

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP280/2014

**CATCHWORDS**

Tribunal's jurisdiction under Part IV of the *Property Law Act 1958* – applicants contend they hold the *whole* of the equitable interest in the property - no jurisdiction where applicants do not claim they are co-owners of the same interest as the respondents

<b>FIRST APPLICANT</b>	Ian McPhee Graham
<b>SECOND APPLICANT</b>	Beth Maureen Graham
<b>FIRST RESPONDENT</b>	Ian Bruce McNab
<b>SECOND RESPONDENT</b>	Alastair Finlay McNab
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C Aird
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	11 March 2015
<b>DATE OF ORDER</b>	26 March 2015
<b>CITATION</b>	Graham v McNab (Building and Property) [2015] VCAT 353

**ORDER**

1. The proceeding is struck out for lack of jurisdiction.
2. Costs reserved with liberty to apply. I direct the principal registrar to list any application for costs for hearing before Deputy President Aird with one hour allocated.

**DEPUTY PRESIDENT C AIRD**

**APPEARANCES:**

For Applicants	Mr M McKenzie of counsel with Ms T Acreman of counsel
For Respondents	Mr R Moore of counsel

## REASONS

- 1 For many years the applicants lived next door to Mr Turner, in a house owned by Mr Turner, which shared a party wall with his home. At the time the two houses were on the one title which was subdivided after Mr Turner's death in 1997. The house lived in by the applicants, which is the subject of this proceeding, is number 73.
- 2 Upon his death in November 1997, under the terms of Mr Turner's will, the property was subdivided, and upon the issue of a new title for number 73, the trustees were to:
  - (c) Permit the [applicants] to reside rent free in [no 73] during their joint lives and the lives of the survivor of them and while they continue to pay all rates, insurance premiums and all reasonable maintenance charges in respect of the said property or until both of them remain away from the said property for a period of 3 months or advise my Trustees in writing that they no longer wished to reside in the said property.
  - (d) subject to subparagraph (c) hereof to transfer the said property...to the Freemasons Hospital [now the Epworth Foundation]...or as the Board of the said hospital shall direct.
- 3 The applicants assert that from the time they moved into number 73, in early 1974, they were told by Mr Turner that the house would transferred to them upon his death ('the representations'). Relying on the representations, they say they did not purchase a house for themselves and instead carried out numerous improvements to the property at their cost, and always with Mr Turner's knowledge and encouragement. When they moved into number 73 in 1974 they were paying \$80 per week to Mr Turner to cover the cost of rates, utilities, insurance and routine repairs and maintenance. Prior to moving into number 73 they had been paying rent of \$120 per week for a smaller house. The applicants continued paying Mr Turner \$80 per week until the date of his death, following which they ceased making the payments pursuant to the terms of the Will. They have continued to pay all the outgoings.
- 4 From the time they moved into number 73, the applicants cared for Mr and Mrs Turner, who were both suffering from ill health, including cooking, housework, gardening and running errands. After Mrs Turner died in 1980, Mr Turner apparently became even more dependent on the applicants. The applicants allege that they were induced to care for Mr and Mrs Turner by the representations.
- 5 On 26 August 2014 (after first making application to the Supreme Court seeking to contest the will which was struck out for lack of jurisdiction) the applicants lodged an application with this Tribunal asserting they are have an equitable estate in the whole of the subject property.

6 In the Amended Points of Claim ('APOC') filed on 22 December 2014 the applicants restate their assertion (first made in the Points of Claim filed with the application) that the improvement works were carried out by them at their cost relying on the representation and:

45A The expenditure by the Applicants in reliance on the promises made by the deceased created an equity in land.

45B The equity arising from the expenditure in the land is an equitable interest in the land. Such equitable interest was and from each expenditure and in combination in total from the date of death of the deceased held by the applicants and was held as tenants in common with the legal and equitable interest held by the deceased until his death.

45C From the date of death of the deceased the executors and trustees were entitled to hold the legal title of the land. They also held any equitable title in part for the estate under the terms of the will and in part for the applicants in equity as set out above, Such equitable interests were held as tenants in common.

...

49. The applicants have an interest in the property arising in equity being the right to possession of and use of the property.

49A The rights of the applicants are property rights constituting a right in property within the terms of the Property Law Act 1958 section 222 definition of property, item (e).

49B Further the matters set out above as to statements, representations and promises by the deceased to provide to the applicants the said property give rise to the applicants having an equitable interest in the said property.

49C The legal interest of the respondents and the equitable interests of the applicants were created on the death of the deceased. Such interests are held by the parties as separate and distinct co-ownership rights and as tenants in common.

