VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST **VCAT Reference: BP814/2018**

CATCHWORDS

PROPERTY LAW ACT 1958*:** respondent gifted his fiancée (the applicant) a half share in an apartment; after their relationship ended the applicant refused to leave the property as requested and brought this proceeding under Part IV of the ***Property Law Act 1958 seeking orders for sale and division of the proceeds between co-owners; respondent counterclaimed seeking declarations that the gift was a conditional gift made in contemplation of marriage and as the marriage had not occurred the gift should be set aside; alternative claim for a declaration that applicant held her interest in the property on trust for the respondent; claims also made on basis the applicant exerted undue influence over the respondent and acted unconscionably; further claim made for an order for an amount equivalent to rent.

APPLICANT:	Maurita Cheryne Joan Grech
RESPONDENT:	Kenneth John Richardson
WHERE HELD:	Melbourne
BEFORE:	Member C. Edquist
HEARING TYPE:	Hearing
DATE OF HEARING:	7 and 8 February 2019
DATE OF ORDER:	19 March 2019
CITATION:	Grech v Richardson (Building and Property) [2019] VCAT 363

ORDERS

1. In these Orders (including the following Reasons) the property at unit 1, 258 Ballarat Road, Footscray in the State of Victoria is referred to as "**the Property**".
2. Under s 124 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**the VCAT Act**") the Tribunal declares that:
   a) the applicant holds her registered interest in the Property on trust for the benefit of the respondent;
   b) the applicant has no beneficial interest in the Property;
   c) the applicant is not entitled to an order that the Property be sold.

3. The applicant must transfer her half interest in the Property to the respondent.
4. In order to give effect to Order 3 the respondent must as soon as practicable prepare the relevant Transfer of Land and any other necessary document and present them to the applicant for signature.
5. If within seven days of being requested in writing to sign the Transfer and any other relevant document the respondent has not signed, the Principal Registrar has authority, upon receipt of an affidavit from the respondent setting out the relevant facts, to sign the Transfer and any other necessary document on behalf of the applicant.
6. The Tribunal declares that the respondent is entitled to an order for possession of the Property. The parties may liaise with a view to formulating Minutes of Consent Orders regarding the timing of the vacation of the Property by the applicant, alternatively may address the Tribunal at a further hearing as to the relevant Orders to be made.
7. The Tribunal declares that under s233 of the *Property Law Act 1958* the applicant is liable to the respondent for an amount equivalent to rent, from a date to be determined to a date to be determined, at a rate per week to be determined, at a further hearing.
8. **The proceeding is listed for a further hearing at 10.00 a.m. on 15 May 2019 at 55 King Street, Melbourne, before Member Edquist, with an allowance of half a day.**
9. The questions of costs and reimbursement of fees under s 115B of the VCAT Act are reserved for determination at the further hearing.

C. Edquist
Member

APPEARANCES:

For Applicant	Mr J. McIntyre, solicitor.
For Respondent	Mr G. O’Hara, solicitor.

REASONS

INTRODUCTION

1. When Maurita Grech accepted Ken Richardson's proposal of marriage in August 2016, it made him extremely happy -"the happiest man on this earth"- as he told her later in a Christmas card. From this point, things moved quickly for the couple. Mr Richardson had been living in Maribyrnong with his mother. She moved into a residential aged care facility on 28 February 2017. Ms Grech was living in the Property at this time, and a day or so later Mr Richardson became aware that it had come onto the market. On 2 March 2017 Mr Richardson made an offer for the Property of $315,000, which was accepted. In or about April 2017 Mr Richardson bought for Ms Grech a brand new Mazda 2 car. Prior to settlement of the Property Mr Richardson agreed to put Ms Grech on the title to the Property, and completed the necessary paperwork on 5 May 2017. After settlement on 10 May 2017, Mr Richardson and Ms Grech were registered as joint proprietors. They moved into the Property together straight away. By late July 2017 their relationship had broken down, and Mr Richardson moved out of the Property. Out of these unhappy circumstances this case arises.

2. In early August 2017 Ms Grech was asked by Mr Richardson's brother-in-law to vacate the Property by text. On 7 August 2017 Mr Richardson applied to the Tribunal for possession. He later withdrew this application as it was misconceived. Ms Grech was not a tenant but was on title as a co-owner. On 16 August 2017, Ms Grech's solicitors (Verducci Lawyers) wrote to Mr Richardson, contending that the parties had been in a de facto relationship from "about February 2015 until late July/ early August 2017", and it was clear that Ms Grech had an interest in the Property, either by way of gift, alternatively by reason of the de facto relationship. Ms Grech subsequently initiated proceedings in the Federal Circuit Court, but after settlement discussions those proceedings were withdrawn.

3. Ms Grech initiated this proceeding on 19 October 2018 seeking orders under Part IV of the *Property Law Act 1958* (Vic) ("**PLA**") for the sale of jointly owned property.

ISSUES

4. Ms Grech's claim is straightforward. She says that by reason of being a registered joint proprietor of the Property, she is presumptively entitled at law to co-ownership of the Property, to the extent of one-half share. In opening submissions, it was contended that she was given her one-half share of the property by Mr Richardson as an "absolute" gift. The transaction was not conditional on them getting married. It was also argued that because they were engaged there was a presumption of gift, or

"presumption of advancement" (as it is traditionally referred to), in favour of Ms Grech.

5. Mr Richardson initially disputed Ms Grech's claim on the basis that, by virtue of the fact that he paid the full purchase price of the Property, there was a presumption in law that Ms Grech's registered interest in the Property is held on trust for him. Alternatively, he disputed her claim on the basis that he gave Ms Grech a half share in the Property only because it had been demanded by her, and then only in contemplation of marriage on the basis that they would live together permanently as husband and wife. By the start of the hearing, Mr Richardson had expanded these bases of defence, adding claims based on undue influence and unconscionability.

6. Mr Richardson's final submissions were much more extensive than Ms Grech's. This was no doubt because it was accepted that he had to displace the presumption of co-ownership arising from the fact that she was on title. The submissions advanced on Mr Richardson's behalf were:

    a) The Tribunal has jurisdiction to make decisions based on equitable principles.

    b) The transfer should be set aside as it was made in contemplation of marriage, and the relationship failed. As it was a conditional gift, and the condition had failed, the gift must fail.

    c) Mr Richardson is entitled to the same result via a different route, namely that in the circumstances a constructive trust was created under which Ms Grech holds her half share in trust for him.

    d) If the Tribunal were to find that the gift was not made in contemplation of marriage, and that it was an unconditional gift, then Mr Richardson has two fallback arguments based on the related doctrines of undue influence and unconscionability.

    e) In the present case, a presumption of undue influence arises. In these circumstances, it is incumbent upon Ms Grech to demonstrate that Mr Richardson had opportunity to obtain independent legal advice in a timely manner before making the transfer.

    f) As Ms Grech received her half share in the property in circumstances where she had exercised undue influence upon Mr Richardson, it would be unconscionable for her to retain her half share in the Property following the failure of the relationship.

7. In reply, it was argued on Ms Grech's behalf that there was no undue influence as Mr Richardson had put her on title as a "free act". It was his decision. Furthermore, there could not be any undue influence as the parties were in an equal position. If anything, he was in an ascendant position over her. The final argument made was that if, as Mr Richardson said at the hearing, he had been pressured by Ms Grech's brother, that was not influence brought to bear by her.

Tribunal's jurisdiction

8. Under s 225 of the PLA, a co-owner of land or goods may apply to the Tribunal for orders. As both Ms Grech and Mr Richardson are on the title as joint tenants, they fall within the definition of co-owner contained in s 222 of the PLA. Accordingly, the Tribunal has jurisdiction to deal with this dispute.

Relevant provisions in Division 2 of Part IV of the PLA

9. Co-owners may apply to the Tribunal, under s 225(2) of the PLA for orders for:
   a) the sale of the land or goods and the division of the proceeds among the co-owners; or
   b) the physical division of the land or goods among the co-owners; or
   c) a combination of the matters specified in paragraphs (a) and (b).

