AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

CITATION: MC CAULEY V MC INNES [2008] ACTRTT (11)

RT 325 of 2008

Catchwords: Tenant, equitable interest in premises, party leasing to her self, constructive trust, oral trust for interest in land.

Tribunal: A. Anforth, Member

Date: 21 August 2008

AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL) NO: RT 325 of 2008

JACQUELINE ELIZABETH McCAULEY
(Applicant)

AND:

ANTHONY BLAIR McINNES
(Respondent/Landlord)

DECISION

Tribunal :A. Anforth, Member

Date :26 June 2008

Decision :21st August 2008

1. The Applicant is a tenant of the premises under a residential tenancy agreement.

2. The Tribunal has jurisdiction to hear and determine the Respondent's application for possession.

3. The Applicant has leave to file any claims within 14 days made in her capacity as a tenant against the Respondent in his capacity as landlord.

4. The matter is to be listed for further directions on date to be fixed by the Registrar.

5. The issue of costs is reserved for submissions.

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Member
21st August2008

AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL) NO: RT 325 of 2008

JACQUELINE ELIZABETH McCAULEY
(Applicant/Landlord)

AND

ANTHONY BLAIR McINNES
(Respondent)

REASONS FOR DECISION

Background

1. In June of 2000 the parties were friends and the Applicant was already living in the premises in question from which she conducted a book distribution business. Either the Applicant approached the Respondent, or the Respondent approached the Applicant, with the proposition that the premises be purchased and that the Applicant remain in possession after the purchase. On the Applicant's version the Respondent approached her with a proposition that he assist her to purchase the premises by advancing the necessary capital for the deposit and raising the mortgage in his name; she was to make the mortgage payments on a periodic basis and carry out repairs and renovations in lieu of her contribution to the deposit. After 5 years she was to have the option of continuing the arrangement; buying the Respondent's interest in the house for $20,000; or calling for the sale of the premises with an apportionment of the capital gain according to some undefined formula.

2. On the Respondent's version of the agreement the Applicant approached him. He was to purchase the property as an investment. He was to supplied the deposit of $10,000 and raised the mortgage solely in his name. The Applicant was to be allowed to remain in situ as a tenant paying an agreed rent of $225pw; save that the tenant was only to actually pay $185.0 per week ($800 pm) which was calculated in an approximate way by reference to the Respondent's mortgage payments . The rent of $800 pm was said to be below market rent on the understanding that the Applicant applied the residue of the rent ($225-$185=$40 pw) towards repairs and maintenance. The Respondent denies any agreement for the Applicant to carry out repairs and renovations costing more than the residue or rent beyond, and understood that that he alone was to be responsible for any authorised renovations or alterations to the premises costing more than the residue of the rent.

3. The Applicant essentially made the periodic payments sufficient to meet the mortgage commitment. She carried out substantial alternations to the premises, some with the Respondent's consent and some without his consent. She has been re-imbursed for some of these costs but not others.

4. The Applicant's claim that she is more than a tenant of the Respondent, and is in fact a joint owner of the equitable title in the house in which she lives. There is no dispute that the Respondent is the sole registered proprietor of the premises.

5. The Respondent for his part asserts that the Applicant is nothing more than a tenant and seeks an order for possession of the premises.

6. By agreement between the parties this decision is directed only to the issue of the status of the Applicant and in particular whether she is, or is not, a tenant of the Respondent. The jurisdiction of the Tribunal is only enliven in the former case. It was agreed that should the Tribunal find that the Applicant is a tenant of the Respondent then the issue of the Respondent's application for possession would be dealt with in later separate proceedings.

The history of the application:

7. The Applicant's application was filed in the Tribunal on 18 April 2008. The application was prompted by the service upon the Applicant of a Notice of Vacate by the Respondent seeking possession by 21 April 2008.

8. The Notice to Vacate alleged:
   (a) The Applicant had caused damage to the premises via a fire in the kitchen
   (b) The Applicant failed to notify the Respondent of the fire damage
   (c) The Applicant made unauthorised additions, alterations and painting to the premises without the Respondent's consent
   (d) The Applicant threatened to strip the premises prior to ceasing to reside in the premises

9. The Respondent later abandoned grounds (a) and (b) above.

10. The Notice to Vacate had not been preceded by any Notice to Remedy. The Notice to Vacate asserted that a Notice to Remedy was not required by reason of prescribed term 93(d) *Residential Tenancies Act 1997* (the Act). Paragraph 3 of the Notice to Vacate stated:

> In accordance with section 93(d) of the Residential Tenancies Act 1997 as there have been in excess of three breaches to the standard tenancy terms, the lessor is not required to provide you with two weeks to remedy the breaches and may issue this notice to vacate.

11. Prescribed term 93 provides:

> 93 The tribunal may order the termination of the tenancy and eviction of the tenant on the ground of breach of the tenancy agreement in the following circumstances:
> (a) the lessor must serve a written notice requiring the tenant within 2 weeks after the day of service to remedy the breach if it is capable of remedy;
> (b) if the breach is not remedied within 2 weeks after the day of service or if the breach is not capable of remedy—the lessor must give a notice to vacate the premises within 2 weeks after the date of service of the notice to vacate;
> (c) if the tenant does not vacate the premises within the period of 2 weeks after the date of service of a notice to vacate—the lessor may apply to the tribunal for an order terminating the tenancy and for the eviction of the tenant;

> (d) if the tenant breaches the terms of the tenancy on 3 occasions on any ground—on the 3rd occasion the lessor may serve a notice to vacate and need not give the tenant 2 weeks to remedy the breach.

12. In terms of prescribed term 93(d) it is not at all clear which breaches are the preceding two breaches the Respondent relies upon in order to justify serving the Notice to Vacate on the tenant for a third breach without the need to first serve a Notice to Remedy. Ultimately there was no evidence from the Respondent of any breaches other than those pertaining to grounds (c) and (d) of paragraph 8 above.

13. The issue of whether the Notice to Vacate is valid is an issue for another day. For present purposes its relevance is confined to its role in invoking the Tribunal's jurisdiction.

14. The matter was listed before the Tribunal on 23 May 2008 for directions only.

15. On 19 May 2008 the Respondent's solicitors filed an affidavit in the Tribunal. In that affidavit the Respondent alleged that the Applicant had initially approached him for a loan for the deposit to buy the premises. The Respondent proposed that instead of making a loan he would advance a similar sum as the deposit, raise a mortgage and purchase the premises with the Applicant as his tenant. The Respondent said that it was agreed with the Applicant that she would pay $225 per week over 5 years. The Respondent then authorised the Applicant to act as his agent for the purchase. The premises were purchased for $111,500 on 2 June 2002 solely in the Respondent's name.

