

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP815/2014

CATCHWORDS

Co-ownership of land; father and son registered joint proprietors; application by son for orders under Part IV *Property Law Act* 1958.

APPLICANT	Mr Gabriel Kon Koroneos
RESPONDENT	Mr Koronis Peter Koroneos
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	17 and 18 February 2016 Written submissions received 2 and 3 March 2016. Respondent's reply written submissions received 11 March 2016
DATE OF ORDER	29 March 2016
CITATION	Koroneos v Koroneos (Building and Property) [2016] VCAT 461

ORDERS

- 1. The proceeding is listed for directions hearing before Senior Member Farrelly at 9.30 a.m. on 28 April 2016 at 55 King Street Melbourne.**
- 2. I direct the principal registrar to serve the parties with a copy of the Tribunal's pro forma draft property sale orders.**
3. Costs reserved.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant

Mr P Barton of Counsel

For Respondent

Mr P Little of Counsel

REASONS

- 1 The applicant, Mr Gabriel Koroneos (“**Gabriel**”) is the son of the respondent, Mr Koronis Koroneos (“**Kon**”). Gabriel and Kon are the registered joint proprietors of a property at 627 – 629 Diggers Road Werribee South, Victoria (“**the property**”).
- 2 As a general principle, when two people own an interest in land as “joint tenants” 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.
- 3 Under Part IV of the *Property Law Act* 1958 (“**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.
- 4 Gabriel has made application for orders that the property be sold and the proceeds of sale be distributed between himself and Kon. Kon says that Gabriel is not entitled to obtain such orders because Gabriel is bound by an agreement they reached, made at the time the property was purchased by them, that Kon could live on the property and have sole use of it until his death. Gabriel says there was no such agreement.

Background

- 5 The property is located next to farming land, some of which has been owned by various members of Kon’s immediate and extended Koroneos family for many years. Kon and his mother today co-own a parcel of land adjacent to the property.
- 6 The Koroneos family business was market gardening. Kon was involved in the business with his parents and Gabriel became employed in the business when he finished his schooling at age 16.
- 7 The property contains two modest homes. One is a three bedroom home and the other is a two bedroom home. In the past, the homes or one or other of them were used as an office for the market gardening business, and market produce was grown on the adjacent farming land.
- 8 In 2006, Kon was a director and shareholder of “Chirnside Resources Pty Ltd” (“**Chirnside**”). At that time, Chirnside co-owned the property, as one of two tenants in common. Chirnside’s share of ownership was two thirds. The remaining third share was owned by Kon’s parents, Pandelis and Alexandra Koroneos.
- 9 Chirnside ran into operational and financial problems, and it was wound up in insolvency by order of the Supreme Court on 28 June 2006. Mr Mansell was appointed liquidator of Chirnside (“**the liquidator**”).
- 10 By contract of sale dated 1 December 2006 (“**the sale contract**”), Chirnside (under the control of the liquidator) together with Kon’s parents sold the property to Gabriel and Kon for \$305,000. Gabriel and Kon, as

purchasers of the property, each signed the sale contract. Gabriel and Kon have differing stories as to the circumstances surrounding their purchase of the property and their agreement as to respective interests in the property.

- 11 To finance the property purchase, Gabriel and Kon borrowed \$320,000 from the Bendigo Bank. Security for the loan included a mortgage over the property, pursuant to which Gabriel and Kon are the mortgagors. The loan account, in the names of Kon and Gabriel, operates as a “line of credit” account. It allows for both deposits and withdrawals, subject to a maximum allowed credit balance of around \$325,000 (“**the Bendigo loan account**”).
- 12 Kon engaged “JC Lawyers” to manage the conveyancing of the purchase of the property on behalf of himself and Gabriel.
- 13 By letter dated 15 May 2007 addressed to Kon and Gabriel, JC Lawyers provided advice in respect of the purchase. The letter was sent to 25 Tower Road, Werribee, a property then owned, and still owned, by Kon. The letter includes the following advice:

Registration on Title

There are two ways in which you may [be] registered on Title:

1. Joint Tenants

This means that on the death of either of you the property will automatically pass to the survivor and not to the deceased’s estate as is the case when the property is held as tenants in common.

