sign the relevant Transfer for his share to revert back to Ms Aravopoulos.
>
> We enclose copy of Transfer of Land that we will require the original of to be signed by your client.
>
> We assume that your client has given you full instructions in this matter and that there will not be any need for the parties to incur a great deal of money to resolve this issue.
>
> We are instructed by our client that your client has never contributed any monies whatsoever towards the purchase or towards payment of the existing mortgage, which is registered over the property.
>
> We note that your client however is stated as a guarantor to the mortgage and our clients are prepared to release your client from this guarantee with the approval of the bank and incur any costs and expenses in so-doing....

21. Surprisingly, there is no evidence of the Applicant ever having responded to that letter, apart from issuing this proceeding some years later.

22. As is often the case where the breakdown of a personal or family relationship interposes with a commercial transaction, the evidence adduced by the parties has a tendency to traverse issues which are not directly relevant to the matters under consideration, notwithstanding that those issues may be very important to the party giving that evidence. This case is no different. Here, the proceeding is beleaguered with allegations of infidelity on the one hand and assault on the other. In my view, those allegations, for the most part, are not material to the issues under consideration. Consequently, I do not consider it necessary to recite or analyse the details of those claims.

THE ISSUES

23. As indicated above, the Applicant seeks an order that the Property be sold and that the net proceeds of sale be divided equally amongst each co-owner. The First and Second Respondents oppose any sale of the Property and contend that the Applicant's legal interest in the Property

was, at all times, held on a constructive trust in favour of the First Respondent or alternatively, both the First and Second Respondents.

24. Mr McKay, of counsel, who appeared on behalf of the First and Second Respondents, conceded that at the time when the Transfer of Land was drawn and executed by the parties, they had each agreed to an equal interest in the Property. However, he submitted this agreement arose only because there was a commitment given by the Applicant that he would enter into a long-term relationship with the First Respondent and, importantly, contribute equally to the repayment of the mortgage loan and other expenses associated with the Property.

25. Mr McKay submitted that the Applicant did not make any payments towards the mortgage loan or other expenses associated with the Property. He said that it was common ground that the relationship between the Applicant and the First Respondent had broken down again, only six months after occupying the Property. Mr McKay argued that in those circumstances, the joint endeavour entered into between the parties had completely failed and it would therefore be unconscionable for the Applicant to retain his legal and beneficial interest in the Property. Mr McKay submitted that in accordance with the principles enunciated in *Muschinski v Dodds*[1] and *Baumgartner v Baumgartner*,[2] it is appropriate for the Tribunal to declare that a constructive trust arose in favour of the First Respondent or alternatively both the First and Second Respondents, to the extent that the Applicant held his legal interest in the Property on trust for one or both of those parties. Mr McKay submitted that the First and Second Respondents, as beneficial owners of the Applicant's legal estate, do not wish the Property be sold and therefore, it would not be fair to do so. Similarly, he argued that given that the Applicant held his beneficial interest on trust for the First and Second Respondents, it was not open for him to claim compensation for rent as a result of being excluded from occupation of the Property.

26. Mr Hume, of counsel, appeared on behalf of the Applicant. He submitted that the Applicant has paid a significant amount of money towards the repayment of the mortgage loan, as well as making payments for other expenses associated with the Property. He further submitted that the failure of the relationship cannot amount to a forfeiture of the beneficial interest held by the Applicant. Accordingly, he argued that no constructive trust arose and the Applicant, as the holder of a legal and beneficial interest in the Property, is entitled to force a sale of the Property under s 225 of the Act and also rightfully claim compensation for rent as a result of being excluded from the Property.

27. In my view, the principle issues for determination can be distilled into the following questions:

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[1] (1985) 62 ALR 429.
[2] (1987) 164 CLR 137.

(a) What have the parties contributed financially to the purchase and other costs of the Property?

(b) Has the joint endeavour entered into between the parties failed and if so, should a constructive trust be imposed, such that the Applicant holds his beneficial interest on trust for the First and Second Respondents or one of them?

(c) Should an order be made that the Property be sold and if so, on what conditions?

(d) If a sale order is made, how should the net proceeds of sale be distributed between the parties?

(e) Should any order be made compensating the Applicant for an amount equivalent to rent during the period that he did not occupy the Property?

RECONCILING THE DISPUTED EVIDENCE

28. As I have already mentioned, in many respects the Applicant's and Respondents' respective accounts of what transpired contradict the other. This is particularly the case in relation to what, if any, payments have been made by the Applicant towards the mortgage loan and other expenses associated with the Property. Having considered the affidavit material filed by each of the parties and their oral evidence given during cross-examination and re-examination, I consider the factual chronology outlined by the First Respondent, and to a lesser extent, the Second Respondent, is more likely to have occurred. In forming that view, I am mindful of some inconsistencies in evidence given by the First Respondent and the Second Respondent, especially during cross-examination. However, on balance, I find that those inconsistencies are explicable by reason of the fluctuation of time between the events in question and the date of hearing. By contrast, some of the facts outlined by the Applicant are difficult to accept, when looked at in a broader context.

