**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST** VCAT REFERENCE NO. BP819/2015

## CATCHWORDS

*Property Law Act 1958* (Vic); application by Applicant for order for sale under the *Property Law Act 1958* s 225; application by Respondent to strike out summarily under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998*; Respondent acknowledges jurisdiction of Tribunal but contends that the Tribunal must exercise its discretion arising under the *Property Law Act 1958* s 228 in a manner that no order for sale is made because to order a sale would be inconsistent with a prior contractual arrangement made between the parties; Applicant relies on *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635; (1993) 116 ALR 26 at 36; Respondent's s 75 application dismissed.

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|---|---|
| **APPLICANT:** | Bluestone Park Pty Ltd (ACN: 139 649 675) |
| **RESPONDENT:** | Kevin Hunt Property Pty Ltd (ACN: 149 744 605) |
| **WHERE HELD:** | Melbourne |
| **BEFORE:** | Member C Edquist |
| **HEARING TYPE:** | Hearing |
| **DATE OF HEARING:** | 23 September 2015 and 30 October 2015 |
| **DATE OF ORDER:** | 17 November 2015 |
| **CITATION** | Bluestone Park Pty Ltd v Kevin Hunt Property Pty Ltd (Building and Property) [2015] VCAT 1813 |

## ORDER

1. The application of the Respondent to summarily dismiss or strike out the Applicant's proceeding made under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
2. **The proceeding is listed for directions at 9.30am on 25 November 2015, at 55 King Street Melbourne, before Member Edquist to make orders for its further conduct – allow 2 hours**.
3. Liberty to apply.
4. Costs reserved, with liberty to apply. Any application for costs will be heard at the directions hearing on 25 November 2015, time permitting.

**MEMBER C EDQUIST**

## APPEARANCES:

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|---|---|
| For Applicant | Mr A Morrison of Counsel |
| For Respondent | Mr M Colbran QC with Mr T Messer of Counsel |

## REASONS

1 The applicant ('Bluestone') and the respondent ('KHP') jointly own the property at 557 St Kilda Road, Melbourne ('the Property'), on a 50/50 basis as tenants in common.

2 Bluestone has come to the Tribunal seeking orders for the sale of the Property and distribution of the proceeds under Part IV of the *Property Law Act 1958* ('PLA').

3 KHP has sought summary dismissal of the proceeding pursuant to s 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act').

4 In a nutshell, the argument of KHP, as articulated by Mr Colbran QC, is that the discretion of the Tribunal, which exists under s 228 of the PLA, must be exercised in a particular way which is consistent with the agreement made between the parties regarding sale of the land contained in their co-ownership deed.

5 The opposing argument put on behalf of Bluestone by Mr Morrison, is that KHP's position is misconceived because its submission must be that the Tribunal is to exercise its very limited discretion under the PLA not to order a sale or division of the property. That discretion, Mr Morrison says, must be exercised in Bluestone's favour, not KHP's. Further, the very limited discretion the Tribunal has to decline to order a sale or division of property is not enlivened here as a result of a close reading of the relevant clauses in the co-ownership deed.

### Background facts

6 Late in 2013, Bluestone and KHP became co-owners of the Property as tenants in common and entered in to a co-ownership deed on 16 October 2013 ('the Co-ownership Deed'). This Deed sets out their respective rights and entitlements with respect to their co-ownership of the Property.

7 The Property is situated on the north side of Moubray Street, between St Kilda and Punt Roads, and has an area of 5580 m². It consists of a beer garden, a bistro and terrace, and Ormond Hall, which is a two-storey Bluestone building constructed in 1890.

8 A company related to KHP, Saratoga Australia Pty Ltd ('Saratoga'), leases the Property from Bluestone and KHP.

9 Bluestone has some grievances regarding the leasing arrangement with Saratoga, and says that it is not receiving its just and equitable share of the rental. In particular, it says that Saratoga is not adequately reporting its sales figures so as to enable Bluestone to calculate the 'Turnover Rent' payable under the lease, and it says that KHP has wrongfully been withdrawing a substantial part of the rental after it has been paid by Saratoga into the co-owners joint account.