2. Tenants in common in equal shares (or unequal shares).

This means that on the death of either of you the property will automatically pass to the deceased’s estate and not the survivor. That means the share will be distributed in accordance with the Deceased’s Will.

We have prepared the Transfer of Land on the basis that you will be registered as Joint Tenants.

Please advise if you do not wish to be registered as Joint Tenants as a matter of urgency so that we may prepare a fresh Transfer of Land.

- 14 Kon says that he cannot recall reading the letter. Gabriel says, and it is not disputed, that he never saw this letter prior to the commencement of this VCAT proceeding.
- 15 Settlement of the sale contract occurred in around mid 2007 and Gabriel and Kon subsequently became registered on title as joint proprietors. Soon after the settlement, Kon moved from his Tower Road home into the larger of the two homes on the property, and he resides there still. He has never paid any rent.
- 16 The smaller of the two homes on the property has, for most of the time since Kon and Gabriel purchased the property, been let to various tenants and the rent is deposited into the Bendigo loan account. There is no dispute that Kon, alone, manages the leasing of the smaller home on the property.

- 17 As noted above, the Bendigo loan account operates as a line of credit with a maximum credit limit of around \$325,000. In addition to deposits in respect of the rental from the small home on the property, Kon has made a number of deposits into the Bendigo loan account. Kon has also made numerous withdrawals from the account for his business purposes. For most of its life, the Bendigo loan account has shown a debt balance in excess of \$300,000. There is no dispute that Gabriel has never made deposits into, or withdrawals from, the Bendigo loan account. The account is entirely managed by Kon.
- 18 Since Kon and Gabriel purchased the property, Kon has been responsible for the payment of all bills and expenses associated with the property. He has also been responsible for maintenance and improvements to the property, although Gabriel has occasionally assisted with maintenance tasks.
- 19 Gabriel and Kon fell into dispute in around late 2011. Gabriel wanted to sell the property so that he could put his share of the proceeds towards purchasing or building a new home with his wife to be, Melissa. Kon refused to sell the property. Kon and Gabriel were unable to resolve their dispute, and Gabriel commenced this proceeding by filing his application on 19 December 2014.
- 20 Kon maintains his alleged entitlement to live exclusively at the property until he dies.
- 21 In the course of the proceeding, Kon and Gabriel each obtained a valuation report on the property. The valuations differ, however for the purpose of this proceeding, Gabriel and Kon accept the mean of the two valuations as the market value of the property.

Gabriel's version of events

- 22 After finishing his schooling in 1998, Gabriel commenced employment in Kon's market gardening business. Gabriel was employed in the business until around late 2004. The exact identity of Gabriel's "employer" for all of that period is not clear, however, it is not in dispute that in 2004 the employer was "Ayriljea Pty Ltd", a company controlled by Kon.
- 23 In 2003, Gabriel purchased a block of land in Evans Way, Werribee for around \$92,000.
- 24 In 2004, Kon and/or Ayriljea Pty Ltd leased a V8 Ford utility vehicle. Gabriel confirms that, although Kon occasionally used the vehicle, the vehicle was effectively Gabriel's vehicle for personal and work use from 2004 to 2009. Kon and/or Ayriljea Pty Ltd paid all the leasing and most of the registration and insurance costs.
- 25 After leaving his father's business in around late 2004, Gabriel continued working in the market gardening industry. Between 2004 and 2006 he was employed by "Gro-Link Nursery" and "AVG Costa".

