GREENS LIST
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CASE LAW UPDATE

William Stark
Barrister

Greens List Barristers
205 William Street, Melbourne VIC 3000 | DX 98 Melbourne | T: (03) 9225 7222 | F: (03) 9225 8485
www.greenslist.com.au |

1. This paper covers some of the latest property law developments, including:

- Off the plan contracts – a case relating to variations from Plan of less than 5%
- Sunset date clauses
- Unfair contracts terms (consumer cases)
- s17A of the Owner's Corporations Act
- Caveat cases
- Miscellaneous cases

A. Off the plan contracts – cases relating to variations less than 5%

Section 9AC of the SLA

2. The property market for the sale of apartments in Victoria, Australia has become more challenging recently.

3. Lockdowns and other restrictions resulting from COVID-19 such as density limits and mask wearing combined with absent foreign buyers, as well as general concern about the viability of some projects, caused banks to impose limits on off-the-plan lending. Further, stamp duty increases have also helped to create downward pressure on values. Finally, we now have upward pressure on interest rates adding to the uncertainty in the apartment market.

4. In August 2021, Associate Justice Matthews in the Supreme Court of Victoria decided an application in relation to Section 9AC of the *Sale of Land Act 1962* (see *Burger & Ors v Longboat Holdings Group 2 Pty Ltd*[1]).

5. In Victoria, there were already 2 decisions (*Besser v Alma Homes Pty Ltd*[2] and *Lockwood v PSP Investments Pty Ltd*[3]) where purchasers of property off the plan were held to be entitled to rescind after material amendments were made to the plans.

Facts in Burger Case

6. Between when contracts were signed and the plan of subdivision was lodged for registration, the developer made several changes to the Plan. These included:

- decreasing the area of the apartment (predominantly the master bedroom by 4.39%).
- reducing the size of the light court resulting in a decrease of natural light into the master bedroom.

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[1] [2021] VSC 469
[2] [2012] VSC 460
[3] [2013] VSC 10

- reducing the size of the common property by vesting part of it in the local council as a council reserve.
- decreasing the area of common property 1 by creating common property 2. Common property 2 was converted into a roof terrace, which the purchaser as a member of common property 1, could not access. Prior to the change, all owners were able to access the roof terrace (however, prior to the changes to the Plan, that terrace was actually inaccessible to everyone).
- changing the size and location of the car spaces, including reducing the size of one car space by 11% and relocating the other from the top of a car stacker to the bottom.

7. The developer notified purchasers of the changes (as it was required to do). However, it had not notified the purchasers of several interim alterations.
8. In response the purchasers of two lots purported to terminate their contracts in accordance with section 9AC of the SLA.
9. The developer refused to accept each termination and refused to return the deposits on the basis that the changes to the Plan did not materially affect the purchasers' lots.
10. Developers have traditionally relied upon a clause that a less than 5% change in apartment area is the benchmark to determine that the lot has not been materially affected. Such a clause was included in each contract in this case.
11. Her Honour disagreed with the developer's position and upheld the termination of each of the contracts by the purchasers and declared that the respective purchasers were each entitled to have their deposits refunded.

Court's conclusions

12. In reaching her decision, Matthews As J considered whether each of the changes made to the Plan materially affected the purchasers' lots.
13. In her deliberations, the Associate Justice rejected the developer's arguments that there was only a "modest change" to the size of the master bedroom and the total reduction in the size of the lots of 4.39% was less than a 5% reduction in size. The developer argued that a 5% variation had previously been held as "generally regarded as tolerable". In that regard, the developer relied on the decision of County Court Judge Kennedy (as Kennedy JA then was) in *Birch v Robek*[4]. In that case, the developer had a similar clause in which purchasers acknowledged that a 5% reduction in size did not materially affect the plan. However, Judge Kennedy concluded in that case that the purchaser was entitled to rescind the contract and have the deposit paid returned (the change in area in that case was 12%).
14. It goes without saying that County Court decisions are not binding on the Supreme Court of Victoria. However, Judge Kennedy has since been promoted

[4] [2014] VCC 68

and is now a Justice of Appeal in the Court of Appeal, at least implying that her decisions should be given more weight.

15. The developer also relied upon the decision of Teague J in *Buckley v DRK*[5], where Justice Teague was disposed to see 5% for a suburban allotment at least in a general sense as being if not the most appropriate balance point, then at least a better one than 2% or 10%.

