VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP975/2016

CATCHWORDS

Agreement for a joint enterprise to purchase a house in order to provide a home for the parties and their respective families - agreement that the house would be owned in equal shares and that the cost of acquisition, the mortgage instalments, outgoings and all other expenses relating to the house would be borne equally by the parties - house purchased and registered in the names of the parties pursuant to the agreement - failure of the respondent to pay one half of the acquisition cost and other expenses - refusal of the respondent to occupy the house or pay any further sums beyond mortgage instalments after the date of refusal totalling $6,200 - whether a constructive trust in favour of the applicant - *Property Law Act* 1958 –. section 233 - adjustment of rights of parties - matters to be considered

APPLICANT	Michael Ngatoko
RESPONDENT	Bill Giannopoulos
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	2 March 2017
DATE OF ORDER	10 March 2017
CITATION	Ngatoko v Giannopoulos (Building and Property) [2017] VCAT 360

ORDERS

1. Declare that the Respondent holds his registered one half share as tenant in common of an estate in fee simple in the dwelling house and land situated at known as 212 Corrigan Road Noble Park, being the land comprised in Certificate of Title Volume 10804 Folio 675, upon trust for the Applicant subject to the terms of this order.
2. Order that, upon payment by the Applicant to the Respondent of $9,700.00, the Respondent execute all documents and do all things necessary to transfer his said registered interest to the Applicant.
3. Order that, until the mortgage that is presently registered over the title to the subject land is discharged, the Applicant indemnify the Respondent with respect to all claims by the mortgagee, whether for repayment of principal, payment of interest or any other sum.

4. Liberty to the parties to apply for further orders or directions to give effect to this order, including (without limiting the generality of the foregoing) an application an order or direction:

   (a) with respect to any mortgage or encumbrance affecting the House;

   (b) pursuant to section 232(j) of the Act; or

   (c) to have any document signed on behalf of the Respondent by the Principal Registrar.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr L. Virgona of Counsel
For the Respondent	In person

REASONS FOR DECISION

Background

1. The Applicant and the Respondent, who is the Applicant's wife's brother, are registered as the proprietors as tenants in common in equal shares of an estate in fee simple in the dwelling house and land situated at known as 212 Corrigan Road Noble Park, being the land comprised in Certificate of Title Volume 10804 Folio 675 ("the House").

2. The Applicant seeks a declaration that the Respondent holds his registered one half share upon trust for the Applicant and an order that, upon payment by the Applicant to the Respondent of an amount of $6,200.00, the Respondent execute all documents and do all things necessary to transfer his share in the House to the Applicant.

3. The ground of the application is that the House was purchased by the parties pursuant to a joint enterprise whereby they would be equally responsible for the cost of the purchase and all other expenses and they would live together in the House with their respective families. The Applicant contends that, in breach of this arrangement, the Respondent refused to pay his one half share of all costs and refused to move into the House. Thereafter all outgoings, improvements, mortgage and other payments in regard to the House have been made by the Applicant and it is argued that, in the circumstances, it would be unconscionable to allow the Respondent to assert his legal one half ownership against the Applicant.

4. The Respondent denies that he breached the agreement and contends that the joint enterprise failed when the Applicant and his sister, Mrs Ngatoko, refused to allow him to move into the House and occupy it in the manner that had been agreed upon. In his counterclaim he seeks an order for the sale of the House and a division of the proceeds as well as some alternate relief.

The Hearing

5. The matter came before me for hearing on 2 March 2017 with two days allocated. Mr L Virgona of counsel appeared on behalf of the Applicant and the Respondent appeared in person.

6. I heard evidence from the Applicant and Mrs Ngatoko and from the Respondent. The evidence concluded in the afternoon of the first day and I informed the parties that I would provide a written decision.

The witnesses

7. The Applicant's case was well supported by documents which were produced whereas the Respondent's case largely dependent upon his own recollection. The Respondent was a poor historian. He said that he has suffered from severe depression throughout the period in question and that he was unable to recall many things. He alleged that he had made numerous payments in cash to the Applicant and Mrs Ngatoko but had no record of them and so was unable to say

in regard to any alleged payment how much it was, when it was made or what it was for. The making of these payments were denied by the Applicant and Mrs Ngatoko.

