VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1352/2016

CATCHWORDS

Co – owned property - Part IV of the *Property Law Act 1958* – application for sale order – claim for adjustment

APPLICANT	Khanh Kim Huynh
RESPONDENT	Mr Bao Kim Huynh (also known as Mr Kim Bao Huynh)
WHERE HELD	Melbourne
BEFORE	Member B. Josephs
HEARING TYPE	Hearing
DATE OF HEARING	24 February 2017 and 28 June 2017
DATE OF ORDER	16 October 2017
CITATION	Huynh v Huynh (Building and Property) [2017] VCAT 1685

ORDERS

1. On the Tribunal's own motion, pursuant to section 146(4)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*, no person other than a party to the proceeding or their legal representatives may inspect the Tribunal's file of this proceeding unless the Tribunal orders otherwise.
2. On the Tribunal's own motion, where a copy of any sale order is attached to either a contract of sale or section 32 vendor's statement, any reference to the reserve price or the proportion of the net proceeds of sale to be distributed to the parties is to be redacted.
3. Pursuant to section 228 of the *Property Law Act 1958* ("the Act"), the property, located at 16 Nicholson Street, Footscray in the State of Victoria, and described in Certificate of Title Volume 2178 Folio 510 ("the property") shall be offered for sale by public auction.
4. Subject to Order 5 of these orders, the sale shall be conducted by a licensed estate agent jointly selected by the parties ("the real estate agent").
5. If the parties cannot agree on the real estate agent within 30 days of the date of these orders, 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.

6. 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.

7. Subject to Order 8 of these orders, and in order to give effect to the sale of the property, the parties shall jointly select and appoint a solicitor to prepare all necessary documents and conduct the conveyance of the property upon sale ("the solicitor").

8. If the parties cannot agree on the identity of the solicitor within 30 days of the date of these orders, 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 such submissions but will not be bound by them.

9. The reserve selling price shall be such price as the parties may agree upon or where the parties cannot agree, as reasonably determined by the real estate agent.

10. The terms of the contract shall provide for a deposit of not less than 10% upon the signing of the contract with the balance to be payable within 60 days after the signing of the contract or such other time as the parties agree.

11. 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 be payable to that party under Order 15(b) (v) of these orders.

12. If 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 by that party under Order 15 (b) (v) of these orders.

13. The real estate agent shall appoint the auctioneer for the sale.

14. 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 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.

15. 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.

(b) the proceeds of sale will 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 applicant;

  (iv) payment of the reasonable legal costs associated with the sale and conveyance of the property; and

  (v) the net balance to be paid to the parties in the following proportions:

    - the first $228,724.27 to the applicant; and

    - the remainder to be distributed equally between the applicant and the respondent.

16. The Principal Registrar is empowered to give such directions as may in his or her opinion be necessary or desirable to give effect to these orders.

17. 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.

18. No orders as to costs.

B. Josephs
Member

APPEARANCES:

For Applicant	Mr G. McCormack of Counsel
For Respondents	No appearance

REASONS

1. The applicant, Khanh Kim Huynh ("Khanh"), commenced this application on 11 October 2016. She is the sister of the respondent, Bao Kim Huynh ("Bao"). Bao is also known as Kim Bao Huynh.
2. Khanh and Bao are the registered joint proprietors of a property at 16 Nicholson Street, Footscray, Victoria ("the property").
3. As a general principle, when two people own an interest in land as "joint proprietors" their respective legal interests in that land are the same, and upon the death of one of them, the deceased's interest in the property automatically passes to the survivor.
4. Under Part IV of the Act, a co-owner of an interest in land may apply to the Tribunal for orders for the sale or division of the land.
5. Khanh has made application for orders that the property be sold and for division of proceeds of that sale.

THE ACT

6. The key sections of the Act, relevantly, state:

> Division 2 – Sale and division
>
> 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; or
>
> (b) the physical division of the land or goods among the co – owners; or
>
> (c) a combination of the matters specified in paragraphs (a) and (b).
>
> (3) A person who makes an application under subsection (1) must give notice of the application to the holder of a security interest over the land or goods to which the application relates.
>
> 228 What can VCAT order?
>
> (1) In any proceeding under this Division, VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.
>
> (2) Without limiting VCAT's powers, it may order-
>
> (a) the sale of the land or goods and the division of the proceeds of sale among the co – owners; or

(b) the physical division of the land or goods among the co – owners; or

(c) that a combination of the matters specified in paragraphs (a) and (b) occurs.

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 it would be more just and fair to make an order under section 228 (2) (b) or (c).

