

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP244/2015

CATCHWORDS

Property Law Act 1958 – s.225 – order for sale of co-owned land – s.228 – Tribunal to make an order that it thinks fit to ensure that a just and fair sale or division – relationship between co-owners broken down - respondent co-owners requesting sale – no reason not to order sale – net proceeds to be distributed according to beneficial ownership

APPLICANT:	James Edward Miller
FIRST RESPONDENT:	Ian Donald Martin
SECOND RESPONDENT:	Teresa Martin
THIRD RESPONDENT:	Ross Harold Brabham
FOURTH RESPONDENT:	Margaret Brabham
FIFTH RESPONDENT:	John David Stodgell
SIXTH RESPONDENT:	The Estate of Judy Lorraine Stodgell
SEVENTH RESPONDENT:	Robin Gaye Lambert
EIGHTH RESPONDENT:	Craig William Lambert
WHERE HELD:	Melbourne
BEFORE:	Senior Member R. Walker
HEARING TYPE:	Hearing for final orders
DATE OF FINAL ORDER:	30 September 2019
DATE OF WRITTEN REASONS:	8 January 2020
CITATION:	Miller v Martin and Ors (Building and Property) [2020] VCAT 29

WRITTEN REASONS FOR THE MAKING OF FINAL ORDERS

Background

1. On 30 September 2019, following the remittal of this proceeding back to the Tribunal by the Supreme Court of Victoria and in accordance with the terms of that remittal, I made final orders in this proceeding in order to determine the statutory claims according to the evidence already heard and the findings already made by the Tribunal as published in *Miller v Martin*

(*Building and Property*) [2016] VCAT 854 (3 June 2016). The Applicant has now requested written reasons for the making of those orders and these are provided.

2. The parties were at all material times the registered proprietors of the beach house and land situated at 3 Robyn Road, Moggs Creek Victoria, 3231, being the land comprised in Certificate of Title Volume 7528 Folio 135 (“the Property”).

The original hearing

3. By this proceeding, the Applicant sought:
 - (a) a declaration that the First to Sixth and Eighth Respondents held their respective interests in the Property on a resulting or constructive trust for the Applicant;
 - (b) an order that each of them transfer their registered interest to the Applicant;
 - (c) alternatively, an order pursuant to s.228 of the *Property Law Act 1958* that the Property be sold and that the whole of the proceeds be paid to the Applicant.
4. On 26 May 2016, following a lengthy hearing, I determined that the Applicant’s claim that he was entitled to sole beneficial ownership of the Property was not made out and I dismissed the proceeding. During the course of the original proceeding it appears that the Eighth Respondent agreed to transfer his share to the Applicant.
5. Upon an appeal to the Supreme Court of Victoria, As.J Mukhtar, after noting that I had only determined the issue concerning the alleged trust, remitted the matter back to the Tribunal to exercise the jurisdiction under Part IV of the Act according to what is just and fair and according to the findings that have already been made on the question of the resulting trust. The appeal was otherwise dismissed.

The directions given

6. Following remittal, the matter was listed for a directions hearing on 10 September 2018 to determine what directions should be given in regard to the further conduct of the matter. Mr Squirrell of counsel appeared on behalf of the First, Second, Third and Fourth Respondents but there was no appearance by the Applicant or the other Respondents.
7. I gave directions for the filing and service by the parties of submissions concerning the final disposition of the proceeding, excluding any submissions as to costs. I ordered that the final orders would be made on the papers after considering the submissions made.