8. The respondent attributed his difficulty in recalling matters during the course of his evidence to his depression.

9. As will appear below, the evidence of the Applicant and Mrs Ngatoko seems to me to provide a more likely explanation of what occurred than the version suggested by the Respondent.

The issues

10. Most of the facts were not disputed. It was agreed between the Applicant and the Respondent that they would purchase a House for both families to live in and that they would share the cost and expenses equally. The dispute concerns who breached the agreement.

11. In 2003 the Applicant and Mrs Ngatoko were living with their two children in rented accommodation in Noble Park. At that time, the Respondent had separated from his then wife and had access to his daughter every second weekend. On those weekends, the Respondent and his daughter would come and live with the Applicant and Mrs Ngatoko. For a period of over a year the Respondent lived sometimes with his mother and sometimes with the Applicant and Mrs Ngatoko.

12. The Applicant and Mrs Ngatoko suggested to the Respondent that they should purchase a House together, to be owned equally by the Applicant and the Respondent in order to provide a home for the Applicant and Mrs Ngatoko and their two children and for the Respondent and his daughter. The Respondent agreed and the parties looked at a number of house and land packages on the market. Eventually they agreed upon a design by a builder, Simonds Homes Pty Ltd ("Simonds Homes").

13. It was agreed between the Applicant and the Respondent that:

    (a) they would buy a house and land package from Simonds Homes;

    (b) they would enter into a joint mortgage with a lender, Wide Bay Australia Ltd ("Wide Bay") to borrow $275,477 to finance the purchase of the land and the construction of the house;

    (c) the house was to have a master bedroom and ensuite which would be occupied by the Applicant and Mrs Ngatoko, a bedroom of a similar size without an ensuite which would be the bedroom of the Respondent, and the other three bedrooms would be occupied by the three children, with each child having one room;

    (d) all expenses, mortgage payments and other costs would be shared by the Applicant and the Respondent equally.

14. On 25 February 2004 the parties signed an agreement for a house and land package and a deposit of $5,220.00 was paid. The Applicant said that he paid the

whole of this deposit himself. The Respondent denied that and said that, although he could not recall having paid a specific amount towards the deposit he could recall that he was required to, and did pay, half the deposit which he thinks must have been $2,500.00.

15. Neither party has produced a receipt for the whole of the deposit although the Applicant has produced a receipt from Simonds Homes dated 29 October 2003 in both names for $1,000.00 which is described on the face of the receipt is being "Initial deposit" and another receipt dated 21 February 2004 from an estate agent in the sole name of the Applicant for $500.00 which is described on the face of the receipt is being "Full deposit", which appears to have been the deposit payable for the land component of the package.

16. Whereas the evidence of the Applicant on this issue is quite clear and unequivocal, the evidence of the Respondent is vague and his memory appears to be unreliable. Moreover, the receipts are in the possession of the Applicant and one of them is in his name alone. I am satisfied that the deposit was paid solely by the Applicant.

17. On 26 October 2004 the parties borrowed a further $13,760 from Wide Bay to build a double garage. Both the Applicant and the Respondent undertook this further borrowing.

18. Once construction commenced, payments were required to be made to Wide Bay. These payments are set out in a statement which is in evidence. The statement shows that, between 12 October 2004 and 10 June 2005, the Respondent made payments totalling $6,200.00 to Wide Bay. The Applicant also made payments.

19. On 5 May 2005 when construction of the House was complete, the parties and Mrs Ngatoko attended the office of Simonds Homes in South Melbourne to pay for the variations to the House, which cost $2,377.70, and receive the keys. The Respondent said that he had no money to contribute to the payment for the variations and so the whole of that amount was paid by the Applicant.

20. The House had been completed by Simonds Homes without any landscaping, paving and without any carpet or internal flooring, apart from the concrete slab. The Applicant and Mrs Ngatoko took out a loan to pay for carpeting and timber flooring material. The timber flooring was laid by the Applicant during the following week with the assistance of Mrs Ngatoko. Although the Respondent was present on two occasions while this happened, he did not offer to help with the installation. The carpet was then laid by a carpet supplier. The Respondent did not contribute to the cost of either the carpet or the timber flooring.

