IN THE HIGH COURT OF AUSTRALIA No. M137 of 2019

MELBOURNE REGISTRY

BETWEEN:

HSIAO

Appellant

and

FAZARRI

Respondent

10 **APPELLANT'S REDACTED REPLY**

Part I: CERTIFICATION

1. We certify that this Reply is a redacted version of the Reply. This version is in a form suitable for publication on the Internet.

Part II: REPLY TO ARGUMENT OF RESPONDENT

Argument: the first issue

2. In Part VI of the appellant's Amended Submissions, in paras 32 to 49 thereof,[1] we
20 contend that by reason of the deed, the 40% transfer was not liable to avoidance and that this being so, and having regard to the terms of the deed, there was no principled reason for making the property settlement order. It matters not whether originally the 40% transfer was voidable, because the parties' entry into the deed affirmed the transfer. The argument in no way depends upon whether or not there was pressure, or upon the reception of any of the further evidence. This is the unexpressed premise of the statement of the first issue in para 2 of the appellant's Amended Submissions. Thus stated, consideration of the first issue is not conflated with the second. (As to which, see para 6 of the respondent's Submissions.)

[1] See particularly paras 35 and 45 thereof.

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3. In his Submissions (including in paras 42ff), the respondent must, but does not, identify a principled reason for interfering with the parties' respective interests in G Street. The parties' separation or divorce furnishes no such reason, for the reasons given in the appellant's Amended Submissions at paras 35 and 45 (the parties' intention was that the appellant should not lose her interest in G Street by reason of separation or divorce). Nor could pressure exerted by the appellant furnish such a reason, for the reasons given in paras 35 and 36 thereof (the deed evidences an election to affirm the 40% transfer).

4. The respondent's argument in paras 46 and 47 of his Submissions - that the deed has no effect because, by reason of the property settlement order, the parties were no longer joint tenants - puts the cart before the horse. The essential question is whether the intermediate Court of appeal should have upheld an order which deprived the appellant of the benefit arising from her interest as a joint tenant of G Street.

5. His argument in para 48 has its answer at para 48 of the appellant's Amended Submissions (absent pressure as a ground of avoidance, there is no basis for making the property settlement order). Moreover, the parties' intentions or agreement as to their interests in property after separation or divorce, though not binding on the court, is a most relevant consideration in exercising the discretion to make a property settlement order.[2] The deed does not oust the jurisdiction under s.79, but is critical to the discretion exercisable pursuant to it. Thus, whether pressure existed or not, there is no ground properly to exercise the discretion as exercised by the Courts below.

6. As to the respondent's argument in paras 51 to 52 of his Submissions, the property settlement order cannot be justified by reference merely to considerations under s79(4), because that is to conflate s79(2) and (4) in disregard of the principled approach to be taken in s79 cases: see para 47 of the appellant's Amended Submissions.

Argument: the second issue

7. The attack made by the appellant in paras 58 and 66 of her Amended Submissions on the finding of pressure depends on the admission of the further evidence relevant to that finding. It is a freestanding submission. If there were no pressure, there is again no reason why the property settlement order should have been made. In the event that this

[2] See *Hyman v Hyman* [1929] AC 601, 608 to 609 per Lord Hailsham L.C. referred to in *Thorne v Kennedy* (2017) 263 CLR 85, 94. *Cf Woodland v Todd* [2005] FamCA 161; (2005) FLC 93-217 at [38].

Court holds that the reliance placed on the deed in our first argument is misplaced, we none-the-less submit that by reason of the further evidence there should be a retrial.

8. In paras 2, 56 and 63 of his Submissions, the respondent relies on the appellant's concession to the Full Court that prior to the trial she deliberately withheld filing the further evidence on which she seeks to rely before this Court. That concession ought to be understood in the context of the relevant proven facts, which are limited to those set out in para 55 of the respondent's Submissions. In those circumstances, 'deliberate' is to be understood in the sense of not accidental. The appellant explains her actions in paras 3, 6, 49 and 50 of her affidavit made 19 November 2018,[3] para 4 of her affidavit made 27 November 2018,[4] and in paras 4 to 10 of a further affidavit by her made 6 December 2018.[5] All these affidavits were filed in the application to the intermediate Court of appeal. A copy of the last affidavit is attached hereto and marked 'A'. (It is not contained in the Core Appeal Book or the Appellant's indexed Book of Further Materials.)

9. While no doubt the appellant's conduct was a factor to be weighed in the balance, so too was the respondent's malpractice and his non-disclosure of and failure to account for evidence inconsistent or apparently inconsistent with his statements made on oath. See paras 54, 58 and 59 of the appellant's Amended Submissions. The further evidence raises the strong inference that the respondent misled the primary Court by not telling the truth. The intermediate Court of appeal does not acknowledge this.

10. The submissions of the respondent at paras 61 to 67 both do not address and do not change the present circumstance that the respondent had a duty to disclose (and to make discovery of) the instrument of transfer to the primary Court.[6] That duty was breached. The fact is that in the instrument of transfer the respondent affirms a fact (namely, that he cohabited with the appellant), which he denied in his evidence, being the evidence accepted by the Courts below.[7]

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[3] AIBFM 63 and 69.
[4] AIBFM 153 and 154.
[5] We understand para 22 of the respondent's Submissions to mean that the appellant was not legally represented from 7 June 2018 until after the conclusion of the trial. This was indeed the fact.
[6] See para 54 of the appellant's Amended Submissions.
[7] See paras 39, 48, 50, 62 and 100 of the Amended Reasons for Judgment of the Primary Court at CAB 8ff, and paras 7, 11, 18(b), and 31 to 34 of the Reasons for Judgment of the Full Court at CAB 64ff.

11. Errors of the type identified in *House v The King*[8] at 505 are identified in paras 54 to 71 of the appellant's Amended Submissions and in the following paragraph.

12. The respondent's submissions, drawing attention to a concession held to be made by the Appellant,[9] are designed to suggest that the statement in the transfer by the respondent (that the appellant was the respondent's domestic partner) was irrelevant to the adjudicative task of the primary Court. The respondent's argument in para 63 of his Submissions overlooks the appellant's point[10] that considerations other than contribution findings enter into the question whether or not a property settlement order should be made. It does not follow that a finding that the parties were living together would have been irrelevant to the making of a property settlement order even if no contribution finding would flow from that finding.[11] The mutual comfort and support deriving from the fact of living together is a matter within s79(4).

Dated: 30 January 2020

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[8] (1936) 55 CLR 499.
[9] That no contribution finding would flow from evidence that the parties were living together.
[10] See paras 67 to 69 of the appellant's Amended Submissions.
[11] See ss79(4)(e) and 75(2)(m) and (o).