10 To finance their purchase of the Property, each of Bluestone and KHP took out a loan with the National Australia Bank ('the Bank'). Bluestone has defaulted on its loan, and says this is due to the effect of Saratoga and KHP together depriving it of the benefit of rental payments. The Bank cancelled Bluestone's facility on 6 October 2014. By notice dated 2 September 2015, the Bank foreshadowed that if the payment of the outstanding amount of the loan was not paid within seven days, the Bank may take action to sell the secured Property. A separate demand has been made by notice dated 3 September 2015 to Bluestone in respect of its guarantee and indemnity of KHP's loan. For these reasons, both parties have advised the Tribunal that determination of this s 75 application is urgent.

## Section 75 of the VCAT Act

11 This section reads:

> **75 Summary dismissal of unjustified proceedings**
>
> (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
>
> (a) is frivolous, vexatious, misconceived or lacking in substance; or
>
> (b) is otherwise an abuse of process.
>
> (2) If the Tribunal makes an order under subsection (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
>
> (3) The Tribunal's power to make an order under subsection (1) or (2) is exercisable by—
>
> (a) the Tribunal as constituted for the proceeding; or
>
> (b) a presidential member; or
>
> (c) a member who is an Australian lawyer.
>
> (4) An order under subsection (1) or (2) may be made on the application of a party or on the Tribunal's own initiative.
>
> (5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law.

## Relevant legal principles

12 The operation of s 75 has been considered many times in this Tribunal, including in the recent case of *Graham v McNab* (Building and Property) [2015] VCAT 353, a decision delivered on 26 March 2015. In that case, Deputy President Aird quoted a passage from the decision in *Norman v Australian Red Cross Society* [1998] 14 VAR 243 in which Deputy President McKenzie had said, after referring to the Victorian Court of

Appeal decision in *Rabel v State Electricity Commission of Victoria* (1998) 1 VR 102:

> (d) An application to strike out a complaint is similar to an application to the Supreme Court for summary dismissal of civil proceedings under RSC r23.01 (see also commentary on this rule [in] Williams, Civil Procedure Victoria). Both applications are designed to prevent abuses of process. However, it is a serious matter for a Tribunal, in interlocutory proceedings which would generally not involve the hearing of oral evidence, to deprive a litigant of his or her chance to have a claim heard in the ordinary course.
>
> (e) The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to a case where a complainant can be said to disclose no reasonable cause of action, or where a Respondent can show a good defence sufficient to warrant the summary termination of the proceeding.

13 Bluestone referred the Tribunal to other authorities to the same effect. It is not necessary to discuss them as KPH accepts that s 75 sets a high bar for it to jump in order to achieve a summary dismissal of Bluestone's claim.

14 However, Mr Colbran submits that the position is clear on the documents put forward in evidence, and that KHP's position cannot be improved by a hearing. He says, furthermore, that in order to comply with the Tribunal's charter to dispose of its business with efficiency, it is appropriate that the Tribunal should dispose of the proceeding summarily at this point.

15 In order to assess whether KHP can achieve its goal it is necessary to assess the legislative framework establishing the Tribunal's discretion as to how it should deal with the Property, and to consider the authorities relevant to the exercise of that discretion.

## Relevant provisions of the PLA

16 The Tribunal's jurisdiction in this proceeding arises under s 225 of the PLA, which is found in Division 2 of Part IV the Act. It provides:

> **225 Application for order for sale or division of co-owned land or goods**
>
> (1) A co-owner of land or goods may apply to VCAT for an order or orders under this Division to be made in respect of that land or those goods.
>
> (2) An application under this section may request—
>
> (a) the sale of the land or goods and the division of the proceeds among the co-owners; or

(b) the physical division of the land or goods among the co-owners; or

(c) a combination of the matters specified in paragraphs (a) and (b).

(3) A person who makes an application under subsection (1) must give notice of the application to the holder of a security interest over the land or goods to which the application relates.

17 The nature of the orders that the Tribunal can make in any proceeding under Division 2 of the PLA is set out in s 228. This section provides:

**228 What can VCAT order?**

(1) In any proceeding under this Division, VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.