10. Under s 228(2) the Tribunal has express power to make orders of this type. Importantly, s 228(1) imposes an overarching responsibility on the Tribunal in any proceeding under this Division to make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.

11. A presumption arises under s 229(1) that if the Tribunal determines that an order should be made for the sale and division of land under this Division, the Tribunal must make an order for sale under s 228(a) unless it considers that it would be more just and fair to make an order for division under s 228(b) or for a combination of division and sale under s 228(c). For the purposes of determining whether an order for division or a combination of division and sale would be more just and fair, the Tribunal is given guidance in s 229(2).

12. Under s 230 the Tribunal, if it considers it just and fair when making an order under s 228, may order:
    a) that the land or goods be physically divided into parcels or 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).

13. Of specific relevance to this proceeding is s 233, which provides:

    (1) In any proceeding under this Division, the Tribunal may order—

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

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

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

14. The jurisdiction of the Tribunal to make an order under s 233 is limited by the operation of ss 233(3). As Ms Grech specifically relies on this subsection in connection with a claim for compensation made by Mr Richardson, it will be discussed in detail below.

15. It is well established that the Tribunal, in exercising powers under Part IV of the PLA, must take equitable principles into account. In *Tien v Pho*[1], Kaye J said this:

> 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-owner's 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"

16. Riegler SM, as he then was, in *Sherwood v Sherwood*[2] gave further guidance as to the exercise of the discretion in these terms:

> 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 general law may lead to inconsistency in the decisions of the Tribunal which may be difficult to justify on any legal basis.
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> 28. I am reinforced in holding this view by the comments of Kaye J in *Edelsten v Burkinshaw & Ors*,[3] where his Honour discussed the discretion of the court under s 229 of the Act:
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>> 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

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[1] [2014] VSC 391 (21 August 2014)
[2] [2013] VCAT 1746 (2 October 2013)
[3] [2011] VSC 362 at [27]

> division of the land must be determined in a manner which best accords with the legitimate rights and interests of each of the parties.

29. In my view, this proposition is entirely consistent with the legal assumption that legislation is presumed not to invade common law rights unless it can clearly be shown that the legislature intended to do so. In *Potter v Minahan*, O'Conner J stated:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[4]

30. In *Minister for Lands and Forests v McPherson*, the NSW Court of Appeal held that the presumption was applicable to principles of equity.[5]

31. The use of the word *just* prefacing the word *fair* reinforces my opinion that the section does not give the Tribunal an unqualified discretion to partition land, simply on the basis of what the Tribunal considers is fair. As highlighted by Kaye J in the extract of *Edelsten* above, 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.*

CREDIT WORTHINESS OF THE PARTIES

17. The first issue to be determined is whether Mr Richardson's gift to Ms Grech of an interest in the Property was unconditional, or whether it was made in contemplation of marriage. This is an issue in respect of which the parties acknowledged that there is a fundamental conflict between the evidence of the protagonists. They could not both be telling the truth. Accordingly, it is necessary for me to make an assessment as their respective creditworthiness.

18. I formed a view that Ms Grech was not a reliable witness for a range of reasons. Ms Grech swore two affidavits. The first was sworn on 4 December 2018. The second was sworn on 11 January 2019, and was effectively a response to an affidavit Mr Richardson had sworn on 21 December 2018. Significantly, in my view, Ms Grech's evidence had not fully crystallised at the time she swore her first affidavit, but developed over time in her second affidavit and again in at least one critical respect (relating to the unconditional nature of the gift) in her evidence at the hearing.

19. I observe that Ms Grech was often evasive when she was giving evidence, and would not answer questions directly. She was also capable of changing

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4 [1908] 7 CLR 277 at 304

5 [1991] 22 NSWLR 687.

her answers without explanation. A prime example of this came up as a result of the very first question in cross-examination, when Ms Grech was referred to paragraph 15 of her affidavit of 4 December 2018. When Mr Richardson's solicitor quoted the words attributed to Ms Grech in that paragraph, her first response was to deny that she had said them. When she was reminded that the words just read to her were from her own affidavit, she accepted that she had said them.

20. Ms Grech offered no excuse at the time for this change of position, such as confusion or nervousness. I might have been prepared to put her inconsistent evidence down to such factors, had a clear pattern of evasiveness and inconsistency in her evidence not emerged.

Relevance of the date of engagement

21. Although the year in which the parties were first engaged did not bear directly on any of the substantive issues, it was a matter which had been the subject of direct evidence from the parties which was directly inconsistent. Accordingly, it was clear that one party or the other was lying about the matter. Both parties invited me to make a determination about the issue because, in doing so, I would have to make findings about credibility. I accordingly turn to an examination of the respective evidence of the parties about this matter.

22. At [10] of her December affidavit Ms Grech said that she became engaged to the respondent on her birthday, 22 February 2013. She said she received an engagement ring that she wore regularly. She exhibited a photo of Mr Richardson kneeling to propose to her, and a photograph of the engagement ring which he said was presented to her in 2013.

23. Mr Richardson in his affidavit systematically responded to Mrs Grech's first affidavit. At [51] he directly contradicted Ms Grech's evidence, deposing that he and Ms Grech only became engaged in August 2016. He specifically said the photograph of the engagement ring was taken by Ms Grech on her camera when he presented her with an engagement ring in 2016.

24. Ms Grech at [11] of her first affidavit had said that she and Mr Richardson had a small engagement celebration at her home and that nine of her closest friends had been invited to attend. Under cross-examination, she could identify only six of those friends. None of them were present at the hearing to give evidence.

25. I was invited at the conclusion of the hearing to draw an inference that the evidence of those witnesses would not have assisted Ms Grech's case, on the basis of the principle established in *Jones v Dunkel* [6]. In final submissions, Ms Grech's solicitor raised the question of whether *Jones v Dunkel* could be applied in the Tribunal, by reason of s 98(1)(b) of the VCAT Act which provides that the Tribunal is not bound by the rules of

[6] [1959] 101 CLR 298; [1959] HCA 8

evidence. I reject that submission on the basis that it is well established that the Tribunal can apply *Jones v Dunkel*. However, the Tribunal must, under s 98(1)(a), apply the rules of natural justice when doing so.[7] I decline to apply *Jones v Dunkel* in the present case because the failure of Ms Grech to call any of the people she had deposed were at the engagement party was not highlighted as an issue by Mr Richardson's solicitor during the course of her evidence. In circumstances where it was not clear to Ms Grech, although represented by a lawyer, that *Jones v Dunkel* might be invoked against her, I consider that it would be unfair for me to draw an adverse finding on the basis of the *Jones v Dunkel* principle where no appropriate warning had been given at a time when Ms Grech could have done something about calling the absent witnesses, or at least explained their absence.

26. However, simply because Ms Grech did not call any of the people she had deposed were at her engagement party, I did not have the benefit of hearing their evidence. The only witness who said that an engagement party took place in 2013 was Ms Grech herself. Mr Richardson expressly denied in his affidavit that there had been an engagement party in 2013.

27. At the hearing, Ms Grech called two witnesses, her son Christopher Grech and a friend, Cathy Tang. Mr Grech had sworn an affidavit on 3 December 2018, and he adopted this affidavit at the hearing. There was no mention in the affidavit of his mother being engaged to Mr Richardson during 2013. Accordingly, I found it surprising that in her second affidavit Ms Grech expressly deposed at [4] that she told her son Christopher in or around June 2013 about the engagement. Curiously, she had not mentioned this in her affidavit sworn in December 2018, before Mr Richardson swore his affidavit.

28. Ms Tang sworn an affidavit on 27 November 2018. She adopted this affidavit at the hearing. At [5] she deposed that sometime in 2017 she found out that Ms Grech and Mr Richardson were engaged. She then deposed that she had later learned that Ms Grech and Mr Richardson had been engaged since "sometime in 2013". Obviously, this was not contemporaneous evidence of the earlier engagement, and was hearsay, presumably based on a statement made by Ms Grech to Ms Tang. I place little weight on this evidence.