16. Readers will note that the wording used by Justice Teague is not exact, and certainly left open room for argument in later cases about whether the arbitrary nature of 5% was sufficient to dispose of a claim that the plan had not been materially changed.

17. Matthews As J concluded:

- **Decrease in area** - a **change in an area of less than 5% can be material**, depending upon the location and nature of the change and its effect.
- In this case the Court commented that a reduction in size of almost 4m2 (which **effectively reduced the size of the master bedroom by a quarter**), 'to a master bedroom that **could hardly be described as palatial prior to the change**, is clearly material' (paragraph 79).
- Additionally, the Court agreed with the purchaser's argument that the change was exacerbated by the creation of the alcove which created unusable space, making it very difficult for typical bedroom furniture to be manoeuvred into the room. The changes also impacted the 'attractiveness of the room'.
- Despite providing no expert opinion of the light flow, and the vendor disputing that the size of the light court between the plans had changed, the Court was satisfied the change had materially affected the lots. The Court acknowledged while the change in the light court in isolation may not have been material, in combination with the changes to the master bedroom, the flow of light into the **bedroom was sufficiently impacted.**
- **The presence of a special condition** where the purchasers agreed that a decrease of less than 5% was not material, standard in many off-the-plan contracts, **did not protect the developer** in these circumstances.
- **Light court change** - this change was not significant on its own. However, when it was combined with the changes to the master bedroom size, it did materially affect the lots.
- **Creation of council reserve** - once the council reserve was created, the purchasers no longer had exclusive rights over the area. This change on its own materially affected the lots.
- **Change in common property** - although the size of the newly created common property 2 was relatively small in the context of the development, the loss of

[5] [1993] ANZ ConvR 423

potential use of the terrace was not insignificant and as a result materially affected the purchasers' lots.

- **Car space changes** - these changes did not affect the type of car that could use the car spaces. Her Honour concluded therefore that these changes did not materially affect the purchasers' lots.

Matters to consider

18. The decision in Burger confirms that no matter what provisions are included in a contract of sale (including the now common acknowledgement that a change in area of less than 5% is not material) it is not possible to contract out of section 9AC.

19. In reality, the **practical impact of any change will always need to be assessed** to determine if a change is material.

20. In those circumstances, developers should include in their contracts of sale off plan, plans of subdivision that are finalised as much as possible and endeavour to keep changes to a minimum.

21. They should also engage with purchasers affected by material changes to manage the impact of those changes.

22. Whilst many changes are obligatory in order for the proposed plan of subdivision to be accepted by council, it is always recommended that developers obtain legal advice on the specific changes before they are made to the Plan to manage any risk that a purchaser may rescind.

23. Since material changes to a plan of subdivision can entitle a purchaser to rescind their off-the-plan contract lawfully, any such rescission can impact a developer's pre-sales and financing arrangements, resulting in reductions to total pre-sales amounts, as well as potential breaches of conditions in development facility agreements.

24. Developers need to be acutely aware of their financier's conditions in relation to purchasers' rights to rescind contracts and obtain legal advice when entering into financing arrangements which are conditional upon a development's pre-sales.

25. Developers should also ensure compliance with the strict timeframes set out in Section 9AC and notify purchasers of changes and potential changes early in an attempt to manage the impact of those changes.

26. Clearly, communication with purchasers is key.

Conclusion

27. While the case turns on its own facts, this decision still sounds a warning to developers in increasingly difficult times.

28. The decision confirms that the attempts by many developers to impose an arbitrary figure of 5% variation on purchasers as being not material will not always be successful.

B. Sunset date clauses

29. The *Sale of Land Amendment Act* 2019 came into force on 4 June 2019.

30. Among other things, the Act includes a requirement that vendors and agents must not knowingly conceal a material fact about a property from a purchaser.

31. For our purposes, the Act also now **limits the ability of vendors to rely on sunset clauses in off the plan sales**.

Off the plan contracts of sale

32. There are no Victorian cases listed on Austlii or LexisNexis yet in respect of this amendment to the Act.

33. The Act introduced provisions similar to those in New South Wales that limited the ability of a developer/vendor to rescind an 'off the plan' contract of sale because either a plan was not registered or an occupancy permit was not issued before a nominated sunset date.

34. The Act applies to all residential "off the plan" contracts (regardless of when they were entered into), so that the requirement to obtain the purchaser's written consent would apply to any purported rescission after 23 August 2018.

