

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO: W141//2010

CATCHWORDS

CO-OWNERSHIP –Part IV of the *Property Law Act 1958*, whether express trust established, whether terms of settlement to be given effect; whether just and fair sale; terms of sale.

APPLICANT	Eftichia Karagiozakis
FIRST RESPONDENT	Mark Karagiozakis
SECOND RESPONDENT	Margo Karagiozakis
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	18 December 2013, 12 & 18 February 2014 and 22 & 23 May 2014. Written submissions last filed: 27 June 2014
DATE OF ORDER	12 August 2014
CITATION	Karagiozakis v Karagiozakis (redacted) (Building and Property) [2014] VCAT 1001

ORDER (REDACTED VERSION)

1. Pursuant to s 228 of the *Property Law Act 1958* and being satisfied that it is just and fair to do so, the property located at Lot 5, Ballan Road, Wyndham Vale, in the State of Victoria, being the land more particularly described in Certificate of Title Volume 9283, Folio 709 (**‘the Property’**), shall be sold in accordance with these orders.
2. On or before **9 November 2014**, the Property shall be offered for sale by public auction.
3. The sale shall be conducted by a licensed real estate agent jointly appointed by the parties (**‘the Real Estate Agent’**).
4. If by **12 September 2014**, the parties cannot agree on the identity of the Real Estate Agent, the Real Estate Agent is to be selected by the Principal Registrar who shall, to the exclusion of the parties, be empowered to give necessary direction. Each party is at liberty to submit the name or names of a real estate agent to the Principal Registrar who shall consider such submissions but shall not be bound by them.

5. The Real Estate Agent shall carry out such sale using all proper and lawful methods, including advertising as appropriate (whether by board or otherwise) and arranging open for inspection times but not so as to be at an excessive or unreasonable cost.
6. In order to give effect to the sale of the Property, the parties shall jointly appoint a solicitor to prepare all necessary documents and conduct the conveyance of the Property upon sale (**'the Solicitor'**).
7. If by **12 September 2014**, the parties cannot agree on the identity of the Solicitor, the Solicitor shall be selected by the Principal Registrar who shall, to the exclusion of the parties, be empowered to give necessary direction. Each party is at liberty to submit the name or names of a solicitor to the Principal Registrar who shall consider such submissions but shall not be bound by them.
8. The reserve selling price will be \$[REDACTED] or such other price as the parties may agree upon or where the parties cannot agree, determined by the Real Estate Agent (**'the Reserve Price'**).
9. The terms of the contract of sale shall provide for a deposit of not less than 10% upon the signing of the contract with the residue to be payable within such time as the Real Estate Agent determines.
10. The parties are at liberty to bid at the auction provided he or she holds a written pre-approval from a financial institution for finance for the purchase of the Property:
 - (a) for the Applicant, an amount equal to two thirds of the Reserve Price; and
 - (b) for the Respondents an amount equal to one third of the Reserve Price.
11. In the event that a party successfully purchases the Property, that party need only pay:
 - (a) for the Applicant, an amount equal to two thirds of the purchase price; and
 - (b) for the Respondents an amount equal to one third of the purchase price.
12. The auctioneer for the sale shall be appointed by the Real Estate Agent.
13. If the Property is not sold at public auction:
 - (a) The Property shall be offered for sale by private treaty at the best price available as determined by the Real Estate Agent but not less than the Reserve Price. Such Reserve Price may be varied by written agreement of the parties or varied by the Real Estate Agent upon giving the parties 72 hours prior written notice of the Real Estate Agent's intention to vary the Reserve Price.
 - (b) The advertising costs of the auction will become a charge upon the Property.

