VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP247/2017

CATCHWORDS

Co-ownership – unequal contributions to purchase price – respondent occupies the land – whether a resulting trust – evidence rebutting presumption of resulting trust – whether a constructive trust – meaning of "just and fair" order for sale and division of proceeds – whether proof is required that moneys expended in relation to the land have increased its value – payment for improvements distinguished from payments for personal amenity – *Property Law Act 1958* s 233.

APPLICANT	Mr John Gates
RESPONDENT	Ms Lyndel Robinson
WHERE HELD	Melbourne
BEFORE	Senior Member A. Vassie
HEARING TYPE	Hearing
DATE OF HEARING	9 – 10 November 2017
DATE OF ORDER	12 January 2018
DATE OF REASONS	12 January 2018
CITATION	Gates v Robinson (Building and Property) [2018] VCAT 40

ORDER

1 Within 21 days, or such other time as the parties agree, the Respondent is to vacate the premises at 9 Buckingham Crescent, West Sunshine and remove rubbish and items of personal property. Should the Respondent fail to remove any rubbish and or items of personal property the cost of removal, disposal and storage of such rubbish or personal property is to be at the sole cost of the Respondent and paid from any money payable to the Respondent under Order 14(b)(vi)(B) below.

2 Within 60 days, or such other time as the parties agree, the property located at 9 Buckingham Crescent, West Sunshine in the State of Victoria and described in the Certificates of Title 11112, Folios 122 and 123 ('**the Property**'), shall be offered for sale by public auction.

3 Subject to Order 4 of these orders, the sale shall be conducted by a licensed real estate agent jointly selected by the parties ('**the Real Estate Agent**').

4 If the parties cannot agree on the Real Estate Agent within 10 days, then the Real Estate Agent is to be selected by the Principal Registrar who, to the

exclusion of the parties, is empowered to give any necessary direction. Each party may submit the name or names of a Real Estate Agent to the Principal Registrar who shall consider such submissions but will not be bound by them.

5 The Real Estate Agent must conduct the sale using all proper and lawful methods, including advertising as appropriate (whether by board, internet or otherwise) and arranging open for inspection times but not so as to be at an excessive or unreasonable cost.

6 Subject to Order 7 of these orders, and in order to give effect to the sale of the Property, the parties shall jointly select and appoint a solicitor or conveyancing agent to prepare all necessary documents and conduct the conveyance of the Property upon sale ('**the Solicitor**').

7 If the parties cannot agree on the identity of the Solicitor within 15 days, then the Solicitor is to be selected by the Principal Registrar who, to the exclusion of the parties, is empowered to give any necessary direction. Each party may submit the name or names of a solicitor to the Principal Registrar who shall consider submissions but will not be bound to them.

8 The reserve selling price shall be $500,000 or such other price as the parties may agree upon or where the parties cannot agree, as reasonably determined by the Real Estate Agent.

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 balance to be payable on within 90 days of the sale date or such other time as the parties agree.

10 Each of the parties may bid at the auction provided he or she holds a written pre-approval from a financial institution for finance for at least the reserve selling price or otherwise provides satisfactory evidence of an ability to pay an amount equalling the reserve price less the amount that would otherwise be payable to that party under these Orders.

11 Where one of the parties purchases the property at auction or by private treaty, then the residue payable by that party is to be reduced by the amount that would otherwise be payable to that party under these Orders.

12 The Real Estate Agent shall appoint the auctioneer for the sale.

13 If the Property is not sold at public auction:

a The property shall be offered for sale by private treaty at a price to be determined by the Real Estate Agent but not less than the reserve price. The sale price and/or the reserve price may be varied by written agreement of the parties or by the Real Estate Agent upon giving the parties 72 hours prior written notice of the Real Estate Agent's intention to vary the sale price or the reserve price.

b The advertising costs of the auction will become a charge upon the Property.

14 If the property is sold:

a Each of the parties must sign all necessary documents in order to give effect to the sale and conveyance of the Property (including the *Transfer of Land*) within 72 hours of receiving written notice to do so from the Solicitor. If any of the parties refuses or neglects to sign a necessary document, or if in the opinion of the Solicitor, it is not practicable to make the necessary request of that party, the Principal Registrar may sign the necessary document which shall in all respects be treated as an execution by the party who has failed or neglected to do so. An affidavit by a solicitor giving evidence of the refusal or neglect to sign a document, or as to the opinion of the Solicitor, shall be conclusive evidence of such refusal, neglect or opinion.

b The proceeds of sale must be applied as follows and in the following priority:

i Payment of 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;

iii Payment of any outstanding rates, charges, taxes and imposts which have not already been paid by the parties;

iv Payment of the reasonable legal costs associated with the sale and conveyance of the Property;

v Payment to the Respondent of $10,667.63;

vi The net balance to be paid to the parties in the following proportions:

A. Applicant: 50%

B. Respondent: 50%

15 The Principal Registrar is empowered to give such directions and execute such documents as may in her opinion is 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 the Property is sold.