29. In her second affidavit sworn in January 2019, Ms Grech at [4] repeated that she and Mr Richardson had initially been engaged on 22 February 2013. Then, at [6] she said that she and Mr Richardson went shopping in around August 2016 to purchase a second engagement ring. Ms Grech is adamant at paragraph [7] that the 2013 engagement ring was different to the 2016 ring.

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[7] See for example *Wei and Anor v Yu* [2015] VSC 726 [27]–[28]

30. I observe that Ms Grech's two affidavits are not consistent about engagement rings. In her first affidavit, Mr Grech's refers to only one ring. Specifically, at [13] she deposes:

> In or around early 2016 Ken and I had an argument which resulted in me returning the engagement ring to him. Ken kept the engagement ring, but our relationship continued.

31. However, in her second affidavit at [11] Ms Grech deposed that she agreed with Mr Richardson's affidavit where he stated that he had taken the engagement ring bought in August 2016. She then added that he had also taken the original engagement ring given to her in 2013, along with the proposed wedding ring.

32. Under cross examination, she could not explain why she had not mentioned the second engagement ring in her first affidavit.

33. On the other hand, I consider Mr Richardson's affidavit evidence to the effect there was only one engagement, in 2016, to be internally consistent. Moreover, his evidence that there was only one engagement ring was not shaken when he was in the witness box.

34. Mr Richardson's evidence on the timing of the engagement was supported by the evidence of his sister Gayle Richardson, who gave evidence on the second day the hearing. She confirmed the contents of an affidavit she had sworn on 21 December 2018. In that affidavit she deposed at [9]:

> In August, 2016 Ken announced to me via telephone call that he was engaged. It took me by surprise as it did most people, but I was happy for Ken as he had never been involved in a romantic relationship, ever.
> By reason of our closeness and the frequency of our contact, I expect that I would have been one of the first people to hear if Ken became engaged. Prior to August 2016, Ken never said that he had that he was engaged to Maurita, and nor did Maurita ever tell me that she and Ken were engaged. Further, no one else ever told me prior to August 2016 that Ken was engaged to Maurita.

35. I consider that Ms Richardson presented as a credible witness. She was calm and articulate. I accept her evidence that she expected that Mr Richardson would have told her if he had been engaged in 2013. Her evidence that he did not do so is consistent with Mr Richardson's own evidence that he only became engaged in 2016.

36. There are two pieces of external evidence concerning the issue which require examination. One of these was that Ms Grech's own solicitors, Verducci Lawyers, in a letter dated 16 August 2017, made a statement that Ms Grech and Mr Richardson had been engaged "in or around February 2015". When this was pointed out to Ms Grech at the hearing, she said that this was a mistake, but it was not her mistake as she had not typed the letter. She said it was her lawyer's mistake. Her representative Mr McIntyre confirmed it may well have been his firm's mistake at the hearing. I am not

satisfied it was a mere typographical error. I say this because the opening paragraph of the letter read as follows:

> We act for Ms Grech. We are instructed that you and our client were in a de facto relationship for a period of time from about February 2015 until late July/early August 2017. You only lived together from about April 2017, as you were residing with your mother and providing care for her.
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> You and our client became engaged in or around February 2015.

37. I add, with studied moderation, that I was not assisted by Ms Grech's solicitors ready concession in the course of the hearing that his firm may have made a mistake, in circumstances where before making the concession the solicitor did not check the file to ascertain what instructions had been recorded about the date of the engagement. The concession was an important one, as it potentially explained a critical inconsistency in Ms Grech's evidence.

38. In my view, the statement that Ms Grech and Mr Richardson became engaged in around February 2015 was not accidental. Ms Grech was asserting the existence of a de facto relationship. It was in her interest to demonstrate that the relationship was not a short one. On the balance of probabilities, I am satisfied that the date of the engagement was deliberately stated in the Verducci Lawyers' letter to have been in February 2015. I accordingly consider that her lawyers' letter seriously weakens her affidavit and oral evidence where she asserts that she was engaged to Mr Richardson in February 2013.

39. The other matter to which I refer is the fact that when Mr Richardson purchased a ring for Ms Grech in 2016, the ring did not fit. He swore at [51(c)] of his affidavit that the ring he purchased in August 2016 had to be altered. Ms Grech's evidence, in her second affidavit at [11], was that Mr Richardson took back the ring he had given her in 2013. If that evidence is accurate, then it is curious that when Mr Richardson purchased another ring in 2016 it did not fit. If Mr Richardson did hold the 2013 ring, he presumably could have ensured that the new ring was identically sized before he gave it to Ms Grech.

40. Of course, Ms Grech's evidence raises the question of why Mr Richardson would have gone out and bought a second ring anyway.

41. This segues back to Ms Grech's response under cross examination, when she was asked to identify differences between the 2013 ring and the 2016 ring, which had been put into evidence by Mr Richardson. She could not do so, which of course is consistent with there always having been only one ring.

42. Having regard to the consistency of Mr Richardson's evidence, to his demeanour in the witness box, and to these other matters, I accept Mr Richardson's evidence in preference to Ms Grech's in relation to the

contested issue regarding when they were first engaged. I find that they were first engaged 2016, not in 2013. I also find that Ms Grech was not truthful in asserting she and Mr Richardson had been engaged in 2013. This finding affects the attitude I take to her other evidence where it clashes directly with that of Mr Richardson.

Was the gift unconditional?

43. As noted, Ms Grech's case is based primarily on the proposition that she was given a half interest in the unit unconditionally, and that it was to remain hers even if she and Mr Richardson did not get married.

44. The following passages in Ms Grech's first affidavit are relevant to this issue:

    a) At [15], she deposed that she had discussed buying the Property with her son in late 2016 or early 2017. She says that Mr Richardson overheard this conversation, and said to her words to the effect that "there is no need for you both to buy it, I will buy it, it will be for our future together" and "it is cheap".

    b) At [16], Ms Grech said that she told Mr Richardson she didn't want him to sell his mother's home in order to buy the Ballarat Road property, and he responded with words to the effect of "don't worry, I have plenty of money, it will be fine". Ms Grech deposed that she protested, and said that she and her son would buy it, but Mr Richardson insisted. He said to me words to the effect of "it is a wedding present". He also said "you will never have to move again".

    c) At [18], Ms Grech deposed that prior to the settlement of the purchase of the Property, Mr Richardson told her that he wanted to put her name on the title, saying "I want both of our names to be on the title, as this property is for our future" and "you will never have to move again".

45. Mr Richardson gave his evidence in response in his affidavit. At [55] he disputes that Ms Grech did not say that she did not want him to sell his Maribyrnong property in order to buy the Property. He also says that he was only financially able to buy the Property if he sold the Maribyrnong property. He denies he said: "don't worry, I have plenty of money, it will be fine".

46. Critically, at [14] of her response affidavit sworn in January 2019, Ms Grech concedes Mr Richardson used the words "wedding present". However, she added that "he had recently purchased me a new car". From this, apparently, she formed this view:

    > I believe that he intended to give the property to me regardless of whether we got married. He certainly used the words that I "will never have to move again".

Evolution of Ms Grech's evidence on the matter at the hearing

47. There is no evidence in either of Ms Grech's affidavits that Mr Richardson said to her that it was his intention that she was to have half the Property irrespective of whether they got married. As just noted, she referred at [14] of her second affidavit to her *belief* that Mr Richardson intended to give her the property regardless of whether they got married. In a similar vein, at [35] of her first affidavit, she deposed:

> Ken knew that my income was limited, and that I had no significant assets of my own, and so I believe that he intended to gift me my share in the property in order to ensure that I was financially provided for in the coming years, regardless of whether we were to get married. His generosity in that regard is also demonstrated through the fact he bought me a brand-new car for my 60th birthday.

48. It is notable that Ms Grech's affidavit evidence about what Mr Richardson *actually said* is consistent with his evidence that putting her on the title was connected to the impending marriage.

