VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO: W138/2013

CATCHWORDS

CO-OWNERSHIP – s 233 of the *Property Law Act 1958*, Joint venture agreement to buy investment property; claim for compensation or reimbursement by one co-owner against another co-owner where loan repayments are unequal; claim for compensation in order to equalise each co-owner's loss on sale. Costs under s 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998*.

FIRST APPLICANT	Belinda Francis Bennett
SECOND APPLICANT	Jane Elizabeth Cogan
RESPONDENT	Karyn Lee Jackson
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	8 October 2014
DATE OF WRITTEN SUBMISSIONS	**7 November 2014**
DATE OF ORDER	21 November 2014
CITATION	Bennett v Cogan (Building and Property) [2014] VCAT 1452

ORDERS

1. The Respondent must pay the Applicants $107,329.10.
2. No order as to costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Mr A Klotz of counsel
For the Respondent	Ms K Jackson in person.

REASONS

INTRODUCTION

1. On 9 July 2014, I published *Reasons* setting out my findings concerning the beneficial ownership of a residential property located in Frankston (**'the Property'**). I found that the parties each held an equal share in the Property, pursuant to a joint venture agreement entered into between them. Consequently, each party was to share equally in the profit or loss upon the sale of the Property, subject to any adjustment being made to compensate for unequal contributions towards the repayment of loans secured for the purchase of the Property or other outgoings concerning the Property.

2. However, my *Reasons* only went so far as to determine the beneficial ownership of the Property. I was unable to make final orders determining the Applicants' claims for compensation or reimbursement because there was insufficient evidence before me. Those claims rested on allegations made by the Applicants that following the sale of the Property, they have shouldered a disproportionate share of the capital loss. In particular, the Applicants claim that the Respondent has failed to contribute equally to the cost of purchasing and maintaining the Property. Consequently, the Applicants now seek orders that the Respondent compensate or reimburse them in order to equalise each parties' commitment and liability to the joint venture agreement.

3. The proceeding was relisted before me on 19 September 2014. The respondent did not appear at that hearing. Despite being asked to pronounce final orders, I refused to do so, principally because it was not clear to me whether the Respondent had actually received notice of the 19 September 2014 hearing date. Moreover, material had been filed by the Applicants one day prior to the hearing date, which included an affidavit and report of Penelope White, chartered accountant. I could not be satisfied that this material had been served on the Respondent prior to the hearing date. Therefore, the hearing was adjourned to 8 October 2014 and orders were made giving the Respondent an opportunity to file any answering material. I also ordered that expert evidence could be given by way of an affidavit, without the need for the expert to appear, subject to the opposing party wishing to cross-examine the deponent of any such affidavit.

4. At the hearing on 8 October 2014, Mr Klotz of counsel appeared on behalf of the Applicants. The Respondent (Ms Jackson) appeared in person, without legal representation.

5. Mr Klotz handed up a document entitled *Minute of Proposed Orders Sought by Applicants*, which set out the final orders sought by the Applicants as follows:

    1. That pursuant to section 233 of the *Property Law Act 1958* (Vic) the respondent pay the applicants $128,032.33.

    2. The respondent pay the applicants' costs of the proceeding, including any reserved costs, to be assessed by the Costs Court in accordance with the County Court Scale

6. The Applicants initially contended that $128,032.33 represents additional loss incurred by them following the sale of the Property, over and above that amount attributable to their two thirds share in the Property. That amount has subsequently been revised down to $107,329.10, following a review by Ms White of various bank statements.

7. The Applicants' claim comprises two elements; namely:

    (a) Reimbursement of monies paid by the Applicants in order to shoulder Ms Jackson's share of the capital loss, in the amount of $64,415.15. This amount is based on calculations made by Ms White.

    (b) Reimbursement of monies paid by the Applicants in order to service a loan that was procured on behalf of Ms Jackson to fund her one third contribution to the total purchase cost of the Property and other costs associated with the sale of the Property.

8. At the hearing on 8 October 2014, Ms Jackson submitted that she was not in a position to answer the claims made by the Applicants because she had only just received a copy of my *Reasons* dated 9 July 2014 and the affidavit of Ms White dated 3 October 2014. In order to afford procedural fairness, I indicated to the parties that I would not rule on the Applicants' claims until Ms Jackson had an opportunity to read and digest the findings set out in my *Reasons*, and the material filed by the Applicants in support of their claims.