(2) Without limiting any matter which VCAT may consider, in determining whether an order under section 228 (2) (b) or (c) would be more just and fair, VCAT must take into account the following-

(a) the use being made of the land or goods, including any use of the land or goods for residential or business purposes;

(b) whether the land is, or the goods are, able to be divided and the practicality of dividing the land or goods;

(c) any particular links with or attachment to the land or goods, including whether the land or the goods are unique or have a special value to one or more of the co-owners.

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;

(d) damage caused by the unreasonable use of the land or goods by a co-owner;

(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.

…

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

BACKGROUND

7. Affidavits of Khanh and Thi Cam Hong Lu (“Thi”) were filed with the application. Thi is 64 years old and is the mother of Khanh and Bao. The application confirmed that Khanh is represented by her solicitor, Mr Tom Le (“Mr Le”) from the law firm, Zeljko Stojakovic.

8. In her affidavit of 6 October 2016, Khanh relevantly affirmed that:

- she was then 37 years old;
- in June 1997, Thi purchased the property for $145,000;
- Thi effected the purchase by paying the 10% deposit from her own savings and the balance was financed by a mortgage from the Bank of Melbourne (“BoM”);
- the property is now mortgaged to the National Australia Bank (“NAB”);
- the amount estimated as currently owing on the NAB mortgage (to be later confirmed) is $370,000;
- Westpac Bank (“Westpac”) purchased BoM after the property purchase;
- exhibits to the affidavit included the Transfer of Land dated 22 September 1997, Westpac statements for the mortgage for 2005 – 2012 and NAB statements for the mortgage for 2012 – 2015;

- the Westpac loan account was in the names of both Khanh and Bao and the statements were sent to the property;
- bank statements prior to 2005 cannot be obtained;
- the NAB account is also in the names of both Khanh and Bao but the statements have been sent to Khanh alone;
- shortly after settlement of the property purchase, Thi, Khanh and Bao all moved into the property;
- they all lived at the property until August 2012 when Thi and Khanh moved out, leaving Bao living at the property;
- in 1998 Thi opened her own business, a restaurant called "Lemon Bistro" in Little Bourke Street, Melbourne ("the restaurant");
- from March 2001, Khanh joined Thi in running the restaurant, later purchasing her mother's share of the business and Khanh then became sole owner;
- Thi, however, still worked at the restaurant until it was sold in July 2014;
- over the time the restaurant operated, income earned from it was applied towards the property, including all mortgage repayments and all outgoings relating to it such as council and water rates and insurance;
- Bao has not made any such payments and is a long term chronic heroin addict;
- Bao has never worked, except for a short time of around two to three months in 2009 and prior to him going to prison in 2012, when Thi and Khanh attempted to help him on each occasion by offering him employment at the restaurant. However, his attendance working as a kitchen hand was only sporadic until he ceased altogether;
- Khanh and Thi were forced to cease living at the property in August 2012 due to safety fears as Bao became more violent and uncommunicative and regularly brought strangers to the property;
- Bao has not paid any rent for his ongoing occupation of the property;
- Bao has not maintained the property since August 2012 with broken windows visible from outside it;
- Bao has demanded that Khanh transfer her share of the property to him;
- Khanh remains fearful of him and has been unable to resolve their co-ownership issues;
- due to Bao's failure to make any contributions to the purchase of the property or to make any payment for outgoings, including mortgage

repayments, together with his non-payment of rent and failure to maintain it, Khanh seeks an adjustment as between her and Bao so that any net sale proceeds are paid solely to Khanh;

- proceedings had previously been instituted by Thi and Khanh in the Federal Circuit Court seeking orders under the Family Law Act 1975 for sale of the property but these were struck out due to lack of jurisdiction;
- throughout the Federal Circuit Court proceedings, Bao evaded service;
- in light of Bao's attitude and behaviour, Khanh did not believe that he would vacate the property in the absence of both a Tribunal order to do so and enforcement of that order, and any maintenance required for an optimum sale would not be able to be undertaken in the meantime;
- in such circumstances, Khanh also sought an order for vacant possession.

9. In her affidavit of 7 October 2016, Thi relevantly affirmed that:
   - Bao was then 39 years old;
   - he completed a Bachelor of Engineering degree at RMIT but did not work during his tertiary education;
   - Khanh completed a Bachelor of Business degree at Latrobe University and worked on a part -time basis during her tertiary studies;
   - in 1992, Thi divorced her first husband, the father of Bao and Khanh, and in 1996 she married her second husband;
   - when Thi purchased the property, she paid the deposit from her own savings;
   - she put the property in the names of Khanh and Bao to secure their future;
   - at the time she purchased the property, neither Bao nor Khanh contributed to the purchase price;
   - she first became aware of Bao's heavy drug use when he entered methadone rehabilitation in 1996, however, his use has continued;
   - she has repeatedly, but unsuccessfully, tried to help Bao overcome his drug problem;
   - in mid-2015, her relationship with Bao became intolerable, due to his increased levels of violence and abuse, and his constant demands both for money and for the property to be transferred to him solely;
   - Bao has not made any contributions to the property, never paid rent, and has not maintained it.

