

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1537/2018

CATCHWORDS

REAL PROPERTY; *Property Law Act (Vic) 1958* Part IV: s228; s229, s233: co-ownership of land; applicant occupied the land since it was purchased by applicant and her late husband; application for sale of co-owned land; amended application for transfer of the respondent's registered interest in the land to the applicant; respondent claims indirect contributions made to the purchase of land and the family businesses; whether resulting or constructive trust.

APPLICANT	Patricia Weatherley
RESPONDENT	Simon Weatherley
WHERE HELD	Melbourne
BEFORE	Member F. Marks
HEARING TYPE	Hearing
DATE OF HEARING	11 and 12 June 2019 Orders in Chambers made on 8 August 2019.
DATE OF ORDER	10 September 2019
CITATION	Weatherley v Weatherley (Building and Property) [2019] VCAT 1393

ORDERS

The respondent, Simon Weatherley, transfer his registered interest in the land situated at 2 Miranda Place Frankston, being the land in Certificate of Title Volume no. 09076 Folio 413, to the applicant.

MEMBER F. MARKS

APPEARANCES:

For the Applicant	Mr D Epstein of Counsel
For the Respondent	Mr L Wirth of Counsel

REASONS

INTRODUCTION

- 1 The parties to this application are family members and share the same surname. Without intending any disrespect, I will refer to the parties and witnesses by their first names.
- 2 The applicant Patricia and her son Simon are registered proprietors of the land located at 2 Miranda Place Frankston (Land), being the land in Certificate of Title Volume no. 09076 Folio 413. Patricia holds a total of 2 equal undivided shares in the Land (one of the undivided shares remains in the name of her late husband Brian) and Simon holds one undivided share, as tenants in common.
- 3 Patricia applied for an order under Part IV of the *Property Law Act 1958* (PLA) for the sale of the Land and division of the proceeds of sale. Patricia sought orders that, after payment of the costs of the sale and discharge of the loan, \$10,000 of the proceeds of sale be distributed to Simon and the balance to Patricia. Patricia's application and Simon's defence were conducted on this basis.
- 4 In closing submissions, Patricia's Counsel submitted that Patricia no longer sought an order for the sale of the Land because she wished to remain at liberty to conduct the sale at her convenience. Patricia's Counsel submitted that the Tribunal make an order that at some time in the future when the Land was sold, \$10,000 be distributed to Simon after payment of the costs of the sale and discharge of the loan.
- 5 Under Part IV of the PLA, the Tribunal has the power to order the immediate sale of the land and division of the proceeds of sale or to order a transfer of a co-owner's interest to another co-owner. Part IV of the PLA does not give the Tribunal the power to make orders for the sale of the Land at some time in the future.
- 6 As the Tribunal does not have the power to make the orders sought, the Tribunal requested Patricia to notify the Tribunal and Simon if she wished to make an application for leave to amend her application to seek an order that Simon transfer his registered interest in the Land to Patricia. Patricia advised the Tribunal that she wished to amend her application and sought leave to do so. Patricia's application to amend was not opposed by Simon.
- 7 By orders made on 8 August 2019, the Tribunal granted Patricia leave to amend her application. By amended application, Patricia now seeks an order from the Tribunal that Simon transfer his registered interest in the Land to Patricia.
- 8 Simon admits that he has not made any direct contributions to the purchase, maintenance or improvement of the Land or the payment of the mortgage, rates, insurance or outgoings. He claims he has made indirect contributions to the Land and to the family businesses over 39 years, which entitle him to

a one third share of the Land and to compensation and reimbursement of more than \$284,180.

- 9 I have determined that Patricia is entitled to an order that Simon transfer his registered interest in the Land to Patricia.

THE DISPUTE

- 10 The parties to this dispute are co-owners of the Land within the meaning of Part IV of the PLA. This dispute concerns what adjustment should be made, if any, to Patricia and Simon's respective legal interests in the Land.