16. The Respondent alleged that agreement was reached between the parties that the Applicant would in fact pay only $800 per month or $185 per week and could keep the residue of the rent ($225-$185=$40.00pw) to use doing repairs to the premises. The Respondent alleged that he specifically informed the Applicant that he was to approve any repairs or renovations and would pay for any cost beyond the residue of rent retained by the Applicant for this purpose.

17. The Respondent alleged that he had his solicitors draw up a deed to embody the agreement, a copy of which was annexed to the affidavit. The Respondent said that his solicitors sent the deed to the Applicant. The deed recites that the Respondent is the owner of the premises and the Applicant is the tenant. It recites that the Applicant was desirous of doing improvement to the premises with the view to obtaining the benefit of the capital improvements on resale.

18. The deed was never executed by the Applicant who has her own story to tell about it.

19. The deed itself recites that the Applicant is to apply the residue of the rent not paid, calculated above to be $40 pw, to the "capital improvements" from which she was to obtain some benefit on resale. It does not expressly provide for the Applicant to expend any further sums of her own money on capital improvement. But the deed then states that upon resale:

> …that the monies expended by Jackie, to the extent that the same are above twenty thousand dollars ($20,000) shall be divided equally between Jackie and Tony…

20. The terms of the deed are difficult to understand for two reasons. Firstly, even if the Applicant expended the residual rent of $40pw over the 5 years of the agreement it comes only to $10,400.00 and not $20,000. Therefore on the assumption that the Applicant was only authorised to spend the residue of the rent the Applicant would not be entitled to return on her investment in the capital improvements on the sale in 5 years hence.

21. Secondly, the deed only offers to reimburse to the Applicant half of the value of the capital improvements made by her over the sum of $20,000, and then it is unclear whether the first $10,400 from the residue of the rent is to be included in the $20,000. The deed does not offer the Applicant any benefit from any capital gain associated with the capital improvements or movements in the market prices. Thus on the face of the deed the Respondent is to obtain the benefit of the first $20,000 improvements made by the Applicant and then 50% of the value of sums expended by the Applicant over and above the $20,000 threshold. The Respondent is to obtain this benefit whilst receiving all of the rent on a periodic basis save for the small residue of $40pw and the Respondent is to obtain the whole of the capital gains on resale. It is not difficult to see why the Applicant found the deed to be offensive.

22. An arrangement of this kind makes little sense to the Tribunal in the context of a tenancy. In fact section 15(3) of the Act has the effect of converting any payments by the tenant for capital improvements, into rent. If it is assumed for the purposes of the deed that the Applicant did in fact expend $20,000 in capital improvements over 5 years then she is to be credited with the weekly equivalent of $77 as addition rent paid. Allowing for the $40pw rent residue retained by the Applicant, then the deed arrangement is equivalent to a rent increase of $37pw for each week of the 5 years over and above the rent actually paid. The issue then arises whether such a rent increase is lawful under the Act, but again this is a matter for another day.

23. In the affidavit the Respondent alleged that renovations to the kitchen were carried out in mid 2003 at a cost of $15,806 and that he paid the whole of the cost. The next major improvement occurred in 2005 when the Applicant remodelled the bathroom without the Respondent's consent. The Respondent alleged that the Applicant informed him at the time that she would render an account to him for the bathroom renovations, being the difference between actual cost to her and the tax deduction she could obtain in relation to it. The tax deduction stemmed from the Applicant's treatment of these costs as the costs incurred in remodelling her business premises.

24. The next renovation recited in the affidavit occurred to front door in 2006. The Applicant allegedly replaced the existing door and door jam with a custom made door and security door. The Respondent denied that he consented to the renovation.

25. At some point in time a fence dividing the premises from the neighbouring premises required replacing. The Applicant paid for the fence. The Respondent said that he expected that the cost of the fence would come from the $40pw

residue of the rent. The Tribunal notes in passing that the sum of $40pw would not go far towards a new fence, new doors etc.

26. In December 2006 the Respondent said he consented to the Applicant's arranging to have the outside of the house painted. He said he gave instructions to use a painter by the name of Steve Hillier who was indebted to the Respondent and could work off the debt via the painting. The Applicant later said she was unaware of any quid pro quo arrangements between the Respondent and Mr Hillier and that she paid Mr Hillier the full amount of his account for which she has not been reimbursed.

27. The Respondent asserted that in 2007 the Applicant retiled the outdoor stairs and landings without his consent. In October 2007 the Applicant allegedly made similar renovations to the laundry door without the Respondent's consent.

28. The Respondent noted that in May or June 2007 the Applicant had undertaken the reduction in the floor level of the kitchen via grinding down the floor. The Respondent said he had expressly forbidden the Applicant from doing this when previously asked for permission by the Applicant. The Applicant has not presented any invoices to the Respondent for the cost of the work. The Applicant latter said that no grinding had taken place and that all that had occurred was the replacement of the old floor boards with new ones.

29. The Respondent said that on 6 November 2007 the Applicant and he met for dinner at the China Tea House, Erindale. The Respondent attempted to raise the cost of the various renovations the Applicant had undertaken and the cost to himself. The Respondent said that the Applicant was unwilling to enter the discussion. The next day the Respondent put the invoices for the renovations in her mailbox. The Applicant places this event on the evening of 15 November 2007.

30. On 16 November 2007 the Respondent wrote to the Applicant outlining the costs incurred in the renovations and proposing a rent increase. Following some correspondence it was agreed that the rent be increased to $1,000 per month or $230 pw. If the Applicant is found to be a tenant then the issue will arise as to whether this rent increase was lawful under the Act.

31. In further correspondence in November 2007 the Respondent sought and the Applicant provided, further invoices for renovations. The Respondent says that he requested explanations of the relevance of each invoice by letter of 27 November 2007 to which there has been no reply, accordingly he has not re-imbursed the Applicant for these costs.

32. The Respondent contends that he has not been allowed access to the premises since 5 December 2007 as a consequence of the present dispute.

33. The Respondent alleges that since late November 2007 he has been the subject of a large volume of abusive correspondence from the Applicant including threats to the safety of his daughter and threats to engage in public defamation of himself, as a result of which he decided only to deal with the Applicant through his solicitors.

