VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP582/2019

CATCHWORDS

Co-ownership, s 225, 228 and 232 *Property Law Act 1958* (Vic); effect of dispute resolution clause in Terms of Settlement.

APPLICANT	Gregory Czapp
FIRST RESPONDENT	Victor Czapp
SECOND RESPONDENT	Frank Cassar
THIRD RESPONDENT	Erica Cassar
WHERE HELD	Melbourne
BEFORE	Senior Member L. Forde
HEARING TYPE	Hearing
DATE OF HEARING	11 September 2019
DATE OF ORDER AND REASONS	23 September 2019
CITATION	Czapp v Czapp (Building and Property) [2019] VCAT 1481

ORDER

1. By **4 October 2019** the first respondent must execute a contract of sale of his legal and equitable interest in the property situated at 7 Norton Drive Melton in the State of Victoria being the land described in certificate of title volume 9400 folio 758 (**the property**) in the form of and upon the terms of the contract of sale dated 31 May 2018 signed by the applicant and the second and third respondents as vendors and David Stanley as purchaser. Settlement is to be 30 November 2019 (**settlement date**).
2. The parties shall jointly select and appoint a solicitor or conveyancing agent to prepare all necessary documents and conduct the conveyance of the Property upon sale (**the Solicitor**).

3. If the parties cannot agree on the identity of the Solicitor by **4 October 2019**, then the Solicitor is to be selected by the Principal Registrar who, to the exclusion of the parties, is empowered to give any necessary direction. Each party may submit the name or names of a solicitor to the Principal Registrar who shall consider such submissions but will not be bound by them.

4. 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*) within 72 hours of receiving written notice to do so from the Solicitor. If any of the parties refuses or neglects to sign a necessary document, or if in the opinion of the Solicitor, it is not practicable to make the necessary request of that party, the Principal Registrar may sign the necessary document which shall in all respects be treated as an execution by the party who has failed or neglected to do so.

5. The Solicitor should prepare the necessary documents to give effect to the section 49 transfer and the cost of preparing the documents are to be deducted from the first respondent's share of the proceeds of sale.

6. By **4 October 2019** the first respondent must lodge an application pursuant to section 49 of the *Transfer of Land Act 1958* (Vic) to be registered as the legal personal representative of the 1/5 share of the property registered in the name of Gregory Victor Czapp.

7. In the event that the first respondent fails to comply with order 6, then the Principal Registrar may sign the necessary documents, which shall in all respects be treated as an execution by the first respondent.

8. The first respondent must do all things necessary to have Caveat number AN 135664J (**the caveat**) removed from the title prior to settlement.

9. If the caveat is not removed, then the charge over the first respondent's interest in the property supported by the caveat is to be satisfied from the first respondent's share of the proceeds of sale of the property and the caveat removed to permit a transfer the property to a purchaser upon settlement. The Solicitor should take all steps necessary to have the caveat removed and any costs associated with those steps be taken from the first respondent's share of the proceeds of sale of the property.

10. The proceeds of sale will be applied as follows and in the following priority:

    a The discharge of any registered encumbrance on the Property;

    b Payment of any outstanding rates, charges, taxes and imposts;

    c Payment of the reasonable legal costs associated with the sale and conveyance of the Property; and

    d The net balance to be paid to Mark Caldwell, Solicitor and applied by him in accordance with the Terms of Settlement signed between the

parties in respect of Supreme Court proceeding number S CI 2017 0094 dated 29 May 2017.

11. The Principal Registrar is empowered to give such directions and execute such documents as may in their opinion be necessary or desirable to give effect to these orders.

12. The applicant's application for cost will be determined in chambers based upon written submissions from the parties.

13. By **4 PM on 18 October 2019** the applicant must file with the Tribunal and serve on the first respondent its submissions in support of his cost application not exceeding 4 A4 pages.

14. By **4 PM on 1 November 2019** the first respondent must file with the Tribunal and serve on the applicant his submissions in opposition to the cost application not exceeding 4 A4 pages.

SENIOR MEMBER L FORDE

APPEARANCES:

For the Applicant	Mr M. Caldwell, Solicitor
For the Respondent	Mr N. Andreou of Counsel
For the Second and Third Respondents	Mr M. Caldwell, Solicitor

REASONS

1 The parties and Gregory Victor Czapp (deceased) are the registered proprietors as tenants in common, each with a 1/5th share, in the property situated at 7 Norton Drive, Melton in the state of Victoria being the land described in certificate of title volume 9400 folio 758 (**the property**).

2 The applicant seeks an order that the first respondent be directed to execute a contract of sale of his interest and the interest of his late father in the property. The first respondent is the administrator of Gregory Victor Czapp's estate.

3 The first respondent has concerns that the sale price is not the best price obtainable. He opposes the order. He says the Tribunal should require the parties to follow the dispute resolution mechanism in Terms of Settlement signed by them on 29 May 2017. He says any breach of those terms should be enforced in a court.

4 The second and third respondents support the applicant's application.

WITNESSES

5 The applicant's evidence consisted of his affidavit affirmed 22 March 2019 and oral evidence, and the affidavit of the second respondent sworn 11 September 2019, and the second respondent's oral evidence.

6 The First Respondent's evidence consisted of his affidavit sworn 9 September 2019 and oral testimony.

FACTS

7 The facts are largely uncontested. The property contains a factory which has been vacant for several years. The premises had been tenanted by Airport Door a business operated by the second respondent. That business went into liquidation.

8 The condition of the premises is poor with significant damage and rubbish. The parties, other than the first respondent, state that the property has been vandalised and significant damage caused through several break-ins and thefts since January 2019.

9 Supreme Court litigation relating to the property commenced in 2017. The proceedings were settled, and the parties signed Terms of Settlement agreeing to a sale of the property.

10 The Terms of Settlement provided that: -

a the property would be offered for sale as soon as reasonably practicable[1];

[1] Clause 1

b each of the parties would promptly and at their own cost remove all their property from the property with any remaining property deemed to have been abandoned and disposed of at the owner's cost;[2]

c CBRE be appointed as the selling agent for the property;[3]

d the second and third respondents obtain from CBRE and circulate written advice (**CBRE advice)** about selling the property including method, price and whether works needed to be carried out on the property before sale;[4]

e The parties will cooperate and use their best endeavours to agree on all matters necessary to effect a prompt sale including execution of all authorities and documents to facilitate such sale at the best price reasonably available taking into account (but not being bound by) CBRE's advice.[5]

11 CBRE were appointed pursuant to the settlement to sell the property. They conducted a marketing campaign and received offers from Multifield Group in the low $1 million range, from Keith Harrison for $1.6 million and from David Stanley for $2 million. CBRE recommended acceptance of the $2 million offer and contracts were prepared and signed by all parties including the purchaser except for the first respondent.

12 The first respondent refused to sign the $2 million contract.

13 There was an exchange of emails between the solicitors for the applicant (Mark Caldwell), and the solicitors for the first respondent (MNG Lawyers), in relation to the $2 million contract and other matters relevant to the Terms of Settlement.

14 In an email of 31 August 2018, the solicitors for the respondent wrote to the solicitors for the applicant, amongst other matters, that

> Upon satisfactory proofs being provided in relation to payments and payment to my client we can then proceed with execution of the contract to lot 5.

The payments referred to costs associated with two other properties addressed by the Terms of Settlement and were unconnected to the property. Lot 5 in the email is a reference to the property.

15 The first respondent says he had no knowledge of the email of 31 August 2018 and would not confirm that it was sent on his instructions. MNG Lawyers were not called to give evidence. The first respondent said he had many meetings with his lawyers and left the letters to his lawyers to write. In the absence of any evidence to the contrary I find it more likely than not that MNG Lawyers acted on instructions from the first applicant and he is bound by the contents of their communications.

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[2] Clause 3
[3] Clause 4
[4] Clause 5
[5] Clause 6

16 The first respondent says that if the property was cleaned up and $2 million was the best price obtainable, he would accept that price.

17 The Terms of Settlement provided that the parties were to, at their own cost, remove all their property from the premises or that property would be deemed abandoned and would be disposed of at the owner's cost. The terms did not specify who would then be responsible for disposal of the property.

18 The first respondent says that the second and third respondents failed to implement any of the CBRE recommendations other than who was to carry out the conveyance.

19 The other parties say that the recommendations were followed to a certain extent and that vandals have this year caused significant damage to the property.

20 The unchallenged evidence was that quotes were obtained for cleaning the premises when it was first to be marketed but that the first respondent refused to contribute to the cost so the cleaning using contractors did not proceed.

21 The first respondent denied at first that that there were any break-ins at the property, but then admitted wiring had been cut and stolen and hard wire pulled out of conduits. Given his admission that wiring was stolen and the evidence of the other parties I find that there had been break-ins and damage caused to the property in 2019 and that the condition of the property is significantly worse than its condition a year ago.

22 The unchallenged evidence is that the estimate to carry out rewiring work at the property is $104,500.[6]

23 The parties did not address the Tribunal on the ownership of the former tenant's goods left in the property. The former tenant is now in liquidation and the liquidator is unlikely to attempt to recover its possessions. The first respondent says the second respondent is liable to clean up that rubbish. As a matter of law, any of the former tenant's abandoned property cannot be said to belong to the second respondent.

24 In late 2018, the parties were in dispute over the CBRE recommendations and whether the first respondent should follow CBRE's recommendation and accept the $2 million offer.

25 The applicant instructed his solicitor to commence the dispute resolution process set out in clause 8 of the Terms of Settlement.

26 Clause 8 of the Terms of Settlement provides:

> In the event that the parties are unable to agree on any matter necessary to effect the sale of Lot 5 and/or Lot 6 (including but not limited to a dispute as to any instruction that should or should not be given to CBRE or the Solicitor), any dispute shall be referred to a

[6] Quotation provided by Cabletech Communications Pty Ltd dated 10 June 2019.

> licensed real estate agent independent of CBRE appointed by the president for the time being of the Real Estate Institute of Victoria for the purposes of resolving such dispute (**Independent Agent**). The Independent Agent shall be required expeditiously and inexpensively to receive submissions from those of the parties that wish to be heard as to the subject matter of the dispute, and to then determine that dispute using the Independent Agent's best judgment. The decision of Independent Agent shall be final and binding upon the parties. The costs of the Independent Agent shall be a cost of sale of the property in question, save that if the decision of the Independent Agent is that (or substantially that) which was advocated for by one or more of the parties, then the costs of the Independent Agent will be borne only by the other party or parties (and the Independent Agent shall also be empowered to determine that question).

27 The applicant's solicitors wrote to the first respondent's solicitors on 12 September 2018 and 2 October 2018 following up on execution of the $2 million contract. Having received no response to that correspondence, the dispute resolution clause in the Terms of Settlement was initiated by the applicant.

28 The uncontradicted evidence is that Donald Brindley was appointed by the Real Estate Institute of Victoria (**REIV**) pursuant to clause 8 of the Terms of Settlement. The engagement was to make a determination about whether the $2 million offer represented market value of the property. He wrote to the solicitors for the parties by letter dated 5 December 2018 setting out the matters he required the parties to agree to before he would accept the appointment.

29 The first respondent says he did not receive the letter although it is not disputed that his solicitors received the letter. In any event he did not sign it. He informed the Tribunal at the hearing that he would sign the letter of appointment of Mr Brindley. No evidence was provided as to whether Mr Brindley was still practicing and if so whether he would accept the appointment on the same terms.

30 It is not disputed that MNG Lawyers contacted Mark Caldwell on 17 January 2019 to determine if the $2 million contract was "still on the table" and that MNG Lawyers would arrange for the first respondent to sign it.[7] It is also not disputed that Mark Caldwell sent two follow up emails to MNG Lawyers asking about execution of the $2 million contract and that no response to these emails was received[8].

31 It is not disputed that the $2 million offer has since lapsed. The same purchaser has made a new offer to buy the property in its current condition for $1.95 million. The decrease in value is said by the applicant to reflect the 2019 damage caused by thieves and vandals and condition of the property.

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[7] Paragraph 19 of second respondent's affidavit
[8] Paragraph 20 & 21 of second respondent's affidavit

32 The applicant and second and third respondents agree to sell pursuant to the $1.95 million contract.

33 The first respondent says his resistance to sign the $1.95 million contract current is that he is unsure whether it is the best price. He produced no evidence to show that a better price was available. He relies upon the recommendations of CBRE given in June 2017 about how to prepare the property for sale and says the pre campaign recommendations were not followed. He does not challenge that the prices is in fact a fair market price but wants some assurance that it is. The recommendations did not specify who would pay for the works recommended by CBRE. The Terms of Settlement did not address this issue.

34 The first respondent did not make any comment upon the fact that CBRE had recommended the $2 million contract be accepted.

FINDINGS/ANALYSIS

35 I find that the first respondent has breached the Terms of Settlement by:

a Not co-operating with the other parties to agree on all matters necessary to effect a prompt sale as required by clause 6. CBRE recommended that the $2 million contract be accepted. The first respondent refused to accept the offer but did not provide any evidence to the contrary to the $2 million contract was not market value. The correspondence in 2018 from the MNG Lawyers to Mark Caldwell demonstrates that the first respondent was using his execution of the $2 million as leverage to obtain other gains. This is contrary to his obligations in the Terms of Settlement; and

b Not signing the Brindley appointment. The first respondent says he did not see the letter from Brindley Consultant. The fact is that the letter was sent to his solicitor and shortly after the solicitor asked for confirmation from Mark Caldwell that the $2 million offer was still available.[9] He had an obligation under the Terms of Settlement to co-operate under clause 7 of the Terms of Settlement.

36 The first respondent submits that the only remedy available to the applicant for breaches of the Terms of Settlement is to sue in a court for specific performance or damages.

37 Counsel for the first respondent submitted that enforcement of the Terms of Settlement was a legal right which was inconsistent with the making of an order for sale.[10] To order a sale was said to frustrate the Terms of Settlement.

38 The Terms of Settlement do not address what happens if a party does not comply with the dispute resolution provision in clause 8.

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[10] Reliance was placed on the decision of Yeo v Brassil [2010] VSC 344 paragraphs 22-24

39 The dispute resolution mechanism in clause 8 was triggered by the applicant. This is not disputed. The applicant is however not required by anything expressed in the Terms of Settlement to do anything further that what he has done. Having gone through the dispute resolution process so far as he was able to do, given the first respondent's lack of cooperation, he can avail himself of all other legal remedies. He has complied with his contractual obligations under the Terms of Settlement. He is not limited to seeking specific performance of those terms. Nowhere in the Terms of Settlement is that limitation imposed on the parties.

40 The first respondent's actions showed a clear intention not to be bound by the Terms of Settlement.

41 One remedy available to the applicant is to bring an application as he has done under s225 and s232 of the *Property Law Act 1958* (Vic).

42 Section 225 (1) provides: -

> A co-owner of land or goods may apply to VCAT for an order or orders under this Division to be made in respect of that land or those goods.

43 Section 232 provides:

> In any proceeding under this Division, VCAT may order—
>
> (a) that the land or goods be sold by private sale or at auction;
>
> (b) that the co-owners may purchase the land or goods at that sale or auction;
>
> (c) in the case of a private sale, that the sale be at fair market price as determined by an independent valuer;
>
> (d) in the case of an auction, that the reserve price is the reserve price set by VCAT;
>
> (e) that an independent valuation of the land or goods take place;
>
> (f) that a sale is to be completed within a specified time;
>
> (g) that the costs of the sale be met—
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> (i) by one or more of the co-owners; or
>
> (ii) from the proceeds of the sale;
>
> (h) that the sale and division of the proceeds of sale or the physical division of the land or goods is subject to any terms and conditions which VCAT considers necessary or desirable in any particular case;
>
> (i) in the case of land, that any necessary deed or instrument be executed and documents of title be produced or other things be done that are necessary to enable an order to be carried out effectively;
>
> (j) in the case of land to which the Transfer of Land Act 1958 applies, directing the Registrar of Titles to make

> amendments to the Register within the meaning of that Act or do any act or make any recordings necessary to give effect to an order under this Division.

44 Importantly, s 228 of the *Property Law Act 1958* (Vic) gives the Tribunal power to make any order it thinks fit to ensure that a just and fair sale of the property occurs.

45 The first respondent did not provide any evidence as to the market value of the property. No valuation was supplied. A property advice prepared by CBRE in June 2017 was tendered by the first respondent. The advice referred to the sale of two lots being the property and another lot. The advice contains some pre-campaign recommendation and an anticipate sale price. The price for the property was stated as between $2,400,000 and $2,600,000. I was not addressed by the parties on the relevance if any of the indicative range to the actual market value.

46 The evidence presented to me as to value can be summarised as follows:

a The highest offer received in the initial marketing campaign conducted by CBRE was $2 million;

b CBRE recommended that the $2 million offer be accepted;

c The second-highest offer was $1.6 million[11];

d The ANZ valued the property in about 2013 at $1.4 million;[12]

e Vandals have caused considerable damage to the property since the original offers;

f The cost to replace a switchboard and wiring (either stolen or damages by vandals) is $104,500[13];

g The purchaser under the current contract, having purchased a neighbouring lot has an incentive to purchase the property. The purchaser will take the property in its current condition;

h In addition to the cost of replacing wiring there will be further costs associated with cleaning up the property if it is to be sold otherwise than in an "as is" condition; and

i There is no evidence that the current offer is not a fair market value offer.

47 The first respondent said, when asked in cross examination if $1.95 million was a fair value for the property, that he could not say whether it was or was not. His issue was that the CBRE recommendation made in June 2017 were not followed. He did not say what effect if any those recommendation will have on the sale price. It is also a matter of dispute between the parties

[11] Paragraph 8 of second respondent's affidavit
[12] Cross examination of second respondent
[13] Paragrapf 22 of second respondent's affidavit

as to how many of the recommendations were in fact followed or completed.

48 The first respondent's action since the end of 2017 have been to delay or frustrate the sale of the property without taking any proactive steps to satisfy himself of the market value.

49 I am satisfied that there is currently a willing buyer who will purchase the property in its current condition. History shows that the parties are unable to cooperate, so it is in their interest to be able to sell the property "as is".

50 It is unfortunate that a valuation has not been obtained. The first respondent did not agree to the appointment of Brinkley Consultants in December 2018 so there is no joint valuation. No party independently obtained a valuation.

51 On the evidence before me[14] I find that the current offer reflects a market value. Given the difficulties the parties have had cooperating to achieve a sale of the property I am satisfied an order requiring the parties to sign the $1.95 million contract will ensure a just and fair sale of the property.

SENIOR MEMBER L. FORDE

[14] See paragraph 44