VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP1088/2016

BUILDING AND PROPERTY LIST

CATCHWORDS

Property Law Act 1958 – s.225 – sale of co-owned property – whether a discretion to order a sale

FIRST APPLICANT	Lou Isgro
SECOND APPLICANT	Marianna Isgro
RESPONDENT	Gaetano Isgro
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	4 December 2017
DATE OF ORDER	4 December 2017
DATE OF WRITTEN REASONS	1 March 2018
CITATION	Isgro v Isgro (Building and Property) [2018] VCAT 312

WRITTEN REASONS FOR DECISION

On 4 December 2017 I made an order that the property which is the subject of this proceeding be sold and the proceeds of sale dealt with as set out in the order. I also made an order that the Respondent account to the co-owners.

The Respondent has now sought written reasons for the making of those orders and these are now provided.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the First Applicant	In person
For the Second Applicant	Mr Lou Isgro
For the Respondent	In person

REASONS FOR DECISION

Background

1 This is an application brought by the Applicants pursuant to Part IV of the *Property Law Act* 1958 ("the Act") for the sale of a four-bedroom residential unit on the Mornington Peninsula, being Unit four, 47 Ronald Street, Tootgarook, 3947 ("the Property") and the division of the proceeds.

2 The Property is registered in the names of all three parties, having been purchased in 1999 for the purpose of using it for family holidays. The first Applicant and the Respondent are brothers and the second Applicant is their mother.

3 Disputes arose as to the use of the Property and it was subsequently rented, the renting being organised first by one of the brothers and then by the other.

4 The condition of the Property has deteriorated somewhat due to an unsatisfactory tenant that did not maintain it and left owing a considerable amount of money.

5 The Property is currently tenanted, the tenant having occupied it for approximately two years at a rental said to be $290 per week. All of this rental has been received by the Respondent who said that he has paid it into a bank account which now has a balance of close to $30,000.00.

6 The Applicants complained that they are excluded from the management of the Property and have not received any of the rental. They therefore seek a sale of the Property and division of the proceeds. They also seek an accounting from the Respondent for the money he has received and holds.

7 The application was opposed by the Respondent.

The proceeding

8 This proceeding was issued on 13 September 2016. It was referred to a mediation which took place on 30 November 2016 but no agreement was reached. The matter was referred to a directions hearing which took place on 20 January 2017 when both parties appeared. An order was then made for a further directions hearing to be held on 17 March 2017.

9 Thereafter, there was extensive delay due to successive applications by the Respondent for adjournments on the ground of alleged ill-health.

10 On 8 March 2017 the Respondent's son applied for an adjournment of the forthcoming directions hearing on the ground that the Respondent was due to undergo a major operation a couple of days before the hearing. He requested that it be adjourned to a date after 23 April 2017. Upon receipt of this information, on 9 March 2017, the directions hearing was adjourned by an order made in chambers to 27 April 2017.

11 On 25 April the Respondent's son applied for a further adjournment until after 30 May 2017, on the ground that his father's recovery had been slower than expected. Upon receipt of this information, on 26 April 2017, the tribunal ordered that the directions hearing be refixed for 6 June 2017.

12 On 2 June 2017 Respondent's son sought a further adjournment until after 29 June 2017 on the ground that the stress of the hearing might set back his recovery from surgery. On this occasion the Applicants objected to the hearing being vacated but, in an order in chambers made on 5 June 2017, the tribunal observed that there was little utility in maintaining the directions hearing in the absence of the Respondent and so the directions hearing was adjourned to 13 July 2017 and the Applicant's costs were reserved. The order made stated that no further adjournments of the directions hearing would be granted in the absence of exceptional circumstances.

13 On 12 July 2017, the Respondent's son again applied for an adjournment on the ground that the Respondent was still recovering from surgery. He sought that the matter be adjourned until 5 August 2017. The application was refused and the directions hearing took place. The Respondent appeared in person, notwithstanding his alleged medical condition. Extensive directions were given for the preparation of the proceeding for trial and the matter was fixed for hearing on 4 December 2017.

14 Amongst the directions given was that the parties were to provide statements of contributions and receipts by 31 August 2017. Such a statement was received from the Applicants on 1 September 2017.

15 On 11 September 2017 the tribunal received an email from the Respondent apologising for not having filed a statement in compliance with the order and saying that he would have everything prepared and submitted by the end of the month. After having regard to that email, the tribunal ordered in Chambers on 12 September 2017 that the date for the Respondent to file and serve his Statement of Contributions and Receipts was extended to 29 September 2017.

16 On 12 October 2017 the tribunal notified the parties of a Compliance Hearing due to the failure of the Respondent to file and serve his Statement of Contributions and Receipts.

17 The compliance hearing was fixed for 8 November 2017. At 4:39 AM that day, the Respondent notified the tribunal by email that he would not be attending due to ill health. In the email he made extensive complaints about the proceeding and the behaviour of his brother. By a further email sent later that morning he said that he did not want the Property to be sold without good reason.

18 The Respondent did not appear at the hearing and the time for him to file and serve his Statement of Contributions and Receipts was extended to 17

November 2017. Notwithstanding this extension, no such statement was received.

