VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP156/2019

CATCHWORDS

Property Law Act 1958 – Pt IV - sale of co-owned land – circumstances in which order for sale may be refused - joint venture agreement containing agreed terms of sale - whether bar to an order - co-ownership not partnership - co-owner not entitled to insist upon separate contracts - co-owner's individual share not co-owned property - order for sale must be in accordance with agreed terms – impact of goods and services tax no reason to depart from agreed terms

APPLICANT	Howard Morey
RESPONDENT	Auslong Development Management Pty Ltd (ACN 601 133 180)
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Hearing of preliminary point
DATES OF HEARING	21-22 October 2019
DATE OF ORDER	15 January 2020
CITATION	Morey v Auslong Development Management Pty Ltd (Building and Property) [2020] VCAT 51

ORDER

1. Order pursuant to Part IV of the *Property Law Act* 1958 that the three allotments of land which are the subject of this proceeding be sold upon terms to be determined by the Tribunal consistent with the attached reasons.
2. The terms of the order for sale will be determined following the hearing fixed for 4 February 2020.
3. The application by each party for an adjustment of rights and any claim for damages will be adjourned to a date to be fixed. Directions in regard to any such claim shall be given at the hearing fixed for 4 February 2020.
4. Costs will be reserved.

R. Walker
Senior Member

APPEARANCES:

For Applicant	Mr D. Epstein of Counsel
For Respondents	Mr H. Redd of Counsel

REASONS

Background

1 The Applicant and the Respondent are and have been since 19 November 2018, the registered proprietors of a piece of land in Waltham Road Blackburn ("the Land") which is subdivided into three separate allotments ("the Lots").

2 As to each of the Lots, the Applicant is registered as the holder of two equal undivided 1/5 shares in an estate in fee simple as tenant in common with the Respondent, which is registered as the holder of the remaining three equal undivided 1/5 shares.

3 By this proceeding, the Applicant seeks an order pursuant to Part IV of the *Property Law Act* 1958 ("the Act") that the Lots be physically divided between the parties or alternatively, for an order that they be sold and the proceeds divided. An order is also sought pursuant to s.234 of the Act for an accounting and compensation.

4 In its Points of Defence, the Respondent contends that the power to order a partition or sale of the Lots pursuant to the Act should not be exercised because to do so would be inconsistent with the terms of a joint venture agreement ("the Joint Venture Agreement") entered into between the parties.

5 The proceeding was fixed by the Tribunal for hearing on 21 October 2019 with two days allocated.

6 A week before the time fixed for the hearing, on 14 October 2019, the Respondent applied for a stay or to strike out the proceeding on the ground that it had issued proceedings in the County Court against the Applicant in relation to substantially the same dispute. The orders sought by the Respondent were refused and directions were given that the hearing fixed for 21 October 2019 would proceed as listed. The Tribunal also ordered that, if the parties were unable to agree on outstanding valuation issues by 31 January 2020, the question of valuation would be determined at a hearing fixed for 4 February 2020 at 10.00 am.

The hearing

7 The matter came before me for hearing on 21 October 2019 with two days allocated to decide whether or not a sale or partition should be ordered. Mr D. Epstein of counsel appeared for the Applicant and Mr H. Redd of counsel appeared for the Respondent.

8 Evidence was given on affidavit. For the Applicant, there were three affidavits filed by him, sworn 4 September 2019, 11 October 2019 and 21 October 2019. There was also an affidavit by a valuer, Colin Robertson, sworn 19 September 2019.

9 For the Respondent, there were two affidavits by its director, Daniel Albert Edwards, sworn 27 September 2019 and 17 October 2019. The Applicant and Mr Robertson were cross-examined.

10 After hearing evidence, I reserved my decision and gave directions for the filing and service of submissions and for the filing and service of any further valuations for the hearing on 4 February 2020.

11 Pursuant to these directions, submissions were received from the parties on 15 November and submissions in reply were received on 22 November 2019.

The acquisition of the Land

12 The Applicant had originally purchased the Land together with his former son-in-law and the son-in-law's father. He said that his intention at the time was to subdivide the Land into three allotments and that he would build a house on one of the allotments to live in with his wife.

