

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NOS. BP215/2016 AND
C1717/2016

CATCHWORDS

Section 77 *Victorian Civil and Administrative Tribunal Act 1998*; application by respondent to BP215/2016 and applicant to C1717/2016 to strike out proceedings and transfer to Supreme Court; current proceeding initiated by respondent in Supreme Court; whether Supreme Court more appropriate forum to determine all issues between parties; application dismissed.

APPLICANT	Hua Li
RESPONDENT	John Hong Ping So
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Acting President
HEARING TYPE	Hearing
DATE OF HEARING	8 December 2016
DATE OF ORDER	5 January 2017
CITATION	Li v So (Building and Property) [2017] VCAT 31

ORDERS

1. The application of Hua Li to strike out Proceeding BP215/2016 and Proceeding C1717/2016 and have the matters referred to the Supreme Court of Victoria, is dismissed.
2. Costs reserved.

Judge Jenkins
Acting President

APPEARANCES:

For Applicant	Mr Alexander of Counsel with Mr H Kirimof of Counsel
For Respondent	Mr Galbally of Counsel with Mr McAloon of Counsel

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REASONS

NATURE OF APPLICATION

- 1 This is a preliminary application by Mrs Hua Li (**Li**) for the Victorian Civil and Administrative Tribunal (**Tribunal**), pursuant to s 77 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**), to strike out two related proceedings before the Tribunal, namely:
 - (a) BP215/2016, in which Mr John Hong Ping So (**So**) is the applicant and Li is the respondent; and
 - (b) C1717/2016 in which Li is the applicant and So is the respondent.
- 2 Li applies to have these VCAT proceedings struck out and have the matters referred to the Supreme Court, so that the issues raised in such proceedings can be more properly heard and determined in conjunction with an existing Supreme Court proceeding between the parties.

BACKGROUND

- 3 I draw upon the helpful written submissions of Counsel which are incorporated in these Reasons, as appropriate.
- 4 In March 2010, the Applicant and the Respondent purchased a property situated at 589 King Street, West Melbourne (**the King Street Property**). The Applicant and Respondent are tenants in common of the King Street Property in equal shares.
- 5 The issues arising between the parties relate to their ownership of the King Street Property.

The current VCAT Proceedings

Applicant's VCAT Proceeding

- 6 Proceeding BP215/2016 was commenced in February 2016. The Applicant So seeks an order for the sale of the King Street Property pursuant to ss 225(1) and 228(2)(a) of the *Property Law Act 1958* (Vic) (**PLA**). As set out in the application, So seeks:

An order compelling a sale of the property and division of proceeds among the parties.

- 7 The sections of the PLA referred to in the application confer upon the Tribunal jurisdiction to make orders for the sale or division of co-owned land.

- 8 Section 225(1) of the PLA provides that:

A co-owner of land or goods may apply to VCAT for an order or orders under this Division to made in respect of that land or those goods.

- 9 Section 228(1) of the PLA ('What can VCAT order?') provides that:

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.

- 10 In the period following the filing of the application in February, the interlocutory steps in the Applicant's VCAT Proceeding have been completed. They have included:
- (a) a mediation on 19 May 2016;
 - (b) the filing of Points of Claim on 5 August 2016;
 - (c) the filing of Points of Defence on 14 September 2016;
 - (d) requests for, and provision of, further and better particulars of the Points of Defence;
 - (e) the filing and service of Lists of Documents by the parties; and
 - (f) a Compulsory Conference on 14 November 2016.
- 11 On 14 November 2016, the Applicant's VCAT Proceeding was listed for hearing on 2 May 2017 (along with the Respondent's VCAT Proceeding).
- 12 The Points of Claim seek that the King Street Property be sold and the proceeds be distributed equally between the Applicant and the Respondent. A claim for damages is also made, on the basis that the Respondent's conduct has delayed the sale of the King Street Property and resulted in a loss of income (by reason if the King Street Property having been left untenanted).
- 13 Li does not oppose the sale of the King Street Property. However, she contends that the proceeds of the sale should not be divided equally because So has not properly accounted for some rent and other expenses. She also disputes the heads of damage claimed by So.