49. However, under cross examination at the hearing, Ms Grech was adamant that Mr Richardson had said to her that she was entitled to her interest in the property regardless of whether they got married. When she was asked to point to a paragraph in either affidavit where she said that, she initially appeared to be confused. When it was clearly explained to her what she had to do, she was given as much time as she needed to read her affidavits. At the end of that exercise, she was unable to point to any paragraph in either of her affidavits which was to the effect for which she was contending in her oral evidence. She was unable to explain why her affidavits did not contain the evidence she was now giving orally. I find Ms Grech's evidence on this critical matter to be entirely unconvincing, and I do not accept it.

How could a gift of a half interest secure Ms Grech's accommodation forever?

50. My finding against Ms Grech in respect of this critical matter is reinforced by the fact that Ms Grech's statement that she would be entitled to retain her half interest in the Property, even if she and Mr Richardson did not get married, is simply not credible as it does not reflect the practical consequences of the marriage not proceeding. What the parties have experienced since July 2017 represents those consequences. In the absence of a voluntary relinquishment by Ms Grech of her interest in the Property, the parties were inevitably going to have a legal dispute. The parties have been to the Federal Circuit Court on the basis that Ms Grech initially asserted that there was a de facto relationship. The parties settled that proceeding. They have now chosen to pursue the dispute here in the Tribunal as a partition dispute under Part IV of the PLA. Even putting her case it is highest, Ms Grech is only a half owner of the property. There is no reason for her to expect that she will *not* have to move out at the conclusion of the proceeding. The best outcome she can expect is that which she has

sought in her pleading, namely that the property be sold and the proceeds be divided. Only Mr Richardson has any prospect of retaining the Property. If his claim for an equitable interest of 100% is accepted, the title will be adjusted and he will be able to retain possession of the Property. The fact that the evidence of Ms Grech simply does not accord with the legal reality is another good reason to doubt that Mr Richardson made the statement which is attributed to him by Ms Grech.

The evidence of Christopher Grech

51. It is necessary that I refer to the evidence of Christopher Grech on this topic. At [5] of his affidavit Mr Grech deposes that in around May 2017 he had a conversation with Mr Richardson in which Mr Richardson said "I will never make your mum move from here-I am not a cruel person". Mr Richardson agreed under cross-examination that he made that statement. I accept that he did.

52. I do not think this evidence takes Ms Grech's case any further, as it is consistent with Mr Richardson's own evidence that his intention was that Ms Grech would never have to move out of the property again. His intention, according to his evidence, was that he and Ms Grech would be living together as husband and wife forever. I consider the statement statement made to Mr Grech has to be understood in that context.

The evidence of Cathy Tang

53. It is also necessary to have regard to the evidence given by Cathy Tang. Her affidavit on 27 November 2018 contained evidence which on its face appeared to be directly relevant. At [6] she deposed that she was informed that Ms Grech and Mr Richardson had bought the Ballarat Road flat and Mr Richardson had said "it is our wedding gift, [Maurita] will never have to move again".

54. Critically from Ms Grech's point of view, at [8] Ms Tang went on to state that she went back to the living room and continued her conversation with Mr Richardson. She asked him "what will happen if the two of you don't get married?" She then deposed that Mr Richardson said "she will never have to move again-it is my gift".

55. Several comments are warranted. First of all, Ms Tang swore that this conversation took place in September 2017. Although this date was not the subject of comment in Mr Richardson's affidavit when he referred to it at [100-102] he did challenge it at the hearing. He said that he and Ms Grech saw Cathy Tang when they were still living together. Accordingly, I consider that the conversation must have taken place before the end of July 2017.This error made by Ms Tang about the date is not in my view fatal to her evidence generally, but it does suggest a lack of attention to detail.

56. The next point is that the conversation referred to by Ms Tang in paragraph [6] is interesting because Mr Richardson is quoted as saying "I have just

bought the [Ballarat Road] flat”. This is not a declaration that he has bought the flat and put Ms Grech on the title. It is, in fact, directly inconsistent with that.

57. This observation is important because the conversation quoted in paragraph [6] does not jell neatly with the conversation referred to in [8]. The separate alleged conversations do not logically sit well together. In the first, Mr Richardson says that he has bought the flat. The underlying proposition behind the second statement is that he has given the entire flat to Ms Grech.

58. I query why Ms Grech’s friend would raise such an issue. I say this because Ms Tang, before she heard Mr Richardson’s answer, could not have known whether her enquiry would have the effect of encouraging Mr Richardson to reconsider his generousity, rather than confirm that it was unfettered.

59. Mr Richardson’s solicitor, at the hearing, made the observation that it was inherently unlikely that Ms Tang would have raised the question of what would happen if the marriage did not take place, just after she had been told such happy news by Mr Richardson.

60. At the hearing, Ms Grech’s solicitor made a counter submission that Ms Tang was a credible witness, and that her evidence was not shaken under cross-examination. I disagree. When she was asked at the hearing why she had raised a question about what would happen if the marriage did not proceed, she appeared flustered, and said she had done so because she was an “optimistic”. Clearly, she meant to say that she was pessimistic.

61. On balance, I accept the submission advanced on behalf of Mr Richardson that it was inherently unlikely that Ms Tang would have raised a question about what was to happen if the relationship broke up, just after she had been informed about happy news of such momentous significance for her friend.

62. Mr Richardson at [101] of his affidavit directly denied answering Ms Tang’s question to him about what would happen “if the two of you don’t get married?” with the statement ‘she will never have to move again-it is my gift”. Under cross-examination, he was less definite in this denial, and conceded that he may have said those words. However, he did not confirm that he did.

63. I find it unlikely that Mr Richardson made this statement. First of all, it is inconsistent with Mr Richardson’s evidence that the gift was directly related to the marriage. Furthermore, just as it made no sense for Ms Grech to take the view that she would be able to stay in the Property forever even if she did not marry Mr Richardson - because this was consistent only with a gift of the entire title, not 50% - why would Mr Richardson say such an illogical thing as this to Ms Tang.

64. I conclude this discussion of Ms Tang’s evidence by observing that she is the only witness other than Ms Grech to attest that Ms Grech’s title to the flat was going to be unaffected by a failure to marry Mr Richardson. Putting

the matter the other way around, the only person other than Ms Tang to suggest that Ms Grech could keep the flat whether or not she got married to Mr Richardson was Ms Grech herself. I have rejected Ms Grech's evidence on this point. On this basis, Ms Tang's evidence regarding the statement attributed to Mr Richardson in paragraph 8 of her affidavit must be viewed as uncorroborated. It is to be assessed in isolation and must stand or fall on its own merits.

65. I have above identified an inconsistency between the alleged statements in paragraphs 6 and 8 of Ms Tang's affidavit, found that it is inherently unlikely that Ms Tang would ask, in the circumstances, what was to happen to the Property if the relationship broke up, highlighted that I regarded Ms Tang at this point of her evidence to be flustered, and stated why I consider it unlikely that Mr Richardson would have made the statement attributed to him in paragraph 8. For these reasons I reject, on balance, Ms Tang's evidence that Mr Richardson made the statement referred to in paragraph 8 of her affidavit, and find that he did not make that statement.

Mr Richardson's further evidence

66. I note that Mr Richardson's contention that he only put Ms Grech on the title in contemplation of marriage is consistent with his actions in early March 2017. At [55] of his affidavit, he relates that:

> I asked Maurita if she would like me to buy the property for us and our future together. I said that would be my wedding present and so she wouldn't have to move again. Maurita said yes she would love that.

67. On 2 March 2017 Mr Richardson completed an offer to purchase the Property. The contract of sale was exhibited to his affidavit. He is named as the sole purchaser. Clearly at this point, even though he had told Ms Grech that he intended to buy the property as a wedding present and that she wouldn't have to move again, he intended that he be the only person on the title.

68. A key question is why Mr Richardson changed his mind, and agreed to put Ms Grech on the title. She said it was his idea. Mr Richardson has a diametrically opposed recollection. At [61] of his affidavit, he said:

> After the agreement to purchase the Ballarat Road Property was in place, but prior to settlement, Maurita said she had been told by her brother Alex, who she said was a lawyer, that as a sign of my commitment to marriage, I should add her name to the title, and that I was not fair dinkum about the marriage unless I put her name on the title.