10. At a directions hearing on 9 December, 2016, at which the respondent did not appear, various orders were made for filing and service of documents

including a Statement of Contributions, notification of the proceedings to NAB, and listing the hearing on 24 February 2017.

11. Just prior to the directions hearing, Mr Le swore an affidavit which deposed to, among other matters, the failure of Bao to respond to any communications by or on behalf of Thi and Khanh, that Bao continued to reside at the property, and that photographs taken of the property two days prior to the directions hearing showed it surrounded by a high concrete wall with a lock and chain on the gate but no uncollected mail visible.

12. The Tribunal was notified by Bao in early January 2017 that he had not been able to attend the directions hearing as he was in remand. This notification was provided after he had received a copy of the orders.

13. Another affidavit was affirmed by Thi on 30 January 2017. She confirmed that she had attended the property on 23 January 2017 with Mr David Matler, a valuer. She further relevantly stated that:

    - when she arrived at the property, she met the valuer at the front of it;
    - the front gate was unlocked and she walked around the outside of the property calling out to Bao;
    - a female friend emerged to whom Thi asked if Bao was at home. The friend denied that he was at home;
    - in response, Thi explained she was Bao's mother and that she wished to come inside the house to have a look at it;
    - the friend agreed and gave her access and this enabled Mr Matler to also access and inspect it to provide a report;
    - when Thi entered the house, Bao was eating in the kitchen;
    - Bao was present during Mr Matler's inspection;
    - Thi explained to Bao both that the valuer was attending to inspect the property to prepare a valuation and that because of Bao she was incurring legal costs to have the property sold;
    - Bao did not make any response to Thi's explanations;
    - Thi was horrified at the condition of the property compared with the neat and tidy manner in which she had left it in 2012;
    - she noted widespread rubbish, broken doors and windows, poorly maintained lawns and an unregistered car parked at the property;
    - shortly after settlement of her purchase of the property, she paid around $300,000 to demolish the old house on it and to build a new house. She was an owner builder but has not retained any documentation for the works;
    - when the property was purchased by her and registered in the names of Khanh and Bao, the plan was that Thi would live in the property,

with the expectation that Khanh and Bao would look after her in her advanced years and when she died it would be left to equally divide between Khanh and Bao;

- in 1998 or 1999, just before the new house was completed, it became very apparent to her that Bao was a heroin addict and at around the same time, Bao's defacto partner, who was then pregnant with Bao's daughter, ended her relationship with, and separated from, Bao;
- when Thi realised and accepted that Bao had a drug problem, she knew that Bao would not be able to financially or emotionally support her in her old age and that only Khanh would be able to support her in her old age;
- Thi paid the majority of mortgage repayments and outgoings relating to the property because she knew that Bao would not be able to do do;
- Khanh financially helped her when she could;
- she confirmed and verified the contents of the Statement of Contributions prepared by Mr Le, which along with Mr Matler's report, were exhibits to her second affidavit.

14. Mr Matler's expert report contained a sworn valuation of the property as at 23 January 2017. He estimated the total size of the property at 372 square metres, with the house being 234 square metres and the garage/storeroom being 40 square metres in size. He regarded the property as being located within an older and very well established residential area. However, the amount of his valuation was reduced due to what he described as "the very poor presentation of the subject residence." He also provided, as requested, a rental value estimate for the property for a period of four years from August 2012.

15. Mr Matler also swore an affidavit on 23 February 2017 in which he confirmed that the alleged cost of construction of the residence in 1998 in an amount of $300,000 would seem to have been reasonable at the time.

16. Mr Le filed a further affidavit, sworn on 21 February 2017, which confirmed notification of the proceedings to NAB, service of Statement of Contributions and supporting documents on Bao, and compliance by Khanh with the Tribunal orders of 9 December 2016.

17. The hearing commenced on 24 February 2017. Khanh and Thi attended. Mr McCormack of counsel, instructed by Mr Le, appeared for Khanh. However, the start of the hearing was delayed a short time as a telephone call had been received by the Tribunal from Bao earlier that morning indicating that he would arrive for the hearing at 10.20 am. When he did not arrive, the hearing began. Mr McCormack handed up a copy of his submissions and then commenced presentation of Khanh's case. However, prior to completion, Bao appeared at 12.20 pm.

