VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. W20/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

Application under section 225 *Property Law Act 1958* for the sale of land and division of the proceeds among co-owners-Claim by one co-owner, the respondent, for compensation or reimbursement under section 233 of the *Property Law Act 1958*-principal claim founded on respondent's assertion that he incurred a loss by having settled a Part IV claim against his late father's estate in the Supreme Court of Victoria in reliance on an allegedly incorrect valuation of his late father's interest in the land-allegations of the incorrect valuation being caused by the fraudulent conduct of the fifth applicant and others-held that this is not one of the matters capable of being taken into account by this Tribunal under section 233 *Property Law Act 1958*-other claims for compensation or reimbursement under section 233 dismissed

FIRST APPLICANT	Gregory John Coach
SECOND APPLICANT	Beverley Ann Coach
THIRD APPLICANT	Kimberly Jade Langdon
FOURTH APPLICANT	Jodie Langdon
FIFTH APPLICANT	Jennifer Maree Armstrong
RESPONDENT	Paul Edwin Coach
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
HEARING TYPE	Hearing
DATE OF HEARING	4-5 September 2014, 7 November 2014
DATE OF ORDER	24 December 2014
CITATION	Coach v Coach (Building and Property) [2014] VCAT 1614

ORDERS

1. The claim made by the respondent for compensation or reimbursement under section 233 of the *Property Law Act 1958* is dismissed.
2. Costs reserved.
3. Liberty to apply.

3. **The proceeding is fixed for a directions hearing at 10.00 am on 4 March 2015 at 55 King Street, Melbourne when any application for costs will be heard, and orders under section 228 of the *Property Law Act 1958* for the sale of the Cremorne property will be made, allow a half day.**

Member A. Kincaid

APPEARANCES:

For the Applicants	Mr J Breedon, Solicitor.
For the Respondent	Mr P Coach, in person.

REASONS

1. The parties own land in Cremorne, Melbourne (the "**property**") as tenants in common in undivided shares. They are descendants of Mr Phillip Coach ("**Mr Coach Snr**") and his wife Merle ("**Mrs Coach**"), both deceased.
2. The applicants, who own three-quarters of the undivided shares in the property, apply under section 225 *Property Law Act 1958* (the "**Act**") for the sale of the property, and division of the proceeds among the co-owners.
3. The respondent is the second child of that marriage. The respondent holds the remaining one quarter undivided share in the property.
4. The property comprises three adjacent lots, referred to during the hearing, and in these Reasons for ease of reference, as Lots M, R and Q.
5. A 2-storey office and industrial premises stands on Lot Q. It was leased to a company called Artiscope Pty Ltd ("**Artiscope**") which carried on a family business there until the late 1990s. Artiscope conducted a family business there until the late 1990s. It was then rented to a third party.
6. Artiscope supplied goods used in advertising and the graphic arts. The respondent started working in the business in 1970, when it was based in South Melbourne. He continued working for Artiscope after it was relocated to Lot Q.
7. The respondent became State Manager of Artiscope. He credits himself with building up a profitable business until 1990, when his employment was summarily terminated.
8. He says that the business ceased trading in 1998 with over $500,000 in debts. This resulted, he says, in the sale of all assets previously held by his parents, with the exception of the property.
9. The applicants want to sell it. They do not contest that he is entitled to one quarter of the net proceeds. The valuation by the City of Yarra dated 15 August 2014 assesses the capital improved value of the property at $1.11 million.
10. The respondent does not want the property sold, if he is only to receive a quarter share. He claims, in addition, compensation or reimbursement under section 233 of the Act.

The Respondent's Claim for Compensation Arising Out of the Death of his Father

11. One of the respondent's claims is for compensation arising from the events following the death of Mr Coach Snr in August 2011. At his death, Mr Coach Snr held a half share in the property.
12. Mr Coach Snr's gross estate was valued for the purpose of probate at $628,000 (the "**probate valuation**"). Included in the probate valuation was $430,000, being the value of Mr Coach Snr's half share in the property.

This was one-half of $860,000, being the capital-improved valuation of the City of Yarra dated 4 August 2011 (the "**City of Yarra valuation**").

13. Little provision was made for the respondent in Mr Coach Snr's will. The respondent lodged Supreme Court proceedings against the estate of Mr Coach Snr under Part IV of the *Administration and Probate Act 1958* seeking provision out of the estate. (the "**Part IV proceeding**").

14. The respondent settled the Part IV proceeding by Terms of Settlement dated 23 April 2013 (the "**Terms of Settlement**"). The Terms of Settlement record that he agreed to accept $167,500 (the "**Settlement Sum**") in settlement of the Part IV proceeding.

15. A consent order was made on 20 May 2013 by which the Part IV proceeding was struck out without any order made on the merits, and with no order as to costs.