34. On 21 May 2008 the Applicant file a large volume of correspondence with the Tribunal under cover of a letter of 19 May 2008. In that covering letter the Applicant:
    (a) denied ever asking the Respondent for a loan for the deposit. She said that the initiative for the Respondent to assist her to purchase the premises came entirely from the Respondent.
    (b) said the deed did not reflect her understanding of the agreement and so she deliberately refused to sign it.
    (c) said the Respondent insisted that he pay the rates on the premises
    (d) said all periodic "rent" payments were made direct to the Respondent's mortgage account.
    (e) said the invoices for the repairs and renovations were not initially provided to the Respondent because the Applicant understood that she was responsible for those costs. It was only after the Respondent demanded them in November 2008 that she provided copies. She denied that she was fully reimbursed for the kitchen renovation, there being a residual $800 outstanding.
    (f) denied that she did not consult the Respondent in relation to the renovations to the bathroom, the front door or the laundry door.
    (g) denied that she ground down the kitchen floor. She said that the old floor boards were removed and replaced with new ones.
    (h) said she paid Mr Steve Hillier, the painter appointed by the Respondent. She denies ever being told of any debt owed by Mr Hillier to the Respondent and received no credit from Mr Hillier for any such debt.
    (i) denied engaging in any abuse towards the Respondent or his daughter and alleged that the converse was the case.

35. From the volume of correspondence annexed to the covering letter it appears that through out November-December 2007 and in February 2008 the Applicant was busy on a daily basis writing one or more letters to the Respondent's solicitor and other people. By way of example only, between 7 December and 31 December 2007 the Applicant wrote 47 letters to the Respondent's solicitors. The Applicant appears to have had a rest in January 2008. In February 2008 she wrote 14 letters to the Respondent's solicitors and in the first 3 weeks of March 2008 she wrote 9 more letter to the Respondent's solicitors.

36. Most of this volume of correspondence deals with a range of historical and emotional issues which have no bearing on the issue before the Tribunal. The sheer volume and intensity of the Applicant's emotional out pouring in these letters makes it difficult to sift the "chaff from the wheat" in terms of relevance. One particularly disturbing repetitive theme in the Applicant's correspondence is her determination to inflict financial harm on the Respondent, to obtain damages against him for her suffering, to publicly humiliate the Respondent and to cause him to expend legal costs in his defence. In her letter of 12 December 2007 she encapsulates her position in saying "I have to do everything I can to stop him"..

37. The following notations of correspondence are selective only and do not purport to represent the full volume. There is no notation of the content of correspondence

beyond 12 December 2007 because that correspondence becomes increasing emotional, threatening and irrelevant to the Tribunal's deliberations:

18 Nov 07 A letter from the Applicant to the Respondent offering to re-imburse all taxes and costs paid by the Respondent to date;

22 Nov 07 A letter from the Respondent to the Applicant outlining his investment strategy for the house and his expectations of making a capital gain. The Respondent said "maintenance would be your responsibility since you could claim it on tax against your business". He said he appreciated the refurbishment to the kitchen but expressed the view that there had been overcapitalisation of the premises through the renovations.

Undated Letter from the Applicant to the Respondent in which she re-iterates that she accepts responsibility for all renovation costs and is not asking for any refund. In that letter the Applicant says "consider the renovations as just changes made by the tenant. It happens with business rentals all the time. Its just an upgrade at no cost to you…you've been lucky to have me take care of this place. You can have it back anytime you want."

Undated Letter from the Applicant to the Respondent in which she expresses her intention to move from the premises. In that letter she says "I'd rather pay market rent and deal with an agent or a standard landlord. I've had an offer to do a cheap rent/renovation deal for someone else which I may pursue. I'll be fine and you'll be free."

Undated Letter from the Applicant to the Respondent acknowledging the Notice to Vacate and asking for an extension to 60 days to vacate. The Respondent reply by letter of 26 November 2007 telling the Applicant she could take as much time as she wished to move.

25 Nov 07 Letter from the Applicant to the Respondent explaining the various renovations and how she had borne the costs of something in the order of $40-50K plus labour. At the end of the letter the Applicant wrote "I'm ready to vacate at any time…Your house, your choice. I have never expected anything out of this arrangement other than a place to live for some unknown period of time. I can happily and easily walk away leaving you with your house and our friendship undamaged."

Undated Letter from the Applicant to the Respondent in which she says that she will move in January 2008. The Applicant wrote "I have been telling you for years that I had no intention of trying to force you to honour our agreement. It would have been so much quicker, easier and less damaging if your had just asked me to leave."

2 Dec 07 Letter from the Respondent to the Applicant in which he states that he will make full restitution for all renovation and repairs costs from this point in time onwards.

Undated Letter from the Applicant to the Respondent denying that she ever asked for restitution and accusing the Respondent of forgetting the nature of the original agreement.

4 Dec 07 Letter from the Applicant to the Respondent again alleging that the Respondent has forgotten or chosen to ignore the original agreement. The letter does not set out the terms of the original agreement.

Undated Letter from the Applicant to the Respondent asserting her right to a share of the ownership of the premises based on the respective total inputs in capital and labour.

5 Dec 07 Letter from the Applicant to the Respondent in which she asserted her right as a co-owner and declared that she did not intend to vacate the premises.

6 Dec 07 Letter from the Applicant to Mr Stephen Read in which she speaks of her determination to obtain to obtain justice. She says "I intend to get my house and compensation. I worked for it, I suffered for it and I deserve it."

8 Dec 07 Letter from the Applicant to the Respondent's solicitors in which she again asserted that the original agreement involved the house being hers, which would be sold and the capital gain apportioned after 5 years.

12 Dec 07 Letter from the Applicant to the Respondent's solicitors in which she openly declares her intention to inflict harm on the Respondent by running up his legal costs with his solicitors

38. On 21 May 2007 the Respondent filed a cross claim seeking an order for possession pursuant to section 51 of the Act. The application annexed a copy of the title search for the premises showing the Respondent as the sole registered proprietor; repeated the allegations contained in the earlier Notice to Vacate at paragraph 8 above; refers to threats allegedly made by the Applicant in various specified correspondence; and repeats the Applicant's declared intention not to vacate the premises.

39. The matter came before the Tribunal on 23 May 2008. Procedural orders were made for the filing of outstanding witness statements and the issue of summons to witnesses who were said by the Applicant to be relevant but hostile to her. Orders were made for identification of witnesses intended to be called and whether each witness was required for cross examination.