9. I further indicated to the parties that I did not consider the affidavit and report of Penelope White to adequately explain how the factual assumptions underpinning her calculations were derived. Consequently, Mr Klotz sought leave to file a further affidavit, and revised report if required, by Ms White in order to answer those concerns. At that point, I asked Ms Jackson whether she required Ms White to attend for cross-examination. She indicated that there was little point because she did

believe that she had access to all of the source documents which Ms White had referred to.[1]

10. Therefore, and with the consent of the parties, I ordered that I would proceed to determine all outstanding issues 'on the papers' without a further hearing and subject to Ms Jackson being given the opportunity to file and serve any answering affidavit material and written submissions in reply. Ms Jackson indicated that she was content for the matter to proceed in that way, rather than have the hearing adjourned to another date.

11. On 20 October 2014, the Applicants filed a *Supplementary Affidavit* by Penelope White. In that affidavit Ms White gave further detail as to how she calculated the amount the Applicants contributed to the cost of financing the Property. The affidavit also set out her calculations of the Applicants' loss on the sale (over and above their two thirds share). In re-calculating that loss, Ms White conceded that following her review of the bank accounts applicable to the joint venture, the amount that Ms Jackson should reimburse the Applicants in order share the aggregate loss equally amongst all three co-owners is $107,329.10.

12. In response to that affidavit and pursuant to orders which I made on 8 October 2014, Ms Jackson filed her written submissions on 7 November 2014, which I have considered.

SHOULD THE RESPONDENT COMPENSATE OR REINBURSE THE APPLICANTS?

Equalising the capital loss

13. The Property comprises two allotments of land on two separate certificates of title. As at the date of my *Reasons*, one allotment had already been sold for $445,000.[2] The remaining allotment was subsequently sold at public auction on 23 August 2014 for $482,500.[3]

14. As I have already commented, the purchase of the Property came about as a result of a joint venture agreement or joint endeavour entered into between the parties. It is common ground that at the time when the joint venture agreement was entered into, it was agreed that each of the parties would contribute equally to the total purchase price, although each parties' contribution was to be procured from a different source or loan. In her witness statement dated 24 April 2014, Ms Bennett explains the arrangement as follows:

[1] Mr Klotz indicated that all of the source documents relied upon by Ms White were discovered documents.
[2] Witness Statement of Belinda Bennett dated 24 April 2014 at paragraph 65.
[3] Supplementary Witness Statement of Belinda Bennett Dated 17 September 2014 at paragraph 1.

12. We agreed we would finance the purchase of 10-12 …, Frankston South as follows:

    a. I would pay the $50,000 deposit with the remainder financed, but that my loan would include an additional $20,000 to take my Mother to Israel as planned as she was 73 and would soon be too old to make the journey. This would equate to finance of approximately $320,000.

    b. Jane would sell her home which had a small mortgage and refinance the remainder equating to approximately $100,000.

    c. Karyn [the Respondent] would sell her home and not require finance due to the equity she had in the property allowing her to pay out her existing mortgage and pay her third outright.

15. However, the original financing plan could not be brought to fruition because Ms Jackson was unable to sell her existing residence; nor was she able to obtain finance in her own right, with the result that her share of the total purchase price was financed through a loan. In her witness statement, Ms Bennett explained how the funding loans were structured:

    27. There were three loan accounts set up with the Westpac Mortgage Loan taken out in Jane and my names, as well as an offset account, as follows:

        a. Loan Account Number 22-7077 for the amount of $102,000, which Jane was to be responsible for servicing (hereinafter referred to as **"Jane's Loan Account"**);

        b. Loan Account Number 22-7050 for the amount of $303,333, which I was to be responsible for servicing (hereinafter referred to as **"my Loan Account"**). My Loan Account had additional funds available of approximately $18,000, as I had borrowed these extra monies to take my Mother to Israel;

        c. Loan Account Number 22-7069 for the amount of $353,900, for which Karen was to be responsible for servicing (hereinafter referred to as **"Karyn's Loan Account"**). Karyn's Loan Account had funds available of approximately $19,700 as Jane and I had borrowed these extra amount on the advice of the Broker, as a safeguard; and

        d. Rocket Deposit Account 59-1222 (hereinafter referred to as **"the Offset Account"**) which was attached to my Loan Account.[4]

[4] Witness Statement of Belinda Bennett dated 24 April 2014 at paragraph 27.

