VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1326/2017

CATCHWORDS

Co-ownership of land purchased as a tenanted investment property – registered interest of one-third for applicant and two-thirds for respondent – land retained as tenanted investment property until respondent and the parties' daughter took up occupation of it as their residence – constructive trust arising from unconscionability of applicant's assertion of a one-third beneficial interest – compensation for applicant's financial contributions – declaration of constructive trust and of a charge upon the land for payment of contributions – *Property Law Act 1958* ss 225, 228, 232, 233.

APPLICANT	Mr Richard Laurence Stewart
RESPONDENT	Ms Phyllis Heather Owen
WHERE HELD	Melbourne
BEFORE	Senior Member A. Vassie
HEARING TYPE	Hearing
DATE OF HEARING	5 September 2018
DATE OF ORDER	12 February 2019
DATE OF REASONS	12 February 2019
CITATION	Stewart v Owen (Building and Property) [2019] VCAT 140

ORDER

1. In this order "the land" means the land at 16 Wright Street Clifton Hill described in Certificate of Title volume 02136 folio 181, "Mr Stewart" means Richard Laurence Stewart and "Ms Owen" means Phyllis Heather Owen.

2. The Tribunal declares that:

   (a) Mr Stewart and Ms Owen hold their respective registered interests in the land upon trust for Ms Owen; and

(b) Mr Stewart has a charge upon the land for payment to him of $39,192.00.

3. Ms Owen must pay to Mr Stewart by 1 July 2019 $531.15 being one half of the hearing fees which Mr Stewart has paid.

4. Upon payment to him by Ms Owen of $39,723.15 ($39,192.00 plus $531.15) Mr Stewart must deliver to Ms Owen an instrument of transfer, executed by him, to her of his registered interest in the land.

5. If by 1 July 2019 Ms Owen has not paid to him $39,723.15 Mr Stewart may apply to renew this proceeding to ask for an order for sale of the land and division of the proceeds of sale.

6. Each party has liberty to apply generally.

A. Vassie
Senior Member

APPEARANCES:

For Applicant	Mr. B. Carr of Counsel
For Respondents	Mr. J. Willee of Counsel

REASONS FOR DECISION

A Co-Ownership Dispute

1. The applicant Mr Stewart and the respondent Ms Owen are registered as proprietors, as tenants in common, of the land described in Certificate of Title volume 02136 folio 181 which is known as 16 Wright Street Clifton Hill ("the Clifton Hill property"). Ms Owen is registered proprietor as tenant in common of 2 of 3 equal undivided shares and Mr Stewart is registered as proprietor as tenant in common of the remaining one equal undivided share. They are co-owners of the Clifton Hill property within the meaning of that expression in Part IV of the *Property Law Act 1958* ("the Act").

2. In this proceeding Mr Stewart applies for an order under s 228(2)(a) of the Act for the sale of the Clifton Hill property by auction and a division of the proceeds of sale so that Ms Owen receives two-thirds and he receives one-third, subject to an adjustment in his favour by way of compensation for what he has spent in relation the Clifton Hill property, and for an occupation rent from Ms Owen.

3. By a counterclaim filed and served by leave given in the course of the hearing of the proceeding Ms Owen claims that Mr Stewart holds his registered interest in the Clifton Hill property on trust for her. She applies for an order that he execute a transfer to her of his registered interest.

4. They both became involved in the purchase of the Clifton Hill property in 1986. At the time of the purchase they were in a sexual relationship. It had begun while they were both employed by the City of Melbourne. Mr Stewart was a property officer, Ms Owen was an administrative assistant. They have a daughter, Michele, who was born in December 1987. Mr Stewart left his employment with the City of Melbourne in 1988. While there is a dispute about how long their sexual relationship lasted, it was certainly over by the end of the 1980s. At no time did they ever live together.

5. Mr Stewart is now a retired solicitor. He studied law while working for the City of Melbourne. He was admitted to practise in 1998. He was not legally qualified in 1986 but he had had some experience of conveyancing procedures. Ms Owen is now also retired.

6. During the three-day hearing that began on 8 September 2018 the parties were the only witnesses. They, or one of them, had prepared a two-volume Tribunal Book ("TB") which included their witness statements: one by Mr Stewart, one by Ms Owen, and a second by Mr Stewart in reply to Ms

Owen's. I received in evidence those documents in the Tribunal Book to which reference had been made during the oral evidence, including the witness statements[1].

7. Mr Stewart's evidence in chief consisted of verification of his witness statements and little else. Ms Owen's evidence in chief expanded on her witness statement very considerably. Mr Willee of Counsel on her behalf tendered, and I received in evidence, a number of separate documents. Some of them had been included in the Tribunal Book. Others had not been included.

Purchase of the Clifton Hill property

8. There is little or no dispute as to how the purchase of the Clifton Hill property came about and was financed.

9. In 1986 Ms Owen, who was living at her parents' home at 9 Tower Crescent Alphington, was looking for a property to purchase as an investment. She had about $20,000.00 of her own money available to put towards a purchase. She found that the Clifton Hill property was on the market. She and Mr Stewart inspected it. They achieved a purchase of it for $95,000.00. There was a tenant in possession of it. Ms Owen paid $7,000.00 as a deposit. The contract of sale was not put in evidence at the hearing. Because of what the parties said and did when Ms Owen applied for a bank loan, which I am about to describe, I infer that Ms Owen alone was named in the contract as the purchaser.

10. Both Mr Stewart and Ms Owen banked with the Commonwealth Bank. Ms Owen applied to the Commonwealth Bank for a loan of $75,000.00. Mr Stewart accompanied Ms Owen when she had an interview with a bank manager. He did so because he was prepared to be a guarantor for her if necessary. The intention of both of them before the interview was that Ms Owen would become the owner of the Clifton Hill property and the borrower from the bank, and that Mr Stewart would not be an owner but would be a guarantor for her if the bank required him to be.

11. During the interview the bank manager told them that Ms Owen's income alone did not satisfy the bank's lending requirements, and that the bank would approve the loan application only if Mr Stewart's name was on the title to the land as well as Ms Owen's and if he and she both signed a mortgage to the bank as co-mortgagors; it would be sufficient for Mr Stewart to be a guarantor only. Mr Stewart agreed to those requirements, and the loan was approved. They signed a mortgage[2], as co-mortgagors, to the bank to secure repayment of the loan of $75,000.00 to both of them.

[1] TB volume 1 items B1, 2 and 3, and C1 – 5 (inclusive); volume 2 items 1, 7, 12, 18 and 222, and items E2, 8, 10, 11, 132, 18, 23, 24 and 26.
[2] TB volume 1 item C4.

12. Using his conveyancing knowledge, Mr Stewart prepared an instrument of transfer of the Clifton Hill property. It described, as transferees, Ms Owen as to two equal undivided third parts or shares and Mr Stewart as to one equal undivided third part or share, as tenants in common.[3] Both of them told me that there had been discussions between them about how the shares should be described but neither was able to tell me exactly how they arrived at a two-thirds and one-third apportionment.

13. Ms Owen gave evidence that because she was contributing more to the purchase price than Mr Stewart she had typed a document that set out their respective contributions from their own funds, then had added in handwriting on top of one column of figures "PO" and on top of the other "RS", so that the document appeared thus:[4]

	PO	**RS**
Establishment fees	610.00	
Deposit	2,500.00	
Deposit	7,000.00	
Legal Fees		1,500.00
Stamp Duty		2,090.00
Settlement	10,383.12	200.00
	$20,493.12	$3,790.00

Because the figure for "settlement" is an exact figure I infer that she prepared the document after settlement of the purchase had occurred or soon before it, when she knew the exact figure paid or payable at settlement. The $1,500.00 for "legal fees" represented Mr Stewart's estimate of what she would save in legal fees if he did the conveyancing himself. During the hearing Mr Stewart told me that he was not making any claim that that $1,500.00 amount represented a contribution by him to the purchase price.

14. I think it likely that that typed document, or the figures set out in it, were in the parties' minds when they arrived at the apportionment of two-thirds to Ms Owen and one-third to Mr Stewart that appeared on the instrument of transfer, even though the parties could not tell me exactly how they arrived at that apportionment.