Respondent's VCAT proceeding

- 14 Proceeding C1717/2016 was commenced on 6 April 2016. Li applies for an accounting of the profits and expenses relating to the rental business operated from the King Street Property and articulates why the accounting is wrong. The initial Points of Claim asserted a claim for compensation based on alleged misleading, deceptive and unconscionable conduct.¹
- 15 In September 2016, Li abandoned this claim via the filing of Amended Points of Claim dated 16 September 2016. The Amended Points of Claim advanced an alternative claim, relating to the Applicant's management of the King Street Property in the period from mid - 2010 until June 2015. In particular, Li sought:
- ... an accounting between Li and So for the undistributed rent and overcharged expenses in the amount of \$7,488.35 and \$35,818.98 respectively.*²
- 16 Both VCAT Proceedings have been managed together and are currently listed for hearing on 2 May 2017.
- 17 As with the Applicant's VCAT Proceeding, the interlocutory steps in the Respondent's VCAT Proceeding have been completed (including the provision of further and better particulars and the exchange of lists of documents).

¹ Points of Claim dated 6 April 2016.

² Amended Points of Claim dated 16 September 2016.

The current Supreme Court Proceeding

- 18 Li and So are also party to Supreme Court Proceeding SCI 2016 04256. Li filed and served a Writ and Statement of Claim in that proceeding on 20 October 2016. So filed and served his Defence on 2 December 2016.
- 19 In the Supreme Court Proceeding, Li alleges that So breached fiduciary obligations he owed to her by forging her signature (or causing her signature to be forged) so as to obtain a loan in his favour, using the King Street Property as security. Li claims that So therefore improperly profited from their fiduciary relationship, by retaining his interest in the King Street Property, and thereby enjoying the capital appreciation of that interest.
- 20 Specifically, the Statement of Claim filed in the Supreme Court of Victoria refers to the parties' purchase and ownership of the King Street Property. It is alleged that in or around May 2013, the Applicant:

... signed or caused to be signed two guarantees using the plaintiff's name and signature, without the plaintiff's consent.

- 21 No liability is alleged to have arisen under these guarantees (which related to existing finance obtained by So in connection with the purchase of the King Street Property).³ Rather, it is alleged that:
- (a) So's alleged conduct in connection with the guarantees (which is denied by So) constituted a breach of fiduciary duties owed by So to Li; and
 - (b) So '*improperly profited*' as a consequence.
- 22 The relief sought by Li in the Supreme Court Proceeding is that So '*account for his improper profit*'. To the extent that particulars of this alleged '*improper profit*' are provided, they consist of references to So's interest in the King Street Property having '*increased in value*'.⁴

The preliminary discovery application

- 23 Counsel for Li also sought to rely upon an intended preliminary discovery application in the Supreme Court proceeding, so as to determine whether a similar claim might be made in relation to another property later purchased by So.⁵ It relates to a property purchased by So in William Street, Melbourne (the **William Street Property**). Li suspects that the King Street Property may have been used as security to secure a loan to enable So, through Diamond Quest Pty Ltd (his corporate entity), to purchase the William Street Property. If that preliminary discovery application is successful, and the result is as anticipated by Li, she will make a claim in relation to the William Street Property.
- 24 In my view, this is not a matter which properly bears upon the current application.

³ The Statement of Claim acknowledges that in 2010 the Respondent had guaranteed the Applicant's obligations to NAB under finance obtained in connection with the purchase of the King Street Property: Statement of Claim, [5(d)].

⁴ Statement of Claim, [17].

⁵ Counsel submitted that such application was foreshadowed in two letters to So (dated 20 July 2016 and 19 October 2016).

APPLICATION FOR STRIKE OUT AND TRANSFER

VCAT's power to transfer its proceedings to the Supreme Court

25 Section 77 of the *Victorian Civil and Administrative Tribunal Act 1998* provides:

- (1) *At any time, the Tribunal may make an order striking out all, or any part, of a proceeding (other than a proceeding for review of a decision) if it considers that the subject-matter of the proceeding would be more appropriately dealt with by a tribunal (other than the Tribunal), a court or any other person or body.*
- (2) *The Tribunal's power to make an order under subsection (1) is exercisable only by a judicial member.*
- (3) *If the Tribunal makes an order under subsection (1), it may refer the matter to the relevant tribunal, court, person or body if it considers it appropriate to do so.*
- (4) *An order under subsection (1) may be made on the application of a party or on the Tribunal's own initiative.*

26 I have previously summarised principles which guide the Tribunal in the exercise of its discretion under s 77. Those principles have equal application to this case.⁶

27 The discretion contained in s 77 is expressed in broad terms and must be exercised only after taking into account the particular circumstances of the case. In the context of the current application, the following principles have particular relevance:

- (a) First, the power is not to be used lightly. Applicants have a right to utilise the procedures of this Tribunal;
- (b) Secondly, a 'high level of satisfaction is required' before an order under s 77 will be made. The Respondent bears the onus of persuading the Tribunal that the proceeding should be struck out;
- (c) Thirdly, the Tribunal must consider what is the natural forum based upon connecting factors; and
- (d) Fourthly, the Tribunal must take into account matters of cost and convenience.