(2) Without limiting VCAT's powers, it may order—

(a) the sale of the land or goods and the division of the proceeds of sale among the co-owners; or

(b) the physical division of the land or goods among the co-owners; or

(c) that a combination of the matters specified in paragraphs (a) and (b) occurs.

18 Section 229 of the PLA creates a presumption that sale of the land which is the subject of the application is to be preferred over physical division, or sale and division. It reads:

**229 Sale and division of proceeds to be preferred**

(1) If VCAT determines that an order should be made for the sale and division of land which is, or goods which are, the subject of an application under this Division, VCAT must make an order under section 228(2)(a) unless VCAT considers that it would be more just and fair to make an order under section 228(2)(b) or (c).

(2) Without limiting any matter which VCAT may consider, in determining whether an order under section 228(2)(b) or (c) would be more just and fair, VCAT must take into account the following—

(a) the use being made of the land or goods, including any use of the land or goods for residential or business purposes;

(b) whether the land is, or goods are, able to be divided and the practicality of dividing the land or goods;

(c) any particular links with or attachment to the land or goods, including whether the land or the goods are

unique or have a special value to one or more of the co-owners.

### Bluestone's argument regarding how the Tribunal must exercise its discretion

19 Bluestone says that there is a long line authorities to the effect that where a court or tribunal is vested with jurisdiction of the type set out in s 228 of the PLA, and the parties have previously entered in to an arrangement which creates some contractual, proprietary or equitable right with respect to the land in question, which is inconsistent with an order for sale or division of the land, then the court or tribunal has a discretion not to order a sale or division of the land.

20 Bluestone says that a relevant arrangement exists in the form of section 12 of the Co-ownership Deed.

21 The relevant background, Bluestone contends, is that in October 2013 the existing relationship between the parties changed, and they ceased to operate the Property jointly. They entered into the Co-ownership Deed with a view to regulating the arrangements for a joint venture under which they would continue to own, manage and lease the Property. In particular, they were to carry out building and arbor works on the Property, and lease the property to Saratoga.

22 Mr Colbran referred me to various clauses in the Co-ownership Deed, including clause 2, which relevantly provides:

- The Relevant Proportions of the Owners' Interest as at the Commencement Date are 50/50 (clause 2.2)
- Except as otherwise expressly provided in this Deed, the Owners must act jointly at all times in relation to the ownership and management of the Property (clause 2.3)
- The Owners agree that they will not Deal with their Relevant Proportion except in accordance with the provisions of clause 12 (clause 2.6)

23 Mr Colbran also referred me to clause 30.2, which set out the obligations of the Owners to use their best endeavours to design, procure all necessary Approvals and complete the Future Building Works as soon as possible, after the Commencement Date, but within two years after the relevant Approvals are obtained. He pointed out that the Future Building Works were defined in Annexure 2.

24 Mr Colbran also referred to the lease which Bluestone and KPH had granted to Saratoga, and to an Arbor Agreement made between Bluestone and KPH of the one part and Saratoga of the other, which dealt with the construction of a structure to be known as 'The Arbor' on the Property. He contended that these agreements were to be read with the Co-ownership Deed and highlighted the commitment of the parties to develop the Property together.

## Clause 12 of the Co-ownership Deed

25 The clause in the Co-ownership Deed upon which Bluestone relies as creating a relevant arrangement between the parties governing the sale of the Property is clause 12, which in part provides:

> **12.1 Restriction**
>
> Unless otherwise agreed by the Owners, and Owner must not Deal with its Interest in whole or in part except as provided in this Deed.
>
> **12.2 Dealings with whole interest only**
>
> Any Dealing must be with the whole of an Owner's Interest. An Owner must not do anything that would result in that Owner holding a lesser interest in the Property than their Relevant Proportion.
>
> **12.3 Notice of proposed sale**
>
> (a) An Owner (**Selling Owner**) wishing to Deal with its Owner's Interest (**Sale Interest**) must first serve notice in writing (**Transfer Notice**) to that effect on the other Owner.
>
> (b) The Transfer Notice must contain the terms and conditions referred to in clause 12.4
>
> **12.4 Contents of Transfer Notice**
>
> A Transfer Notice must:
>
> (a) specify all terms and conditions (including the sale price and settlement date (which must not be any earlier than 60 days after the date of execution of the contract) for the sale of the Sale Interest; and
>
> (b) include a copy of a valuation report showing the current market value of the Sale Interest prepared by an Independent Valuer, which must have been procured not more than 14 days before the date the Transfer Notice was served on the Offeree; and
>
> (c) comply with all Laws relating to the sale of the Sale Interest.

26 Other provisions in clause 12 can be summarised as follows:

(a) Clause 12.5 sets out a procedure for determination of the price of the Property by the obtaining of a current market value from an Independent Valuer.

(b) Clause 12.6 provides that the effect of a Transfer Notice is that it constitutes an offer to sell the Sale of interest.

(c) Clause 12.7 gives the Offeree 10 Business Days after the Sale Price is determined to accept the offer comprised in the Transfer Notice.

(d) Clause 12.8 provides that all acceptances contemplated by clause 12 must be in writing.

(e) Clause 12.9 provides that if the Offeree does not accept an offer in accordance with clause 12.7, then the Owners must use their best endeavours to sell the whole of the Property to a non-owner in accordance with a specified procedure.

(f) Pursuant to clause 12.10, if there is no buyer for the Property and a non-Owner Contract is not entered into as contemplated by clause 12.9 within the period of 180 days commencing on the day on which an offer is not accepted or deemed to have been declined, then the Transfer Notice served by the Selling Owner under clause 12.3 is deemed withdrawn and if the Selling Owner wishes to Deal with its Interest, the Selling Owner must comply with this clause 12.

(g) Pursuant to clause 12.11, any Incoming Owner must enter into a Deed of Accession under which the Incoming Owner agrees to be bound by the terms and conditions of the Co-ownership Deed.

(h) Pursuant to clause 12.12, a Selling Owner must not transfer its Sale Interest to an Incoming Owner without first seeking approval in writing of the other Owner, and the other Owner must not unreasonably withhold approval in certain circumstances.

27 Mr Colbran noted that the process outlined in clause 12 of the Co-ownership Deed was underpinned by a dispute resolution process established by clause 13, and said that an expert has been appointed to resolve a dispute between the parties pursuant to clause 13.5.

28 KPH contends that that this is a clear case for the Tribunal to exercise its discretion to refuse an order for sale under s 225 of the PLA. It says that Bluestone cannot deal with its Interest other than in accordance with the Co-ownership Deed, and that an order for sale or partition under the PLA would subvert the agreement made between the parties.

29 KPI's further says that Bluestone called in aid the Sale Procedure in early 2014, but elected not to continue with the sale in accordance with that Sale Procedure. KPH contends that it is now entitled to acquire the interest of Bluestone by reason of the Default Procedure.[1]

30 If an order were to be made under the PLA, KPH says, this would:

> defeat the obligations they [Bluestone] have entered into.

31 In instituting this proceeding Bluestone was indulging in a:

> blatant attempt to avoid their obligations under the Deed.

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[1] KPH's Outline of Submissions filed on 22 September 2015 ('KPH's Submissions'), paragraphs 11, 12 and 13.

### The respective views of the parties as to the breadth of the Tribunal's discretion to refuse to make an order

32 There is agreement between the parties that the Tribunal has jurisdiction in relation to this proceeding pursuant to s 225 of the PLA. Both parties referred to the decision of Judd J in *Yeo v Brassil* [2010] VSC 344 regarding the issue.

33 There is also agreement that the Tribunal has a discretion to refuse to make an order under s 228 of the PLA. However, there is tension between the parties as to the breadth of the Tribunal's discretion to decline to make an order.