- 26 Gabriel returned to working with his father in around late 2006.
- 27 As noted above, Chirnside was placed into liquidation on 28 June 2006. Gabriel says that soon after the appointment of the liquidator, he saw a sale/auction sign erected on the property. He says that, at that time, he was looking to purchase an investment property and he spoke to Kon about purchasing the property. He says that Kon suggested that they purchase the property together prior to the auction. He says that he and Kon went to meet the liquidator at the liquidator's office in Melbourne, and that the liquidator informed them that he (the liquidator) was looking for a sale price of around \$300,000.
- 28 Gabriel says that, after meeting the liquidator, he and Kon visited the Bendigo bank branch in Werribee to enquire about a loan to purchase the property. He says the bank agreed to loan them \$320,000.
- 29 Although there is no evidence on the point, it is apparent that Kon's parents also agreed to sell their one third share of the property.
- 30 Gabriel says that he and Kon agreed that Gabriel's "*contribution to the mortgage would be by [Gabriel] working at a low rate of \$500 per week*". That is, Gabriel agreed to work in his father's market gardening business for a wage lower than what he might otherwise have been entitled to expect, or which he might have received working elsewhere. Gabriel says that Kon's contribution, as agreed, was to make all of the necessary repayments to the Bendigo loan account. Their agreement was entirely verbal.
- 31 Gabriel says that there was no agreement between he and Kon that Kon would be entitled to live at, and have sole use of, the property. He says that he simply had no objection to Kon moving into the property after the settlement of the purchase of the property.
- 32 In 2009 Kon and/or Ayriljea Pty Ltd paid the initial costs of the lease of a new vehicle, to replace the Ford utility, for Gabriel's use. Gabriel continued to work with his father until 2010, at which time the market gardening business owned by Kon and/or Ayriljea ceased operating. Gabriel retained possession of the new vehicle and took over the leasing and other costs associated with the vehicle.
- 33 Gabriel became engaged to Melissa in May 2011. In late 2011, Gabriel and Melissa were looking to build a home on the Evans Way property which Gabriel had purchased in 2003, or alternatively to purchase a home elsewhere in Werribee, to become their family home. Gabriel says that they were experiencing difficulty obtaining finance because of Gabriel's mortgagor obligation in respect of the property. To overcome that difficulty, he says he decided to sell the property and to apply his share of the sale proceeds to building or purchasing a new home with Melissa. He says that he told Kon that he wished to sell the property. He says that Kon was, initially, agreeable to selling the property.

- 34 Gabriel says that he and Melissa visited Kon at the property on Christmas Day 2011. They expected to see Kon making preparations to move out of the property into Kon's house in Tower Road Werribee. Instead, they were surprised to be told by Kon that he had decided to stay living at the property and to rent out his Tower Road home.
- 35 Gabriel has produced a number of telephone text messages between himself and Kon which Gabriel says confirm Kon's agreement in late 2011 to selling the property. He says the text messages also show that Kon's allegation as to an agreement entitling him to live at the property until he died was first raised by Kon *after* Kon had initially agreed to sell the property. Some of those text messages are:
- Kon to Gabriel 6 October 2011:

Cos it'll separate you from me financially which is what you want as I understand it you can do your thing how you want! No interference from me, unless you ask [ask] my opinion. this is a big property and I can't see myself getting on top of it! Courtney and I are finished and your involved setting yourself up! so I can do my thing in werribee where everything is within walking distance
 - Kon to Gabriel 20 October 2011:

Hi gabe... 58 Slattery St Werribee is a home for sale that sounds like a beauty... go and have a look with Melissa and even mum only if you want to
 - Kon to Gabriel 2 November 2011:

Hi Gabe. If we sell 629 and 627 diggers road [the property] then I can go back to Tower Road and live there
 - Kon to Gabriel 9 January 2012:

I may get the real estate agent to come have a look and give an estimate of what 629 and 627 diggers road is worth
 - Kon to Gabriel 4 March 2013:

Hi Gabe, this house is part of your inheritance. As such you will get the whole lot when I die. I was hoping you would understand. I am disappointed in your attitude. Sorry son but I don't want to sell my future short. I worked too hard to throw it away. I never asked my father for a cent and he never gave me a cent. It's best you don't ask me again...
- 36 In late 2011, Gabriel and Melissa purchased a home in Newark Close Werribee. The sale contract settled in mid-February 2012. Gabriel and Melissa moved into the new home when they were married in April 2012.
- 37 Gabriel's parents separated in around 1993. From around 2004 until 2012, Gabriel lived, rent-free, at a house in Werribee owned by his mother Sophie.