17 Costs reserved. Any application fee or hearing fee payable upon the making an application for an order for costs shall be paid by the party making the application.

A. Vassie
Senior Member

APPEARANCES:

For Applicant	Mr A. Felkel of Counsel
For Respondent	Mr R. Ternes of Counsel

REASONS FOR DECISION

1 The applicant John Gates and the respondent Lyndel Robinson are first cousins. In 2004 they purchased a house property on land at 9 Buckingham Crescent, West Sunshine ("the land"). They are registered as proprietors of the land as tenants in common in equal shares. Although I have not seen any title documents, there appears to be no dispute that the land is described in Certificates of Title volume 11112 folios 122 and 123.

2 Mr Gates has applied for an order under Part IV of the *Property Law Act 1958* ("the Act") for sale of the land and division of the proceeds of sale between him and Ms Robinson. She does not oppose the making of such an order. The dispute in the proceeding is about what adjustment should be made, if any, to their respective legal interests in the land, and what compensation or reimbursement, if any, should be paid by one of them to the other out of the proceeds of sale before any division of the proceeds occurs.

3 At the hearing of the proceeding, which began on 9 November 2017 and concluded on the following day, the applicant attended a Tribunal Book ("TB") which the parties agreed I could receive as a single exhibit. I did. It included documents intended to support the claims of each party as to what he or she contributed by way of acquisition costs, mortgage repayments, rates and other outgoings, insurance, and improvements to the land and maintenance of the house. Both Mr Gates and Ms Robinson gave oral evidence. They were the only witnesses.

Acquisition of the Land

4 The parties purchased the land on 24 January 2004 for a price of $192,500.00. They had purchased it with a view to holding it as investment, doing some renovations to it and renting it out. They agreed that they would bear equally all expenses, including mortgage loan repayments; they had obtained a mortgage loan of $152,800.00 from a credit union to go towards the purchase money.

5 Near the beginning of his evidence in chief, Mr Gates said, "We agreed to buy [the land] jointly, and always intended that it be 50 – 50." During her evidence given in cross-examination, Ms Robinson said that "the arrangement was that we would pay expenses 50 – 50."

6 To meet the deposit, the balance of purchase money, stamp duty and other disbursements, Mr Gates contributed $30,075.00 and Ms Robinson contributed $17,813.00. There was no dispute about those facts and figures. During her cross- examination, Ms Robinson also said that Mr Gates "paid more than the 50% he was supposed to pay" when they purchased the land.

7 Upon completion of the purchase, the parties obtained registration of a transfer of the land to them as joint proprietors. (Later, as I shall describe, they became tenants in common, in equal shares, instead of joint

proprietors.) They jointly mortgaged the land to the credit union and became equally liable to repay the mortgage loan.

Ms Robinson Becomes the Occupier

8 Soon after the purchase — whether it was before or after settlement was not made clear in the evidence — the parties changed their plans for the land. Ms Robinson wanted to occupy the house herself. Mr Gates agreed to her doing so, and she did. Their evidence was that she agreed that she could pay rent to him once she began occupation, but they never agreed upon the amount of periodical rent or when or how it should be paid. In the event, Ms Robinson did not ever make any rental payments to Mr Gates.

9 Either before or shortly after Ms Robinson took occupation, Mr Gates paid $990.00 for polishing of the timber floor. Otherwise, all payments for improvements to the land or maintenance or repair of the house have been made by Ms Robinson.

10 Ms Robinson has remained in occupation to the present day. All payments of Council rates, water rates and insurance have been made by her, not by Mr Gates.

11 Until 2008 both parties contributed to mortgage loan repayments. Since 2009 Ms Robinson alone made the payments. The parties have agreed that Mr Gates' total payments under the mortgage have been $21,385.00 and Ms Robinson's have been $165,959.15.

12 In May 2008 the parties fell out. Ms Robinson asked Mr Gates to agree to sell his interest in the land to her and he said that he would. Matters, however, did not get to the stage of Ms Robinson ever making an offer. As a consequence of the falling-out, Ms Robinson registered an instrument of transfer which severed the joint tenancy so that the parties instead became registered as tenants in common in equal shares.