16. The respondent's sister Jennifer Maree Armstrong (the "**fifth applicant**") and the executor of Mr Coach Snr's estate, paid the respondent the Settlement Sum.

17. The respondent says (and this is disputed by the applicants) that the Settlement Sum was calculated by adopting one-quarter of the probate valuation (being $157,000), plus a legacy in his favour ($10,000) under his father's will.[1] He now says that the City of Yarra valuation, half of which was included in the probate valuation, was incorrect. The reason for this, he says, is that the City of Yarra valuation only valued Lots M and Q, and not Lot R.

18. The respondent says that on about 18 June 2013, about 2 months after he entered into the Terms of Settlement and received the Settlement Sum, he received from Mr Geoffrey Quinn, the solicitor acting for members of the family in conveyancing matters ("**Mr Quinn**"), a copy of the title document to Lot R (and other documents previously held by Mr Coach Snr). He says that he then realised that the property (and his quarter interest in it) included not only Lots M and Q, but also Lot R.

19. He also alleges that there was a course of dealing involving his late sister Deborah Langdon and, more recently, the fifth applicant and Mr Quinn, which was fraudulently intended to prevent him having knowledge of the family's ownership of Lot R (and his quarter share in it).

20. He says further that this course of dealing also had the result that, to the fifth applicant's knowledge, Lot R was not taken into account by the City of Yarra for the purpose of the City of Yarra valuation. If it had done so, he says, the value of his father's estate would have been greater, and he would not have settled the Part IV proceeding for the Settlement Sum. He says that the fraudulent course of dealing caused him to enter into the Terms of

[1] If this is so, it remains unclear as to the reason for the further $500 being paid.

Settlement based on the incorrect valuation, and that he ought now to be compensated for the loss he says he then incurred.

21. The respondent resists the proposed sale, if it means that he will receive only his one-quarter share of the proceeds. He wants a further amount from the sale of the property in compensation, to reflect the true value of Mr Coach Snr's half interest at the date of the allegedly incorrect City of Yarra valuation.

22. Specifically, if the property sells for more than $860,000, as he confidently expects it will, in addition to his quarter share, he claims an additional 12.5% of the net proceeds above $860,000.[2]

23. The respondent also makes other claims pursuant to section 233 of the *Property Law Act 1958* for the payment of compensation or reimbursement by the applicants.

The Applicable Legislation-Matters to Which the Tribunal is Entitled to Have Regard

24. Section 233 of the Act provides as follows:

> (1) In any proceeding under this Division, VCAT may order-
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> (a) that compensation or reimbursement be paid or made by a co-owner to another co-owner or other co-owners;
>
> …
>
> (2) In determining whether to make an order under sub-section (1), VCAT must take into account the following-
>
> (a) any amount that a co-owner has reasonably spent in improving the land…;
>
> (b) any costs reasonably incurred by a co-owner in the maintenance or insurance of the land….;
>
> (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…for which al the co-owners are liable;
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> (d) damage caused by the unreasonable use of the land....by a co-owner;
>
> (e) in the case of land, whether or not a co-owner who has occupied the land should pay an amount equivalent to rent to a co-owner who did not occupy the land;
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> ….

25. It is clear from a reading of section 233(2) of the Act that the loss allegedly caused to the respondent by his entering into the Terms of Settlement, are not considerations that may be taken into account in respect of a claim for

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[2] See his Points of Defence dated 4 July 2014.

compensation or reimbursement under section 233(1) of the Act. These issues can only be addressed on an application by the respondent to the Supreme Court to set aside the Terms of Settlement, being in respect of a proceeding brought there.

26. In order that he may have done so, among the orders made by Senior Member Riegler at a Directions Hearing in this proceeding on 20 June 2014 was the following order:

> 3. By 31 July 2014 the Respondent must file and serve any application to transfer this proceeding to the Supreme Court pursuant to section 77 of the Victorian *Civil and Administrative Tribunal Act 1998*

25. The respondent has not yet made any such application.

The Loss to the Respondent Said To Arise from Entering Into the Terms of Settlement

27. As is sometimes the case where a party is not legally represented, the facts and circumstances which are required to ground or underpin the orders that the Tribunal may make under section 233(1) of the Act have become camouflaged by extraneous matters which are not directly relevant to the issues for my determination, but are nevertheless at the forefront of the respondent's concerns. Having heard evidence from him as to why he says he suffered a loss arising from his entering into the Terms of Settlement, and although I am unable to take it into account in his application for compensation, I consider it appropriate to make my own observations about it. I should emphasise that the views I express in this respect do not amount to findings.

28. The claims of the respondent, arising from the Terms of Settlement, are:

    (a) that the City of Yarra valuation valued the property on the assumption that it was made up only of Lots M and R, and not Lot Q;

    (b) that the mistaken valuation was caused by the fraudulent conduct of the fifth applicant and/or others; and

    (c) that to the knowledge of the fifth respondent, the respondent relied on the mistaken valuation when entering into the Terms of Settlement, causing the applicant to incur loss thereby, to the financial advantage of the fifth applicant and/or others.