35. The Act introduced the definition of a "***sunset clause***" that applied only to residential contracts which provided for the contract to be rescinded if either the plan had not been registered by the sunset date or an occupancy permit has not been issued by the sunset date.

36. New sections 10A and 10B of the Act provide that a vendor can no longer automatically rescind a contract under a sunset clause unless the vendor first obtains the written consent to the rescission of each purchaser after giving at least 28 days written notice before the proposed rescission. The notice must state:

    a. the reason why the vendor is proposing to rescind the contract;

    b. the reason for the delay in the registration of the plan of subdivision or the issuing of the occupancy permit; and

    c. that the purchaser is not obliged to consent to the proposed rescission.

37. This right cannot be contractually removed (s 10C).

38. As in New South Wales, a vendor/developer is able to obtain an order from the Supreme Court to rescind the contract if the contract contains a sunset clause, or if all the purchasers do not agree.

39. The Act lists the matters that the Court is to take into account in determining if such an order should be made, including:

a. the reasons for the delay;

b. whether the vendor has acted unreasonably or in bad faith;

c. whether the lot in question has increased in value; and

d. the effect of the rescission on the purchaser.

40. The Supreme Court would need to be satisfied that making the order is just and equitable in all the circumstances. If the order was granted, the Court would also be able to order that the vendor pay reasonable compensation to the purchaser.

41. As a further protection for purchasers, vendors would need to pay purchasers' costs of Supreme Court proceedings, unless they satisfy the Court that the relevant purchaser unreasonably withheld consent to rescission of the contract.

42. Other amendments in the Act required off the plan contacts to include specific statements about a vendor's right to seek rescission under a sunset clause.

43. These statements set out the need for vendors to obtain purchasers' consent or a Supreme Court Order to rescind a contract of sale pursuant to a sunset clause and also confirm that a purchaser was not obliged to provide its consent. Failure to provide such statements in a contract of sale attract a fine of 240 penalty units ($38,685.60) for natural persons and 1200 penalty units ($193,428) for bodies corporate.

44. Not surprisingly (as this is consumer legislation), there is no protection for vendor/developers against purchasers using a sunset clause to their advantage should the value of the land sold go down (noting that the property market has recently had a downturn in Melbourne).

45. There have been a number of NSW cases dealing with a similar provision. For example, see *Silver Star Fashions Pty Ltd v Broi*[6], in which the Supreme Court of New South Wales (Darke J) refused the vendor's request to rely upon the sunset clause.

46. In *DGF Property Holdings P/L v Butros & Ors*[7], the Court sent a strong message to developers that the Court will not easily permit rescission of off-the-plan contracts, even if the vendor's conduct cannot be said to be in bad faith or unreasonable. In that case, the developer had been in dispute with the vendors of the land to the developer, which was the main cause of delay in the registration of the plan of subdivision. Despite that, the Court only granted the application on certain specified conditions being met by the developer.

[6] (2018) 19 BPR 38,813; [2018] NSWSC 1445

[7] [2018] NSWSC 344

C. Unfair contract terms

47. There is now an unfair contract terms regime in Pt 2-3 of the **Australian Consumer Law** (ACL). The regime in the ACL is mirrored by the same regime under the ASIC Act.

48. The Australian Consumer Law aims to protect consumers and ensure fair trading in Australia.

49. Among other things, the Australian Consumer Law applies to standard form consumer contracts.

50. A standard form contract is typically prepared by one party to the contract and not negotiated between the parties. It is offered on a take it or leave it basis.

51. In determining whether a contract is a standard form contract, the Court will look at:

    a. Whether one of the parties has all or most of the bargaining power in the transaction;

    b. Whether the contract was prepared by one party before any discussion occurred between the parties about the transaction;

    c. Whether the other party was, in effect, required either to accept or reject the terms of the contract in the form in which it was presented;

    d. Whether the other party was given an effective opportunity to negotiate the terms of the contract; and

    e. Whether the terms of the contract take into account the specific characteristics of the other party or the specific transaction.

52. The Australian Consumer Law defines a consumer contract as a contract for the supply of goods or services to an individual for personal, domestic or household use or consumption.

53. The Australian Consumer Law gives the Courts the power to declare a standard form consumer contract term unfair. That declaration does not affect the validity of the remainder of the contract in question.

54. A term of a consumer contract will be unfair if the Court finds that it:

    a. Would cause a significant imbalance in the parties' rights and obligations arising under the contract;

    b. Is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and

    c. Would cause detriment (whether financial or otherwise) to a party if it were to be relied upon.