21. The Applicant and Mrs Ngatoko and their two children then moved into the House but the Respondent did not do so.

Termination

22. There are two distinct versions as to what then occurred. According to the Applicant, the Respondent complained that the House was too far from his

workplace and that he would prefer to stay rent-free with a friend who was a former workmate.

23. According to Mrs Ngatoko, approximately two months after they moved into the House, the Respondent contacted her and told her that he no longer wanted to contribute to the loan repayments for the House because he did not have enough money to go out. She said that she said to him: "That's fine Bill, but you will have to have your name removed from the loan and the title". She said that he replied: "Yeah okay whatever. That's fine. I just want out." The Applicant said that they agreed that they would pay the Respondent what he had contributed.

24. The Respondent's version is quite different. He said that, during the construction of the House, at around the lock-up stage, Mrs Ngatoko told him that she would not permit the Respondent and his daughter to have the use of the two bedrooms they were intended to have in the House following its completion. He said that instead, she proposed that she would keep his room for her own use and that the Respondent would have to share a bedroom with his daughter. He said that Mrs Ngatoko justified this by saying that the daughter only came on weekends and so did not need her own room. He said that Mrs Ngatoko's position was supported by the Applicant and after a heated argument he was told to pack his things and to leave the Noble Park House where they were all then living, and he did so. He said that thereafter he was not advised when completion of the House took place nor when the owner and Mrs Ngatoko moved in. In his oral evidence during the hearing the Respondent said that Mrs Ngatoko said that she wanted his room so that she could use it to conduct a massage business.

25. The Applicant and Mrs Ngatoko denied ever having told the Respondent that he and his daughter would not be permitted to occupy their rooms as had been agreed.

26. I think the Respondent's version of these events is unlikely to be true. He had lived on and off with the Applicant and Mrs Ngatoko rent-free for over a year in the Noble Park House. It was asserted by the Applicant and Mrs Ngatoko, and admitted by the Respondent, that they socialised together with the three children, including going on holidays. There is no suggestion by the Respondent of any falling out which might have led to a change in attitude on the part of the Applicant and Mrs Ngatoko. It was acknowledged also that the three children got on very well together and the Applicant and his wife said they were very attached to their niece.

27. Mrs Ngatoko denied the suggestion that she wanted to use the room for a massage business. She acknowledged that she had done massages in people's homes in the past but said that she had not done it for several years and had no intention of restarting such a business. The Applicant and Mrs Ngatoko said that the room had not been used in this way since they moved into the House over 11 years ago.

28. Moreover, the suggestion by the Respondent that the falling out between the parties occurred when the House reached lock-up stage seems inconsistent with the fact that:

(a) the respondent was still making payments thereafter;

(b) he attended the final meeting at Simonds Homes with the Applicant and Mrs Ngatoko to collect the keys when the House was completed; and

(c) after the keys were collected he attended the House when the flooring was being laid by the Applicant.

He asserted in his defence and counterclaim that he was unaware of the date upon which the House was completed or the date on which the Applicant and his family moved in but this is inconsistent with his oral evidence.

29. I therefore prefer the evidence of the Applicant and Mrs Ngatoko on this issue. I accept Mrs Ngatoko's evidence of the telephone conversation she had with her brother and find that it was agreed that his name would be removed from the loan and the certificate of title and that the Applicant and Mrs Ngatoko would repay to him his contributions. However this did not occur.

30. In 2006, a solicitor representing the Applicant and Mrs Ngatoko approached the Respondent and offered to pay him $10,000 in exchange for transferring his interest in the House to the Applicant. There was some negotiation between that solicitor and a solicitor acting for the Respondent who said at first that the Respondent would accept the offer. The solicitor then ceased to act and nothing further was done.

31. Later in 2006, at the wedding of the brother of the Respondent and Mrs Ngatoko, the Applicant handed the Respondent a transfer of land asking him to sign it in exchange for the payment of $10,000. The Applicant said in evidence that the Respondent refused to sign it because he had told the Respondent that he would be transferring a half share in the House to his wife.