- **Did the City of Yarra valuation dated 4 August 2011 value the property on the assumption that it comprised only Lots M and R, and not Lot Q?**

29. I have referred to the three lots in general terms. In order to address this question, something more needs to be said about their characteristics.

30. The first lot, Lot Q, derived from Town Plan TP870096Q, is now identified on Certificates of Title 11353/223-226.

31. It is common ground that the area of Lot Q is 314 square metres.

32. Mr Coach Snr and Mrs Coach purchased Lot Q. They chose to hold a half undivided share only, with a one quarter share being held by Gregory John Coach (their eldest child, born 1947) (the **"first applicant"**) and the remaining quarter share being held by the respondent.

33. The first applicant subsequently transferred one-half of his share to his wife Beverley Ann Coach (the **"second applicant"**), such that they each hold a one-eighth interest in Lot Q.

34. Upon the death of Mrs Coach, Mr Coach Snr assumed ownership of her quarter interest in the property.

35. After his death in August 2011, Mr Coach Snr's half share was divided under his will equally between:

    (a) Kimberley Jade Langdon (the **"third applicant"**) and Jodie Langdon (the **"fourth applicant"**) who are the daughters of the late Deborah Langdon (nee Coach) (their third child) (such that they now have a quarter interest in Lot Q); and

    (b) the fifth applicant (their fourth child) (such that she has a quarter interest in Lot Q).

36. Immediately adjacent to Lot Q, to the north, are two further lots which are part of the property. They are vacant areas of land. They were owned by the Metropolitan Transit Authority ("**MTA**"). The two lots were known compositely as "Railway Lot 37".

37. One of the lots, Lot M, was described in the Certificate of Title 9804/762 issued on 10 December 1987 (the "**Lot M Certificate of Title**").[3]

38. The other lot, Lot R, is referred to in Title Plan 953639R and is now identified on Certificate of Title Volume 11463 Folio 045. It was held by the MTA under the general law, being described in a Conveyance dated 2 November 1987 (the "**Conveyance**").[4]

39. Artiscope leased Lots M and R from the MTA for 12 years from 1 June 1982 for the purposes of a car park and for access to its loading bay in the building on Lot Q.

40. In 1987 the opportunity arose for Mr Coach Snr to buy these lots. At the request of the MTA, Newton & Co Pty Ltd prepared a valuation report of Railway Lot 37 dated 23 March 1987 (the "**Newton valuation**").

41. The Newton valuation described the total area of Railway Lot 37 as 195.1 square metres. The Newton valuation valued Railway Lot 37 at $31,500.

42. Mr and Mrs Coach subsequently purchased each of the lots forming Railway Lot 37. Similar to their purchase of Lot Q, they chose to hold a

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[3] It subsequently became land described on Title Plan TP 118060M compiled on 24 August 1999

[4] It has now been brought under the Torrens system. It is the land described in Title Plan TP 953639R compiled on 10 December 2013, and is now described in Certificate of Title 11463/045.

half undivided share only in each, with a one quarter share being held by the first applicant, and the remaining quarter share being held by the respondent.

43. The ownership of Lots M and R has since developed in the same way as I have described for Lot Q.

44. The Plan attached to the Conveyance shows the area of Lot R to be 163m2. It is common ground that Lot M comprises 22 square metres, and Lot Q comprises 314 square metres, making a total of 336 square metres.

45. The respondent relies on an email exchange between himself and the City of Yarra as evidence of his submission that the City of Yarra did not take into account Lot R when making the City of Yarra valuation. By email dated 25 July 2014 to the City of Yarra, he wrote:

> Further to our conversation 16/4/2014 please confirm the land area re [the property]. My recollection of our conservation (sic) was 320 square metres.

46. The City of Yarra replied as follows:

> Our records show that the [property] area is 320 square metres **however this could be incorrect**.
>
> We will have to investigate and re-do the valuation if need be (**emphasis added**).

47. It would appear that 320 square metres approximates to the combined area of Lots M and Q. It is also clear, however, from the City of Yarra's email that it considers that this area "could be incorrect". In this circumstance, it is unclear whether the City of Yarra valuation valued only Lots M and Q, and not Lots M, Q and R.

- **If the valuation mistakenly valued only Lots M and Q, as alleged by the respondent, was it caused by the fraudulent conduct of the fifth applicant and/or others?**

48. If I were satisfied that the City of Yarra valuation valued only Lots M and Q, I could not be satisfied that the incorrect valuation was the result of the fraudulent conduct of the fifth applicant and/or Mr Quinn, for the reasons that follow.

The Standard of Proof

49. Allegations of fraud are made by the respondent against the fifth applicant and Mr Quinn. I preface my discussion by saying something about the standard of proof where there is an allegation of fraud.