55. In considering whether a term is unfair, a court will consider, among other things, whether the term was transparent. Examples of terms that are not

transparent include terms that are hidden in pages of fine print, schedules, are phrased in legalese, or in complex or technical language, or are ambiguous or contradictory.

56. Consumers can seek redress for any loss that is incurred as a result of a term that is declared to be an unfair contract term.

57. A consumer contract is presumed to be a standard form contract unless the business can prove otherwise.

58. The Australian Consumer Law does not apply to standard form consumer contract terms that, among other things, set the upfront price payable under the contract.

59. There are numerous cases that have been decided under s23 of the Australian consumer law. See for a recent example *Lobux P/L v Willshaun P/L*[8].

60. This was the case in the Federal Court, Queensland registry, decided by Justice Kylie Downes.

61. In that case, Her Honour concluded that certain terms and conditions of the agreement between the Applicant and the Respondent were unfair contract terms and were therefore void.

62. This type of finding is unlikely in a property dispute in Victoria. Although the contract used is a standard form, it is very common for parties to include special conditions that vary the terms of the contract. Further, the contract is well balance between vendors and purchasers and is therefore unlikely to be found to cause a significant imbalance between the parties' rights.

63. However, in circumstances where a vendor attempts to impose onerous obligations on purchasers, which are not reasonably necessary for their legitimate business interests, there may be a risk that a court will find those particular obligations do breach section 23.

64. In another example, *OPR WA Pty Ltd v Marron* [2016] WASC 395, then Acting Master, now Justice Strk heard an application for summary judgement. The dispute concerned a contract for sale of real estate. The defendant alleged that the terms of the contract were on fair, and therefore in breach of section 23.

65. The judgement analysed previous decisions which confirmed, among other things, that the principles concerning penalties and forfeitures do not apply to stipulations in contracts for the sale of land that provide for forfeiture of reasonable deposits.

66. While the parties assumed that the contract was a standard form contract, the court concluded there was no evidence that the contract was a consumer contract.

67. The court concluded that the contract was not unfair, as there was a not a significant imbalance between the rights of the parties. If the contract had

[8] [2022] FCA 204

completed, the deposit would have counted towards the purchase price. On the other hand, if the contract terminated through buyer default, there was a significant risk of forfeiture of the deposit, and the possibility of an excess being kept upon a resale, after taking into account the costs and expenses of the resale and the amount of the deposit forfeited.

68. As a result, the application for summary judgement was successful and no leave was granted to defend the proceeding.

D. S17A of the Owner's Corporations Act.

69. I was unable to locate any cases that have been decided under the new legislation, s17A of the *Owner's Corporations Act*.

70. The section tries to clarify that it is the owners corporation that is the occupier for the purposes of collecting rainwater or other water that occurs or flows on land occupied by the owners corporation.

71. Section 8(4) of the *Water Act*, 1989 makes it clear that the owners corporation has the right to use that water.

72. Whilst the legislation seems clear, as we know, as lawyers, we are always looking for loopholes.

E. Caveat cases

73. Every year there are a number of cases determined by the Supreme Court of Victoria (and the County Court of Victoria) about the validity of caveats.

74. There are so many that Philip Barton of the Victorian Bar writes a blog about Victorian Caveat cases.

75. Philip has written about most of the cases below.

76. Among others, the following cases were decided in the last 12 months.

77. *Dolan v Dolan* [2022] VSC 543 was a **dispute between a mother and daughter** regarding a property in Lorne, Victoria. The daughter sought orders that her elderly mother, who had resided in the property for almost 20 years, vacate the property. Further, that the caveat that her mother placed on the property title be removed and an agent be engaged to sell the property. The daughter also sought orders that the sale proceeds be applied to pay out the loan secured by a mortgage over the property, outstanding property rates and taxes, and the estate agent fees, commissions and conveyancing costs. The daughter then sought that the net sale proceeds then be distributed in the following way: 36% to her, $20,000 to her mother, and the remainder into a trust account pending resolution of the property dispute.

78. The mother had lodged a **caveat based upon** her contributions to the purchase and maintenance of the property, on the basis of **an implied, resulting or constructive trust**.

79. Ierodiaconou As J dismissed the daughter's interlocutory claims and ordered that **the caveat remain on title**, but that it be amended to reflect the mother's claim to 93% of the value of the property. The main dispute was referred for trial.