19 On 29 November 2017 the Respondent sent an email requesting an adjournment of the hearing fixed for 4 December 2017. In support of the application he provided the following medical certificates:

(a) a certificate from a psychiatrist to say that the Respondent "suffered anxious personality" and that he (the psychiatrist) did not think he could handle the pressure of an attendance at the tribunal. The psychiatrist acknowledged that he last saw the Respondent in September 2016; and

(b) a certificate dated 14 October 2017, from a general practitioner to say that the Respondent had been suffering major cardiac surgery and severe anxiety and would be unfit to attend the VCAT hearing from 14 October 2017 to 31 December 2017.

20 The tribunal sent an email to the parties declining to adjourn the matter, given the lateness of the application, and stating that it would be considered at the hearing. On 1 December 2017 Respondent sent back a lengthy email making various complaints about his brother and the proceeding brought against him and reaffirming that he was opposed to a sale.

The hearing

21 The matter came before me on 4 December 2017. The Applicant appeared on his own behalf and on behalf of his mother. The Respondent appeared together with his son.

22 The Respondent repeated his application for an adjournment. After considering what he had to say I refused the application as I consider that the medical certificates presented did not demonstrate that he was unable to conduct the proceedings, his manner and appearance during the application for the adjournment were not such as to raise any questions or doubts concerning his health and the way he conducted the adjournment application demonstrated quite clearly that he was perfectly capable of defending the matter. Indeed, he then proceeded to do so.

23 The hearing then proceeded and I heard the evidence of both the first Applicant and the Respondent.

Power to order a sale

24 Power to order a sale is conferred upon the Tribunal by s.225 of the *Property Law Act 1958*, which, where relevant, provides as follows:

"Application for order for sale or division of co-owned land or goods

(1) A co-owner of land may apply to VCAT for an order or orders under this Division to be made in respect of that land…

(2) An application under this section may request—

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

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

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

25 In most instances it is not practicable to physically divide land. What is generally sought is a sale. Once a co-owner has made a claim of a kind permitted by s225 the tribunal may make any order it thinks fit to ensure that a just and fair sale or division of the land or proceeds of sale occurs (S.228).

26 Whether the tribunal has a general discretion to refuse to order a sale of co-owned Property was considered by Judd J in *Yeo v Brassil* [2010] VSC 344 where the learned judge said (at para 21 et seq,):,

> "21 The appellant conceded that there may be circumstances in which a court may refuse to exercise the power of sale or division notwithstanding the existence of the jurisdictional foundation. He submitted, however, that hardship or general unfairness did not justify a refusal of an application. While there are no decided cases dealing with the relevant sections of the Victorian legislation, the New South Wales Supreme Court and Court of Appeal, when dealing with corresponding powers of sale, recognised there may be circumstances in which an order may be refused, although the circumstances are limited. In Re *McNamara and the Conveyancing Act (1961) 78 WN (NSW) 1068* Myers J held,
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> > '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 bar to 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. I see no reasons for reconsidering the view I previously took, and I am still of the opinion that the Court has no general discretion which would enable it to refuse an application on such grounds as hardship or unfairness.'
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> 22 In Hogan v Baseden (1997) 8 BPR 15,723 at 15726-7, the New South Wales Court of Appeal held,
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> > 'It would not be a proper exercise of the power to decline relief under s 66G of the Conveyancing Act to refuse an application on grounds of hardship or general unfairness: See *Re McNamara and the Conveyancing Act (1961) 78 WN (NSW) 1068; Ngatoa v Ford (1990) 19 NSWLR 72 at 75.* It follows that in the unhappy event that the parties are unable to settle their differences then the making of an order appointing trustees for sale seems inevitable unless the Respondent could establish a legally binding agreement not to put

her out of occupation of her home, or circumstances that would ground some estoppel to similar effect.'

23 I would respectfully adopt the general principles applied by the Supreme Court of New South Wales and the New South Wales Court of Appeal as providing appropriate boundaries to the circumstances in which a court may properly decline to exercise the power to order a sale or division of Property when it has jurisdiction to do so. The court has no general discretion which would enable it to refuse an application on grounds of hardship or unfairness."

Relevant facts

27 In the present case no legally binding agreement not to sell the Property was suggested, nor was there anything in the evidence of circumstances that would ground some estoppel to a similar effect.

28 It was clear from the evidence that

(a) the Respondent has been receiving the rental from the Property for some time and that he has not accounted for any part of it to his brother or his mother;

(b) the two brothers could not agree on what should be done in regard to the Property and how it should be managed;

It is quite clear from the material on the file, particularly the lengthy emails sent to the Tribunal by the Respondent, that the relationship between the two brothers is very bitter and there is no prospect of them reaching any agreement in regard to this Property.

29 In those circumstances it is appropriate to order a sale and a division of the proceeds. An order to this effect will be made in the usual form. Since the parties cannot agree on the appointment of an estate agent the appointment will be by the Principal Registrar.

30 Additionally, it is appropriate to make an order that the Respondent account for the rental that he has received.

SENIOR MEMBER R. WALKER