34 On the one hand, KPH concedes that in *Yeo v Brassil,* at [21] to [23], Judd J:

> provided some detail of the very limited grounds on which the Tribunal might decline to order a sale or partition despite having jurisdiction under the PLA. By analogy with corresponding legislation in NSW and decisions of the NSW Supreme Court and Court of Appeal in *McNamara, Re & Conveyancing Act* (1961) 78 WN (NSW) 1068 and *Hogan v Baseden* (1997) 8BPR 15, 723…

35 Judd J held that while there is no general power to refuse an application on grounds of hardship or general unfairness, there may be limited circumstances which permit the exercise of a discretion not to order sale or partition. His Honour did not set out in great detail the boundaries of these 'limited circumstances', referring only to the decisions of *McNamara* and which described the circumstances as including '*some proprietary right, or some contractual or fiduciary obligation (with which an order for sale would be inconsistent*' (*McNamara*) or '*a legally binding agreement not to put [the respondent] out of occupation of her home*' (*Hogan*).

36 Later in its Submissions Bluestone argued that the position was:

> The Tribunal does not have a general or open discretion to refuse to order either a sale of the land or goods, or physical division of the land or goods, once its jurisdiction is enlivened.
>
> However, there may be limited circumstances in which the Tribunal might decline to order either a sale or physical division. There is no conclusive test of where these circumstances might arise. The authorities set out above discuss the existence of equitable interests or fiduciary duties which are inconsistent with an order for sale or physical division as being potential grounds. There are conflicting authorities as to whether a mere contractual agreement preventing a sale or physical division will be sufficient.[2]

37 KPH asserts the existence of a mere contractual agreement will be sufficient to create circumstances in which a court or tribunal may properly decline to exercise the power to order a sale or division. It refers to *McNamara,* where Myers J said:

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[2] Bluestone's Submissions paragraphs 33(b) and (c).

> As I have previously said I do not consider that there is an absolute duty in the Court to make an order merely because the parties are co-owners and although I adhere to my refusal to attempt to define the nature of the matters which would be a part of the application, what I had in mind was some proprietary right, or some contractual or fiduciary obligation with which an order for sale would be inconsistent.[3]

38 KPH also relies on other authorities including the decision of the New South Wales Court of Appeal in *Hogan v Baseden* and authorities from Queensland[4] and England.[5]

### The 'Dealing' argument

39 A major submission made by Bluestone is that when clause 12.1 of the Co-ownership Deed is read with clause 2.6, it does not operate as an agreement by the parties not to avail themselves of the mechanisms set out in Part IV the PLA. The essence of this argument is that clauses 2.6 and 12.1 of the Co-ownership Deed prevent the parties from 'Dealing' with their 'Interests' otherwise than in accordance with clause 12.

40 Reference is made to the definition of 'Deal with' or ' Dealing' in the Co-ownership Deed as meaning:

> in relation to any Interest, any sale, assignment, transfer, novation, disposition, declaration of trust, assumption of obligations or other alienation (including by virtue of a change of trustee) (other than leasing, licensing or granting occupation rights) or granting other like rights and whether affecting legal or equitable interests and expressions cognate to deal with have a corresponding meaning and includes a Change of Control.

41 Bluestone contends that the restriction contained in clauses 2.6 and 12.1 of the Co-ownership Deed:

> therefore applies to alienation or disposition of a party's interest other than in accordance with the deed. It says nothing about an application to VCAT or the courts.
>
> If the parties had intended to limit their access to the Tribunal or the courts, it would have been easy to fashion a provision that had such an effect. There are no proper grounds for the implication of such a term.[6]

42 KPH says that this argument is irrelevant, because what is contended by it is that sale or partition of the Property under s 228 of the PLA is inconsistent with the Co-ownership Deed. The fact that clauses 2.6 and 12.1 do not prevent Bluestone from making an application to the Tribunal is not to the point.

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3 KPH's Submissions at p 15.
4 *Re Permanent Trustee Nominees (Canberra) Limited* (1989) 1 Qd R 314.
5 *Re Buchanan-Wollaston's Conveyance* [1938] Ch.738.
6 Bluestone's Submissions paragraphs 45 and 46.