[3] Exhibit A1.
[4] TV volume 2 item E2.

15. The transfer, dated 27 October 1986, was registered in the Office of Titles on 8 November 1986.[5] Mr Stewart organised the settlement of the purchase. I infer, from the date of transfer, that the settlement occurred on or shortly after 27 October 1986. The existing tenant remained in possession.

16. Ms Owen's direct contribution to the purchase price was $20,493.12, including the deposit. Mr Stewart's direct contribution came from the payment of the stamp duty on the transfer and other incidental costs: a total of $2,290.00. By becoming co-mortgagors to secure repayment of the bank loan of $75,000.00 they each made an indirect contribution of $37,500.00.[6] Their contributions can be set out as follows:

	Mr Stewart	**Ms Owen**
From own funds	$ 2,290.00	$20,493.12
Bank Loan (a joint liability)	$37,500.00	$37,500.00
	$39,790.00	$57,993.12
Percentage contribution:	40.59%	59.31%

17. Mr Stewart's case is that, as a consequence of the bank's requirements which had to be met before the bank was prepared to lend, his and Ms Owen's intention changed. Instead of the original intention that she alone would become the owner of the Clifton Hill property, by the time of settlement of the purchase their intention became that they would both be the owners, in the shares described in the transfer: his share was one-third. Ms Owen's case is:

    (a) their original intention never changed, that she became and has remained the sole beneficial owner, and that the transfer took the form that it did simply to meet the bank's requirements; and

    (b) whatever their intentions were by the time of settlement of the purchase, it is unconscionable for Mr Stewart to maintain now that he has any beneficial interest in the Clifton Hill property, with the result that he holds his registered one-third share in trust for her and should be required to transfer it to her.

The Written Agreement

18. On 12 November 1986, a few days after settlement of the purchase, Mr Stewart and Ms Owen signed a written agreement. Mr Stewart prepared it. Ms Owen gave evidence, which Mr Stewart did not dispute, that he handed the document to her at their workplace and that she signed it on the same day.

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[5] Exhibit A1 (the transfer) and TB volume 1 item C1 (the Certificate of Title).
[6] *Calverley v Green* (1984) 155 CLR 242 at p 257.

19. Because of the importance of the document to Mr Stewart's case I set it out in full[7], leaving uncorrected various spelling mistakes in it:

> This is an agreement between Phyllis Heather Owen (OWEN) and Richard Laurence Stewart (STEWART) and is a legal agreement concerning the ownership and operation of property at 16 Wright Street, Clifton Hill (the property). In consideration of the purchase and ownership of the property by Owen and Stewart, it is agreed that the following conditions of ownership will apply.
>
> 1. All rates charges and other associated costs together with any maintenance costs; repairs required to the property are to be borne by both parties in proportion of Owen 2/3; Stewart 1/3.
> 2. The property will be rented out on a monthly basis with lease term as agreed between the parties. Rental received from the lease of the premises shall be applied first to repayment of mortgage interest and principle to the Commonwealth Bank and any residue shall be divided between Owen and Stewart to the proportions of Owen 2/3; Stewart 1/3.
> 3. In event that Owen or Stewart or both wish to reside in the property, rental shall be paid at a market rate as established by two independent licenced real estate agents dealing within the area of the property. In the event of any discrepancy between estimates of value for rental, an average of the two estimates shall be taken and accepted as binding by both parties. The rental so received shall be applied in the same way as in paragraph 2 above, that is first to the payment of mortgage principle and interest and then any residue divided in the proportions of Owen 2/3; Stewart 1/3.
> 4. It is agreed that the property shall be retained in ownership for a minimum period of 3 years from the date of settlement, namely the 27th October, 1986 and after the expiration of this term, should either Owen or Stewart wish to sell the property, a market valuation will be obtained from 3 independent licenced estate agents trading in the area of the property and in the event of any discrepancy their estimates of value shall be averaged and the average figure shall be accepted as the value of the property and be binding on both parties.
> 5. This price shall be set as the minimum reserve price in the event of sale by public auction or by private treaty.
> 6. If at any time after the three year ownership period, either party wishes to sell the property, it will be sold by public auction with the reserve figure as established in paragraph 5 above excepting

[7] TB volume 1 item C2.

that should any offer of sale by private treaty be received and at a figure acceptable to both parties, the property may be sold on this.

7. In the event that Owen or Stewart wish to buy the other party's share rather than place the property for public sale, the interested party shall have a period of 30 days in which to make arrangements to purchase the outstanding share and the value of the property as established in paragraph five above shall be binding on both parties as the basis for any private purchase arrangement between them.

8. In the event of death of either Owen or Stewart prior to the sale of this property, this agreement shall be binding on their heirs; assigns and successors on the same terms and conditions as apply above.

9. Repayments of mortgage principle and interest shall be made in the proportion of Owen 2/3; Stewart 1/3. Stewart's contribution shall be paid into a bank account nominated by Owen on a monthly basis in advance of the due date for payment. Owen will thereafter be responsible to see that the payment is effected.

10. In the event that either party is in arrears with their repayment or proportion of maintenance or other charges as detailed in paragraph 2, the non-defaulting party may at any time after a period of 30 days from the date of such default give a further 30 days' notice of termination of the agreement and in the event of continued default the property shall be sold in accordance with the requirements of paragraph 4, 5, 6 and 7 above. Any proceeds shall be applied following payment of all costs and charges associated with the sale in the proportion to Owen 2/3; Stewart 1/3, with the allowance that either party remaining in arrears of payment will have deducted from the proportion of proceeds accruing to them such arrears as may apply at that time.

11. In the event of arrears of repayment as detailed in paragraph 10 the time limit as applied in paragraph 4 shall not apply.

20. Ms Owen alleges (but Mr Stewart disputes) that the idea of having a formal agreement prepared and signed came from her. In paragraph 11 of her witness statement[8] she explained why she wanted one:

> 11. I was worried that Richard was registered on title when I had contributed most of the purchase funds. I asked Richard to prepare a document which would show that the property was mine. He agreed to draw up an agreement. I trusted him. He did not suggest that I get independent legal advice and I signed the agreement (**Appendix 2**). I did not challenge him.

[8] TB volume 1 item B2.

By "Appendix 2" she meant the agreement which I have set out above.

21. During cross-examination Mr Stewart gave evidence that the idea of having a written agreement was his, and that he wanted one so that he and Ms Owen confirmed that they owned the Clifton Hill property in the shares expressed in the instrument of transfer.

22. Obviously the written agreement did not show that the property was Ms Owen's, as she said that she had wished it to show. On the other hand it did not state explicitly that Mr Stewart had a one-third beneficial interest and that Ms Owen had a two-thirds beneficial interest, although that was its implication. Rather, the written agreement dealt primarily with how the investment property was to be managed, how rent was to be received and applied, how mortgage principal and interest was to be paid, how the outgoings and other liabilities were to be paid for and by whom, and how the proceeds of sale were to be divided if there were to be sale within three years of the settlement date. It recorded a commercial arrangement, entered into because of and in the context of their personal relationship. Ms Owen gave evidence that when she signed it she believed that she was agreeing to a division of responsibility for the mortgage loan repayments, not to Mr Stewart's having a one-third ownership.

23. On the evidence I am unable to decide whose was the idea of there being a written agreement. I do not think it matters whose idea it was.

24. In paragraph 7 of her Points of Defence[9] Ms Owen alleges that Mr Stewart:

    (a) failed to advise her that she could obtain independent legal advice before she signed the written agreement, and

    (b) "in breach of his fiduciary duties to [Ms Owen] he unconscionably took advantage of the power imbalance between the parties and coerced [her] into executing the agreement."

