Civil and Administrative Tribunal

New South Wales

Case Name:	McFadden v Chief Commissioner of State Revenue
Medium Neutral Citation:	[2019] NSWCATOD 4
Hearing Date(s):	26 October 2018
Date of Orders:	2 January 2019
Decision Date:	2 January 2019
Jurisdiction:	Occupational Division
Before:	AR Boxall, Senior Member
Decision:	(1) The decision under review is set aside. (2) The matter is remitted for reassessment by Chief Commissioner of State Revenue in accordance with findings of the Tribunal set out in these reasons.
Catchwords:	TAXES AND DUTIES – Land Tax – principal place of residence exemption – strata lots in the same ownership – strata lots beneficially owned by the same persons
Legislation Cited:	Administrative Decisions Review Act 1997 s 63 Land Tax Management Act 1956 s 10(1)(r), Schedule 1A Taxation Administration Act 1996 ss 96, 100
Cases Cited:	B&L Linings Pty Ltd v Chief Commissioner of State Revenue (2008) 74 NSWLR 481 Grant v Edwards [1986] Ch 638 Green v Green (1989) 17 NSWLR 343 Shepherd v Doolan [2005] NSWSC 42
Category:	Principal judgment
Parties:	Applicant: Vickki Anne McFadden Respondent: Chief Commissioner of State Revenue

Representation:	Counsel: M Richmond SC (Applicant) P Lane (Respondent) Solicitors: Rankin Ellison (Applicant) Crown Solicitor's Office (Respondent)
File Number(s):	2018/00104183
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 This application seeks the review of the decision made by the Respondent under the Land Tax Management Act 1956 (the ***LTM Act***) on 25 September 2017, to issue land tax assessments under the LTM Act for the 2016 and 2017 land tax years in relation to certain land at Double Bay on the basis that the relevant land did not qualify for the exemption provided under section 10(1)(r) of the LTM Act in respect of land which falls within the principal place of residence exemption provided for by Schedule 1A of the LTM Act.

2 The land in question is Lot 2 in Strata Plan 17324, and is located at 18 Castra Place, Double Bay. These reasons will refer to it as the ***Land***.

3 This is an application under section 96 of the Taxation Administration Act 1996 for the administrative review by the Tribunal of the Respondent's decision. The Applicant:

(1) Objected to the assessments referred to above, by a written objection dated 24 November 2017;

(2) received the Respondent's determination dated 5 February 2018 of that objection, in which he denied the objection;

(3) was dissatisfied with that determination; and

(4) accordingly, has applied to the Tribunal for an administrative review of the Respondent's original decision.

4 The provisions of section 100 of the Taxation Administration Act 1996 apply to this review. Notably:

(1) Sub-section 100(2) of that Act provides that neither the Applicant nor the Respondent are limited in the present application to the grounds of the objection; and

(2) sub-section 100(3) of that Act provides that the Applicant *"… has the onus of proving the applicant's case in an application for review",* an onus which is discharged by reference to the ordinary civil standard: B&L Linings Pty Ltd v Chief Commissioner of State Revenue (2008) 74 NSWLR 481.

5 Moreover, under section 63(2) of the Administrative Decisions Review Act 1997, the Tribunal "… *may exercise all of the functions that are conferred or imposed by any relevant legislation on the administrator who made the decision"*.

6 At the beginning of the hearing the Presiding Member disclosed that:

(1) He was acquainted personally with both the Applicant and her husband, Mr Woods, having known them since the mid-1980s when he and they were employed by the same law firm; since 1988 their acquaintance had been limited to occasional encounters every few years at social functions organised by that firm;

(2) He was acquainted personally with senior counsel for the Applicant, having been in partnership with him for some years in that same law firm before senior counsel went to the Bar; and

(3) He was acquainted socially with counsel for the Respondent, who is a colleague of the Presiding Member's wife.

Counsel for both parties said that their clients had no objection on the basis of these acquaintanceships to the Presiding Member undertaking the present review.

7 The only evidence provided was in the form of affidavits, which were unchallenged. The summaries provided below are derived from these affidavits.

Background – overview of the Land

8 The Land is one of two lots in a strata plan. The building in which it is located was originally a two-storey building comprising two apartments: Lot 1 on the ground floor, and Lot 2 (being the Land) on the first floor. Works undertaken by the Applicant and her husband have added an additional third storey, which is also comprised in the Land.

9 The Applicant is the sole registered proprietor of the Land, which she purchased in April 1999. The Applicant and Mr Woods acquired Lot 1 in November 2013; they are the registered proprietors of it as tenants in common in equal shares.

10 Between November 2013 and December 2014 the Applicant and her husband undertook building works involving both the Land and Lot 1. Since December 2014 the Applicant and her husband have occupied the Land and Lot 1 as their matrimonial home.