THE FACTS

- 11 In April 2000 Patricia and her late husband, Brian, purchased the Land for \$140,000. They paid a deposit of \$14,000 and contributed a further \$13,689.34 from their own resources. They borrowed \$119,000 from the Bank of Melbourne secured by a mortgage over the Land.
- 12 The sale was completed on 29 June 2000. Brian and Patricia were registered on title as joint proprietors, subject to the mortgage. In January 2006, after receiving an amount from her late brother's estate in England, Patricia paid out the mortgage loan on the Land.¹
- 13 In late December 2006, following discussions with Simon, Brian became interested in purchasing a mowing business called Peninsula Mowers. Brian did not have experience in lawn mower sales or repairs of outdoor power equipment. At that time Simon was employed by New Street Mowers in Frankston, where he had worked for 6 years and gained experience as a small engine mechanic.
- 14 Brian and Patricia were advised that due to their age, one of their children should be a co-borrower and named on the Title. Elizabeth was unable to borrow at that time. Christopher, Simon's younger brother was interstate. Simon agreed to be a co-borrower and to be named on the title, so that his parents could obtain a loan secured by a mortgage over the Land to enable a company they incorporated to purchase Peninsula Mowers.
- 15 Patricia says Simon agreed to be named on the Title in consideration of Brian and Patricia agreeing to pay him \$7,500 in lieu of the first home owner's grant if Simon later purchased a property and would otherwise have qualified for that grant. Simon has not been paid the agreed amount. Simon disputes Patricia's evidence of the arrangement. Simon says his father agreed to give him a beneficial interest in the Land.
- 16 In December 2006 Brian, Patricia and Simon signed a transfer of land in which Brian and Patricia, as joint proprietors, transferred 1 of a total of 3

¹Paragraph 8 of Patricia's witness statement dated 26 April 2019 [TB 80] states that she paid out the mortgage loan on 31 January 2005. This appears to be incorrect as page 1 of the Westpac premium option home loan statement [TB 35] shows the loan as being paid out on 31 January 2006.

equal undivided shares in the Land to Simon, as tenants in common. The transfer of land was registered on 17 March 2007.

- 17 On 30 January 2007 Brian and Patricia incorporated a company, P & B Weatherley Pty Ltd (Company). They were appointed directors and shareholders. A short time later, Patricia Brian and Simon obtained a loan of about \$265,000² (Business Loan) secured by a mortgage over the Land in favour of Permanent Custodians Ltd. In early 2007 the Company purchased Peninsula Mowers for approximately \$300,000³.
- 18 Simon was seen as being vital to the success of the Peninsula Mowers business. Simon was employed by Peninsula Mowers from about February 2007 until about April 2011. While employed Simon worked as a small engine mechanic and was paid \$650 net per week. He was not paid overtime. Elizabeth also started work at Peninsula Mowers in 2007 and is currently employed as sales manager.
- 19 In about mid-April 2011 Simon left Peninsula Mowers after an argument with his parents. Simon says he was sacked by his father. Patricia and Elizabeth say Simon left of his own accord and refused to return. In 2011, following Simon's departure, Elizabeth's husband, Ammon Wright, started work with Peninsula Mowers and assisted Brian, Patricia and Elizabeth with the operation of the business.
- 20 On 3 December 2015 Brian died and on 1 February 2016 Elizabeth was appointed a director and shareholder of the Company. Elizabeth, Ammon and Patricia currently work at Peninsula Mowers. The Company has paid and continues to pay, the monthly repayments on the Business Loan.

PROPERTY LAW ACT

- 21 Section 228(1) of the PLA provides that in any proceeding under Division 2 of Part IV, the Tribunal may make any order it thinks fit to ensure that a "just and fair" sale or division of land occurs.
- 22 The power to order a "just and fair sale or division" extends to a power to order one co-owner to transfer its registered interest to the other co-owner.⁴ Such an order may be appropriate where a co-owner has established that he or she is the sole beneficial owner of the whole of the land or to a greater share than his or her registered interest reflects.⁵
- 23 Such an order may be appropriate where, for other reasons, that would be the just and fair outcome.⁶ Where the parties are registered proprietors and

² Patricia's witness statement dated 26 April 2019 at [14]. Patricia's statement of contribution and receipts states that Brian and Patricia borrowed \$286,000 from Bluestone Mortgages (manager for Permanent Custodians Ltd). The points of claim at [5] state that Patricia and Brian needed to borrow \$265,000.