32. The Applicant said that he then had great difficulty in contacting the Respondent because he would not return calls and kept moving his address. There were several further discussions but no agreement was reached. This proceeding was then brought.

Payments made

33. According to a letter dated 19 August 2016 from Auswide Bank, which appears to be the same entity as Wide Bay or possibly its successor, mortgage repayments totalling $293,841.28 have been made in the name of the Applicant and the Respondent. Of this, according to the evidence, only $6,200.00 was paid by the Respondent and the rest has been paid by the Applicant. In addition, there was a first home buyer's grant of $7,000.00 that was received by the parties and applied towards the purchase price of the House. The respondent's share of that, $3,500.00, should be added onto the mortgage instalments that he made, so that his total contribution was $9,700.00.

34. The Applicant has paid all rates and outgoings, appliances for the House, the driveway, the land deposit, a pergola costing $29,500, a swimming pool costing $44,000 and various other expenses that he has listed on a spreadsheet extending over several pages and forming part of his witness statement.

35. The Applicant says that the total of all sums expended by him on the House is $468,216.91. There is no reason to disbelieve this evidence.

The law

36. In general, where property is transferred to two persons, one of whom has provided the whole of the purchase money, the property is presumed to be held by the other in trust for that person unless the relationship between them, such as parent and child or husband and wife, is such as to raise a contrary presumption that the transferee was intended to take a beneficial interest. The presumption may also be rebutted by evidence that the intention of the person who provided the money was that the other transferee would take a beneficial interest (see: *Calverley v. Green* [1984] HCA 81).

37. In the present case, although nearly all the payments under the mortgage have been made by the Applicant, the House was paid for with money borrowed by both parties. Prime facie therefore, the House belongs beneficially to the Applicant and the Respondent in equal shares in accordance with their registered interests.

38. However Mr Virgona argued that the House was acquired by the parties for the purpose of the joint enterprise that is, to provide a family home for the families of both the Applicant and the Respondent. He said that the purpose failed because of the refusal of the Respondent to take up residence in the House and pay his one half share of the mortgage payments and other expenses. He submitted that, in these circumstances, I should find that the Respondent holds his interest in the House on a constructive trust in favour of the Applicant.

39. He referred me to the case of *Muschinski v Dodds* [1985] HCA 78. In that case a man and a woman purchased a property with a view to them developing it as an arts and crafts centre and building a House for themselves to live in as a domestic couple. Although the property was transferred to them in equal shares, the woman provided over $25,259.45 towards the cost whereas the man provided only $2,549.77. The relationship failed and the man sought one half of the value of the property. The majority of the court (Deane J, Gibbs CJ and Mason J) held that the shares of the parties were held upon a constructive trust to repay from the proceeds of sale the unequal contributions made by each of them and to then make an equal division as to the balance. The purpose of the order was to avoid an unconscionable result.

40. Deane J said (at para 18):

> "18. Nor does the fact that Mr. Dodds is seeking to take advantage of the overall arrangement which the parties framed to meet the exigencies of their personal relationship deprive his conduct of its unconscionable character. In circumstances where the parties neither foresaw nor attempted to provide for the double contingency of the premature collapse of both their personal relationship and their commercial venture, it is simply not to the point to say that the parties had framed that overall arrangement without attaching any condition or providing any safeguard specifically to meet the occurrence of that double contingency. As has

been seen, the relevant principle operates upon legal entitlement. It is the assertion by Mr. Dodds of his legal entitlement in the unforeseen circumstances which arose on the collapse of their relationship and planned venture which lies at the heart of the characterization of his conduct as unconscionable. Indeed, it is the very absence of any provision for legal defeasance or other specific and effective legal device to meet the particular circumstances which gives rise to the need to call in aid the principle of equity applicable to preclude the unconscionable assertion of legal rights in the particular class of case." *(emphasis added)*

41. From this passage it is apparent that it is the assertion of the legal right in circumstances where it is unconscionable to do so that amounts to the unconscionable conduct. The learned judge said (at para 6):

> "Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle".