11 It is common ground between the Applicant and the Respondent that the effect of these works has been:

(1) To combine the Land and Lot 1 into a single residence; and

(2) To render the Land incapable of use as a separate dwelling.

All of this has occurred, however, with the strata plan continuing and both lots in it (including the Land) retaining their separate legal identities under the Real Property Act. There is thus a mismatch between, on the one hand, the title status of the Land as a separate lot in a strata plan and, on its other, its practical use, as an integrated part of a single residence.

Background – the Applicant's property dealings and arrangements

12 The Applicant and Mr Woods married in 1996. Before doing so they entered into a pre-marital agreement dated 17 August 1996 (the ***Agreement***) which makes elaborate provision for the regulation of property matters as between the couple. These reasons will return below to certain specific provisions of the Agreement, but its general purpose is summarised in recitals B and C which provide as follows:

> "B The parties intend this agreement shall provide for their financial relationship:
>
> (a) during their marriage, and
>
> (b) should the marriage irretrievably break down.
>
> C Each party has been independently advised by his or her separate legal representative prior to entering into this agreement as to the effect of this agreement and his or her rights under Part VIII of the Family Law Act 1975 (Cth)…".

13 For several years after their marriage, the Applicant and Mr Woods occupied as their matrimonial home a property in Shellcove Road, Neutral Bay which belonged to the Applicant at the time of the marriage.

14 In July 1998 the Applicant and Mr Woods purchased 16 Castra Place, Double Bay as their prospective marital home. They bought that property as tenants in common, with the Applicant having a ¾ share and Mr Woods a ¼ share. They then embarked on a programme of renovations, which were not completed until September 2001 when they moved into that property as their matrimonial home.

15 In the meantime:

(1) The Applicant in April 1999 sold the Shellcove Road property;

(2) In that month, she purchased the Land, title to which was registered in her name alone;

(3) Between April and August 1999 the couple undertook renovations of the Land; and

(4) In August 1999 they took up residence in the Land.

16 In September 2001, following the completion of the renovations to 16 Castra Place, they ceased to reside in the Land and moved to 16 Castra Place. They continued to live there until December 2014, and in the first half of 2015 they sold 16 Castra Place.

17 Between September 2001 and January 2014 the Land was leased to tenants. In January 2014, however, the couple received consent from Woollahra Municipal Council to convert the property at 18 Castra Place (including the Land) from duplex apartments into a single residence. They then embarked on this process, which was completed in late 2014. On 5 December 2014 the Applicant and Mr Woods ceased residing in 16 Castra Place and moved next door into the newly renovated and integrated 18 Castra Place, which remains their matrimonial home.

The dispute

18 Schedule 1A of the LTM Act, which contains the operative provisions for the exemption from land tax granted under section 10(1)(r) for principal places of

residence, deals at length in clause 14 with the application of the exemption to land which comprises two or more strata lots. It provides relevantly as follows:

> **14 Application of exemption to residence comprised of 2 or more lots in a strata plan**
>
> (1) *The principal* place of residence exemption does not extend to land that is comprised of 2 or more strata lots, and that is used and occupied by the *owner* of the lots (or by one of them) as a *principal place of residence*, unless:
>
> (a) the strata lots (excluding any ancillary lot) have adjoining walls or floors, and
>
> (b) the strata lots are in the same *ownership*, and
>
> (c) the strata lots comprise a single residence (excluding any additional residential occupancy that may be disregarded under *clause* 4).
>
> (1A) Strata lots are in the same *ownership* if:
>
> (a) the lots are *owned* by the same *person* or, if any of the lots are jointly *owned*, the lots are all jointly *owned* by the same *persons*, or
>
> (b) each lot is beneficially *owned* by the same *person* or, if any of the lots have more than one beneficial *owner*, each lot is beneficially *owned* by the same *persons*(subject to *clause* 11).
>
> (2) For the purposes of this *clause*, 2 or more strata lots are not to be regarded as comprising a single residence unless there is internal access between all the strata lots (other than any ancillary lot), such as internal connecting doors or internal staircases.

19 It was agreed between the parties that:

(1) The two lots at 18 Castra Place are occupied by the Applicant and her husband as their principal place of residence;

(2) The two lots have adjoining walls or floors;

(3) The two lots comprise a single residence; and

(4) More specifically, there is internal access between both lots in the form of internal stairs.

Nothing in the evidence provided, including relevantly approved plans for the renovations and photographs of the interior of 18 Castra Place following its renovation, give any grounds to question the correctness of this agreement.

20 What then follows is that the issue in dispute is whether the two strata lots comprised in the Land and Lot 1 are *"… in the same ownership …"* for the purposes of Clause 14(1)(b) of Schedule 1A to the LTM Act. Since the registered proprietor of the Land is the Applicant, but the registered proprietors

of Lot 1 are the Applicant and her husband as tenants-in-common, clause 14(1A)(a) of Schedule 1A cannot apply to treat the two lots as being in the same ownership. Accordingly, the question then is whether Clause 14(1)(b) of Schedule 1A applies, to treat both lots as being in the same ownership because *"… each lot is beneficially owned by the same persons …"*.