40. In response to these orders the Applicant filed a request with supporting reasons for a summons to; Meyer Vandenberg Lawyers, to produce their file relating to the drawing of the original deed for the Respondent; Mr Read; Mr Hillier; and Mr Berand. In addition the Applicant filed witness statements from Elana McCauley, Colin Jones and Stephen Read and lodged a letter dated 7 June 2008 asserting that she was unclear as the scope of the matter to be determined by the Tribunal.

41. The statement by Elana McCauley stated that she had a conversation with the Respondent at a wedding in 2004 in which the Respondent said "that he hoped my mother would be able to own the premises free and clear, because he cared about her and wanted her to have some equity and own her own home". The statements from Mr Jones and Mr Read appear to have no direct relevance to any thing to be determined by the Tribunal at this point in time.

42. By letter of 6 June 2008 the Respondent raised objections with the Registrar concerning the issue of summons to Mr Read, Mr Hillier, Mr Berand and Meyer Vandenberg. In response to these objections, and the Applicant's letter of 7 June 2008, the matter was listed for urgent directions on 12 June 2008.

43. After hearing the parties on 12 June 2008 the Tribunal authorised the issue of the various summons.

44. On 16 June 2008 the Applicant lodged, unsolicited, with the Tribunal copies of correspondence between herself and the Respondent's solicitors. The tenor of the correspondence was essential one of treats and posturing by the Applicant which did not add anything of evidential value.

45. On 16 June 2008 the Respondent's solicitors filed with the Tribunal, unsolicited, an amended Notice to Vacate in the same terms as previously save that the reference to the fire damage to the kitchen was deleted. The Respondent also sought a summons to issue to the Applicant to produce her various tax records relating to her business.

46. On 17 June 2008 the Applicant again filed with the Tribunal, unsolicited, correspondence from herself to the Respondent containing a range of allegations of improper conduct and other matters of little evidential value.

47. On 18 June 2008 the Applicant requested the Tribunal to issue a summons to the Respondent for his tax and financial records together with an explanation of the reasons for her request, namely that the manner in which the Respondent characterised the rent payments in his tax return may throw light on his true understanding of the nature of the payment. The Respondent subsequently objected to the issue of this summons.

48. The Applicant also wrote to the Registrar making allegations against a particular witness accusing her of "unstable mental history" and that the Respondent had mislead the Tribunal concerning the availability of another witness.

49. On 18 June 2008 the Respondent filed a witness statement from Edward Barend and the Applicant filed a witness statement from Tom Casson.

50. Mr Barend stated that he was the business manager for the Respondent at the time of the purchase of the premises in question in 2000 until December 2007. His statement essentially corroborated the Respondent's version of events but only in so far as Mr Barend was relaying that which the Respondent had told him concerning the issue over the years. Mr Barend had no first hand experience of the venture or of the Applicant's involvement.

51. Mr Casson was a tradesman who did some of the renovations for the Applicant. His statement was not relevant to the present issue before the Tribunal.

52. On 19 June 2008 the Respondent filed a witness statement from Thersa Gifford. Ms Gifford was an employee of the Applicant from 1999-2006. She said that she had never heard the Applicant make any assertion of ownership of the premises. From her conversations over the years with the Applicant and Respondent her understanding of the arrangement was consistent with the Respondent's version. She said she saw no examples of hostility from the Respondent to the Applicant.

53. On 19 June 2008 the Respondent also complained to the Tribunal of the costs being incurred by the Respondent in dealing with the Applicant's voluminous correspondence and the Applicant's allegedly defamatory statements to a range of people known to both parties.

54. On 19 June 2008 the Respondent filed an affidavit. In that affidavit the Respondent:

    (a) denied the allegation by the Applicant that she in fact paid any of the $10,000 deposit;
    (b) provided evidence that he paid the rates and taxes on the land including the excess water;
    (c) noted that a standard residential tenancy agreement was annexed to the deed in 2000 that the Applicant refused to sign;
    (d) pointed out that there had not been a rent increase from the beginning of the arrangement in 2000 until later in 2007 but the mortgage had risen steadily in this period. This fact was said to be inconsistent with the Applicant's assertion that her rent payments were in fact mortgage payments.
    (e) alleged that he had never heard the Applicant assert a right of co-ownership until December 2007;
    (f) annexed a letter from the Applicant dated 12 October 2006 in which the Applicant said "I'm in no position to buy the house from you and I cant continue to rent a space where I'm considered irresponsible if I let dirt come into contact with the treated pine."
    (g) stated that he has declared to the ATO all rent payments received from the Applicant as rental income;
    (h) denied the statement attributed to him in the witness statement of Elana McCauley;

55. The matter was listed for urgent further directions before the Tribunal on 20 June 2008. The Applicant appeared in person and Ms Moore, solicitor appeared for the Respondent. The Tribunal heard argument concerning the proposed issue of the summon to the Respondent to produce his tax and financial records and ordered production. Orders were made for access by the parties to the Applicant's financial and the file of Meyer Vandenberg, both of which had been produced under summons. The Tribunal explained again to the Applicant the scope of the matter before the Tribunal and the process to be followed in preparing for the hearing and at the hearing.

56. On 24 June 2008 the Applicant notified the Tribunal that she did not require Mr Hillier to attend for cross examination.

57. On 24 June 2008 the Respondent filed an affidavit from his accountant annexing the Respondent's tax returns for the financial years 30 June 2002 to 30 June 2007. Those returns show the declared gross rental income as follows:

2006/2007	$6400
2005/2006	$6400
2004/2005	$9600
2003/2004	$9600
2002/2003	$9600

On the Respondent's evidence he was receiving $800 pm from the Applicant for rent which is $9600 pa. This accords with the 2002/2003-2004/2005 financial years but it is not consistent with declared gross rental income in 2005/2006-2006/2007. The documents appended to the tax returns for the latter years suggest a short fall in rent by the Applicant as the explanation.

58. On 25 June 2008 the Respondent filed submissions on the law.

59. The matter was head on 26 June 2008. The Applicant appeared in person and Mr Kay, solicitor, appeared for the Respondent.

60. The Applicant gave evidence and was subjected to cross examination. In her evidence in chief the Applicant said that the arrangement with the Respondent was for her to pay the mortgage and the renovation costs. At the end of 5 years she was to have the option of:
    (a) continuing with the present arrangement
    (b) buying out the Respondents share of the premises for $20,000
    (c) selling the property and apportioning the profits.