29. In particular, the Applicant states in his affidavit that he signed the sale contract. The sale contract was tendered in evidence. It does not bear the Applicant's signature, nor does it name him as a purchaser to the transaction. This is odd, given the Applicant's evidence that, at the time of the auction, the First Respondent wanted to purchase the Property with the Applicant and this was condoned by both her father and the Second Respondent. By contrast, the First Respondent said that she had not mentioned to either the Second Respondent or her father that the Applicant was to be involved the purchase of the Property. She states:

> 41. Trakas and I decided it would make it easier to break the news to my family about the events of the last 24 hours if things were revealed slowly, so that my family had time to understand that Trakas and I were committed to each other,

> and that the purchase was reasonable. It was therefore agreed that I would be named in the contract as the sole purchaser of the Property, with the words 'and/or nominee' added so that the exact purchaser details could be sorted out later on.

30. In my view, the explanation given by the First Respondent as to why the Applicant was not named as a purchaser in the sale contract is plausible. On the other hand, the Applicant provided no explanation as to why he was not named in the contract. Moreover, his evidence that the Second Respondent and his father had agreed to him being a co-owner prior to the auction seems to be odds with him not signing the sale contract.

31. Further, the Applicant gave evidence that he handed over a deposit cheque in the amount of $16,600, in circumstances where he was not going to *hold the father to the gift* of $27,000. Indeed, during cross-examination, he said that he was entirely comfortable with that cheque being drawn. However, that begs the question: why would the Applicant part with $16,600 without being named as a party to the sale contract? By contrast, the First Respondent said that the deposit cheque was provided by the Applicant only as a 'holding cheque' until it was replaced on the following Monday. In my view, that scenario is more likely to be the case in circumstances where the person providing the cheque is not named as purchaser in the sale contract.

32. The Applicant also stated that he guaranteed the mortgage loan because he had a number of other properties at the time which he could offer as security. However, it was revealed during cross-examination that the Applicant did not own any real property in his personal capacity. All properties which he said were owned by him, were, in fact, owned by corporate entities or other persons. Certificates of title were tendered in evidence to verify this.

33. Moreover, the *Consumer Credit Contract Schedule*, which set out the particulars of the mortgage loan, was tendered in evidence. It stated that the Heidelberg Property was also used as security for the mortgage loan. According to the First Respondent, there was ample equity in the Heidelberg Property to satisfy the mortgagor's requirements, without the need for the Applicant to provide further surety. She said that the Applicant was only named as a guarantor because he was to be on title but not a borrower under that mortgage loan. Again, in the absence of the Applicant having any real property in his own name, it is difficult to accept his evidence that he guaranteed the mortgage loan because of he *was able to provide a guarantee because I* [he] *had a number of other properties at the time.*

34. Mr Hume submitted that little weight should be given to the fact that the Applicant had misunderstood how those particular properties were held because the Applicant was still the 'owner' in a practical sense. I reject that submission. My perception of the Applicant was that he was a

sophisticated person who was familiar with property transactions. It seems unlikely that in those circumstances, the Applicant would not know whether he, in his personal capacity, owned property or whether that property was owned by a corporate entity or someone else over which he exercised control. In my view, this constitutes a failing in the Applicant's evidence.

35. Further, I do not accept the Applicant's evidence concerning the alleged gift of $27,000, which he said was a gift from the First and Second Respondents' father to both the Applicant and the First Respondent. In my view, that scenario is unlikely to have taken place. In particular, the father, Vasilios Aravapoulos, gave evidence that he was unhappy at the prospect of the First Respondent and the Applicant renewing their relationship because he considered that their previous relationship had not gone well.

36. Moreover, there is no evidence that $27,000 was ever paid to any of the parties. The only evidence as to the father's contribution relates to payment of the deposit. The amount of $27,000 is not reconcilable with the payment of the deposit or any other amount. In particular, it is common ground that the sale price was $166,000, with a deposit of $16,600 having been paid, leaving a balance to be paid of $149,400, plus stamp duty and purchase costs. It is also common ground that $155,000 was borrowed. That amount is consistent with payment of the residue plus stamp duty and other costs of purchase. The amount borrowed is, however, inconsistent with there ever being an amount of $27,000 paid towards the purchase.

37. The father's evidence is also entirely inconsistent with the Applicant's version of events. In his affidavit, the father states:

> 11. At the time of my gift of $16,600.00 (or $18,000.00), I certainly did not intend that money (or any part of it) be a gift to Trakas, or to Kiki. If I had known about Trakas' involvement, I would not have agreed to give my gift at all. I only want my gift to be used towards the purchase of the property for George alone.