The Alleged Contributions

13 There is no dispute about the financial contributions that Mr Gates has made in relation to the land. Those contributions are:

Acquisition costs	$30,075.00
Mortgage payments	$21,385.00
Floor polishing	$990.00
	$52,450.00

14 In addition, Mr Gates claims to be entitled to compensation from Ms Robinson for her occupation of the land. The parties have agreed upon what was the total market rent payable from the date of the commencement of the occupation in 2004 until the hearing date. The total is $173,900.00, calculated on the basis of a valuer's assessment. The amount which Mr Gates claims is $92,253.95, which is 53.05% of the total.

15 The financial contributions that Ms Robinson claims to have made in relation to the land are:

Acquisition costs	$17,813.00
Mortgage payments	$165,959.15
Council rates	$15,840.86
Water rates	$5290.39
Building insurance	$9349.37
Solar panels	$4866.93
House repairs and renovations	$39,324.31
Garden and external works	$21,198.20
	$279,642.21

16 The first four of those contributions — the acquisition costs, the mortgage payments, the Council rates and the water rates — are not in dispute. The others are in dispute, either wholly or partly.

The Competing Claims for Adjustment of Interests

17 Mr Gates has sought an order that adjusts the parties' interests in the land so that they are no longer equal but he holds a 53.05% share and Ms Robinson holds a 46.95% share, and that there be compensation by one to the other after some of the above contributions have been taken into account. Mr Felkel of Counsel for Mr Gates submitted the following table in explanation of the adjustment sought; in the table, Mr Gates is described as "John" and Ms Robinson as "Lyndel".

Table 1: Contributions to purchase price

	John	**Lyndel**
Parties' contribution $47,888	**$30,075**	**$17,813**
Balance of purchase price of $152,800 (based on an equal legal interest and paid through Home Loan)	**$76,400**	**$76,400**
Total contribution to purchase price	**$106,475**	**$94,213**
Percentage	**53.05%**	**46.95%**

Mr Felkel submitted that because of the unequal contributions to the purchase price and other acquisition costs there was a presumption of a resulting trust so that the parties held their respective beneficial interests in the land in the proportions which equated to the proportions of their respective contributions.[1] He correctly submitted that a calculation made on

[1] *Calverley v Green* (1984) 155 CLR 242 at pp 246-247.

that basis must regard the parties' equal liability under the mortgage as being an equality of contribution by them for the mortgage debt and that payments of instalments in reduction of the mortgage debt are not to be regarded as direct contributions to the purchase price.[2] He also correctly submitted that for the purposes of such a calculation one may include not only the contributions to the purchase money but also incidental costs such as stamp duty and disbursements.[3]

18 Ms Robinson also has sought an order that adjusts the parties' interests in the land, but so that Mr Gates holds a 27.93% share and she holds a 72.07% share. A calculation that results in such an adjustment takes into account all contributions, actual or nominal (i.e. rent payable by Ms Robinson), not just contributions to the purchase price. Mr Ternes of Counsel for Ms Robinson submitted another table in explanation of the adjustment sought; again, Mr Gates is described as "John" and Ms Robinson as "Lyndel."

Property division calculations – method 3

	John	**Lyndel**	**TOTAL**
Deposit/acquisition costs	$ 30,075.00	$ 17,813.00	$ 47,888.00
Mortgage payments	$ 21,385.00	$ 165,959.15	$187,344.15
Loss of rent	$ 55,941.43	$ -	$ 55,941.43
House repairs/renos	$ 990.00	$ 39,324,31	$ 40,314.31
Council rates	$ -	$ 15,840.86	$ 15,840.86
Water rates (ex usage)	$ -	$ 5,290.39	$ 5,290.39
Building insurance	$ -	$ 9,349.37	$ 9,349.37
Solar panels	$ -	$ 4,866.93	$ 4,866.93
Garden and external	$ -	$ 21,198.20	$ 21,198.20
TOTALS	$108,391.43	$279,642.20	$388,033.64
Percentages	27.93%	72.07%	100.00%

In that calculation, Mr Ternes has included in Mr Gates' favour only "an amount for loss of rental income proportionate to his share of the mortgage repayments over the years", submitting that that was the fairest method of calculation.[4] Except for the way in which "loss of rent" has been treated, there is authority that the method of calculation set out in the table is a legally permissible approach to adjustments of interests in land by an order made under Part IV of the Act.[5]

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2 *Calverley v Green* (1984) 155 CLR 242 at p 257.
3 *Murtagh v Murtagh* [2013] NSWSC 926; *Halsbury's Laws of Australia*, volume 27, para [430-545], footnote 12.
4 Respondent's written submissions, paras 14-16.
5 *Tien v Pho* [2014] VSC 391 at [12] and [13].

19 For reasons that I give below, I have decided that no adjustments to the parties' interests are warranted and that they should remain equal. A fair and just division of the proceeds of sale of the land, however, in view of the contributions that the parties have made in relation to it, requires that Mr Gates make a compensation payment to Ms Robinson from the proceeds of sale before those proceeds are divided equally.