25. I deal with those allegations as follows:

    (i) *Independent legal advice*. It is true that Mr Stewart did not tell Ms Owen that she could or should obtain independent legal advice before she signed the written agreement. In my view he had no obligation to do that. The decision to sign an instrument of transfer that expressed Mr Stewart to have a one-third interest in the Clifton Hill property was one that they made jointly, as a means of satisfying the bank's requirements for approval of a loan application. Nothing in the written agreement departed from or was inconsistent with the instrument of transfer. The written agreement did go on to record the commercial arrangement, for the Clifton Hill property as an investment property, that I described in paragraph 22 above, but it did not affect her detrimentally any more than the instrument of transfer did.

[9] TB volume 1 item A2.

(ii) "*Fiduciary duties*". Neither during the hearing or in the written submission on Ms Owen's behalf did Mr Willee develop the claim of a fiduciary relationship by identifying what aspects of it made the relationship fiduciary. The parties' sexual relationship, in circumstances when they were not living together, is not one of a kind that the law has recognised as being fiduciary.[10]

(iii) "*Power imbalance*". The allegation of power imbalance has no basis other than the circumstances that in their place of employment Mr Stewart was Ms Owen's immediate superior but not her ultimate superior – in Mr Stewart's words he did not have the power to "hire and fire" – and that Mr Stewart had more legal and conveyancing knowledge than Ms Owen had. Those circumstances, in my view, did not create an imbalance of any significance.

26. Ms Owen's own evidence showed that the allegations that Mr Stewart "unconscionably took advantage of a power imbalance" and "coerced" her into signing the written agreement could not be, and were not, made out. Her evidence was that he left the document for her to sign, she signed it, and she did so because she trusted him, not for fear of what might happen if she did not sign it or as a consequence of anything that Mr Stewart said or did by way of coercion.

27. Whether it is unconscionable for Mr Stewart now to assert that he has a one-third beneficial interest in the Clifton Hill property, and to deny that Ms Owen has the sole beneficial interest as she claims, is to my mind the most important question in this proceeding. All I say at the moment is that Mr Stewart did not "unconscionably take advantage of the power imbalance" when he presented the document to her for her to sign, nor did he coerce her into signing it.

Credibility

28. I pause in the chronological narrative to express my conclusions about the credibility of Mr Stewart and of Ms Owen, the only two witnesses.

29. I regard Mr Stewart as having been a truthful and careful witness. The attempt made during the hearing to paint him as a pantomime villain – an attempt made, I assume, on Ms Owen's instructions - failed utterly. On one particular matter which I describe below[11] I think he was less than candid and engaged in some rationalisation. Apart from that matter, I accept his evidence on most matters.

[10] In *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at pp 96-97 Mason J described the relationships usually recognised as fiduciary.

[11] See paragraph 54 below.

30. I also regard Ms Owen as having been a truthful witness, doing her best to give evidence of facts and events as she recalled them. Occasionally however, she was vague or non-responsive to questions asked of her. On one particular matter which I describe below[12] her evidence was demonstrably wrong. On the whole, Mr Stewart's evidence was more reliable.

31. Wherever I say below that I prefer Mr Stewart's evidence on a matter to Ms Owen's it is for the reasons given in the two previous paragraphs.

1987 to mid-1991: The Relationship Has Ended

32. The parties had signed the written agreement on 12 November 1986.

33. I select mid-1991 as the end of a relevant period because Mr Stewart became bankrupt in July 1991. The significance of that fact will appear below.

34. In June 1987 Ms Owen told Mr Stewart that she was pregnant. In December 1987 their daughter Michele was born.

35. Ms Owen continued to live with Michele at her parent's home in Alphington. The Clifton Hill property remained let to tenants.

36. In 1988 Mr Stewart left his employment at the City of Melbourne, Ms Owen remained working there.

37. The parties' sexual relationship had ended by the end of the 1980s. The parties gave different evidence about when it ended. In my view there is no need for me to decide exactly when it ended, and I do not.

1987 to mid-1991: Rent, Mortgage and House Maintenance

38. Judy Conti, the tenant who was in possession of the Clifton Hill property at the time of settlement of the purchase, remained in possession as tenant for several years, until 1995.

39. Mr Stewart's version of how rent was received, how and by whom mortgage payments were made and how maintenance and repair costs for the Clifton Hill property were met was set out in paragraphs 25 and 26 of his first witness statement[13]:

> 25. The Property was tenanted at the time of purchase. The rental paid was initially approx. $130.00 per week ($563.33 per calendar month). Rents were paid into Ms Owen's bank account at Commonwealth Bank 28 Lt Collins St Melbourne A/c Number 429725477, from which account the monthly payments

[12] See paragraphs 46 and 47 below.
[13] TB volume 1 item B1.

on the mortgage loan were then withdrawn. The surplus or shortfall of rent over mortgage if any was retained or paid by Ms Owen. I assisted financially from time to time by transferring funds to Ms Owen's account number 429725477, including for my 1/3rd share of maintenance and repair costs as required.

26. Throughout the period from purchase of the Property in 1986 until Ms Owen moved into the Property in the late 1990's, I provided property management support, answered and resolved tenants' queries and provided review, preparation and execution of leases on the Property.

40. Ms Owen's contrary version was set out in paragraphs 14 and 15 of her witness statement[14]:

14. The rent received never covered the amount of the mortgage. As an example in the year 1986 the rental received was $563.33 per month against a mortgage liability of $1,003.00 per month: in 1992 the rental received was $671.75 against a mortgage liability of $1,006.00 per month.

15. I paid the balance of every mortgage repayment over and above the rent received from my own resources from the time of settlement of the property on 5 November 1986 until August 2000.

41. The Commonwealth Bank's mortgage loan statements[15] bear out Ms Owen's version to the extent that in the period under discussion, 1987 to mid-1991, the mortgage liability was a little over $1,000.00 per month and the rent received was less than the mortgage payment each month. There was no surplus that Ms Owen could retain. There was always a monthly shortfall that had to be met. It was paid from Ms Owen's personal account, as Mr Stewart stated. What is at issue is whether Mr Stewart transferred any funds to her account as he stated he did.

42. Mr Stewart admitted that he had no documentary proof of transfer of funds from him to Ms Owen's account during this period. Despite the lack of documentary proof, I prefer Mr Stewart's evidence that he made such a transfer of funds from time to time to Ms Owen's evidence that she alone met the shortfall between the mortgage repayment each month and the rent each month. But because of the lack of documentary evidence Mr Stewart has not proved how much he paid. It would be unjust to refuse to make any allowance in his favour for payments which I accept he made. I propose to allow a nominal figure which I specify below.

[14] TB volume 1 item B2.
[15] TB volume 1 item C3.

43. Documents which Ms Owen tendered and which I received as an exhibit[16] show that there was one occasion when Mr Stewart become involved in "property management support" as he claimed. In 6 May 1987 he wrote to a plumber accepting a quotation. There was no documentary evidence of any other occasion. Those same documents supported evidence which Mr Stewart gave that he paid a plumber $1,500.00 towards the cost of $4,500.00 for a new roof. The documents showed that Ms Owen made two separate payments towards the cost, one of $1,500.00 on 31 July 1991 and the other of $3,000.00 on 14 August 1991. It is likely that the first $1,500.00, one-third of the cost, came from Mr Stewart. I accept his evidence that he made that financial contribution and allow $1,500.00 in his favour. Ms Owen acknowledged that whenever the tenant wanted repairs or maintenance done to the Clifton Hill property the tenant usually contacted Mr Stewart about those things rather than her.

Bankruptcy: The Letter to the Official Trustee

44. In July 1991 Mr Stewart, in financial difficulty because of a dispute with a builder, voluntarily became bankrupt. The Official Trustee in Bankruptcy became his trustee. Upon his bankruptcy whatever interest Mr Stewart had in the Clifton Hill property vested in the Official Trustee.[17]

45. On 12 May 1992 the Official Trustee lodged at the Office of Titles a caveat[18] claiming an equitable estate or interest as to one equal undivided third part or share in the Clifton Hill property, being Mr Stewart's registered interest.

46. Mr Stewart gave evidence that in late May 1992 Ms Owen told him that the caveat had been lodged, and that she had been in touch with the Official Trustee's office to enquire what to do about the caveat and had been told that she should send a letter to the Official Trustee giving details of the purchase of the Clifton Hill property. Ms Owen's evidence was that she had known nothing about the caveat until Mr Stewart had told her about it and had asked her to write the Official Trustee to say that the Clifton Hill property was hers.