Kon's version of events

- 38 There is no dispute as to Gabriel's employment history, the provision of vehicles for Gabriel's use, and Gabriel's living arrangements as set out above.
- 39 Kon says that, following the liquidation of Chirnside, he wanted to purchase the property. The property had been integral to the Koroneos family's life for many years, and he felt a spiritual connection to it. He says also that, having suffered heart problems in 2006, he had begun to think more about his future and he decided that he wanted to live on the property as his "*last property*".
- 40 Kon says that he also wanted to give Gabriel a start in life in the same way that his own father had given him a start. For this purpose, he wanted to include Gabriel on the title of the property, and he wanted Gabriel to inherit the property when he died. Kon says that he told Gabriel these things at a meeting with Gabriel in Kon's office in "around late 2006". Kon says that at that meeting he also told Gabriel that he [Kon] wanted to live at the property until he died. Kon says that Gabriel responded by thanking him. Kon says the matters discussed with Gabriel at that meeting form the agreement now relied on by Kon, namely that Kon would be entitled to exclusive use of the property until he died, following which Gabriel would inherit the property ("**the alleged agreement**"). Gabriel denies attending any such meeting and having any such conversation with his father. Gabriel denies the alleged agreement.
- 41 The alleged agreement was entirely verbal. Kon says that his bookkeeper, Ms Makarow, was in the office when the alleged agreement was made.
- 42 Kon says that he, alone, had discussions and negotiations with the liquidator over a number of months before reaching agreement as to the purchase price for the property. Kon says that Gabriel did not meet the liquidator, and that there was not a sale/auction sign placed on the property as alleged by Gabriel.
- 43 The liquidator was not called to give evidence.
- 44 Kon says that he, alone, went to the Bendigo Bank to arrange the loan facility. Kon says that he told Mr Brad Peel of the Bendigo Bank that he "*wanted Gabriel's name to be on the title as a joint proprietor and that on my death it is to go to Gabriel*". He says that Mr Peel told him that "*as Gabriel was on the title that he had to be on the mortgage as well*".¹
- 45 Neither Mr Peel or anyone from the Bendigo bank was called to give evidence.
- 46 Kon agrees that Gabriel approached him in late 2011 to discuss his (Gabriel's) difficulty in obtaining finance to build or purchase a new home, the difficulty arising because of, or exacerbated by, Gabriel's status as

¹ Kon's witness statement paragraph 23

mortgagor in respect of the property. Kon says that Gabriel wanted to “get off the title” to make it easier to obtain finance.

- 47 Kon says that he considered ways to remove Gabriel from the title and that as part of that consideration he made enquiries as to the value of the property. Kon says that he was concerned as to capital gains tax liability (on sale of the property) and stamp duty (on transferring title to his name alone). Partly for these reasons, Kon decided against selling the property or transferring the title into his name alone. Kon says that the telephone text messages produced by Gabriel must be read in light of Kon’s consideration in this regard.

The Act

- 48 A registered joint proprietor of a property is entitled to seek orders under Part IV of the Act for the sale and/or division of the property and distribution of the proceeds of sale. Relevant sections of the Act are:

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)

...

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 that 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 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.

230 Order varying entitlements to land or goods

When making an order under section 228, VCAT, if it considers it just and fair, may order—

- (a) that the land or goods be physically divided into parcels or shares that differ from the entitlements of each of the co-owners; and
- (b) that compensation be paid by specified co-owners to compensate for any differences in the value of the parcels or shares when the land or the goods are divided in accordance with an order under paragraph (a).

Findings

- 49 The primary issue in this proceeding is whether, because of the alleged agreement, Gabriel is prevented or “estopped” from exercising his entitlement under part IV of the Act to obtain orders for the sale or division of the property. Gabriel seeks orders for the sale of the property and the distribution of the proceeds of sale.
- 50 If Gabriel is entitled is entitled to the orders he seeks, the parties may seek an adjustment to their interests in the property having regard to their respective contributions, receipts and expenses in respect of the property, and any adjustment in their respective interests would be reflected in orders as to how the proceeds of sale of the property are to be distributed (“**the adjustment to interests issue**”). This issue was touched on, but not dealt with fully at the hearing on 17 and 18 February 2016. The hearing focussed on the primary issue. Accordingly, if I determine that Gabriel is entitled to the orders he seeks, the parties will be given further opportunity to present further evidence and submissions on the adjustment to interests issue before any final orders are made.
- 51 The parties raised a number of matters, referred to above in these reasons, in support of their respective positions. Most of the matters raised are not relevant to the primary issue.