The Act

20 The parties are co-owners of the land within the meaning of Part IV of the Act. They agree that the land should be sold and that there should be a division of the proceeds of sale, in accordance with ss 228 and 229(1) of the Act. Those sections provide:

> **228 What can VCAT order?**
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> (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.
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> (2) Without limiting VCAT's powers, it may order—
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> (a) the sale of the land or goods and the division of the proceeds of sale among the co-owners; or
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> (b) the physical division of the land or goods among the co-owners; or
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> (c) that a combination of the matters specified in paragraphs (a) and (b) occurs.
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> **229 Sale and division of proceeds to be preferred**
>
> (1) If VCAT determines that an order should be made for the sale and division of land which is, or goods which are, the subject of an application under this Division, VCAT must make an order under section 228(2)(a) unless VCAT considers that it would be more just and fair to make an order under section 228(2)(b) or (c).

21 The obligation of VCAT under those sections is to make an order that achieves a "just and fair" division of the proceeds of sale. I accept Mr Felkel's submission that, to achieve an order that is "just" as well as "fair", the Tribunal should have regard to and be informed of the general law as well as Part IV of the Act, and should not impose "some form of instinctive justice".[6] One must, however always keep in mind the provisions of Part IV themselves. The general law must yield to these provisions wherever they differ from the general law, as s 233(5) of the Act, which I am about to set out, makes clear.

22 So far as it is relevant to this proceeding and to the parties' competing contentions in it, s 233 of the Act provides:

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6 *Sherwood v Sherwood* [2013] VCAT 1746 at [27]-[34], following *Edelsten v Burkinshaw* [2011] VSC 362 at [27].

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;

…;

(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;

…;

(e) in the case of land, whether or not a co-owner who has occupied the land should pay an amount equivalent to rent to a co-owner who did not occupy the land;

…

(3) VCAT must not make an order requiring a co-owner who has occupied the land to pay an amount equivalent to rent to a co-owner who did not occupy the land unless—

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

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

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

(4) …

(5) This section applies despite any law or rule to the contrary.

23 Having taken into account all the matters which s 233(2) requires it to take into account, VCAT, in discharging its obligation to achieve a "just and fair" division of the proceeds of sale of the land, may make an order:

i under s 233(1)(c), that an adjustment be made to a co-owner's interest in the land; or

ii under s 233(1)(a), that compensation or reimbursement be paid by one co-owner to another; or

iii so, that there is a combination of an adjustment of an interest and compensation or reimbursement.

"Resulting Trust"?

24 When purchasers of land contribute equally to the purchase price and to other incidental acquisition costs, there is a presumption of a resulting trust so that the purchasers hold the land in trust for themselves as tenants in common in the proportions in which they contributed.[7] The presumption, however, may be rebutted by evidence that the intention of the parties was otherwise.[8]

25 Although the unequal contributions of Mr Gates and Ms Robinson, as set out in the table contained in paragraph 17 above, do give rise to the presumption of a resulting trust in the way contended for by Mr Felkel, I consider that the presumption has been rebutted by the evidence of both parties: Mr Gates' evidence that they agreed to buy the land jointly and "always intended that it be 50 – 50", and Ms Robinson's evidence that Mr Gates "paid more than the 50% he was supposed to pay" when they purchased the land. Each of those pieces of evidence was admissible against the party who gave it,[9] for each was contending that he or she was entitled to a greater than 50% interest in the land. The evidence was of a common intention, at the time of acquisition, that their interests in the land should be equal. It rebutted the presumption of a resulting trust.

26 So I do not accept the submission on behalf of Mr Gates that it is just and fair to make adjustments to the parties' interests in the land so that Mr Gates holds a 53.05% share and Ms Roberson holds a 46.95% share.

"Constructive Trust"?

27 To support his submission on behalf of Ms Robinson that there should be adjustments to the interests so that she holds a 72.07% share and Mr Gates holds a 27.93% share, Mr Ternes argued that the facts give rise to a constructive trust whereby the parties hold the land in trust for themselves in those proportions.

28 A constructive trust is a remedial concept that meets the case when it would be unconscionable for one party to retain a benefit with respect to land that is not commensurate with that party's contribution to a joint acquisition and

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7 See footnote 1. Mr Felkel correctly submitted that there was no countervailing presumption of advancement, because the relationship of two cousins does not give rise to a presumption that one is intending to advance the other.

8 *Halsbury's Laws of Australia*, volume 27, para [430-550].