³ Patricia's witness statement dated 26 April 2019 at [16]. The points of claim at [5] state that the purchase price of Peninsula Mowers was \$390,000.

⁴ *Pavlovich v Pavlovich* [2012] VCAT 809; *Binns v Binns* [2018] VCAT 759.

⁵ *Lyle v Lyle* [2011] VCAT 323; *Stewart v Owen* [2019] VCAT 140

⁶ *Binns v Binns* (supra)

“co-owners” as defined, a decision can be made by the Tribunal that a co-owner is the sole beneficial owner.⁷

- 24 Section 229 of the PLA provides that the Tribunal must make an order under s228(2)(a) unless the Tribunal considers it would be more just and fair to make an order for the physical division of the land (s228(2)(b)) or an order for the sale of, and the physical division, of the land (s228(2)(c)).
- 25 Consequently, the Tribunal must make an order that achieves a “just and fair” division of the Land. The Tribunal should have regard to, and be informed of, the general law as well as Part IV of the PLA⁸. However, s233 applies despite any law or rule to the contrary (s233(5)).
- 26 Section 233(1) of the PLA provides that the Tribunal may order that compensation or reimbursement be paid to a co-owner (s233(1)(a)), or that an adjustment be made to a co-owner’s interest in the land to take account of amounts payable by co-owners to each other during the period of the co-ownership (s233(1)(c)).

What matters can be taken into account?

- 27 The very wide powers in s233(1) must be considered in the light of the matters referred to in s233(2). The Tribunal must take into account:
- any amount that a co-owner has recently spent in improving the land;
 - any costs reasonably incurred by a co-owner in the maintenance or insurance of the land;
 - in the case of land, the payment by a co-owner of more than that co-owners proportionate share of rates, mortgage repayments, purchase money, instalments or other outgoings in respect of that land, for which all the co-owners are liable; and
 - 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.
- 28 The amounts to be taken into account in determining compensation, reimbursement or an adjustment of the interest of one co-owner, must be of a nature whereby it is appropriate to make an adjustment to the interest of one party or the other. A debt unrelated to the Land would not be in that category. To take an unrelated debt into account would have the effect of elevating the person to whom that debt was owed to the position of a secured creditor, the security being over the interest of the debtor in the co-owned land. This may have significance for other unsecured creditors of the debtor.⁹

⁷ *Krsteski v Jovanski* [2011] VSC at [41] – [49].

⁸ *Sherwood v Sherwood* [2013] VCAT 1746 at [27] – [34] the following *Edelsten v Burkinshaw* [2011] VSC 362 at [27].

⁹ See also *Sutherland v Corkhill* [2011] VCAT 709 at [21] per SM Walker.

29 The purpose of the legislation is to effect a just and fair division of jointly owned property. The exercise of the powers is to be confined to that purpose. It was not the intention of Parliament to confer on the Tribunal by this legislation a power to secure debts over co-owned property that are not directly related to that property.¹⁰

PATRICIA'S POINTS OF CLAIM

30 Patricia says that Brian and she contributed fully to the purchase of the Land in 2000, and to its maintenance and to the payment of outgoings. Patricia says in about December 2006 Simon agreed to be named on the title, to enable them to borrow to purchase the lawn mowing business, Peninsula Mowers. She says Simon agreed to have no beneficial interest in the Land.

31 Patricia claims that there is a presumption of a resulting trust in favour of herself and her late husband Brian. Patricia says that although she agreed in about December 2006 to pay Simon \$7,500 if he became eligible at some stage in the future for a first home owner’s grant, she has offered and agreed to pay Simon \$10,000 from the proceeds of sale of the Land.