14. If the Property is sold:
- (a) The parties will within 72 hours of a written request by the Solicitor execute a transfer of land in respect of the Property to the purchaser. If any of the parties refuse or neglect to execute a transfer of land or if in the opinion of the Solicitor it is not practicable to make the necessary request of that party, the Principal Registrar may execute the transfer of land which shall in all respects be treated as an execution by the party who has refused to sign.
 - (b) The proceeds of sale will be applied as follows and in the following priority:
 - (i) The Real Estate Agent's commission or fee, including the auctioneer's fee and other expenses of the sale;
 - (ii) The discharge of any registered encumbrance on the Property (if any);
 - (iii) Any outstanding rates, charges, taxes and imposts;
 - (iv) The reasonable legal costs associated with the sale and conveyance of the Property; and
 - (v) The net balance to be paid as follows and in the following priority:
 - (A) Two thirds to the Respondents;
 - (B) Payment to James Michael Keogh to satisfy Caveat No. AG438239H;
 - (C) The balance to the Applicant.
15. The Principal Registrar is empowered to give such directions and execute such documents as may in his opinion be necessary or desirable to give effect to these orders.
16. Where any contract for the sale of the Property by public auction has not been signed by a party prior to the day of the auction, such contract may be executed on behalf of that party by the Real Estate Agent if a sale of the Property is effected.
17. On or before **19 September 2014**, the parties shall jointly and irrevocably instruct a solicitor (**'the Compensation Solicitor'**) to provide advice to the parties to make any claim for compensation on their behalf in relation to the sale of the Property, pursuant to s 98 and s 106 of the *Planning and Environment Act 1987*.
18. In the event the parties cannot agree on the identity of the Compensation Solicitor, the Compensation Solicitor shall be selected by the Principal Registrar who shall, to the exclusion of the parties, be empowered to give necessary direction. Each party is at liberty to submit the name or names of a solicitor to the Principal Registrar who shall consider such submissions but shall not be bound by them.

19. Liberty to apply with respect to the terms and conditions of the sale of the Property and any question that might arise in connection with the sale or the execution of any document relating thereto, including varying these orders.
20. **This proceeding is listed for a further directions hearing before Senior Member E. Riegler at 10 am on 24 September 2014, at which time the Tribunal will hear any application for costs or application to vary these orders - 3 hours allocated.**
21. Costs reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

Applicant: Ms E Karagiozakis with Mr N Butcher, in person.

First & Second Respondents: Mr M Black of counsel.

REASONS (REDACTED VERSION)

Introduction

1. The proceeding concerns the ownership of a farming property located in Wyndam Vale, Victoria (**'the Property'**). The Property borders an urban growth zone located to the west of metropolitan Melbourne. The parties co-own the Property as tenants in common in equal shares. It is not in dispute that the Property is to be sold. However, the parties are unable to agree as to how that sale is to be effected and how the net proceeds of sale are to be distributed.
2. The proceeding occupied five hearing days, with much of the time being occupied with peripheral matters which have engulfed the dispute and lead to an acrimonious relationship between the Applicant and her brother, Mark Karagiozakis, the First Respondent and his wife, the Second Respondent.
3. The Applicant first issued this proceeding in November 2010. At that time, she sought an order pursuant to s 225(2)(a) of the *Property Law Act 1958* (**'the Act'**) that the Property be sold and the proceeds of sale be divided, fifty percent in her favour and fifty percent in favour of the Respondents. On 18 February 2011, the Respondents issued a counterclaim, wherein they sought orders that the Property be sold, albeit that the proceeds of sale were to be divided twenty percent to the Applicant and eighty percent to the Respondents.
4. On 7 April 2011, a compulsory conference was convened, at the conclusion of which, the parties entered into written terms of settlement (**'the Terms of Settlement'**) providing for the sale of the Property, with the net proceeds of sale to be distributed largely commensurate with each party's legal interest. The relevant clauses of the Terms of Settlement provided:

...

3. The parties be at liberty to bid at the auction provided he or she holds written preapproval from a financial institution to be produced to the real estate agent;
 - a) for the Applicant an amount equal to 2/3 of the reserve price;
 - b) for the Respondents an amount equal to 1/3 of the reserve price.
- 3A. In the event that a party successfully purchases the property at auction, that party need only pay:
 - a) if the Applicant, 2/3 of the purchase price;
 - b) if the Respondents, 1/3 of the purchase price.