43 I accept the logic of KPH's position regarding this argument. KHP does not contend that Bluestone cannot ask the Tribunal for an order under s 228 of the PLA. It accepts Bluestone can. Its point is that clauses 2.6 and 12.1 of the Co-ownership Deed constitute an agreement between the parties which constrains the Tribunal to exercise its discretion under s 228 against sale or partition.

### The Interest versus freehold estate argument

44 Bluestone also submits that the proscription regarding 'Dealing' relates only to a party's 'Interest'. Bluestone develops this submission by pointing out that clause 1.1 of the Co-ownership Deed defines 'Interest' to mean:

> in relation to an Owner, all Interests, Rights and benefits attaching to the Property held by the Owner.

45 Bluestone goes on to highlight that a material distinction is to be drawn between an individual interest held by a co-owner in a freehold estate, and the freehold estate itself, and refers to the High Court decision in *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635; (1993) 116 ALR 26, at 36 ('*Nullagine*').

46 Nullagine was concerned with an application for sale or physical division of land pursuant to s 126 of the *Property Law Act 1969 (WA)*, which is the Western Australian equivalent of s 228 in Victoria's PLA. The Western Australian Club Inc opposed the application on the basis of a covenant in a deed made between the co-owners, which Bluestone said was in terms almost identical to the covenant comprised by clauses 2.6 and 12.1 of the Co-ownership Deed.

47 Bluestone submitted that the majority judgment of Deane, Dawson and Gaudron JJ held that clause 4(b) contained no reference to either partition of the land or to an application to the court for an order for partition. Nor did it contain any express reference to the disposition of the freehold itself, as opposed to a co-owner's interest in the freehold. Accordingly, they held that clause 4(b) did not, properly construed, prevent the parties from applying to the court for relief under s 126(1) [of the Western Australian Act].[7]

48 Bluestone argues that *Nullagine* is relevant to the present proceeding because:

> the law is clear that even in the definition of 'Dealing' in the Co-ownership Deed is wide enough to refer to an application to VCAT under Part IV of the PLA (which it is not), clauses 2.6 and 12.1 are drafted only in terms of an interest in the freehold estate, and not the freehold estate itself. As it is the freehold estate in respect to which Bluestone asked the Tribunal to make sale or division orders, clauses 2.6 and 12.1 cannot (even on a construction most favourable to KHP)

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[7] Bluestone's Submissions paragraphs 53 and 54.

prevent recourse to the Tribunal in the manner in which KHP contends.[8]

49 KPH's response to this argument is that it accepts that there is a distinction between an Interest and freehold. However, KPH contends that *Nullagine* can be distinguished from the present proceeding because in *Nullagine* the contractual arrangements in question had come to an end. A further contention is that the argument Bluestone derives from *Nullagine* is not to the point, because KPH is not arguing that clauses 2.6 and 12.1 of the Co-ownership Deed prohibit Bluestone from making an application to the Tribunal. KPH accepts that such an application can be made. Its point is that the application must be decided one way.

## Ruling

50 Bluestone's contention regarding the importance of the distinction between an interest in land and the freehold estate itself is well made. The majority comprising Deane, Dawson and Gaudron JJ in *Nullagine*, at [p 38] said:

> Clause 4 (b) contains no reference at all either to partition of the land or to make an application to a court for an order for partition. Nor does it contain any express reference to a sale of the freehold of the land either by the club and Nullagine acting jointly or pursuant to an order for sale made by a court under a statutory provision such as that contained in s 126 of the Property Law Act. In terms cl 4 (b) is concerned only with the disposition "by" a party of "*its share or interest*" in the land (emphasis added).
>
> As a matter of both law and language, there is a clear distinction between the individual "interest or share" owned by two or three or more tenants in common of a freehold estate in land and the freehold estate itself.