42. The principle was applied in *Baumgartner v Baumgartner* [1987] HCA 59 and also in *Payne v. Rowe* [2012] NSWSC 685. In the latter case a mother and her two adult children purchased a small rural property in order that the three of them would initially share a dwelling on the property and then the plaintiff and the second defendant would each build a separate dwelling on the land at their own cost. They would own the land equally as joint tenants so that if any of them died their share would pass to the survivor or survivors. The personal relationship between the three parties broke down and the Applicant sought an order for the sale of the property.

43. In finding that there was a constructive trust, Ball J. said (at para 93:

> "Implicit in Mr Oliver's second submission is the submission that there was no joint endeavour between the parties with the result that they should be left to their claims for contribution. That submission should not be accepted. The parties plainly bought the property as a joint endeavour which would enable each of them to live on and enjoy the property for an indefinite period of time. The fact that they chose to acquire the property as joint tenants supports that view. Each of them made contributions to that joint endeavour in circumstances where it would be unconscionable to permit one or more of them to retain the benefit of contributions made by the others following the breakdown of the relationship between them. The result is that it is appropriate for the court to impose a constructive trust."

44. In that case most of the money provided for the purchase that was not borrowed had been provided for the plaintiff and it was found that it would be unconscionable for the other parties to obtain the benefit of those monies on the breakdown of the relationship.

45. The principal has recently been applied in two recent cases in this tribunal. In *Sherwood v. Sherwood* [2013] VCAT 1746 a brother and sister purchased a property together as an investment. The relationship broke down but the

Tribunal did not make a finding of a constructive trust. Senior Member Riegler said (at para 93):

> "I do not accept that the purchase of the property can be characterised in the same way as the purchase of the land in *Payne v. Rowe*. There is little or no evidence to support a finding that it was the intention of the parties to purchase the property for the purpose of living together for an indefinite period of time. Indeed, the evidence demonstrates that there were periods of time where the parties did not cohabit the property. In my view, the evidence points to a finding that the parties intended to purchase the property as an investment, albeit that each of them lived in the property from time to time, including periods where they cohabited."

46. In *Trakas v. Aravopoulos* [2016] VCAT 592 a woman purchased a property at auction and had it transferred into the names of herself, the applicant in that case and her brother. She and her brother borrowed $455,000.00 from a bank which was secured by a mortgage that they both signed as mortgagors and the balance of the purchase money was provided by their father. Although the applicant was not a borrower of the mortgage sum and did not provide any monies towards the purchase, he signed a guarantee to the bank for the mortgage debt.

47. The applicant's interest in the property was transferred to him because it was the common intention of the applicant and the woman that they would occupy the property in a long-term and committed de facto relationship and they agreed to contribute equally to the repayment of the mortgage loan and other expenses associated with the property.

48. After cohabiting together for about six months the de facto relationship broke down and the applicant left the woman and moved out of the property. He subsequently brought an application seeking a sale of the property and a division of the proceeds between himself, the woman and her brother.

49. Senior Member Riegler found that the Applicant had made no financial contribution at all to the acquisition of property or the mortgage payments or other expenses. After considering the above authorities the learned Senior Member said (at para 81):

> "In my view, the circumstances of this case justify the imposition of a constructive trust, such that the applicant holds his beneficial interest in the property on trust for the first and second respondents. The substratum of the joint endeavour simply did not eventuate, despite the fact that on the applicant's view, he and the first respondent cohabited the property for the first six months following settlement of the purchase. In my opinion, it would be unconscionable to allow the applicant to retain his right, title and interest in the property in circumstances where the assumptions upon which he acquired that right, title and interest never crystallised in any meaningful way."

Submissions

50. The present case is not merely the purchase of an investment as in *Sherwood v. Sherwood*. The Applicant and the Respondent bought the property and undertook their joint borrowing as part of a joint enterprise to provide a home for themselves and their respective families. The purpose of the endeavour was to

enable them all to live in and enjoy the property for an indefinite period of time. It was agreed that the cost and all expenses were to be shared equally.