49D The legal interest on registration on title of the respondents and the equitable interest acquired by the applicants gives rise to co-ownership as between the applicants and respondents such interests being as tenants in common.

AND THE APPLICANTS SEEK THE FOLLOWING ORDERS

A. A declaration that the applicants have an equitable interest in the property.

B. In the alternative, a declaration that the applicants hold an equitable interest as co-owners of the property with the executors as tenants in common.

C. In the alternative, that the beneficiary under the Will, Epworth Foundation has a beneficial interest in the property subject to the interest of the applicants as co-owners in equity.

D. In the alternative, an order for accounting pursuant to section 234 of the Property Law Act 1958.

E. In the alternative, a partition or sale of the land as to the legal and equitable interests therein pursuant to section 225 *Property Law Act* 1958.

F. ...

7 In their Points of Defence, dated 1 December 2014, the respondents deny the applicants' claim and further contend that the Tribunal does not have jurisdiction to consider it as the applicants are not making the claim as a co-owner pursuant to s 225(1) of the *Property Law Act 1958* ('the PLA'). Further, that insofar as the applicants seek to make a claim for breach of contract, that such claim is statute bared pursuant to the provisions of the *Limitation of Actions Act 1958*,<sup>1</sup> and that insofar as they assert there was an express declaration of trust over number 73, such application will fail by virtue of s53 of the PLA.

8 By letter dated 18 January 2015 the respondents sought further and better particulars of the applicants' claim including:

Finally, and on the assumption (derived from, in particular, the orders sought in the APOC) that your clients no longer claim a full equitable interest in the Property, we request that you advise as to the proportions in which you allege that the Property is held equitably as between the Applicants and the Respondents/[Epworth] Foundation.

9 In their Further and Better Particulars dated 16 February 2015 the applicants assert:

8. The orders sought at B and C of the Amended Points of Claim are sought in the alternative.

9. The applicants claim an equitable interest as to the whole of the property. [underlining added].

10 Following an unsuccessful compulsory conference the Tribunal made orders for the hearing of the foreshadowed application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') for hearing.

11 In the Application for Directions/Orders dated 23 February 2015 the respondents seek orders under s75 of the VCAT Act that the proceeding be struck out because the Tribunal does not have jurisdiction to hear and determine the applicants' claim; alternatively that the APOC be struck out on the basis that they are:

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

(b) is otherwise an abuse of process.

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<sup>1</sup> This claim is in the Prayer for Relief in the Points of Claim filed with the application. It seems this claim has been abandoned by the applicants, as it does not appear in the Prayer for Relief in the APOC.

12 The application was supported by an affidavit by David Campbell Skeels, solicitor for the respondents in which at paragraph 15 he summarises the respondents' position in relation to this proceeding which, for the sake of clarity, I have set out here:

In respect of the Respondents' application herein, the Respondents contend that:

- (a) Insofar as the Applicants claim is for the entire equitable interest in the said property, the application does not relate to a dispute as between co-owners and therefore not within the jurisdiction of the Tribunal; and
- (b) Alternatively, insofar as the Applicants' claim is for a part, portion or share of the equitable interest in the said property, the application is vague, contradictory, misconceived, lacking in substance and should be struck out as an abuse of process on the bases that the application:
  - (i) Fails to identify the nature of the interest in the property claimed;
  - (ii) Fails to specify the basis upon which the interest claimed arises;
  - (iii) Fails to specify the extent of the interest claimed; and
  - (iv) Fails to identify the party against whom the interest claimed is made.

13 On 21 January 2015 the respondents' solicitors wrote to the applicants' solicitors pointing out certain inconsistencies in the APOC and seeking clarification as to the exact nature of the allegations and the claims made by the applicants.

14 Mr Moore of counsel who appeared on behalf of the respondents spoke to the Outline of Respondents' Submissions dated 24 February 2015. Mr McKenzie of counsel who appeared on behalf of the applicants together with Ms Acreman of counsel spoke to the Outline of Applicants' Submissions dated 3 March 2015.

## **SECTION 75**

15 Section 75 of the VCAT Act provides:

- (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 sub-section (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.

...

- (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.

16 The power under s75 is discretionary, and it is well established that any exercise of this discretion must be approached with caution. As Deputy President McKenzie said in *Norman v Australian Red Cross Society*,<sup>2</sup> after considering the judgment of the Court of Appeal in *Rabel v State Electricity Commission of Victoria*<sup>3</sup>

...

- (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 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. (emphasis added)

17 I accept the Tribunal should not exercise the power to strike out a proceeding lightly. Nevertheless there can be no utility in allowing a matter to proceed where the Tribunal clearly does not have jurisdiction. Whether the Tribunal has jurisdiction is a legal question which does not necessarily involve a consideration of the facts.