69. Mr Richardson's evidence on this specific point shifted slightly at the hearing, when he said that Alex had communicated with him directly by telephone, rather than via Ms Grech. I was given no clear explanations as to why Mr Richardson had changed his evidence in this respect. I put the change down to lack of attention to detail rather than dishonesty. Critically, I note that the change was a small one regarding the identity of the person

who had been the conduit of the advice from Alex. The fundamental evidence that it was Alex who had originally suggested that Ms Grech be put on the title was not altered.

70. In any event, the fact that the suggestion that Mr Richardson put Ms Grech on title came from her brother is not material because she, on Mr Richardson's evidence, embraced her brother's suggestion. At [67] of his affidavit, he deposed:

> Maurita was quite definite that I should put her name on the title. Although I had made the offer to purchase the property in my own name I was content to comply with Maurita's request. Having regard to what her brother had advised, I wanted to show Maurita that I was "fair dinkum" about the marriage. Also, I trusted Maurita and believed that we would get married and live together for life. However, without the pressure from Maurita, I would not have given her any interest in the property before we got married.

71. There is a direct clash between Mr Richardson's evidence that he put Ms Grech on the title at her insistence, and her evidence that it was his idea. At [15] of her second affidavit she deposed:

> Ken insisted that he put my name on the title of the property.I never demanded it.

72. For the reasons already stated I regard Mr Richardson to be a much more credible witness than Ms Grech. For this reason I prefer Mr Richardson's evidence that the suggestion that he put Ms Grech on title came from her brother; that he accepted her brother's view that he had to put Ms Grech on the title if he was "fair dinkum" about the marriage; and that this factor, together with Ms Grech's later insistence that she be on title, were the reasons that he agreed to this course.

73. I am supported in this finding by the fact that Mr Richardson's version of events is consistent with his initial intention, as evidenced by the fact that he signed the contract of sale naming himself only as purchaser.

Summary and finding

74. I have rejected Ms Grech's evidence that Mr Richardson said to her that she was entitled to her interest in the property regardless of whether they got married.[8] I have also rejected Ms Tang's evidence that Mr Richardson made the statement attributed to him in paragraph 8 of her affidavit that, even if the two of them didn't get married, Ms Grech "will never have to move again-it is my gift".[9]

75. On the other hand, it is clear from Mr Richardson's actions that when he first offered to purchase the Property he intended to put only himself on the title. I have accepted his evidence that he only changed his mind and put Ms Grech on the title as a result of a suggestion made to him by Ms Grech's

[8] See paragraph 49 above
[9] See paragraph 65 above

brother that he had to put her on title if he was "fair dinkum" about the marriage, and as a result of Ms Grech's own insistence.

76. In the circumstances I am satisfied that there was a direct linkage between the intended marriage and the gift of a half interest in the Property. Accordingly, I find that the gift was made in contemplation of marriage.

The legal ramification of the gift being made in contemplation of marriage

77. This finding is fatal to Ms Grech's case because the marriage did not take place. The legal result is that the gift fails. This is illustrated by *Kais v Turvey*[10], a decision of the Court of Appeal in Western Australia. In that case, a woman who was in a de facto relationship with a man purchased a home unit in in her name only. The man moved in shortly after this. The man began to pay monthly instalments owing under the mortgage over the unit. The woman repeatedly made the man aware that the unit was hers and that he had no interest in it. Several months later they agreed to get engaged. A date was set for the wedding. The man discharged the mortgage over the unit by paying the full capital sum owing. He also expended substantial monies to make improvements to the unit. Subsequently the woman ended the engagement. After the man discharged the mortgage and paid for the improvements, the woman told him that she had never intended to marry him. The man sought a declaration in the Supreme Court of Western Australia that the woman's interest in the home was held upon a constructive trust for himself and her, and that the unit be sold and the proceeds divided proportionally to their respective interests.. The trial judge dismissed these claims. The man appealed, arguing that the sum contributed towards the unit were gifts made in contemplation of marriage and that, due to the termination of the relationship, the woman was obliged to repay the monies. Malcolm CJ said:

> I am also of the opinion that a gift made in contemplation of marriage falls into the class of conditional gifts.[11]

78. In support of this statement Malcolm CJ quoted Brennan J in his dissenting judgement of *Muschinski v Dodds*[12], who expressed the relevant law as follows:

> A condition annexed to a gift may be of either of two kinds: a condition involving a forfeiture for non-fulfilment or a condition creating merely a personal obligation to fulfil it. A donee who takes a gift to which a condition of the latter kind is annexed incurs anequitable obligation to perform the condition: (citations omitted)[13]

79. Malcolm CJ then continued:

[10]]1994] 11 WAR 357
[11] [1994] 11 WAR 357 at 360
[12] [1986] 160 CLR 583 at 605-606
[13] [1986] 160 CLR 583 at 605-606

> In other words, a gift in contemplation of marriage is to be regarded as a gift upon condition that shall be returned in the event that the contemplated marriage does not take place. [14]

80 Seaman J expressly agreed with the Chief Justice, and Ipp J said words to the same effect in a separate judgement.

Did the engagement create a presumption of advancement in favour of Ms Grech?

81. In *Kais v Turner* the Court of Appeal in Western Australia acknowledged, without questioning its current relevance, the historic principle that where "a man pays the purchase price for a property which is transferred into the name of his wife or his intended wife there is a presumption that the transaction was a gift"[15] The Court of Appeal did not dispute the principle, but decided the case on the basis the gift was conditional upon the marriage taking place.

82. That reasoning is sufficient to dispose of Ms Grech's argument in the present case that the engagement gave rise to a presumption of advancement in her favour. The engagement may have at law created a presumption of gift, but as the gift was conditional, and the condition was not discharged (by the marriage of the parties) the presumption is displaced.

Mr Richardson's fallback arguments

Constructive trust

83. In *Stewart v Owen*[16] SM Vassie explained at [95]:

> Since the mid-1980's the law in Australia has been that a constructive trust may be imposed upon a legal entitlement to land when a title-holder's assertion of or exercise of that legal entitlement is, in all the circumstances, unconscionable. The constructive trust is a remedy that equity affords, regardless of agreement or intention. Its form was articulated in two High Court decisions.

84. The two decisions of the High Court referred to by SM Vassie were *Muschinski v Dodds*[17], and *Baumgartner v Baumgartner*[18], which was decided two years later. The facts in *Muschinski v Dodds* were summarised by the plurality (Mason CJ, Wilson J and Deane J) in the second case in these terms:

> [A] man and woman who had lived together for three years decided to buy a property on which to erect a prefabricated house and to restore a cottage. The woman was to provide $20,000 from the sale of her house and the man was to pay the cost of construction and

[14] [1994] 11 WAR 357 at 361

[15] [1994] 11 WAR 357 at pa360, citing *Moate v Moate* [1948] 2 All ER 486; *Wirth v Wirth* (1956) 98 CLR 228

[16] [2019] VCAT 140 (12 February 2019)

[17] [1985] HCA 78; (1985) 160 CLR 583.

[18] [1987] 164 CLR 137

> improvement from $9,000 he would receive on the finalization of his divorce and from loans. The property was conveyed to them as tenants in common. Although some improvements were made by the man, the erection of the house did not proceed and the parties separated. The woman contributed $25,259.45 and the man $2,549.77 to the purchase and improvement of the property.[19]

85. The High Court in *Muschinski v Dodds* declared that the parties held their respective legal interests upon trust to repay to each his or her respective contribution and as to the residue for them both in equal shares.

86. In *Baumgartner v Baumgartner*, Mason CJ, Wilson and Deane JJ explained in their joint judgement that in *Muschinski v Dodds* Deane J (with whom Mason J. agreed) had applied "the general equitable principle which restores to a party contributions which he or she has made to a joint endeavour which fails when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them."

