

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1437/2015

CATCHWORDS

Real property, sale of property and division of proceeds, interlocutory hearing regarding ss75 and 78 of the *Victorian Civil and Administrative Tribunal Act 1998*, “misconceived”, alleged failure to comply with directions, alleged attempt to deceive another party, removal of caveat, solicitor appointed to act in conveyancing.

APPLICANTS	Vincenza Colaci, Giuseppe Colaci, MaryAnne Spanti
RESPONDENT	Mr Rocco Colaci
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	13 July 2016
DATE OF ORDER	15 July 2016
CITATION	Colaci v Colaci (Building and Property) [2016] VCAT 1191 (15 July 2016)

ORDERS

- 1 It is ordered by consent that the respondent is to be named as Mr Rocco Colaci which is his given name and the name which appears on the title to the relevant property. He is commonly known as Mr Rino Colaci.
- 2 The respondent’s application for orders under section 75 and/or section 78 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
- 3 In place of the part of order 13(a) of 3 May 2016 that refers to a caveat, pursuant to section 232(j) of the *Property Law Act 1958*, in order to give effect to these and previous orders of the Tribunal to sell the property, the Registrar of Titles is hereby directed to forthwith amend the register within the meaning of the *Transfer of Land Act 1958* by removing caveat AM373904T encumbering the title to the property known as 30 Somali Street Pascoe Vale in the State of Victoria and more particularly described in Certificate of Title Volume 8072 Folio 530.
- 4 I authorise the parties jointly or individually to deliver a copy of these orders to the Registrar of Titles for the purpose of order 3.

- 5 **I direct the Principal Registrar to email a copy of these orders and reasons, marked “Urgent”, to Bartram Lawyers, attention Ms C. Chua, to enable Bartram Lawyers to consider whether they are willing to continue to act as the Solicitor for the purpose of the orders of 3 May 2016.**
- 6 If Bartram Lawyers are no longer willing to act, they are requested to notify the parties and the Tribunal in writing as a matter of urgency.
- 7 If either party does not wish Bartram Lawyers to continue to act, they must notify Bartram Lawyers, the other party and the Tribunal in writing as a matter of urgency.
- 8 If :
- (a) Bartram Lawyers notifies the Tribunal that they are no longer willing to act and the parties do not forthwith notify the Tribunal that they have agreed on another firm of solicitors, or
 - (b) if either party notifies the Tribunal and the other party that they do not wish Bartram Lawyers to act,
- then the Solicitor referred to in the orders of 3 May 2016 is to be selected by the Principal Registrar who shall, to the exclusion of the parties, be empowered to give necessary direction.**
- 9 Each party is at liberty to submit the name or names of a solicitor to the Principal Registrar who shall consider such submissions but shall not be bound by them. Any such submission must be made urgently and **the Principal Registrar is directed to treat such appointment as urgent.**
- 10 There is liberty to apply generally.
- 11 Costs are reserved with liberty to apply.
- 12 **I direct the Principal Registrar to send copies of these orders to the parties by email today.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants

Mr J. McPherson, solicitor

For Respondents

Mr R. Colaci in person with the assistance of his wife

REASONS

- 1 The hearing of 13 July 2016 concerned applications made by the respondent, Mr Rocco Colaci, for orders under either section 75 and/or section 78 of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”) to strike out or dismiss the applicant’s application for sale and division of the property at 30 Somali Street Pascoe Vale, Victoria. It also concerned an application by the applicants for removal of caveat AM373904T from the title to the property.

Background

- 2 In about 1987 the first applicant, Mrs Vincenza Colaci, and her husband Mr Francesco Colaci purchased the property and were registered as co-owners. The property was purchased as an investment property and was one of a number held by the Colaci family. There is potentially a more extensive dispute between family members about division of property, but as proceedings have not been commenced at the Tribunal or elsewhere, this is not relevant to this proceeding.
- 3 Not long after the purchase, Mr Francesco Colaci was diagnosed with a serious illness and his wife consented to a change in the title so that they were tenants-in-common. By his will he left his share of the property to the second and third applicants and the respondent who, for simplicity, I refer to as Giuseppe, MaryAnne and Rocco respectively. Mrs Vincenza Colaci owns half of the property and Giuseppe, MaryAnne and Rocco each own one sixth.
- 4 On 27 October 2015 the applicants applied to the Tribunal for sale and division of the property. The relevant part of the reasons for application is:

The First Applicant wishes to sell the Property. The Second and Third Applicants consent to the sale of the Property. Despite numerous requests, the Respondent has failed to provide consent or give any reason for withholding his consent.
- 5 The proceeding came before the Tribunal for a directions hearing on 29 January 2016. At the directions hearing it was listed for a further directions hearing on 11 March 2016 at which time the parties were asked to advise the Tribunal whether there was agreement for sale of the property, and the terms of any such agreement and also whether Rocco intended to make an application under section 77 of the VCAT Act. That section is headed “More appropriate forum” and allows the Tribunal to direct that part or all of the proceeding be struck out to enable it to be dealt with by a court, other tribunal or a person. A copy of the standard orders for sale and division of property was attached to the orders of 29 January 2016. On 29 January 2016 the respondent represented himself with the assistance of his wife, who I refer to in these reasons as Mrs Colaci as Mrs Vincenza Colaci was not present at the hearing.

- 6 On 11 March 2016 the Tribunal set the proceeding down for a further directions hearing before a judicial member at which time the Tribunal would hear and consider the respondent's application under section 77. The respondent was ordered to file with the Tribunal and send to the applicant any affidavit material upon which he would rely by 1 April 2016. No application of this nature was made and on 4 April 2016 the applicants applied for an order dismissing the respondent's application under section 77 and seeking a directions hearing at the first available opportunity.
- 7 On 11 April 2016 an order was made in chambers staying orders 1 to 4 of the Tribunal's orders dated 11 March 2016 and listing the proceeding for a directions hearing on 3 May 2016 to make orders for the further conduct of the matter.
- 8 On 3 May 2016 the respondents were represented by a professional advocate for the first time. Ms C Chua of Bartram Lawyers appeared on their behalf. Consent orders were made for the sale of the property. The issue of division of the proceeds has been left for a later date.
- 9 There were two further orders in chambers on 1 and 15 June 2016. The parties appeared before Senior Member Levine on 12 July 2016 who set the proceeding down urgently for 13 July 2016. Relevantly, order 1 was as follows:

There shall be an urgent hearing at 10.00 a.m. on 13 July 2016 at 55 King Street Melbourne with an estimated time of one day:

 - (a) to determine the Respondent's application pursuant to sections 75 and 78 of the *Victorian Civil and Administrative Tribunal Act 1998* which is based upon his application and supporting documentation filed 8 July 2016 and index to the supporting documentation and shorter application filed 11 July 2016; and
 - (b) if the application is unsuccessful to determine the Applicants' application to vary the consent orders for the sale of the property to order the immediate removal of the caveat or caveats lodged by the Respondent over the property.
- 10 The urgency is because the property is due to be sold by auction on 30 July 2016, it has already been inspected by a number of potential purchasers and the contract of sale needs to be produced without delay.
- 11 Jellis Craig are the real estate agents who have been appointed to sell the property by consent of all parties. All parties signed an authority to enable Jellis Craig to sell the property by auction on 30 July 2016, although the respondent and Mrs Colaci gave evidence that the respondent was bullied into signing the authority. The respondent and Mrs Colaci expressed the view that a spring sale is more advantageous than a winter sale, but did not adduce expert evidence to that effect.

- 12 At the hearing of 13 July 2016 Mr J McPherson, solicitor, appeared for the applicants and Mr Rocco Colaci appeared in person with the assistance of Mrs Colaci.

Section 75

- 13 Section 75(1) of the VCAT Act is the relevant part and provides:

75 Summary dismissal of unjustified proceedings

- (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
- (a) is frivolous, vexatious, misconceived or lacking in substance; or
 - (b) is otherwise an abuse of process.

- 14 In response to my question about which aspect of section 75 is relevant to this proceeding, Mrs Colaci said she believed that the proceeding is misconceived because:

- there was an issue concerning the first applicant's address given in the application;
- it was possible that the year the respondent was registered as an owner of the property was not as represented on the application but was the following year;
- a reference to the first applicant's open heart surgery should have been a reference to a heart attack; and
- the applicants' statement that the respondent did not consent to the sale is untrue.

- 15 Mr McPherson drew my attention to the decision of Justice Garde, sitting as the Tribunal in the matter of *Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd (Building and Property)* [2015] VCAT 1683. At paragraph 8 of his reasons, his Honour referred to the decision of Kaye J in *Forrester v AIMS Corporation* and said in part:

Before a proceeding can be summarily dismissed:

- (a) it must be 'very clear indeed' that the action is 'absolutely hopeless'; or
- (b) the action must be 'so clearly untenable that it cannot possibly succeed'.

Kaye J also held that:

- (c) the strike out power 'may not be invoked where all that is shown is that, on the material currently put before the Tribunal, the complainant may fail to adduce evidence substantiating an essential element of the complaint'; and

- (d) the respondent to a complaint has the onus of showing ‘that the complaint is undoubtedly hopeless’.
- 16 I am not satisfied that any of the matters raised by the respondent are sufficient to show that the proceeding brought by the applicants is “undoubtedly hopeless”.
- 17 I remark that the respondent did not agree to sell the property until immediately before the directions hearing of 3 May 2016, which was reflected in consent orders of that date. I note the respondent’s allegation that he did not know he was a co-owner of the property until sometime in 2015 which is discussed further below.
- 18 I dismiss the part of the respondent’s application which relates to section 75 of the VCAT Act.

Section 78

- 19 The relevant parts of s78(1) are as follows:

78 Conduct of proceeding causing disadvantage

- (1) This section applies if the Tribunal believes that a party to a proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as—
- (a) failing to comply with an order or direction of the Tribunal without reasonable excuse; or
- ...
- (e) attempting to deceive another party or the Tribunal;
- ...

- 20 Mrs Colaci submitted that there were a number of breaches of section 78. She referred to alleged failures to comply with an order of the Tribunal, and alleged attempts to deceive another party.

Failing to comply with an order

Notice to remove caveat

- 21 Order 13 of 3 May 2016 provides in part:

If the Property is sold:

Each of the parties must sign all necessary documents in order to give effect to the sale and conveyance of the Property (including the Transfer of Land, and if necessary the withdrawal of caveat) within 72 hours of receiving written notice to do so from the Solicitor. [Underlining added]

- 22 Mrs Colaci gave evidence that the caveat was lodged on 3 December 2015 on the basis of an implied, resulting or constructive trust. She agrees that to date, no steps have been taken to enforce the respondent’s rights under the alleged trust.

- 23 Mr McPherson gave evidence that when his firm approached the Titles Office to remove the caveat, they were referred to this proceeding before the Tribunal. He agreed that his firm had contacted the respondent's then solicitors (who are also the Solicitor under the orders of 3 May 2016 ("conveyancing Solicitor")) seeking to remove the caveat in circumstances where the property had not been sold.
- 24 Mrs Colaci submitted that the applicants' lawyers' attempt to have a caveat removed was both a breach of order 13(a) of 3 May 2016 and an attempt to deceive another party. I note that in the email from the applicants' solicitors to the Tribunal and to the previous solicitor of the respondent of 15 June 2016, there was to be a directions hearing on 16 June 2016 to have the respondent sign the sales authority and to have the conveyancing Solicitor issue a notice to withdraw the caveat to the respondent. The applicants' solicitors sought cancellation of the directions hearing in circumstances where the sales authority had been signed and the conveyancing Solicitor had issued the notice to withdraw the caveat within 72 hours.
- 25 I am satisfied that the notice is inconsistent with order 13(a) of 3 May 2016, as a pre-condition to that order is that the property has been sold. I find that the attempt of the applicants' solicitors to rely on order 13(a) to require the respondent to remove the caveat before sale of the property amounts to at most a, possibly innocent, misrepresentation of the effect of the order.
- 26 Nevertheless, the alleged failure to comply with an order in this instance appears to have been by both the applicants (or their solicitors) and the conveyancing Solicitor.
- 27 In any event, I am not satisfied that this alleged breach resulted in a disadvantage to the respondent in the conduct of this proceeding, other than unnecessary aggravation.

List of Documents

- 28 Order 19 of 3 May 2016 provided that by 30 June 2016 the parties were required to serve on each other a list of documents. Order 20 provided that the parties must make such documents available for inspection and photocopying upon three days written notice. The respondent complains that the applicants did not follow this order because instead of making the documents available for inspection and photocopying, they sent electronic copies of all the documents to the respondent.
- 29 As I said in the hearing, I am surprised that any party would object to this course of action except where a party is concerned that the electronic copy provided might not match the original.
- 30 I note that the respondent has not served a list of documents on the applicants and claims that he has no documents which are relevant to the proceeding.

Conclusion regarding failure to comply with an order

- 31 I am not satisfied that there was a failure to comply with orders by the applicants or their solicitors.

Attempting to deceive another party

Sign board proof showing “private sale”, not auction

- 32 I accept Mrs Colaci’s evidence that when Jellis Craig sent out the sign board proof for approval, it showed that the property was to be sold by private sale rather than by auction. I also accept her evidence that very little time was given to approve the proof. Nevertheless, this action appears to have been in error and was by the real estate agent not by the applicants or their solicitors. I note that the purpose of sending out proofs is to avoid such errors on the board itself and that there is no suggestion that the error appeared on the board.

Date of the auction

- 33 The Respondent and Mrs Colaci both gave evidence that they believed the parties had agreed the auction would be in spring. Nevertheless, after this alleged agreement the respondent agrees that he signed the sale authority. The respondent agreed that he signed and returned the authority on either 14 or 15 June 2016 and a month earlier by email of 17 May 2016, he had written to Ms Georgie Maggs of Jellis Craig and said in part:

[In] your email dated 13 May you inform me of a collective decision where the property will now be sold in winter. You attach a completed auction authority, pre-signed by your clients [the applicants] for a July auction, with clear instructions for my signature.

You follow-up yesterday informing of my requirement to sign your resent documents.

Georgie this is bullying, disguised as a “collective decision” will not be tolerated. This does not reflect previous documented discussions with your office and request orders by VCAT. [Sic]

- 34 I am satisfied that the respondent was not happy that the auction was to be on 30 July 2016. Nevertheless, I am not satisfied that he was misled when signing the authority or that he signed the authority under duress by the applicants.

Inaccurate date on email

- 35 The respondent alleged that the applicants or their solicitors had changed the date on at least one email presented to the Tribunal. An example was an email from the respondent to Ms Maggs of 17 May 2016 at 8:32 AM which also appears in an email trail sent by Mr McPherson to the Tribunal and which appears to bear the timestamp 16 May 2016 22:32:22+0000. The respondent and Mrs Colaci were unable to say how this difference in time has any bearing whatsoever on matters of importance between the parties. I

am not satisfied that the email date difference is the result of tampering as distinct from an electronic glitch.

Allegation of collusion

36 I note the allegation of the respondent that his lawyers colluded with the applicants' lawyers to "force us to sign". I accept the explanation by Mr McPherson that the fact that two lawyers agree does not unequivocally point to collusion; it can also demonstrate that two lawyers have reached the same conclusion and both have advised their clients wisely. I do not have further regard to this allegation.

Conclusion regarding alleged attempt to deceive the other party

37 I am not satisfied that there was an attempt by the applicants or their solicitors to deceive the respondent with respect to the conduct of the proceeding.

Conclusion regarding s78

38 Mr McPherson drew my attention to the decision of Member Kincaid in *T.B.T (Victoria) Pty Ltd v Trombone Investments Pty Ltd (Retail Tenancies)* [2013] VCAT 2021 where he said, at paragraph 13:

Section 78 of the VCAT Act also requires me to be satisfied that relevant conduct of the Applicant that may be proved by the Respondents, in this case attempting to deceive the Respondents or the Tribunal, is such that it also "unnecessarily disadvantages the Respondents".

39 I am not satisfied that the alleged failures to comply with orders and the alleged attempts to deceive, even if proven, unnecessarily disadvantage the respondent other than to cause him annoyance.

40 I dismiss the part of the respondent's application which relates to section 78 of the VCAT Act.

General comment regarding sections 75 and 78

41 There is, without doubt, a dispute between the applicants and the respondent about the conduct of the sale of the property and the subsequent distribution of assets. The place to come for such disputes is the Tribunal. If there is an ongoing dispute about the respondent's rights under his father's will, proceedings should be commenced elsewhere. This has not occurred, and unless it does it is in the interest of all parties that this proceeding continues at the Tribunal.

Applicants' application to remove caveat

42 The respondent said that this caveat and the caveat over another property were lodged because he was unaware that he was the owner of this property until 2015 when the applicants sought to sell it. This evidence is surprising, because there are two documents which purport to be signed by the

respondent but which he said he did not sign. The document relevant to this proceeding is the respondent's document number 15 filed 13 July 2016, which is the transfer of land to Giuseppe, Rocco and MaryAnne of 31 May 1991.

- 43 I am not qualified as a handwriting expert, but given the respondent's evidence I asked him to show me his driving license. The signature on his driving license, albeit a recent one, bears no resemblance to the signature on respondent's document number 15. I do not draw any conclusion about whether document number 15 was forged, but assuming the respondent's evidence in this respect is accurate, it is understandable that he would take steps to protect himself by means such as lodging a caveat.
- 44 Mr John Morello, real estate agent of Jellis Craig, gave evidence for the applicants. I accept his evidence that anything "adverse" on the title can cause concern amongst potential purchasers and either make a property more difficult to sell or reduce its value.
- 45 Order 13(b)(v) of 3 May 2016 provides:
- The net balance to be held in trust by the Solicitor (and if not distributed within 30 days to be held in an interest [bearing] account) pending written agreement of the parties as to how the balance is to be distributed, or pending further order of the Tribunal.
- 46 I am satisfied that this order protects the respondent from potential inappropriate dealing with the proceeds of the sale. It is therefore unnecessary for the respondent to continue to have a caveat registered on the title to the property. I am also satisfied that removal of the caveat is necessary to minimise the risk of a poor sale outcome because of the caveat. This is for the benefit of all the parties. I therefore make orders that the Registrar of Titles remove the relevant caveat, as was done by Senior Member Walker in *Tien v Pho & Anor (Real Property)* [2013] VCAT 265.

Conveyancing solicitor

- 47 The parties agree that the firm of solicitors appointed to act for all parties for conveyancing is Bartram Lawyers who previously acted for the respondent. The issue of whether the parties still wish Bartram Lawyers to undertake conveyancing on their behalf was raised but not resolved on 13 July 2016. The Tribunal also raised the issue of whether Bartram Lawyers would be willing to act in circumstances where they no longer act for the respondent and the parting of ways between solicitor and client appears to have been less than cordial.
- 48 I therefore direct the Principal Registrar to urgently send a copy of these orders and reasons to Bartram Lawyers, attention Ms C. Chua, to enable Bartram Lawyers to consider whether they are willing to act as conveyancing Solicitor. If Bartram Lawyers are no longer willing to act, they are requested to notify the parties and the Tribunal in writing as a matter of urgency.

- 49 The parties are asked to urgently turn their attention to the question of whether they wish Bartram Lawyers to continue to act and if either party does not, they must notify Bartram Lawyers, the other party and the Tribunal in writing as a matter of urgency.
- 50 If Bartram Lawyers notifies the Tribunal that they are no longer willing to act and the parties do not forthwith notify the Tribunal that they have agreed on another firm of solicitors, or if either party notifies the Tribunal and the other party that they do not wish Bartram Lawyers to act, then a new Solicitor for the purpose of the orders of 3 May 2016 is to be selected by the Principal Registrar who shall, to the exclusion of the parties, be empowered to give necessary direction. Each party is at liberty to submit the name or names of a solicitor to the Principal Registrar who shall consider such submissions but shall not be bound by them. Any such submission must be made urgently and the Principal Registrar is directed to treat such appointment as urgent.

SENIOR MEMBER M. LOTHIAN