18. To direct questioning by me, after being sworn in, Bao neither provided a credible explanation for his conduct generally nor specifically about why he had failed to file and serve any supporting material, why he had failed to comply with orders, and why he had arrived at the Tribunal so late. However, despite these circumstances, in the interests of natural justice and not shutting him out entirely, I adjourned the proceeding part heard to 28 June 2017, which was the next available and suitable date for all parties. I also made orders permitting Bao to file and serve all documents and submissions on which he sought to rely before the next hearing date. I also specifically recorded in my orders that, despite having already provided Bao with all of the supporting material of the applicant previously, Khanh's solicitor again provided him on 24 February 2017 with copies of all affidavits, the application, and outline of submissions and attachments filed, served and relied upon by Khanh to that date. Additionally, my orders also noted that Bao acknowledged to the Tribunal that he had been verbally provided with compliance dates and the next hearing date. He also did not dispute that he was still living at the property and he provided current mobile phone and email address details.

19. On 29 March 2017, Thi made a further affidavit in which she reiterated that income earned over the years from the restaurant had been applied towards the property. Company tax returns for the restaurant for the financial years ending 30 June 2008 through to 30 June 2014 (inclusive) were exhibits to the affidavit. As the business was sold in 2014, there was no tax return for the financial year ending 30 June 2015. After the business was sold in 2014, the responsibility of making mortgage repayments and payment of outgoings for the property, according to Thi, "shifted" to Khanh, and she continues to make these payments.

20. In this third affidavit, Thi also referred to, and explained, Asian culture – filial piety. According to her, filial piety is a large part of Vietnamese cultural expectations mandating the younger generation to take care of their elderly parents who are in need. This enables the elderly parent(s) to live in the comfort of familiar surroundings, where they can speak their own language and eat similar food. Thi maintains that this is what is expected of adult children when their parents are in their advanced years and Khanh has agreed to this requirement.

21. Khanh also made a further affidavit on 29 March 2017. She confirmed that after the restaurant sale in 2014, she has remained responsible for NAB mortgage repayments and payment of the other outgoings and that, in accordance with Vietnamese Asian culture, she has agreed with Thi to take care of her in her advanced years. A current NAB statement was also an exhibit to this affidavit. It showed an amount owing of $368,399.35.

22. Thi swore a further affidavit on 26 June 2017.She affirmed that she had been on holidays overseas from 23 May to 9 June 2017. On 28 May 2017, she received a telephone call from a lady from Marngoneet Correctional Centre ("Marngoneet") who informed her that Bao is being held in custody

there. Marngoneet is a medium security prison. On 11 June 2017, Thi received a telephone call on her mobile phone from Bao who confirmed to her that he was being held at Marngoneet. She again spoke with him in a slightly longer telephone call on 16 June 2017. According to Thi, Bao told her that he would arrange for her to be added to the prisoner's visitors' list and that he would make an appointment for her to visit him within two weeks. Bao also told her "to look after the house" and "to check on the house" and "to sell the house" if she wanted to do so.

23. Thi does not know any of the details of Bao's current prison term, including its length, release date or reasons for imprisonment. On 21 June 2017, she went to the property with a locksmith and changed the locks. She now has the keys. No one was then in occupation at the house although Bao's belongings remained there. The house was in the same condition as when seen by Mr Matler.

24. Mr Le also swore a further affidavit on 26 June 2017, confirming compliance by Khanh with my orders of 24 February 2017 in that the further affidavits of 29 March were served on Bao. Mr Le also confirmed that no material had been filed or served by Bao.

25. The hearing continued on 28 June 2017. Mr McCormack, instructed by Mr Le, again appeared for Khanh. Khanh and Thi were also in attendance. Bao did not appear and no application for an adjournment was made by or on his behalf. I was satisfied in all the circumstances that the hearing should proceed. Khanh had complied with all Tribunal orders. Bao had received all the material of Khanh relating to the substance of her application. The claims and relief sought had remained the same throughout. I would investigate the merits of the matter and the onus remained on Khanh to prove her case on the balance of probabilities. Bao had been given reasonable opportunity to present his case. At the conclusion of the hearing on this second day, I reserved my decision.

26. After the hearing re-commenced, it soon became apparent, upon reviewing the Westpac and NAB mortgage statements and the tax returns relating to the restaurant, that oral evidence from Khanh would be required to clarify and explain some matters relating to this material.