47. This is the matter about which Ms Owen is demonstrably wrong. The registered transfer[19] to Ms Owen and Mr Stewart gave, as the transferees' address, 9 Tower Avenue Alphington, the address of Ms Owen's parents where she was still living in 1992. That was the only address to which the Registrar of Titles could have sent notice of the caveat, as the Registrar was obliged to do[20]. I find that Ms Owen received notice of the caveat at that address, told Mr Stewart that she had received it, and (as Mr Stewart's evidence went) had been requested to send a letter to the Official Trustee about ownership of the Clifton Hill property.

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[16] Exhibit R6.
[17] *Bankruptcy Act 1966* (Commonwealth) s 58(1)(a).
[18] TB volume 1 item C5.
[19] Exhibit A1.
[20] *Transfer of Land Act* 1958 s 89(3).

48. Although Mr Stewart gave evidence that in his Statement of Affairs lodged with the Official Trustee he had disclosed his registered one-third share in the Clifton Hill property, he did not produce the Statement of Affairs at the hearing. Mr Willee for Ms Owen submitted that I should draw an adverse inference against Mr Stewart because of the non-production and should find that he had not disclosed his registered one-third interest. I do not accept that submission. The Statement of Affairs, once lodged, became a public record the production of which Ms Owen, just as readily as Mr Stewart, could have required.[21] Moreover it is likely that the Statement of Affairs was the source of the information that caused the Official Trustee to lodge the caveat.

49. The notice of the caveat led Ms Owen to type and sign a letter and send it to the Official Trustee. Mr Stewart had an input into the letter, as I state below. Because of its importance to Ms Owen's case I set it out in full also, but the underlining is mine. It was dated 2 July 1992.[22]

> **Re ESTATE NO 695/19917 – R STEWART - 16 WRIGHT STREET, CLIFTON HILL**
>
> I refer to your enquiry concerning the above property.
>
> The property has been rented out since it was purchased. The tenant now there is the same person in the property since before the purchase was made.
>
> Rental is paid directly into account no. 580279 429725477 19 in my name with the Commonwealth Bank, 297 Lt Collins Street branch. Current rental is $671.72 per month.
>
> When I first applied to the Bank for a loan, I was told that my salary was too low to meet the repayment/salary ratio set by the Bank and that I did not qualify for an advance. I then asked Mr Stewart to sign with me which he agreed to do. Our combined income levels were sufficient for me to qualify for a loan.
>
> The loan was approved, I made all financial contributions towards deposit and costs and have met the all costs over and above the rental received and for repairs since settlement.
>
> Mr Stewart handled the conveyancing on my behalf. Mr Stewart was advised by the Bank that because there were co-borrowers, both names were required on the title. I complied with the Bank's direction. <u>The property is now and has always been my property and Mr Stewart has no beneficial interest in it</u>.
>
> The reason I have been able to meet these costs is because I have been living with relatives and still am.

[21] *Bankruptcy Act 1966* (Commonwealth) s 55(2)(b), (9).
[22] TB volume 2 item E12.

50. Before Ms Owen typed, signed and sent the letter there had been a draft of it to which Mr Stewart made handwritten additions[23]. Mr Stewart and Ms Owen each denied having prepared the draft letter. Each alleged that the letter was the other's idea. The significant differences between the draft letter and the sent letter were these:

    (i) Mr Stewart had added to the draft letter, in handwriting., the reference, including the estate number and his name, which became bold capitals in the sent letter.

    (ii) In the draft letter Ms Owen's bank account number, and the figure for current rental, had been left blank.

    (iii) Wherever the sent letter referred to "Mr Stewart" the draft letter had left a blank space after "Mr" and Mr Stewart had added "Stewart" in handwriting.

    (iv) The sentence "Our combined income levels were sufficient for me to qualify for a loan" had not been in the draft letter. Mr Stewart had added it in handwriting.

    (v) The final sentence in the sent letter did not appear in the draft letter. Ms Owen added it.

51. On the back of the draft letter Mr Stewart had handwritten: "Phyllis – Suggested draft letter to send."[24]

52. Authorship of the draft letter is a mystery that I have not been able to solve. It is unlikely that Ms Owen drafted it. The phrase "beneficial interest" is language that a lawyer, not a lay person, would use. Moreover the notation on the back of the letter makes it likely that Ms Owen saw the draft letter for the first time after Mr Stewart had made the handwritten alterations. It is also unlikely that Mr Stewart drafted it. There is no apparent reason why he would draft it but leave a blank space instead of his own name. I accept each party's evidence that he or she had not prepared the draft. I can conclude only that it was prepared by a third person who had familiarity with the phrase "beneficial interest" but did not know the identity of either of the persons to whom the letter related. I am unable to make any finding about who instructed or requested the third person to prepare the draft letter.

53. The obvious purpose of the letter was to discourage the Official Trustee from selling the Clifton Hill property and realising Mr Stewart's registered interest in it. The letter was asserting that Mr Stewart had only that bare legal interest, not any beneficial interest, and was setting out matters that would support the assertion.

[23] TB volume 2 item E10.
[24] TB volume 2 item E11.

54. When cross-examined Mr Stewart's explanation for the sentence I have underlined in the letter – that he had "no beneficial interest" – was that upon his bankruptcy his ownership interest had vested in the Official Trustee. This is the matter about which I say that Mr Stewart was less than candid and was indulging in rationalisation. There was no need for the Official Trustee to be told about the vesting of Mr Stewart's interest. That was the very reason for the Official Trustee's lodgement of the caveat. Both Mr Stewart and Ms Owen – Mr Stewart by making handwritten alterations to the draft letter and passing it on to Ms Owen, and Ms Owen by making further additions then signing and sending the letter – were telling the Official Trustee that, despite Mr Stewart having a registered interest in the Clifton Hill property, he had no beneficial interest and had never had any.

55. Evidently the purpose was achieved. The Official Trustee made no attempt to sell the Clifton Hill property. Mr Stewart was discharged from bankruptcy in 1994. Whatever interest he had in the Clifton Hill property re-vested in him six years after the date of discharge[25]. Because more than 20 years have elapsed since his bankruptcy it is now too late for the Official Trustee to make any claim to the Clifton Hill property.[26]

56. The draft letter and the sent letter support Ms Owen's claim that at all material times the intention of the parties was that she was the sole beneficial owner of the Clifton Hill property.

Rent, Mortgage Payments and Outgoings While There Was a Tenancy

57. By 1994 interest rates had dropped. The required monthly mortgage payments were reduced to amounts that were less than the monthly rent received from the tenant of the Clifton Hill property. Mr Stewart's evidence was that he temporarily stopped making payments to Ms Owen's bank account for mortgage payment purposes, there having been no need for them. Insofar as there was a surplus of rent payments after the mortgage payments were made, Ms Owen retained the surplus.

58. There is no dispute that throughout the tenancy Ms Owen paid all municipal rates, water rates and insurance for the Clifton Hill property.

59. I have found that Mr Stewart did from time to time make monetary contributions towards mortgage payments until 1994 but he has not been able to prove the amounts he paid. Between 1986 and 1994 the mortgage payments were a little over $1,000.00 per month, or a little over $12,000.00 per year. The Tribunal Book included a table[27] of rent received each month. Mr Stewart has proceeded on the basis that the table is accurate.[28] It shows monthly rental payments of, on average, about $7,500.00 as per

[25] *Bankruptcy Act 1966* (Commonwealth) s 129AA.
[26] *Bankruptcy Act 1966* (Commonwealth) s 127(1).
[27] TB volume 2 item E26.
[28] Applicant's written submission, paragraph 24.

year. The shortfall of rental payments from mortgage payments was therefore about $4,500.00 per year for eight years: about $36,000.00. I would not accept that Mr Stewart paid as much as one-third of that figure, despite the written agreement in 1986 having provided that he should do so. Doing the best I can, I allow to Mr Stewart $6,000.00 as the amount of his contributions toward mortgage payments until 1994.