50. In *Briginshaw v Briginshaw*,[5] Dixon J stated:

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or

[5] (1938) 60 CLR 336.

facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.[6]

51. Section 140 of the *Evidence Act 2008* adopts the same principles:

> 140 Civil proceedings-standard of proof
>
> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
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> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—
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> (a) the nature of the cause of action or defence; and
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> (b) the nature of the subject-matter of the proceeding; and
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> (c) the gravity of the matters alleged.

52. The authorities make clear that *Briginshaw* does not postulate a test which creates a different standard of proof in civil cases.[7] I also note that the Tribunal is not bound by the rules of evidence.

53. The Court of Appeal in *Michael Kyriackou v Law Institute of Victoria Limited*[8] has recently confirmed that because section 98 of the *Victorian Civil and Administrative Tribunal Act 1998* states the Tribunal is not bound by the rules of evidence, it is not bound by the provisions of section 140 of the *Evidence Act 2008*, nor by the common law principles established by *Briginshaw*. Nevertheless, the Court said, those principles reflect common sense notions of probability with respect to human conduct and it is entirely proper for the Tribunal to take them into account when considering allegations of serious misconduct.

54. The High Court explained the underlying notion in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*.

> [T]he strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a

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6 Ibid 361–2.

7 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, 171 (Mason CJ, Brennan, Deane and Gaudron JJ); *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, [110] (French and Jacobson JJ).

8 [2014] VSCA 322 at [22]-[30].

conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.[9]

55. When assessing the strength of the evidence of the respondent, and his submission that the fifth applicant, Mr Quinn and possibly others have engaged in fraud, these are the principles that would be adopted.

Analysis of Events Said To Amount to Fraud

56. He submits that the fraudulent conduct of the fifth applicant caused the incorrect City of Yarra valuation, upon which he claims to have relied when entering into the Terms of Settlement.

The Fifth Applicant's and Mr Quinn's Alleged Knowledge of the Conveyance-Alleged Withholding of Its Existence from Respondent

57. The Conveyance in relation to Lot R was signed by Mr and Mrs Coach, the first applicant and, importantly, by the respondent.

58. The respondent says, however, that since signing the Conveyance in late 1987, he did not see it. He gave evidence that he did not subsequently become aware of it until he received a letter from Mr Quinn dated 18 June 2013, which included a copy.

59. For evidence that both Mr Quinn and the fifth applicant were at all times aware of the existence of the Conveyance, he relies upon a letter from Mr Quinn addressed to Artiscope dated 2 May 1988 (the "**Quinn letter**). Enclosed with the Quinn letter were copies of the Conveyance and the Lot M Certificate of Title. In that letter, Mr Quinn enquired whether he should continue to hold them, or whether Artiscope wished to collect them. The respondent gave evidence that he did not see this letter at the time. The respondent said in evidence that he assumes it to have been received by Mr Coach Snr, who subsequently asked Deborah Langdon, then the Company Secretary of Artiscope, to arrange for collection of the documents. I accept that this is probably what occurred.

60. The words of a receipt appearing on Mr Quinn's Deeds' Packet indicate that on 27 July 1988 Deborah Langdon collected the Conveyance and the Lot M Certificate of Title from the offices of Mr Quinn. It appears that on that day, she was also provided by Mr Quinn with a form of acknowledgment of receipt dated 27 July 1988 (referred to below), on his firm's letterhead, for signature by each of the four family members who had interests in Lots M and R. They were Mr Coach Snr, Mrs Coach, the first applicant and the respondent.

61. The signatures of Mr Coach Snr, Mrs Coach, the first applicant and the respondent all appear in the acknowledgment of receipt. The date "28 July

[9] (1992) 67 ALJR 170, 171 (Mason CJ, Brennan, Deane and Gaudron JJ) (citations omitted).

1988" has been inserted against the signatures of Mr Coach Snr, Mrs Coach and the first applicant suggesting that they signed the acknowledgment of receipt the day after Deborah Langdon collected the Conveyance and the Lot M Certificate of Title from the offices of Mr Quinn. The respondent accepts that his signature appears in the form of acknowledgment of receipt. Against his signature however, is the date "27 February 1988". The respondent says it is not written in his handwriting. He says that the date is in the handwriting of his sister, Deborah Langdon. The purported date, 5 months before the acknowledgment of receipt came in to existence, was plainly a mistaken entry. It invites the conclusion that the date was inserted in error by Deborah Langdon in about late July 1988.

62. The typed acknowledgment of receipt refers to the Lot M Certificate of Title, and also the Conveyance. However, the reference to the Conveyance is in blue ball-point pen. The respondent says that at the time he signed the acknowledgment of receipt, it contained no reference to the Conveyance. He suggests that the reason for this was that Deborah Langdon, with the connivance of other family members and possibly Mr Quinn, wished to keep the fact that the property included Lot R unknown to him.