61. She said the agreement was that she was to expend $20,000 in renovations over the 5 years to match the Respondent's initial investment of the deposit of $10,000. The Respondent and the Applicant were to each take half the capital gain on any sale.

62. The Applicant maintained that the dinner at Erindale China Tea House occurred on 15 November 2007 at which time she offered to buy out the Respondent's interest in the house.

63. The Tribunal put to the Applicant some of the statements in her correspondence from paragraph 37 above. In particular the Tribunal put to the Applicant the content of her letter of 27 November 2007 which was written after the dinner at the China Tea house, in which the Applicant said:

> "I have no interest in imposing any limits on your overall investment strategy. In fact even at our business dinner I told you that I appreciate the time you've given me in your house and that I'm ready to vacate at any time …I have no intention of being in a position where I can be seen to be stopping you from making, or forcing you to make , any particular decision. Your house, your choice. I have never expected anything out of this arrangement other than a place

> to live for some unknown period of time. I can happily walk away leaving you with your house…"

64. The issues that immediately arise out of this passage are:
    (a) The statement that the Applicant has no interest in imposing any limits on the Respondent's investment strategy is inconsistent with her testimony that she had the three options at the end of 5 years. The fact of having these options is itself a limit on the Respondent's investment autonomy:
    (b) The Applicant says that at the dinner at the China Tea House she thanked the Respondent for the time he had given her in his house. This is not consistent with the Applicant's oral testimony that she purported to exercise her option to buy him out at that dinner:
    (c) The Applicant says that she is ready to vacate at any time, which is inconsistent with her later actions and with her assertion of co-ownership;
    (d) The Applicant says "your house, your choice" which is again not consistent with the later assertion of co-ownership
    (e) The Applicant says that she has never expected anything from the "arrangement" other than "a place to live for some unknown period" which is entirely inconsistent with her later assertion of co-ownership.

65. The Applicant was unable to offer any explanation for this apparent change in the tenor of correspondence after 4 December 2007 save to say that her apparent admissions to being a mere tenant prior to this date were a consequence of her intimidation at the hands of the Respondent. The Tribunal asked the Applicant on several occasions to explain what acts of intimidation by the Respondent she was referring to and how these acts of intimidation caused to write these apparently untrue statements about her status in the house. The Applicant was either unable or unwilling to provide any meaningful response to these questions from the Tribunal.

66. In cross examination the Applicant admitted that in her tax returns she had claimed the payments made to the Respondent as business "rent" and not as a mortgage payment for a capital purchase.

67. Mr Stephen Read gave evidence and was subject to cross examination. His evidence did not touch on the matters relevant to the Tribunal.

68. The Applicant did not call any other witnesses. She further indicated that she did not require Mr Barend or Ms Gifford for cross examination. The Applicant had not previously advised the Respondent of this fact and both these witnesses were on standby to give their evidence.

69. The Respondent gave evidence and was subject to cross examination. His oral evidence did not add anything additional to his affidavit.

70. At the conclusion of the hearing both parties were invited to file and serve any submissions on the evidence and/or the law. The Applicant was to file hers by 30 June 2008; the Respondent by 7 July 2008; and the Applicant's submissions in reply were due by 11 July 2008.

71. On 30 June 2008 the Applicant filed her submissions. Apart from re-iterating her version of the agreement, the Applicant drew attention to:
    (a) the lack of logic inherent in the unsigned deed concerning the proposal to refund to the Applicant 50% of her capital expenditure over the threshold of $20,000.
    (b) the implausibility that a mere tenant would take on the responsibility for repairs and improvements;
    (c) the failure of the unsigned deed to deal with the issue of the apportionment of the capital gain;

72. In a separate submission of the same date the Applicant offered an explanation of the manner in which the Respondent intimidated and abused her such as to cause her write the apparent admissions contained in the various pieces of her correspondence that had been put to her during the hearing. She said that she was initially adopting a path of least resistance and was prepared to write or say anything that would keep the Respondent happy. This attitude apparently changed after the dinner on 15 November 2007 on which occasion she said that she told the Respondent that she "wanted to buy him out". The Tribunal notes in passing that:

    (a) there is no correspondence in evidence dating back to 15 November 2007 in which the Applicant makes any claim of ownership. There is correspondence after 15 November 2007 in which the Applicant appears to conceded total ownership to the Respondent (eg the letter of 25 November 2007).The earliest identified claim to partial ownership by the Applicant appears to be her correspondence of 4 December 2007.
    (b) the letter of 25 November which described the events at the Tea House made no reference to the Applicant having offered to buy out the Respondent and the content of that letter is only consistent with her admitting to a tenancy.
    (c) prior to 4 December 2007 her offer to pay for renovations and rates/taxes is consistent with a view by the Applicant of the arrangement as a commercial lease for a business premises albeit she also lived on the premises.

73. On 6 July 2008 the Applicant advised the Tribunal in writing that she did not propose to read any submissions from the Respondent nor file and serve any submissions in reply. She invited the Tribunal to proceed to judgement.

74. On 9 July 2008 the Respondent file his submissions. The Respondent relied upon the statements of Mr Barend and Ms Gifford who were not required for cross examination. The Respondent objected to the admission into evidence of the second letter from the Applicant of 30 June 2008 in which she offered an explanation of why she felt intimidated by the Respondent. The Respondent pointed out that the evidence was closed at the end of the hearing and that he had not had the opportunity of testing by way of cross examination the Applicant's assertions contained in this letter. This submission is clearly correct and the Tribunal puts no weight on the content of that second letter.

75. The Respondent pointed to:

(a) the various pieces of correspondence from the Applicant in which she seemingly admitted to being only a tenant:
(b) the Respondent tax records which disclosed the rent payments as income;
(c) the range of threats by the Applicant in the correspondence principally directed to the Respondent but not exclusively so.
(d) the fact that the Applicant exercised an exclusive right of occupancy of the premises to the point of excluding the Respondent after 5 December 2007. This is consistent with a tenancy but not consistent with co-ownership by the parties.

76. The Respondent sought costs against the Applicant for the manner in she allegedly delayed the proceedings, the cost of having witnesses on standby, and the meritless nature of the Applicant's case.