80. In *A. P. Welco Holdings P/L and Anor v Canterbury Hills P/L and Anor* [2022] VSC 490, Button J considered concerns an attempt to eke a caveatable interest out of a Memorandum of Agreement (MOA) concerning the development of land. The attempt was unsuccessful. The Court **found that the equitable interest claimed was not made out**, as the parties had not finalised the terms of the proposed agreement.

81. In *Launch Concept Developers P/L v Di Mauro & Ors* [2022] VSC 512 (before Moore J), the registered **proprietor failed to have caveats based on charges temporarily removed so that it could refinance**.

82. In *Hooper v Parwan Investments P/L (recs apptd)* [2022] VSC 285 (before Matthews As J), **caveats based respectively on a contract of sale and a charge were removed to permit sale by receivers appointed by a mortgagee bank**.

83. In *BD87 P/L & Anor v FGK3GEN P/L & Anor* [2022] VSC 361 (before Ginnane J), a **caveat based on an equitable mortgage was removed to permit the registered proprietors to refinance by paying out a registered mortgage**, on condition that the debt secured by the equitable mortgage was repaid and an amount calculated for interest was also paid.

84. *Reindel & Ors v Confreight P/L and Ors (No 1)* [2022] VSC 163 (before Daly As J) concerned an ongoing dispute between Reindel and Baker, and their associated corporations. **Baker alleged and Reindel denied that one of Baker's corporations had loaned money to Reindel. Caveats were lodged** over the title to a unit owned by Reindel and 4 units owned by one of his corporations. Daly As J ordered the removal of the caveats over the titles to the properties owned by the corporations but **allowed the caveat over the title to the property owned by Reindel to remain, on the basis that the dispute over whether the agreement had been signed was a matter for trial**.

85. *Reindel & Ors v Confreight P/L and Ors (No 2)* [2022] VSC 442 arose out of the **same development** as the previous case. In this case **the dispute was between the joint venturers who undertook the development**. The 65% interest holder ended up with five units from the development, and the developer was wound up with no return to investors.

86. Daly As J found that **there was no basis to lodge caveats arising from a *Barnes v Addy* claim**. Accordingly, she ordered their removal. However, she also granted an injunction restraining Reindel and his corporations from dealing with the relevant residential units.

87. The decision in *Seabourne v Lester & Anor* [2022] VSC 52 (Irving As J) dealt with the aftermath of family court orders and the failure by the ex-husband to pay the amount due under those orders to the ex-wife. The plaintiff was the de facto wife of the ex-husband. The ex-wife, the first defendant, in accordance with the

family court orders transferred a unit to the ex-husband, who then on sold it to the plaintiff.

88. **The ex-wife lodged a caveat over the title to the unit on the basis of an alleged implied, resulting or constructive trust. On the facts, the court found the trust was not made out**.

89. A decision by Gorton J, *Fazal v Fazal* [2022] VSC 165 dealt with a development site. The dispute was between a mother and son. The property was purchased in the son's name, although the mother guaranteed repayment of a mortgage loan.

90. Later, the mortgagee forced the son to sell the property before construction of the development was completed. The mother then lodged a caveat, claiming an equitable interest in the property.

91. Justice Gorton ordered the removal of the caveat.

92. Shortly after those orders, the mother lodged another, identical caveat.

93. The court found that the mother was potentially abusing the process of the court by supporting a second caveat identical to a removed caveat. The maintenance of the caveat was an abuse of process.

94. In a related decision by Gorton J, *Fazal v Madappilly* [2022] VSC 227, the dispute (over the same development site) was between the son and a person claiming to be the builder the son had engaged.

95. The son denied the engagement and sought removal of the caveat.

96. The court found that although there was an issue to be tried in respect of the claimed equitable interest in the property, the caveat should be removed on the balance of convenience.

97. The factors on the balance of convenience included:

    a. The fact that interest was running on the mortgage,

    b. The contract of sale had been entered into under pressure from the mortgagee due to failure to make repayments on the mortgage when they were due.

    c. The purchaser was a bona fide purchaser for value without notice of the interest claimed by the caveator, who could seek specific performance. The purchaser would have a claim against the son for damages if the sale did not proceed.

    d. Neither party resided at the property. If the caveat was removed the caveator would still have a cause of action for damages.

    e. There was no evidence that the caveator had the means to complete the proposed development.