63. I could not be satisfied on the evidence of the handwritten reference to the Conveyance in the acknowledgment of receipt, that it was added after the respondent signed the acknowledgment, and that the reason for its not being inserted prior to him signing (if that is what happened) was to conceal its existence from him.

Evidence as to the Subsequent Loss of the Conveyance

64. On 31 May 2013, Mr Breedon as the legal advisor to the fifth applicant as Executor of the Estate of Mr Coach Snr undertook a title search of the property. The purpose of doing so was to assist Mr Quinn in the formalising of titles to the property so it could be sold. The search results did not include the Conveyance. He provided the results of his search to Mr Quinn. One of the titles he obtained, and supplied to Mr Quinn, was in respect of a Lot G, being land shown on Title Plan 877158G. Given that Lot G looked very much like Lot M, or Lots M and R combined,[10] Mr Quinn incorrectly assumed that the title to Lots M and R had in fact not been transferred to the Coaches. He therefore wrote to the MTA by letter dated 5 June 2013 seeking immediate rectification of the title.

65. By email dated 25 June 2013 the MTA correctly informed Mr Quinn that no mistake had been made, and that Lot G had never been the subject of transfer to the Coaches. The MTA provided to Mr Quinn copies of the titles to Lots M and R, and a copy of the Conveyance in respect of Lot R. It appears that at this time Mr Quinn was reminded about the existence of the Conveyance in respect of Lot R.

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[10] Indeed, Lot G was shown in TP 877158G as having a northern boundary on Stephenson Street, in the way that Lots M and G do. Stephenson Street had long been re-aligned however, such that it now runs alongside Lots M and R, and not Lot G.

66. Evidence as to the loss of the Conveyance, subsequent to its being uplifted from the office of Mr Quinn by Deborah Langdon, is provided in a statutory declaration made by Mr Quinn on 20 September 2013 in connection with an application to convert Lot R, still then general law land, to a Transfer of Land Act title. That declaration states, in part, as follows:

> 4. My records show that Conveyance and [the Lot M] title were both collected by Deborah Langdon on behalf of the family on 27 July 1988 and a receipt was signed by the 4 owners.
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> 5. Following [Mrs] Coach's death in 1999 the [Certificates of Title in relation to Lots M and Q] were returned to Quinn & Quinn for estate purposes on 8 June 2000 but my records indicate that the Conveyance was not returned and certainly no mention of the Conveyance was mad in estate documents.
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> 6. The 2 Certificates of Title were dealt with at that time in regard to [Mrs] Coach's estate. Quinn & Quinn retained control of the Titles on behalf of the family and I also acted in the transfer of Gregory Coach's share to him and his wife, following which the titles were returned to Quinn & Quinn. The land in the 2 certificates of title and in the Conveyance formed one property and at all times was occupied by the family's business.
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> 7. Following the death of [Mr Coach Snr] in 2012 I ensured that Quinn & Quinn retained control of the 2 titles due to family issues and in fact all the interest titles are held by Quinn & Quinn. The Conveyance was not held by Jonathan Breedon who acted for [the fifth applicant], the Executor, probably because she did not know about it.
>
> 8. To the best of my knowledge and belief the missing Conveyance has not been deposited as a security or on a lien.
>
> 9. That I have made full and exhaustive searches and inquiries and state that the missing Conveyance was never returned to Quinn & Quinn, and that I have no further means of ascertaining its whereabouts.
>
> 10. I have searched all files relating to Coach family matters, all Deeds held by my firm and state that we do not hold the said Conveyance.

67. Having regard to this evidence, it seems likely that at some date between 27 July 1988, when Ms Langdon uplifted the Conveyance from the office of Mr Quinn and 8 June 2000, when titles to only Lots M and Q were returned to the office of Mr Quinn, the Conveyance was lost.

Alleged Withholding of the Conveyance from Connolly

68. The respondent says that further attempts were made to conceal from him the fact that the property also included Lot R were made in connection with the obtaining of valuations of the property.

69. He says that a purported current market valuation of the property was provided by Connolly Real Estate Pty Ltd ("**Connolly**") in October 1993 (the "**first Connolly valuation**"). He says that it was fraudulently procured by his late parents, acting in concert with Mr Quinn, because Connolly was not provided with the Conveyance. It certainly appears from the first Connolly valuation that Connolly was then under the misapprehension that the property comprised only Lots M and Q, being the Lots for which Certificates of Title had issued.

70. It seems that Connolly was not made aware of the existence of Lot R, the land comprised in the Conveyance. Connolly assessed the combined land area for both Certificates of Title at 335.82 square metres. The first Connolly valuation purportedly valued the property on a vacant possession basis at $240,000.