27. The bank statements examined had been, as noted earlier, exhibits to the affidavits. The statements for the Westpac home loan account, as also previously noted, commenced from 2005 and were addressed to both Khanh and Bao at the property. The early statements described the Westpac mortgage as a Fixed Options Home Loan. The loan draw - down on 31 May 2005 was $200,000. Each month interest of varying amounts on the loan was charged on the account and, according to the earlier statements, each month an amount of $1500 was deposited into the account. This payment pattern continued through to April 2008 when the regular monthly deposit into the home loan account became $1600.

28. Additionally, from May 2007, the Westpac loan became known as a Premium Option Home Loan but the account itself remained the same. The monthly deposits continued at $1600 until a final loan repayment of $164,801.71 and interest of $426.20 were made on 27 March 2012 to clear the Westpac mortgage. Due to the monthly loan repayments having been in excess of the monthly interest charges the principal had been reduced over the 2005-2012 period by $35,198.29.

29. The loan draw-down from NAB on 27 March 2012 was $368,400. Again, as previously noted, the NAB account was also in the joint names of Khanh and Bao but the statements were addressed to Khanh at her respective Kensington addresses (as opposed to the address of the property). Between 2012 and now, Khanh has had at least two separate addresses in Kensington, according to the NAB statements. The NAB mortgage was described as a Choice 100% Offset Home Loan Interest Only in Arrears. The NAB home loan statements exhibited to the affidavits were for account number 13-005-7785. However, these statements confirmed that the 100% offset arrangement was effected by deposits of savings into NAB account 13-034-0679. Despite this, no statements had been provided as at the hearing for this latter account and Khanh's oral evidence was, at the very least, required to clarify the position with this second account. The interest charged on this loan again varied from month to month.

30. In relation to the tax returns pertaining to the restaurant for 2008 to 2011 (both inclusive) exhibited to the affidavits, these were company tax returns for Lemon Bistro Pty Ltd and showed its principal activity as restaurant operation. However, the remaining tax returns exhibited to the affidavits were for 2012, 2013 and 2014 and were trust tax returns for the Lemon Bistro Trust. They showed Mushoo Pty Ltd as Trustee for the Lemon Bistro Trust, the main business activity continued to be restaurant operation, and the distribution statements showed distributions to Khanh only.

31. I then stood the matter down until Mr Le obtained company searches of Lemon Bistro Pty Ltd and of Mushoo Pty Ltd and Khanh obtained some documentary information relating to the sale of the restaurant business.

32. The company search of Lemon Bistro Pty Ltd showed that it was registered on 13 April 2000 and was deregistered on 2 May 2012.Thi had been sole director, secretary and shareholder from 13 April 2000 until 18 November 2004 and from then until 2 May 2012, Khanh was sole director, secretary and shareholder.

33. The company search of Mushoo Pty Ltd showed that it had been purchased as a shelf company on 19 May 2009 and was deregistered on 12 November 2014. From 19 May 2009 until 12 November 2014, Khanh was sole director, secretary and shareholder.

34. A Sale of Business Contract for the sale of Lemon Bistro restaurant confirmed, along with a copy of the Statement of Adjustments, that the sale of the business was settled on 8 July 2014 with Mushoo Pty Ltd as vendor,

an unrelated company as purchaser, and the net proceeds of the sale being paid to Mushoo Pty Ltd.

35. In Khanh's oral evidence, she stated that she completed her Bachelor of Business degree in 2001 and graduated in 2002. Throughout her tertiary education, she worked part – time at the restaurant whenever she could (study demands permitting), and in seasonal employment when that was available. After completing her tertiary education, she continued working until she obtained full-time employment undertaking marketing in the telecommunications area for around 18 months. Even throughout this time, she continued working at the restaurant during evenings and at weekends. After ceasing this employment she travelled for three to six months and upon her return, she commenced working again at the restaurant until she became sole owner in November 2004. She then continued to work in the restaurant until its sale. Khanh married in 2015, she now has a young child and she continues in part-time employment.

36. According to Khanh, the restaurant could accommodate 100 customers at any time. It traded from 11.30 am to 11.30 pm, Mondays to Fridays and for dinner on each of Saturday and Sunday. When she worked full time, she worked both "front of house" and "back of house." This involved her in all aspects of the business including controlling its accounts and financial operations. As a result, she was able to confirm that she paid from the business the mortgage and outgoings for the property. In this regard, she confirmed making the regular payments into the Westpac account each month to cover the interest. She also confirmed in her evidence that, in relation to the NAB repayments, the offset account number 13-034-0679 is also in the joint names of Khanh and Bao. However, Khanh has paid all deposits into that account, initially from the restaurant's earnings and, since its sale, from her current income. The deposits she has made, and continues to make, have always been to cover the interest charges from month to month.