F. Miscellaneous Cases

98. The following miscellaneous cases were also decided in the last 12 months.

Asset based lending

99. The decision of the High Court in *Stubbings v JAMS (No 2)*[9], dealing with **whether asset based lending is unconscionable.** The High Court concluded, in the circumstances of that case, that the loan was indeed unconscionable, and ordered the discharge of the mortgage provided the lender repaid the principal.

100. Among other aspects that are of interest in the decision, the loan was facilitated through a suburban law firm; the court took a dim view of the firm's conduct in that case.

Road access for purposes of section 32C

101. In *Corngate Investments Pty Ltd v Lukewood Pty Ltd & Anor* [2022] VSC 298, Ierodiaconou As J had to determine whether vendors of Real Estate had complied with section 32 by failing to disclose that access to the property required crossing an occupational rail crossing.

102. The question for determination was whether the property had access by road, as section 32C requires a vendor to disclose if the property does not have access by road.

103. Her Honour examined the meaning of no access by road, and the definition of a road and concluded that the defendant/vendors had complied with section 32, and as a result the rescission notice served by the plaintiff/purchaser was ineffective.

Mortgagees' duties selling in a pandemic

104. They have been a number of cases dealing with **mortgagees' duties selling in a pandemic**.

105. For example, the New South Wales Court of Appeal in *Hung v Aquamore Credit Equity Pty Ltd*[10] unanimously upheld the trial judge's decision that the borrower had not proven it suffered any damage as a result of the unauthorized exercise of the power of sale. The court also held that the borrower had not proven that the lender did not take all reasonable care in selling the property.

106. In Victoria, Matthews As J heard an application for summary judgment in *230V Harvest Home Road Pty Ltd v Joseph Salvo & Ors*[11] and concluded that the plaintiff had no real prospects of success on its statement of claim. As a result, summary judgment was granted in favour of the defendants/mortgagees who had sold the relevant property at a mortgagees' auction.

Presumption of advancement

107. In the Federal Court a couple of years ago, the Australian Taxation Office sought a ruling that the **presumption of advancement** was archaic and therefore

[9] [2022] HCA 6
[10] [2022] NSWCA 272
[11] [2021] VSC 558

no longer a part of Australian law (see *Commissioner of Taxation v Bosanac (No 7)*[12]).

108. Justice McKerracher noted (at paragraph 2 of the judgment):

> The central question is whether on the facts of this case a 'presumption' of advancement displaces a presumption of a resulting trust and whether the operation of either presumption is rebutted by evidence of a contrary intention. What is significant is that it is the Commissioner, not Mr Bosanac who is contending for the relief sought. Even though the Bosanacs are separated and resolving their affairs through Family Court proceedings, Mr Bosanac has not sought to assert a resulting trust and has not opposed the contentions advanced for Ms Bosanac in favour of the legal *status quo* which also accords with a 'presumption' of advancement.

109. The dispute concerned a property in Dalkeith, Perth Western Australia, which Ms Bosanac. However, both the husband and wife contributed equally to the purchase of the property.

110. As a result, at paragraph 62, McKerracher J noted:

> A resulting trust may be presumed in instances where the legal title that vests in one or more of the parties does not reflect the respective contributions of the parties to the purchase price. Relevantly in this case, a trust is presumed to have been declared where a person who provides money to purchase property is not vested with the legal title to that property.

111. At paragraph 65, McKerracher J also noted:

> Although it is referred to almost universally as a 'presumption' of advancement, the dominant approach in Australia is that it is not strictly a presumption. It is rather a description of certain circumstances, being the existence of particular relationships, in which the presumption of a resulting trust does not arise.

112. Finally, at paragraph 67, McKerracher J noted:

> The 'presumption' of advancement and the presumption of a resulting trust can both be rebutted by evidence concerning the actual intention of the person who provided the purchase money at the time of the purchase.

113. At the heart of the dispute was a doctrinal question as to whether the presumption of advancement could still be raised by a wife in relation to the matrimonial home. If it did arise, there was then a question as to the inferences that could or should be drawn from the surrounding circumstances in that

[12] [2021] FCA 249

instance, as to Mr Bosanac's intention at the time of the purchase of the Dalkeith Property.

114. Mr Bosanac had become bankrupt and the C of T was a major creditor, who stood to gain if the presumption of advancement was rebutted, so that Mr Bosanac would hold a half interest in the equity of the property.

