

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1427/2018

CATCHWORDS

Co-ownership of Land; application for sale under s 225 of the *Property Law Act 1958*; whether proceedings brought by donee of power of attorney are contrary to the instructions of the donor; whether applicant holds his interest in the Land on trust for the respondent; whether an interest in a joint tenancy can be held on trust, orders for sale.

APPLICANT	Trevor Donkin
RESPONDENT	Nicholas Donkin
WHERE HELD	Melbourne
BEFORE	Senior Member L. Forde
HEARING TYPE	Hearing
DATE OF HEARING	12 and 13 June 2019
DATE OF ORDER AND REASONS	12 July 2019
CITATION	Donkin v Donkin (Building and Property) [2019] VCAT 1057

FINDINGS

- 1 I find that the applicant does not hold his interest in the Land at 1A Remon Avenue, Camberwell in the State of Victoria being all that land contained in certificate of title volume 9966 folio 907 (the property on trust for the respondent).
- 2 I find that the commencement and maintenance of this proceeding by Graeme Bird, as attorney, is not contrary to the known wishes and directions of the applicant and is not a breach of trust or fiduciary duty.

ORDER

- 1 I find that the applicant and the respondent are joint proprietors of the property.

- 2 Pursuant to s 228 of the *Property Law Act 1958* the property must be sold and the proceeds of sale, after expenses, be divided equally between the applicant and the respondent.
- 3 **By 6 October 2019**, or such other time as the parties agree, the property, shall be offered for sale by public auction.
- 4 Subject to Order 5 of these orders, the sale shall be conducted by a licensed real estate agent jointly selected by the parties (**‘the Real Estate Agent’**).
- 5 If the parties cannot agree on the Real Estate Agent by **7 August 2019**, then the Real Estate Agent 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 real estate agent to the Principal Registrar who shall consider such submissions but will not be bound by them.
- 6 The Real Estate Agent must conduct the sale using all proper and lawful methods, including advertising as appropriate (whether by board, internet or otherwise) and arranging open for inspection times but not so as to be at an excessive or unreasonable cost.
- 7 Subject to Order 8 of these orders, and in order to give effect to the sale of the Property, 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’**).
- 8 If the parties cannot agree on the identity of the Solicitor by **7 August 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.
- 9 The reserve selling price shall be such price as the parties may agree upon or where the parties cannot agree, as reasonably determined by the Real Estate Agent.
- 10 The terms of the contract of sale shall provide for a deposit of not less than 10% upon the signing of the contract with the balance to be payable on 60 days or such other time as the parties agree.
- 11 Each of the parties may bid at the auction provided he or she holds a written pre-approval from a financial institution for finance for at least the reserve selling price or otherwise provides satisfactory evidence of an ability to pay an amount equalling the reserve price less the amount that would otherwise be payable to that party under Order 15(e) of these Orders.
- 12 Where one of the parties purchases the Property at auction or by private treaty, then the residue payable by that party is to be reduced by the amount that would otherwise be payable to that party under Order 15(b)(v) of these Orders.
- 13 The Real Estate Agent shall appoint the auctioneer for the sale.

- 14 If the Property is not sold at public auction:
- a The Property shall be offered for sale by private treaty at a price to be determined by the Real Estate Agent but not less than the reserve price. The sale price and or the reserve price may be varied by written agreement of the parties or by the Real Estate Agent upon giving the parties 72 hours prior written notice of the Real Estate Agent's intention to vary the sale price or the reserve price.
 - b The advertising costs of the auction will become a charge upon the Property.
- 15 If the Property is sold:
- a 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.
 - b The proceeds of sale will be applied as follows and in the following priority:
 - i Payment of the Real Estate Agent's commission or fee, including the auctioneer's fee and other expenses of the sale;
 - ii The discharge of any registered encumbrance on the Property;
 - iii Payment of any outstanding rates, charges, taxes and imposts which have not already been paid by the First Respondent;
 - iv Payment of the reasonable legal costs associated with the sale and conveyance of the Property; and
 - v The net balance to be paid to the parties in the following proportions:
 - (A) Applicant: 50%
 - (B) Respondent: 50%
- 16 The Principal Registrar is empowered to give such directions and execute such documents as may in his opinion be necessary or desirable to give effect to these orders.
- 17 Where any contract for the sale of the Property by public auction has not been signed by a party prior to the day of the auction, such contract may be

executed on behalf of that party by the Real Estate Agent if the Property is sold.

- 18 Under s 146(4)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*, no person other than a party to the proceeding or their legal representatives may inspect the Tribunal's file of this proceeding unless the Tribunal orders otherwise.
- 19 Costs reserved.
- 20 The parties are at liberty to apply for an order either varying or revoking Orders 3 to 19 of these orders provided such liberty is exercised by 4.00 pm on 24 July 2019 by filing with the Tribunal and serving on the other parties a written notice that they seek to vary or revoke Orders 3 to 19 of these orders.
- 21 These orders are stayed and suspended until 4.00 pm on 31 July 2019 or until further order in the event that a party exercises their right to apply for an order to vary or revoke Orders 3 to 19 of these orders pursuant to Order 20 of these orders.
- 22 For the avoidance of any doubt, Orders 3 to 19 of these orders will come into effect and operation from 4.00 pm on 31 July 2019 if no party exercises their right to apply for an order to vary or revoke Orders 3 to 19 of these orders.

L. Forde
Senior Member

APPEARANCES:

For Applicant

Mr T Messer of counsel

For Respondents

Mr J Foster and Mr T Greenway of counsel

REASONS

BACKGROUND

- 1 The applicant seeks an order for the sale of Land at 1A Remon Avenue, Camberwell in the State of Victoria (**Land**) which he co-owns with his youngest son, the respondent.
- 2 The respondent resists the application on two grounds namely that:
 - i the applicant holds his interest as joint registered proprietor in the Land on trust for the respondent (**Trust Argument**);
 - ii the proceeding is brought by the donee of a power of attorney given by the applicant contrary to the wishes and instructions of the applicant (**POA Argument**).

THE HEARING

- 3 The hearing took place over two days. The applicant relied upon the two witness statements and oral evidence of Mr Graeme Bird, his son-in-law, and the witness statement and oral evidence of Mr D Minogue, his solicitor.
- 4 The respondent relied upon his witness statement and gave oral evidence. The respondent summonsed Mr Anthony Mahon, solicitor, to appear and give oral evidence.

TRUST ARGUMENT

- 5 It is not disputed that on 13 April 2017 a new title for the Land was issued recording the applicant and respondent as joint proprietors of the Land. Previously, the applicant had owned the Land with his wife who passed away in September 2016.
- 6 The respondent asserts that the applicant created a trust in his favour over the applicant's share in the Land on 7 November 2016.
- 7 The respondent relies upon the contents of a letter dated 7 November 2016 from the applicant to his solicitors, Mahons Lawyers as establishing the trust. The relevant part of the letter reads

“Upon finalization of my late wife's estate, I shall become the sole owner of my current residential address, 1A Remon Avenue, Camberwell. I have delivered the original title deed to your office for the express purpose of creating a co-tenancy arrangement with my son, Nicholas. My wish is for him to become the sole owner upon my passing.”
- 8 Counsel for the respondent submitted, and it is well established, that for a valid trust there must be certainty as to the subject matter, the identity of the

beneficiary of the trust and that the creator intended to impose equitable obligations by way of trust.¹

- 9 There is clearly certainty in this matter about the subject matter of the alleged trust being the Land and the identity of the beneficiary being the respondent.
- 10 The issue is whether there was certainty that the applicant intended to impose equitable obligations by way of trust.
- 11 The respondent submitted that an express trust will arise if the applicant used language or acted in a way which indicates an objective intention to create a trust. He says that, objectively construed, the applicant evinced an intention that the respondent be the beneficial owner of the entirety of the Land from the date the applicant and respondent became joint proprietors.
- 12 The respondent submitted that the intention to create a trust was reinforced in later correspondence² and actions. For the reasons that follow it is unnecessary to set out those actions in these reasons.
- 13 The respondent submitted that by providing the original certificate of title to the Land to his solicitors, the applicant perfected his gift of his share in the Land to the respondent.
- 14 The applicant denies the existence of a trust. It was submitted that it is not possible to speak of one joint tenant holding their interest in property on trust for the other as they have no separate interest. For any trust to have arisen, the joint tenancy had to be severed.
- 15 Reliance was placed on the decision of *Wright v Gibbons*³ and in particular the following passage:

“The interest of each joint tenant in the Land held are always the same in respect of possession, interest, title and time. No distinction can be drawn between the interest of any one tenant and that of any other tenant. If one joint tenant dies his interest is extinguished. He falls out, and the interest of the surviving joint tenant or joint tenants is correspondingly enlarged.⁴

“...in contemplation of law joint tenants are jointly seised for the whole estate they take in Land and no one of them has a distinct or separate title, interest or possession. It follows that an attempt on the part of two or three joint tenants mutually to assure each to the other his or her undivided share in the hope that each of their two shares will be taken by a new title and so enure as a several undivided interest, must fail because it can accomplish nothing.”⁵
- 16 The respondent did not make any submissions in response to the argument that an interest in a joint tenancy cannot be held on trust for a beneficiary.

¹ Paragraph 38 of respondent’s submissions

² Letter dated 27 January 2017, exhibit NRJD-8 to respondent’s witness statement. TB 70.

³ (1949) 78 CLR 313

⁴ Lathan CJ at 323

⁵ Dixon J at 329

- 17 I agree with the legal position set out in *Wright v Gibbons*.⁶ It is not possible to speak of one joint tenant holding their interest in property on trust for the other as they have no separate interest.
- 18 Accordingly, given the applicant and respondent are joint proprietors of the Land, the applicant does not have a separate interest in the Land. It is not possible for the applicant to hold his interest in the Land on trust for the respondent.
- 19 The fact that the parties are joint proprietors is enough to defeat the respondent's claim of a trust.
- 20 In any event, I do not accept the respondent's submission that a trust has been created because I do not find that the applicant intended to impose equitable obligations by way of trust. He determined that he and his son would become registered as joint proprietors. There was no mention in his instructions of a desire to create a trust.
- 21 In determining the intention to create a trust, events occurring after the trust was said to be created cannot be determinative of whether there was an intention to impose equitable obligations by way of trust at the relevant time.
- 22 The principles concerning ascertainment of the relevant "intention" to create a trust were considered by the High Court of Australia in *Byrnes v Kendle*,⁷ where Heydon and Crennan JJ said:

The question is what the settlor or settlors did, not what they intended to do. That truth tends to be obscured by constant repetition of the need to search for an "intention to create a trust". That search can be seen as concerning the first of the three "certainties" – what Dixon CJ, Williams and Fullagar JJ called in *Kauter v Hilton*:

"[T]he established rule that in order to constitute a trust the intention to do so must be clear and that it must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries."

But the "intention" referred to is an intention to be extracted from the words used, not a subjective intention which may have existed, but which cannot be extracted from those words. This is as true of unilateral declarations of alleged trust as it is of bilateral covenants to create an alleged trust. It is as true of alleged trusts which are not wholly in writing as it is of alleged trusts which are wholly in writing.

- 23 The statement relied upon to support the creation of a trust is "*I have delivered the original title deed to your office for the express purpose of creating a co-tenancy arrangement with my son, Nicholas. My wish is for him to become the sole owner upon my passing.*"

⁶ *ibid*

⁷ (2011) 243 CLR 253 [113-114]

- 24 The respondent relies on the written words in the letter as creating the trust. No reliance is placed on oral statements. The intention must be extracted from the words used, not a subjective intention.
- 25 The meaning of “co-tenancy arrangement” in the letter is unclear. “Co-tenancy” is a word commonly used in residential tenancies. Two or more persons are tenants of the same property. The work in the letter could be a reference to a joint tenancy or tenants in common. The term is clarified by the final sentence that the applicant’s wish is for the respondent to become the sole owner of the Land after his death. This wish identifies the co-tenancy as being a joint proprietor tenancy rather than a tenancy in common arrangement. The joint proprietor arrangement fulfils the applicant’s wish which was clearly set out as “*My wish is for him to become the sole owner upon my passing*”.
- 26 The intention to create a trust must be clear. The instructions in the letter on their plain meaning are objectively instructions to a solicitor to change the ownership of the Land, once Mrs Donkin’s estate is finalised to a joint tenancy between the applicant and the respondent.
- 27 I find that there was no intention by the applicant to create a trust. I make this finding because:
- i the plain wording in the letter is consistent with a person’s instructions to his solicitor to change the legal ownership of the Land in the future;
 - ii the expression of the applicant’s wish that the respondent become the sole owner of the Land upon his death is instructive of the type of co-tenancy the applicant desired;
 - iii the instructions are consistent with previous instructions the applicant gave his former lawyer, Anthony Mahon in April 2016 in relation to a Cremorne property. Those instructions are confirmed in a letter from Mr Mahon to the applicant. Nowhere in that letter is reference made to the creation of a trust⁸;
 - iv the instructions need to be read as a whole. The words convey instructions to the solicitor to do something in the future which is to create a co-tenancy. The words used do not purport to create an immediate trust; and
 - v there is no clear intention expressed by the words in the letter for the creation of a present trust.
- 28 In summary, I find that no trust was created by the letter of 7 November 2016 for the following reasons:-
- i no trust can arise when the property of the trust is the settlor’s interest as joint proprietor in land; and

⁸ Letter from Mahons to applicant dated 19 April 2016 concerning the applicant’s “desire to transfer property situate 19 Chapel Street Cremorne to your son Nick as an *intervivos* disposition.”

- ii the applicant's instructions in the letter do not show a clear intention to create a trust.

POA ARGUMENT

- 29 The respondent amended its defence on 23 May 2019 to add
- 1B He further says that the proceeding is brought on behalf of the Plaintiff (sic) by his power of attorney who is acting in breach of his duties and obligations as power of attorney by bringing this proceeding contrary to the wishes and instructions of the plaintiff (sic) (as detailed in paragraph 1A(c) herein).
- 30 It is well settled law that to use a power of attorney contrary to the known wishes of the donor is a breach of trust.
- 31 The respondent gave evidence that the applicant had no intention to sever the joint tenancy.⁹ The effect of the sale of the property would be to sever the joint tenancy. The respondent gave detailed evidence about the applicant's various wills and intention for his children to be treated equally. Documents in support of his position were exhibited to his witness statement.
- 32 The respondent made allegations against Mr Bird, the donee of the power of attorney suggestive of improper conduct.
- 33 Mr Bird gave evidence that he was a reluctant donee. His unchallenged evidence was that he recorded in a notebook all conversations with the applicant once he held the power of attorney. The notes formed the basis of his witness statement where he recorded the applicant's conversations with him and the applicant's repeated expression of interest to sell the Land and reject any intention for the respondent to inherit the Land through a joint tenancy.
- 34 Based on the written documentation provided by the parties and history of the instructions given by the applicant to his lawyers, it is clear that the applicant, over the years, changed his mind about his affairs as his relationship with his adult children altered.
- 35 I found Mr Bird to be an honest and reliable witness. He provided his recollection of what the applicant told him based on contemporaneous notes made by him. He did not provide his opinion as to whether what the applicant told him was true. He presented as an attorney who was acting in accordance with the wishes of the applicant as told to him by the applicant.
- 36 He did not present, as was suggested, as someone who was attempting to increase his wife's inheritance from the applicant for his own benefit.
- 37 In contrast, I found the respondent to be an unreliable witness. At times he was evasive and on one occasion when he did not like the questions being

⁹ Witness statement of respondent and exhibit R1 being a letter from Rennick & Gaynor dated 4 July 2018.

asked of him, he had a sudden lapse of memory. He was uncomfortable giving his evidence which at times suggested a lack of candour.

- 38 Mr Bird is not a party to the proceedings. He signed the application pursuant to his power of attorney. Mr Trevor Donkin is and remains the applicant.
- 39 A claim that a proceeding is brought by an attorney acting outside the scope of his power is not a defence to the applicant's claim itself. There are legal avenues to address such a situation. The respondent has not availed himself of those avenues.
- 40 I prefer the evidence of Mr Bird to that of the respondent where it conflicts. I find that the applicant did express his intention to sell the Land on numerous occasions to Mr Bird as detailed in his witness statement. I reject, on the evidence presented, that Mr Bird has in any way acted improperly.
- 41 According to the respondent's claim raised as a defence that the proceedings are brought in breach of the power of attorney is dismissed.

SHOULD A SALE BE ORDERED?

- 42 I have found against the respondent on his two arguments opposing the sale of the Land.
- 43 In any proceeding under part IV of the *Property Law Act 1958 (Act)*, the Tribunal can make any order it thinks fit to ensure that a just and fair sale or division of Land occurs.
- 44 The evidence given by Mr Bird who himself is retired and which was unchallenged is that the Land is unoccupied and earning no income. It is a wasting asset. The applicant is in a nursing home and will never return to the Land. Mr Bird has taken it upon himself to visit the property regularly to check on its security. The property requires maintenance and cleaning which Mr Bird is unable to provide. Mr Bird has arranged for the payment of all outgoings since the applicant vacated the property due to his ill health.
- 45 The respondent did not make any submission in relation to the state of the Land. The respondent submitted that the applicant did not need his share of the sale proceeds to fund his retirement living.
- 46 Having found that the respondent's legal objections to the sale of the Land are unfounded and given the unchallenged evidence about the wasting state of the Land, it is appropriate to make an order pursuant to s 228 of the Act for the sale of the Land. Final orders as to the method of sale will be made after submissions from the parties.

L. Forde
Senior Member