21 There is no dispute between the parties that Lot 1 is legally and beneficially owned by the Applicant and Mr Woods. Lot 2, however, is at the heart of the dispute.

The contentions

22 The Applicant says in summary that:

(1) The Land is held by her subject to a trust in favour of herself and her husband.

(2) This is because:

(a) There was a common intention, evidenced in clause 6 of the Agreement, as between her and her husband, that each of them have a beneficial interest in the Land, either when it was acquired in 1999 for use as a matrimonial home and/or when Lot 1 was acquired in 2013 for the purpose of being combined with the Land to create a single dwelling for use as their matrimonial home; and

(b) The Applicant's husband has acted to his detriment on the basis of that common intention, by making financial contributions in connection with the Land at or about the time of its acquisition in 1999, or in connection with the works undertaken to combine the two lots into a single residence.

(3) Alternatively, the effect of clause 6 of the Agreement is to establish an express trust of the Land under which the Applicant's husband has a beneficial interest in the Land.

23 The Respondent in summary says that:

(1) The Agreement establishes the respective mutual rights and obligations of the Applicant and Mr Woods in relation to property matters during their marriage and on its breakdown. It provides no basis for inferring any common intention contrary to the terms of the Agreement, and nothing in the events or circumstances surrounding the Applicant's and Mr Woods' involvement with the Property are such as to suggest that anything done by Mr Woods is sufficient to give him an interest in the Property in accordance with the terms of the Agreement.

(2) The Agreement does not by its terms create a trust over the Property.

(3) No constructive trust of the Property in favour of Mr Woods arises since:

(a) The Applicant has not demonstrated any common intention with Mr Woods that payments made by him should give rise to any interest in the Property, quite apart from the Agreement.

(b) The amounts paid by Mr Woods in connection with the Property are not of their nature referable to the acquisition of any interest in the Property.

The Agreement

24 Central to this controversy is clause 6 of the Agreement. It provides as follows:

> *"The parties agree that any real property purchased by them after the date of this agreement and during the relationship as their matrimonial home shall be owned as tenants in common in proportion to their financial contributions. The parties also agree that until they purchase a property as their matrimonial home they will reside in [the Applicant's] property at 35B Shellcove Road, Neutral Bay and the provision of this property for their joint use shall be a contribution to their shared lifestyle referred to in clause 19 of this agreement".*

25 This sits in the context of another 26 operative clauses, and some 11 recitals, lettered A to K:

(1) Recitals B and C are set out above;

(2) These are supplemented relevantly by Recital J, which provides as follows:

> *"J In the hope of leading to marital tranquillity in their life together and to avid or reduce any disputes between them in the future about ownership, use and descent of property and to avoid unpleasantness and dispute should, despite their best intentions, the marriage in any circumstances not work out, they are setting down in writing before their marriage what they are agreeing as to how their financial relationship with each other following their marriage should be regulated";*

(3) Clause 4 provides for clothing, jewellery and personal effects owned by a party at the time of the marriage or acquired by a party following the marriage to remain the property of that party:

> *"The parties agree that they shall remain the sole and absolute owners to the exclusion of the other of all items of clothing, jewellery and personal effects owned by each of them at the date of the marriage, together with any items of clothing, jewellery and personal effects acquired by each of them during the relationship or of which they are or have been the donee, devisee or legatee shall be and remain the separate property of the party who purchased and paid for it or otherwise received it as a gift";*

(4) Clause 4 provides for gifts given by one party to the other during the marriage to remain the property of the recipient;

(5) Clause 7 deals with acquisitions of real property during the marriage, other than the matrimonial home:

> *"The parties agree that should they purchase any other real property jointly during their relationship such real property shall be owned by them as tenants*

in common in proportion to their financial contributions to the said real property unless otherwise agreed between the parties";

(6) Clause 8 makes provision in respect of acquisitions of personalty:

"The parties agree that any items of personalty purchased by them jointly during the relationship shall be owned on an equal basis unless otherwise agreed between the parties";

(7) Clauses 9, 10 and 11 provide for processes to be followed:

(a) to preserve *"jointly owned assets"* following notice of intention to terminate the marriage being given by either party, and

(b) to procure a division and distribution, or failing that sale and distribution of the proceeds of sale of, relevant personalty and real property on the irretrievable breakdown of the marriage;

(8) Clause 12 and 13 provide for property acquired by, respectively, the Applicant or Mr Woods by way of inheritance or gift to remain the sole property of the relevant party;

(9) Clause 14 states the general principle that each party shall remain entitled both during the marriage and following its breakdown to any property which he or she owns or to which he or she is beneficially entitled and identifies by reference to schedules certain assets of each party to which this general principle expressly applies. Each party expressly renounces any claim in respect of those identified assets;