The alleged contributions

32 The financial contributions that Patricia and Brian have made in relation to the Land are:

Year	Contribution	Amount
2000	Acquisition costs of Land - purchase price \$140,000 payment of stamp duty and other disbursements	Cash contribution of \$13,689.34 plus \$14,000 deposit Amount borrowed \$119,000
2000 to 2006	Regular repayment of mortgage	Monthly repayments
January 2006	Repayment of the loan in full and discharge of the mortgage	119,701.96
2000 to date	Municipal rates and water rates and insurance paid	All paid
2000	Purchase of second hand kitchen	\$4,000
	Installation of two new bathrooms	\$5,000
2018	Excess paid on insurance claim for rectification of damage to patio roof caused by possums	\$500

¹⁰ See also *Sutherland v Corkhill* (supra) at [22] per SM Walker.

	Installation of ducted evaporative air-conditioning	\$3,976
	New carpets	\$2,600
	Repair and maintenance	Over \$1000
2018	Purchase of new oven	\$500

SIMON'S POINTS OF DEFENCE

- 33 Simon admits that in about late December 2006 he agreed to be a co-borrower and named on the title so that his parents could purchase the mowing business, Peninsula Mowers.
- 34 However, Simon claims his father agreed to give him a beneficial interest in the Land because of the contributions he made to the Land and the family businesses, both before and after his parents purchased the Land in 2000.

The alleged contributions

- 35 Simon claims to have made indirect financial contributions of \$284,180 and seeks reimbursement of rent of \$60,493.33, details of which are set out in the following table.

Year	Contributions before the purchase of the Land	Amount
1990	Simon claims he paid his father Brian, \$600 per week out of his net earnings of \$750 per week when employed at a bakery in Mount Eliza for 52 weeks.	\$31,200
1991 to 1997	Simon claims to have been underpaid by \$300 each week for 6 years when employed in the family paper recycling business. He claims he was paid \$150 instead of \$450.	\$93,600
	Contributions after the purchase of the Land	
2006 to 2011	Simon claims to have been underpaid \$350 each week for 5 years when employed by Peninsula Mowers. He claims was paid \$650 per week and should have been paid \$1,000 per week, which he claims was the amount paid to his brother in law Ammon Wright when Ammon started work with Peninsula Mowers in mid-2011.	\$91,000
2006 to 2011	Simon claims he was entitled to, but not paid, overtime at Peninsula Mowers. He claims an average of 10 hours overtime per week of \$26.30 per week for 5 years.	\$68,380
	Reimbursement	
2010 to 2019	Reimbursement equivalent to rent said to be owed by Patricia to Simon for occupying the Land.	\$60,493.33

- 36 At the hearing Simon's claim for reimbursement of rent was not pressed. I therefore find that this claim has been withdrawn. At the hearing Simon admitted that he started work at Peninsula Mowers in 2007 and not in 2006, as claimed in his points of defence and Statement of Contributions.
- 37 Simon did not file a counterclaim. However, in closing submissions Simon's Counsel submitted that Simon sought orders that on the sale of the Land he receive the following:
- (a) A third of the gross, or the net value of the Land; or
 - (b) \$10,000 for the loss of the first home buyers grant; and
 - (c) \$31,070 for the loss of the stamp duty concession otherwise payable on purchasing land with a dutiable value of \$600,000; and
 - (d) \$350,000 for the lost opportunity of purchasing a property in 2013.

THE EVIDENCE

- 38 The Tribunal made orders on 25 January 2019 that the parties' evidence be given by witness statements. Patricia filed two witness statements dated 17 April 2019 and a further statement dated 26 April 2019. She also filed a witness statement made by her daughter Elizabeth, on 24 April 2019.
- 39 Simon filed a witness statement dated 10 May 2019. Simon's witness statement did not address Brian and Patricia's acquisition of the Land in 2000, nor the agreement he claimed he made with his parents to be a co-borrower and registered on the Title in 2007. Further, his statement did not address his alleged indirect contributions to the purchase of the Land, the paper recycling business and Peninsula Mowers.
- 40 At the hearing the parties sought to rely on unsworn statements of witnesses who did not attend the hearing and were not available to be cross-examined. I did not allow those statements to be received into evidence. The parties relied on and gave oral evidence about their statements of contribution and receipts filed with the Tribunal. None of the parties relied on expert valuation evidence.