71. Connolly provided a revaluation of the property in February 1998 (the "**second Connolly valuation**"). It was addressed to Artiscope, and states that it was provided under instructions from Deborah Langdon. The second Connolly valuation valued the property on a vacant possession basis at $375,000. Connolly was apparently still under the misapprehension that the property was comprised only of Lots M and R, being the Lots for which Certificates of Title had issued. Indeed, it appears likely that Connolly was asked simply to revisit the first Connolly valuation, and reassess the then current market value. This is because the second Connolly valuation, when describing the title and other particulars of the property, is in identical terms to the first Connolly valuation.

72. The respondent says that the second Connolly second valuation was procured by the other owners of the property for the purpose of making an offer to buy the respondent's share at an undervalue, knowing that, like the first Connolly valuation, it did not value Lot R. Indeed, he says, by letter dated 23 February 1998 Mr Coach Snr on behalf of the other co-owners provided to the respondent a copy of the second Connolly valuation. By that letter, Mr Coach Snr also offered to buy out the respondent's quarter share for $100,000 (being one quarter of the $375,000 valuation, plus a $6,250 premium).

73. It also appears, however, from a letter from Oakley Thompson, solicitors acting for the other co-owners, to the respondent dated 11 March 1998, that the expressed reason the co-owners wished to buy out the respondent's quarter share was so they would be able to grant a mortgage over the property for the purpose of obtaining further finance for Artiscope. The letter goes on to state that in the event of the respondent refusing to accept the offer to buy his share, partition proceedings under the *Property Law Act 1958* would be commenced against him, on the basis that his refusal to join in granting a mortgage to facilitate the raising of funds for Artiscope, or sell his interest to the co-owners, was unreasonable in the circumstances. Given this correspondence, there is little support for the respondent's submission that the purpose of the second Connolly second valuation was simply to buy out his quarter share at a known undervalue.

74. The respondent says that the co-owners, and Mr Quinn, well knew that the both Connolly valuations failed to value Lot R. Why, it might fairly be asked, did Mr Quinn not provide a copy of the Conveyance relating to Lot R to Connolly? If he did not have the Conveyance at the time he instructed Connolly (and given that Deborah Langdon appears to have received it on 27 July 1988, this is likely to have been the case) why is there no evidence of Mr Quinn making an enquiry as to the location of the Conveyance, in

order for him to instruct Connolly? It may be fairly said, in support of the respondent's contention, that even though the instructions in respect of the first Connolly valuation were given about 5 years after the Conveyance is likely to have been uplifted by Deborah Langdon, both the terms of the Quinn letter and the annotation on Mr Quinn's own Deeds packet pointed to the existence of another document of title (being the Conveyance) in respect of the property.

75. Having regard to the *Briginshaw* principles discussed above, there would appear to be insufficient evidence as would point to a conclusion other than that Mr Quinn inadvertently failed to make an enquiry at the time, as may have allowed him to include a copy of the Conveyance in his brief to Connolly.

The Inventory of Assets prepared by the Fifth Respondent as Executrix Failing to Refer to the Conveyance as one of the Documents of Title to the Property

76. Against this background, the respondent also says that, in furtherance of the family conspiracy to prevent him having knowledge of the existence of Lot R, on 9 November 2011 the fifth applicant as executrix of the estate of Mr Coach Snr signed off on the probate valuation that described the property only by reference to the Certificates of Title in relation to Lots M and Q.

77. The fifth applicant gave evidence under subpoena served on her by the respondent. She denied having been aware of the existence of the Conveyance at the time she prepared the probate valuation. She gave evidence that she only became aware in about June 2013 that the title to Lot M did not represent the area that she now knows as Lots M and Lot R. The issue first arose, she said, following her sending a facsimile to an estate agent, who pointed out to her at about that time that the 22 square metre area of Lot M could not conceivably represent the entire car park area. She subsequently went to the office of Mr Quinn with the file containing the various documents from the files of Mr Coach Snr, copies of which the respondent subsequently received on 18 June 2013.

78. The respondent suggested to the fifth applicant during her evidence that when she took possession of Mr Coach Snr's documents in April 2010, when he was moved to Hampton House for care, and as the holder of a Power of Attorney from Mr Coach Snr in her favour, she must have reviewed the documents. It was suggested by the respondent that she must have become aware of the Conveyance. The fifth applicant replied that there were many things to be attended to at that time, and that she simply stored all the papers in her spare room. She said that she never saw a copy of the Conveyance, and denied being aware of it at the time that she prepared the inventory of assets and liabilities. She said that she only became aware of the Quinn letter when she was later looking through their father's files in connection with the respondent's Part IV claim. She says

unapologetically that she had no reason to look at those files at an earlier date.

79. Again, there is no evidence as would suggest that the fifth applicant was aware of the Conveyance when she completed the probate valuation.

The Affidavit Sworn By Mrs Armstrong in the Part IV Proceeding Failing to Exhibit the Newton Valuation

80. The respondent also challenged the fifth applicant in respect of her affidavit sworn on 29 January 2013, in opposition in the Part IV proceeding. He suggested that she exhibited at JMA-5 the letter from the MTA offering to sell Railway Lot 37 (being Lots M and Q) to Mr Philip Coach, but not the Newton valuation that was attached to the letter. The respondent submitted that the fifth applicant knew that if she had done so, he would have realised that he had been misled into thinking that the total area of the property was only 335.82 square metres. This is because the Newton valuation correctly describes Lots M and R as being 195.1 square metres. He says that had he known this, he would have realised that the total area of the property was not 335.82 square metres as he (and presumably Connolly) had previously been led to believe. He says that he would have realised that the total area was substantially more, given that Lot Q alone is 314 square metres. The fifth applicant says in response that the only purpose in her exhibiting the letter from the MTA was to demonstrate that the family purchased Railway Lot 37 for $31,500. She said that she assumed that the respondent would have seen the Newton valuation enclosed with the letter, because he was very involved in the business of Artiscope at the time. This seems a plausible explanation.

81. I was impressed with the demeanour of the fifth applicant and the consistency of her answers to the challenging way in which the respondent sought to put his theory that she and others fraudulently withheld from him knowledge of Lot R. It seems that although she became aware of the Quinn letter in early 2013, during the conduct of the Part IV proceeding, she was not aware that it referred to a document of title relating to Lot R, and that she was at all times until about June 2013 under the impression that the Certificates of Title in relation to Lots M and R fully described the property.

No Evidence of Alleged Fraudulent Conduct Having Any Effect on the City of Yarra when making the City of Yarra Valuation

82. At the heart of the respondent's claims is that the fifth applicant and/or or others fraudulently acted so as to cause the City of Yarra to make a mistaken valuation upon which the respondent relied when entering the Terms of Settlement.

83. I observe that there is nothing in the written material, nor was there anything arising during the evidence, as would in any way support this contention with the clarity and cogency required where fraud is alleged.

Mistakes Conceded by Both Respondent and Fifth Applicant

84. The question was fairly raised during the hearing as to why, if the respondent appears to have been provided with copies of the two Certificates of Title (which were attached to the second Connolly valuation referred to in the letter from Mr Coach Snr dated 23 February 1998), he did not discern that Connolly had not valued Lot R?

85. The respondent says, in effect, that the Certificate of Title for Lot M shows it to be the shape of a "right triangle",[11] and that the shape of both Lots M and Lot R together is also in the shape of a "right triangle".[12] In other words, he incorrectly thought that the title to Lot M showed both Lots M and R. He also said under cross-examination that he concluded from the second Connolly valuation that the total area of the property was only 335.82 square metres. Given the configuration of Lots M and R, this seems plausible.

86. In cross-examination, the respondent said that he never saw the Conveyance during the 11 years after he signed it in November 1987, and that it was not unreasonable for him to have forgotten that it was one of the three documents of title that made up the property. This also seems plausible.

87. The fifth applicant gave similar evidence. She said that she presumed the title to Lot M fully described the car park area. She said that she never understood until about June 2013 that the car park area, formerly known as Railway lot 37, comprised 2 titles. She assumed that the title to Lot M reflected what she now knows is the land described in titles to Lots M and R.

88. It is regrettable for the respondent and the fifth applicant that it has been revealed that many of the issues arising in the broader dispute between them concerning the Terms of Settlement spring from a misconception held by each of them as to what the Certificate of Title in relation to Lot M represented.

• Did the Respondent Rely on the City of Yarra Valuation?

89. The respondent's case would also depend on his proving that he relied on the City of Yarra valuation, when deciding to enter into the Terms of Settlement.

90. My final observation is that he swore an affidavit on 6 December 2012 in the Part IV proceeding, to which he exhibited a letter dated 19 May 2011 that he received from Richard Ellis (V) Pty Ltd, providing opinion that the value of the property was then within a range of between $1,350,000 and $1,500,000. That opinion is based on an alleged total area of the property of 529 square metres, which would seem to take account of Lots M, R and Q.

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[11] That is to say, looking at the Certificate of Title, a triangle with a right angle at the bottom left corner

[12] Again, with a right angle at the bottom left corner.

91. In other words, it would appears to be open to conclude that he went into the negotiation leading to the Terms of Settlement well aware that the current market value of the property was higher than the City of Yarra valuation. It is most doubtful, in this circumstance, that it could be reasonably concluded that the respondent placed sufficient reliance on the City of Yarra valuation for the purpose of entering into the Terms of Settlement as to ground a cause of action for fraudulent misrepresentation.

Other Issues

92. The respondent endeavoured to expand the hearing into a number of different areas, principally:

    (a) what he says was his substantial contribution to the success of the family business conducted by Artiscope, by which he was employed from 1970 until the termination of his employment (and physical locked out) in 1990[13];

    (b) Mr Coach Snr's confidence in him throughout the 20 year period of his employment by Artiscope (resulting in his become State Manager), his subsequent estrangement from his parents after his termination, and alleged reconciliation from about the date of Mr Coach Snr's 80th birthday party in 2003 to the time of his father's death in 2011;

    (c) his concern about alleged events involving the fifth applicant, said to have affected Mr Coach Snr's health and welfare between July 2010 and 22 October 2010, during which time Mr Coach Snr was admitted to Cabrini Hospital[14]; and

    (d) adequate financial provision having allegedly been made for the fifth applicant, partly by the transfer of their late uncle Kenneth Coach's property at 327 Inkerman Street, St Kilda, under the terms of the latter's will, to the fifth applicant and Deborah Langdon and, upon Ms Langdon's death, wholly to the fifth applicant.

93. After hearing the respondent's reasons for wishing to rely on these matters, I ruled that these and other issues were not relevant to the issues for my determination. They are arguably matters that may have been relevant to the Part IV proceeding, had it not settled in the way I have described.

The Respondent's Other Claims for Compensation or Reimbursement

94. The respondent makes a number of other claims for compensation or reimbursement.

95. First, he says that he should receive $52,500 being 5 years rent at $875 per month, that he imputes to having been received between 1993 and 1998 by Mrs Coach who, together with Mr Coach Snr, held a half share in the

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[13] Mr Coach Snr sought to call a Mr Ron Meares, a former employee of Artiscope, to corroborate this, but I disallowed it.

[14] Mr Coach Snr asked me to read a memorandum concerning these events, which I did.

property before her death in February 1999. It arises from the purchase in 1988 by the family (including himself as to a quarter share) of a property at Lane Cove, Sydney for $865,000[15] but which only achieved $500,000 on its sale in 1993. His evidence was that it was purchased with the assistance of a $565,000 interest only loan.

96. The respondent gave evidence that his quarter share of the rent paid by Artiscope to the family was diverted during the 5-year period between 1988 and 1993 to pay interest on the loan. He says that following the termination of his employment by Artiscope in 1990, he objected to his share of the rent from the property being used to fund the loan. The respondent relies on his letter to "PA/M/GJ Coach" in when he stated this emphatically. The response from his mother dated 8 March 1991 stated, in part:

> With regards to rent from [the property], you know we have an interest only loan on the property in Lane Cove which the rent from [the property] goes to finance, but at the end of the period when the loan is due we plan to sell the property in Lane Cove and relocate Artiscope. The market should have improved by this time and hopefully we should gain a benefit in which you will receive your rightful share.

97. He says that when the other members of the family decided in 1993 to sell the Lane Cove property for $500,000, allegedly without consulting him, he only agreed to join with the family in the sale upon reaching an agreement with his mother whereby, in addition to his share of the rent from the property, he would also receive his mother's share of rent from for 5 years from 1993-1998. This, he says, was to compensate him for having his share of the rent used between 1988-1993 to meet interest payments on the loan.

98. I find that this claim is for breach of contract, and is not one of the matters I am required or able to take into account under section 233(2) of the Act when considering whether to order the payment of compensation or reimbursement to the respondent. The claim is dismissed.

99. Secondly, Mr Coach Snr also makes associated claims arising out of losses incurred by him because of the rent allegedly being progressively reduced to $25,000 per annum (with his quarter share returning about $6,250 per annum). I am not satisfied that a claim arising between one co-owner and another concerning the alleged decision by one of them to reduce the rent received by the co-owners is a matter that I am able to take into account in a claim for compensation or reimbursement pursuant to section 233(2) of the Act. This claim is also dismissed.

100. Thirdly, the respondent makes claims for unauthorised fees allegedly deducted by his brother Greg Coach, the first applicant, before distributing rent. I am not satisfied that the respondent has demonstrated that grounds exist for compensation or reimbursement pursuant to section 233(2) of the Act. There was also no evidence about this issue, going beyond the assertion of the respondent. This claim is dismissed.

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[15] See "Points of Defence 3" dated 4 July 2014, but see "$765,000" in Statement dated 13 May 2014

101. Fifthly, the respondent makes a claim for the cost of maintenance undertaken by the last tenant of the property. He alleges that it was overcharged and, in any event, unsatisfactory. I am not satisfied that the respondent has demonstrated that grounds exist for compensation or reimbursement pursuant to section 233(2) of the Act, and the claim is dismissed.

102. Sixthly, the respondent makes a claim against the anticipated proceeds of sale of the property for $76,000 legal fees that he incurred in the Part IV proceeding. The Terms of Settlement expressly state that the Settlement Sum is inclusive of his costs, and so the claim is unsustainable. In any event, it is not a matter that I can take into account in a claim for compensation or reimbursement pursuant to section 233(2) of the Act. The claim is dismissed.

103. I dismiss the respondent's claims for compensation or reimbursement, and I make the attached orders.

Member A. Kincaid