IN THE HIGH COURT OF AUSTRALIA **No. M137 of 2019**
MELBOURNE REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA

BETWEEN:

HSIAO
Appellant

and

FAZARRI
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Parts I & II: CERTIFICATION AND OUTLINE OF APPELLANT'S PROPOSITIONS

We certify that this outline is in a form suitable for publication on the internet.

The G Street Property

1. The Appellant seeks an order for payment to her of one half of the value of the G Street property as at the date of the trial, namely one half of $3,070,000 less $100,000 paid to her by the Respondent.
2. Property purchased by Respondent in April 2014. In April 2014 Property transferred to Respondent and Appellant as tenants in common with Respondent holding 9/10ths and the Appellant 1/10th: FC [11] CAB 65; Appellant's Book of Further Materials (ABFM) 126. By an instrument of transfer dated 15 December 2014, Respondent and Appellant transferred the Property to themselves as joint tenants: ABFM 104. Registered 27 February 2015: ABFM 126.
3. The Trial Judge (whose findings were not disturbed by the Full Court) found that the Appellant and the Respondent held the property as joint tenants, that there was no "*trust arising favouring the husband*" and that "*the husband*" does "*not dispute the joint proprietorship*": FCA [52] CAB 15.
4. The Trial Judge also held that "*unlike the 10 per cent*", the joint tenancy transfer "*could not be seen as a gift... because the wife pressured him at a vulnerable time*": FCA [51], [52] [84]. Neither the Trial Judge nor the Full Court explained the significance of a finding that the transfer was not a "*gift*". Neither the Trial Judge nor the Full Court decided there was any resulting trust for the Respondent or that the joint tenancy transfer was void or voidable for duress or as an unconscionable transaction.
5. In March 2015, the Appellant and the Respondent signed a deed styled "*Deed of Gift*": ABFM5. The Deed affirms the joint tenancy. Clause 8 operates if the Appellant and Respondent are divorced or separated. Clause 8(b)(ii) provides that, if the Appellant and Respondent have no children, the Appellant shall be entitled, in any property settlement or Family Court proceedings, to a payment from the Respondent of the greater of $1 million and half the value of the Property. These were the precise circumstances at trial.
6. The Trial Judge did not refer to clause 8 of the Deed of Gift. The Full Court quoted clause 8 [68] and said the "*primary judge was aware of the terms of the deed*" and "*set out the text of clause 7*"[70] and that "*there is no basis to suggest the primary judge failed to take the deed into account when making findings about what happened when the Respondent*

signed the transfer in December 2014"[72]. The fact the Trial Judge misunderstood the effect of the Deed of Gift and did not refer to clause 8 makes it clear he did not take the clause into account.

7. The correct approach to determination of a property settlement was set out in Stanford (2012) 247 CLR 108, esp. [35]-[43].

8. The approach of the Trial Judge, approved by the Full Court, is flawed for at least the following reasons:

a) It is not clear that, as a first step, the legal and equitable interests of the parties to the marriage were identified. The Appellant was a joint tenant of the Property when the parties married and at the date of trial. The Trial Judge obscured the position by suggesting that the joint tenancy transfer "*could not be seen as a gift*" ([51] [52] [84] [86]) and referred to "*the issue of the interest she contributed in G Street*" [79] [104]. In determining whether to make an order under section 79, the Trial Judge did not take into account the Appellant's interest as joint tenant of the Property [54]-[57] and [63]-[66][104].The Full Court approved the Trial Judge's findings: [65]-[74].

b) When the Court has identified the property of the parties to the marriage, section 79(2) requires that the Court must only make any order altering the interests of the parties to the marriage in the property, including an order for a settlement of property in substitution for any interest in the property, if the Court is satisfied it is "*just and equitable in the circumstances*". As is clear from Stanford [41], this requires more than an assessment of "*contributions to the acquisition, conservation and improvements of G Street*": FCA [29] [70] [73].

c) The provisions of the Deed of Gift are important. First, the Deed of Gift, in relation to which there is no suggestion of pressure, is a clear affirmation of the transfer. Second, the provisions of the Deed of Gift provide that the gift constituted by the transfer is for the benefit of the Appellant, notwithstanding separation or divorce. In the circumstances, the Court below cannot have been satisfied that it was just and equitable to make an order depriving the Appellant of her interest in the Property without an order providing for payment to her of a sum of money equal to its value.

d) The Full Court [78] - [85] mentioned that the Deed of Gift was not an agreement under section 71A and observed that the "*primary judge was not bound*" by the terms

of the Deed of Gift [84]. Although not bound by the Deed of Gift, consideration of the Deed of Gift was of primary importance for the Trial Judge in making the determination whether or not to exercise the power under section 79. The Full Court also remarked that, in any event, "*given the applications each party has made for final orders, clause 7 provided that the Deed of Gift has no application*" [84]. This observation is simply wrong. Clause 7 does not address the state of affairs which was before the Family Court.

9. The Court is in a position to make an order for payment of one half of the value of the Property.

10 Admission of Further Evidence

10. The Full Court rejected the application for admission of further evidence identified in and exhibited to the three affidavits of the Appellant of 20 November 2018, 27 November 2018 and 6 December 2018. The Appellant appeals in relation to the evidence identified in the Notice of Appeal: [2] CAB 92. That evidence is referred to by the Full Court as category (a) documents and evidence [20]-[30] and category (b) evidence [35].

11. The Appellant can succeed in the appeal without the further evidence. Nonetheless, the further evidence is relevant, and justice requires that it should have been admitted by the Full Court under section 93A (2) of the Family Law Act or should be admitted in evidence before the High Court.

20 12. The category (a) documents are relevant to the question whether the Respondent was under "*pressure*" to sign the joint tenancy transfer and demonstrate there was no such pressure.

13. The Full Court deals with category (b) documents and evidence at [31]-[37]. Documents 2, 11, 12 and 13 relate to the joint property transfer and to a stamp duty declaration in relation to the transfer. The evidence of the category (b) documents directly contradicts the finding in FCA [48], and the Respondent's evidence that he and his wife had not lived together, which the trial judge accepted [38]-[39] [48] [67]. The Respondent did not make disclosure of these documents which were adverse to his case.

14. Orders sought CAB 93-4.

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