- 52 The phone text messages commence approximately five years after the time of the alleged agreement and, for this reason, they are of limited if any probative value as to the alleged agreement. In any event, the messages can be read in light of the interpretation put on them by both Gabriel and Kon. In my view the text messages do nothing more than evidence Gabriel's desire to sell the property and Kon's consideration of Gabriel's request. They do not prove the existence or non existence of the alleged agreement. They do not prove any binding promise by Kon to sell the property.
- 53 Whether Gabriel contributed to the purchase of the property by accepting wages lower than he might otherwise have earned is not relevant to the primary issue. It does not assist in determining whether the alleged agreement was made. It may have some relevance to the adjustment of interests issue. I note in passing that wage records indicate that in August 2006, just before he returned to work with his father, Gabriel was being paid \$668 gross per week by Gro-Link Nursery, and that in January 2007, by which time Gabriel had returned to work with his father, he was being paid \$691 gross per week.
- 54 Similarly, the payments made by Kon into the Bendigo loan account may be of relevance to the adjustment of interests issue, but in my view it is a matter of no relevance to the primary issue. I note in passing that \$320,000 was borrowed from the Bendigo bank to finance the purchase of the property. Although rental payments from the leasing of the smaller home on the property have been regularly deposited into the Bendigo loan account, as at 9 February 2016 the account had a debt balance of \$320,354.
- 55 Similarly, that Kon may have provided financial assistance and other benefits to Gabriel, including the leased motor vehicles, may be of relevance to the "adjustment of interests" issue, but in my view it is a matter of no relevance to the primary issue. Kon submits that Gabriel's reticence to recognise such financial benefits goes to Gabriel's credit as a witness. I do not accept this submission. In my view, there was little reticence or hesitation in Gabriel's evidence, and to the extent there was any, it reflected, as much as anything, Gabriel's limited knowledge and understanding of financial matters.
- 56 It is apparent that Kon loves his son Gabriel and has assisted him throughout his life, but this is not the issue in this proceeding.
- 57 Kon's "spiritual connection" to the property is of limited, if any, relevance to the primary issue. It may partly explain Kon's motivation behind purchasing the property in 2006, but it carries little, if any, probative value as to whether the alleged agreement was made. Likewise, Gabriel's motivation to purchasing the property is of little, if any, probative value.
- 58 Kon says his Tower Road home formed part of the security for the finance to purchase the property. He says also that he was responsible for negotiating the sale price and arranging the loan and the conveyancing for

the purchase. In my view, these matters are not relevant to the primary issue.

59 Kon relies on the evidence of Ms Makarow, who has provided bookkeeping services to Kon and/or Kon's related business entities for many years. In providing those services, Ms Makarow occasionally visited Kon's office. As I understand it, Kon's office may at different times have been at one of the homes at the property, or at Kon's Tower Road home, or at a property he rented for some time in Rainsford Street Werribee.

60 Ms Makarow says in her witness statement:

In about late 2006 or early 2007, I was at Kon's office when Kon told me he negotiated with the liquidator of Chirnside Resources Pty Ltd to purchase the Property. He also said he wanted Gabriel to take over the Property when he (Kon) died. He said he was going to put Gabriel on the title and he (Kon) will live there and when he died the Property will go to Gabriel...

Then when Gabriel arrived at the office from the farm, Kon told Gabriel that Chirnside Resources Pty Ltd had gone into liquidation. He then said, moving forward he wanted Gabriel to eventually inherit the Property. Kon said he wanted to live at the Property until he died and at which time the Property would go to Gabriel. Gabriel said he was "on board" and had no complaints with this;²

61 Ms Mackarow confirmed in evidence that she had kept no notes of the conversation referred to in her witness statement, and that it was late last year [2015] when she was first asked to recall the conversation and to prepare a witness statement. She says that her reference to "*late 2006 or early 2007*" in her witness statement was a bit of a guess, but that she did recall that the conversation was before the property was purchased by Kon and Gabriel.

62 Kon's evidence, as set out in his witness statement, as to the alleged meeting at his office is as follows:

... around late 2006 I spoke to Gabriel about inheriting the Property. Before Gabriel came in I spoke to Ms Andrea Makarow ("Andrea"), my bookkeeper, about my intentions. I told her I wanted Gabriel to inherit the Property after I died, and I was going to put him on the title with me. I then called Gabriel into the room. While Andrea was present, I said to Gabriel I wanted to add your name to the title. I said I wanted to live at the property until I died and then the Property would be transferred to you. Gabriel said thanks Dad.³

63 There are notable differences between Kon's evidence and Ms Makarow's evidence referred to above. Ms Mackarow says that Kon had told her that he had negotiated with the liquidator of Chirnside to purchase the property. She also says that Kon told Gabriel that Chirnside had gone into liquidation. There is no mention of Chirnside or the liquidator in Kon's version of events.

² Ms Makarow witness statement at paragraphs 3(d) and (e)

³ Kon's witness statement at paragraph 21

- 64 Ms Makarow says that, after Kon had told Gabriel of his intentions, Gabriel “*said he was “on board” and had no complaints with this*”. In Kon’s version of events, Gabriel simply said “*thanks Dad*”.
- 65 These differences in the evidence are not, in my view, minor and irrelevant. The differences indicate that, if there was any meeting at all, it is not entirely clear what was actually discussed at that meeting, and between whom. The differences in detail are important having regard to the fact that the alleged conversation at the alleged meeting is the foundation of the alleged agreement.
- 66 Gabriel denies that the meeting and the conversation ever took place.
- 67 That parties may disagree as to what was discussed and agreed in relation to their acquisition of an interest in land is all the explanation one needs to understand the importance the law has long placed on having something in writing when creating or disposing of an interest in land.⁴
- 68 Kon instructed JC Lawyers to act on behalf of himself and Gabriel in respect of the purchase of the property. When asked, during his evidence, about his instructions to the lawyers, Kon said that he instructed his lawyers to put Gabriel on title (he cannot recall whether he used the term “joint proprietor” or some other term) so that Gabriel would inherit it when Kon passed away.
- 69 Prior to the settlement of the purchase, JC Lawyers sent Kon the letter dated 15 May 2007 [referred to earlier in these reasons] which, among other things, explains briefly the difference between “joint tenants” and “tenants in common”. The letter states that the lawyers would prepare a Transfer of Land which would note Kon and Gabriel as joint tenants, and that if this was not what Kon or Gabriel wished, they should contact the lawyers as a matter of urgency.
- 70 There is nothing in the letter as to Kon holding a life tenancy or some other proprietary interest in the property inconsistent with a joint tenancy. It seems improbable to me that Kon would make the alleged agreement with Gabriel, but then not raise that agreement when providing instructions to his lawyer, a lawyer whom Kon says had previously acted for him in several matters including his divorce from his wife and a business dispute with his brother.
- 71 Kon says he cannot recall reading JC Lawyer’s letter of 15 May 2007, however he does not say that he did not receive it. Kon did not respond to the letter and, as such, Kon and Gabriel were named as joint tenants in the Transfer of Land document.
- 72 Kon and Gabriel each signed the sale contract as purchasers. They are named on title as joint proprietors. Lawyers instructed by Kon confirmed in writing that they would prepare documentation naming Kon and Gabriel as

⁴ See sections 53 and 54 *Property Law Act 1958*, section 126 *Instruments Act 1958*

joint proprietors. Kon and Gabriel are both mortgagors under the mortgage over the property. The Bendigo loan account is in both their names. These are all matters on the written record.