13 Due to a change of domestic arrangements, the son-in-law and his father sold their 60% share to the Respondent by a contract of sale that was signed in about 2 September 2014. Highly detailed evidence of the negotiations that led to this purchase were provided in the Applicant's affidavit material but it is generally irrelevant to what I have to decide.

The Joint Venture Agreement

14 On 15 September 2014, before the Respondent's purchase of it 60% interest was settled, the Applicant and the Respondent entered into the Joint Venture Agreement. By recital C, the parties noted that they wished to reach agreement on the terms upon which they would undertake a development upon the Land. "Land" was defined as the land comprised in Certificate of Title Volume 5127 Folio 225, that being the Land, the subject of this proceeding prior to its subdivision.

15 Relevant definitions in the document for present purposes are:

> **Agreed Arbiter** means the nominee of the President of the Law Institute of Victoria.
>
> **Cost** includes any cost, charge, expense, outgoing, payment or other expenditure of any nature whatsoever, including legal fees.
>
> **Excluded Expenses** means:
>
> (a) taxes payable by a party other than GST in connection with the Project;
>
> (b) expenses incurred by a party to protect or obtain advice about its own interests, such as personal accounting or legal expenses.
>
> **Project** means the subdivision and sale of the Land into three separate titles - together with any applicable common areas.
>
> **Project Bank Account** means the bank account to be opened as required by Clause 3.5(a).

Project Expenses means all costs or expenses incurred by the parties in pursuance with *(sic.)* the Project other than Excluded Expenses.

Proposed Lots means each of the Lots (other than common areas) on the Proposed Plan of Subdivision.

Proposed Plan of Subdivision means such plan of subdivision as the project land surveyor may recommend and includes such replacements to such proposed plan as the parties may agree upon and adopt from time to time.

Respective Proportion means:

(a) in respect of Morey - 40%;

(b) in respect of Auslong - 60%.

16 The operative terms of the document were as follows:

"**3.1 The Project**

The parties agree to undertake the project on the terms of this Joint Venture Agreement.

3.2 Marketing and sale of Lots

The parties will do all that may be reasonably required of them to:

(a) subdivide the Land in accordance with the Proposed Plan of Subdivision;

(b) enter into contracts to sell all of the proposed Lots;

as soon as reasonably possible.

3.3 Agreed servants, agents and consultants

Unless otherwise agreed, the servants or agents and consultants set out in Schedule 1 shall be engaged to perform the functions set out against their name in Schedule 1.

3.4 Decision making

Where the parties are unable to agree on a matter concerning the Project (Dispute), any of the parties may refer the matter as to which agreement has not been reached to the Agreed Arbiter for that Agreed Arbiter to either:

(a) express his or her opinion as to the preferred resolution of the dispute as an expert; or

(b) nominate a third party to do so.

The parties shall be bound to adopt the opinion of the Agreed Arbiter or his nominee as to the preferred resolution of the dispute, and agree between themselves to proceed in accordance with that opinion. The parties must do all things which may be reasonably required of them to facilitate the prompt and economical determination of the Dispute, including providing such information and using their best endeavours to reach agreement as to all matters which may be necessary to facilitate the provision of an opinion by the Agreed Arbiter or his nominee. The parties agree not to make any claim against the Agreed Arbiter or his nominee as a consequence of any opinion he may form.

3.5 Bank account

(a) The parties shall open an account in their joint names at the Camberwell Branch of the ANZ bank for the sole purpose of the Project.

(b) All monies received by way of contributions to Project Expenses or the proceeds of the sale of Proposed Lots shall be paid into the Project Bank Account.

(c) The monies held in the Project Bank Account from time to time shall be used for the sole purpose of paying Project Expenses or distributions to the parties in accordance with this Joint Venture Agreement.

3.6 Contributions to project expenses

(a) The parties shall from time to time determine:

(i) what funds are necessary to fund the actual or anticipated Project Expenses;

(ii) what contributions should be made by a party.

(b) Unless otherwise agreed:

(i) the contributions required of the parties shall be in the Respective Proportions: and

(ii) each party shall make the contribution to the Project Bank Account required pursuant to Clause 3.6(a) above within seven days of a determination made pursuant to Clause 3.6 (a).