4. A condition of sale will be that the purchase price shall be payable as to not less than 10% upon the signing of the contract with the residue to be payable within such time as the real estate agent determines and be otherwise in the form of the Law Institute of Victoria pro forma contract of sale.
 5. The reserve selling price will be \$1.87 million.
 - ...
 10. Upon the clearance of any cheque received the balance of the purchase price and as soon as practicable thereafter, the solicitor shall distribute the purchase price (including any deposit) as follows:
 - i) ...
 - k) Thirdly, to pay the balance of funds:
 - a) as to 1/3 to the parties equally subject to any funds required to satisfy James Michael Keogh in respect of Caveat No. AG438239h shall be paid from the Applicant's share of the sale proceeds only.
 11. Liberty to apply.
 12. The proceeding otherwise be struck out with a right of reinstatement and no order as to costs.
5. In accordance with the Terms of Settlement, the proceeding was struck out by order dated 7 April 2011.
6. Mr Michael Hede of *Knight Frank Real Estate* was subsequently appointed as the real estate agent to conduct the sale of the Property. In accordance with his retainer, the Property was marketed and an auction date fixed. However, in late 2011, the auction was aborted. According to the Respondents, the parties agreed to postpone the proposed auction as the *Logical Inclusions Advisory Committee* was poised to conduct a public hearing in relation to the Western Growth Area in order to consider what lands, including the Property, should be included within the Urban Growth Boundary. I understood that the rezoning of the Property within an Urban Growth Boundary would have had a significant and positive impact on the value of the Property.
7. In December 2011, the Respondents signed a document entitled *Agreement*, (**'the Agreement'**) which varied the Terms of Settlement as follows:
1. That the auction of the Property is to be postponed until a date not more than 120 days after the determination has been made by the Minister of Planning as to whether the property is to be rezoned into the Urban Growth Boundary.

2. The reserve selling price of the Property at the rescheduled auction shall be \$5,000,000, unless otherwise agreed by the parties in writing;
 3. Any costs incurred by the parties either in respect of the selling agent, Knight Frank, or the solicitors appointed to handle the sale of the Property on behalf the parties, Ferraro & Co, shall be borne as follows:
 - a. One third of the cost shall be borne by Effie; and
 - b. Two thirds of the cost shall be borne by Mark and Margo.
 - ...
 6. The proceeding W141/2010 remain struck out with a right of reinstatement;
 - ...
 8. The parties acknowledge that this Agreement is supplementary to the Terms and to the extent that there is any discrepancy between the terms of this Agreement and the Terms, this Agreement shall prevail.
8. Although a copy of the Agreement, purportedly bearing the signature of the Applicant, was tendered in evidence, the Applicant denies that she signed the document.
9. The *Logical Inclusions Advisory Committee* did not ultimately recommend that the Property be included within the Urban Growth Boundary. As a result, by letter dated 24 October 2012, the Respondents' solicitors wrote to the Applicant's then solicitors to inform them that the Respondents were desirous that the sale of the Property proceed. That letter further stated:
- It is contemplated that an application under Part 5 of the Planning and Environment Act 1987 for a "loss on sale" may be made by reason of the overlays over the subject property. We are happy to provide the relevant planning authorities with notices pursuant to section 106 (1) (B) of that Act at the appropriate time.
10. The reference to the application for compensation for a *loss on sale*, relates to the fact that the Property is subject to a public acquisition overlay in respect of both the *Western Region Grasslands* and the *E6 Outer Ring Road*. As such, the parties believe that if the Property is sold, it may be possible to claim compensation pursuant to s 98 and s 106 of the *Planning and Environment Act 1987* commensurate with any diminished value resulting from that public acquisition overlay.
11. By letter dated 30 November 2012, the Respondents' solicitors wrote to the Applicant's solicitors, stating:

We confirm that our clients now wish to proceed to a sale ... as soon as practicable. Our clients are content for Mr Michael Hede of Frank Knight to act as the agent.

In relation to the issues that will need to be resolved in respect of the proposed sale and any loss on sale claim pursuant to Section 106 of the Planning and Environment Act 1987 we comment as follows:

1. reserve price for the sale of the property - in the absence of agreement between our respective clients this will need to be determined;
2. solicitors acting on the sale of the property. We note that previously Ferraro & Co acted on the sale of the property;
3. Solicitors acting in the prosecution of the loss on sale claim. Our clients suggest that an independent solicitor be retained to prosecute the loss on sale claim on behalf of our respective clients. Initially such claim would involve:
 - a. Obtaining a valuation as to the value of the property both with and without the 2 overlays; and
 - b. Providing the relevant planning authority with notices pursuant to section 106 (1) (b) of the Act.