38. Accordingly, I find that the events leading up to the purchase of the Property are more consistent with the First Respondent's evidence. In particular, I find that the First Respondent initiated contact with the Applicant in June 1999 but did not disclose that to her parents or brother. I further find that when the Applicant and the First Respondent attended and bid at the auction of the Property, neither the father nor the Second Respondent were aware of the Applicant's involvement in that auction, contrary to what the Applicant said in evidence.

39. It seems to me that the inclusion of the Applicant as a co-owner was, at the time of auction, a hope held by the First Respondent (and possibly the Applicant) which could not be brought to fruition until sanctioned by

the father and, in all likelihood, the Second Respondent. This was because the father and the Second Respondent were to contribute financially to the purchase, and, in the case of the Second Respondent, consent to the jointly owned Heidelberg Property being used as additional security for the loan used to finance the acquisition of the Property.

40. That scenario explains why the Applicant was not initially named on the contract of sale. It is also consistent with the father replacing the deposit cheque given by the Applicant with his own on the following Monday. In other words, initially, the idea of purchasing another property to supplement the acquisition of the Heidelberg Property[3] was to be a family transaction, with the Second Respondent principally enjoying the benefits of that acquisition. However, it seems that the First Respondent eventually persuaded her father and brother to sanction her reunion with the Applicant, and to consolidate that reunion by allowing the Applicant to be a party to the purchase of the Property, subject to him also contributing to the cost of the Property. It is only at that point, that the First Respondent nominates both the Applicant and the Second Respondent as co-purchasers and the Transfer of Land is drawn to reflect that agreement. That scenario is consistent with the First and Second Respondents' evidence and I find this to be the more likely chain of events.

WHAT HAVE THE PARTIES CONTRIBUTED FINANCIALLY?

41. The Applicant gave evidence that he contributed financially to the purchase of the Property. In his affidavit, he sets out those financial contributions as follows:

> 20. I later paid the First Respondent a sum of $13,500.00, which the First Respondent told me would be put into the loan account for the property.
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> ...
>
> 22. In the middle of July 1999 I was in a car accident where a car was written off and an insurance payout of $15,000 was received. Some of these monies were used in the Hawthorn property...
>
> ...
>
> 25. Following us both moving in, I also paid $750 a month as a monthly repayment of the mortgage between November 1999 and January 2001. I also made payments towards, insurance, body corporate fees, rates and South East Water payments, as well as towards other costs payable for expenses from time to time for the period between November 1999 and January

[3] See paragraph 6 above.

2001. I also paid legal costs towards the initial purchase of the property.

...

33. On 8 November 2000 1 took out a loan in order to advance further funds due to the pressures placed upon me by the first respondent. Then on around 20 December 2000, the First Respondent contacted me again requesting funds for the Property.

34. On 27 December 2000 I withdrew $5,000 from my account. On 1 January 2001 I was visited by the First Respondent at my workplace, the Grand Hyatt, where I gave the first respondent $5,000.

42. The First and Second Respondents emphatically deny receiving any money from the Applicant or him making any contribution to repayment of the mortgage loan or the other costs of the Property.

43. The Applicant elaborated on the evidence given in his affidavit during cross-examination. He confirmed that the payments made by him were all made in cash. He said that apart from the bank statement showing a withdrawal of $5,000 from his account, he had no other bank statements verifying cash withdrawals of the amounts said to have been given to the First Respondent. He said that enquiries had been made of his bank to obtain statements but was told that those records could no longer be retrieved. During cross-examination, he was asked whether he received any receipts or written documentation from the First Respondent verifying payments said to have been made. He answered that he did not, nor did he request any such receipts, having regard to the fact that he was in a romantic relationship with the First Respondent.

44. Regrettably, the bank statements produced by the First and Second Respondents do not cover the period when the mortgage loan commenced (approximately 31 October 1999) through to 30 June 2003. Although the Third Respondent provided discovery in the form of a List of Documents, no bank statements were produced by it to span that period.

45. Consequently, the only direct evidence is from the parties. However, the parties are completely at odds as to whether or not payments were made.

46. The First and Second Respondents engaged Mr Macaulay, a forensic accountant, who prepared a spreadsheet which showed an approximate reconstruction of the movement of the mortgage loan from the period 1 November 1999 through to 30 June 2003. In preparing that spreadsheet, he assumed that the repayments and interest were as recorded on the *Consumer Credit Contract Schedule* as follows:

(a) The first 12 payments were $1,058 per month, and from then on, the monthly payments were $1,157 per month.

(b) The interest rate was variable, save for the first 12 months, where the rate was fixed at 5.39% per annum. This was then increased to 6.55% per annum.

47. Mr Macaulay assumed the repayments were made on a monthly basis in accordance with the above amounts. Adopting those assumptions, Mr Macaulay calculated that the account balance as of 1 July 2003 should have been $138,862. However, the bank statement states that the principal owing as of that date was $134,095.71. According to Mr Macaulay, that meant that the borrowers were $4,766 ahead in their repayments as of 1 July 2003 - based on his assumed repayment schedule. However, the actual bank statement states, under the heading *Special Repayments*, that the borrowers were ahead in their repayments by $9,485.50.