9 Ibid, especially footnote 5 to para [430-550].

retention of the land.[10] It is a remedy which equity imposes regardless of actual or presumed agreement or intention.[11] So the evidence to which I referred above and which rebutted the presumption of a resulting trust would not prevent there being a constructive trust if it is unconscionable for Mr Gates to have the benefit of the half interest in the land which he holds at law by virtue of being a registered proprietor of the land together with Ms Robinson as tenants in common in equal shares.

29 The circumstances which give rise to a constructive trust appear to be these. First, there has been a relationship or joint endeavour which has broken down. Secondly, there has been a financial contribution by one or both parties to the relationship or to the joint endeavour. Thirdly, in those circumstances and in all the circumstances, it would be unconscionable for one party to the relationship or joint endeavour to retain a benefit not commensurate with that party's financial contribution.[12]

30 In cases where a constructive trust has been found to exist the relationship between the parties has usually been one of de-facto husband and wife, but the concept is not confined to such a relationship. In the present case, the relationship between the parties has broken down. Mr Ternes submitted that the case was also one in which the basis of a "joint endeavour" had been removed. I do not accept that submission. At first the parties had had in mind to pursue a "joint endeavour" of holding the land as an investment property and renting it out, but then very soon changed their minds. Ms Robinson decided to live in the house herself and Mr Gates agreed to her doing so. The joint endeavour did not break down. It did not begin. This is a case of change of minds, not of the removal of the basis for a joint endeavour.

31 As shown in paragraphs 13 and 15 above, the financial contributions by the parties while they have been owners of the land have been unequal. However, in my view, the circumstances in which Ms Robinson has made greater contributions than the Mr Gates has made do not involve any conduct by Mr Gates that would make it unconscionable for him to retain a half interest in the land. Ms Robinson can be compensated in another way for the contributions she has made.

32 Between 2004 and 2008 both parties made contributions towards repayment of the mortgage loan. To 2008, Ms Robinson paid $51,942.53 and Mr Gates paid $21,385.00.[13] Why, to that date, the contributions had been unequal was not explained in the evidence. After 2008 Ms Robinson alone made all payments in reduction of the mortgage loan. Mr Gates' evidence was that at the time when Ms Robinson was indicating to him that she wanted to buy him out she asked him to stop making any further payments under the

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10 *Halsbury's Laws of Australia*, volume 27, para [430-620].

11 *Baumgartner v Baumgartner* (1987) 164 CLR 137 at p 148, approving Deane J. in *Muschinski v Dodds* (1985) 160 CLR 583 at p 614.

12 See footnote 10 and the authorities cited in footnote 11.

13 TB p 342. The figures were agreed.

mortgage. Ms Robinson did not contradict that evidence. I accept it. There was therefore nothing unconscionable about Mr Gates' omission to contribute mortgage loan repayments after 2008.

33 I shall be dealing in detail with the claims that Ms Robinson is making with respect to improvements to or maintenance of the house and land. For the moment, however, it is relevant to observe that, with one exception, all work that was done on the land and the house and all payments that she made for that work were done or made on Ms Robinson's initiative, without any request by Mr Gates for the doing of the work and without his having been consulted before it was done. The exception was a retaining wall which she wanted to replace; she consulted Mr Gates about that, and he did not approve of it. In particular, she spent $15,917.00 in 2008 on renovating the bathroom and laundry, on her own initiative and without consulting Mr Gates. This is not a criticism. I am merely explaining why it was not unconscionable that Mr Gates did not contribute to the cost. Likewise, Ms Robinson paid the rates and insurance premiums on her own initiative, without asking Mr Gates to contribute to them.

34 It is noteworthy that in one of the leading cases where the constructive trust remedy was expounded and put into operation[14] the High Court did not make an order that altered the parties' ownership interests. A man and a woman who had lived together for three years decided to buy a property, erected a house on it and renovated a cottage on it. The woman contributed $25,259.45 and the man contributed $2549.77 to the purchase and improvement of the property, which was conveyed to them as tenants in common in equal shares. The High Court declared that the parties held their respective legal interests upon trust to repay to each his or her respective contribution and as to the residue for them both in equal shares.

35 For those reasons I conclude that it is not unconscionable for Mr Gates to retain a half interest in the land, that it is not appropriate to apply the constructive trust remedy in this proceeding, and that it would not be just and fair to alter the interests of the parties in the land in the way contended for on Ms Robinson's behalf.

Mortgage Repayments, Rates and Insurance

36 It is just and fair to make an order for compensation, under s 233(1)(a), to each party for what he or she has paid by way of mortgage repayments: $21,385.00 by Mr Gates, and $165,959.15 by Ms Robinson. These figures have been agreed.

37 Likewise, Ms Robinson should be compensated for the Council rates and water rates (excluding usage charges) which she has paid throughout. The figures of $15,840.86 for Council rates and $5290.39 for water rates have been agreed.