60. The only item of maintenance or repairs to the Clifton Hill property that I have found that Mr Stewart made is $1,500.00 towards roof replacement. It follows, and I find, that Ms Owen paid for all other such items. Those findings are consistent with the assertion in the letter to the Official Trustee that Ms Owen "met all costs over and above the rental received and for repairs since settlement": an assertion that Mr Stewart approved.

Ms Owen Occupies the Clifton Hill Property

61. By 1996 the long-term tenant Judy Conti had vacated the Clifton Hill property and, after some short-term tenancies, it had become vacant.

62. In 1996 Ms Owen accepted a voluntary redundancy package from her employment.

63. Ms Owen told Mr Stewart that she wished to move from her parents' home in Alphington and live with Michele at the Clifton Hill property. Although there is dispute about precisely when she told Mr Stewart of her wish, I am satisfied that it occurred after she received the redundancy payment.

64. Mr Stewart gave evidence, which I accept, about the substance of the parties' conversations about Ms Owen's move to the Clifton Hill property. It was this:

    (i) Ms Owen said that she was able to use some of the redundancy payment to pay $20,000.00 to the bank to reduce the mortgage debt.

    (ii) She told him that because she was no longer working she was no longer able to meet the mortgage payments. She asked him to resume making the mortgage payments.

    (iii) He agreed to her moving with Michele to occupy the Clifton Hill property and agreed to her request to meet the monthly mortgage payments to the bank.

65. Ms Owen paid a $20,503.00 lump sum to the bank to reduce the mortgage debt. Mr Stewart did thereafter meet the mortgage payments by transferring funds to Ms Owen's bank account, but when he began doing this is unclear.

66. In 2000 Ms Owen and Michele, who was then aged 13 or 14, moved from Alphington to the Clifton Hill property and began to occupy it. In his first witness statement Mr Stewart had said that the move occurred in 1996. In cross-examination he conceded that the move occurred after 1996; he made the concession after being shown a copy of a will which he had drawn for Ms Owen and which she had executed on 29 June 1996; her address

identified in the will was 9 Tower Avenue Alphington.[29] At all events Ms Owen is more likely than Mr Stewart to have been sure about which year it was when she made the move. I find that she and Michele began to live in the Clifton Hill property in 2000, as Ms Owen said in her witness statement that she did.

67. It is noteworthy that, to that date, there was never any suggestion from Mr Stewart that Ms Owen should make any payment, by way of rent or otherwise, in return for her occupation of the Clifton Hill property.

68. In July 2000, according to Mr Stewart's evidence, he and Ms Owen requested the Commonwealth Bank to allow them to make payments of interest only, under the mortgage, for the next four years. The bank agreed to the request, and they both signed an amended loan agreement. No amended loan agreement was tendered in evidence, but Ms Owen did not dispute Mr Stewart's evidence about this matter and I accept it.

69. By 2000 Mr Stewart had not made, and had not been asked to make, any child support payments for Michele to Ms Owen. She conceded that Mr Stewart had assisted her by paying for Michele's orthodontic treatment.

70. After having moved to the Clifton Hill property Ms Owen made an application to the relevant agency for child support from Mr Stewart. Once Mr Stewart learned of the application he and Ms Owen had a discussion about it.

71. Mr Stewart's evidence about the discussion, which I accept, was contained in paragraph 65 and 66 of the first witness statement:[30]

> 65. I contacted Ms Owen and advised her that I could not continue to both pay the house instalments and also child support, so that if the application were to proceed, we would need to re-lease the Property or she would need to make her share of loan payments from her own resources. She advised me that she preferred to keep the then current arrangement and intended as consequence to withdraw the Child Support application. I had no part in that subsequent withdrawal, the decision by Ms Owen to do so or any correspondence or discussion with the Department concerning the matter.
>
> 66. We, however, separately informally agreed at this time as part of our discussion that given that Ms Owen and Michele were living in the Property rent free with me paying the repayments, this was equivalent to child support in any event. I agreed to waive my claim to a share of rent for Ms Owen's occupation until Michele turned 18 years old in December 2005.

[29] Exhibit R2.
[30] TB volume 1 item B1.

72. Ms Owen's version of the discussion was that there was no mention of rent, or of her living at the Clifton Hill property rent free until Michele turned 18, or of her having to pay rent after Michele turned 18. She said that Mr Stewart agreed to make all future mortgage loan instalment payments in return for her not proceeding with the child support application: that the mortgage payments were to be "in lieu of" child support.[31] As I have preferred Mr Stewart's evidence about the discussion I do not accept hers on the matter of rent. It follows that to say that Mr Stewart was taking upon himself the burden of the mortgage payments in lieu of child support is an over-simplification. In lieu of child support Mr Stewart was not only taking upon himself the burden of the mortgage payments but also giving up any claim for an occupation rent until Michele turned 18, when any obligation to pay child support would end. Mr Stewart was cross-examined about an email that he had sent to Michele in March 2017, by which time she was living in the United States of America. In that email he said that his agreement with her mother had been "for her to live there [at the Clifton Hill property] during the period of your childhood rent free whilst I paid the mortgage in lieu of child support".[32] I regard that email as having been quite consistent with Mr Stewart's evidence, that "in lieu of child support" were two things: mortgage payments and "rent free".

73. Ms Owen also gave evidence that Mr Stewart had brought with him to the discussion a document and had persuaded her to sign it, for the purpose of her withdrawal of the application for child support. Mr Stewart emphatically denied that he had brought with him or had persuaded her to sign any document. Preferring, as I do, Mr Stewart's evidence about the discussion, I conclude that Ms Owen's memory has played her false about this alleged document.

The Mortgage is Discharged

74. In accordance with the outcome of the parties' discussion, Mr Stewart made all future mortgage loan repayments and did so until August 2008. Ms Owen calculated that he paid $29,402.00 in all.[33] Mr Stewart's estimate was not seriously at odds with that figure.[34] I accept it. The calculation has the appearance of having been a careful one.

75. Ms Owen has argued that that sum should not be regarded as having been made in relation to the Clifton Hill property because it was made in lieu of child support. I do not accept that argument. In the first place, the mortgage loan repayments were only one of two things that Mr Stewart was providing in lieu of child support, the other being no claim for occupation rent until Michele turned 18. In the second place, whatever they were in

[31] TB volume item B2, paragraph 26 of her witness statement: also TB volume 2 item E24.
[32] TB volume 2 item E23.
[33] See footnote 31.
[34] Mr Stewart's Statement of Contributions and Receipts, filed on 13 April 2018, set out three sums which totalled $29,240.27 for the period July 2000 to December 2008 but not including the $1,697.05 that he paid in 2009 to discharge the mortgage.

lieu of, the payments totalling $29,402.00 still were made in reduction of the mortgage over the Clifton Hill property and so related to that property. Whether Mr Stewart ever had, or has now, any liability for child support is not my concern. He is entitled to be given credit for those payments in a calculation of what expenditure he has made in relation to the Clifton Hill property.

76. Michele turned 18 in 2008. Mr Stewart gave evidence, and I accept, that after that date Ms Owen had not paid or offered to pay to him any occupation rent, so he stopped paying mortgage loan instalments in August 2008.

77. On 13 March 2009 Ms Owen, from her share of the proceeds of sale of the Alphington property after her father's death, paid $10,000.00 in reduction of the mortgage debt.

78. On 2 September 2009 Mr Stewart paid to the Commonwealth Bank $1,697.05 which was the balance owing under the mortgage, and the mortgage was discharged. That amount is included in Ms Owen's calculation of $29,402.00.[35]

The Act

79. Neither party challenged or questioned the Tribunal's power to make the order that the other party has sought in the proceeding. Nevertheless I propose to draw attention to the provisions in Part IV Division 2 of the Act that are important to the determination that I am making.