48. Mr Macaulay was unable to say how the borrowers were ahead in their repayments by $9,485.50, given that he was not provided with copies of any bank statements for the period up to 1 July 2003. Nevertheless, he qualified his opinion by suggesting that there are a number of variables which could have impacted on what was ultimately owed on 1 July 2003, such as variations in the interest rate, the methodology used to calculate interest and the possibility of accelerated repayments reducing the amount of interest charged.

49. In his report, Mr Macaulay stated:

> 5. The fact that borrowers are ahead could be due to someone making an extra payment off the principal, or it could be due to falls in the interest rate in which case the standard payments would result in principal being paid back at a faster rate.
>
> 6. I consider it reasonable to assume that the loan was repaid according to the initial arrangements, which is to pay $1,058 per month for 12 months, and then pay $1,157 per month. In other words, it doesn't look like there were any one-off payments of principal owing.
>
> 7. From the documents provided to me, it is impossible to substantiate the Applicant's claim that he paid $750 per month towards the loan for the initial period of approximately 14 months of the loan.

50. During cross-examination, Mr Macaulay reiterated that it was difficult to say that the positive balance of either $4,766 or $9,485.50 represented a capital contribution. He said this was because the interest rate alters despite the fact that there is a loan agreement. Indeed, he conceded that his method of calculating the amount of interest charged against the principal owing may have been different to the method adopted by the bank. In particular, he stated that he calculated interest on a simple basis.

However, the bank may have had a more complicated way of calculating interest. He said that it is quite often the case that his methodology results in a different outcome, when compared to actual bank statements.

51. Mr Macaulay also said that if there was a very large difference, something in the order of 10 or 20 percent, then it was likely that there had been a capital contribution.

52. Both the First and Second Respondents gave evidence that accelerated repayments were made to the mortgage loan. According to the First Respondent, payments were made on a weekly or fortnightly basis rather than on a monthly basis. Notwithstanding that there are no bank statements over the relevant period to corroborate repayments being made on a weekly or fortnightly basis, *Statement 10* of the *Investment Home Loan Summary* states that the *Remaining loan term is 11 years and nine months based on repayments of $632.50 per fortnight* [underlining added]. In my view, the fact that this statement contemplates fortnightly repayments lends some weight to the evidence given by the First and Second Respondents that repayments up until that date had been made on a fortnightly basis. Consequently, I find this to be the case.[4]

53. The question remains whether that fact alone can explain why the borrowers were ahead in their repayments by $9,485.50.

54. *Statement 10* of the *Investment Home Loan Summary* covers a period 1 July 2003 until 31 December 2003. Therefore, according to what is written on that statement, as of 31 December 2003, the repayments were ahead by $9,485.50. If, for example, I was to assume that monthly repayments of $1,058 were made for the first 12 months of the mortgage loan commencing 15 November 1999, and then increased to $1,157 until 15 December 2003,[5] the total amount paid would be $56,662, representing 50 repayments. If on the other hand, fortnightly repayments of $632.50 were made over that same period, the total amount paid would be $67,998.50, representing 107 repayments. The difference in the amount of repayments is $11,336.50. There is a difference of $1,851 between that rudimentary method of calculation and the amount stated on the *Investment Home Loan Summary* statement as being the repayments that were ahead. However, that difference can be explained by the fact that one additional repayment is included in the calculation when paid on a fortnightly basis (for the period 15 December to 30 December 2003) and also by the fact that the amount of interest payable on the loan during the first 12 months was at a discounted rate.

[4] Later bank statements showed that repayments were made on a weekly basis, although it is not clear whether these weekly payments were credited against the mortgage loan account on a weekly basis or on a fortnightly basis.

[5] Adopting the same assumptions as set out in the Schedule attached to Mr Macaulay's report.

55. In my view, that rudimentary calculation lends some weight to the evidence given by the First and Second Respondents that accelerated repayments are the sole reason why they were ahead in their repayments by $9,485.50 as of 31 December 2003. Accordingly, I find that on the balance of probabilities, it is more likely than not that the First and Second Respondents were ahead in their mortgage loan repayments by $9,485.50 as a result of making fortnightly repayments, rather than because of any capital contribution.

56. Accordingly, I am again left with the competing evidence of the parties. In that regard, I find that the First and Second Respondents' evidence is more likely to have been the case. I formed this view for a number of reasons. First, I find it improbable that the Applicant would hand $13,500 in cash to the First Respondent without ever receiving any confirmation of that payment or even requesting a copy of the mortgage loan statement to verify that the lump sum payment was credited to that account. In my view, this scenario becomes even more unlikely in circumstances where, on the Applicant's own evidence, he thought that the First Respondent's financial affairs were poor.[6]

57. Second, the Applicant's contention that he paid $5,000 cash to the First Respondent in January 2001 without receiving any confirmation of that payment is difficult to accept without some documentary evidence corroborating that payment. In particular, the payment of $5,000 was made approximately six months after the Applicant said that he was *ousted* from the Property. He states in his affidavit that:

> 27. In April 2000, I saw a young man running out of the Hawthorn property, tucking in his shirt. I questioned the respondent about this, but was not given any satisfactory answers. In May or June 2000 I asked her about the recent changes in behaviour and the respondent told me she was having an affair with a man who I now know to be the respondent's husband. The respondent also told me that she had been having an affair with the man that I saw leaving the home in April 2000.
>
> 28. As a result of the relationship breaking down, the first respondent ousted me of the Hawthorn property. I left the property on about 31st of July in 2000.

58. According to the Applicant, the First Respondent had two affairs prior to him being *ousted* from the Property. It seems unlikely that he would hand over $5,000 in cash in circumstances where he was twice betrayed before being *ousted* from his home, and not ask for a receipt or some other form of confirmation that the $5,000 was applied in reduction of the mortgage loan.

[6] Applicant's evidence given during cross-examination.

59. Finally, the Applicant said that he made cash payments of $750 per month from November 1999 to January 2001. This means that he kept making cash payments of $750 per month to the First Respondent in circumstances where the relationship had broken down by the end of July 2000 due to infidelity on the part of the First Respondent. It seems inconceivable that, in those circumstances, the Applicant would continue to trust the First Respondent to apply monies paid in reduction of the loan amount, without, at the very least, receiving some receipt or written confirmation of the payments made and how they were applied. This scenario becomes more improbable when one considers that the Applicant struck me as being a sophisticated person who, at the relevant time, was educated and had some prior knowledge of property investment. Moreover, without any corroborating documents or details of expenditure, I do not accept that the Applicant contributed or paid for any of the 'other expenses' associated with the Property.

60. It may be that the Applicant made some cash payments to the First Respondent during the period in question. However, I do not accept his evidence that periodic payments of $750 per month were made until January 2001. Moreover, even if payments were made it is difficult to isolate what component of those payments was to be directed towards living expenses, payment of outgoings or payment in reduction of the mortgage loan. In the absence of any corroborating evidence or specific details regarding the payments said to have been made, I find that whatever payments were made were simply payments contributing to the living expenses of those persons who occupied the Property. I do not accept that there were periodic payments made each month specifically directed towards reduction of the mortgage loan.

61. Moreover, I find that the First and Second Respondents' evidence is consistent with their demands, made after the Applicant vacated the Property, that he transfer his interest in the Property to them.[7] Those demands were made some years before this litigation commenced.

62. In weighing up all of the evidence and documentation tendered in evidence, I am not persuaded that the Applicant has made any financial contribution to the purchase price of the Property or any ongoing costs associated with the Property. Consequently, I find that the deposit money was paid by the father on behalf of the First and Second Respondents. I further find that all repayments of the mortgage loan have been made by the First and Second Respondents, with the Second Respondent contributing the lion's share of those repayments.

63. I further accept the First and Second Respondents' evidence that the mortgage loan was fully paid out on 4 January 2010, after the First and Second Respondents sourced alternative finance.

[7] See paragraphs 18-20 above.

WAS THE APPLICANT A BORROWER UNDER THE MORTGAGE LOAN?

64. The question remains, however, whether the Applicant otherwise contributed to the purchase price of the Property by virtue of him guaranteeing the obligations of the First and Second Respondents under the mortgage loan.

65. As I understand the argument advanced by Mr Hume, apart from the deposit, the parties all contributed to the purchase price because they were all liable to repay the mortgage loan. In that respect, I accept that joint borrowers of a loan, financing the acquisition of a property, are perceived to have jointly provided the purchase funds, even in circumstances where one person wholly repays the loan without any contribution from the other person. This is because repayments of a mortgage loan are not counted as contributions to the purchase price and do not affect the beneficial interest of the parties arising from their individual contributions to the purchase price. That proposition is made clear by the High Court in *Calverley v Green*.[8] In *Murtagh v Murtagh*, Hallen J summarised the principle as follows:

> The general rule in relation to subsequent contributions to the repayment of a mortgage loan is that these will not alter the extent of the proportionate beneficial interests determined by contributions to the purchase or acquisition cost.[9]

66. Mr Hume referred me to a decision of O'Brien J in *Ingram v Ingram*,[10] where his Honour found that the granting of a mortgage constitutes valuable consideration, such as to defeat a claim that a resulting trust arose in favour of the mortgagor who repaid all the monies of the loan secured by the mortgage. The facts in *Ingram v Ingram* are somewhat different to the present case. In that case, the parties were both borrowers and each principally liable to repay the loan secured by the mortgage.

67. However, the question arises whether the Applicant, although indirectly liable as guarantor, actually borrowed any of the purchase monies. In my view, being a guarantor of a mortgage loan does not equate to being a borrower under that loan. The Applicant merely offered surety in the event that the First and Second Respondents defaulted under that loan. No funds were drawn on his account or credited to any account held by him and he had no primary obligation to make any repayments under that mortgage loan. His obligation, as guarantor, was to indemnify the bank in case of default by the borrowers. In my opinion, the mere fact that the Applicant guaranteed the First and Second Respondents' obligations under the mortgage loan, does not mean that he contributed to the purchase of the Property by a one third share of the funds borrowed.