Our clients suggest that either Tania Coincoita of Best Hooper or Daniel Minogue of Rennick & Gaynor act in this regard...

12. On 8 January 2013, the Applicant filed an application with the Tribunal to reinstate the proceeding. At that time, the Applicant was no longer legally represented. The *Application for Directions Hearing or Orders* filed by her stated, in part:

Reference to Terms of Settlement dated 7/04/2011.

My application to VCAT is to seek Directions and Orders as Clause 7 to progress with VCAT Terms of Settlement

re auction of Property at ...

Specifically request Notice of Clause 2 reference "within 14 days, failing agreement, by the President, for the time being, of the REIV."

I note All Landowners are in agreement to proceed to Auction and Reserve Price.

I make application for VCAT assistance as Terms of Settlement are threatened.

Insistence in Unprofessional emails/advice (as evidenced below) from Respondent to cause Applicant to Breach.

I believe a Breach by Refusal to comply with the terms of Settlement by refusing to proceed with Auction By Knight Frank Real Estate...¹

¹ The extract of the *Application for Directions Hearing or Orders* has been reproduced as is.

13. The reference to the refusal to comply with the Terms of Settlement, and *unprofessional emails and advice* stems from the Applicant's belief that the Respondents, their solicitors and possibly, the real estate agent have conspired to defraud her. In essence, the Applicant believes that the auction that was originally contemplated under the Terms of Settlement was deliberately aborted by the Respondents, presumably to effect some financial gain. As I have already indicated, most of the hearing time was occupied with peripheral issues, which included this line of enquiry. In her affidavit dated 3 December 2013, the Applicant sets out in more detail the form of orders sought by her. Those proposed orders reflect the concern held by her:
1. ...
 2. VCAT make Order of the Applicant as sole Authority to proceed with/ sale of the Property.
 3. Applicant to apply for Loss on Sale Compensation for all parties.
 4. Order for applicant that, account for Respondents, held by VCAT and determination by VCAT of alteration of Ownership.
 5. Order me to refer the matter of unconscionable conduct to Victoria Police Fraud Squad for Criminal Fraud Investigation.
 6. The Applicants seek these orders as the only way her Right to adjust and Fair Sale under the Property Law Act and Property Coownership Act 2005 and would ensure a Just and Fair Sale for the Respondents. To prevent misleading and deceptive and unconscionable conduct of the Option/sale of the Property by the Respondents and their solicitor ...²
14. As is sometimes the case where parties are not legally represented, the facts and circumstances which are required to ground or underpin the legal conclusions sought by the parties become diluted and camouflaged by extraneous matters which are not directly relevant to the issues for determination but are, nevertheless, at the forefront of the dispute between the parties. Regrettably, the present case suffered as a consequence of such issues dominating the claim prosecuted by the Applicant, who was, for the most part, represented by her partner, Mr Noel Butcher. In particular, both the Applicant and Mr Butcher spent considerable time dealing with issues concerning alleged impropriety on the part of the Respondents, their solicitors and the real estate agent retained to conduct the original auction, rather than focusing on the primary issues for determination; namely, the sale of the Property and the distribution of the net proceeds of sale.

² The extract of the affidavit has been reproduced as is.