115. The C of T argued (at paragraph 72):

> Following *Cummins*, the Commissioner says that an inference that a husband does not intend to gift his contribution to the purchase price of the property may be supported, in the absence of any evidence to the contrary, simply by the fact that the property acquired was the matrimonial home.

116. The trial judge concluded (at paragraphs 185 and 196), after a detailed analysis of a long line of High Court and English authority, that the presumption of advancement still forms a part of the law of Australia.

117. Having so found, McKerracher J concluded that the facts relied upon by the C of T did not but the presumption. Those facts were:

(a) the Dalkeith Property was the matrimonial home of Mr and Ms Bosanac, it being purchased in late 2006 after which they resided there together for a period of more than seven years;

(b) Mr Bosanac's contribution to the purchase price took the form of borrowed funds from Westpac and those funds were borrowed on the condition that Ms Bosanac would register a mortgage in favour of Westpac over the Dalkeith Property to secure the loan funds;

(c) both Mr and Ms Bosanac were jointly and severally liable to pay the entirety of the funds advanced and it follows that Mr Bosanac assumed a very substantial liability in contributing to the purchase without the benefit of having his name registered as a proprietor on the title; and

(d) there is evidence of shared back accounts and some sharing of other property assets.

118. The Court therefore concluded at paragraph 229:

> Given that *Cummins* does not preclude the 'presumption' of advancement from arising where the transaction involves the matrimonial home, and on the basis of long standing authority, I consider that the 'presumption' of advancement arises in Ms Bosanac's favour. The Commissioner has not adduced evidence sufficient to rebut the 'presumption.

119. And at paragraph 231 (emphasis added):

> The notion that a husband is to be presumed to gift property to his wife, while the same will not be presumed of a wife to husband, between same sex spouses, or between de facto partners, may grate with modern ideals and expectations of equality. **But as things currently stand the 'presumption' of advancement remains part of Australian law even for the matrimonial home**.

Early release of a deposit

120. A case concerning the **early release of a deposit**. In *GLP Batesford Holdings Pty Ltd v 68 Bridge Road Land Pty Ltd* [2022] VSC 614, Riordan J considered:

    a. A contractual provision requiring the purchaser to authorise release of deposit within 5 days of a statement under s27(3) of the *Sale of Land Act*, 1962.

    b. Whether that provision was void as a contravention under s28.

    c. Whether a purchaser's notice under s27(6) that it is not satisfied must be on reasonable grounds.

    d. Whether rescission notice based on purchaser's alleged default by failing to authorise release was valid.

121. In the case, the purchaser failed to authorise the release of the deposit. The question was whether that was a default under the contract.

122. The Honourable Justice Riordan concluded that the purchaser was not obliged to release the deposit, and the provisioning question was void as a contravention of section 28. As a result, the vendors putative notice of rescission was invalid.

VCAT's jurisdiction over co-owned land

123. The Supreme Court considered VCAT's jurisdiction over co-owned land in *Djordjevich v Peter Djeka Pty Ltd* [2022] VSC 732. The proceeding was an appeal from original VCAT decision.

124. The original VCAT proceeding was a claim by Djeka against Mr Djordjevich for an order for the sale of the land pursuant to the provisions of Pt IV Div 2 of the *Property Law Act*, 1958, and the equal division of the proceeds. Mr Djordjevich opposed an order for sale and claimed that Djeka became a co-owner of the land by fraud.

125. VCAT rejected the claim of fraud and ordered the sale of the disputed property, with considerable detail in the orders about the sale process. The tribunal also ordered that the net balance of the sale proceeds be distributed between the parties 50/50. Specifically, the tribunal ordered that its registrar was to perform various functions if there was an intransigent or uncooperative party, or the parties were at loggerheads. The underlying intent of those orders

was to ensure that the tribunal's decision was carried into effect and not frustrated by anybody.

126. The court found that the orders made by VCAT fell within its powers provided under Pt IV, Div 2 of the *Property Law Act*, 1958.

127. At paragraph 101, the court found:

> 101 … the responsibilities given to the Principal Registrar under the orders are within the statutory function of the Principal Registrar to provide administrative support and assistance to the Tribunal in the exercise of its jurisdiction and functions under s 32(1) of the VCAT Act.

128. The case makes it clear that VCAT has jurisdiction over co-owned land and can in effect make any orders it sees fit at the conclusion of a hearing.

WG Stark

Hayden Starke Chambers