51. Mr Virgona submitted that for the Respondent in the present case to assert that he has a one half beneficial interest in the House when he has paid only $6,200.00 and the Applicant has paid amounts totalling $468,216.91 would be unconscionable in the circumstances.

52. I accept that submission, save that I have found that the Respondent's contribution was $9,700.00. The agreement was that the Applicant and the Respondent were to make equal contributions to that joint enterprise. They have not done so because of the Respondent's decision to abandon the enterprise and leave the whole of the burden of the mortgage payments, the cost of completing the House, the carrying out of improvements and the outgoings for the Applicant to bear alone. He has carried this burden for over 12 years and in the process, he has paid $468,216.91, half of which ought to have been borne by the respondent.

53. In the circumstances it would be unconscionable to permit the Respondent to retain the benefit of the contributions made by the Applicant following the breakdown of the relationship between them.

54. I therefore find that the House is held upon a constructive trust such that the Respondent holds his interest upon trust for the Applicant, subject to the Applicant repaying to the Respondent his contributions of $9,700.00 and assuming sole responsibility for the existing registered mortgage.

The operation of the Act

55. As was pointed out by the learned Senior Member in *Trakas v. Aravopoulos*, whether relief is sought as a constructive trust or by an adjustment of rights under the *Property Law Act* 1958 ("the Act"), the tribunal's jurisdiction to make orders with respect to co-owned property is set out in Part IV of the Act.

56. Power to order a sale or division is found in sections 228 and 230. For an adjustment of rights, the relevant section is section 233, which, where relevant, provides as follows:

> "233 (1) In any proceeding under this Division, VCAT may order—
>
> (a) that compensation or reimbursement be paid or made by a co-owner to another co-owner or other co-owners;
>
> (b) that one or more co-owners account to the other co-owners in accordance with section 28A;
>
> (c) that an adjustment be made to a co-owner's interest in the land or goods to take account of amounts payable by co-owners to each other during the period of the co-ownership.
>
> (2) In determining whether to make an order under subsection (1), VCAT must take into account the following—
>
> (a) any amount that a co-owner has reasonably spent in improving the land or goods;

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

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

(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;

(f) ……..

(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."

57. The operation of this section was considered by Kay 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 by taking 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."

Application of the section

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, as in *Trakas v. Aravopoulos*, 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.

59. In the present case all of the payments were made by the Applicant, save for mortgage instalments totalling $6,200.00 and one half of the first home buyer's grant of $3,500.00. The disparity between the Respondent's contribution and $468,216.91 is so great that a fair adjustment should result in the Respondent's share being very small indeed. I think that a fair adjustment would be achieved by directing the transfer of the Respondent's interest in the House to the Applicant, subject to the re-payment to the Respondent by the Applicant of his contribution of $9,700.00.

The counterclaim

60. By way counterclaim the Respondent makes the following alternative claims:

    (a) an order that the House be sold and the proceeds of sale divided, subject to any adjustment by unequal contributions made by the Applicant and rental due and payable by the Applicant to the Respondent on account of his having the sole occupation of the House;

    (b) alternatively the division of the House on the basis of what is just and fair having regard to the capital appreciation of the House, said to be $87,335;

    (c) payment by the Applicant to the Respondent of rental during his sole occupancy of the House;

    (d) alternatively the sum of $21,406, being the agreed sale price of the Respondent's interest, $10,000, plus accrued interest.

61. As to the claims in (a) and (c), since the Applicant is seeking compensation or reimbursement for payments that he has made with respect to the House, I can make an adjustment in favour of the Respondent pursuant to s.233(2)(e) of the Act, if I consider that the Applicant should pay an amount equivalent to rent to him, since he was a co-owner who did not occupy the House. However I must be satisfied that it is fair to make such an adjustment.

62. In that regard I take into account that it was the Respondent's decision not to move into the House and that the Applicant and Mrs Ngatoko have not benefited by his failure to do so. Their occupancy of the House was part of the joint endeavour that was agreed upon. Their sole occupancy was the choice the Respondent. The two rooms intended for the Respondent and his daughter were available to be occupied by them.