16. In her affidavit sworn on 17 October 2014, Ms White deposes to having reviewed the bank accounts and other documents concerning the joint venture. She states that each co-owner has made a capital loss of $64,415[5] on the investment, calculated as follows:

Description	**Credit**	**Debit**	**Each party's share**
Original Purchase price		1,061,700	(353,900)
Sale proceeds of No 12	445,000		
Adjustments on sale	237.71		
Cost of sale • Agent fees/commission • Demolition • Other holding costs [6]		 17,261.57 20,000 6,682	
Net proceeds of sale of No 12	401,293.72		
Balance sheet after sale of No 12		660,406	(220,135)
Sale proceeds of No 10	482,500		
Adjustments on sale		1,127.76	
Costs of sale • Agent fees/commission • Conveyancing fees		 12,272 1,939.42	
Net proceeds of sale of No 10	467,160.82		
Balance sheet after sale of No 10		193,245	(64,415)

17. The amount of $64,415.15 represents one third of the capital loss on the joint venture, following sale and realisation of the Property. It includes the costs of and associated with the sale of the Property. This amount assumes that each party has contributed $353,900 to the joint venture, which equates to the total financial commitment of $1,061,700.

18. The net proceeds of sale are $927,737.71, according to the information in the above table. Therefore, the net loss after the sale of the Property is $193,245.04. This means that each party incurred a capital loss of $64,415 (rounded down).

19. As Ms Jackson did not contribute any cash funds to absorb that capital loss, the shortfall of $193,245 was borne solely by the Applicants in order to discharge all loans to allow settlement of the Property to be effected.

20. This means that the Applicants have not only incurred their capital loss of $64,415 each but have also borne the burden of shouldering the capital

[5] Rounded down to the nearest dollar.
[6] These *holding costs* represent further advertising costs and general improvements as described in the Witness Statement of Belinda Bennett dated 24 April 2014 at paragraph 72.

loss incurred by Ms Jackson. In my view, the Applicants are entitled to compensation or reimbursement from Ms Jackson respect of that one third share of the capital loss.

Payments towards Ms Jackson's loan

21. Ms White also states that she has reviewed the bank statements for the loans used to finance the joint venture and concluded that the Applicants have paid $42,913.95 in respect of repayments and interest as a result of Ms Jackson failing to make repayments towards *Karyn's Loan Account* (the loan procured on behalf of Ms Jackson). Therefore, Ms White concludes that Ms Jackson's proportionate share of the loss is increased by that amount, totalling $107,329.10. She states:

> 6. I analysed and calculated the amount of interest paid by Bennett and Cogan by reference to the bank statements of the "Rocket Account". The Rocket Account is the account into which Bennett and Cogan deposited their own funds, from which account monies where drawn to make payment of the monthly instalment due by Jackson on Jackson's loan.
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> 7. The amount contributed by Bennett and Cogan to the Rocket Account for the above purpose totalled $34,050.09 and the calculation of this amount appears on page 2 of Attachment "A"….
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> …
>
> 9. The opening balance of the Jackson loan was $353,900 and the balance of her loan at discharge was $369,446.28, the difference being $15,546.28. Her loan was increased as funds were drawn against it and put in another account to enable Bennett and Cogan to continue servicing Jackson's loan once Jackson had ceased paying her loan instalments. The attached schedule marked "A", sets out how the funds were drawn and how the funds were then returned/used to pay Jackson's monthly instalments.
>
> 10. In the analysis referred to in paragraphs 6 and 7 above, I established that part of the funds in the Rocket Account were used to pay expenses in connection with the sale of 10 … Avenue, Frankston. The total of these expenses amounted to $6,682.42. One-third (1/3) of this amount is (i.e. $2,227.47) attributable to Jackson and the remaining two-thirds (2/3) totalling $4,454.95 is attributable to Bennett and Cogan. I note that the entire $6,682.42 amount has been taken into account in the allocation of costs in my schedule dated 3 October 2014.
>
> 11. The effect of this is that the increase in Jackson's loan of $15,546.28 (see paragraph 9) is to be adjusted by a reduction of $6,682.42.