APPLICANT'S SUBMISSIONS

37. The Statement of Contributions was filed on behalf of Khanh on 30 January 2017. Relevantly, it reads as follows:

    1. **Purchase Price:** The property at 16 Nicholson Street, Footscray was purchased on 22 September 1997 for $145,000;

        (a) In 1998 and 1999 the Applicant's mother, Thi, organised and paid for a new dwelling to be built on the land. The construction cost was $300,000. There are now no receipts or documents for the construction works undertaken.

    2. **Loan Repayments** (interest charges only):

        (a) Interest from June 2005 to December 2016 is $174,315.27; and

(b) Interest from 22 September 1997 to 11 May 2005 is estimated (based on the average bank standard variable rates) at $70,387.22.

TOTAL LOAN REPAYMENTS: $244,702.49

The Applicant does not have any loan/mortgage documents prior to 1 May 2005. An assumption has been made that her loan from 22 September 1997 to 11 May 2005 was the purchase price of $145,000.00 plus stamp duty of $4,360.00, less 10% deposit paid totalling $134,860.00.

[Annexures 1 and 2 are attached to the Statement of Contributions for breakdown of interest calculations. Annexure 1 is headed as containing interest calculations from June 2005 to December 2012 and also sets out a calculation and breakdown of council and water rates in the manner referred to below. Annexure 2 is headed as containing interest calculations from 22 September 1997 to 11 May 2005].

3. Payment of Rates and Utility Charges:

(a) Maribyrnong Council Rates = **$37,804.85;**

(b) City West Water Rates = **$8,588.90**; and

(c) Utilities – Gas & Electricity (Supply charges only) = **E$7,978.40**

AGL Gas per quarter in 2010/2011 average = $23.55 per quarter.

$23.55 x 4 x 20 years = $1,884.00

Electricity per quarter from 2010/2011 average = $76.18 per quarter.

$76.18 x 4 x 20 years = $6,094.40

Total Estimated Electricity and Gas Supply Charge = E$7,978.40

No data for gas and electricity supply charges is available before or after 2010/2011. The Applicant's solicitor has contacted the Australian Energy Regulator who referred him to the Essential Services Commission. The solicitor sought historical data of the average electricity and gas supply charges. The Essential Services Commission has not replied. The utility figures are calculated by taking the 2010/2011 figures as a "median".

4. Repairs and maintenance = **Nil**

5. Rent monies received = **Nil**

6. Loss of Rent from August 2012 to January 2017 = **$151,200** [this figure has been stated as having been calculated on the basis of Mr Matler's report].

7. [Reference is made to the property valuation contained in Mr Matler's report]

Purchase Price	$145,000.00
Plus stamp duty	$4,360.00

Cost of Building	$300,000.00
Total:	$449,360.00
Interest:	$244,702.49
Council Rates	$37,804.85
Water Rates	$8,588.90
Lost Rent	$151,200.00
Utilities	E$7,978.40
Total:	$450,274.64
Total Contribution	$899,634.64
Current amount owing to mortgagee NAB	$368,399.35
Total of Contributions and Mortgage =	$1,268,033.99

38. An outline of submissions prepared by Mr McCormack was filed and served prior to the hearing on 24 February 2017. His references in the outline to the nature of the application, the orders sought, the failure of Bao to respond, his lack of compliance with orders, the notification of the proceedings to NAB, and the Affidavits relied on in support do not require any reiteration. I will refer to the balance of his submissions below by incorporation into my findings.

FINDINGS

39. As required under section 225(1) of the Act, Khanh is a co-owner and, as such, can apply for the sale of the land and division of the proceeds. In compliance with section 225(3), NAB has been notified of the application.

40. Mr McCormack submitted that the statutory presumption in section 229(1) is that an order for sale "must" be made unless VCAT considers it "would be more just and fair" that there be a physical division or a combination of sale and physical division. Given that the property contains a single residence on a small site, I agree with him that physical division is not a possibility here. I also agree with Mr McCormack that the Tribunal has no general discretion which enables it to refuse to make an order under section 229 on grounds of hardship and unfairness (*Yeo v Brassil* [2010] VSC 344 [20] – [26]).

41. In all the circumstances, including taking into account the matters set out in section 229(2), I find that orders under Part IV of the Act are warranted and the property should be sold.

42. The Statement of Contributions sets out an amount of $899,634.64 as having been spent on the property. I accept the calculations of the figures comprising this amount as reasonable. I also find that Bao has not made any contributions and that the contributions have been made by Thi and Khanh. In these circumstances, Mr McCormack has submitted that "the presumption of advancement is here relevant, being that the payments made by the mother are presumed (even apart from the mother's evidence to that effect) to be for the benefit of the applicant."