63. Further, the time when the constructive trust came into being is also relevant. In *Trakas v. Aravopoulos*, Senior Member Riegler refer to the following passage to be found in the joint judgment of Drummond, Sundberg and Marshall JJ in the Federal Court decision of *Secretary of the Department of Social Security v.*

Agnew [2000] FCA 59. After referring to the passage from the judgement of Dean J in *Muschinski v Dodds* above, the judgement continued (at para 18):

> "See also *Re Jonton Pty Ltd* [1992] 2 Qd R 105 and *Zoborg v Commissioner of Taxation* [1995] FCA 1226; (1995) 64 FCR 86 at 91-92. Those cases also indicate that the court has a discretion to modify the prima facie date on which the trust takes effect. We would adopt the view of A J Oakley that "in the absence of any judicial order to the contrary, a constructive trust will take effect from the moment at which the conduct which has given rise to its imposition occurs: ……. In the present case there is no reason, such as third parties in need of protection, to defer the inception of the trust, and accordingly it came into existence when the conduct which gave rise to its imposition occurred.".

64. In this case, that was the time when the common purpose failed and the legal right to a one half share was asserted. From that time the Respondent held his interest upon trust for the Applicant and so could not claim any rental from him. Any allowance for way of rent would only be between when the Applicant moved in and when the Respondent informed his sister that he would not be proceeding with the joint enterprise or contributing any more money to it. It is unclear how long that was, but it was not more than two months.

65. Moreover, section 233(3) of the Act would suggest that any allowance for rental in favour of the party who was not in occupation should be balanced against the money expended in relation to the land by the co-owner in occupation.

66. According to the valuation evidence, the market value of the House if it were to be sold is $595,000.00. The amount presently outstanding on the mortgage is $241,962.41. If one adds that onto the $468,216.91 paid by the Applicant, it follows that the Applicant has already paid or is presently liable to pay $710,179.32. The difference between that figure and the present market value of the House is $115,179.32. I have no evidence as to the rental value of the House between the date upon which the House was completed and the date of hearing.

67. For these reasons, it is not established that is appropriate to make any allowance in favour of the Respondent against the Applicant with respect to the Applicant's occupancy of the House.

68. As to a share in the increased market value of the House, that occurred after the constructive trust took effect and so it belongs to the applicant. Moreover, it is not demonstrated that, even having regard to the increase in the market value of the House, it is fair and reasonable to allow anything further to the Respondent beyond the value of his contributions.

69. Finally, although the Respondent's then solicitor informed the Applicant's former solicitor that he accepted their offer of $10,000 for his interest in the House, it appears that he changed his mind and thereafter refused to sign the transfer of land in exchange for the money offered to him by the Applicant. There is no legal basis for him now to claim payment of that sum of $10,000 or any interest on it.

Orders to be made:

70. The Respondent will remain personally liable to the mortgagee under the mortgage that is registered over the title to the House until such time as that mortgage is discharged. However I was told that the interest rate under that mortgage is very high and the Applicant proposes to refinance as soon as he can obtain a transfer from the Respondent. The existing mortgage will then be discharged and the exposure of the Respondent will be extinguished.

71. I had considered whether I should make the execution of a transfer of land by the Respondent contingent upon the discharge of this existing mortgage but I think that might cause practical difficulties and be unnecessary when it is highly likely that it will shortly be discharged in any event. I will reserve liberty to apply in the case that does not occur.

72. The order will be as follows:

    (a) Declare that the Respondent holds his registered one half share as tenant in common of an estate in fee simple in the dwelling house and land situated at known as 212 Corrigan Road Noble Park, being the land comprised in Certificate of Title Volume 10804 Folio 675, upon trust for the Applicant subject to the terms of this order.

    (b) Order that, upon payment by the Applicant to the Respondent of $9,700.00, the Respondent execute all documents and do all things necessary to transfer his said registered interest to the Applicant.

    (c) Order that, until the mortgage presently registered over the title to the House is discharged the Applicant indemnify the Respondent with respect to all claims by the mortgagee, whether for repayment of principal, payment of interest or any other sum.

    (d) Liberty to the parties to apply for further orders or directions to give effect to this order.

SENIOR MEMBER R. WALKER