Simon's evidence

- 41 The gist of Simon's evidence was that through an arrangement or arrangements reached with his father Brian, he contributed indirectly to the purchase of the Land in 2000 and to the start-up and purchase of the family businesses in 1991 and 2007 respectively. In return his father, Brian, told him the businesses would be his. In 2007 he was given a one third share in the Land because of the contributions he had made.
- 42 Simon said that in 1990, when he was 17, he gave his father \$31,200 from his earnings as an assistant baker at a bakery in Mount Eliza which Brian used to start the family paper recycling business in 1991. Simon said he was employed in the family paper recycling business, from 1991 until 1997. During this period, he also received Government benefits. He said he was

underpaid throughout his employment because Brian told him that the business would ultimately be his and his brother Chris’.

- 43 Simon gave evidence that the paper recycling business was sold in 1997 for about \$140,000. He gave further evidence on being cross examined that the plant and equipment was sold for about \$40,000 with the business name being sold separately. He said Brian told him about the sale price. Simon said the funds from the sale of the paper recycling business were used by his parents to purchase the Land in 2000.
- 44 Simon said in about December 2006, he agreed to be a co-borrower and named on the title. He agreed because his father told him he was the key to the success of Peninsula Mowers which would be his one-day, and because of the earlier contributions he had made over the years. Simon did not provide evidence to corroborate the arrangements that he claimed he made with his father in 1990, or more recently in 2007. His evidence was directly contradicted by Patricia.
- 45 I found Simon’s evidence of his payment of \$31,200 to his father Brian in 1990 and the arrangements he said he made with Brian to be vague, inconsistent and, at times, implausible. I found Simon’s evidence of his indirect contributions to the Land and the purchase of the businesses, again to be vague and inconsistent. A good deal of Simon’s evidence was not supported by documentary evidence. In so far as he relied on documents to support his claim, I found his evidence to be inconsistent with those documents.
- 46 Further, Simon did not explain the basis on which the Tribunal must take into account his alleged indirect contributions, when making orders for sale of the Land and division of the proceeds under Part IV of the PLA.

Patricia’s evidence

- 47 Patricia is a director and shareholder of the Company and is 74 years old. Patricia has three children. Simon is her eldest son and was born in 1973. Her second son Christopher was born in 1975 and her daughter Elizabeth was born in 1981.
- 48 Patricia disputed Simon’s statement of contributions and his evidence of his alleged arrangements with his father and his contributions to his father and the family businesses that he said he made over 39 years. Patricia said Simon worked as a cashier at the bakery at Mt Eliza in 1990 but did not earn anything like the amount he claimed he had earned.
- 49 Patricia married Brian in 1966, nearly 53 years ago. She said she always discussed personal and financial matters with Brian. Patricia said she had never heard of the arrangements which Simon said he made with his father.
- 50 Patricia disputed Simon’s evidence about the sale of the paper recycling business in 1997. She said the plant and equipment, which comprised a pickup truck and forklift, was sold for about \$10,000, due to a downturn in

the price of paper. She said if the plant and equipment had been sold for anything like the amount claimed by Simon, Brian and she would not have borrowed to purchase the Land in 2000.

- 51 Patricia gave evidence that she worked full-time at Independent News in Hastings from 1996 for 11 years and that Brian commenced full-time employment at Independent News in 1998 where he worked for about two years. Brian then worked with their son Chris in his tiling business. Patricia said Brian and she saved for the deposit of the Land which they purchased in 2000. She paid off the mortgage loan in full. She said when Simon agreed to be a co-borrower and named on the title, he agreed not to have any interest in the Land.
- 52 I found Patricia's evidence about some of the events which occurred a number of years ago, to be vague and at times inconsistent. It is not surprising that Patricia had some difficulty recalling specific details about some of the events that were said to have occurred over the last 39 years. However, I found Patricia's evidence to be clear and consistent about Simon's agreement to be a co-borrower and named on the title to enable the Company to purchase Peninsula Mowers and I accept her evidence.

