

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO BP596/2014

**CATCHWORDS**

CO-OWNERSHIP - Costs - whether delay in effecting settlement of transfer of land entitles one party to an award for costs and penalty interest.

<b>APPLICANT</b>	Julie Ann Vermeulen
<b>RESPONDENT</b>	Lisa Rosaleen Foreman
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member E. Riegler
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	21 December 2015
<b>LAST DATE FOR RECEIVING WRITTEN SUBMISSIONS</b>	8 January 2016
<b>DATE OF ORDER</b>	29 January 2016
<b>CITATION</b>	Vermeulen v Foreman (Building and Property) [2016] VCAT 92

**ORDER**

1. The Applicant's claim for costs, interest and reimbursement of the application filing fee is dismissed.
2. The Respondent's claim for costs is dismissed.

**SENIOR MEMBER E. RIEGLER**

**APPEARANCES:**

For the Applicant	Ms J Vermeulen in person
For the Respondent	Ms L Foreman in person by telephone

## REASONS

### INTRODUCTION

1. The Applicant and Respondent are siblings and were co-owners of a commercial property located in Wodonga (**‘the Property’**). The Property was devised to the parties in equal shares under the terms of their late father’s will.
2. Pursuant to an agreement reached between the parties on 7 September 2015, the Respondent was to purchase the Applicant’s interest in the Property.<sup>1</sup> After some delay, settlement of that agreement eventually took place on or about 23 November 2015.
3. Notwithstanding the transfer of the Applicant’s interest in the Property, the parties still remain in dispute. In particular, each party seeks an order that the other pay their costs of the proceeding. In addition, the Applicant seeks an order that the Respondent pay penalty interest on the balance of the settlement amount (\$141,300) from the period 9 October 2015 until 23 November 2015, on the ground that the Respondent is alleged to have been late in effecting settlement of the transfer.
4. Both parties made oral submissions at the hearing on 21 December 2015 and have subsequently filed numerous documents dating back to the beginning of the proceeding in support of their respective claims. Having considered those documents, which largely comprise copies of email correspondence, I set out below what I consider to be the salient background facts.

### BACKGROUND

5. On 7 November 2014, the Applicant issued this proceeding seeking an order that her interest in the Property be transferred to the Respondent in consideration that the Respondent pay her market value for that legal interest. At that time, the Property had been valued for probate purposes at \$300,000.
6. A mediation of the proceeding was conducted on 21 November 2014, however, the dispute between the parties was not resolved on that day. Consequently, orders were made requiring the parties to file certain documentation, following which a compulsory conference was to be conducted on 20 March 2015.
7. On 5 March 2015, the Applicant wrote to the Tribunal and advised that agreement had been reached between the parties, which entailed the Respondent purchasing the Applicant’s interest in the Property for an agreed sum of \$150,000. According to the Applicant, the Respondent was

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<sup>1</sup> The agreement made between the parties on 7 September 2015 was a variation of earlier agreements reached between the parties but which were not brought to a conclusion.

to pay the Applicant \$15,000 by 27 February 2015 with the balance of \$135,000 payable by 20 March 2015.