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[8] (1984) 155 CLR 242.
[9] [2013] NSWSC 926.
[10] [1941] VLR 95.

68. Accordingly, I find that the First and Second Respondents have paid the total amount of the purchase price for the Property. I am not satisfied that any payments have been made by the Applicant, despite what he has set out in his affidavit and oral evidence.

SHOULD A CONSTRUCTIVE TRUST BE IMPOSED?

69. Mr McKay submitted that although the First and Second Respondents agreed to include the Applicant as owner of a one third legal interest in the Property, that agreement was motivated by the following assumptions or understandings:

(a) that the Applicant would commit to a long-term de-facto relationship with the First Respondent; and

(b) that the Applicant would contribute to one third of the costs and expenses associated with the Property.

70. All parties accept that the de-facto relationship has irretrievably broken down. Further, having regard to my comments above, I find that the Applicant has not made any financial contribution to the costs and expenses associated with the Property.

71. Mr McKay argued that the joint endeavour contemplated by the parties did not eventuate and in those circumstances it would be unconscionable to allow the Applicant to retain his one third ownership of the Property.

72. Mr McKay referred me to *Muschinski v Dodds*[11] and *Baumgartner v Baumgartner*,[12] two decisions of the High Court of Australia, which set out the relevant principles concerning the imposition of a constructive trust.

73. In *Muschinski v Dodds* a man and woman who had lived together for three years decided to buy a property with a view to building a residential dwelling on the property in which they were to live and to use as an arts and craft centre. The property was conveyed to them as tenants in common. Although some improvements were made to the land, the building of the dwelling did not proceed and the parties ultimately separated. At that point, the woman had contributed $25,259.45 and the man $2,549.77 to the purchase and improvement costs of the property. The court declared that the parties held their respective legal interest upon trust to repay to each his or her respective contribution and as to the residue for them both in equal shares.

74. In *Muschinski v Dodds*, Deane J stated:

> ... Like most of the traditional doctrines of equity, it operates upon legal entitlement to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct... Those circumstances can be more

[11] (1985) 62 ALR 429.
[12] (1987) 164 CLR 137.

> precisely defined by saying that the principle operates in a case where the substratum of a joint relationship endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him to do so...[13]

75. Similarly, in *Muschinski v Dodds*, Mason J, having accepted the finding of the lower courts that the common intention of the parties was that Mr Dodds was to have an equal share of the property, nevertheless expressed the following view:

> The general principle underlying the proportionate repayment of capital contributions to joint venturers on the failure of a joint venture is wide enough to support this aspect of the constructive trust.[14]

76. Mr Hume submitted that there were a number of factors which weighed against the imposition of a constructive trust. First, he argued that there could be no equitable relief granted against the Applicant whereby he was compelled to continue with his relationship with the First Respondent on pain of forfeiture or pain of a penalty against his beneficial interest in the Property. I do not accept that argument. The situation in both *Muschinski v Dodds* and in *Baumgartner* also related to the breakdown of personal relationships. In *Muschinski*, Deane J observed:

> Nor does the fact that Mr Dodds is seeking to take advantage of the overall arrangement which the parties framed to meet the exigencies of their personal relationship deprive his conduct of its unconscionable character. In circumstances where the parties neither foresaw nor attempted to provide for the double contingency of the premature collapse of both their personal relationship and the commercial venture, it is simply not to the point to say that the parties had framed that overall arrangement without attaching any condition or providing any safeguard specifically to meet the occurrence of that double contingency. As has been seen the relevant principle operates upon legal entitlement. It is the assertion by Mr Dodds of his legal entitlement in the unforeseen circumstances which arose on the collapse of their relationship and planned venture which lies at the heart of the characterisation of his conduct as unconscionable. Indeed, it is a very absence of any provision for legal defeasance or other specific or effective legal device to meet the particular circumstances which gives rise to the need to call in aid the principle of equity

[13] (1985) 62 ALR 429 at 455.
[14] Ibid at 439.

applicable to preclude the unconscionable assertion of legal rights in the particular class of case.[15]

77. Second, Mr Hume submitted that the conduct of the Second Respondent in adopting self-help measures to try and procure a transfer of the Applicant's beneficial interest disentitled him from calling upon equity to assist.[16] I do not consider that the allegations, even if proven, are causal to the relationship breaking down between the First Respondent and the Applicant or to the failure to make any contribution to the purchase price or cost of the Property. Consequently, I do not accept that the conduct of the Second Respondent, if proved, deprives equitable intervention.