Findings of fact by the Tribunal:

77. The Applicant was a tenant of the premises prior to the purchase of the premises by the Respondent in 2000. She used the premises principally as her home but also conducted her book business from her home and another premises,

78. Following the purchase by the Respondent the Applicant remained in possession of the premises continued to use the premises principally as a home as well as running part of her book business from the premises.

79. At all material times the Applicant exercised the exclusive right of possession of the premise to the point of excluding the Respondent from access to the premises except with her consent.

80. The Respondent is the registered proprietor of the premises and as such holds the exclusive legal title to the premises (section 58 *Land Titles Act 1925*).

81. The real contest between the parties is the nature of the agreement reached between the parties in 2000 that led to the purchase of the premises. The competing contentions are set out above.

82. In favour of the Applicant's version of the agreements that she was a co-owner of the equitable title, is the fact that:
    (a) the deed was unsigned:
    (b) for the reasons given at paragraphs 19-22 above the deed makes little sense in the context of an alleged tenancy agreement:
    (c) a mere tenant is not responsible for structural repairs and renovations (prescribed terms 54-55 of the Act) such as the unsigned deed purported to attribute to the Applicant:
    (d) the Applicant's rent was approximately equal to the periodic mortgage repayments:
    (e) the Applicant did in fact pay for much of the renovations, at least until the dispute arose in later November 2007 at which time the Respondent belatedly made a conditional offer to pay some of those costs:
    (f) no residential tenancy agreement was ever signed.

83. In favour of the Respondent's version of the agreement that the Applicant was a mere tenant, is the fact that:
    (a) the Respondent advanced the whole of the capital sum for the deposit:
    (b) the Respondent raised the mortgage;
    (c) the contract of sale and certificate of title were solely in the Respondent's name;
    (d) the Respondent in fact paid the government taxes and charges which are costs that fall to the owner/landlord;
    (e) the Respondent did have the deed drawn at the commencement of the arrangement in 2000 with the residential tenancy agreement annexed, albeit was never executed by the Applicant;
    (f) the Respondent in fact reimbursed the Applicant for some, but not all, of the renovations;
    (g) the Respondent declared the periodic payments received from the Applicant as "rent" to the Tax Commissioner;
    (h) Mr Berand, the Respondent's business manager over the whole of the relevant period corroborated the Respondent's version.
    (i) nothing in the file of Meyer Vandenberg was inconsistent with the Respondent's version.

84. Against the Applicant is the fact that:
    (a) she declared the periodic payments as "rent" to the Tax Commissioner as opposed to capital payments for the purchase of an asset:
    (b) she did not assert any equitable title until 4 December 2007 after a dispute had arisen with the Respondent:
    (c) that Ms Gifford had no indication from the Applicant of the assertion of her equitable interest until recently, when she had been in a position relative to the Applicant to have heard a more contemporaneous assertion of that right over the years:
    (d) most importantly, the Applicant's own correspondence until 4 December 2007 contained statements that were only consistent with her being a tenant, whether residential or commercial;
    (e) the Applicant's correspondence after 4 December 2007 became increasing bitter in nature and indicated an intention to make the Respondent pay, both financially and in reputational terms.
    (f) the Applicant's various correspondence contain important issue of inconsistency. In particular the Applicant asserted in oral evidence that she sought to exercise her option of the right to buy out the Respondent's interest at the dinner at the China Tea House on 15 November 2007 whereas her correspondence in the two weeks after that date gave no indication of this position and were only consistent with an admission of a mere tenancy. This inconsistency is compounded by the open nature of the threats made by the Applicant to inflict economic harm on the Respondent.

85. Against the Respondent is the fact that:
    (a) the agreement propounded by the Respondent as a residential tenancy agreement contains invalid terms imposing on the tenant the obligation for repairs and renovations;

(b) the deed propounded by the Respondent makes little commercial or logical sense and would have been most unfair to a mere tenant and in breach of the Act.

86. Put at its highest for the Applicant there may not have been a true meeting of minds in 2000 such that her understanding of the nature of the agreement may not have been the same as the Respondent's. The pity is that the Applicant did not press the matter after she received the deed to which she objected, which should have alerted her to the fact that a difference of expectation existed concerning the nature of the agreement. The deed was presented to her shortly after the purchase in 2000 at which time she had not invested any capital or labour in the project. It was open to the Applicant at that time to have demanded clarification of the agreement or in default thereof to have moved to other premises. She had nothing invested at that point in time. Unfortunately the Applicant did not do so and continued with her perception of the "arrangement".

87. Put at its lowest for the Applicant, she was aware that she was only a tenant. She took the view that because the premises were used for her business that she was akin to a commercial tenant who could claim various tax deductions for the renovation of business premises and that she may recover some part of any renovation costs on resale. This would explain why the Applicant was prepared to accept responsibility for renovations in return for a rent reduction and the avoidance of the disruption of moving premises.

88. Put at its highest for the Respondent, he was purchasing an investment property with a guaranteed tenant in situ with whom he had entered a very favourable agreement whereby he was relieved from the usual landlord obligations to maintain and repair the premises. He stood to gain from the Applicant's investment of her labour and capital in carrying out the renovations to the extent of the whole of the first $20,000 and then 50% of all renovations costs paid thereafter by the Applicant.

89. Put at its lowest for the Respondent, he has taken unfair advantage of the Applicant by allowing her to improve his property on a mistaken understanding of the nature of the agreement and he may have committed various breaches of the Act in his capacity as a landlord.

90. Having read all the correspondence and heard the parties in evidence, the Tribunal finds as a fact that:
    (a) the Respondent purchased the premises as an investment property in his own right. The Respondent did not intend to permit the Applicant any ownership in the property and intended only that the Applicant was a mere tenant;
    (b) the agreement between the parties was that the Applicant remain in possession as a tenant; that she be responsible for repairs and renovations and that she may recover some of her capital investment in the renovations to the premises upon resale;
    (c) there was no agreement between the parties whereby the Applicant was to take any interest in the title to the premises, either immediately or after 5 years;