(10) In clause 15, each of the parties agrees to resign their respective directorships of any company identified in clause 14, or of which the other party's family control the majority shareholding;

(11) Clauses 16 and 17 contain a renunciation of claims by, respectively, Mr Woods and the Applicant in relation to property in which the other's interest is protected under the Agreement following the breakdown of the marriage;

(12) Clause 18 sets out the general principle, that each party *".. should be free to accrue assets and make investments and save his or her own income for himself or herself for their future security as they wish ….."*;

(13) Clause 19 provides a gloss on clause 18, under which the parties agree that *"… they shall by mutual agreement contribute to their day to day living expenses and lifestyle (including but not limited to provision of holidays, motor vehicles and motor vehicle expenses) by which ever* [sic] *party is best able to do so by reason of his or her earning capacity or investment income from time to time so that they can enjoy equality of benefits of lifestyle"*;

(14) Clause 20 provides for each party to be responsible for his or her own debts - *"The parties acknowledge that they will be responsible for his or her own debts incurred during the marriage …"* – while providing a regime for each of them to obtain the consent of the other before incurring material debts;

(15) Clause 21 provides for cross-indemnities in respect of debts incurred by one party in the name of the other without prior written consent;

(16) Clause 22 and 23 contain acknowledgements by, respectively, the Applicant and Mr Woods that benefit of expenditure made by the one for the convenience or comfort of both of them in their life together will be accepted with gratitude but without any right to call for such expenditure or any obligation to indemnify the other in respect of it;

(17) Clause 24 contains a governing law clause;

(18) Clause 25 provides a regime for future variations of the Agreement;

(19) Clause 26 addresses the possibility of certain proposed amendments to the Family Law Act 1975 (Cth) being enacted; and

(20) Clause 27 contains certain provisions relevant to the Family Provisions Act 1982 (NSW).

Some initial observations concerning the Agreement

26 The first observation concerning the Agreement is that although - as Recitals B, C and J record, and clause 26 contemplates – one of its functions is to operate as a financial agreement within the meaning of section 90B of the Family Law Act 1975 (Cth) and more particularly to deal with the matters referred to in section 90B(2) of that Act (including the disposition of the spouses' property in the event of breakdown of the marriage), it takes the opportunity afforded by section 90B(3) to deal with other matters, including the ownership by the spouses of certain categories of property during the marriage. It does so through an elaborate scheme which identifies various categories of assets and sets out the respective entitlements of the spouses to those different categories while at the same time establishing some basic rules for the spouses in connection with claims which either of them may assert. The categories of assets reflect not merely the nature of the underlying assets – realty or personalty, for example – but further subdivide or aggregate asset classes by reference to the circumstances in which, or the purposes for which, the relevant assets are acquired or brought into the marriage.

27 The second is that the drafting of the Agreement is at times less than ideal. This is partly because the objectives of the Agreement are ambitious, being to regulate the property and financial affairs of the spouses over their entire married life, and the drafting challenges of doing so with absolute clarity are probably insurmountable. This is also in part because the authors of the

Agreement did not necessarily feel themselves constrained to a slavish adherence to the normal meanings of certain expressions commonly used in the law of property:

(1) Clause 7, for example, provides that *"The parties agree that should they purchase any other real property jointly* [underlining added] *during their relationship such real property shall be owned by them as tenants in common* [underlining added] *in proportion to their financial contributions"*. The language is regrettable, since its somewhat unconventional approach to established concepts is not without ambiguity. Does the word "jointly" mean that the clause only applies to real property acquired as joint tenants? If so, how can that jointly owned real property also be held by them as tenants in common? Is the intention of the clause in fact that jointly owned real estate be held by the spouses as equitable tenants in common according to their respective contributions? If that is the case, is it the intention that such a regime apply only to property held by them as joint tenants? If so, is the intention that the beneficial ownership of real estate held by them as legal tenants in common not reflect their respective contributions? If that is the case, why should the clause not also apply to real property in the name of one spouse under some kind of informal nominee arrangement, by imposing an equitable tenancy in common measured by reference to the spouses' respective contributions?

(2) Clause 8 shows a similar tendency. It provides that the parties *"… agree that any items of personalty purchased by them jointly* [underlining added] *during the relationship shall be owned on an equal basis* [underlining added] *unless otherwise agreed between the parties"*. Is it merely (and unnecessarily) stating the obvious, that two joint owners of property own it in equal shares? Alternatively, is it inviting the reader to proceed on the basis that the word "jointly" does not have its traditional meaning, but rather in this context refers to any kind of formal – and possibly informal – co-ownership arrangement? The pointlessness of the first may suggest that the second is intended.