(iii) if there is at any time insufficient monies held in the Project Bank Account to pay Project Expenses which are due and payable (Shortfall), the parties shall promptly pay into the Project Bank Account the Respective Proportion of the shortfall.

3.7 Contracts with third parties

The parties shall jointly and severally enter into such contracts with third parties as are necessary or convenient to undertake the Project

3.8 Mortgage over the Land

The parties agree that they will jointly and severally grant a mortgage over the Land as security for borrowings to complete the Project.

3.9 Interest on advances

Interest shall be paid or allowed on funds not paid when due at the rate of 7.5% per annum calculated monthly.

3.10 Distribution of profits or losses

After payment of all expenses other than Excluded Expenses the net profit or losses of the Project shall be distributed/born in accordance with the Respective Proportions.

3.11 General obligations of each party

Each party undertakes to each other party to:

(a) be just and faithful to, and cooperate with, the others in relation to all matters concerning the Project:

(b) do and cause to be done all acts necessary or desirable for the implementation of the Project;

(c) not to mortgage, charge, sell, transfer, assign or otherwise part with or encumber their interest in the Land, without the prior written consent in writing *(sic.)* of all other parties;

(d) not unreasonably delay any action, approval, direction, determination or decision required under this Joint Venture Agreement; and

(e) not be involved, whether directly or indirectly, with any activity which may prejudice the achievement of the objective of maximising the profits available to be distributed to the parties as a consequence of the Project as soon as reasonably practicable."

The subdivision of the Land

17 The real issue between the parties appears to be, whether GST is payable on any sale of the Applicant's share of the Lots. The Applicant contends that it is not liable for GST on his share. That is disputed by the Respondent.

18 According to Mr Edwards, the dispute about GST arose when, in about November 2014, he told the Applicant that the Respondent's external accountant, Mr Huang, had advised that the joint-venture was likely to be considered by the Australian Tax Office to be a tax law partnership or a general law partnership and so it should be registered for GST. He said that he left the matter to be discussed between the Applicant and the Respondent's accountant.

19 On 27 July 2015, Mr Huang sent some taxation office rulings to the Applicant in regard to the matter. The email was copied to Mr Edwards and Mr Wei. Almost immediately afterwards, the Applicant sent an email to Mr Edwards and Mr Wei, stating:

> "Hi Jay and Daniel
>
> We may need to amend the agreement as it is my intention to have my gains treated as a capital gain, we may need to add that I have the option of keeping one block (which I won't keep). Just thinking out loud and I will come up with some other options which we can discuss. The end result we do not want to set up a separate legal partnership for us. I have not read the ruling and will not have the chance until later this week."

20 It would seem from this email that it was not the Applicant's intention to keep a block but rather, to amend the agreement so that he had the option of keeping one, even though that he did not intend to keep it. The apparent purpose of this amendment was to avoid the imposition of GST.

21 Mr Edwards said that the issue of the Applicant wanting to retain a lot did not come up again until 21 April 2016 when the Applicant told Mr Edwards in an email:

> "Just confirming this will not have an impact on the registering of the subsequent titles - that is my preference to have ownership of one block and the balance in the other, which would be around 10% each subject to valuation. I imagine that can be sorted out before registering the titles?"*(sic.)*

22 At this stage there was also a discussion about whether, if the parties took separate titles, stamp duty would be payable on the transfers. In an email that he sent to the Respondent's solicitors on 22 April 2016, Mr Edwards asked whether stamp duty would be payable, and stated:

> "As discussed, it is (& always has been) Howard's intention to retain one block after the subdivision, for the purpose of constructing a new residence for his use."

In his affidavit, Mr Edwards said that the text of this email did not accurately reflect the history of the matter and was an error by him, motivated at the time by a misconceived desire to assist the Applicant.

23 On 13 January 2017, the Applicant sent an email to Mr Edwards and Mr Wei, saying, amongst other things:

> "I have reconsidered and have decided that we should enter into contracts to sell all proposed lots asap as per the JV agreement.
>
> Now is a very good time to sell."

