VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP73/2015

CATCHWORDS

Real Property, sale of land and distribution of proceeds under s228 of the *Property Law Act 1958* ("PLA"), co-ownership arising from a civil forfeiture order under the *Confiscation Act 1997*, Respondent's application for adjustment of interests under s233 of the PLA, no liability of applicant to pay the mortgage or purchase money

APPLICANT	Attorney-General For the State of Victoria
RESPONDENT	Lesley Paul Kinealy
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	25 September 2015
DATE OF ORDER	25 September 2015
DATE OF REASONS	7 October 2015
CITATION	Attorney-General for State of Vic v Kinealy (Building and Property) [2015] VCAT 1577

REASONS

1 I made orders which were sent to the parties on 28 September 2015. At the hearing I undertook to provide written reasons, which I now publish.

2 This proceeding is an application by the Applicant, the Attorney-General for the State of Victoria, for the sale of land at Myrniong ("the Property"), co-owned by the Applicant and the Respondent, Mr Kinealy. The Property consists of two lots, and the Applicant and the Respondent own both lots as tenants in common in equal shares.

HOW THE PARTIES BECAME JOINT OWNERS

3 In the words of Justice Forrest in 2013[1], the circumstances of the Applicant and the Respondent owning the Property together is the "extraordinary result" of a Civil Forfeiture Order ("CFO") under the *Confiscation Act 1997*. The Property was purchased by the Respondent and his then domestic

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1 [2013] VSC 67

partner, Ms Tennent, in 2001. In July or August 2005 the Property was let to Mr and Mrs Panzera. In 2009 Mr Panzera was convicted in the County Court on six counts, two of which were:

- trafficking in a drug of dependence not being less than a commercial quantity; and
- attempting to cultivate a narcotic plant, namely cannabis, in a quantity not less than a commercial quantity.

4 Although the Property was let to Mr Panzera, not owned by him, it was found to be "tainted property" under the Confiscation Act because it was "used in connection with the commission of the offence". It was subject to a restraining order. The Respondent then successfully sought an exclusion of his interest from forfeiture for hardship.

5 The outcome was different for Ms Tennent's interest in the Property. Justice Forrest said Ms Tennent did not take any steps to protect her property. His Honour said, among other things:

> 68 Where a restraining order is enforced in relating to a Schedule 2 offence, provided the pre-conditions … set out in s37 are met then the Court must make a forfeiture order in respect of property which is the subject of a restraining order.
>
> 69 Regrettably, I am bound to make a CFO against Ms Tennent, despite there being not a scintilla of evidence that she knew what was going on at the property. The Act imposes a positive obligation on a party to take part in a proceeding, once a restraining order has been made over a property in which that person has an interest. …
>
> 70 Notwithstanding my firm view that a CFO against her interest in the property is an extraordinarily harsh result, there is no other option. The legislation compels the making of the order.

THE PROCEEDING BEFORE THE TRIBUNAL

6 The Applicant sought sale of the Property and division of the proceeds under s228(2)(a) of the *Property Law Act 1958* ("PLA"), together with consequential orders to provide the necessary powers for sale and division to take place.

7 Section 228 provides in part:

> **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; …

8 The Applicant submitted that the appropriate orders as to the division of the proceeds were payment of the costs of sale including the real estate agent's commission and advertising costs, then division of the balance so that each party received 50% each.

9 I was satisfied that in the absence of a reason put forward by the Respondent, the orders sought by the Applicant were appropriate.

Tribunal orders

10 Three directions hearings were held. The relevant orders were as follows:

On 20 March 2015:

> 2. If a party contends that the net proceeds of sale (if a sale is ordered) are to be distributed differently to the percentage of legal interest held by that party, then that party must **by 8 May 2015** file and serve a Statement of Contributions, setting out payments made in respect of the initial purchase price, loan repayments, payment of rates and other outgoings and maintenance.

On 19 May 2015:

> 3. By **19 June 2015** if the respondent contends that the net proceeds of sale (if a sale is ordered) are to be distributed differently to the percentage of legal interest held by him (50%) he must *file and serve* a Statement of Contributions, setting out payments made in respect of the initial purchase price, loan repayments, payment of rates and other outgoings and maintenance. Copies of all supporting documents on which the respondent relies must be attached to the Statement of Contributions.