(3) Clause 9 contemplates the equal division by the parties on the breakdown of their marriage of *"their jointly owned personalty"* [underlining added]. Does this refer only to personal property held by the spouses as joint tenants, in which case it may be of limited practical utility? Alternatively, does it refer to personal property held under co-ownership arrangements more generally, in which case it may have rather more contractual and commercial utility?

(4) Clause 11 provides that following the parties' separation in anticipation of the termination of their marriage, neither spouse will sell, mortgage, charge, pledge or damage or otherwise encumber *"… any jointly owned assets"* [underlining added]. Similar questions arise.

28 The third is that the authors of the Agreement have adopted a somewhat inconsistent (and not necessarily entirely clear) approach to the use of the plural and the singular, especially in the case of third-party personal pronouns:

(1) Sometimes, as in clause 19, the plural is used to refer to the spouses collectively - *"… they shall by mutual agreement contribute to their day to day living expenses and lifestyle …… so that they can enjoy equality of benefits of lifestyle* – and with singular personal pronouns adopted scrupulously to refer to individual spouses – "…. *by which ever* [sic] *party is best able to do so by reason of his or her earning capacity or investment income from time to time"* [underlining added].

(2) Sometimes, however, the distinction between the singular and the plural disappears, with the latter serving as a convenient (but ambivalent) alternative to the more laborious (but clearer) approach of distinguishing where logically appropriate between the plural and the singular. Clause 4 provides an example: *"The parties agree that they shall remain the sole and absolute owners to the exclusion of the other of all items of clothing, jewellery and personal effects owned by each of them at the date of the marriage …"*. The words "*to the exclusion of the other*" suggest that assets of the relevant kind brought into the marriage by a spouse remain the property of that spouse, but the balance of the sentence is not necessarily consistent with this proposition. The sentence provides that *"they"* (which grammatically appears to be a reference to the parties to the Agreement) " … *shall remain the sole and absolute owners …. of all items of clothing, jewellery and personal effects owned by each of them at the date of the marriage"*. But if a particular item was owned by one spouse only at the time of the marriage, how can "they", being both parties, "remain" the owners of an item which one of them did not own? The answer to this dilemma is to read the plural personal pronoun in what counsel, quoting the Oxford English Dictionary, described as an anaphoric reference to a singular noun or pronoun of undetermined gender, and thus as referring not to both spouses but to either of them. The issue in interpreting the Agreement is not that such an anaphoric usage may be adopted, but that the Agreement appears to do so unpredictably and inconsistently.

The elements of a common intention constructive trust

29 These are summarised relevantly by White J (as he then was) in *Shepherd v Doolan* [2005] NSWSC 42. In doing so, His Honour relied principally on the majority judgment of the Court of Appeal in *Green v Green* (1989) 17 NSWLR 343.

30 The elements as summarised by His Honour were as follows, and I respectfully adopt his summary:

(1) "One class of cases where equity will intervene to prevent the unconscientious denial by the legal owner of another party's rights is where the parties agreed, or it was their common intention, that the claimant should have an interest in property owned by another, and the claimant acted to his or her detriment on the basis of that agreement or common intention": [2005] NSWSC 42, at paragraph 31.

(2) "Where a constructive trust is imposed, based on the parties' common intention as to the ownership of property upon which the claimant has acted to his or her detriment, the inquiry is as to the actual intention of the parties": [2005] NSWSC 42, at paragraph 34.

(3) "The intention to be established need not be that the parties have a specific share of the property. It is sufficient that they intend that the claimant should have a beneficial interest or 'some form of proprietary interest': [2005] NSWSC 42, at paragraph 36.

(4) "The intention may be established in various ways. There may be an agreement between the parties as to how the property should be held. There may be express statements as to their intention. Their intention may be inferred from their conduct. The question of what acts demonstrate an agreement or common intention referable to the beneficial enjoyment of the property is one of evidence, not law": [2005] NSWSC 42, at paragraph 37.

(5) "The plaintiff must also show that she acted to her detriment in a way referable to the agreement or intention that she have an interest in the property": [2005] NSWSC 42, at paragraph 40.

(6) "Conduct which is insufficient to establish a common intention as to the ownership of the property may be sufficient to constitute relevant actions to the plaintiff's detriment to establish a trust if the common intention is established otherwise": [2005] NSWSC 42, at paragraph 40.

(7) "In Grant v Edwards Nourse LJ said (at 648) that to qualify as acting on the common intention, the conduct must be such that the plaintiff could not reasonably have been expected to embark upon it unless she were to have an interest in the property": [2005] NSWSC 42, at paragraph 40.

(8) "In Green v Green (at 357) Gleeson CJ, with whom Priestley JA agreed, approved a less stringent test taken from the judgment of Sir Nicholas Browne-Wilkinson VC in Grant v Edwards (at 657) that:

> *'… once it has been shown that there was a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify. The acts do not have to be inherently referable to the house …. ' …": [2005] NSWSC 42, at paragraph 40.*

(9) "The quantum of the claimant's beneficial interest will be that which the parties agreed upon or intended, if that can be established": [2005] NSWSC 42, at paragraph 41.