24 The parties obtained a permit to subdivide the Land on 8 February 2016, following a hearing in this Tribunal. A conveyancer, Byways Conveyancing, was engaged to act for the parties in regard to the sale of the Lots.

25 On 16 January 2017, the parties obtained planning permission from the local council to develop the three Lots. An appeal to this Tribunal by objectors was unsuccessful and, on 24 August 2018, the Tribunal directed that permits for a dwelling on each Lot be granted.

26 On 7 August 2017, an authority was signed, authorising an estate agent, Jellis Craig Blackburn Pty Ltd, to sell all three Lots at prices to be confirmed. According to this document, the sales were to be GST inclusive.

27 Sales brochures and marketing material were prepared and approved by the Applicant, Mr Edwards and Mr Wei throughout September 2017.

28 According to Mr Edwards, on the afternoon of Friday, 13 October 2017, the Applicant telephoned him. In his witness statement, he provides the following account of the conversation that he says took place:

> "He said that it had become clear to him that he faced too much risk associated with how he intended to deal with his tax liabilities, so it had become clear to him that he needed to retain a lot, and accordingly, that he was retaining Lot 1 and that this property was to be taken off the market immediately. He also made claims that if he was to do this there would be no liability for GST on the sale of his interest in any of the lots. Given at this stage the selling agents had made clear to me that the majority of buyer interest was focused on

> Lot 1, I raised concern to Howard that such an action had the potential to "derail" the sales and marketing of all 3 lots and furthermore, having agreed to go to the market, it was too late to now make such a demand. I said to him that one possibility might be to let the existing sales process continue until we had acceptable offers on two out of the three properties, and that we could then discuss arrangements whereby he could retain the remaining lot. However, he said he was not interested in that, and that he insisted that he acquire Lot 1. The call ultimately terminated with no agreement having been reached."

29 In his third witness statement, the Applicant denied that he had said anything to the effect that he thought there was too much risk associated with how he intended to deal with his tax liability. He did not respond to anything else that Mr Edwards said about this conversation.

30 On 15 October 2017, the Applicant sent an email to the estate agent, copied to Mr Edwards and Mr Wei, to say that there was a dispute between the three of them that needed to be mediated and that until it was resolved, he was unable to sign either the Section 32 statement or a contract of sale.

31 On 15 October 2017, after the Respondent's director, Mr Edwards, informed the Applicant that they were not prepared to renegotiate the agreement so as to allow him to retain one of the Lots, the Applicant sent an email to the Respondent's directors stating:

> "I am invoking clause 3.4 of the agreement and that I am raising we have a dispute as per the agreement as advised in your previous email.
>
> Do you wish for me or yourself to advise the Law Institute to seek an agreed arbiter."*(sic.)*

32 The Applicant received an email the following day from Champions, Solicitors:

(a) complaining that the Applicant was in default under the Joint Venture Agreement, in that he had failed to sign statements required by Section 32 of the *Sale of Land Act* 1962 for the proposed Lots and requiring him to do so without delay, saying that if the default continued the Respondent would look to him for any resulting loss;

(b) requiring him to pay a further sum of $2,000.00 into the joint venture bank account to match a contribution of $3,000.00 paid by the Respondent; and

(c) saying that his reference to an agreed arbiter was misconceived.

The Supreme Court proceedings

33 On 16 November 2017, the Respondent issued Supreme Court proceeding SC1 2017 04664 complaining that the Applicant had failed, neglected and refused to sign Section 32 statements in respect to the three Lots, despite having been requested to do so, and had failed to pay his proportion of the joint-venture expenses, then said to be $12,000.00, into the project bank account.

34 On 28 June 2018, the Supreme Court proceedings were settled upon terms whereby the Applicant agreed:

(a) to do all that may reasonably be required of him to enter into contracts to sell all of the three Lots;

(b) to sign statements pursuant to Section 32 of the *Sale of Land Act* 1962 for the sale of each lot; and

(c) to sign an agreement under Section 173 of the *Planning and Environment Act* 1987 in the form proposed by the Respondent's lawyer.

35 It appears to be common ground that, by this time, the real estate market had declined and the value of the Lots had dropped substantially.