8. In early March 2015, the parties again fell into dispute. In particular, the Applicant contended that the sale price of \$150,000 attracted GST. However, the Respondent took the view that GST was not applicable to the transaction. Each of the parties relied upon expert opinion. Regrettably, that expert opinion differed. As it turned out, the Applicant indicated that she would seek a private ruling from the Australian Taxation Office. Given that the dispute focused on that single issue, it was agreed that there was little utility in maintaining the compulsory conference listed for 20 March 2015 and it was vacated.
9. On 1 May 2015, the Applicant received a private ruling from the Australian Taxation Office, which stated that GST was applicable on the proposed transaction. For reasons unknown to me, a copy of the *Private Tax Ruling* was not provided to the Respondent until 22 May 2015. Upon receipt of that *Private Tax Ruling*, the Respondent contended that the information upon which the *Private Tax Ruling* was premised was not accurate. Consequently, the dispute as to the applicability of GST remained unresolved.
10. On 3 July 2015, the Applicant wrote to the Respondent's solicitors and advised that due to the Respondent's *procrastination*, the offer to transfer her interest in the Property for \$150,000 plus GST would only remain open until 6 July 2015. The Applicant further stated that after that date, the sale price for her interest in the Property would increase to \$155,000 plus GST.
11. On 8 July 2015, the Respondent's solicitors wrote to the Applicant advising that the Respondent had resolved to become registered for GST, the effect of which, meant that the sale could be categorised as the sale of an *ongoing interest* and therefore would not attract GST. However, notwithstanding that concession, further time was lost because the Respondent experienced delay in registering for GST and obtaining an ABN. This was exacerbated by the fact that the Respondent resided in Florida, USA.
12. On 8 July 2015, the Respondent wrote to the Applicant and stated that in order to resolve matters, she would also agree to pay an additional \$5,000 to purchase the Applicant's interest in the Property.
13. On 13 August 2015, the Applicant wrote to the Respondent requesting that the Respondent amend the proposed sale contract to reflect the revised contract price of \$155,000 plus GST (if applicable) and for settlement of the transaction to occur on 4 September 2015.
14. On 14 August 2015, the Respondent replied that the timeline imposed by the Applicant was too tight. In response, the Applicant wrote to the

Respondent stating that the settlement date was not negotiable and that any delay would occasion penalty interest.

15. Given the ongoing dispute between the parties, the matter was listed for a further directions hearing on 7 September 2015. At that directions hearing, orders were made by consent, which stated, in part:

Having regard to the agreement reached between the parties the Tribunal makes the following orders.

1. Subject to Order 2 of these orders, the Applicant must sell and transfer her legal interest in the property known as Unit 5, 22 Stanley Street, Wodonga in the State of Victoria, described in Certificate of Title Volume 9751, Folio 571 (**'the Property'**) to the Respondent in accordance with the following orders.
2. Subject to Order 1 of these orders, the Respondent must pay the Applicant \$157,000 as consideration for her interest in the Property (**'the Purchase Price'**).
3. By **4.00 pm on 9 September 2015**, the Applicant must notify the Respondent of the details of her solicitor's trust account in order allow the Respondent to electronically transfer the Purchase Price into that solicitor's trust account.
4. The Purchase Price payable by the Respondent to the Applicant is subject to:
  - (a) the Applicant complying with Order 3 of these orders; and
  - (b) the Respondent first receiving a copy of a contract of sale executed by the Applicant, which is to be substantially in the form previously exchanged between the parties, save that the purchase price is to be amended to \$157,000 (**'the Sale Contract'**).
5. The Purchase Price payable by the Respondent to the Applicant is to be paid as follows:
  - (a) Ten per cent (10%) payable on or before **4.00 pm on 11 September 2015** (*Australian Eastern Standard Time*) to be electronically transferred into the Applicant's solicitor's trust account; and
  - (b) The residue payable on or before **4.00 pm on 9 October 2015** (*Australian Eastern Standard Time*) to be electronically transferred into the Applicant's solicitor's trust account.
6. Upon the exchange of the Sale Contracts and payment of the Purchase Price:
  - (a) The Respondent must prepare and execute a transfer of land and any other document required to give

effect to the transfer of the Property (**‘the Transfer Documents’**);

- (b) The Applicant must execute the Transfer Documents and, if required, return the executed Transfer Documents to the Respondent’s solicitors within 3 business days of receipt of the same.
  - (c) The Respondent must, if applicable, lodge the Transfer Documents and do all other things and pay all fees and imposts required in order to effect the transfer of the Property.
7. Where a party refuses or neglects to execute a document required to give effect to the transfer of the Property or if in the opinion of the Principal Registrar it is not practicable to make the necessary request of the party, the Principal Registrar may execute the document which shall in all respects be treated as an execution by the party who fails to do so.
16. In accordance with the Tribunal’s orders dated 7 September 2015, \$15,700 was transferred into the trust account of *Samuel Sleigh & Associates* on 9 September 2015, being the solicitors which had previously acted for the Applicant.
17. However, further disputation arose as to the form of the proposed Contract of Sale and Transfer of Land. In particular, the Respondent’s solicitors had prepared those documents on the basis that both parties were to be named as transferors, with the Respondent named as transferee. However, according to the Applicant, the Contract of Sale and Transfer of Land should name the Applicant as the sole transferor and the Respondent the sole transferee. The Respondent’s solicitors argued that it made no difference which of the two forms of Contract of Sale and Transfer of Land were adopted, save and except that adopting the approach suggested by the Applicant would result in there being two certificates of title, whereas the former approach would result in one consolidated certificate of title.
18. The Respondent further contends that around that time, it became unclear as to whether *Samuel Sleigh & Associates* were still acting on behalf of the Applicant. This is because *Samuel Sleigh & Associates* were not responding to a number of emails forwarded by the Respondent’s solicitors. Moreover, the Respondent’s solicitors were receiving correspondence directly from the Applicant, which again put into question whether *Samuel Sleigh & Associates* were still acting.
19. On 10 September 2015, the Respondent’s solicitors wrote to *Samuel Sleigh & Associates* stating, in part:

Good morning Samuel,

I am holding a signed contract and transfer, pending confirmation from you that you are once again representing Julie Vermeulen, in response to my fax of Tuesday 8<sup>th</sup> September in this troubled transaction. I had proposed to effect a formal exchange of contracts by mail if indeed you had instructions once again. The contract needs to be amended to provide for a sale price of \$157,000. I have a message from Commonwealth Bank confirming that the deposit of \$15,700 was transferred to your trust account by Lisa Foreman on Wednesday 9<sup>th</sup>.

...

Lisa is only interested in finishing all this. I will draw a second form of transfer in the fashion Julie demands, and submit a contract and both transfers to you for her signature, if you can confirm that you are indeed actually acting for Julie...

I cannot act further until you confirm that you have instructions...

20. On 28 September 2015, solicitors acting on behalf of the Respondent again wrote to *Samuel Sleigh & Associates* stating, in part:

Good morning Samuel,

Thank you for confirming that you do indeed have instructions to enable completion of this transaction!

...

Finally, I understand that everyone intends completion to be effected on 9 October next.

Can you please urgently confirm that this is Julie's understanding? If so, I will obtain confirmation from Lisa, then amend the contract I hold and forward it to you with two forms of transfer. One transfer will be from Julie alone to Lisa, effectively a transfer of her 50% interest in the property as a tenant in common. But I will also provide a 2<sup>nd</sup> form of transfer, from the two of them to Lisa alone, which will have the same effect, but which will produce a single title after registration, rather than to separate titles each for a 50% interest, but each in Lisa's name...

21. It appears from the correspondence filed by each of the parties that instructions were not received by *Samuel Sleigh & Associates* prior to the anticipated settlement date of 9 October 2015. Consequently, settlement did not take place on that day. In particular, on 23 October 2015, *Samuel Sleigh & Associates* wrote to the Respondent solicitor stating, in part:

Dear Sir,

We refer to the above matter and advise that we are yet to receive instructions from our client with regard to your proposal. Accordingly, are unable to give you any undertaking in that regard. As soon as our client gives us her instructions, we will advise you of same.

Please do not deposit any monies in to our trust account until further correspondence.

Thank you for your assistance in this matter.

22. On 2 November 2015, the Respondent's solicitors wrote to *Samuel Sleigh & Associates* stating, in part:

We write to confirm we have instructions to settle the purchase of our client's purchase of your client's interest in the above-mentioned property.

We confirm we are holding an original signed contract page and transfers, ready to be sent to you on confirmation of your instructions to proceed to settlement.

We further confirm we are holding funds in our trust account for payment of the purchase price under the contract, noting the deposit has already been paid.

Without your confirmation that we can proceed to settlement, our client is not in a position where she can satisfy orders made by VCAT, dated 7 September 2015...

23. Given the impasse between the parties, the proceeding was listed for a further directions hearing on 11 November 2015. On that day, orders were made in order to effect settlement of the transfer. In particular, it was ordered that settlement was to take place on 20 November 2015 at the offices of *Samuel Sleigh & Associates*.
24. It appears from subsequent correspondence that settlement was, in fact, effected on 23 November 2015.