(10) "Unlike the presumption of a resulting trust, there is no reason that the beneficial interest cannot change over time": [2005] NSWSC 42, at paragraph 44.

The application of these principles

31 The first question is whether there is any evidence of a common intention, that Mr Woods have a beneficial interest in the Property. The Applicant says that clause 6 of the Agreement provides that evidence; the Respondent says that it does not.

32 Clause 6 is no less affected by the drafting anomalies described above than are the Agreement's other provisions. That being said, however, it is in my view possible to read the clause consistently and sensibly in the context of the present review in such a way as to demonstrate the parties' intentions in relation to their respective interests in their marital home.

33 Turning to clause 6 itself, the relevant provision is the first sentence, which is as follows:

> *"The parties agree that any real property purchased by them after the date of this agreement and during the relationship as their matrimonial home shall be owned as tenants in common in proportion to their financial contributions."*

34 As a provision whose objective is to set out the rules which regulate the ownership of the spouses' marital home this sentence might be considered too imprecise to be entirely successful:

(1) It applies to real property "*.. purchased by them"*. Does this mean that only real property, title to which is vested in both spouses under one of the legally recognised forms of co-ownership arrangement, falls within its scope? Alternatively, does it follow the less precise approach adopted elsewhere in the Agreement towards plural personal pronouns, as references to either or both spouses?

(2) It applies to real property "*purchased by them …… as their matrimonial home"*. Does this mean that it applies only to property purchased for the specific purpose of acting as the marital home, or does it cover property purchased by both spouses (or, depending on the preferred approach under (1), either spouse) which, after a period of use for another purpose, happens to become their marital home?

(3) Does it require that title to any such property actually be registered in the names of the spouses as tenants in common, with their respective shares in the property determined by reference to their respective contributions (whatever those may be)? Alternatively, does it admit of the possibility of an equitable tenancy in common, however the legal title may be vested?

(4) How are the spouses' respective *"financial contributions"* determined? Are they contributions only to the cost of purchasing the property, or do

they extend to associated costs (such as stamp duty)? Do they extend beyond that, to costs incurred in constructing improvements on the property, or renovating it?

(5) It is expressed to apply to *"any real property"*. This clearly covers both a sole parcel of land on a single title, and land covered by multiple titles. In the latter case, the likelihood must increase of questions such as those posed above arising.

35 Even if clause 6 is deficient as a contractual provision, it nonetheless clearly forms one element in a wider scheme established by the spouses and directed at regulating their respective entitlements to the real and personal property acquired by one or both of them during, or in some circumstances before, the marriage. Under this scheme, the Agreement divides the universe of real property belonging to one or both spouses into three distinct categories of increasing breadth, with each category regulated by different rules:

(1) The narrowest category is the marital home, which is the subject of clause 6.

(2) A wider category covers other real property acquired by them "jointly" – whatever that may mean - during the relationship, which is the subject of clause 7.

(3) Wider still is the final category, a residual grouping which covers other property (including real property) otherwise acquired by a spouse before, during or after the marriage, which is dealt with in clauses 12 to 18.

36 It is clear from this structure not only that the parties considered the marital home to be property of particular sensitivity which deserved correspondingly particular treatment in the context of their marital relationship, but also that they had reached certain mutually acceptable conclusions as to what that treatment should be. These may not have been articulated in clause 6 with clinical precision, but the existence of the clause both:

(1) demonstrates the common intentions of the spouses that certain mutually accepted principles should apply in determining their respective interests in their marital home, thus satisfying the test summarised by White J in *Shepherd v Doolan*; as His Honour observes at paragraph 37:

> *"The intention may be established in various ways. There may be an agreement between the parties as to how the property should be held. There may be express statements as to their intention. Their intention may be inferred from their conduct. The question of what acts demonstrate an agreement or common intention referable to the beneficial enjoyment of the property is one of evidence, not law"; and*

(2) allows those principles to be ascertained with sufficient clarity to permit their application in the present case, in the course of the enquiry referred to by White J in *Shepherd v Doolan* and summarised in paragraph 31(2) above.

37 The first issue is whether, so far as the intentions demonstrated by the spouses in clause 6 are concerned, the Land is real property purchased *"by them"*. The answer, in my view, is that – assuming for the moment that the element of purchase is satisfied - it is:

(1) In the context of a provision directed at the specific topic of the spouses' marital home, it is not only possible but, I would suggest, more appropriate to read the third-party plural personal pronoun in its various forms in the second of the two possible ways outlined in clause 29, for the reasons set out below.

(2) Clause 6 starts from two clear premises: first, that the spouses expect that there will be at any given time during the marriage a property which is the marital home, and secondly that there should be a mutually agreeable rule for determining the spouses' respective interests in that peculiar category of property. It then attempts, clumsily perhaps in some respects, to articulate that rule.