- 73 There is nothing on the written record, nothing in writing, to support the alleged agreement. The existence of the alleged agreement is, in essence, the word of Kon against the word of Gabriel. I place little weight on the evidence of the bookkeeper, Ms Makarow, because her version of events differs from Kon's and I am not satisfied that her recollection of a conversation and a meeting, approximately nine years after the event, is reliable.
- 74 On all the evidence, I am not persuaded that what is on the written record should be displaced by an alleged contrary verbal agreement. There is insufficient evidence to do so. I am not satisfied on the evidence that Gabriel and Kon entered the alleged agreement.
- 75 Accordingly, I do not accept that Gabriel is, by reason of the alleged agreement, estopped from seeking orders for sale under part IV of the Act.
- 76 Kon makes an alternative submission. He submits that Gabriel represented to Kon that he (Kon) would be entitled to live exclusively at the property until he died. Alternatively, he says that Gabriel, by his conduct, induced Kon into assuming that Kon would be entitled to live exclusively at the property until he died. In such circumstance, Kon submits that it would be "unconscionable" to now allow Gabriel to assert his rights under part IV of the Act.
- 77 I do not accept the submission. On the evidence before me, I find that Gabriel made no representation as alleged.
- 78 As to the allegation that Gabriel's conduct induced Kon into assuming he would be entitled to live exclusively at the property until he died, it is not clear what conduct is being referred to. If it is Gabriel's conduct in allowing Kon to live at the property, then I reject that such conduct induced Kon into the alleged assumption. On the evidence before me, for some years Gabriel simply had no objection to his father living at the property. If Kon assumed that he would have the right to live at the property until he died, then on the evidence before me such assumption was not induced by Gabriel's conduct, but was rather an assumption of Kon's own making.
- 79 It is certainly plausible that Kon and Gabriel, as father and son who worked together, may have had one or several conversations in respect of the property and Kon's living arrangements. It is understandable that Gabriel had no objection to Kon living at the property. It is plausible that Kon may have expected that this living arrangement might continue until he died, and it is plausible that Gabriel was, at least for a while, amenable to such arrangement. However such matters, however plausible they may be, do not add up to a binding legal agreement to displace or alter the interests of the parties as identified on the written record.

80 For the above reasons, I am satisfied that Gabriel is not prevented or “estopped” from exercising his entitlement under part IV of the Act to obtain orders for the sale of the property and the distribution of the proceeds of sale.

Future conduct of the Proceeding

81 In the event I find, as I have, that orders under part IV of the Act are warranted, Kon seeks to become the sole proprietor of the property. There are two ways that this might be achieved.

82 The property can be offered for sale and Kon may become the successful purchaser.

83 Alternatively, without any sale, Gabriel could transfer his interest in the property to Kon. If this is to occur, then in my view it must occur by agreement between Kon and Gabriel, not by compulsion. Presumably any such agreement will depend upon the Bendigo bank’s approval to removing Gabriel as mortgagor.

84 Having regard to Gabriel’s legitimate wish to realise his interest in the property, and having regard to Kon’s understandable desire to become the sole registered proprietor of the property, and having further regard to section 229 of the Act, I consider it fair that orders be made for the sale of the property by auction, including orders entitling Kon (or Gabriel) to purchase the property subject to satisfactory proof of his ability to pay at least the reserve selling price.

85 Setting a reasonable timeframe for the sale will also allow Kon and Gabriel a limited time to attempt to negotiate an agreement for the transfer of title to the property into Kon’s name alone. If they are unable to reach agreement, then the auction would proceed. I consider a period of 3 to 6 months may be a reasonable timeframe, however I will hear submissions from the parties on this.

86 Having regard to the above matters, and having regard also to the fact the parties may wish to present further evidence and submissions on the adjustment of interests issue, I will list the proceeding for a directions hearing before me for the purpose of discussing the future conduct of the proceeding. It may be that, after considering these reasons, the parties reach agreement on proposed consent orders that finalise the proceeding. I will order that the parties be provided a copy of the Tribunal’s pro forma draft property sale orders. I will also reserve costs.

SENIOR MEMBER M. FARRELLY