87. In *Baumgartner v Baumgartner*, a man who had been in a de facto relationship with a woman was found to have held a house registered in his name only on trust for the parties in the proportions in which they had contributed their earnings to its acquisition. His assertion that after the relationship had failed the property was his to the exclusion of any interest in the woman was unconscionable conduct which attracted the intervention of equity and the imposition of a constructive trust. *Muschinski v Dodd*[20] was applied. Mason CJ, Wilson and Deane JJ quoted this passage from Deane J's judgment in *Muschinski v Dodd*:[21]

> …the principle operates in a case where the substratum of a joint relationship or 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 so to do: cf. *Atwood v. Maude* and per Jessel M.R., *Lyon v. Tweddell* . (Citations omitted).

88. I consider this principle is potentially applicable to the present case. Mr Richardson put Ms Grech's name on the title in circumstances where they were engaged and he thought they would get married and live together in the Property forever. His vision of their life together was a mirage. Within months of moving in together their relationship had failed. Ms Grech

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[19] [1987] 164 CLR 137 at 147
[20] [1986] 160 CLR 583
[21] [1985] 160 CLR 583 at 620
[23] [1985] 160 CLR 583 at 614

cannot attribute blame to him for the failure of the relationship.[22] It was not his intention that she should continue to enjoy the benefit of half ownership of the property once the relationship failed. This is demonstrated by the fact that within weeks of moving out Mr Richardson, through his brother-in-law, was demanding that she vacate the Property. In a misconceived endeavour to enforce his rights, Mr Richardson issued his own proceeding in the Tribunal, which as noted, he subsequently withdrew. Accordingly, it is necessary to examine whether it would be unconscionable for Ms Grech to continue to retain the benefit of her half interest in the property.

89. I will return to the topic of unconscionability shortly. Before I do so, I observe that if a relevant finding regarding unconscionability is made, then it will be appropriate to declare the existence of a constructive trust irrespective of the parties' prior actual or presumed agreement or intention. As Deane J pointed out in *Muschinski v Dodd:*

> [T]he constructive trust serves as a remedy which equity imposes regardless of actual or presumed agreement or intention "to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle"[23]

90. In this connection, I note that in *Kais v Turvey* the Court of Appeal of Western Australia held that the fact that there was no common subjective intention to create a trust did not preclude the declaration of constructive trust following *Baumgartner v Baumgartner* and *Muschinski v Dodd*.[24]

Unconscionability and undue influence

91. One of the leading High Court authorities on the topic is *The Commercial Bank of Australia Ltd v Amadio*, a case in which parents who were unfamiliar with written English were asked by a son to execute a mortgage in favour of the bank over land which they are owed to secure an overdraft of a company which the son controlled. In the particular circumstances of that case, the High Court was prepared to set aside the mortgage.

92. Of general relevance to the present case are two passages explaining that the remedies arising from unconscionability and due influence are distinct but not mutually exclusive. The first comes from the judgment of Mason J, who stated:

> Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced

[22] See paragraph 132 below
[23] [1986] 160 CLR 583 at 614
[24] [1994] 11 WAR 357 at 363 per Ipp J, Malcolm CJ and Seaman J agreeing

> because to do so would be inconsistent with equity and good conscience. But relief on the ground of "unconscionable conduct" is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, e.g., a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink. Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.
>
> There is no reason for thinking that the two remedies are mutually exclusive in the sense that only one of them is available in a particular situation to the exclusion of the other. Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest.[25]

93. The second passage is from Deane J, where he states:

> The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related. The two doctrines are, however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party (see Union Bank of Australia Ltd. v. Whitelaw; Watkins v. Combes ; Morrison v. Coast Finance Ltd). Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.[26]

Identifying unconscionable conduct

94. It is instructive to refer to the judgement of Mason J in *Amadio* again, where he said:

> It goes almost without saying that it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct. As Fullagar J. said in *Blomley v. Ryan*:

[25] [1982] 151 CLR 447 at 461
[26] [1982] 151 CLR 447 at 474

> "The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other."

Likewise Kitto J. spoke of it as "a well-known head of equity" which—

> "… applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands."

95. The High Court has had to revisit the topic of unconscionability in recent years in at least two cases. The first of these was *Kakavas v Crown Melbourne Ltd*[27]. The second was *Thorne v Kennedy*[28], which involved a wealthy property developer age in his late 60s who was divorced, with adult children. He met a woman in her mid 30's who was living in the Middle East, online in 2006. She relocated to Australia. They then became engaged. The man insisted that the woman signed a prenuptial agreement shortly before the wedding. She received strong legal advice that the agreement was inappropriate and that she should not sign it. She signed the agreement anyway. In late September 2007 they married. After the marriage, she signed a postnuptial agreement which was in substantially similar terms. The marriage failed within four years. In April 2012 the woman commenced proceedings in the Federal Circuit Court seeking to have the agreements set aside. The trial judge set it aside. There was a successful appeal to the Full Court of the Family Court. The woman appealed to the High Court, and was successful. Relevantly, the majority comprising Kiefel CJ, Bell, Gageler, Keane, and Edelman JJ, said:

> 37. There was no controversy on this appeal concerning the principles of unconscionable conduct in equity. Those principles were recently restated by this Court in *Kakavas v Crown Melbourne Ltd*.
>
> 38. A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage "which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests". The other party must also unconscientiously take advantage of that special disadvantage. This has been variously described as requiring "victimisation", "unconscientious conduct", or "exploitation". Before there can be a finding of unconscientious taking of advantage, it is also generally necessary that the other party

[27] [2013] 250 CLR 392; 298 ALR 35; [2013] HCA 25

[28] [2017] HCA 49

> knew or ought to have known of the existence and effect of the special disadvantage. (Citations omitted).

96. I will shortly turn to an examination of the evidence to determine whether Mr Richardson was subject to a special disadvantage which, adopting the test propounded in *Kakavas*, seriously affected his ability to make a judgement as to his own best interests. However, before doing so, it is desirable to examine the elements of a claim for undue influence, as the first limb of a claim for unconscionability overlaps significantly with such a claim.

When does undue influence exist?

97. The nature of undue influence was discussed in *Thorne v Kennedy* by the majority, who said at [31]:

> In 1836, in a passage which was copied verbatim by Snell thirty years later, Story said that a person can be subjected to undue influence where the effect of factors such as pressure is that the person "has no free will, but stands *in vinculis* [in chains]". He explained that "the constant rule in Equity is, that, where a party is not a free agent, and is not equal to protecting himself, the Court will protect him". In 1866, this approach was applied in equity by the House of Lords, recognising undue influence in a case of pressure that deprived the plaintiff of "free agency". In 1868, in probate, Sir James Wilde also described undue influence as arising where a person is not a "free agent". In *Johnson v Buttress*, Dixon J described how undue influence could arise from the "deliberate contrivance" of another (which naturally includes pressure) giving rise to such influence over the mind of the other that the act of the other is not a "free act". And, in *Bank of New South Wales v Rogers*, McTiernan J characterised the absence of undue influence as a "free and well-understood act" and Williams J referred to "the free exercise of the respondent's will".

Proving the existence of undue influence

98. The burden of proving and due influence exists rests on the party asserting it: *Westpac Banking Corporation v Mitros*[29]. The manner of proof was addressed by the majority in *Thorne v Kennedy* at [34] in these terms:

> There are different ways to prove the existence of undue influence. One method of proof is by direct evidence of the circumstances of the particular transaction. That was the approach relied upon by the primary judge in this case. Another way in which undue influence can be proved is by presumption. This presumption was relied upon by Ms Thorne in this Court as an alternative. A presumption, in the sense used here, arises where common experience is that the existence of one fact means that another fact also exists. Common experience gives rise to a presumption that a transaction was not the exercise of a person's free will if (i) the person is proved to be in a particular relationship, and (ii) the transaction is one,

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[29] [2000] VSC 465 at [25]

> commonly involving a "substantial benefit" to another, which cannot be explained by "ordinary motives", or "is not readily explicable by the relationship of the parties". (Citations omitted)

99. In *Thorne v Kennedy* the High Court made it clear that today no such presumption of undue influence arose in favour of a woman merely upon engagement to a man [30]. Nonetheless, in the circumstances of the case, undue influence was established. At [59], the majority noted:

> it was open to the primary judge to conclude that Ms Thorne considered that she had no choice or was powerless other than to enter the agreements. In other words, the extent to which she was unable to make "clear, calm or rational decisions"[31] was so significant that she could not aptly be described as a free agent.

