

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 agents commission on sale are payable and become a charge upon the property.

APPLICANT	Christina Ganitis
RESPONDENT	George Ganitis
FIRST INTERVENOR	David Henderson
SECOND INTERVENOR	Commercial CBS Pty Ltd (ACN 121 045 225)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	30 October 2014
DATE OF ORDER	11 November 2014
CITATION	Ganitis v Ganitis No 2 (Building and Property) [2014] VCAT 1415

ORDER

1. Pursuant to s 232(g) of the *Property Law Act 1958*, the Applicant and the Respondent must pay the commission fees of the Second Intervenor, 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 as otherwise agreed by the parties.
2. No order as to costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mrs C Ganitis, in person
For the Respondent	Mr C Kandiliotis, solicitor
For the First Intervenor	No appearance
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. On 1 October 2014, the First Intervenor’s claim for payment of his fees and disbursements was heard. The amount claimed was \$5,126.69. The Owners both admitted that one or both of them were liable to pay that amount. Consequently, they consented to an order that that sum be payable upon the eventual sale of the Property and that in the interim, that amount is to be a charge levied upon the Property.
6. Given the Owners’ consent, on 13 October 2014 I ordered that the First Intervenor’s fees and disbursements fixed in the amount of \$5,126.69 were to be jointly paid by the Applicant and the Respondent upon sale of the Property and that such sum was to become a charge upon the Property, pending payment. I published *Reasons* on the same day, setting out my findings.
7. The present application concerns the Second Intervenor’s claim for payment of the commission on sale in the amount of \$22,011. The Owners

both oppose any order requiring payment of the Second Intervenor's commission.

Background

8. The background to this dispute is set out in my *Reasons* dated 13 October 2014. For the sake of completeness, I repeat some of what I stated therein.
9. 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.
10. 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 made on that day.
11. 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, failing which the real estate agent would be selected by the Principal Registrar. No submissions were filed by either party, nor was there any indication of who the parties wanted to act as the real estate agent.
12. Consequently, by letter dated 24 December 2013, the Principal Registrar wrote to each of 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.

13. By letters dated 24 December 2013, the Principal Registrar 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.
14. 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.
15. By letter dated 7 February 2014, the Principal Registrar 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.
16. 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 Auction 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 Auction 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.
17. Mr Varellas' oral evidence given during the hearing on 31 October 2014 was consistent with what he stated in his affidavit. Mrs Ganitis' evidence was also consistent with Mr Varellis' account of what transpired, although she added that Mr Varellis' had threatened that if she did not sign the

Exclusive Sale Authority, she 'would lose the home'. This allegation was denied by Mr Varellis.

18. 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, was 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.

19. 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. That minimum sale price is also reflected in minutes of consent orders filed and signed by the Respondent and further, in correspondence dated 12 August 2013 forwarded to the Tribunal by the Applicant's former legal representative, which stated, in part:

As required by the Tribunal, we enclose the following documents.

...

2. A property valuation letter dated, 9 August 2013, from Sam Mihelakos & Co Pty Ltd, estimating that the valuation of said property to be in the vicinity of Six hundred thousand dollars (\$600,000).[sic]
3. An Exclusive Auction Authority by Sam Mihelakos & Co Pty Ltd, dated, 12 August 2013, indicating the reserve selling price, the advertising costs and the commission to be charged by them.

Kindly note that we have solely been instructed to collate the required documentation and to act as the conveyancers, should be Applicant be allowed to sell this property.

20. According to Mr Varellas, offers were received above the *vendor's price*. However, the Owners took no further steps to give effect to those offers. The final offer received by the Second Intervenor was in the form of a contract of sale signed by the prospective purchaser, with a stated sale price of \$667,000, together with the tendering of a cheque for the deposit amount of \$66,700. However, neither of the Owners countersigned that contract of sale.
21. On 30 April 2014, the First Intervenor wrote to the Tribunal outlining his concern that there were difficulties with effecting the sale of the Property. In response to that correspondence, the Tribunal ordered that a directions hearing be listed on 12 May 2014.
22. As indicated above, it was at this point that the Applicant first indicated to the Tribunal that she 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. Consequently, both Intervenors raised the question as to payment of their fees, costs and commission.