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14 *Muschinski v Dodds* (1985) 160 CLR 583.

38 As for building insurance, Ms Robinson claimed to have contributed $9349.37. While in the Tribunal Book she meticulously documented the payment of Council rates and water rates, the Tribunal Book contained no documents about insurance and Ms Robinson did not give any oral evidence about a calculation of $9349.37. She did, however, tender and I received in evidence[15] insurance renewal notices and certificates for the years 2008, 2009, 2010, 2011 and 2016. These documents show that Ms Robinson had taken out and renewed for those years a combined insurance policy for the building at 9 Buckingham Crescent, for contents and for a motor vehicle, and that the total premiums paid for the building insurance component for those years totalled $3750.48. So she proved the payments of building insurance in that total sum and should be compensated accordingly.

"No Proof of Increase in Value"

39 In relation to Ms Robinson's claims that she had contributed payments towards installation of solar panels ($4866.93), house repairs and renovations ($39,324.31) and garden and other external works ($21,198.20), Mr Felkel submitted that I should not take any of them into account because Ms Robinson had not led any evidence that the subject matter of any of those payments had increased the value of the land and so had not proved that they had increased the value. In support of the submission he cited a passage from a judgement of the Supreme Court of Western Australia,[16] and set out the passage in his written submission. In reproducing it I include his underlining.

> It is therefore necessary to examine the principles which apply to claims for an account or an allowance in respect of improvements, mortgage repayments, repairs and other like expenditure on property as between beneficial co-owners.
>
> …
>
> In an instance where the beneficial ownership of the property is shared between two people, either husband or wife, co-habitees or others, and one leaves, with the remaining co-owner continuing or taking over mortgage repayments and the responsibility for repairs and improvements, there can be an account taken in equity between those parties. <u>For the paying party to recover an allowance for any appreciation in the value of the capital asset because of these outgoings it is necessary to prove that the expenditure has, in fact, produced an ascertainable increase in the capital value as, for example, in the case of renovation which has enhanced the market value of the house or, in relation to the repayments of mortgage whether repayments have affected an ascertainable reduction in the principle previously owing under the mortgage. In the absence of proof of an increase in capital value so caused, no recovery because of unrelated appreciation in value will be possible and the parties are left</u>

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15 Exhibit R2.

16 *Silvester v Sands* [2004] WASC 266 at [139]-[141] (Heenan J.)

> to hold the property, or share the proceeds of any sale, on the basis of their established beneficial interests, usually, but not always, arising from the extent of the contributions towards the cost of its acquisition
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> …
>
> Often there will be a situation where one of the co-beneficial owners vacates the premises and leaves the other in occupation who, staying on, through choice of necessity continues to meet the mortgage repayments, rates, taxes and like expenditure but, in such cases, the person claiming a contribution or an account will be chargeable with occupation rent in respect of the period in which he or she continued to enjoy sole possession of the premises.

40 If the submission were correct it would follow that I should also not take into account the payment of $990.00 that Mr Gates made for floor polishing, because he too did not lead any evidence of a consequent increase in value.

41 Mr Felkel drew attention to a VCAT decision[17] in which the Senior Member, after setting out the above passage, accepted that it was the correct approach to take to a claim based upon expenditure on repairs and improvements and stated that a Supreme Court judge in Victoria had cited it with approval.[18] But the only part of the passage which the Victorian judge cited with approval was the final paragraph, beginning "Often there will be a situation …", which dealt with the matter of an occupation rent. Moreover, that Victorian case turned on the law relating to partnership, not on upon Part IV of the Act. So there is no Victorian decision which binds me to accept the proposition that in a claim made under Part IV there can be no allowance for expenditure on repairs, maintenance or improvements unless the subject matter of the expenditure has been proved to have increased the value of the land.

42 The *Property Law Act 1969* (Western Australia) contains provisions[19] which, as in Part IV of the Victorian Act, enable the making of an order for sale of co-owned land, the discharge of any encumbrance affecting the land directed to be sold and the division of the residue between the parties interested. But there is no provision in the Western Australian Act like s 233 of the Victorian Act, which specifies the matters which VCAT must take into account when making an order for compensation or for adjustment of an interest, and which in sub-section (5) states that the section applies "despite any law or rule to the contrary." The specified matters which VCAT must take into account include "any amount that a co-owner has reasonably spent in improving the land" and "any costs reasonably incurred by a co-owner in the maintenance … of the land." There is no qualification in the section that the amount spent on the costs incurred must have been proved to have increased the value of the land.

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17 *Sherwood v Sherwood* [2013] VCAT 1746 at [87]-[89].
18 *Rosselli v Rosselli* [2007] VSC 14 at [156] (J. Forrest J.)
19 Sections 126 and 127.

