IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY **No. A30 of 2017**

BETWEEN:

LEON PIPIKOS

Appellant

and

VELIKA TRAYANS

Respondent

(Cross-appellant)

10 **RESPONDENT'S REPLY**

(TO THE APPELLANT'S SUBMISSIONS ON THE CROSS-APPEAL)

Part I: Certification

1. The respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: Reply to the Appellant's Submissions to the Cross-Appeal

2. The appellant's approach to the issues raised by the cross-appeal should be rejected for the several reasons set out below.

3. The central plank of the appellant's submissions on the cross-appeal is his reliance on the proposition stated by Kourakis CJ at AB490.10 that, "*it is most*
20 *improbable that Leon would have agreed to George and Velika taking a half interest in the Penfield Road property without securing an agreement that he would receive in return a half interest in the Clark Road property*". The appellant's also develops the same submission at paragraphs ARS[17], [16] and [20].

4. This proposition is demonstrably incorrect for the following reasons: (1) The case as pleaded (at AB7.15) was that the alleged purchase was "*in order* to provide the defendant and her husband with the funds to purchase Penfield Road". (2) This is consistent with the evidence of the respondent at AB212.20 (quoted below at paragraph 7). (3) The same proposition, that the purpose of the
30 purchase of Clark Road was merely to put George in funds for the purchase of Penfield Road appears from the plaintiff's opening at trial: T7.L25-30 (4) The evidence concerning the calculation of the purchase price (AB495.20) is

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inconsistent with the proposition that Leon was seeking some compensatory financial advantage in exchange for his advance of George and Velika's share of the purchase price of Penfield Road rather than merely to secure re-imbursement. (5) Moreover, the undisturbed finding as to the non-payment of the $8,000 reflects the reality of the brothers arrangement namely that Leon and Sophie were to contribute 50% of the balance due to purchase the Penfield Road property (approximately $37,000 of the $74,000) and not the purchase of a half share in the Clark Road property.

5. Once this essential plank is removed from the appellant's submissions, the transaction is perfectly rational. The brothers (Leon and George) had done previous property deals (for example, Taylors Road) and it was quite rational for Leon to seek 50% participation in the new purchase and to finance his brother's participation so long as he had some assurance of reimbursement. In that example George and Velika's half share was paid: see AB25.35-38. This view is also supported by Sophie's evidence: at AB149.19-24 and 151.8-10.

6. The appellant's related submissions are at ARS [15] and [16]. Those submissions do not have regard to any evidence against the appellant's contentions and thus are selective in their approach to the evidence. For example, the appellant's submission at ARS[15] does not have regard to the evidence of the respondent (accepted by the trial judge) when informed by her husband George that "...'*I bought the property with Leon and Sophie and because we don't have the funds I'm giving Leon half of the share of our property*' " that, " 'I said, *'What?'* I said *'No way, George, you can't do that".* And then I said to him *'You need to pay him back a deposit and give him extra money so he doesn't have any claim to our family home*' "[1]. In other words, the husband presented the purchase of the Penfield Road property as a *fait accompli.* That evidence does not, on any view, support the appellant's proposition "that the transfer of an interest in the Clark Road property was a necessary condition of Velika and George's acquisition of an interest in the Penfield Road property" (ARS[15]). Moreover, it is clear from the evidence that George (not Leon or Sophie) was named as the purchaser of the Penfield Road property. In other

[1] AB261.12-18 and 262.4-6; T283L12-18 and T284L4-6.

words, George was committed to purchase the Penfield Road property regardless of his wife's consent or agreement to the same.

7. The appellant's submission at ARS [16] does not have regard to the evidence given by the respondent recorded at FC [60] that, "*Leon was just going at me about losing this money, about losing money on this property deal and I was trying to reassure him that no, no, he's not going to lose it because he'll get that money back and then he still wasn't happy about that because of George's behaviour* ....". In other words, Leon's concern (as understood by the respondent) was for the *return of the money* that Leon had contributed on the Penfield Road purchase and not for a share of the Clark Road property. It was in that context that the 2009 acknowledgement came into existence and the respondent's version of how the document came into existence was preferred by the trial judge (TJ[92]).