78. Third, Mr Hume pointed to the fact that the joint endeavour was said to be between the Applicant and the First Respondent. He submitted that it was common ground that the First Respondent barely contributed to the repayment of the mortgage loan. He argued that this was in stark contrast to the claimants in both *Baumgartner* and in *Muschinski*, who made substantial, rather than trivial contributions. In addition, the First Respondent freely admitted during cross-examination that her motivation in counter-claiming was solely, or at least substantially, for the benefit of the Second Respondent. In my view, this factor is not to the point. In particular, I do not consider that the joint endeavour was one solely as between the Applicant and the First Respondent. As I indicated above, the more likely scenario is that the Second Respondent consented to being a third co-owner, and ultimately jointly financing the acquisition of the Property, on the basis that it would provide a suitable residence for the Applicant and the First Respondent to live and thereby improve the quality of their relationship. According to the Second Respondent, this was a motivating factor:

> 21. Ultimately, however, Kiki convinced me to agree to include Trakas as a co-purchaser. She seemed to have total faith in his commitment to her. Kiki explained that Trakas had made a long-term commitment, and that she had no doubt that they would share their future together. She begged me to include Trakas as part of the family. Kiki made it sound as though she and Trakas were in a strong, stable relationship that would lead to good things, and a happy future together, so I trusted her and wanted her to be happy.

79. Moreover, the joint endeavour went further than simply providing a suitable residence for the Applicant and the Second Respondent to live in but also contemplated that the Applicant would contribute equally to the

[15] Ibid at 457.

[16] See paragraph 19 above. In addition, the Applicant alleged that there was a further altercation between him and the Second Respondent after this proceeding had been issued.

purchase price and ongoing costs of the Property. Again, according to the Second Respondent, this was a further motivating factor:

> 22. At the same time, the idea of having to meet only 1/3 of the mortgage payments addressed the concerns I had regarding my financial situation with this second property purchase...

80. Both these elements of the joint endeavour failed. In my view, the mere fact that the First Respondent has now indicated a desire to transfer her legal and beneficial interest in the Property to her brother is not material in answering the question whether or not it would be unconscionable to allow the Applicant to retain his one third legal interest in the Property.

81. In my view, the circumstances of this case justify the imposition of a constructive trust, such that the Applicant holds his beneficial interest in the Property on trust for the First and Second Respondents. The substratum of the joint endeavour simply did not eventuate, despite the fact that on the Applicant's view, he and the First Respondent cohabited the Property for the first six months following settlement of the purchase. In my opinion, it would be unconscionable to allow the Applicant to retain his right, title and interest in the Property in circumstances where the assumptions upon which he acquired that right, title and interest never crystallised in any meaningful way.

RELIEF UNDER THE ACT

82. Irrespective of whether relief is sought through the mechanism of a constructive trust or other equitable relief, the Tribunal's jurisdiction to order sale or alter a co-owner's interest in land is derived under Part IV of the Act. The relevant provisions of that Act are as follows:

> **228 What can VCAT order?**
>
> (1) In any proceeding under this Division, VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.
>
> (2) Without limiting VCAT's powers, it may order –
>
> (a) the sale of the land or goods and the division of the proceeds of sale among the co-owners; or
>
> (b) the physical division of the land or goods among the co-owners; or
>
> (c) that a combination of the matters specified in paragraphs (a) and (b) occurs.
>
> ...
>
> **230 Order varying entitlements to land or goods**
>
> When making an order under section 228, VCAT, if it considers it just and fair, may order –

(a) that the land or goods be physically divided into parcels of shares that differ from the entitlements of each of the co-owners; and

(b) that compensation be paid by specified co-owners to compensate for any differences in the value of the parcels or shares when the land or the goods are divided in accordance with an order under paragraph (a).

...

233 Orders as to compensation and accounting

(1) In any proceeding under the Division, VCAT may order:

(a) that compensation or reimbursement be paid or made by a co-owner ot another co-owner other co-owners;

(b) that one or more co-owners account to the other co-owners in accordance with section 28A;

(c) that an adjustment be made to a co-owner's interest in the land or goods to take into account of amounts payable to each other during the period of the co-ownership.

(2) In determining whether to make an order under subsection (1), VCAT may take into account the following-

(a) any amount that a co-owners had spent in improving the land or goods;

(b) any costs reasonably incurred by a co-owner in the maintenance or insurance of the land or goods;

(c) the payment by a co-owner of more than that co-owner's proportionate share of rates (in the case of land), mortgage repayments, purchase money, instalments or other outgoings in respect of that land or goods for which all the co-owners are liable;

(d) ...

83. In *Tien v Pho*,[17] Kaye J discussed the operation of those sections as they interplayed with equitable and common law principles. He stated:

> 21. ... That submission addressed the first ground of appeal, the relevant part of which that the Tribunal "... ought to have given effect to the parties' rights and obligations in the

[17] [2014] VSC 391.

property prevailing under the law of trusts, and should not have made orders that adjusted the party's property rights in a manner at odds with their actual intention as to the ownership of the property both at the time of its acquisition and afterwards" (emphasis added). When I asked Mr Lim to identify the relevant legal error made by the Senior Member in applying s 233(1)(c), so as to adjust the legal and equitable interests of the parties in the property, Mr Lim responded that he could not "think" of any legal error made by the Senior Member in that regard. That concession by Mr Lim, which was fatal to the first submission, was clearly correct.