43 So, while a court in Western Australia must apply the general law, contained in the passage I set out in paragraph 39 above, when deciding whether to make an allowance for the cost of renovations, etc. in the division of the proceeds of sale of co-owned land, and by applying the general law must require the party seeking the allowance to prove that there has been an increase in the value of the land because of the renovations, etc., a VCAT member must instead take into account of the matters set out in s 233 of the Act, unqualified as they are by any such requirement, for s 233 applies despite any law or rule to the contrary.

44 I therefore reject the submission that I should not take into account monies which Ms Robinson claims to have spent upon the house and the land because there was no evidence that there had been a consequent increase in value.

Solar Panels

45 Ms Robinson gave evidence that she had had solar panels installed on the house at 9 Buckingham Crescent in May 2015, in the hope that by doing so she would reduce her electricity bills. She claimed to have paid $4866.93 for the solar panels. The Tribunal Book did not include any contract for the installation of the panels or any record of claimed payments. In the end, Mr Felkel conceded the figure claimed but not any entitlement of Ms Robinson to the benefit of it.

46 In view of the well-known contemporary concerns in the community about climate change, renewable energy and electricity prices, I consider that many (but not all) prospective purchasers of the property would regard the presence of solar panels as a desirable feature which adds to the property's marketability and so is an improvement to the property. In the reckoning of whether one party shall pay to the other as compensation before the proceeds of sale are divided, I should and do allow that amount of $4866.93 to Ms Robinson.

Improvements, Maintenance and Repair

47 Ms Robinson has claimed $39,324.31 for "house repairs and renovations". The Tribunal Book included annual lists of her alleged payments for these, and include copies of invoices and receipts which documented many, but not all, of the items for which she was claiming.

48 I do not allow those items which represent the cost of purchase of (for example) paint, paint brushes and rollers, and sealer, apparently purchased for the purpose of Ms Robinson's do-it-yourself painting and performance of other minor maintenance items. I do not allow the claimed cost of locks and keys and similar items which appear to be for Ms Robinson's personal security and benefit rather than improvement to the property.

49 I do allow the items which one could reasonably regard as having been improvements to the property, whether by way of additional fixtures and

fittings or by way of upgrading existing fixtures and fittings. By far the most significant in terms of amount was $15,917.00 which Ms Robinson paid in mid-2008 for renovation of the existing bathroom and laundry. It and the others which I allow are satisfactorily documented in the Tribunal Book. I set them out, as follows, to the nearest dollar, the column "TB" referring to the relevant page in the Tribunal Book. The items carrying an asterisk are those which Mr Felkel conceded (subject to his overall objection, referred to in paragraph 39 above, which I have rejected).

Year	TB	Item	Amount
2004	193	Plumbing to connect trough to main service*	$ 407
"	200	Television antenna	$ 190
2005	208	Television outlets	$ 150
"	212	Roof and wall repair*	$ 960
"	213	Cupboard in toilet	$ 490
"	225	Gas heater*	$ 359
2007	227	Removal of old air conditioning unit and shelving	$ 1419
2008	234	Insulation: pink batts	$ 957
"	252	Wall tiles purchased for bathroom renovation	$ 1116
"	253	Bathroom door	$ 250
"	254	Matching door	$ 281
"	256	Renovation of bathroom and laundry	$15,917
"	258	New shower frame to replace old shower	$ 732
"	260	Cupboard doors	$ 440
"	266	Door to exterior	$ 1581
"	268	Floor tiles purchased for bathroom	$ 262
2010	286	Security door*	$ 650
"	287	Door to exterior	$ 278
			$26,439

50 There were other items which I might have allowed if there had been documentary evidence of them, but there was none.

Year	TB	Item	Amount
2004	189	Taps for laundry and back yard	$ 407
2005	206	Alarm system	$ 902
2008	231	Air conditioner	$ 499
2010	289	Plumber, and gas water heater	$ 107
2012	290	"Spotlight"	$ 790
2014	292	"2 sheets laser light"	$ 495
2017	295	Replace TV antenna	$ 150
			$3368

51 I also do not allow items of a kind that are notoriously susceptible to depreciation in value and to fair wear and tear:

Year	TB	Item	Amount
2004	197	Venetian blinds	$ 580
2008	236	Roll-up blinds	$ 230
"	241	Lounge room blinds	$ 230
"	248	Carpet	$ 313
"	263	Light fitting	$ 150
			$1503

52 In the result, I allow Ms Robinson $26,439.00 for improvements, maintenance and repair. I allow Mr Gates $990.00 for the polishing of floorboards.[20]

Garden and External Works

53 Ms Robinson has claimed $21,198.20 paid by her for making changes to the garden at 9 Buckingham Crescent, maintaining the garden and improving or otherwise altering the exterior. Again, the Tribunal Book documented many of her payments by including copies of relevant invoices or receipts.