8. Submissions were duly received from the Respondents' solicitors on 26 September but, by the due date of 21 October 2018, none were received from the Applicant.
9. On 29 October 2018, the Tribunal received an email from the Applicant stating that he had appealed against the orders of the Associate Justice but not indicating whether or not he intended filing any submissions.
10. On 27 November 2018, I directed the filing and service of either submissions or alternatively, an affidavit evidencing that an appeal had been brought.
11. Thereafter, the Tribunal received notification from the Respondents' solicitors that an appeal had been brought but they objected to the final disposition of the matter being deferred until such time as the appeal was heard and determined.
12. On 14 January 2019, after noting that an appeal had been brought, I ordered that the proceeding be stayed until further order and that the parties notify the Tribunal as soon as the outcome of the application for leave to appeal was known.
13. On 9 May 2019, the Tribunal received an application from the Respondents that the matter be fixed for a directions hearing as soon as possible. In an accompanying affidavit, their solicitor, Adriane Leah Whiticker, deposed that, as well as having appealed from the order of As.J Mukhtar, the Applicant, who was self-represented, has also:
 - (a) appealed unsuccessfully to the Court of Appeal against an order for costs made against him in a separate cost hearing before As.J Mukhtar;
 - (b) applied unsuccessfully to the Court of Appeal for an injunction to restrain the Respondents' solicitors from continuing to act; and
 - (c) informed the Court of Appeal that he proposes to appeal from its decision.
14. She expressed concern that, whatever order I make in the final disposition of this proceeding, the Applicant will appeal against it and that therefore it is desirable that the matter be finally disposed of as soon as possible. She also pointed out that the Property, which is a beach house, remains unoccupied and unmaintained and its condition is deteriorating.
15. In response to this application, the Tribunal listed a directions hearing on 23 May 2019. The Applicant appeared in person and the Respondents were

represented by Mr Squirrell of counsel. After hearing from the Applicant and Mr Squirrell, I ordered that the stay on the proceeding be lifted, that the time for the Applicant to file and serve his submissions be extended until 21 June 2019 and the time for the Respondents to file and serve any submissions in reply be extended to 5 July 2019.

16. No submissions were received from the Applicant and, when contacted by the registry on 5 August 2019, the Respondents' solicitors stated that they were not proposing to file any submissions in reply because they had not received any submissions from the Applicant.
17. On 30 September 2019, after considering the submissions filed on behalf of the Respondents, I made a lengthy and detailed order directing the sale of the Property and a division of the proceeds.
18. By Paragraph 17 of the order, the proceeds of sale were to be applied as follows and in the following priority:
 - (a) Payment of the expenses incurred by the solicitor in preparing the Property for sale, including cleaning and removing and disposing of any chattels, belongings, possessions or rubbish on the Property;
 - (b) Payment of the agent's commission, including the auctioneer's fee, advertising and other expenses of the sale;
 - (c) The discharge of any registered encumbrance on the Property;
 - (d) Payment of any outstanding rates, charges, taxes and imposts which had not already been paid;
 - (e) Payment of the solicitor's reasonable legal costs and expenses associated with the sale and conveyance of the Property and with the exercise of the powers conferred upon the solicitor by the order; and
 - (f) The net balance to be paid to the parties in the following proportions:
 - (i) 8/30ths to the Applicant;
 - (ii) 16/30ths jointly to the First, Second, Third and Fourth Respondents;
 - (iii) 3/30ths to the Fifth and Sixth Respondents or, if the Solicitor should be satisfied that their interests had been transferred to the Applicant, to the Applicant; and

- (iv) 3/30ths to the Seventh and Eighth Respondents or, if the solicitor should be satisfied that their interests had been transferred to the Applicant, to the Applicant.
19. The shares payable to the Fifth and Sixth Respondents and to the Seventh and Eighth Respondents were not to be disbursed to the Applicant without the written consent of those Respondents or alternatively, an order of the Tribunal.
20. The Applicant now seeks written reasons for the making of this order.

What remained to be decided?

21. The prayer for relief in the Points of Claim sought the following:
- A. A declaration that the First to Sixth and Eighth Respondents hold their respective interests in the Property on resulting trust and/or constructive trust for the Applicant.
 - B. An order that the First to Sixth and Eighth Respondents transfer all their right title and interest in the Property to the Applicant.
 - C. Alternatively, an order pursuant to section 228 of the *Property Law Act 1958* (Vic.) that the land be sold on such terms and conditions as the Tribunal shall direct.
 - D. An order pursuant to section 233 of the *Property Law Act 1958* (Vic.) that the proceeds of sale after the deduction of selling costs, security costs and legal costs of the sale be distributed to the Applicant in its entirety (100%) alternatively, in such proportions as the Tribunal shall determine.
 - E. Costs.
 - F. Such other order or direction as the Tribunal thinks fit.
22. Under the terms of the remittal, the proceeding was to be finally determined according to the findings already made, which are set out in a very lengthy decision. For the lengthy and detailed reasons accompanying that decision, I determined that none of the First to Sixth Respondents held their interest in the Property on a resulting or constructive trust for the Applicant. That finding effectively determines the orders that were sought in paragraphs A and B of the prayer for relief.
23. The order sought in paragraph C of the prayer for relief that the Property be sold was not contentious and the First to Sixth Respondents agreed that that should occur. The Applicant only sought a sale on the basis that he was to

receive the whole of the proceeds. However, since I had determined that he was not the sole beneficial owner of the Property, that was inappropriate.