36 On 15 August 2018, the Respondent's solicitors wrote to the Applicant's solicitors complaining that the Applicant had:

(a) insisted that separate contracts of sale be prepared for the sale of his interest in each of the Lots;

(b) insisted that the contract for the sale of his interest not be inclusive of GST;

(c) refused to accept advice that the sales of his interests in the Lots would not be GST exempt; and

(d) refused to cooperate with the Respondent.

The auction

37 The estate agent had advised that Lot 1 should be marketed first. It was agreed that it would be offered for sale by public auction on 15 September 2018. The argument as to whether or not GST was payable with respect to the Applicant's share remained unresolved.

38 By a letter dated 7 September 2018, the Respondent's solicitors said that, in order to mitigate its loss and allow the auction to go ahead, there would be a separate contract for the sale of its own interest provided that the contract complied with its GST obligations as it understood them to be. The letter said that in taking this course, the Respondent in no way accepted that the use of a separate contract was appropriate and it maintained that the Applicant's insistence on separate contracts was a breach of its obligations under the Joint Venture Agreement.

39 The Respondents sought the Applicant's agreement to use the same conveyancer but he refused to agree and engaged his own solicitors for the sale of his 40% share.

40 It is common ground that the only bid received at the auction from a prospective purchaser was for $1,160,000.00. Following consultation with the parties, the auctioneer made another vendor bid and, there being no further bids, the Lot was passed in.

41 The Applicant said in evidence that he had wanted to accept the bid of $1,160,000.00 but that Mr Edwards and Mr Wei refused to accept it. Mr Edwards denied that allegation and said that the instruction to the auctioneer to reject the bid and make a further vendors' bid was by agreement between all parties. I think that it is unlikely the auctioneer would have made a further vendor bid without the instructions of all parties so I prefer Mr Edwards' evidence in this regard.

42 Negotiations proceeded with the only bidder. According to the Applicant, in late October 2018 the Agent informed the parties that the prospective purchaser was willing to pay $1,200,000.00 upon terms whereby settlement would occur in February the following year. The Applicant said that he informed the agent that he accepted the offer but that it was refused by the Respondent. Mr Edwards said that this offer was subject to a deposit of only 5% and the purchaser selling his existing property. He said that the Applicant had declined the offer. He attached to his witness statement an email from the estate agent to this effect. I prefer the evidence of Mr Edwards.

43 A number of valuations of the three Lots were obtained by both parties in 2018 and 2019, showing a range of anticipated values.

44 According to the Applicant's affidavit, the market thereafter dropped and the advices concerning the value of the Lots that were given to them by the agent progressively reduced.

The dispute resolution process

45 Following the failure of the auction, further progress on the sale of the Lots was frustrated by the dispute as to whether the sale of the Applicant's interest in each Lot would be GST exempt. The Applicant continued to assert that it was exempt and the Respondent maintained that it was not. Each party obtained a ruling from the Australian Tax Office that appeared to support his or its position.

46 Although the Applicant had indicated in his email of 15 October 2017 that he was invoking the dispute resolution procedure in the Joint Venture Agreement, it does not appear that he took any steps in this regard. However, on 31 January 2019, he commenced this proceeding seeking an order for the partition or sale of the Land and the division of the proceeds of sale.

47 While the Applicant pursued its remedy in this proceeding, the Respondent sought to use the dispute resolution process set out in Clause 34 of the Joint Venture Agreement. Both processes continued side-by-side.

48 By letter dated 15 February 2019, the Respondent's solicitors wrote to the President of the Law Institute of Victoria seeking the nomination of an agreed arbiter in respect of the dispute between the Respondent and the Applicant.

49 By letter dated 8 March 2019, the President of the Law Institute of Victoria notified the Respondent's solicitors that he had nominated Professor John Sharkey to act as arbiter.

50 Professor Sharkey noted that he had been requested to provide an opinion as to:

(a) whether any goods and services tax (GST) was payable in respect of the sale of Mr Morey's interest in certain subdivided lots of land; and

(b) whether the proceeds of sale of Mr Morey's interest in each of the lots were required to be paid into the project bank account.