The claims

15. Based on the material filed by the Applicant and her answers to questions that I asked during the course of the hearing, I understand the Applicant's claim to be as follows:
 - (a) The Property is to be offered for sale either by auction or private sale.
 - (b) The Applicant is to be given complete authority and discretion to effect the sale.
 - (c) That the conduct of the Respondents and their solicitors are to be referred to the Victorian Police Fraud Squad.
 - (d) That the beneficial interests of the property are to be adjusted such that the Applicant holds a fifty percent share and the Respondents jointly hold the remaining fifty percent share.
16. By contrast, the Respondents indicated in closing submissions that the orders sought by them are:
 - (a) That the Property be offered for sale, initially by public auction and if not sold, by private sale to be conducted within 120 days of the date of these orders.
 - (b) That either RPM Real Estate Group or Biggins Scott be appointed as the selling agent;
 - (c) That Verducci Lawyers be appointed as the solicitors to conduct the conveyance.
 - (d) That Mark Bartley of HWL Ebsworth Lawyers be appointed to act in relation to the loss on sale claim.
 - (e) That the net proceeds of sale be distributed as follows:
 - (i) Two thirds to the Respondents;
 - (ii) Payment to James Michael Keogh to satisfy Caveat AG438239H,
 - (iii) \$50,000 to be paid into the Respondents' solicitor's trust account, pending the Tribunal's determination of the costs of the proceeding; and
 - (iv) The balance to the Applicant.
17. For the reasons which follow, I find that it would be just and fair to order the sale of the Property, largely on terms consistent with the Terms of Settlement and reflected in the Respondents' closing submissions.

Should the Applicant be given complete authority and discretion to sell the Property?

18. As indicated above, the Applicant's claim rests on allegations that the Respondents, their solicitors or the real estate agent have acted with impropriety following the execution of the Terms of Settlement. I do not find this to be the case.
19. In my view, the Applicant's allegations are without foundation. The chain of correspondence passing between the parties clearly indicates that the parties mutually agreed to postpone the auction contemplated by the Terms of Settlement, pending a determination by the *Logical Inclusions Advisory Committee*. There is no evidence suggesting that the auction was postponed for any other reason, nor is there any logical motive which would explain why the auction would be postponed for anything but for that reason.
20. Mr Black of counsel, who appeared on behalf of the Respondents, pointed to the Agreement amending the Terms of Settlement. He submitted that this document, of itself, was evidence of the parties' agreement to postpone the auction.
21. In my view, the chain of correspondence and the evidence of Mr Blogg, the solicitor acting on behalf on the Respondents,³ clearly demonstrate that the parties had agreed to postpone the auction and enter into the Agreement. The fact that the Applicant says that she did not sign the Agreement is of no consequence.
22. The Applicant further pointed to a number of inconsistencies in documents produced during the course of the hearing, some of which were generated by the Respondents' solicitors, while other documents were sourced from the public domain. For example, the Agreement is dated 9 March 2011, whereas the date should have been 9 March 2012. The Applicant contends that this in some way demonstrates impropriety on the part of the Respondents. I do not accept that to be the case. In my view, the wrong date simply reflects a typographical error. It has no effect on the substance of the Agreement, nor do I consider it to be relevant to any issue in contention.
23. Similarly, the Applicant referred to a copy of a Certificate of Title of the Property that was produced during the course of the hearing. That copy appeared to be different to other copies appearing elsewhere in the documents produced during the course of the hearing. In particular, three differences were identified:
 - (a) a handwritten notation "30/11" in the top right-hand corner of the front page;

³ As set out in the affidavit of Andrew Collis Blogg dated 17 January 2014.

- (b) the words “the above mortgage is discharged 28 March 1980” appear to the right of the map in a front-page; and
 - (c) the handwritten notation “J183857 AS Payne” appears on the second page.
24. According to the Applicant, the Respondents deliberately tried to alter the copy of the Certificate of Title. It is not clear to me what purpose would be served if that were proved to be the case. Mr Black submitted that all of the missing information which appears on the copy produced by the Applicant is information which was handwritten or stamped onto the original Certificate of Title at a date after the copy of the Certificate of Title was obtained. He suggested that the simplest explanation was that the handwritten stamped information has not photocopied well. In my view, the explanation seems plausible. In any event, nothing turns on the document. It is historical. There is no dispute that the current copy of the Certificate of Title correctly records the legal ownership of the Property and all encumbrances affecting the Property. I fail to see how the handwritten stamped information on the older copy of the Certificate of Title is relevant to the claim prosecuted by the Applicant.
25. As I have already indicated, there is insufficient evidence to satisfy me that the Respondents, their solicitors or the real estate agent had acted with impropriety. That being the case, I do not consider there are any grounds in which to order that the sale of the Property be conducted in a manner where the Applicant is given sole authority and discretion.
26. In my view, the most just and fairest method of selling the Property is to give effect to the original Terms of Settlement, subject to some modification, which I discuss later in these Reasons.