12. Accordingly, the re-stated increase in the Jackson loan is $8,836.86 ($15,546.28 - $6,682.42 = $8,863.86).

13. In my Affidavit dated 3 October 2014, I stated that each party's share of the loss in the joint venture was $64,415.15. I explained this by stating that there is an overall "cash loss" of $193,245 represented by physical cash lost by the joint venture. Only Bennett and Cogan contributed their own actual cash funds to the joint venture whilst Jackson did not contribute any of her own actual cash funds. As Jackson did not contribute any of her own cash funds to the venture, all of her funding was sourced from the Westpac loan facility. This loan was repaid to Westpac on the settlement of 10 … Avenue, Frankston. In effect Jackson did not suffer a cash loss as she had not contributed any cash funding. This is the reason why Jackson owes Bennett and Cogan $64,415.15 in cash.

14. In summary, the amount due by Jackson to Bennett and Cogan is made up as follows:

Share of loss per Schedule B of my original statement	$64,415.15
Increase in loan Jackson per paragraph 12. above	$8,863.86
Interest on Jackson's loan by Bennett and Cogan per paragraph 7 above	$34,050.09
Total amount due	$107,329.10

22. Both Ms Bennett and Ms White gave evidence that they contributed $34,050.09 towards the loan that was obtained in order to fund Ms Jackson's one third contribution to the purchase price. In her written submissions dated 7 November 2014, Ms Jackson takes issue with that contention. She states:

…

3. The mortgage that I was paying off was $353,900 Approx. but was less than that due to the fact that I was paying down the principle [sic.]. Cogan states that it was $370,000. I cannot be held accountable for extra money that both Jane and Belinda borrowed without my knowledge nor did I agreed to that extra money and nor would I have as the loan I was paying was all I agreed to pay and could afford to pay. For whatever reasons Jane and Belinda say they got the extra money for it was not part of the agreement made with me, just like Belinda borrowed another extra $20,000 for herself…

23. The difficulty with Ms Jackson's submission is that no specific details are given as to how much of the principal was paid down by her. Indeed, there is no evidence to suggest that the loan was an interest and principal loan. Ms White's evidence indicates that the loan was an interest only loan,

given her conclusion that none of the principal was ever paid down during the life of the loan, despite repayments being made. In addition, Ms Jackson's statement is at odds with the accounting analysis undertaken by Ms White. In particular, Ms White deposes to having undertaken an analysis of the funds paid towards Ms Jackson's loan and the additional amount drawn against that loan. She states that the additional amount drawn against the loan is partly attributed to the costs associated with the sale of the Property and partly attributed to servicing the loan after Ms Jackson ceased making monthly payments; and not because of funds borrowed by Ms Bennett for her own purpose.

24. Perhaps, the confusion arises because of a statement in Ms Bennett's witness statement, wherein she recounts that *Karen's loan account had funds available of approximately $19,700 as Jane and I had borrowed this extra amount on the advice of the Broker, as a safeguard.* According to the analysis undertaken by Ms White, that $19,700 was deposited into an account held by Ms Cogan and later used to make repayments of Ms Jackson's loan. In my view, it makes no difference that some of the loan obtained on behalf of Ms Jackson had surplus funds that were not required to complete the initial purchase. The critical issue is that $353,900 was borrowed and that this amount represented an equal share of the total purchase price for the Property. The situation would be different if more than $353,900 was borrowed. In that scenario, it would be inequitable to require Ms Jackson to service or repay such a loan (unless the additional funds were required for some purpose associated with the maintenance or sale of the Property).

25. In weighing all of the evidence and submissions made by each of the parties, I find the evidence of Ms White to be the most persuasive. Therefore, I find that the Applicants are entitled to compensation or reimbursement from Ms Jackson in respect of the $34,050.09, which they contributed towards the loan procured on Ms Jackson's behalf.

26. Further, I accept that an additional $8,863.96 was borrowed by the Applicants, again to partly service the loan that was obtained in order to fund Ms Jackson's one third contribution of the purchase price and partly to pay for Ms Jackson's one third share of the costs of sale. In my view, the Applicants are also entitled to compensation or reimbursement from Ms Jackson in respect of that expenditure.

Conclusion

27. Based on the Applicant's evidence and the evidence of Ms White, I find that Ms Jackson is obliged to compensate or reimburse the Applicants in respect of payments made by them to service the loan procured on behalf of Ms Jackson and to further compensate them so that the parties' capital losses are equalised. Accordingly, I will order that Ms Jackson pay the

Applicants $107,329.10 pursuant to s 233(1)(a) of the *Property Law Act 1958*. I understand that as between the Applicants, they have reached agreement as to how that amount is to be distributed between them.