(3) Whatever the linguistic peculiarities of clause 6, its underlying functions must not be overlooked, which are:

(a) to establish a mutually acceptable general regime for regulating the spouses' interests in the one piece of real estate which is their marital home for the time being, and

(b) to do so in a way which is capable of applying not just to successive marital homes, but also to the multiplicity of possible title arrangements under which those homes may be held.

Any other approach would establish artificial constraints on the implementation of the spouses' clear underlying intention, to regulate their respective entitlements to the marital home for the time being on a mutually agreeable basis for the duration of their marriage, and in the varying circumstances which they may encounter during their marriage. Hence, in my view, the word "them" in clause 6 refers to one or the other or both of the spouses so as to be capable of giving effect to that intention in as flexible and accommodating a way as practicable.

38 The second issue is whether the Land can be considered as real property purchased by them (being, as discussed in paragraph 38 above, a reference to either or both of the spouses) as their marital home. There is no dispute that:

(1) 18 Castra Place, which includes both the Land and Lot 1, is the spouses' marital home;

(2) That has been the case since December 2014;

(3) Both the Land and Lot 1 are real estate;

(4) Lot 1 was clearly purchased by them in 2013 with a view to being used in conjunction with the Land as a combined marital home;

(5) The Land was purchased by the Applicant in April 1999 to be the matrimonial home, and for a little over 2 years from August 1999 until September 2001 it was so occupied by them;

(6) From September 2001 until January 2014 the Land was leased to tenants;

(7) From January 2014 until December 2014 the Land was the subject of renovation works, on the completion of which it was reoccupied by the couple (along with Lot 1) as their marital home.

39 Those simple findings lead to the more complex question, whether the Land can be considered as having been purchased as the spouses' matrimonial home for the purposes of clause 6. The sequence of events outlined above in relation to the Land does not sit entirely congruently with the wording of that clause. This is because although there is no doubt that the Land was purchased in 1999 as the marital home and was occupied in that way for 2 years, it ceased for 13 years to have that use until in December 2014 it again resumed that function (or, at least, was returned to use as part of the spouses' home). It was not, strictly speaking, ".. *purchased …. as their matrimonial home"*, at least in its current incarnation.

40 Does it still fall within the parties' intentions demonstrated in clause 6? The answer, in my view, is that it does, for either of two reasons:

(1) The first is a relatively narrow approach. Having originally been acquired as the marital home in 1999, it retains that purposive quality for purposes of clause 6 even despite the intervening period during which it was leased to tenants. It was purchased as the matrimonial home and, at least for so long as it remains under the ownership of the spouse who acquired it, it retains the quality of having been so purchased; that it ceased in fact to be the matrimonial home for an extended period cannot change that history. This approach might have presented challenges had it become necessary to determine entitlements to the Land if the spouses' marriage had broken down between late 2001 and December 2014 when their matrimonial home was elsewhere. Counsel for the Respondent pointed out the Applicant's income tax returns during that period, in which she treated all the rental income from the

Land as her income and, conversely, Mr Woods did not recognise any of the rent as taxable income. The clear inference is that, at least during that period, neither spouse considered Mr Wood to have any beneficial interest in the Land, which illustrates neatly the difficulties which might have arisen in determining the spouses' respective interests in the Land during the relevant period. However, now that the Land has reverted to its original function and is (or at least forms part of) their current matrimonial home, there is no need to pursue those questions. Not only is the Land an integral part of their matrimonial home, but relevantly it was and remains land purchased for that purpose, however it may have been used for part of the intervening period.

(2) The second approach is to accept the drafting deficiencies of clause 6, while recognising the underlying broad mutual intention inherent in that clause in the context of the current reality of the spouses' living arrangements. Both the Land and Lot 1 may have been "*purchased by them"* at different times, but in both cases it was with the intention that the relevant land serve as matrimonial home. The spouses' integration into a single matrimonial residence of the two lots provides a sufficient continuing nexus between the original acquisition of the Land as a matrimonial home and its current use to support the conclusion that the spouses' respective interests in the Land are to be determined in accordance with the general intention evidenced by clause 6. This is despite that clause's failure to foresee the precise circumstances of the acquisition, intervening use and integration of the two lots at 18 Castra Place. In reaching this conclusion I am conscious of (and place weight on) the overall scheme of the Agreement, of which a central element is that a special regime applies in determining the spouses' respective interests in that narrow category of real estate which is their matrimonial home from time to time. Clause 6 may have failed to address precisely the current situation, but it evidences with sufficient clarity the spouses' intentions concerning their respective entitlements to the matrimonial home.

41 The third issue is whether Mr Woods can be considered as having acted to his detriment in a way referable to the agreement or intention that he have an interest in the Land, to paraphrase the test set out by White J in *Shepherd v Doolan*, at [2005] NSWSC 42, at paragraph 40.