51 However, Brennan J in *Nullagine* acknowledged that the effect of clause 4(b) was to restrain each of the Club and Nullagine from disposing of its share or interest in the property without first offering that share or interest to the other. He then went on to observe [at p 31]:

> An exercise by Nullagine of the statutory right to apply for and to obtain an order or sale of the property would not only prevent Nullagine from performing its promise to allow the club a right of pre-emption - and be inconsistent with Nullagine's covenant on that account - it would require Nullagine to breach the express prohibition against transferring its share. That is because completion of the sale of the property would require a conveyance of Nullagine's share or interest to the purchaser. I would reject Nullagine's argument that an agreement conferring on one tenant in common a right of pre-emption on the sale of a co-tenant's share does not impliedly preclude an exercise of a right to apply for and thus to obtain an order for sale of the land of which the co-tenants are seized. If that argument were correct, one co-tenant, having promised the other co-tenant (in this

[8] Bluestone's Submissions paragraph 56.

> case, the party from whom the former purchased its half share) that it would not dispose of its share without giving the other an opportunity to become the sole owner of the land, could at any time have the land sold on the open market. The agreement to allow the other party a right of pre-emption would be worthless.

52 Toohey J in *Nullagine* expressed the same conclusion in these terms [at p 49]:

> Clause 4 (b) is concerned with the disposition of a co-owner's interest in the land, not directly with the sale of land held in co-ownership. Nevertheless, on the proper construction of the subclause, it operates so as to prevent a co-owner seeking an order for sale of the land without first offering its interest in the land to the other co-owner. A sale of the land necessarily involves a sale of each co-owner's interest and there is considerable unreality in regarding a sale of the land pursuant to an order of the Supreme Court as not touching the rights and obligations of the parties under cl 4 (b).
>
> Although s 126 of the Act speaks of a sale of "the land", that is clearly a compendious way of referring to the estates or interests of the "parties interested" in the land. What is sold pursuant to an order of the Supreme Court is the estate or interest of each co-owner, not some independent entity.

53 Notwithstanding the clearly expressed views of Brennan J and Toohey J, the majority in *Nullagine* saw the distinction between the interest of a tenant in common on the one hand and the freehold itself as fundamental, and it underpinned their refusal to accept the correctness of the Full Court's decision that the contractual right of pre-emption contained in cl 4(b) in respect of a co-owner's half interest in land prevailed over the co-owner's right to seek a partition or sale of the whole of the land. The majority [at p 39] said:

> Where [in a partition suit] sale is decreed, the single conveyance in fee simple by the tenants in common or joint tenants pursuant to a court order does not involve the sale or disposition of the individual share or interest of the individual tenant. The court order directing the sale of "the land" is an order for the sale of the fee simple in the whole of the land. It follows that the conveyance in such a case extinguishes the share or interest of the individual tenant and effects the sale or disposition of the freehold itself.

54 The majority went on [at p 40]:

> Once one takes account of the clear distinction between a sale or other disposition "by" an individual tenant in common of "its share or interest in the land" and the sale (or partition) of the land (ie a freehold estate), it becomes reasonably plain that 4 (b) is simply not directed to the sale or disposition of the land itself. What cl 4 (b) is directed to is a separate sale by one of the two tenants in common of its distinct share or interest. Indeed, that is all that the procedure required by cl 4 (b) allows in a case which falls within its terms.

55 In the present proceeding, clause 12, like clause 4(b) in *Nullagine*, restrains each tenant in common from disposing of its share or interest in the Property without first offering that share or interest to the other.

56 Having regard to the view of the majority in *Nullagine*, I accept that Bluestone's case is arguable. Its proceeding cannot be said, to adopt the words of s 75(1) of the VCAT Act, to be:

(a) frivolous, vexatious, misconceived or lacking in substance; or

(b) otherwise an abuse of process.

57 As it was contended by KPH that the joint venture arrangement between the parties gave rise to fiduciary duties which were also relevant to the exercise of the Tribunal's discretion, it is appropriate that I note that the existence of a joint venture was not conceded by Bluestone, let alone the existence of any relevant fiduciary duty.

58 For these reasons, it is appropriate that I dismiss KPH's s 75 application for summary dismissal of Bluestone's proceeding.

59 As the parties are keen to have the Tribunal determine the proceeding, it will be listed for a directions hearing at 9.30am on 25 November 2015, before me, with an allowance of 2 hours. There will be liberty to apply. Costs are reserved with liberty to apply.

**MEMBER C EDQUIST**