28 In *Ausecon Developments Pty Ltd v Kamil*,⁷ Judge S Davis identified further relevant principles as follows:

In determining whether to exercise its powers under section 77, the VCAT may have regard to the following matters, among other things:

- *the distance the proceeding has travelled in the VCAT, particularly when compared with the distance any corresponding proceeding has travelled in another forum;*
- *the fact that the VCAT is considered to be, or is almost, the "first port of call" for the type of proceeding in question; and*
- *whether the applicant's choice of forum is seen as an attempt to gain an inappropriate tactical advantage.*

⁶ *Lambrou v Australian Associated Motor Insurers Pty Ltd* [2015] VCAT 415 [24].

⁷ [2015] VCAT 1474 [23].

29 After considering all of these matters, the Tribunal must then determine whether the subject-matter of the two proceedings is more appropriately dealt by another forum, namely the Supreme Court.

ANAYSIS OF SUBMISSIONS OF COUNSEL

30 Both Counsel made helpful oral and written submissions which I draw upon, as appropriate, below.

31 First, there is no question that the Applicant has a right to utilise the procedures of the Tribunal to obtain the conventional relief sought via the Applicant's VCAT Proceeding. The Tribunal may properly be described as the '*first port of call*' for such proceeding as the Tribunal is clearly empowered to grant the relief claimed by So.⁸

32 Secondly, it is uncontroversial that the Supreme Court has jurisdiction to hear all claims between So and Li. However, Counsel for Li further submits that the Tribunal does not have jurisdiction to hear Li's King Street claim, which alleges breaches of fiduciary duty.

33 Counsel for Li concedes that the Tribunal can undoubtedly apply equitable principles when its statutory powers necessarily involve the application of those principles, including in deciding the 'just and fair' division of the proceeds of the sale of co-owned property. However, Counsel submits that the Tribunal does not have general equitable jurisdiction to hear, determine and provide remedies for breaches of fiduciary duties, which is the claim that Li has made and is entitled to pursue. Counsel further submits that general equitable claims confer advantages of certainty of application according to established principles and are not left to the Tribunal's broader discretion under Part IV of the PLA.

34 In my view, the claim disclosed by Li in the Supreme Court proceeding is somewhat imprecise and in any event, tied to the value of, and a fair and just share in, the King Street property. While there is clearly no inherent equitable jurisdiction in the Tribunal, there is relevant ancillary jurisdiction conferred under s 228 of the PLA to deal with Li's claims, as articulated.

35 Section 228 of the PLA provides that *VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs*. In the Supreme Court proceeding, Li claims to be entitled to an accounting for the increase in the value of the So's interest in the King Street Property. If an entitlement to such relief was established by Li, Counsel for So submits that there is no reason why the Tribunal could not give effect to it via such order(s) as the Tribunal ultimately makes under section 228 of the PLA for the 'just and fair' division of the proceeds of sale of the King Street Property.⁹ I agree.

⁸ PLA ss 225(1) and 228(2)(a).

⁹ Counsel also submits that this is consistent with the letter from Macpherson & Kelley dated 21 November 2016, which states that, "allegations of breach of fiduciary duty made by Ms Li in the Supreme Court Proceeding may affect the proper determination of the final distribution of the King Street Property sale proceeds since it may affect the determination of what each parties' 'just or proportionate share according to his or her interest in the property' is (Property Law Act 1958, s 28A)".

36 Counsel for So also referred to a recent example of equivalent relief being granted by the Tribunal in *Trakas v Aravopoulos*.¹⁰ In an application for relief under s 225 of the PLA, akin to So’s VCAT Proceeding, the Tribunal ultimately found as follows:

*In the present case, I am persuaded that it would be just and fair to order an adjustment of the legal holdings of the Property, the effect of which would require the Applicant to transfer his legal interest and holding in the Property to the First and Second Respondents, so that they then solely hold the Property as tenants in common in equal shares. An order in that form is consistent with the equitable relief sought by the First and Second Respondents and, in my view, is the only sensible mechanism to fairly address what would otherwise be unconscionable conduct on the part of the Applicant.*¹¹

37 In arriving at that conclusion, the Senior Member made it clear that the relief was based upon ‘equitable intervention’, such as warranted the imposition of a constructive trust:

*Irrespective of whether relief is sought through the mechanism of a constructive trust or other equitable relief, the Tribunal’s jurisdiction to order sale or alter a co-owner’s interest in land is derived under Part IV of the Act [the PLA].*¹²

38 This approach is consistent with that approved by the Supreme Court in *Tien v Pho*,¹³ which served to confirm that the Tribunal is empowered under s 233 of the PLA to adjust parties’ interests in land by way of altering the parties’ ‘rights and interests at common law and in equity’.