What should the reserve price be?

27. The Applicant contends that the value of the Property is \$26 million. No evidence was adduced to substantiate this allegation. By contrast, Mr Hay, property valuer and land economist, gave evidence on behalf of the Respondents. He referred to a sworn valuation report that he had prepared in December 2010, where he had valued the Property at \$[REDACTED] million. During his evidence in chief, he opined that the current value of the Property was \$[REDACTED] million. He said the reduced value reflected a downturn in the marketplace. In his affidavit sworn on 18 December 2013, he stated:
- 3. On 16 December 2013 I was requested by Aitken Partners to provide an update on my said report so as to reflect what I believed to be a fair price to set as a reserve price should the property need to be sold within the next three months. As a consequence, I have reviewed recent sales of similar properties

and have formed the view that a fair price to set as a reserve price of the subject property is \$[REDACTED] million.

28. Mr Hay gave further evidence in relation to *loss on sales* claims. He said that those claims were made in circumstances where overlays affected the value of land. In the present case, he said that the *loss on sales* compensation equated to the difference between the actual sale price and the value of the land, absent any overlay. Therefore, the actual sale price was to some extent, irrelevant, because the co-owners would be compensated for the difference between the sale price obtained and the true value of Property, if unencumbered. In fact, Mr Hay said that properties subject to a *loss on sale* claim were usually sold at auction without a reserve price, given that it had little relevance in that situation.
29. Mr Hay was the only expert who gave evidence as to the value of the Property. Although he was extensively cross-examined by Mr Butcher, his opinion remained firm.
30. I find Mr Hay's opinion to be soundly based, given the comparative sales analysis he relied upon to arrive at his valuation. Therefore, I accept his evidence as to the market value of the Property and I consider that \$[REDACTED] million should be set as the reserve price.

Adjustment of rights

31. The Applicant claims that her beneficial interest in the Property should be adjusted such that she holds a fifty per cent interest in the Property. In her closing submission, she states:

1. The Applicant as a co-owner has over the time of the ownership of the property, and her loyalty to her parents, then needs and cooperation has contributed and is in-measurable in \$\$\$. By the managing of the Farm and of the 2 dam constructions over a period of 2 years. Its ability to provide fresh water for stock and income viability and native wildlife was imperative and an asset of value added to the future needs of the property in drought proofing...

Adjustment of rights:

- (i) The applicant has at all times from the co-ownership of the property has been in the belief as her parents explained to her in 1988 at the age of 26 as her mentors and valued their wisdom and experiences, and passion for the land, in sharing of the skills and knowledge of European and Western farming practices, that the Joint proprietors are based on Joint entities Petros and Maria Karagiozakis are one entity, and Mark and Margo Karagiozakis are one entity, and I the Applicant the other entity as applied in the mortgage of 1988 with the State bank of Australia. In those circumstances the Applicant say that the Respondents percentage is 50% with respect to Intention at

Purchase by the Purchaser, Father Mr Petros Karagiozakis to include Family Members on Title with Respect to Fairness of Conduct by All Joined Proprietors. The Breach of Trust by the Respondents and their Representatives Aitken Partners are IRREPAIRABLE.⁴

32. Considering the Applicant's submission in a legal context, which I must do, it appears that she contends that a constructive trust was created at the time of purchase, whereby the grantor, namely her father, the late Petros Karagiozakis, intended that she hold a fifty percent interest in the Property.

33. In *Rasmussen v Rasmussen*,⁵ Coldrey J summarised the legal principles relating to constructive trusts as follows:

In *Hohol v Hohol* [1981] VR 221 O'Bryan J identified three essential elements of a common intention constructive trust. In that case his Honour said at 225:

From the cases I have referred to it can be said that the essential elements of the trust are, first, that the parties formed a common intention as to the ownership of the beneficial interest. This will usually be formed at the time of the transaction and may be inferred as a matter of fact from the words or conduct of the parties. Secondly, that the party claiming a beneficial interest must show that he, or she, has acted to his, or her, detriment. Thirdly, that it would be a fraud on the claimant for the other party to assert that the claimant had no beneficial interest in the property...