100. It follows that I must examine the evidence to determine whether, in all the circumstances, Ms Grech had exerted such influence over Mr Richardson that he was no longer in a position to exercise free will.

Was Mr Richardson the subject of undue influence?

101. As a starting point to discussing this question, it is useful to compare the relative life experiences of Mr Richardson and Ms Grech.

102. According to the oral evidence given at the hearing by his sister, Ms Gayle Richardson, Mr Richardson was a sickly child. He had a turned eye and spent much time in hospital. He also had eczema. His mother was extremely protective of him, and this made them very close. This evidence was consistent with Ms Richardson's statement that Mr Richardson's relationship with his mother was one of "dual dependency".[32] As I have previously noted, I found Ms Richardson to be a credible witness, and I accept her evidence here. In the light of Ms Richardson's statement regarding her brother's relationship with his mother, I also accept Ms Grech's assessment that Mr Richardson was dominated by his mother.

103. Mr Richardson had a mono-track working life, according to his affidavit at [8-12]. After leaving high school at the age of 17, before completing matriculation, he worked at the State Bank of Victoria which was later taken over by the Commonwealth Bank. He retired from the Commonwealth Bank at 55, and so was in the employ of the two banks for about 38 years. When he first started he was a mail clerk. Later he acted as a bank teller and customer service officer. During his mid-30s, he was promoted to be a relief supervisor at various branches for about four years. However, the bank was not satisfied with his performance, and he went back to being a teller again. He spent the last 15 years of his working life working for the bank in a call centre.

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[30] [2017] HCA 49 at [36]

[31] *NA v MA* [2007] 1 FLR 1760 at 1785 [114] per Baron J.

[32] Se Ms Richardson's affidavit at [2]

104. Mr Richardson deposed, at [15], that he lived with his parents in the house he had grown up in until his father died in 2013. After this family home was sold, he bought a property in Maribyrnong which he moved into with his mother. He remained living with his mother at that property until 28 February 2017 when his mother entered an aged care facility at the age of 91.

105. Mr Richardson stated at [7] that religion was an "important influence" on his life and provided him with "social interactions". He noted his father used to be a relief preacher at the local Methodist Church and that he now attended the Uniting Church.

106. Mr Richardson commented on his personal life in his affidavit at [13-21]. He described himself as shy and reserved and he said he has never felt very confident. He has always been fairly much a loner. After leaving school he did not have a social life. He deposed:

> 17. I did not follow the usual path of parties, pubs and going out with girls. I don't drink alcohol and never have.
>
> 18. After I started working I would go on holidays overseas. I never travelled with a companion but always joined a tour group organised by a travel company.

107. Mr Richardson said, at [16], that he has never owned a motor vehicle and has never had a driver's licence. He would have to take public transport unless he was given a ride in a car.

108. As to personal relationships, Mr Richardson deposed:

> 19. I am not and never have been married or in a de facto relationship. I do not have any children.
>
> 20. Except for the brief relationship with Maurita, which was non-sexual, I have never had any romantic relationship. I consider Maurita to have been my first girlfriend.
>
> 21. Apart from family members, my social connections had mainly been formed through involvement with my church and volunteer work.

109. At the hearing, Mr Richardson gave evidence about his current social life. He confirmed that was he centred on the church, and on the River Club, a group of people mostly in the 70s and 80s, and almost exclusively women, who met socially once a week for bingo and a meal.

110. His sister Gayle Richardson deposed in her affidavit at [9] that prior to his engagement Mr Richardson "had never been involved in a romantic relationship, ever."

111. At the hearing, Ms Grech suggested in her evidence that Mr Richardson had been more than friends with a woman named Jenny, with whom he used to meet and talk to on the telephone, at the time in 2012 that Ms Grech met him. However, having heard Mr Richardson's evidence about this

relationship, I accept that he and Jenny were merely friends, who had met through his church.

112. In summary, I am satisfied that Mr Richardson has experienced a remarkably limited life. Ms Grech described his life as “bizarre”. If by that she meant that his life was abnormally narrow, and in that sense peculiar or odd, I agree.

113. Ms Grech gave evidence that she went out with a couple of young men, albeit in an innocent way, prior to marriage. She was then married for 11 years and had a son (Christopher) and a daughter. The daughter has children, and accordingly Ms Grech is a grandmother. During cross-examination she denied that she had boyfriends following the breakdown of the marriage, and I have no reason to doubt her evidence on this point. At the time of the hearing she was on a disability pension. She was licenced to drive a car.

114. In summary, I consider Ms Grech to have lived a reasonably conventional life. On the evidence, she was clearly a more worldly person than Mr Richardson. These observations, however, do not establish that she exerted undue influence over Mr Richardson.

115. The evidence that Ms Grech did exercise undue influence over Mr Richardson arises from the manner in which they conducted their relationship once they moved into the Property together. Two matters require comment. The first is the uncontested evidence that Mr Richardson did not initially have a key to the Property. His sister gave evidence that once, after visiting his mother at a nearby nursing home, he had dropped into her place on a Saturday night. He stayed and stayed, and ultimately she asked him why he wasn’t going home. He said it was because he didn’t have a key. Ms Richardson came to the Property the following day and confronted Ms Grech’s son about the issue. She borrowed Mr Grech’s key, and had it copied at a nearby shopping centre.

116. The second aspect worthy of comment arises from the sleeping arrangements at the Property. When Ms Grech and Mr Richardson moved in, they were joined by her son and his girlfriend. Ms Grech and Mr Richardson had, because of their strong religious beliefs, a nonsexual relationship as they were not married. In these circumstances it is understandable they chose to sleep in separate rooms. What is not understandable, in my view, is that Christopher Grech and his girlfriend, took the second bedroom, and it was Mr Richardson who had to take the couch.

117. I consider the fact that Mr Richardson did not have a key to the Property he had paid for, and was the one person who ended up sleeping on the couch, to be significant factors. They are not the actions of a man capable of articulating or asserting his reasonable needs and expectations. They are actions which demonstrate, in my view, that he was subject to undue influence by Ms Grech. I make a finding to this effect.

118. I now turn to examine the legal implications of this finding.

Legal implication of the finding of undue influence

119. Deane J in *Louth v Diprose* said:

> It has long been established that the jurisdiction of courts of equity to relieve against unconscionable dealing extends generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party to the transaction with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that special disability was sufficiently evident to the other party to make it prima facie unfair or "unconscionable" that that other party procure, accept or retain the benefit of, the disadvantaged party's assent to the impugned transaction in the circumstances in which he or she procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: "the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain" or retain the benefit of it. (Citation omitted).[33]

120. It follows from this principle that because I have made a finding that Ms Grech exercised undue influence over Mr Richardson, and because she must because of their everyday interactions have been aware of this, it is 'prima facie unfair or "unconscionable" ' that she remain on title. The burden of demonstrating the contrary accordingly passes to her.

121. The cases demonstrate that one way that the stronger party in a relationship of undue influence *might* displace the presumption of unconscionability regarding a particular transaction is by ensuring that the weaker party has the benefit of independent legal advice concerning it. An example is *Watkins v Combes,* an undue influence case decided by the High Court in 1922. A disposition of property made by a 69 year old woman at a time that the evidence established that she was failing both physically and mentally when the impeached transaction took place, was set aside. The majority, comprising Knox CJ, Gavan Duffy and Starke JJ, having observed that the defendants failed to prove either that the woman was removed from the influence at the time of the transaction or that she had independent advice in connection with it, ruled the transaction could not stand [34].

122. *Thorne v Kennedy*[35] is a case where the younger woman, who was the subject of undue influence, had taken independent legal advice regarding the impeached prenuptial and postnuptial agreements. Six matters had been relied on by the primary judge. After assessing, evaluating and characterising the circumstances, the trial judge had reached the conclusion that Ms Thorne was powerless and believed that she had no choice to do

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33 [1992] 175 CLR 621 at 637
29 [1922] 30 CLR 180 at 188-189
35 [2017] HCA 49

anything other than sign the agreements. The High Court upheld the trial judge's decision that the agreements were to be vitiated.

Did Mr Richardson take independent advice?

123. Mr Richardson deposed in his affidavit that he did not take any independent advice or discuss the transaction with his family before arranging Ms Grech's name to be added to the title[36].

124. It appears from the evidence that the only person, other than Ms Grech and her brother, that Mr Richardson discussed putting Ms Grech on title with was the real estate agent Simon Gray. Mr Gray deposed in his affidavit at [6] that he who drove Mr Richardson to his conveyancer at EasyLink Conveyancing on 3 May 2017. When Mr Richardson told him that Ms Grech "had given him quite strict instructions that she was to be put on the title 50/50", he had asked Mr Richardson "if this was a smart move".

125. Mr Richardson's solicitor contended that Mr Gray's rhetorical question did not amount to advice. Furthermore, coming from a real estate agent, it could not be said to be legal advice.

126. Mr Richardson was not asked in cross-examination whether he sought the advice of his conveyancer about the wisdom of the transaction, and there is no evidence otherwise that he received advice on the ramifications of putting Ms Grech on title from that source. Mr Richardson in his affidavit at [66] refers to advice from the conveyancer about the practicalities of the transaction only.

127. For these reasons, I find that Mr Richardson did not have the benefit of independent legal advice prior to putting Ms Grech on title.

128. It follows, in my view, that Ms Grech has not discharged the onus which has been cast upon her, following *Louth v Diprose* above[37], to show "that the transaction was fair, just and reasonable".

Exploitation of the Mr Richardson's disadvantage

129. As Kitto J pointed out in *Blomley v Ryan*[38], equity intervenes "whenever one party to a transaction is at a special disadvantage in dealing with the other party … and the other party unconscientiously takes advantage of the opportunity thus placed in his hands" . Citing this passage in *Amadio* , Dawson J. said[39]:

> What is necessary for the application of the principle is exploitation by one party of another's position of disadvantage in such a manner that the former could not in good conscience retain the benefit of the bargain.

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[36] Mr Richardson's affidavit sworn 21 December 2018, at [68]
[37] Se paragraph 118 above
[38] [1956] 99 CLR 362 at 415
[39] [1982] 151 CLR 447 at 489

130. What Dawson J said of a bargain can be said equally of a gift. In the present case, I am satisfied that having exploited Mr Richardson's inability to exercise his free will or judgment to reasonably protect his own interests in order to secure a place on the title of the Property prior to actually marrying him, and in now denying that the gift was made in contemplation of marriage and insisting on partition of the Property on the basis that she is a joint owner with a 50% interest, Ms Grech is acting unconscionably. This provides a separate basis, over and above the finding about the failure of the gift as being conditional on marriage[40], for removing Ms Grech from title.

The constructive trust argument revisited

131. It will be recalled from the discussion above concerning *Baumgartner v Baumgartner* and *Muschinski v Doods* that for a constructive trust to be declared there must be unconscionable conduct. As I have made a finding of unconscionability against Ms Grech, it is appropriate to declare that Ms Grech holds her half interest in the Property on trust for Mr Richardson. This creates yet another basis for removing Ms Grech from title.

Proposed orders regarding title and possession

132. The power of the Tribunal to make declarations arises under s124 of the VCAT Act. Under that section, I will declare that:

    a) Ms Grech holds her registered interest in the Property on trust for the benefit of Mr Richardson;

    b) Ms Grech has no beneficial interest in the Property;

    c) Ms Grech is not entitled to an order that the Property be sold.

133. On the other hand, Mr Richardson is entitled to an order that Ms Grech must transfer her half interest in the Property to him. I will make that order, together with ancillary orders necessary to ensure that the transfer is promptly effected.

134. Mr Richardson is also entitled to an order for possession of the Property. Rather than make Orders about this now, I believe the parties to negotiate Minutes of Consent Orders about Ms Grech's vacation of the Property, alternatively debate those Orders at a further hearing.

The claim for an amount equivalent to rent

135. Reference has been made above to s 233 of the PLA, which empowers the Tribunal to make an order for payment of compensation from one co-owner to another.[41] In circumstances where Mr Richardson is entitled to a declaration that Ms Grech has no beneficial interest in the Property and yet she has been in occupation despite having been asked to leave Mr

[40] See paragraph 75 above

[41] See paragraph 13 above. Reference is also made to s 233(3) which provides that the Tribunal must not make an order requiring a co-owner who has occupied the land by in amount equivalent to rent to a co-owner who did not occupy the land

Richardson as early as 4 August 2017, I consider this may be an appropriate case for an order for compensation to be made.

136. However, before making any order it is necessary to have regard to the defences raised by Ms Grech in her Defence to Counterclaim based on s 233(3) of the PLA, namely that the Tribunal must not make an order requiring her, as the co-owner who has occupied the Property, to pay an amount equivalent to rent to Mr Richardson as the co-owner who did not occupy the Property, except in limited circumstances. These circumstances are:

    a) where the co-owner who has occupied the land is seeking compensation, reimbursement or an accounting for money expended by her in relation to the Property; or

    b) the co-owner claiming an amount equivalent to rent has been excluded from occupation of the Property; or

    c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to occupy the land with the other co-owner.

137. I accept the argument that gateway (a) to a claim under s 233(3) is not open, because Ms Grech is not seeking compensation or reimbursement or an accounting of money expended by her in relation to the Property. Furthermore, I accept that Mr Richardson was not excluded from the Property as he left of his own volition. That deals with the second gateway. It remains to deal with the third gateway.

138. In his Amended Points of Counterclaim Mr Richardson seeks an order under s 233(3) of the PLA for "an amount equivalent to rent in the sum of $340 per week". Accordingly, the I am satisfied that Mr Richardson is making a claim of the type contemplated by ss 233(3)(c). It remains to consider whether Mr Richardson suffered a detriment because it was "not practicable" for him to occupy the Property with Ms Grech.

139. Mr Richardson deposed at [84] of his affidavit that the relationship deteriorated after he moved in to the Property. As he put it, "living together just didn't work for us." He elaborated at [85], saying "Maurita said she wasn't used to having a man in the house. My presence seemed to annoy her". According to Mr Richardson at [86], Ms Grech's frustration led to "impatience, rudeness and distance". At [88] he set out some hurtful things he deposed she said to him.

140. Ms Grech, in her second affidavit at [28], denied the contention that she was ever impatient, rude or distant and at [30] also denied saying the hurtful things attributed to her.

141. However, there was agreement between the parties that they argued about where they were to get married. Both agree she wanted to marry in the Catholic Church and both agree that Mr Richardson did not want to. For

present purposes I regard Mr Richardson's evidence at paragraph [92] of his affidavit to be critical. He deposed:

> I finally left at the end of July 2017. By that stage I accepted that the marriage would not take place. Also, I felt that I would have had a nervous breakdown if I did not leave.

142. I accept this evidence, and formally find that it was not practicable for Mr Richardson to continue to occupy the Property with Ms Grech.

143. This finding opens the way to a further finding to the effect that Mr Richardson is entitled to an order for compensation equivalent to rent for the period that Ms Grech continued in occupation of the Property after he had asked her to leave.

144. In my view Mr Richardson could not, when on 4 August 2017 through the medium of his brother-in-law's text message he demanded that Ms Grech vacate, reasonably have expected her to leave immediately. It is appropriate for the parties to be given an opportunity to address me on the question of the date from which the claim for compensation in an amount equivalent to rent ought to run. The parties are also, in my view, entitled to be heard on the question of when the claim should cease to run and on the further question of the rate per week at which the claim should be assessed. A further hearing will be necessary for this.

Costs and reimbursement of fees

145. The questions of whether costs are to be awarded under s 109 of the VCAT Act and fees are to be reimbursed under s 115B of the VCAT Act are reserved for determination at the further hearing.

C. Edquist
Member