Elizabeth's evidence

- 53 Elizabeth is the Sales Manager of Peninsula Mowers. She said in or about December 2006, her parents asked her to be a co-borrower, so they could purchase Peninsula Mowers. At that time, she was unable to borrow because she had been blacklisted from obtaining credit for 7 years because of a debt she incurred at the age of 18, after purchasing an Optus mobile phone.
- 54 Elizabeth started work at Peninsula Mowers in 2007. Shortly after the purchase of Peninsula Mowers, Elizabeth took over the administrative side of the business when her mother became ill. In 2011 she was employed as the sales manager and Simon was employed as the workshop manager and mechanic. When Simon left Peninsula Mowers in April 2011 her husband Ammon Wright resigned from his employment at RJP Repairs in South Melbourne and started work at Peninsula Mowers to help the family out.
- 55 Elizabeth said that Ammon was not paid \$1,000 per week when he started work at Peninsula Mowers in mid-2011. She said he was paid less than he had been paid at RJP Repairs. Consequently, she said Ammon was forced to take on work with Rockets Truck repairs in Braeside for about 2 years to make up for the reduction in his wage when he moved to Peninsula Mowers to assist Elizabeth's family after Simon's departure.

ACQUISITION OF THE LAND

- 56 It was not disputed that Patricia and Brian jointly and directly contributed to the purchase of the Land in 2000. It was not disputed that Simon did not directly contribute to the purchase of the Land or to its improvement,

maintenance, the payment of outgoings or to the mortgage repayments. It was not disputed that when Patricia and Brian purchased the Land they were registered as joint proprietors of the Land, subject to a mortgage which was repaid in full by Patricia in January 2006.

- 57 Whether or not Simon paid money to his father 39 years ago, and/or was underpaid when employed in the family recycling business between 1991 and 1997, is not to the point.
- 58 Section 233(2) sets out the matters that the Tribunal must take into account in discharging its obligation to achieve a “just and fair” division of the Land. These matters include amounts recently spent in improving the land, maintenance insurance, rates, mortgage repayments, purchase money, instalments or other outgoings in respect of the land.
- 59 I find that the indirect contributions which Simon claims to have made to the purchase of the Land in 2000, are not matters to be taken into account by the Tribunal under s233(2) of the PLA, or by the Tribunal in making an order for compensation and/or reimbursement.

NO RESULTING TRUST

- 60 The cases make it clear that a beneficial interest under a resulting trust will not be established by contributions other than contributions to the purchase price. As I have found that Simon did not contribute to the purchase of the Land in 2000, the presumption of a resulting trust does not arise.
- 61 Counsel for Patricia submitted that prior to Patricia, Brian and Simon borrowing in 2007 to enable the Company to purchase Peninsula Mowers, Patricia and Brian were joint proprietors of the Land which was not subject to a mortgage. He submitted that Patricia and Brian were the legal and equitable owners of the Land.
- 62 Counsel for Patricia submitted that when Brian and Patricia, as joint proprietors, transferred one of a total of 3 equal undivided shares in the Land to Simon, as tenants in common, the legal title was merely structured as a mechanism to obtain finance for the purchase of Peninsula Mowers, and there was no intention to change the beneficial interest or to confer any beneficial interest on Simon. I accept this submission.
- 63 Simon’s Counsel submitted that on becoming a co-borrower and being registered as a proprietor of one of 3 equal undivided shares, as tenants in common, Simon became entitled to a one third share of the Land. He submitted that a calculation made on that basis must regard the parties’ equal liability under the Business Loan as being an equality of contribution by them for the Business Loan debt. I do not accept this submission.
- 64 The principles about resulting trusts have been set out in a number of cases. In the context of a “purchase money resulting trust” case, a presumption of

resulting trust arises in favour of a person where that person purchases property in the name of another, or in the joint names, or both.¹¹