51 Professor Sharkey said that, by letter dated 2 April 2019, the Respondent's solicitors provided its contentions concerning the dispute and enclosed a number of documents upon which it relied.

52 By letter dated 3 April 2019, the Applicant's lawyer said (inter alia):

> "We are instructed to advise the appointed Arbiter that our client does not intend to participate in the arbitration of the matter …
>
> "…our client does not agree to enter into any formalised arbitration of this matter whilst proceedings are afoot."
>
> "…we have not formally nor informally agreed to your engagement"

53 They also stated:

> "In the attachments provided by Reddie Lawyers in their 2 April letter, we draw your attention to the following correspondence which outlines the position maintained by our client:
>
> 1. a letter from PCL Lawyers to Reddie Lawyers dated 8 March 2018; and
> 2. email from Ms Restall to Mr Reddie dated 15 March 2019 at 8:22 AM."

54 On 15 April 2019, the present proceeding in this Tribunal came before me for directions. Mr Epstein of counsel appeared for the Applicant and Mr Redd of counsel appeared for the Respondent. I directed the filing and service of pleadings, statements of contributions and receipts by the Respondent and I listed the matter for a full day's mediation on 31 May 2019 and for a full hearing on 21 October 2019. Directions were also given for the filing and service of affidavit material.

55 Notwithstanding the contentions of the Applicant's solicitors in their letter of 3 April, Professor Sharkey informed the parties on 18 April 2019 that he proposed to proceed with the matter and, gave directions for the filing and delivery of submissions, which were to be filed and delivered by the Respondent, on 26 April 2019, and by the Applicant, on 3 May 2019.

56 On 24 April 2019, the Applicant's solicitors sent an email to Professor Sharkey confirming that the Applicant refused to be involved in any arbitration process, asserting that there was no power to make a ruling and

that the Applicant would bring a further application before this Tribunal and rely on the correspondence as to costs.

57 In response, Professor Sharkey extended the time for the Applicant to file and serve submissions to 8 May 2019 and confirmed that he proposed to proceed unless restrained. Thereafter, no submissions were made on behalf of the Applicant.

58 On 10 May 2019, Professor Sharkey informed the parties that he would deliver his opinion on the basis of the materials provided to him without conducting any formal hearing.

59 On 15 May 2019, Professor Sharkey published his opinion, which is in the following terms:

> "Having considered the matters referred to me I am of the opinion that:
>
> (a) in entering into the Joint Venture Agreement the parties formed a general law partnership;
>
> (b) the partnership thus created is liable for GST on taxable supplies that it makes;
>
> (c) each of Auslong and Mr Morey is jointly and severally liable to pay GST on any such supply;
>
> (d) the projected GST turnover is above the GST registration turnover threshold of $75,000 as a consequence of which the partnership is required to be registered for GST;
>
> (e) the sale of any lot will constitute a taxable supply for the purposes of the Act; and
>
> (f) the proceeds of any sale of a lot must be paid to the credit of the project bank account."

60 The mediation listed in this proceeding occurred on 31 May and the matter was listed for a telephone mention on 14 June 2019. However, the matter was not resolved.

61 On 30 September 2019, the Respondent commenced proceedings in the County Court of Victoria seeking specific performance of the Joint Venture Agreement, damages and interest. It is unclear why this was done, since the dispute was listed to be determined in this proceeding and would be heard only three weeks later. As stated above, an application by the Respondent to the Tribunal for an order striking out the current proceeding and referring the matter to the County Court was refused on 14 October 2019.

The Law

62 Power to make orders with respect to co-owned land is conferred by s.225 of the Act which, where relevant, provides as follows:

> "Application for order for sale or division of co-owned land …
>
> (1) A co-owner of land … may apply to VCAT for an order or orders under this Division to be made in respect of that land …...

(2) An application under this section may request—

(a) the sale of the land … and the division of the proceeds among the co-owners; or

(b) the physical division of the land …. among the co-owners; or

(c) a combination of the matters specified in paragraphs (a) and (b)."

63 By s.228 of the Act, in determining such an application, the Tribunal may make any order it thinks fit to ensure that a "just and fair" sale or division of the land occurs. In doing so, it may order the sale of the land and the division of the proceeds of sale among the co-owners, the physical division of the land or a combination of the two.