18 For the reasons which follow, I find the applicants' claim is not a co-ownership dispute and therefore the Tribunal does not have jurisdiction to consider it. It will therefore be struck out for lack of jurisdiction.

## JURISDICTION

19 The applicants' claims in this proceeding are brought under Part IV of the PLA which is headed "Co-owned land and Goods".

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<sup>2</sup> 1998 14 VAR 243

<sup>3</sup> [1998] 1 V.R. p.102

- 20 Section 225(1) of the PLA provides:
- 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 goods”
- 21 ‘Co-owner’ is defined in s222 of the PLA as:
- Co-owner means a person who has an interest in the lands or goods with one or more other persons as –
- (a) joint tenants
  - (b) tenants in common.
- 22 The respondents contend that for the Tribunal to have jurisdiction, the definition of ‘co-owner’ requires that the person with a legal or equitable interest in land must hold that interest with one or more persons, as a joint tenant or a tenant in common. It is not enough to simply hold an equitable interest in the land unless that interest is held with one or more other persons.
- 23 Further, that as the applicants do not hold a legal interest in the land with one or more other person, that for them to bring a proceeding under Part IV of the PLA they must assert and prove they hold that equitable interest as a joint tenant or a tenant in common with the respondents, as that is who they claim against in this proceeding. For the reasons which follow, I agree.
- 24 As is apparent from the extracts from the APOC set out above, the applicants assert they hold an equitable interest in the *whole* of the subject property; not as a co-owner with the respondents.

### **THE APPLICANTS’ POSITION**

- 25 The applicants’ claims as set out in the APOC are confused and inconsistent. On the one hand they assert they hold an equitable interest in the whole of the property, yet in paragraph 45C of the APOC they assert that from the date of Mr Turner’s death the respondent Trustees were entitled to hold a legal interest in number 73, but that they also held an equitable title *in part for the estate and in part for the Applicants as to the equity set out above. Such equitable interests were held as tenants in common.* However, as noted above, the applicants confirmed in their Further and Better Particulars, and again by their counsel at this directions hearing, that they claim to hold the *whole* of the equitable estate in the property.

### **Are the applicants co-owners of the property?**

- 26 The applicants contend they hold both legal and equitable interests in the property and that they hold those interests as tenants in common firstly with the respondents, and secondly with the Epworth Foundation, the secondary beneficiary under the Will. In the Applicants’ submissions the proposition is put this way at [12]:

The Applicants' interests are both equitable and legal. On the normal property law analysis, ownership by parties as joint tenants or tenants in common arise when the same interest is owned in different proportions or the ownership arises at different times. Then if one looks at the whole equitable interest each time some other equity arises in the Applicants there arises a co-ownership of an equitable interest with a difference as to the nature of the interest, but the interest created (carved out of the interest previously extant) is owned in equity by way of a tenancy in common.

- 27 Mr Moore of counsel who appeared on behalf of the respondents referred me to the definition of 'tenancy in common' in Osborne's Legal Dictionary:

Where two or more persons are entitled to land in such a manner that they have an undivided possession but several freeholds: that is, no one of them is entitled to the exclusive possession of any part of the land, each being entitled to occupy the whole in common with the others. It is distinguished from joint tenancy by the fact that on the death of any one of them his share passes, not to the survivors, but to his devisee, who then becomes tenant in common with the survivors. [underlining added]

- 28 In considering whether the Tribunal has jurisdiction to consider the applicants' claims, I am not concerned with the merits of their claims. For present purposes, I find on the material which has been filed that it is arguable they have an equitable interest in the property. However, that is not enough to enliven the Tribunal's jurisdiction. The applicants have made their application under Part IV of the PLA yet they claim they are the owners of the *whole* of the equitable estate in the property. On their own case, they demonstrate that they are not co-owners of an equitable interest in the property.

- 29 Further, there are no pleadings, particulars in the Applicants' Further and Better Particulars or evidence in their affidavits filed in this proceeding to support the applicants' assertion that they hold any legal interest in the property. Therefore, if it is accepted, for present purposes only (and I make no finding in that respect) that they hold an equitable interest in the land, they cannot hold that equitable interest as tenants in common with the respondents who own the legal interest in the property. In *Garnett v Jessop*<sup>4</sup> this Tribunal confirmed that only co-owners of property can apply to the Tribunal under Part IV of the PLA, and that the respective interests of the parties to the proceedings must be held as co-owners of the same interest. The Tribunal stated at [58-59]:

58. Nothing in the analysis above detracts from the requirement in the definition of 'co-owners' that the person with an interest (legal or equitable) in (relevantly) land '*with one or more persons*' must hold that interest *as a joint tenant or a tenant in common*... a person holding an equitable interest in land or goods

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<sup>4</sup> [2012] VCAT 156



must do so *as* a joint tenant or a tenant or a tenant in common. Simply holding an equitable interest will not suffice to attract the jurisdiction.