On 30 June 2015:

> 2. The date by which the respondent must file and serve a statement of contributions together with copies of all supporting documents is extended to 28 August 2015. [Underlining added]

Respondent's documents

11 In response to these orders the Respondent filed two bundles of documents. The first was received by facsimile on 18 August 2015 and included a letter from the Respondent's conveyancing firm regarding appropriate insurance for the mortgagee, the Respondent's conveyancing firm's "Purchase Settlement Instructions", a Mortgage Loan Schedule, a Loan Purpose Checklist, the first page of the contract of sale for the Property dated 4 December 2000 and various bank statements.

12 The second was received on 9 September 2015. It included the first page of the contract of sale for the Property dated 4 December 2000, various bank statements and two summaries of amounts alleged to have been paid by the Respondent.

13 The documents, taken together, indicate that the Respondent obtained a loan of $182,000 from Perpetual Trustees Victoria Ltd trading as RESI Home Loans to purchase the Property, although the loan was not secured by a mortgage over the Property, but a property owned by the Respondent in Werribee. The loan was in the Respondent's name alone, even though the purchase was in the name of the Respondent and Ms Tennent. In 2007 the Respondent appears to have refinanced with Homeside Lending, a division of the National Australia Bank Ltd. This loan was also in the name of the Respondent alone, and again, the Property was not used as security for the loan – the Werribee property was. The Werribee property burnt down in mid-2014 and that land was sold by the bank.

14 The Respondent gave evidence that only he paid the loans, which is consistent with neither of the loans mentioning Ms Tennent as a borrower. Further, I note Justice Forrest recorded that rent was paid by Mr Panzera for about five months to the Respondent alone. However, in his calculations he did not take into account any amount for rent received.

The Respondent's case

15 During the hearing I asked the Respondent what he sought. He said that he estimated that the Property should have 60% of the loans attributed to it and of that, he claimed the share that Ms Tennent should have paid was 50%. The total amount he sought from the Applicant, to compensate him for Ms Tennent's share, was $199,537.50.

16 I note a report on behalf of the Valuer-General dated 11 June 2014 gives the market value of the Property as approximately $350,000. The report is of limited efficacy because the valuer did not gain access to the Property. However, if the report gives an indication of the likely value of the Property, without any deduction for sale costs, the parties would each receive $175,000.

17 The Respondent was not legally represented at the hearing and there was no indication that he had obtained legal advice. Nevertheless, it was the Applicant's view that the Respondent was seeking adjustment under s233 of the PLA, and his submissions appeared to be consistent with that view.

DISCUSSION

18 The relevant parts of s233 are as follows:

> **233 Orders as to compensation and accounting**
>
> (1) In any proceeding under this Division, VCAT may order—
>
> (a) that compensation or reimbursement be paid or made by a co-owner to another co-owner or other co-owners;
>
> (b) that one or more co-owners account to the other co-owners in accordance with section 28A;

(c) that an adjustment be made to a co-owner's interest in the land or goods to take account of amounts payable by co-owners to each other during the period of the co-ownership.

(2) In determining whether to make an order under subsection (1), VCAT must take into account the following—

…

(c) the payment by a co-owner of more than that co-owner's proportionate share of rates (in the case of land), mortgage repayments, purchase money, instalments or other outgoings in respect of that land or goods for which all the co-owners are liable; [Underlining added]

19 Mr Rimmer of Counsel for the Applicant submitted that the Respondent does not fall within the wording of s233(2)(c). He said that as between the Applicant and the Respondent there was no sum for which the Applicant was liable, therefore there was no basis upon which the Applicant could have an obligation towards the Respondent to reimburse him.

20 I note that even if any liability of Ms Tennent's to the Respondent were relevant, there is nothing to indicate that once the purchase of the Property settled, she had any liability to a lender or to the Respondent. Therefore, I accepted Mr Rimmer's submission that any obligation Ms Tennent might have to the Respondent is a personal obligation rather than an encumbrance on the land.

CONCLUSION

21 I accepted Mr Rimmer's submissions and made no adjustment between the parties.

SENIOR MEMBER M. LOTHIAN