### **SHOULD COSTS BE ORDERED?**

25. Orders for costs in the Tribunal are regulated by Division 8 of Part 4 of *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**). The relevant provisions are to be found in s 109 which provides as follows:

#### **109. Power to award costs**

- (1) Subject to this Division, each party is to bear their own costs in the proceeding.
- (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
- (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to -
  - (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as -
    - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

- (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
  - (iii) asking for an adjournment as a result of (i) or (ii);
  - (iv) causing an adjournment;
  - (v) attempting to deceive another party or the Tribunal;
  - (vi) vexatiously conducting the proceeding;
- (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
  - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
  - (d) the nature and complexity of the proceeding;
  - (e) any other matter the Tribunal considers relevant.
26. *In Vero Insurance Ltd v The Gombac Group Pty Ltd*,<sup>2</sup> Gillard J set out the steps to be taken when considering an application for costs under s 109 of the Act:

[20] In approaching the question of any application to costs pursuant to s 109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows -

- (i) The prima facie rule is that each party should bear their own costs of the proceeding.
  - (ii) The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order.
  - (iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s 109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.
27. Having regard to the chronology set out above and the matters set out under s 109(3) of the Act, I do not find that it would be fair to order costs in this proceeding. I have formed this view because it appears that the delay in effecting settlement of the proceeding is partly due to the conduct of each party. In particular, I fail to understand why, in light of a private *Private Taxation Ruling*, the Respondent took so long to accept the simple solution of becoming registered for GST, especially in circumstances where that solution was suggested to her by the Applicant. The procrastination on the part of the Respondent concerning that issue clearly

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<sup>2</sup> [2007] VSC 117.



delayed settlement of the transaction and may well have resulted in additional legal expenses being incurred by both parties.

28. On the other hand, the fact that the Applicant failed to provide clear instructions to her legal representatives, following the Tribunal's orders made on 7 September 2015 resulted in further delay before settlement could be effected on 23 November 2015. Again, this delay may well have resulted in additional legal expenses being incurred by both parties.
29. In my view, both parties have caused delay to the settlement of the transaction between them. The transfer of the Applicant's interest in the Property to the Respondent could have been effected at a much earlier point in time and with significantly less involvement by legal representatives, had the parties cooperated with each other. This did not occur. In those circumstances, I am not persuaded that it would be fair to order that one party pay the costs of the other.
30. Equally, I am not persuaded that it would be fair to order that the Respondent reimburse the Applicant for the application filing fee paid by the Applicant to initiate this proceeding.
31. Accordingly, each party's claim that the other pay their costs is dismissed. There will be no order as to costs in this proceeding.

#### **SHOULD INTEREST BE ORDERED?**

32. As I understand the Applicant's contention, she claims to be entitled to penalty interest at a rate of 14.5% pursuant to Special Condition 7 of the Contract of Sale.<sup>3</sup> I was not provided with a copy of that special condition. However, I assume that the right to claim interest is premised on a vendor establishing that a purchaser has breached the contract of sale by causing settlement to be delayed.
33. As I have already indicated, the chronology set out above indicates that much of the delay which occurred after 7 September 2015 resulted from acts or omissions on the part of the Applicant, either in her insistence as to the form of the Contract of Sale and Transfer of Land or because she failed to provide instructions to her solicitors in a timely manner. As to the form of the Transfer of Land, I am not persuaded that it was imperative for the Transfer of Land to name one transferor. In my view, it was equally appropriate for the Transfer of Land to be drafted in the way first suggested by the Respondent's solicitors.
34. Having regard to these matters, I am not persuaded that the delay in effecting settlement on 9 October 2015 was caused by a breach on the part of the Respondent either under the terms of the Contract of Sale or of the Tribunal's orders dated 7 September 2015. In the absence of the Applicant explaining how the Respondent breached special condition 7 or any other

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<sup>3</sup> Written submission filed by *Samuel Sleigh & Associates* on behalf of the Applicant dated 23 November 2015.

clause in the Contract of Sale, I am unable to conclude that an entitlement for interest under the Contract of Sale accrues.

35. Accordingly, the Applicant's claim for penalty interest is dismissed.

**SENIOR MEMBER E. RIEGLER**