(d) the Applicant did not provide any of the capital costs for the purchase of the premises and had no liability under the mortgage;
(e) there was a friendship but no personal relationship between the parties such as would found a "presumption of advancement" at law;
(f) the Respondent entered an agreement with the Applicant in 2000 to escape his duties at law as a landlord by offering a marginally reduced rent in exchange for the Applicant forgoing her rights as a tenant to require the landlord to provide and maintain the premises in a reasonable state of repair;
(g) the Applicant did not view herself as anything other than the equivalent of a commercial tenant until around 4 December 2007. This date was the first time that the Applicant determined to assert a right to the title of the premises.
(h) the period payments made by the Applicant, referred to as "rent" may have been approximately equivalent to the Respondent's mortgage payments, but they were also within the range of the commercial rent as well. The Tribunal finds that the payments were in fact rent;
(i) the Respondent stood back and watched the Applicant carry out extensive repairs going well beyond the value of the marginal rent reduction, consistent with his understanding expressed in the deed that the Applicant may expend in excess of $20,000 in renovations over 5 years. Whilst he may have complained to the Applicant from time to time about the nature and cost of the renovations he did not take any steps as a landlord to prevent it; he was content for the Applicant to bear the costs of the renovations and repairs until after she asserted an equitable interest in the premises; and he fully intended to take the advantage of any capital gains arising from the renovations;

Legal tests to be applied:

91. The Tribunal only has jurisdiction if either a "residential tenancy agreement" exists or an "occupancy agreement" exists. The terms are defined in the Act as follows:

> 6A(1) An agreement is a ***residential tenancy agreement*** if, under the agreement—
> (a) a person gives someone else (the ***tenant***) a right to occupy stated premises; and
> (b) the premises are for the tenant to use as a home (whether or not together with other people); and
> (c) the right is given for value.
>
> (2) The agreement may be—
> (a) express or implied; or
> (b) in writing, oral, or partly in writing and partly oral.
>
> (3) The right to occupy may be—
> (a) exclusive or not exclusive; and
> (b) given with a right to use facilities, furniture or goods.
>
> (4) This section is subject to the following sections:
> section 6D (Certain kinds of agreements not residential tenancy agreements)
> section 6E (Certain people given right of occupation not tenants)
> section 6F (Certain kinds of premises mean no residential tenancy agreement).

71C(1) An agreement is an ***occupancy agreement*** if—
(a) a person (the ***grantor***) gives someone else (the ***occupant***) a right to occupy stated premises; and
(b) the premises are for the occupant to use as a home (whether or not with other people); and
(c) the right is given for value; and
(d) the agreement is not a residential tenancy agreement.

(2) The agreement may be—
(a) express or implied; or
(b) in writing, oral, or partly in writing and partly oral.
Note After 6 weeks, the occupancy agreement should be in writing (see s 71E (c)).

(3) The right to occupy may be—
(a) exclusive or not;
(b) given with a right to use facilities, furniture or goods.

(4) The person given the right to occupy the premises may be—
(a) a boarder or lodger; or
(b) someone prescribed by regulation for this section.

Note This Act does not apply to retirement villages, nursing homes, hostels for aged or disabled people or other prescribed premises (see s 4).

92. As the holder of legal title the Respondent is the person with the right to possession. If the Applicant has no equitable claim to any part of the property then her right to be on, and remain upon, the property asserting an exclusive right of possession against the owner can only arise from a statutory tenancy (residential tenancy agreement under the Act), a tenancy at common law or a contractual license.

93. If it be assumed that the Applicant has no equitable title to assert, then on the findings of fact above the Applicant would answer the description of a tenant under a residential tenancy agreement per each of the criteria in section 6A. The fact that the tenancy agreement was not reduced to writing does not negate the existence of such an agreement (s6A(2)(b)).

94. The test of whether a tenancy agreement exists is to be judged objectively from the nature of the rights conferred and exercised, as opposed to the subjective intention of the parties (*Radaich v Smith* (1959) 101 CLR 209; *Bruton v London Quadrant Housing Trust* 1999 3 AER 481 (HL)). At common law the key indicia of a tenancy is the exclusive right to possession (*Radaich v Smith)* although this indicia is expressly excluded from the definition of a "residential tenancy agreement". In the present case the Applicant was given, and in fact exercised an exclusive right of possession.

95. The fact that the Respondent has purported to impose conditions on the agreement inconsistent with a residential tenancy agreement under the Act (relating to repairs and renovations cf section 15(3) and prescribed terms 54-55) does not of itself take the agreement outside the scope of a residential tenancy agreement; it simply means that the inconsistent terms are void and that monies paid under the void term may be recoverable by Applicant (sections 8-9 of the Act).

96. By even if for some reasons not apparent to the Tribunal the present agreement is not a residential tenancy (other than the possible existence of an equitable interest

by the Applicant in the title), the agreement must answer the generality of the definition of an "occupancy agreement".

97. Thus the Tribunal concludes that, putting to one side the issue of the Applicant's claimed equitable title to the house, that she is a tenant under a residential tenancy agreement which is sufficient to invoke the jurisdiction of the Tribunal.

98. The real issue is whether the Applicant can establish her claim to an equitable interest in the premises. Should she succeed with that proposition then she may not be a tenant, either under a residential tenancy agreement or at common law, for the simple reason that a tenancy is a contract (*Progressive Mailing House P/L v Tabali* (1985) 157 CLR 17) and at common law a party cannot contract with themself as both the landlord and the tenant (Cheshire and Fifoot's Law of Contracts 8th ed at [3.11]; *Kinnaird –Mills v Anderson* 1999 NSWRT 33). In these circumstances the Tribunal would have no jurisdiction.

99. However the generality of the above proposition may need to be qualified in the light of section 208 *Civil Law (Property) Act 2006* (ACT) which permits a person to assure property to themselves.

> 208 A person may assure property to—
> (a) himself or herself; or
> (b) himself or herself and anyone else.

100. The "dictionary" to this Act defines an "assurance" as:

> "assurance" includes a conveyance and a disposition made otherwise than by will.

101. The dictionary to the *Legislation Act 2001* defines "property" to include equitable interests.

102. It may be that the creation of a residential tenancy agreement or a tenancy at common law answers the description of an "assurance" of "property" within the meaning of section 208 and thus permits a person to enter a tenancy agreement with themself as both landlord and tenant. If this were the case, and if on the facts the Tribunal found that the Applicant and Respondent jointly held the equitable title, then it would be open to the Tribunal to find that the Applicant and Respondent in their capacity as joint equitable title holders entered a residential tenancy agreement with the Applicant alone. In this event the Tribunal would again become possessed of jurisdiction.

103. For present purposes it is not necessary to pursue this point, because the point only arises if the Applicant has any "property" to assure i.e. if the Applicant is first found to have an equitable interest in the premises.