COSTS

28. The Applicants seek further orders that Ms Jackson pay their costs of and associated with the proceeding.

29. Orders for costs in the Tribunal are regulated by Division 8 of Part 4 of *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**). Section 109 of the Act provides:

> **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.

30. Mr Klotz argued that the Applicants' costs should be paid by Ms Jackson under s 109(3) (c) and (e) of the Act on the following grounds:

(a) The defence raised by Ms Jackson was at all times untenable and without any proper foundation. In that respect, Mr Klotz argued that the position taken by Ms Jackson was contradictory in that on one hand, she denied any interest in the Property by reason of the joint-venture agreement having come to an end; while on the other hand, she had lodged a caveat over the Property, asserting an equitable interest.

(b) Moreover, the position taken by Ms Jackson during the course of the hearing was that the parties had entered into a settlement agreement, the effect of which was to discharge her from any further liability or losses arising out of the failed joint venture. This differed from the position set out in her points of defence, which asserted that the joint venture agreement had been repudiated by the Applicants.

(c) The oral evidence of Ms Jackson was contradictory and did not accord with what she had stated in her witness statement.

(d) Ms Jackson's conduct left the Applicants with very little choice but to commence and proceed to final hearing.

31. By contrast, Ms Jackson submitted that the caveat was lodged on the advice of her then solicitor for the purpose of applying pressure on the Applicants to perform what she believed was a concluded settlement agreement between the parties.

32. In *Vero Insurance Ltd v Gombac Group Pty Ltd*,[7] 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 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

[7] [2007] VSC 117.

> paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

33. In my view, it would not be fair to order costs in this proceeding for the following reasons.

34. First, it is clear that Ms Jackson honestly held a view, albeit erroneously, that a settlement agreement between her and the Applicants had been concluded, even though the final amount to be paid was still unresolved. This is evidenced by the fact that she took little or no action in respect of the Property after April 2011, apart from lodging a caveat against the certificate of title for one of the allotments comprising the Property. However, I accept her explanation that she acted on the advice of her solicitor in lodging the caveat and that the purpose of lodging the caveat was to place pressure on the Applicants to perform what she understood to be a concluded settlement agreement.

35. Second, the question whether a settlement agreement was effected between the parties was fundamental in determining any liability on Ms Jackson's part. As detailed in my *Reasons*, I ultimately found that the settlement negotiations between the parties had not concluded, with the result that no agreement had been reached discharging Ms Jackson from her obligations under the joint venture agreement. Had I found to the contrary, Ms Jackson would have been discharged from any further obligations or liability in respect of the joint venture agreement or the Property.

36. In my view, determining whether the settlement negotiations ultimately culminated in a concluded agreement necessitated the matter proceeding to hearing. This is because each party's recollection of what had occurred differed. That is not to say that one party had deliberately told an untruth. As McClelland CJ said in *Watson v Foxman*,[8] in the context of claim for misleading and deceptive conduct:

> In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes and litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions of self-interest as well is conscious consideration of what should have been said or

[8] (2000) 49 NSW LR 315.

> could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.[9]

37. I am not persuaded that the factors set out under s 109(3) of the Act are enlivened to such a degree that it would be fair to order costs in the proceeding. In particular, the hearing of the substantive issues in dispute occupied only one hearing day. The subsequent directions hearing on 19 September, being the first return date after the publication of my *Reasons*, could not proceed because I was not satisfied that Ms Jackson had been notified of the hearing date. In any event, orders were made to progress matters on that day.

38. The next return date was 8 October 2014. On that day, I refused to make the orders sought by the Applicants. This was not merely because Ms Jackson was not in a position to respond but also because the affidavit relied upon by the Applicants was deficient. Therefore, I granted a further indulgence to the Applicants to file and serve additional or supplementary affidavit material, which they did. It cannot be said that in the circumstances outlined above, Ms Jackson has conducted the proceeding in a manner which has unnecessary disadvantaged the Applicants.

39. Having regard to all of the factors set out above, I do not consider that the circumstances of this case make it fair to order costs and I refuse to do so. There will be no order for costs, including reserved costs.

SENIOR MEMBER E. RIEGLER

[9] Ibid at 318-319.