8. The appellant in his Appellant's Reply Submissions (**ARS**) at [12] sets up a list of propositions said to be advanced by the respondent (cross-appellant) and then proceeds to address each one in turn with a view to demonstrating that the cross-appeal should fail. However, the appellant's list of propositions does not have regard to other propositions advanced by the respondent in, for example, either paragraphs or sub-paragraphs of paragraphs [44], [47], [50], [59], [60], [62] of the respondent's written submissions.

9. The appellant at ARS[13] relies upon well accepted principles of contract law to submit that an agreement of the type alleged to exist, existed in the circumstances of this case. But the application of such principles must have regard to the whole of the circumstances including that the two brothers were involved in several properties and other (car) acquisitions (RS [44]) in which there was no recording of the terms and an overlay of mutual trust and family relationship and the need to adjust to changing financial circumstances. Such circumstances do not bespeak of the rigid formality of arms length transactions in which one party might seek a commercial benefit such as a market rate of interest return on a property investment.

10. The appellant's submission at the first sentence at ARS[14] is inconsistent with, inter alia, what the Full Court said at the last sentence at FC[41]: AB499.

11. As to the appellant's submissions at ARS[18]: the difficulties in identifying the precise nature of the interest said to be acquired, the adjustment of the respective

parties rights given the existence of a registered mortgage, rates and taxes (such as stamp duty) are all swept to one side by the appellant – on the basis that such terms can be implied or to be worked out in the future – but no such exercise was been undertaken by the protagonists or by the either of the courts below and, it is submitted, it is not possible to fashion an order which could give effect to such other considerations given George's relinquishment of any interest in the Clark Road property and the consent of Leon to a sale.

12. As to the submission at ARS [19] – there cannot be a transfer of a "half interest" in the land in South Australia under the Real Property Act 1886 (SA) (**RPA**). A person is either a tenant in common or a joint tenant: s.74 RPA. The RPA does not recognise "half-interests" other than in those terms. Moreover, a transfer of a "half interest" would inevitably attract stamp duty from the time of its creation together with interest on the outstanding amount. It would have to be a condition of any decree of specific performance that the appellant paid such an amount in addition to the $8,000.

13. As to the submission in ARS[21] – the amount of money that the appellant might receive from a sale of Clark Road, even if successful, may be less than that offered by the respondent in the District Court, in which case, under the relevant rule of the District Court Rules he is not entitled to his costs 21 days from the date upon which the offer was made.

14. Ultimately, the appellant relies upon the Full Court's findings that:

    a. the conversations between two brothers concluded an agreement for two persons to acquire a half interest in the respondent's property[2] - in circumstances where the undisturbed finding of fact was that the respondent was not privy to the conversations between the two brothers[3] and no agency was pleaded or argued for by the plaintiff.

    b. the terms of the agreement involved the sale by the respondent and husband of *their* legal and equitable interests in the Clark Road property[4] - in circumstances where there was *no evidence* that the husband had any equitable interest in the property.

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[2] FC [68]: AB508.
[3] FC [4]: AB490.
[4] FC [73]: AB 510.

c. the agreement was binding upon the wife because of her *subsequent* conduct in signing documents[5] - notwithstanding that the respondent was told by her husband that the purchase of Penfield Road was a *fait accompli* ("*I bought*") and where there was no offer made to the respondent capable of acceptance by conduct. In other words, her conduct in attending to sign some documents for the Penfield Road property did not demonstrate any acceptance of the alleged agreement with Leon; but was required because her (then) husband had already committed them to the purchase of the Penfield Road property (in circumstances where, inter alia, she was never told the amount being paid by Leon).

d. the agreement involved one brother and his wife allegedly acquiring a capital interest in his brother's and his wife's family property upon the advancement of a portion only of the purchase price that had been agreed - in circumstances where there is an undisturbed finding that the balance was not paid[6] and where the plaintiff did not[7] contribute to any mortgage, ongoing maintenance or other associated property costs.

15. If the factual findings of the Full Court as to the alleged agreement are set aside, no basis remains for deducting 15% from the costs order made by the Full Court.

DATED 14 December 2017

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[5] FC [80]: AB512.
[6] FC [70]: AB 509 the finding by the trial judge that the balance of $8,000 was not paid was not overturned by the Full Court.
[7] With one exception and on one occasion; which was repaid by the respondent and her husband: AB274.12-AB275.11.

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