43. He has then submitted, in terms of the financial adjustment sought, that although Khanh and Bao are joint proprietors, when one turns to the question of contributions, and in particular the matters referred to in section 233(2) of the Act, not only is an adjustment required, but the adjustment that should be made, as sought by Khanh, is that 100% of the net proceeds of sale be paid to her because none of the deposit, improvements, mortgage payments or expenses of the property have been paid for by Bao.

44. In considering these submissions, it is necessary for me to initially consider relevant and well settled principles. In this regard, it is appropriate to consider the case of *Wilkins v Wilkins* [2007] VSC 100 ("Wilkins"). Wilkins was a case where land had been purchased by parents in the names of two of their sons with the main issue for determination being whether or not the sons held the legal interest in the land as joint proprietors for their mother (her husband having pre-deceased her) at the date of her death. Kaye J, in beginning his consideration of that issue, and relying on a number of authorities, stated: "The principles which are relevant to that issue are well settled and not in dispute. In the absence of evidence to the contrary, a registered proprietor of real estate is presumed to own the equitable interest in it. However, where a person purchases property, and places that property in the name of someone else, the law presumes that that person holds the property on a resulting trust for the purchaser who paid the cost of acquisition of it. The presumption of a resulting trust may be rebutted by showing that there is a relationship between the parties which gives rise to a countervailing presumption known as the 'presumption of advancement.' In such a case, the presumption of the resulting trust is, in effect, nullified. As the High Court stated in *Martin v Martin* ([1959] HCA 62); "It is called a presumption of advancement but it is rather the absence of any reason for assuming that a trust arose or in other words that the equitable right is not at home with the legal title."

45. Where the person advancing the money has a special relationship (for example, as here where there is a mother on the one hand and a son and daughter on the other) of a nature where it is likely that the advance was intended to be retained beneficially by the recipient (ie as a gift) then the presumption arises against there being a resulting trust (see *Calverley v Green* [1984] HCA 81).

46. However, both the presumption of advancement, and the presumption of a resulting trust, may be rebutted by evidence of the actual intention of the purchaser at the time of the purchase. (*Charles Marshall Pty Ltd and ors v Grimsley and anor* [1956] HCA 28).

47. In her first affidavit, Thi affirmed that she "put the…. property under the names of my son and my daughter with the view to secure their future." I accept that as being the evidence of her actual and absolute intention at the time of purchase and it rebuts both the presumption of advancement and the presumption of a resulting trust. I do not regard her evidence as contained in her subsequent affidavits, including filial piety, as being inconsistent with that expressed intention. Her evidence of her subsequent concerns about, and disappointments in, and with, Bao cannot change the position.

48. I therefore find that Thi's contributions cannot be attributed to Khanh alone and they must be found as contributions to, and for the benefit of, Khanh and Bao equally. Accordingly, they are not relevant to the issue of adjustment.

49. However, before considering the adjustment issue further, it should be noted that there was essentially no evidence given about Thi's second husband and their marriage, including where they lived, or about the living circumstances of both Khanh and Thi after they left the property. As noted earlier, Khanh married in 2015, and has lived at two different addresses in Kensington. Very little evidence was given about the inter-relationship between Thi, Khanh and Bao generally, and, specifically at the property, between 1997 and 2012. No evidence was available to the Tribunal about any improvements to the property over time or about the nature, extent and cost of maintenance and repairs now required to the property, or about the cost and payment of any insurance. Finally, no evidence was provided about why the principal of the Westpac loan appears to have been greater than that of the BoM mortgage which was discharged or why the principal of the NAB loan is greater than that of the Westpac loan which was discharged.

50. In relation to the adjustment of rights between Khanh and Bao, as already noted, the relevant section is section 233 of the Act.

51. The application of this section was examined in *Ngatoko v Giannopoulos (Building and Property)* [2017] VCAT 360 ("Ngatoko"). Ngatoko involved an application under Part IV of the Act for an adjustment of rights between parties in relation to an alleged joint enterprise to purchase a home to be owned in equal shares but from which various issues of dispute arose. In Ngatoko, the Senior Member stated at [57] and [58]:

> [57] "The operation of this section was considered by Kaye J in Tien v Pho [2014] VSC 391 when the learned judge said (at para 23 and 24):
>
> "[23] Pausing there, it is clear, from its express terms, that s 233 authorises the Tribunal, on an application under Part 4, to

make an adjustment to a co-owner's existing interest in land or goods taking into account (inter alia) amounts paid, and costs incurred, by a co-owner in respect of the property which exceed that co – owner's proportionate share of those costs or payments. Such an adjustment must, necessarily, involve an alteration of the parties' rights and interests at common law and in equity. The issue is placed further beyond doubt by s 233 (5) which provides that s 233 '…applies despite any law or rule to the contrary.'

[24] Thus on its clear terms, s 233 authorised the Senior Member to make an adjustment to the respective interests of the plaintiff and the defendant to take into account (inter alia) the payment by the defendant of more than his proportionate share of the mortgage repayments in respect of the property."

[58] The words "contribution" and "reimbursement" in the section suggest that the adjustment to be made is to balance a situation where one co-owner has paid more than that co-owner's share of whatever the payment or expense happens to be. The excess amount is then compensated for by an equivalent adjustment against the other co-owner's share. Where one co-owner has paid everything and the other has contributed nothing at all,……, it might be appropriate to adjust the rights as between the co –owners so that the share of the co – owner who has contributed nothing is extinguished and the other co-owner becomes the sole owner."

52. However, given the extent of contributions by Thi who is not a party to the proceeding, my findings as to her intentions at the time of purchase and the lack of evidence about certain matters, this is not a case which can involve a complete extinguishment of Bao's share. Despite this, as contemplated by the wording of section 228 and from the above passage in Ngatoko, an adjustment, in the particular circumstances of an application, can be greater than the actual amount by which one co-owner's contribution exceeds their proportionate share and that of the other co-owner where it is just and fair.

53. I regard it as appropriate, in calculating any adjustment for the distribution of the balance of the proceeds of sale, to first allocate to each of the applicant and the respondent 50% responsibility for such of the expenses as have been established by the evidence.

54. I am satisfied on the evidence generally, but with particular regard to her oral evidence about the restaurant and the contents of the business returns and documents, that for the purposes of calculating an appropriate adjustment in this application, Khanh has contributed, and done so solely, to the rates, mortgage repayments and utilities from the time she became the sole owner of the restaurant business in November 2004. The Statement of Contributions is calculated to 30 January 2017. It was apparent, however, from her evidence on the second day of the hearing that Khanh was still

solely contributing to the expenses after that date and continuing as at 28 June 2017.

55. Doing the best I can from the Statement of Contributions, I calculate total loan repayments, rates and utilities for the period of November 2004 to June 2017 as follows:

Loan repayments	$187,553.89
Council rates	$29,647.10
Water rates	$6,437.05
Utilities	$5,086.23
Total	**$228,724.27**
Each party's 50% responsibility	$114,362.13

56. Khanh has borne 100% of the rates, utilities and loan repayments for the period of November 2004 to June 2017, that is both Bao's 50% responsibility of $114,362.13 and her own 50% responsibility of $114,362.13. I also have no doubt that from July 2017 through to any sale of the property, Khanh will continue to pay these outgoings. In all the circumstances, including the obvious imbalance between Khanh and Bao's contributions after Thi's contributions ceased, I find a just and fair adjustment is that the net proceeds of sale be distributed as follows:

- first $228,724.27 to Khanh; and
- the remainder to be distributed equally between Khanh and Bao.

57. In the Statement of Contributions, Khanh had also sought rent from August 2012. Section 233(2)(e) of the Act permits, provided s 233(3) applies, an adjustment to be made where one co-owner occupies a property to the exclusion of the other co-owner. Her claim is for the period after Khanh left the property and Bao had solely occupied it.

58. Bao has not sought compensation, reimbursement or an accounting and accordingly s 233(3)(a) does not apply. There is no substantive evidence that has been led to enable consideration of the possible application of s 233 (3)(c). Section 233(3)(b) was considered in *Davies v Johnston (Revised) (Real Property)* VCAT 512. As noted by the Senior Member in that case at [46], s 233(3)(b) is subject to an important exception; namely, it needs to be shown that the co-owner in occupation excluded the other co –owner. The evidence does not support that this was the case. I accept that it was an unfortunate and strained relationship between Khanh and Bao when Khanh left. However, she left of her own volition.

59. Costs are not sought by the applicant. The final order sought was one for vacant possession. Since the application was made, circumstances of relevance in this regard have changed. Bao is not in occupancy, the locks

have been changed and Thi has the key. No possession order is required to be made in this situation. However, I am of the opinion that Khanh should have a key.

60. Orders have been made for sale and distribution of net proceeds. The Tribunal has also, of its own motion, made self – explanatory orders I and 2 to ensure appropriate confidentiality.

B. Josephs
Member