80. The power to make the order for sale of the Clifton Hill property and division of the proceeds in the way that Mr Stewart has sought derived from ss 225 and 228, which, so far as presently relevant, provide:

> **225 Application for order for sale or division of co-owned land or goods**
>
> (1) A co-owner of land or goods may apply to VCAT for an order or orders under this Division to be made in respect of that land or those goods.
>
> (2) An application under this section may request—
>
> (a) the sale of the land or goods and the division of the proceeds among the co-owners.
>
> …..
>
> **228 What can VCAT order?**
>
> (1) In any proceeding under this Division, VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.

[35] TB volume 2 item E24.

(2) Without limiting VCAT's powers, it may order—

(a) the sale of the land or goods and the division of the proceeds of sale among the co-owners.

81. Section 232, so far as presently relevant, provides:

232 Other matters in VCAT orders

In any proceeding under this Division, VCAT may order—

(a) that the land or goods be sold by private sale or at auction…

…..

(i) in the case of land, that any necessary deed or instrument be executed and documents of title be produced or other things be done that are necessary to enable an order to be carried out effectively…..

82. Section 233 has importance for the various claims that each party has made for monetary adjustments in the division of proceeds of sale of the Clifton Hill property, if there is an order for sale and division. For reasons that will appear below I have not found it necessary to decide most of those claims. The parts of s 233 that are relevant to the determination I am making are these:

233 Orders as to compensation and accounting

(1) In any proceeding under this Division, VCAT 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 section 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.

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

(a) any amount that a co-owner has reasonably spent in improving the land or goods;

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

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

The reference to s 28A in s233(1)(b) is to a section that provides that a co-owner receiving more than "a just or proportionate share" of that co-owner's interest in property is liable to account to any other co-owner of the property.

83. Mr Carr of Counsel for Mr Stewart did not dispute that the Tribunal has the power to make the order that Ms Owen seeks: that he transfer to her his equal undivided one third share as tenant in common of the Clifton Hill property. The power conferred by s 233(1)(c) to order an "adjustment" of his interest, by transferring it to Ms Owen, is limited to a case where there were "amounts payable by co-owners to each other during the period of the co-ownership." This case does not fall into that category. I adhere to the view I have expressed elsewhere,[36] that the source of the power to make the order sought is s 228(1) when it empowers VCAT to make any order it thinks fit "to ensure that a just and fair sale or division of land" occurs; in a case where VCAT orders a physical division of co-owned land the order would be ineffective unless VCAT could go on to order that one co-owner transfer one part of the divided land to the other.

Equitable Principles

(a) Resulting Trust

84. In the written submissions filed on Ms Owen's behalf there was a faint suggestion that the parties' respective contribution to the costs of the acquisition of the Clifton Hill property created a resulting trust. The submission reveals a misconception that the bank loan secured by the mortgage was not a jointly-contributed acquisition cost. It was.

85. The misconception is reflected in paragraph 4 of the counterclaim, where Ms Owen alleges that Mr Steward contributed only $2,290.00 to the purchase price and that Ms Owen contributed $20,493.12. It ignores the bank loan and the parties' entry into the mortgage.

86. Where two persons contribute towards the cost of acquiring land, and their relationship is not one that creates a presumption of advancement[37], there is instead a presumption that they hold the land in trust for themselves as

[36] *Binns v Binns* [2018] VCAT 759, following the reasoning in *Pavlovich v Pavlovich* [2012] VCAT 809.

[37] The relationship of the kind that these parties had does not give rise to any presumption that one was intending to advance the other by financing a purchase for them. The presumption is one that is usually confined to a relationship of husband and wife or of parent and child. See *Anderson v McPherson* (No 2) [2012] WASC 19 at [139] – [141].

tenants in common in the proportions that they contributed.[38] The presumption is rebutted by evidence that the intention of the two persons was otherwise.[39]

87. Where those persons enter into a mortgage to secure repayment of a loan that is applied to fund the acquisition of the land, they are regarded as having contributed to the acquisition costs one half each of that loan.[40] Payment of instalments in reduction of the debt secured by the mortgage are not regarded as direct contributions to the purchase price.[41] For the purpose of calculation of the acquisition costs one may include incidental costs such as stamp duty and disbursements.[42]

88. If there were to be a presumption of a resulting trust in this case the outcome would be that the parties hold the Clifton Hill property upon trust for themselves as tenants in common in the shares of 40.69% for Mr Stewart and 59.31% for Ms Owen.[43] That outcome would be more favourable to Mr Stewart than the one he has sought. It is certainly not the outcome that Ms Owen had sought.

89. The presumption has been rebutted in this case. Whatever else the written agreement with which they entered in 1986 may signify, it is ample evidence that they did not intend to hold the Clifton Hill property on trust for themselves in those shares of 40.69% and 59.31% respectively. The whole concept of a resulting trust can be put to one side.

(b) Constructive Trust: Common Intention

90. In her counterclaim Ms Owen alleges that it was always the parties' intention that she would have the sole beneficial interest in the Clifton Hill property. The counterclaim seeks a declaration to that effect, and an order that Mr Stewart transfer to her his registered interest in the Clifton Hill property. Those features of the counterclaim are consistent with a case that Mr Stewart holds his registered interest upon constructive trust for Ms Owen because it was their common intention at the time of acquisition that the Clifton Hill property was to be hers solely.

91. Before two landmark High Court decisions on constructive trusts in the mid-1980's,[44] there was authority that a constructive trust of land would arise if (i) the parties formed a common intention, usually at the time of acquisition of the land, as to the ownership of the beneficial interest in it,

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[38] *Calverley v Green* (1984) 155 CLR 240 at p 257.
[39] *Halsbury's Laws of Australia*, volume 27, para [430 – 550].
[40] See footnote 38.
[41] See footnote 38.
[42] *Murtagh v Murtagh* [2013] NSWSC 96; *Halsbury's Laws of Australia,* volume 27, para [430 – 542], footnote 2.
[43] See paragraph 16 above.
[44] *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137.

(ii) the party claiming the beneficial interest acted to that party's detriment in reliance upon the common intention, and (iii) it would be a fraud upon the claimant for the other party to assert that the claimant had no beneficial interest.[45]

92. Since those two High Court decisions it is no longer necessary that there be proof of a common intention. A constructive trust for the holding of a beneficial interest in land in particular shares may arise even if the parties had had a different intention about what shares they had or were to have.[46]

93. Proof of a common intention in the present case is difficult because, as Mr Willee appeared to recognise in his written submission, the parties' intention seems to have changed from time to time. Before they went to the interview with the bank manager it was clear that their common intention was that the Clifton Hill property was to be Ms Owen's solely. By the time that they signed the written agreement shortly after settlement of the purchase, an independent reader of the agreement would draw a different conclusion about their intention: that Mr Stewart had rights and obligations with respect to the management of an investment property and would have a right to a share in the proceeds of its sale. Then by the time that they both had input into the letter to the Official Trustee in 1992 an independent reader of the letter would conclude that the intention at the time of acquisition had been that Ms Owen alone had a beneficial interest in the Clifton Hill property.

94. I am not satisfied that Ms Owen has proved the common intention that she has alleged. That does not mean, however, that a constructive trust cannot arise independently of any common intention. It can.

(c) Constructive Trust: Unconscionability

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.