Costs of sale

23. In my *Reasons* dated 13 October 2014, I found that s 232(g) of the *Property Law Act 1958* (**‘the Act’**) empowered the Tribunal to order that the costs of an aborted or unsuccessful sale could be met by one or more co-owners. I considered that the word ‘sale’ in the provision was to be construed widely to include an attempted 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.
24. Therefore, I found that the words *costs of the sale* included the costs associated with an attempted sale. I did not consider that s 232(g) of the Act restricted the Tribunal’s jurisdiction to make an order under that subsection solely to situations where the subject property is actually sold. I remain of that view.

Is commission payable on an aborted sale?

25. Mr Varellis submitted that the First Intervenor is entitled to be paid the sales commission of 3.3% inclusive of GST on the highest binding offer made during the sales campaign. That offer was \$667,000, which equates to a commission of \$22,011. That offer exceeds the *Vendors price* of \$600,000, as stated in the *Exclusive Sale Authority*.
26. The relevant terms of the *Exclusive Sale Authority* state:
- 1.3 “binding offer” means:
 - 1.3.1 an offer at the Vendors price and on the terms set out in the Particulars of Appointment which would result in an enforceable contract of sale, if signed by the Vendor and exchanged with the purchaser; or
 - 1.3.2 an enforceable contract of sale signed by the Vendor and the purchaser.

For the purposes of **GC1.3.1** the offer must be in a contract of sale signed by the purchaser and “Vendors price” has the meaning in **GC1.14**.

...

1.13 “sold” is the result of obtaining a binding offer and “sale” and “sell” have corresponding meanings.

...

10.3 a commission is payable in accordance with this Authority, if the Property is **sold**;

27. As mentioned above, a signed contract of sale, together with a deposit cheque in the amount of \$67,700 was procured by the Second Intervenor. According to Mr Varellas, that crystallised the obligation to pay the commission of \$22,011. No advertising or marketing costs have been claimed by the Second Intervenor.
28. Mr Kandiliotis, the solicitor who appeared on behalf of the Respondent, submitted that the payment of the commission only crystallises upon there being a fully executed contract of sale. He argued that the mere tendering of an offer did not crystallise any obligation to pay the commission.
29. In my view, Mr Kandiliotis’ submission is inconsistent with the express words of the *Exclusive Sale Authority*. The written terms are clear and do not suffer from ambiguity. In particular, the word *sold* is defined to include obtaining a *binding offer*. *Binding offer* is defined as obtaining a contract of sale signed by the purchaser at a price at or above the *vendor’s price*. That is precisely what occurred in the present case. Therefore, I find that a *binding offer* was received and as a consequence, the obligation to pay commission crystallised prior to the sale orders being revoked.

Are the co-owners liable to pay the commission?

30. As I have indicated above, the Applicant opposes any order requiring her to pay the Second Intervenor’s commission. As I understand her position, she contends that she was not aware of the appointment of the Second Intervenor and would never have consented to orders for the sale of Property by the Second Intervenor.
31. I have already mentioned, that statement is inconsistent with the Tribunal’s records, which reveal that 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. It is also inconsistent with the Applicant having not raised any issue with the Tribunal or her solicitor after being approached by Mr Varellas in March 2014.
32. Moreover, after the proceeding was listed for directions on 12 May 2014, the Applicant’s former solicitors, *First Legal & Migration Services* wrote to the Tribunal by letter dated 8 May 2014, stating, in part:

The above refers and to your fax of 6 May 2014, enclosing the Victorian Civil and Administrative Tribunal (VCAT) order made before His Senior Member E Riegler, on 5 May 2014.

The said order is to list the matter for a directions hearing at 3:15 PM on 12 May 2014, to consider the matters raised in the email correspondence from Henderson Legal dated 30 April 2014.

We refer to our telephone discussion with VCAT on 6 May 2014 and also as mentioned in our previous correspondence of 12 August 2013, the Applicant intends to represent herself in this matter, however has instructed us to bring the following to your attention:

1. Although it has always been the intention of the Applicant to sell the property at 4 Kendall Street, Coburg Vic 3858, she will seek an order to defer the sale until such time when her health improves, as the Applicant is due to undergo a Thyroid operation at the Royal Melbourne Hospital on 16 June 2014 and has also been suffering from severe pain in her leg/s.

...

2. The Applicant will seek an order from the Tribunal to exclude Terry Karoutsos of Stockdale & Leggo, as the selling Real Estate Agent, and she cannot amicably negotiate the sale of the property with him and has no objection to Commercial CBS Pty Ltd, of 791 Nicholson Street, North Carlton 3054, to be the Real Estate Agents to undertake the sale of the property, as was appointed by His Senior Member R.Walker on 27 November 2013.

[sic]

33. Curiously, that correspondence does not raise any concern over the selection of the Second Intervenor as the selling agent. In fact, it states that she has no objection to the selection of the Second Intervenor as selling agent. The letter simply suggests that the Applicant requires that any sale be deferred for an unspecified period of time, which is precisely what occurred when the proceeding was returned and orders made on 12 May 2014.
34. It is regrettable that the Owners did not raise any issue regarding the timing of the sale or any objection to the real estate agent at an earlier point in time. When asked by the Tribunal why the Applicant did not raise any issue following her confrontation with Mr Varellis in March 2014, the Applicant said that she did not want to bother anyone.
35. In my view, that explanation does not justify not having taken any steps to abate the sale process, especially when one considers that the sale orders dated 27 November 2013, requiring the Property to be sold, remained extant. It was incumbent upon the Owners to have promptly raised any concern over the sale process with the Tribunal, as was their right. In particular, Order 15 of the sale orders dated 27 November 2013 stated:

15. Liberty is reserved to both parties to apply with respect to the terms and conditions of the sale of the Property and any question that might arise in connection with the sale or the execution of any document relating thereto including varying the orders hereby made.
36. However, no issue was raised by them, either in correspondence or in communication with their respective legal representatives. This led to a train of events, which culminated in the First Intervenor having prepared documentation relating to the sale and the Second Intervenor negotiating with prospective purchasers in order to effect a binding offer in excess of the *vendors price*.
37. In the circumstances, I consider that the terms of the *Exclusive Sale Authority* should be given effect to. Therefore, I will order that the Second Intervenor's commission is payable. Given that both Owners had refused to sign both the *Exclusive Sale Authority* and the contract of sale executed by the prospective purchaser, I consider that payment of the commission should be borne equally between them.
38. Having regard to the Applicant's legal representatives' letter dated 8 May 2014, it appears that the Applicant has no objection to the Property being sold by the Second Intervenor, provided she is afforded more time before the sale is completed. That being the case, if a sale can still be procured through the services of the Second Intervenor, then the commission payable would not, in my view, be twice payable if the *Exclusive Sales Authority* remained operative. In other words, the amount that I have found payable would not be payable again if the original binding offer could be resurrected or another binding offer obtained, with the result that a sale is then completed through the services of the Second Intervenor.
39. Accordingly, I find that both Owners are obliged to pay the Second Intervenor's commission in the amount of \$22,011 (or a higher amount if a higher binding offer is subsequently procured by the Second Intervenor) in equal proportions.

Final Orders

40. I note that the Second Intervenor indicated that it would not oppose an order being made that its commission is payable upon sale and settlement of the Property but only if it were allowed to levy a charge upon the Property in respect of that commission. This was the form of order made in respect of the First Intervenor's claim. However, the distinguishing feature in respect of the First Intervenor's claim was that both Owners consented to a charge being levied upon the Property for the amount claimed. That is not the case in respect of the Second Intervenor's claim.
41. In my view, it would not be appropriate to order that the Property be given as security for the payment of the Second Intervenor's commission, absent any agreement to that effect. Such an order would place the Second

Intervenor in a position of secured creditor and give it priority over other creditors. The sale orders made by the Tribunal on 27 November 2013 did not go so far as to grant a charge upon the Property in respect of the real estate agent's commission. Those orders only allowed the advertising costs of an auction (if held) to become a charge upon the Property.

42. Moreover, the sale orders made on 27 November 2013 further contemplated that the real estate agent's commission was payable after the balance of the purchase price had been paid. Therefore, consistent with the orders made on 27 November 2013, I consider that it is appropriate that the payment of the Second Intervenor's commission also be payable out of the proceeds of sale when the Property is eventually sold and before distribution between the co-owners.
43. Accordingly, I will further order that the payment of the Second Intervenor's commission is stayed pending sale and settlement of the Property or earlier if the parties so agree.

SENIOR MEMBER E RIEGLER