84. His Honour stated further:

> 23. Pausing there, it is clear, from its express terms, that s 233 authorises the Tribunal, on an application under Part 4, to make an adjustment to a co-owner's existing interest in land or goods by taking account (inter alia) amounts paid, and costs incurred, by a co-owner in respect of the property which exceed that co-owners proportionate share of those costs or payments. Such an adjustment must, necessarily, involve an alteration of the parties' rights and interests at common law and in equity. The issue is placed further beyond doubt by s 233 (5), which provides that s 233 "... applies despite any law or rule to the contrary".
>
> 24. Thus, on its clear terms, s 233 authorised the Senior Member to make an adjustment to the respective interests of the plaintiff and the defendant to take into account (inter alia) the payment by the defendant of more than his proportionate share of the mortgage payments in respect of the property.

85. Mr McKay submitted that even if the Tribunal was not persuaded to order an adjustment of the parties' equitable estates by means of a constructive trust, then it could do so under s 233(1)(c) of the Act. In *Sherwood v Sherwood,*[18] I expressed the view that the discretion bestowed upon the Tribunal under Part the Act did not licence the Tribunal to decide applications made under that legislation without regard to established principles. I said:

> 27. Although, the Act does not expressly state that the Tribunal's discretion is to be applied in accordance with the general law, I am of the opinion that to simply determine the issues based on what the Tribunal may, from time to time, consider to be just and fair without having regard to the general law is not an outcome that I consider to be *just and fair*. The public expect decisions of the Tribunal to be consistent, in terms of applying the law to the facts as found. To disregard the

[18] [2013] VCAT 1746.

general law may lead to inconsistency in the decisions of the Tribunal which may be difficult to justify on any legal basis.

28. I am reinforced in holding this view by the comments of Kaye J in *Edelsten v Burkinshaw & Ors*,[19] where his Honour discussed the discretion of the court under s 229 of the Act:

> However, clearly, it would be inferred from s 229 that the land should be divided on a basis which is "just and fair". The use of such a phrase in the legislation is not a licence to the court to resort to some form of instinctive justice. Rather, clearly, the basis of the division of the land must be determined in a manner which best accords with the legitimate rights and interests of each of the parties.

86. In the present case, I am persuaded that it would be just and fair to order an adjustment of the legal holdings of the Property, the effect of which would require the Applicant to transfer his legal interest and holding in the Property to the First and Second Respondents, so that they then solely hold the Property as tenants in common in equal shares. An order in that form is consistent with the equitable relief sought by the First and Second Respondents and, in my view, is the only sensible mechanism to fairly address what would otherwise be unconscionable conduct on the part of the Applicant.

87. In particular, it is difficult to envisage a situation where it could be said that there could be a just or fair sale of co-owned land in circumstances where the only co-owner pressing for sale holds a minority interest and has not contributed any money to the purchase price of the co-owned property - and only acquired his interest through promises which never came to fruition.

THE APPLICANT'S CLAIM FOR AN AMOUNT EQUIVALENT TO RENT

88. As to the Applicant's claim for compensation for an amount equivalent to rent, Mr McKay drew my attention to the decision of the Full Court of the Federal Court of Australia in *Secretary of the Department of Social Security v Agnew*,[20] where the joint judgment of Drummond, Sundberg and Marshall JJ stated:

> See also *Re Jonton Pty Ltd* [1992] 2 Qd R 105 and *Zoborg v Commissioner of Taxation* (1995) 64 FCR 86 at 91-92. Those cases also indicate that the court has a discretion to modify the prima facie date on which the trust takes effect. We would adopt the view of AJ Oakley that "in the absence of any judicial order to the contrary, a constructive trust will take effect from the moment at which the conduct which has given rise to its imposition occurs: *Constructive Trusts* 3rd ed (1997) at 5. See also Pawloski, op cit, at 12, 130-132. Cf *Re Sabri; Ex parte Brien v Sabri* (1996) 21 Fam LR 213, at 223-229.

[19] [2011] VSC 362 at [27].
[20] [2000] FCA 59.

In the present case there is no reason, such as third parties in need of protection, to defer the inception of the trust and accordingly it came into existence when the conduct which gave rise to its imposition occurred.

89. I accept that it is appropriate for the constructive trust in this case to operate from the date that the unconscionable conduct of the Applicant occurred; namely, when he failed to contribute to the cost of purchasing the Property, being a date that pre-dates his departure from the Property. Put another way, it would be incongruous that an amount equivalent to rent should be awarded in favour of the Applicant in circumstances where he did not hold a beneficial interest in the Property over the relevant time in question.

SENIOR MEMBER E. RIEGLER