96. The first, *Muschinski v Dodds*[47], was a case where the parties, while in a de facto relationship, purchased land and became registered proprietors of it as tenants in common in equal shares, as was their intention. They intended to restore a building on the land for use as their arts and crafts business and to erect on the land a prefabricated house to live in. The woman contributed the whole of the purchase price for the land. The man contributed a smaller amount to be used for development of the land in the way intended. They separated before the development was complete. The plurality (majority) of

[45] E.g. *Allen v Snyder* (1977) 2 NSWLR 685 and *Hohol v Hohol* [1981] VR 221.
[46] *Muschinski v Dodds* (1985) 160 CLR 583 at p 611.
[47] (1985) 160 CLR 583.

the High Court declared that the parties held their respective interests upon trust to repay to each his or her contribution and as to the residue for them both in equal shares. Two of the plurality (Mason J and Deane J) did so on the basis that a constructive trust arose. The third (Gibbs CJ) decided that the man should account to the woman for her contribution and that there should be an equitable charge upon his legal interest in the land to secure payment of what was due to the woman.[48]

97. The second, *Baumgatner v Baumgartner*[49], also involved a de facto relationship. The parties purchased a house which was in the man's name alone, with the aid of a mortgage which was also in the man's name alone, but they had pooled their incomes for the purpose of acquisition of the land. The plurality (Mason CJ, Wilson J and Deane J) decided that the man held the land on trust for both parties in the proportions in which they had contributed their earnings to its acquisition, subject to a charge in the man's favour for a lump sum which he had contributed form the sale of an asset of his. The significance of the case is that the plurality adopted the way that Deane J had articulated in *Muschinski v Dodds* the circumstances in which a constructive trust arises:

> [In *Muschinski v Dodds*] This Court declared that the parties held their respective legal interests upon trust to repay to each his or her respective contribution and add to the residue of them both in equal shares.
>
> Deane J (with whom Mason J agreed) reached this result by applying the general equitable principle which restores to a party contributions which he or she has made to a joint endeavour which failed when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them. His Honour said (17):
>
> > … 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 specifically provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him to do so …

[48] (1985) 160 CLR 583 at p 598.
[49] (1987) 164 CLR 137.

> His Honour pointed out that the 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"…[50]

98. From those authorities it appears that the situation in which a constructive trust arises has the following features:

    (i) There has been a relationship or joint endeavour which has broken down without any blame being attributable to one party to it.

    (ii) There has been a financial contribution by one or both parties to the relationship or to the joint endeavour.

    (iii) In these circumstances, and in all the circumstances, it would be unconscionable for one party to the relationship or joint endeavour to retain a benefit greater than that party's contribution.

99. All those features exist in the present case, in my opinion.

100. The joint endeavour of Mr Stewart and Ms Owen was their acquisition of an investment property: the Clifton Hill property. Their sexual relationship was the context in which the joint endeavour began. Their sexual relationship ended after they acquired the property. The joint endeavour ended in 2000 once Ms Owen, with Mr Stewart's agreement, took up occupation of the Clifton Hill property as a home for herself and their daughter, so that it was no longer an investment property. There is no blame attributable to either of them for the ending of the relationship or for the ending of the joint endeavour.

101. Each of them made financial contributions to the joint endeavour by way of initial contributions to the purchase money and acquisition costs, by entry into the mortgage, and by making payments in reduction of the mortgage, either by way of lump sum or by instalments: the source of the instalments paid until 2000 was Ms Owen's bank account, into which the tenant's rent was paid and into which (I have found) Mr Stewart made occasional deposits; between 2000 and 2008 Mr Stewart paid the instalments. Throughout, Ms Owen alone has paid all rates and insurance for the Clifton Hill property, and all money spent on its maintenance and upkeep, except for one payment of $1,500.00 by Mr Stewart for roof repairs.

102. The circumstances which, in my opinion, make it unconscionable for Mr Stewart to assert in this proceeding, as he has done, that he has a one-third beneficial interest in the Clifton Hill property are these:

    (a) He enabled Ms Owen to sign and send to the Official Trustee the letter dated 2 July 1992 which stated that he had no beneficial interest in the Clifton Hill property. There was no evidence that he urged Ms Owen to sign and send that letter, but he had an input into a draft of that

[50] (1987) 164 CLR 137 at pp 147 – 148.

letter and approved the draft. By doing so he gave Ms Owen reason to be reassured that he shared her belief that she had the sole beneficial interest in the Clifton Hill property and that he did not have any beneficial interest in it.

(b) During the years that the Clifton Hill property was let to tenants, Mr Stewart largely left its management in the hands of Ms Owen. The rent was paid into her bank account. The instalments for repayment of the mortgage loan came out of that bank account. She paid all rates and insurance premiums. Except for one payment by Mr Stewart of $1,500.00 towards roof repairs, all money spent on maintenance and upkeep came from Ms Owen. Mr Stewart allowed Ms Owen to treat the Clifton Hill property as if it were her own.

(c) Once Ms Owen and Michele took up occupation of the Clifton Hill property, Mr Stewart continued to allow her to treat the Clifton Hill property as if it was her own, except that he paid mortgage loan instalments until 2008 and made a small payment to discharge the mortgage. Ms Owen continued to pay all rates and insurance premiums and continued to pay for all maintenance and upkeep. Although (so I have found) the parties discussed the matter of an occupation rent that would be payable by Ms Owen after Michele turned 18, the matter was never raised again before this proceeding commenced.

103. The claim that a constructive trust has arisen from circumstances that make it unconscionable for Mr Stewart to assert that he has a beneficial interest in the Clifton Hill property is not a claim that has been made explicitly in Ms Owen's counterclaim. But the Points of Defence did include, in paragraph 7, an allegation of unconscionable conduct (albeit in connection with Ms Owen's entry into the written agreement, which I have found did not involve any unconscionable conduct) and the counterclaim has sought declarations and orders that are consistent with a case that there is a constructive trust. The Tribunal is not a court of pleading. The Tribunal is required to act fairly and according to the substantial merits of the case, and to conduct each proceeding with as little formality and technicality as a proper consideration of the matters before it permit, so long as there is no departure from the rules of natural justice.[51] The written submission from Mr Carr on Mr Stewart's behalf has shown that Mr Stewart and his legal advisors were well aware that a constructive trust arising from unconscionability was one of the ways in which Ms Owen had put her case during the hearing.[52]

[51] *Victorian Civil and Administrative Tribunal Act 1998*, ss 97 and 98(1)(d) and (4).
[52] Written submission for Mr Stewart as applicant, paragraph 51.

104. I have accepted the claim Ms Owen makes that there is a constructive trust imposed upon Mr Stewart's legal one-third interest in the Clifton hill property. I proceed to consider what remedy is appropriate in the circumstances.

(d) Equitable Charge

105. As Ms Owen has sought equitable relief, she must in turn do equity to Mr Stewart. In view of the smallness of the cash contribution that Mr Stewart made to the cost of acquiring the Clifton hill property, and in view of the fact that over the years since acquisition almost all of the money that Mr Stewart has spent in relation to the Clifton Hill property has been in part payment of what was due under the mortgage loan rather than in direct acquisition or maintenance costs, I do not consider that the justice of the case requires a declaration that the trust upon which the parties hold the beneficial interest in the Clifton Hill property should be in shares commensurate with their respective contributions. Instead, I consider that the just and fair outcome is the declaration of a trust that the parties hold the land in trust for Ms Owen, with there being a means of compensating Mr Stewart for his financial contribution by making Ms Owen account to him for it.

106. The financial contribution which Mr Stewart has made totals $39,192.00, made up as follows:

Acquisition costs	$ 2,290.00
Roof repairs	$ 1,500.00
Mortgage loan repayments	
(1) Before 2000	$ 6,000.00
(2) 2000-2008 and for discharge in 2009	$24,402.00
	$39,192.00

107. The declaration of an equitable charge upon one party's interest in land to secure payments to the other party of the sums that the other party had contributed to a joint endeavour was a remedy granted in *Baumgartner v Baumgartner*[53] and a remedy which Gibbs CJ in *Muschinski v Dodds*[54] would have granted had he not been persuaded to make the order that Deane J favoured. So, as well as making the declaration of trust in favour of Ms Owen, I shall declare that Mr Stewart has a charge upon the Clifton Hill property to secure the repayment to him of his financial contributions.

(e) Laches

108. In his written submission Mr Willee for Ms Owen mentioned the equitable defence of laches without elaborating upon it or explaining how it is said to be applicable in this proceeding. The defence can arise if, by delay or inaction, a party making an equitable claim causes the other party to alter his or her position or permits a situation to arise which it would be unjust to

[53] (1987) 164 CLR 137.
[54] (1985) 160 CLR 583 at p 598.

disturb.[55] As Mr Stewart's claim has been brought under Part IV of the Act, not pursuant to any equitable claim of right, the defence of laches has no potential application. In case it should be thought that the defence of laches might be a reason not to make the declaration giving Mr Stewart the benefit of an equitable charge, I say that there has been no evidence of Ms Owen having altered her position in any way because his claim was not made earlier.