- 65 Where more than one person contributes the purchase price and there are unequal contributions, but the property is conveyed into the name of only one of those people, there is a presumption of resulting trust as equitable tenants-in-common in shares proportionate to the parties' respective contributions.¹²The presumption is rebutted by evidence of contrary intention.
- 66 A person's beneficial interest under a resulting trust is solely determined by his or her direct financial contribution to the purchase price at the time the property is purchased and the trust was created. That is, each person's beneficial interest will be in the proportion of his or her direct financial contribution to the purchase price.¹³
- 67 Patricia's evidence that she did not intend to confer an interest on Simon, beyond what was necessary to obtain that finance, is consistent with her circumstances at the time of the transfer.
- 68 In my view the evidence establishes that Brian and Patricia transferred one undivided share in the Land to Simon only because they were told that Simon needed to be on the Title before they could arrange finance for the purchase of Peninsula Mowers mowing business.

NO CONSTRUCTIVE TRUST

- 69 Simon's Counsel submitted that a constructive trust should be imposed in favour of Simon. Patricia's Counsel submitted that there was no basis on the evidence for imposing a constructive trust.
- 70 Where there has been a failure of a relationship between two parties a Court will impose a constructive trust in order to prevent unconscionable conduct by a party relying on his or her legal estate in the property to the exclusion of the other party.¹⁴
- 71 A constructive trust in such circumstances has been defined in the following terms:¹⁵
- 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.
- 72 In order to found a constructive trust of the kind discussed in *Muschinski* and *Baumgartner*, the contribution must be made to the acquisition,

¹¹ *Calverley v Green* (1984) 155 CLR 242; *Sivritas v Sivritas* [2008] VSC 374 at [118-127] per Kyrou J and his summary of the relevant cases.

¹² *Calverley v Green* (1984) 155 CLR 242; *Sivritas v Sivritas* [2008] VSC 374 at [118-127] per Kyrou J and his summary of the relevant cases.

¹³ *Sivritas* (supra) at [132].

¹⁴ *Baumgartner v Baumgartner* (supra); *Muschinski v Dodds* (supra) at 621.

¹⁵ *Muschinski v Dodds* (1985) 160 CLR 583 at 614; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

maintenance or improvement of the property in respect of which the trust is claimed.¹⁶ Contributions need not necessarily have been made directly to the acquisition or improvement of the property in issue, but they must be linked, albeit indirectly, to the acquisition, maintenance and improvement of the property.¹⁷

- 73 In my view, on the evidence, there is no basis for imposing a constructive trust. The evidence supports a finding that Patricia and Brian purchased the property as joint proprietors.
- 74 There is no evidence of any joint endeavour regarding the acquisition of the Land. For a constructive trust over the Land, Simon's contribution must be directed to the acquisition and/or maintenance of the Land (the subject of the alleged constructive trust). Simon has admitted that he did not directly contribute to the acquisition and/or maintenance of the Land.
- 75 Here, the only joint relationship or endeavour, involved the purchase of Peninsula Mowers. Simon's name was placed on the title and he agreed to be a co-borrower so his parents could borrow money to enable the Company to purchase the business. However, on the evidence, there was no joint endeavour between Simon and his parents to purchase the business because the Company purchased Peninsula Mowers.
- 76 I note that even if a joint endeavour in the purchase of the business existed, that joint endeavour did not fail. The Company has continued to operate Peninsula Mowers and make the necessary loan repayments.

CONCLUSION

- 77 I have found that there is no resulting trust or constructive trust to be imposed. On the evidence before me I am not satisfied that Simon has made out his defence. I will order that Simon transfer his registered interest in the Land to Patricia.
- 78 I will hear the parties in relation to any application that they may wish to make in relation to Patricia agreeing to pay Simon \$10,000 on the sale of the Land.

MEMBER F. MARKS

¹⁶ *Cressy v Johnson* (No 3) [2009] VSC 52 per Kaye J.

¹⁷ *Hill v Love* (2018) 53 VR 459 at [127].