42 The evidence in Mr Woods' affidavit of 14 June 2018 is uncontested, that during the renovation of the Land in 1999 which was undertaken in anticipation of the spouses' making the Land their matrimonial home he:

(1) Acted as project manager for the renovations;

(2) Made a number of relatively small (but documented) financial contributions to the costs of the renovation; and

(3) Made certain additional contributions towards the renovation which he is now unable to quantify or to specify.

43 If one considers that the Land's acquisition in 1999 as the matrimonial home satisfies the purposive test in clause 6, then the personal services supplied and the expenditure incurred by Mr Woods in the expectation that he would have an interest in the Land are sufficient under at least the wider test referred to by White J in *Doolan v Shepherd* (and the majority in *Green v Green*) to constitute a relevant detriment. The extent of the interest determined by reference to the value of those contributions might well be extremely modest, but that is beside the point. As Gleeson CJ and Priestly JA said in *Green v Green* at 357, adopting Browne-Wilkinson VC's approach in *Grant v Edwards* (at 657):

> *"… once it has been shown that there was a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify".*

There is, however, no reason, as White J observed, in the case of a common intention constructive trust *"….. that the beneficial interest cannot change over time"*: [2005] NSWSC 42, at paragraph 44. The consequence is that Mr Wood's subsequent financial and other contributions to the integration of the Land and Lot 1 may well have increased the quantum of his interest; that Is not a matter on which any view needs to be reached for purposes of this review.

44 If, however, one takes the somewhat wider second approach outlined above, by looking to clause 6 as recording an overall intention of the parties which is applicable to their acquisition and integration over an extended period of the Land and Lot 1 as a single matrimonial residence, then it is relatively straightforward to identify a relevant detriment on the part of Mr Woods:

(1) According to paragraph 15 of his affidavit dated 14 June 2018 (which was uncontested) he contributed $2,500,000 to the cost of acquiring Lot 1 and $750,000 to the costs of renovating the Land and Lot 1 and of integrating the two lots into a single residence; and

(2) As is clear from paragraph 17 of his affidavit (and paragraph 26 of the Applicant's affidavit dated 15 June 2018, which was equally uncontested) the result of the renovations has been to integrate Lot 1 and the Land into a single residence, so that just as the Land cannot without significant works practically be occupied as an independent residence separate from Lot 1, neither can Lot 1 be occupied or used as a separate residence independently of the Land; access to the Land is

necessarily through Lot 1, which has been altered in such a way as to reduce the practical ability of the owners of Lot 1 to dispose of it or to lease it independently of the Land extensive building works to separate the two lots.

45 On either basis, I am satisfied that Mr Woods acted to his detriment in a way referable to the agreement or intention that he have an interest in the Land.

Conclusions

46 I am satisfied, therefore, on the balance of probabilities that the Land and Lot 1 have the same beneficial owners for purposes of clause 14(1A)(b) of Schedule 1A of the LTM Act, and thus qualify for exemption section 10(1)(r) of the LTM Act.

47 The terms of Clause 14 of Schedule 1A to the LTM Act are not such as to require any investigation into the precise quantum of a beneficial owner's interest in the relevant strata lots. Once it is determined that the relevant parties each have a beneficial interest in the relevant strata lots (as my conclusion above does) then that is the end of matters. I am not required to (nor do I) reach any conclusion as to the quantum of the respective interests of the Applicant or her husband in either the Land or Lot 1.

48 There was a second argument raised on behalf of the Applicant, that clause 6 amounted to a declaration of trust over the matrimonial home by the spouse who owns it, in favour of the other spouse. Counsel for the Respondent replied in effect that the terms of the clause were not apt to do so. In view of my conclusion as to the common intention of the spouses, it is not necessary for me to reach a conclusion on this issue. If I had been required to do so, however, my inclination would have been to agree with counsel for the Respondent.

49 Counsel for the Respondent noted that in her various dealings with the Chief Commissioner concerning the Land before this review, the Applicant:

(1) Had put a variety of arguments, which had not been consistent with the approach adopted by her in the present review; and

(2) Had not sought to demonstrate that the Land was subject to a trust, and that in consequence the Chief Commissioner was justified in refusing the exemption.

Both points were well made, but in the context of the present review the Tribunal is required under section 63 of the Administrative Decisions Review Act 1997 *".. to decide what the correct and preferable decision is having regard to the material then before it"*. This history is a factor to which I may have regard, but the enquiry which I am required to undertake is not constrained by it. Rather, I am required to look to all the material before the Tribunal, not merely that before the Chief Commissioner at the time he made the decision under review.

Orders

(1) The decision under review is set aside.

(2) The matter is remitted for reassessment by Chief Commissioner of State Revenue in accordance with findings of the Tribunal set out in these reasons.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar