

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING & PROPERTY LIST**

VCAT REFERENCE NO W43/2013

**CATCHWORDS**

CO-OWNERSHIP DISPUTE – Costs – s 232 of the *Property Law Act 1958* - whether the costs of an aborted sale are to be paid by one or more co-owners. Whether conveyancing fees and disbursement are to become a charge upon the property.

<b>APPLICANT</b>	Christina Ganitis
<b>RESPONDENT</b>	George Ganitis
<b>FIRST INTERVENOR</b>	David Henderson
<b>SECOND INTERVENOR</b>	Commercial CBS Pty Ltd (ACN 121 045 225)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member E. Riegler
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	1 October 2014
<b>DATE OF ORDER</b>	13 October 2014
<b>CITATION</b>	Ganitis v Ganitis (Building and Property) [2014] VCAT 1293

**ORDER**

1. Pursuant to s 232(g) of the *Property Law Act 1958*, the Applicant and the Respondent must pay the fees and disbursements of the First Intervenor fixed in the amount of \$5,126.69, such sum to be paid from the proceeds of the sale and settlement of the property located at 4 Kendall Street, Coburg in the State of Victoria or earlier by agreement between the parties.
2. The amount payable to the First Intervenor pursuant to Order 1 of these orders is to become a charge upon the property located at 4 Kendall Street, Coburg in the State of Victoria, being described in Certificates of Title Volume 11345, Folios 717 and 718 to be discharged upon payment of the that amount.

**SENIOR MEMBER E. RIEGLER**

**APPEARANCES:**

For the Applicant	Mrs C Ganitis, in person
For the Respondent	Mr C Kandiliotis, solicitor
For the First Intervenor	Mr D Henderson in person
For the Second Intervenor	Mr P Varellas and Mr T Karoutsos

## REASONS

### This application

1. The Applicant and the Respondent are co-owners of a residential property located in Coburg (**‘the Owners’**). On 14 March 2013, the Applicant lodged an application with the Tribunal, wherein she sought orders for the sale of the Coburg property (**‘the Property’**).
2. The proceeding was heard on 27 November 2013, following which the Tribunal made orders for the sale of the Property. Those orders provided that the real estate agent responsible for the sale of the Property and the conveyancing solicitor were to be selected by the Principal Registrar. In accordance with those orders, both the real estate agent and the conveyancing solicitor were selected by the Principal Registrar.
3. On 12 May 2014, a directions hearing was listed before the Tribunal at the request of the conveyancing solicitor and as a result of difficulties concerning the sale of the Property. In particular, it appeared that the Owners no longer wanted the Property sold, at least in the short term. The Respondent did not appear on that day. Nevertheless, the Applicant advised the Tribunal that neither of the Owners wanted the sale to proceed. Accordingly, orders were made on that day setting aside the order for sale and suspending the ancillary orders.
4. As a consequence of the sale process being aborted, both the conveyancing solicitor and real estate agent sought leave to intervene in order to seek orders that they be paid or reimbursed fees, costs, disbursements or commissions relating to the aborted sale. The First Intervenor is the conveyancing solicitor selected by the Principal Registrar; and the Second Intervenor is the real estate agent selected by the Principal Registrar.
5. The present application concerns those claims; namely:
  - (a) a claim made by the First Intervenor against the Owners or one of them for the legal costs and disbursements resulting from an attempted sale of Property; and
  - (b) a claim made by the Second Intervenor against the Owners or one of them for the commission and other costs associated with the attempted sale of Property.
6. Regrettably, insufficient time had been allocated to hear both claims on 1 October 2014. Consequently, the Second Intervenor’s claim was not reached and therefore adjourned to be heard on 30 October 2014. Nevertheless, the First Intervenor’s claim was heard on 1 October 2014. The *Reasons* which follow set out my findings in respect of that claim.

## Background

7. The Property is described in two separate certificates of title, with the Owners each being registered as the legal owner of one of two equal undivided shares in each allotment. The land was subdivided into two allotments by an instrument dated 13 April 2012. According to the solicitors formerly acting on behalf the Applicant, the Applicant was unaware that the allotment had been subdivided in 2012. Nevertheless, as the dwelling straddles over both allotments, it was impractical to only sell one allotment. Consequently, she sought an order for the sale of both allotments comprising the Property.
8. Initially, the Respondent opposed the sale of the Property. This was confirmed in correspondence from his solicitor dated 6 November 2013. However, it appears that the Respondent's position changed prior to the hearing of the proceeding on 27 November 2013, as minutes of consent orders were signed by the Respondent, which contemplated the sale of the Property, essentially on the same terms as the orders pronounced on that day.
9. The orders made on 27 November 2013, allowed the parties to file submissions as to the selection of a real estate agent by no later than 9 December 2013. No submissions were filed by either party, nor was there any indication of who the parties wanted to act as the real estate agent.
10. Consequently, by letter dated 24 December 2013, the Tribunal wrote to the Owners separately stating:

I refer to the Tribunal's order made in the above proceeding on 27 November 2013. I enclose a copy of those orders for your attention.

In accordance with clause 4 of VCAT orders dated 27 November 2013, I propose to appoint a solicitor to do all things necessary for the purpose of undertaking the legal conveyancing associated with the sale of the property. To assist me in appointing a solicitor, I invite you to nominate three names for the conveyancing of the said property.

In addition, and in accordance with clause 2 of VCAT orders dates [sic] 27 November 2013, I propose to appoint a licensed real estate agent to do all things necessary for the purposes of marketing and selling the property, which is the subject of the Tribunal's order in this proceeding. As a result, I will consider new proposals from Sam Mihelakos & Co Pty Ltd and Commercial CBS Pty Ltd to market and sell the property.

In making these appointments, this in no way renders the Principal Registrar nor the Victorian Civil and Administrative Tribunal responsible or liable to the appointed real estate agent and solicitor for any costs incurred in conducting the sale of the above property.
11. By letters dated 24 December 2013, the Tribunal wrote to Sam Mihelakos & Co Pty Ltd, Commercial CBS Pty Ltd and Barry Plant Coburg inviting each to submit a full proposal for the selling of the Property, including a

schedule of costs and details of the real estate agent's experience and expertise in selling properties similar to the Property.

12. Only Commercial CBS Pty Ltd responded. Attached to that proposal was a further proposal from Stockdale & Leggo Carlton Pty Ltd, which gave a market appraisal of the Property, the amount of commission that would be charged on *successfully selling the property* and a fee schedule of the proposed marketing. As was explained to me during the course of the hearing, Commercial CBS Pty Ltd and Stockdale & Leggo Carlton Pty Ltd operate in unison when marketing and selling residential property in Coburg.
13. By letter dated 7 February 2014, the Tribunal advised both Owners that Henderson's Legal was selected as the conveyancing solicitor and Commercial CBS Pty Ltd was selected as the real estate agent. There was no objection raised by either of the Owners in response to that letter.
14. According to Mr Varellas, the director of Stockdale & Leggo Carlton Pty Ltd, an attempt was made by him to have the Owners sign an Exclusive Sale Authority but to no avail. Mr Varellas said that neither Owner was willing to sign the Exclusive Sale Authority and in fact, ordered him off the Property. Mr Varellas then contacted the First Intervenor, who advised him to prepare a statutory declaration recounting what had occurred. To that end, Mr Varellas prepared an affidavit which stated, in part:
  4. On 4 March at approx. 12pm, I attended the property and spoke at length to both the applicant and respondent regarding signing of the document titled Exclusive Option Authority to appoint Stockdale & Leggo Carlton Pty Ltd and Commercial CBS Pty Ltd to auction the property.
  5. The applicant and the respondent had failed and refused to sign the Exclusive Option Authority.

Both Christina Ganitis and George Ganitis did not want to sign anything instructing us to sell the home as they said they didn't know that we had been instructed by VCAT to sell the property on their behalf.
15. After being advised that there were difficulties in procuring the signatures of both Owners, an *Exclusive Sale Authority* and a *Costs Agreement* filed with the Tribunal by Henderson's Legal were signed by the Principal Registrar on 21 and 26 March 2014 respectively. The signing of those two documents was undertaken pursuant to Order 14 of the Tribunal's orders dated 27 November 2013, which stated:
  14. The Principal Registrar is empowered to give such directions and execute such documents as in his opinion be necessary or desirable to give effect to these orders.
16. The *Exclusive Sale Authority* executed by the Principal Registrar stated that the *Vendor's Price* was \$600,000, which reflected the minimum sale

price specified in the Tribunal's orders dated 27 November 2013. According to Mr Varellas, offers were received above that minimum price but the Owner's maintained that they did not want to sell the Property. On 30 April 2014, the First Intervenor wrote to the Tribunal outlining his concern that there are significant problems with the sale of the Property. In response to that correspondence, the Tribunal ordered that a directions hearing be listed on 12 May 2014.

17. As indicated above, at the directions hearing on 12 May 2014, the Applicant indicated that she was unhappy with the sales process and did not wish the sale to proceed. She further indicated that she had spoken to the Respondent and both were of the same mind. As a consequence, the Tribunal ordered that the orders requiring the sale of the Property be set aside and that the ancillary orders be suspended pending further order. It was at that point that both Intervenors raised the question as to payment of their fees, costs and commission.

### Costs of sale

18. Section 232 of the *Property Law Act 1958* ('the Act') states:

In any proceeding under this Division, VCAT may order -

(a) that the land or goods be sold by private sale or at auction;

...

(g) that the costs of the sale be met –

(i) by one or more of the co-owners; or

(ii) from the proceeds of the sale.

19. The section says nothing about the payment of costs, fees or commissions incurred as a result of an aborted or unsuccessful sale. That raises the question whether the words *costs of the sale* are to be construed widely, so as to also include the costs of any attempted sale or alternatively; construed narrowly, so that the section only operates once a property has been sold.

20. The word *sale* is defined in *The Shorter Oxford English Dictionary* as *the action or an act of selling...Opportunity of selling...A putting up of goods to be sold publicly*. Accordingly the term is not confined to a situation where a property has been sold but also includes the act of selling the property or offering the property for sale.

21. Construing the word *sale* to include the act of selling would empower the Tribunal to make orders relating to the costs of an aborted or unsuccessful sale. In my view, that approach is consistent with the wide powers otherwise given to the Tribunal under s 228 of the Act which states:

In any proceeding under this Division, VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.

22. By contrast, a narrow interpretation of s 232(g) of the Act could lead to unintended consequences. For example, it would not allow the Tribunal to make any order for the costs of a failed public auction, ordered pursuant to s 232(a) of the Act. Although willing vendors might agree on how those costs are to be paid, the situation may be different where one co-owner has previously opposed the sale order. In that situation, how would the costs of the failed auction be paid? Clearly, the lacuna created by such a narrow interpretation of the Act could not have been intended by the legislature, especially when one considers the wide powers otherwise given to the Tribunal under s 228 of the Act.
23. Therefore, it is my view that the words *costs of the sale* include the costs associated with an attempted sale. I do not consider that s 232(g) of the Act restricts the Tribunal's jurisdiction to make an order under that subsection solely to situations where the subject property is actually sold.

### **Who should pay for the costs of sale?**

24. Mrs Ganitis conceded that upon sale of the Property (at some future date), the First Intervenor will be paid his legal fees and disbursements in the amount of \$5,126.69.
25. The Respondent did not contest the amount claimed by the First Intervenor but contended that his legal fees and disbursements should be paid solely by the Applicant. Mr Kandiliotis, the solicitor who appeared on behalf of the Respondent, argued that although the Respondent initially opposed an order for the sale of the Property, the Respondent consented to the Tribunal ordering the sale of the Property and did nothing to prevent its sale at any time thereafter.
26. The submission made by Mr Kandiliotis is somewhat at odds with the affidavit of Mr Varellas. In particular, Mr Varellas stated in his affidavit that both co-owners *did not want to sign anything instructing us to sell the home*. Moreover, email correspondence from the First Intervenor to the Tribunal dated 30 April 2014 recounts a conversation between the First Intervenor and the director of the Second Intervenor, wherein the First Intervenor is advised that both vendors are not assisting in the sale of Property.
27. In my view, the evidence points to both Owners resisting the sale of the Property. Accordingly, I find that in those circumstances, it would be fair that both Owners paid the fees and disbursements claimed by the First Intervenor in equal proportions or alternatively, that those fees and disbursements be paid out of the proceeds of sale when the Property is eventually sold and before distribution between the Owners.

### **Orders**

28. The First Intervenor indicated that he would be satisfied if an order was made that his fees and disbursements become a charge upon the Property

and that he was paid upon sale and settlement of the Property. The Owners did not oppose the imposition of a charge upon the Property as security for the First Intervenor's fees and disbursements.

29. In my view, that is an appropriate order to make. Accordingly, I will order that the Owners must pay the First Intervenor's fees and disbursements fixed in the amount of \$5,126.69 and that such sum shall become a charge upon the Property, pending payment.
30. I will further order that the payment of the Intervenor's fees and disbursements is stayed pending sale and settlement of the Property or earlier if the parties so agree.

**SENIOR MEMBER E RIEGLER**