(f) Effect Upon Jurisdiction

109. The declaration that the parties hold the Clifton Hill property in trust for Ms Owen - that is to say, she is the sole owner of it in equity – does not mean that the Tribunal loses jurisdiction under Part IV of the Act to make any order at all. As registered proprietors as tenants in common the parties have been, and remain "co-owners" within the meaning of Part IV of the Act, they having "an interest in land" for the purposes of the definition of "co-owners" in s 222 of the Act, a definition which does not limit "an interest" to a beneficial interest.[56]

Hearing Fees

110. Mr Stewart paid hearing fees of $354.10 per day for the three-day hearing, a total of $1,062.30. Ms Owen's counterclaim was filed on the second day of the hearing, after I had given leave for her to file it. Had the counterclaim been filed before the hearing, the principal registrar would have required each party to pay one-half of the hearing fees. During the hearing I said that, whatever other orders I made as part of my determination of the proceeding, there would be an order that Ms Owen pay to Mr Stewart one-half of the hearing fees. So I am ordering Ms Owen to pay to Mr Stewart half of $1,062.30, which is $531.15.

Outcome

111. I do not make the order for sale and division of the proceeds of sale that Mr Stewart sought. Instead, Ms Owen's counterclaim succeeds. I will declare that the parties hold their respective registered interests in the Clifton Hill property upon trust for Ms Owen. I will order Mr Stewart to execute and deliver to Ms Owen an instrument of transfer of his registered interest to her upon payment by her to him of $39,723.15 being his financial contributions of $39,192.00 plus $531.15 as one-half of the hearing fees. I will declare that Mr Stewart has a charge upon the Clifton Hill property for payment to him of $39,192.00.

112. Irrespective of the rights and obligations that Part IV of the Act confers upon co-owners, an equitable charge upon land confers upon the person having the benefit of the charge a right of realisation by judicial process[57]: the person may seek an order for sale of the land.

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[55] *Halsbury's Laws of Australia*, volume 12, para [185 – 1835].
[56] *Krsteski v Jovanoski* [2011] VSC 166 at paras [42] – [43].
[57] *Halsbury's Laws of Australia*, volume 19, para [295 – 2065], footnote 5 and the authorities cited there.

113. Ms Owen should be given a reasonable time to pay Mr Stewart $39,723.15. I am allowing her until 1 July 2019. If she does not pay by that date Mr Stewart may, if he sees fit to do so, renew this proceeding to ask for an order for sale - either pursuant to Part IV of the Act or pursuant to his right as the person having the benefit of the charge – and division of proceeds of sale in accordance with the orders I make today.

114. As I would expect Mr Stewart, a former solicitor, to obey those orders, I do not go on to make orders commonly made in proceedings brought under Part IV of the Act empowering the principal registrar to sign a document on behalf of a party if the party does not. Should a need for such an order arise, Ms Owen may make appropriate application pursuant to liberty to apply.

Ms Owen's Contributions

115. Having decided that Ms Owen is the sole owner in equity of the Clifton Hill property, subject to the charge in Mr Stewart's favour, I have no need to make findings about how much Ms Owen's financial contributions have been. Being the sole owner in equity, she always had the responsibility for making mortgage payments, rates, insurance and for paying for maintenance and upkeep of the Clifton Hill property, and is not entitled to look to Mr Stewart for any of those things; on the contrary, Mr Stewart is entitled to recover from her what he paid towards mortgage repayments and for the roof repairs. However, in case it should hereafter be said that I should have made findings about those matters, and in deference to the industry of the legal representatives of each party in preparing and presenting their cases on those matters, I shall say something about them briefly.

116. *Mortgage loan repayments*. The Tribunal Book included a table of loan repayments said to have been made by each party[58]. It showed Mr Stewart to have made payments totalling $29,401.65. I have already said that I have accepted that figure. It also showed Ms Owen to have made payments totalling $167,786.63. The figure was not challenged and I see no reason not to accept it. It includes the two lump sum payments of $20,503.00 and $10,000.00 which Ms Owen paid in reduction of the mortgage debt.

117. *Rates*. I received rate notices from City of Yarra as an exhibit[59]. They were incomplete. The earliest of them was for 2008. Both written submissions made estimates of the total. For Ms Owen the estimate was $37,222.00. For Mr Stewart the estimate was $35,832.00. I would have decided upon the average of those two estimates, which is $36,527.00, as the total of rates paid by Ms Owen to the City of Yarra.

[58] TB volume 2 item E24.
[59] Exhibit R10.

118. I also received as an exhibit a series of accounts from City West Water, for service charges as well as usage charges[60]. I accept that Ms Owen paid all of those. Neither party offered any calculation of service charges.

119. *Insurance*. The Tribunal Book included a calculation of $7,470.12 for insurance of the Clifton Hill property paid by Ms Owen[61]. I did not understand there to have been any dispute about it.

120. *Maintenance expenditure*. Ms Owen departed from the Tribunal Book when documenting what she said she paid for repairs to and maintenance of the Clifton Hill property. She tendered three sets of documents which I received as exhibits.

121. The first was a list of such payments between May 1987 and September 1999[62]. The total was $11,589.35. The second was a list of such payments between June 2000 and March 2017[63]. The total was $6,911.86. I would accept the second of those figures. The first should be $10,089.35, because Ms Owen's calculation had included the whole $4,500.00 paid for roof replacement. She should have included $3,000.00 only, Mr Stewart having contributed $1,500.00.

122. The third was a list, in the form of a statement headed "James' Landscaping & House Maintenance" of work done between March 2012 and February 2018, totalling $54,704.00.[64] This was work done on the Clifton Hill property by Ms Owen's brother, who was not a qualified tradesman but, being aged in his 50's and no longer having full-time employment, did whatever odd jobs Ms Owen agreed that he could do and charged for it on an hourly basis.

123. I accept three submissions that Mr Carr made about the list of the brother's charges. The first was that the work was not done under a commercial arrangement where by only a reasonable number of hours could be charged for; instead, it was done to keep the brother employed, in a way in which the work done might expand to fill the time available for its completion. The second submission was that the list was a mixture of proper maintenance items and other items which were primarily for Ms Owen's amenity and enjoyment. The third submission was that, in those circumstances, it would be fair to allow one-half of the claimed amount of $54,704.00 i.e. $27,352.00.

[60] Exhibit R11.
[61] TB volume 2 item E27.
[62] Exhibit R6.
[63] Exhibit R7.
[64] Exhibit R9.

Occupation Rent

124. Ms Owen having sought compensation for money she had expended on the Clifton Hill property, Mr Stewart was entitled to respond by claiming an occupation rent from Ms Owen.[65] He made that claim only from December 2005 onwards, after Michele turned 18.

125. As I have decided that Ms Owen has had the sole beneficial interest in the Clifton Hill property (subject to a charge in favour of Mr Stewart) she cannot be, and is not, liable to allow him an occupation rent. However, in case it should hereafter be said that the issue of an occupation rent is one that ought to have been decided, I shall explain what I did about the issue during the hearing.

126. The Tribunal Book had included a letter from Claire Reardon of Jellis Craig North Side (PM) Pty Ltd dated 15 February 2018 headed "Rental Agreement, 16 Wright Street, Clifton Hill".[66] The letter included an assessment of what market rent the Clifton Hill property would have attracted between 1991 and 2018. Mr Carr, during his opening, indicated his intention to rely upon the letter as evidence and not to call Ms Reardon as a witness. On the final day of the hearing Mr Willee objected to Mr Carr's tendering of the letter. Mr Carr responded by applying for an adjournment so that he could call Ms Reardon.

127. By the time that this controversy arose I had already tentatively reached the view that the proceeding would be determined in a way that did not require a calculation of or an allowance for occupation rent, and that adjourning the hearing for the purpose of adducing better evidence than the letter would be a waste of time and money. Accordingly I told Counsel that I would receive the letter as evidence. But I have had no need to act upon it.

128. Should the issue of an occupation rent ever need to be decided, there ought to be better evidence about it than the letter.

A Vassie
Senior Member

12 February 2019

[65] The Act s 233(1), (2) and (3).