39 Accordingly, I am not persuaded that the Tribunal does not have jurisdiction to deal with the particular allegations made by Li in the Supreme Court Proceeding.

40 Thirdly, the VCAT Proceedings are well-advanced. By contrast, the Supreme Court Proceeding is at a relatively preliminary stage. So filed a Defence on 2 December 2016 but no directions hearing has occurred and, save for the exchange of pleadings, no interlocutory steps have been completed. There is no indication as to when the Supreme Court Proceeding might be listed for trial. Further, no proposal has been made as to how, if the VCAT Proceedings were to be struck out, the issues raised in the VCAT Proceedings would be addressed in the Supreme Court Proceeding.

41 I accept that considerations of cost and convenience weigh heavily in favour of the VCAT Proceedings being permitted to proceed to hearing in May 2017.

42 Fourthly, the Respondent’s solicitors have referred to the ‘risk of inconsistent findings of fact’. Counsel for So submits that no such risk will arise if the claims sought to be made in the Supreme Court Proceeding are agitated in the VCAT Proceedings and determined by the Tribunal. This is the most efficient way forward for Li if she wishes to persist with those claims. I agree.

43 Alternatively, the claims in the VCAT Proceedings, as currently articulated, need not transgress the issue raised by Li in the Supreme Court Proceeding.

¹⁰ [2016] VCAT 592.

¹¹ [2016] VCAT 592, [86] per Senior Member E. Riegler.

¹² [2016] VCAT 592, [82]. See also the analysis at [83]-[85], including the reference to *Tien V Pho* [2014] VSC 391, where Kaye J confirmed that there was no error by the Tribunal in adjusting “the legal and equitable interests of the parties in the property” by application of section 233(1)(c) of the PLA.

¹³ [2014] VSC 391, [23]. See also *Sherwood v Sherwood* [2013] VCAT 1746, [33]-[34].

- 44 Finally, at the hearing of Li's application, the solicitors for So tabled an open offer to settle the whole of the claims respectively made in the VCAT Proceedings. Significantly, the offer, if accepted, would give Li everything which she is claiming in her VCAT Proceeding. After considerable discussion and time allowed for the parties to confer, it became apparent that Li would not accept the offer while it contained a confidentiality clause and a non-disparagement clause, both quite standard clauses in a settlement agreement. It also became apparent that Li would accept consent orders made by the Tribunal, which effectively incorporated the terms of the offer made by So, as such orders of the Tribunal would not contain the clauses to which Li objects in the letter of offer.
- 45 The date for the acceptance of So's offer has now expired. At the listed hearing of the VCAT Proceedings, So may still choose to prosecute his claims and defend Li's counterclaim. In such event, in my view, the issues can be determined without reference or prejudice to the subject matter of Li's Supreme Court Proceeding, leaving Li to pursue such equitable claims separately. Accordingly, I have not considered it necessary to address in any detail the further written submissions of Counsel for Li.
- 46 Counsel for So raised two further matters:
- (a) First, it was submitted to the effect that the Supreme Court Proceeding should be viewed as an improper tactical manoeuvre on the part of Li to derail the VCAT Proceedings and delay determination of So's claims. While the equitable claims made by Li and the relief sought, as currently articulated, are imprecise, the Supreme Court Proceeding, on its face, purports to make a bona fide claim; and
 - (b) Secondly, it was submitted to the effect that the position being adopted by Li, in refusing to accept So's offer, amounted to an abuse of process warranting a strike out of her VCAT Proceeding. While this is a most unusual circumstance, a party is entitled to pursue an unconditional determination or settlement of their claims. However, the position adopted by Li may be relevant to a question of costs, which is a matter which can be addressed at the final hearing.

CONCLUSION

- 47 As noted above, a 'high level of satisfaction is required' before an order under s 77 of the VCAT Act will be made. For the reasons stated above, the relevant considerations weigh heavily against striking out the VCAT Proceedings with a view to referring such matters to the Supreme Court. I am not persuaded that there is any advantage in the issues raised by either of the VCAT Proceedings being transferred to the Supreme Court. Furthermore, the issues apparently raised by Li in the Supreme Court Proceeding may be prosecuted separately and without prejudice to a settlement or final determination of the VCAT Proceedings.
- 48 The Respondent's (Applicant in this preliminary hearing) application for the striking out of the VCAT Proceedings is dismissed.

Judge Jenkins
Acting President