34. Further, in *Bloch v Bloch & Anor*,⁶ the High Court stated:

While it is true that no particular form is necessary for the creation of an express trust, the intention of the settlor to create a trust must be explicit. In every case it is a question of fact for the court to determine whether an intention to create a trust is sufficiently evinced...

35. In my view, the limited evidence given by the Applicant on this issue fails to demonstrate that her father intended to grant her a fifty percent interest in the Property. In fact, that contention is at odds with the evidence given by Mark Karagiozakis, who said:

13. In or about August 1988, I purchased the property for \$232,000 in August 1988 with my father Petros. My father and I made the following contributions to the purchase of property:

- a) I contributed \$20,000 and my father contributed \$3,200 to make up the deposit of \$23,200;
- b) from the sale of property at 62 Second Avenue, Altona North, a property owned jointly by my father and I, we contributed \$150,278.02 to the purchase price of the

⁴ The extract of the Applicant's closing submissions has been reproduced as is.

⁵ [1995] 1 VR 613 at 615.

⁶ (1981) 37 ALR 55.

property, of which \$149,663.23 was paid to the vendor and \$614.79 were costs for the purchase;

- c) the balance of the purchase price, being \$59,123.50 was funded by a loan of \$70,000 from the State Bank of Victoria secured by a mortgage on the property.

...

- 15. Save for being a (co) mortgagor Effie made no contribution to the purchase price.
 - 16. For the duration of the loan over the property Margo and I made monthly cash payments to my father as contributions to the mortgage. From October 1988 until some time in 1989 we made contributions of \$600 per month and, from 1989, this contribution increased to \$1,000 per month. My father worked as a labourer and Margo and I, from the milk bar business we operated, paid most of the mortgage payments. Effie made no contribution towards repayment of the mortgage.
36. As indicated by Mr Black's closing submission, Mark Karagiozakis' evidence demonstrates that he made considerable contribution to the payment of the mortgage loan and other outgoings relating to the Property. However, as Mark Karagiozakis conceded, those payments were not being pursued for the purpose of seeking contribution or adjusting legal interests.
37. In my view, the Applicant's claim that the legal interests recorded on the Certificate of Title should be adjusted fails on the ground that there is no or insufficient evidence to establish that either a constructive trust was created or a resulting trust arose, justifying an order that the beneficial interests be adjusted.
38. In addition, having regard to the Terms of Settlement entered into between the parties and doing the best I can to give effect to what was then agreed between the parties,⁷ I do not consider it just or fair to vary the net proceeds of sale to reflect what the parties may or may not have contributed to the costs of maintaining the Property or repaying the mortgage loan. Those costs and repayments shall fall where they lie.

Orders

- 39. As I have already indicated, I consider that it is just and fair that the sale of the Property is conducted to largely reflect what the parties had originally agreed, as reflected in the Terms of Settlement, subject to necessary changes either because of the effluxation of time or because those Terms of Settlement did not take into account the possibility of making a *loss on sale* claim. Therefore, I accept the proposed orders sought by the Respondents, subject to ensuring that there are default

⁷ As claimed by the Applicant.

mechanisms in place, should the parties not agree on certain matters, such as the identity of the real estate agent or the conveyancing solicitor. In my view, having those default mechanisms in place provides some guarantee that neither party will dominate over the other in effecting the sale of the Property.

40. I note that the Respondents have also sought an order that \$50,000 be placed into trust pending the Tribunal's determination on the question of costs. Given that I have not heard any argument as to whether costs should be ordered, I do not consider it appropriate to make such an order at this point in time. However, I will list the matter for a further hearing on the question of costs and if appropriate, adjust these orders to reflect any order for costs that might be made. In that respect, I give the parties liberty to apply.
41. In relation to the orders sought by the Applicant that the conduct of the Respondents be referred to the Victoria Police Fraud Squad, I refuse to make any such order, given my findings set out above. In my view, there is no basis to the allegation that the Respondents, their solicitors or the real estate agent has acted with impropriety.

SENIOR MEMBER E. RIEGLER