104. Section 201 *Civil Law (Property) Act 2006* relevantly provides that no legal or equitable estate in land can be created except if evidenced in writing. Section 202 provides that any interest purportedly created by oral agreement takes effect only as an interest at will:

> 201(1) An interest in land cannot be created or disposed of by a person except—

(a) by writing signed by the person or by the person's agent properly authorised in writing; or
(b) by the person's will; or
(c) by operation of law.
Note 1 The Legislation Act, dict, pt 1 defines "interest", in relation to land and other property, and ***land*** .
Note 2 See also the Legislation Act, s 168 (References to person with interest in land include personal representative etc).

(2) A declaration of trust by a person in relation to an interest in land must be—
(a) in writing signed by the person; or
(b) made by the person's will.

(3) A disposition by a person of an equitable interest or trust existing at the time of the disposition must be—
(a) in writing signed by the person or by the person's agent properly authorised in writing; or
(b) made by the person's will.

(4) This section—
(a) does not affect the creation or operation of a resulting, implied or constructive trust; and
(b) is subject to section 202 (Creation of interests in land by word of mouth).

202(1) This section applies to an interest in land if the interest is—
(a) created by word of mouth; and
(b) not put into writing signed by the person creating it or by the person's agent properly authorised in writing.
(2) The interest is an interest at will only, whether or not consideration is given for it.

105. Section 201(4) creates an exception to the above general rule in the case of "resulting, implied or constructive trusts". Section 203 provides for an exceptions in the case of lease for less than 3 years which is not relevant to the present issue of whether the Respondent has assigned any part of the equitable title to the Applicant (the equitable title is not a mere lease).

106. Section 204 then provides that the no suit lies in contract based on an unwritten assignment of property:

204(1) A proceeding does not lie against a person on a contract for the sale or other disposition of land unless the agreement on which the proceeding is brought, or a memorandum or note of the agreement, is in writing signed by the person or by the person's agent properly authorised in writing.

(2) This section—
(a) applies to contracts whenever they were made; and
(b) applies to land under the *Land Titles Act 1925* ; and
(c) does not affect the law about part performance or sales by a court.

107. If the Applicant is found to have acquired a share of the equitable title it may then be that her "rent" payments and renovation costs will constitute the "part performance" required by section 204(2)(c) which operates as an exception to the general bar to actions based on oral contracts for interests in land.

108. The Applicant's claim to an equitable interest in the title to the property can only arise in one of two way:
(a) If the Respondent is alleged to purchased the legal and the whole of the equitable title in his own name and then subsequently "assured" to the Applicant her part of the equitable title (what ever this part may be): or

(b) If the Applicant's equitable interest arose at the point of purchase.

109. There has been no purported "assurance" by the Respondent to the Applicant of any interest in the premises. The Applicant's case is essentially that the Respondent, by his words and conduct, has constituted himself a trustee for her of her part of the equitable interest in the premises. Whether the relationship of trustee arise at the point of purchase or after the purchase would make no difference to the operation of section 201 as in either case the declaration of trust must be in writing.

110. Accordingly, it seems to the Tribunal that the Applicant's case can only succeed if she can establish a resulting, implied or constructive trust operating in her favour per the exception in section 201(4)(a).

111. In short, a "resulting trust" arises where the party purchasing the property does so with the money or assets supplied in whole or part by another party. Such a transaction raises a rebuttable presumption that the first party has acquired the property as trustee, in whole or part, for the party who supplied the means of acquiring the property. In general parties are presumed to take ownership in proportion to the contributions made (*Cleverly v Green* (1984) 155 CLR 242).

112. In the present case the Applicant did not contribute any capital to the purchase and did not participate in raising the mortgage. The highest the Applicant can put her case in favour of a resulting trust is that her "rent" payments were in fact mortgage payments and she contributed value in the renovations. The problems for the Applicant with this argument are:

(a) the Tribunal is not satisfied that the "rent" payments were in fact mortgage payments. Whether the Applicant asserted any equitable interest or not, she still needed somewhere to live and was thus in a position of having to pay rent, as she in fact was prior to the Respondent's purchase. She claimed the rent payments as rent in her tax returns. She received value for the rent, namely a place to live.

(b) In order to establish a resulting trust the Applicant's contribution must arise at the point of purchase. Put at its highest, her contribution only accrued over the 8 years of the arrangement. She did not make any initial contribution at all.

113. Accordingly the Tribunal finds that no resulting trust existed in the present case.

114. An "implied trust" is simply one that stands in contradistinction to an "express trust". It may be implied by operation of law or from the dealings of the party evidence in writing. There is no scope for an implied trust in the present case.

115. A "constructive trust" arises in the context of a transaction for the acquisition of an interest in land where the holder of the legal title (the Respondent) has, in conjunction with the non-owner (the Applicant), demonstrated a common intention that the non-owner will receive an interest in the land, and the holder of the legal title has so conducted himself that it would be inequitable to allow him to

deny the non-owners interest (*Gassing v Gassing* [1971] AC 886; *Brickyard v Wall* 1971 126 CLR 376).

116. The Applicant's assertions in the present case appears to be directed to a constructive trust.

117. The question then arises as to whether there was a common intention between the Applicant and Respondent at the time of purchase along the lines of that asserted by the Applicant, namely that the Respondent and herself would jointly own the property and that she would have an option to buy out the Respondent's interest after 5 years for $20,000. The Tribunal has found as a fact that there was no such common intention of the parties at the time at the time of the purchase. Put at its highest for the Applicant, the parties were at the time of purchase operating under a mistaken understanding of each other's intention; but more probably the Applicant did not have any such understanding at any time and only raised the claim to joint ownership after 4 December 2007.

118. If the Respondent at no point promised the Applicant any interest in the premises other than a tenancy, then it cannot be unconscionable for him not to now transfer to the Applicant any interest in the title.

119. For the reasons given in the two paragraphs immediately above, the Tribunal finds that there is no constructive trust operating in favour of the Applicant.

Conclusion:

120. Absent any resulting, implied or constructive trust in favour of the Applicant, her claim to a share in the equitable title to the premise must fail. From this conclusion it then follows from paragraphs 93-96 above that the Applicant is a tenant of the premises under a residential tenancy agreement or in the alternative an "occupant" under an occupancy agreement per Part 5A *Residential Tenancies Act 1997*. In either case the Tribunal has jurisdiction to hear and determine the Respondent application for possession and any claim the Applicant may choose to make against the Respondent for any breaches of the residential tenancy agreement by the Respondent.

121. The matter is to be relisted for further directions.

A. Anforth
21st August 2008