59. ...The definition of 'co-owner' contemplates that a person may hold their interest as a co-owner with more than one other person. Such a 'co-owner' (more particularly, a tenant in common) may there hold less than a 50% interest. The applicant must prove that in fact he does hold an equitable interest in the land and that he that he has that interest as a joint tenant or tenant in common with the respondent... [underlining added]

30 Therefore, to fall within the definition of co-owner in s222, the parties must be the co-owners of either the legal interest *or* the equitable interest in a property. Where the applicants claim to hold the *whole* of the equitable estate, and the respondents own the *whole* of the legal estate, they are not co-owners of the same interest.

Whether it is sufficient that each of the applicants is a co-owner of the whole of the equitable estate in the property with the other

31 The applicants assert that there is nothing in s225 or the definition of 'co-ownership' in s222 of the PLA that requires the applicants to be co-owners, either as joint tenants or as tenants in common with the respondents nor is there any provision in the PLA such that the respondents must be beneficial owners of the property.

32 This is a difficult submission to follow. Section 225 provides:

- (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).

...

33 In considering the Tribunal's powers under s225 in conjunction with the definition of 'co-owner' in s222, it is clear that the Tribunal has been empowered to resolve disputes between persons who are co-owners of property. In circumstances where the applicants assert they own the whole of the equitable estate in the property, and where there is no dispute between them, the relief sought by the applicants is simply not available to them under s225.

### Epworth Foundation as a co-owner

- 34 The applicants assert that, on one interpretation, Epworth is a co-owner and should be joined as a party because under s226 all co-owners of the land to which a proceeding relates are parties to a proceeding under s225.
- 35 Again, in the absence with any claims as to the proportions in which the applicants own the equitable interest with the Epworth, this submission is inconsistent with their claim that they are the owners of the whole of the equitable interest in the land.

### Possible other interest in the land

- 36 In paragraph 19 of the Applicants' Submissions it is suggested that *the respondents may have another interest in the property in respect of any entitlement to commission and any right of indemnity charged against the property which may be a legal interest, or it may be at this stage an equitable interest.*
- 37 In the absence of any details, it is unclear how this claim is put and to which paragraph of the APOC it relates.

### **The applicants' alternative claims**

- 38 In their Further and Better Particulars the applicants say that the orders sought at B and C of the Prayer for Relief in the APOC are alternatives to the orders sought in A. To recap, the applicants seek the following orders:
- A. A declaration that the applicants have an equitable interest in the property.
  - B. In the alternative, a declaration that the applicants hold an equitable interest as co-owners of the property with the executors as tenants in common.
  - C. In the alternative, that the beneficiary under the Will, Epworth Foundation has a beneficial interest in the property subject to the interest of the applicants as co-owners in equity.
  - D. In the alternative, an order for accounting pursuant to section 234 of the Property Law Act 1958.
  - E. In the alternative, a partition or sale of the land as to the legal and equitable interests therein pursuant to section 225 *Property Law Act 1958.*
- 39 Read on its own, 'A' simply seeks a declaration that the applicants have an equitable interest in the property. However, as discussed above, they have confirmed in their Further and Better Particulars that their claim is that they hold the *whole* of this equitable interest.
- 40 The applicants' alternative claim as set out in 'B' is lacking in substance, being inconsistent with their assertion that they hold the *whole* of the equitable interest. The basis for any claim that they hold any equitable interest as tenants in common with the respondents, particularly in the

absence of any particulars as to the share owned by each of them, confirms this claim is lacking in substance.

- 41 The applicants' further alternative claim as set out in 'C' is also lacking in substance. Whilst the Epworth Foundation might well have a beneficial interest in the property, this claim suffers from the same limitations as 'B'.
- 42 In circumstances where I have determined that the applicants' claims do not support their contentions that they are co-owners for the purposes of Part IV of the PLA, the orders sought in 'D' and 'E' are not within the jurisdiction of the Tribunal.

#### **THE RESPONDENT'S ALTERNATIVE APPLICATION**

- 43 The respondent's alternative application is that certain paragraphs of the APOC should be struck out for the reasons set out earlier in these Reasons. As I have determined that the proceeding should be struck out for lack of jurisdiction, it is not necessary to consider this alternative application.

#### **CONCLUSION**

- 44 I will therefore order that the proceeding be struck out for lack of jurisdiction with costs reserved.

**DEPUTY PRESIDENT C AIRD**