54 For the more substantial items of expenditure I make a distinction between those which can reasonably be regarded as improvements to the land and those which can just as readily be regarded as having been for Ms Robinson's personal amenity and enjoyment. She purchased two water tanks and spent money having them installed. Whatever might be a prospective purchaser's plans and intentions about a garden, I think that the prospective purchaser would welcome the tanks as a good drought-proofing

[20] TB p 23.

measure and would consider that they improved the land. Similarly money spent on replacing fences — by way of a half share of the cost, the other half share being met by the relevant neighbour, except for one fence the whole cost of which Ms Robinson bore because (so she said and I accept) the neighbour was hostile and she needed to replace the fence for her own protection — I regard as having been spent on improvements to the land. By contrast, money spent on landscaping and paving may have produced a result that was pleasing to her but might not be to everyone's taste and which prospective purchaser might not necessarily want to retain. I also put into the category of money spent for Ms Robinson's personal amenity the cost of tree removal; her evidence was that the tree had been healthy but she had wanted to plant a vegetable garden in its place.

55 I allow the cost of what I consider to have been improvements to land. Again I set those out, to the nearest dollar, and with the column "TB" and the asterisks having the same significance as for the table under paragraph 49. The notation "R1" refers to the document received as exhibit R1, separately from the Tribunal Book.

Year	TB	Item	Amount
2006	305	Back fence (½ share)*	$ 620
2006	306	Right side fence (part)* (½ share)	$ 425
2007	313	Left side fence (full cost)	$2380
2007	314	Right side fence (other part) (½ share)	$ 347
2008	319	Water tank (first)	$1095
2008	320	Installation thereof	$1155
2008	R1	Water pump	$ 250
2009	327	Water tank (second)	$1033
2009	328	Installation thereof	$ 451
			$7756

56 I do not allow those items which I consider to have been for Ms Robinson's personal amenity, not for improvements, or the item for the "sleeper wall" to which, as I understood the evidence, Mr Gates had refused to agree when Ms Robinson consulted him about it.

Year	TB	Item	Amount
2007	312	Sleeper wall	$2300
2008	317	Tree removal	$ 405
2008	318	Landscape design: tree	$ 770

		lopping	
2009	325	Sandstone bricks	$ 739
2009	326	Paving	$2335
			$6549

57 I do not allow the numerous items claimed for things purchased for maintenance of the garden: plants, mulch, fertiliser, potting mix, and so forth. Those were for maintenance of something for Ms Robinson's personal amenity and enjoyment.

58 In the result, I allow Ms Robinson $7756.00 for improvements to the exterior.

Occupation Rent

59 Ms Robinson having agreed to pay rent to Mr Gates at the time when she began to occupy the land alone with his consent, there is no need for any other legal justification for allowing to Mr Gates one half of the market rent payable during the period of her occupation until the date of the hearing. The parties have agreed that the market rent for that period was $173,900.00. One half of that is $86,950.00. Had Ms Robinson not agreed to pay rent, the justification for allowing an occupation rent in favour of Mr Gates in that amount would have been s 233(2)(e) of the Act, in the circumstances that Ms Robinson has sought compensation for money within the terms of s 233(3)(a).

Balancing the Compensation

60 The amounts I have allowed it to Mr Gates and Ms Robinson respectively for money expended in relation to land are:

Item	Mr Gates	Ms Robinson
Acquisition costs	$30,075.00	$ 17,813.00
Mortgage payments	$21,385.00	$165,959.00
Council rates		$ 15,840.86
Water rates		$ 5290.39
Building insurance		$ 3750.48
Solar panels		$ 4866.93
Improvements to house	$990.00	$ 26,439.00
Improvements to exterior		$ 7756.00
	$52,480.00	$247,715.66
		$ 52,480.00
		$195,235.66

61 To equalise the amounts expended there should be an allowance to Ms Robinson of half of $195,235.66, which is $97,617.83.

62 Offset against that equalising allowance is the amount of $86,950.00 payable by Ms Robinson to Mr Gates for occupation rent. The result is that the balance payable by Mr Gates to Ms Robinson is $10,667.83, calculated as follows:

Equalising allowance	$97,617.83
Occupation rent	$86,950.00
	$10,667.83

The Orders

63 The orders I make for the sale of the land and division of the proceeds of sale are largely in the form which Mr Felkel proposed, Mr Ternes accepted and s 232 of the Act authorises, except that I order that before there is a division of the net proceeds of sale between the parties equally there must be a payment to Ms Robinson of $10,667.83.

A. Vassie
Senior Member