24. The effect of the findings already made was that the parties owned their respective registered interests beneficially and, in view of the complete breakdown of the former relationship between the parties and the expressed wish of the First to Sixth Respondents that the Property be sold and the proceeds divided, I thought that a sale was appropriate and that it would be just and fair to divide the net proceeds of sale between the parties according to their registered interests.
25. In this regard, I was told from the bar table that the shares of the Fifth, Sixth, Seventh and Eighth Respondents have either been transferred or are to be transferred to the Applicant. What had actually occurred in that regard at the time that I made a final order was unclear. Therefore, I directed that the solicitor was to enquire as to the ownership of those shares and, either with the agreement of the remaining Respondents or an order of the Tribunal, the proportion of the net proceeds applicable to those shares be paid to the Applicant.
26. Paragraph D of the prayer for relief seeks an order under section 233 of the Act. That section provides as follows:
 - “(1) In any proceeding under this Division, VCAT may order—
 - (a) that compensation or reimbursement be paid or made by a co-owner to another co-owner or other co-owners;
 - (b) that one or more co-owners account to the other co-owners in accordance with section 28A;
 - (c) that an adjustment be made to a co-owner's interest in the land or goods to take account of amounts payable by co-owners to each other during the period of the co-ownership.
 - (2) In determining whether to make an order under subsection (1), VCAT must take into account the following—
 - (a) any amount that a co-owner has reasonably spent in improving the land or goods;
 - (b) any costs reasonably incurred by a co-owner in the maintenance or insurance of the land or goods;
 - (c) the payment by a co-owner of more than that co-owner's proportionate share of rates (in the case of land), mortgage repayments, purchase money, instalments or other outgoings in respect of that land or goods for which all the co-owners are liable;

- (d) damage caused by the unreasonable use of the land or goods by a co-owner;
 - (e) in the case of land, whether or not a co-owner who has occupied the land should pay an amount equivalent to rent to a co-owner who did not occupy the land;
 - (f) in the case of goods, whether or not a co-owner who has used the goods should pay an amount equivalent to rent to a co-owner who did not use the goods.
 - (3) VCAT must not make an order requiring a co-owner who has occupied the land to pay an amount equivalent to rent to a co-owner who did not occupy the land unless—
 - (a) the co-owner who has occupied the land is seeking compensation, reimbursement or an accounting for money expended by the co-owner who has occupied the land in relation to the land; or
 - (b) the co-owner claiming an amount equivalent to rent has been excluded from occupation of the land; or
 - (c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to occupy the land with the other co-owner.
 - (4) VCAT must not make an order requiring a co-owner who has used goods to pay an amount equivalent to rent to a co-owner who did not use the goods unless—
 - (a) the co-owner who has used the goods is seeking compensation, reimbursement or an accounting for money expended by the co-owner who has used the goods in relation to the goods; or
 - (b) the co-owner claiming an amount equivalent to rent has been excluded from using the goods; or
 - (c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to use the goods with the other co-owner.
 - (5) This section applies despite any law or rule to the contrary.”
27. Most of the evidence led during the original hearing related to the allegation by the Applicant that all of the money outlaid to purchase the Property and to pay outgoings and maintenance were provided by him from his own funds.
28. After exhaustively examining all of the evidence produced, I concluded that it was more probable than not that the money referred to came from a common fund of unknown origin which was controlled by the Applicant but

which belonged beneficially to a partnership comprising the Applicant, the First and Fourth Respondents and, at different times, the other parties.

29. Consequently, I found that the money spent and the costs incurred were spent or incurred by all parties and not just the Applicant. This finding was fatal to any claim by the Applicant under section 233. The claim for an adjustment of interests under paragraph D of the prayer for relief therefore fails.

Conclusion

30. By section 228 of the Act, in any application for sale or division of land, the Tribunal is to make an order that it thinks fit to ensure that a just and fair sale or division of the land occurs.
31. In the absence of an order under section 233, it is just and fair that the parties should share the proceeds of sale according to their beneficial interests in the Property and that is what was ordered.

SENIOR MEMBER R. WALKER