64 By s.229, a sale and division of the proceeds is to be preferred unless the Tribunal considers that it would be more just and fair to make an order for a physical division or a sale and a division. In determining that, the Tribunal must consider:

(a) the use being made of the land;

(b) whether the land is able to be divided and the practicality of dividing it;

(c) any particular links with or attachment to the land, including whether it is unique or has a special value to one or more of the co-owners.

65 By s. 230, if it considers it just and fair, the Tribunal may order—

(a) that the land…..be physically divided into parcels or shares that differ from the entitlements of each of the co-owners; and

(b) that compensation be paid by specified co-owners to compensate for any differences in the value of the parcels or shares when the and…are divided in accordance with an order under paragraph (a).

66 The Tribunal can include in the order an appointment of trustees under s. 231 for the purpose of effecting the sale or division.

67 There are extensive powers conferred by s.233 for orders to be made for compensation and accounting and for an adjustment to a co-owner's interest in the land so as to take account of moneys payable by co-owners to each other during the period of co-ownership. In determining whether to make such an order, the Tribunal must take account of:

(a) any amount that a co-owner has reasonably spent on improving the land;

(b) any costs reasonably incurred by co-owner in the maintenance or insurance of the land;

(c) the payment by a co-owner of more than that co-owner's proportionate share of rates, mortgage repayments, purchase money, instalments or other outgoings in respect of the land for which all the co-owners are liable;

(d) damage caused by the unreasonable use of the land by a co-owner; and

(e) in certain circumstances 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.

68 For some guidance as to the application of this section and equivalent legislation in other states, Mr Redd referred me to a number of authorities.

69 In *Re McNamara and the Conveyancing Act* (1961) 78 WN (NSW) 1068, Myers J said:

> "As I have previously said I do not consider that there is an absolute duty in the Court to make an order merely because the parties are co-owners and although I adhere to my refusal to attempt to define the nature of the matters which would be a bar to the application, what I had in mind was some proprietary right, or some contractual or fiduciary obligation with which an order for sale would be inconsistent. I see no reasons for reconsidering the view I previously took, and I am still of the opinion that the Court has no general discretion which would enable it to refuse an application on such grounds as hardship or unfairness."

70 In *Ngatoa v Ford* (1990) 19 NSWLR 72 (at p.76) Needham J said:

> "In *Re Bolous* [1985]2 Qd R 165 at 167, Ryan J followed the view of Myers J in *Re McNamara* and held that the facts that the property in question was being used for partnership purposes, and that it may be partnership property, was circumstances which made it inappropriate to make an order for the appointment of statutory trustees for sale of the property. He said that such an order would be inconsistent with the rights of the parties under the partnership agreement."

71 In *Hogan v Baseden* [1997] NSWCA 151 the New South Wales Court of Appeal said:

> "It follows that in the unhappy event that the parties are unable to settle their differences then the making of an order appointing trustees for sale seems inevitable unless the Respondent could establish a legally binding agreement not to put her out of occupation of her home, or circumstances that would ground some estoppel to similar effect."

72 In *Yeo v Brassil* [2010] VSC 344, Judd J, referred to the foregoing passages from *Re McNamara* and *Hogan v Baseden* and said (at paras. 23-4):

> "23 I would respectfully adopt the general principles applied by the Supreme Court of New South Wales and the New South Wales Court of Appeal as providing appropriate boundaries to the circumstances in which a court may properly decline to exercise the power to order a sale or division of property when it has jurisdiction to do so. The court has no general discretion which would enable it to refuse an application on grounds of hardship or unfairness.

> 24 The evidence before the tribunal and this court did not disclose the existence of a legal or equitable right with which the making of an order for sale would be inconsistent. An existing contract of sale would, no doubt, constitute such a right, but a mortgage, charge or other form of security would not. Section 225(3) required notice to be given to the holder of a security interest over the land. There was no suggestion that notice was not given to the bank and there was no evidence that the bank had itself taken any step inconsistent with the making of the order sought."

73 Mr Redd referred me to the case of *Callahan v O'Neill* [2002] NSWSC 877 as an example of a case where an order for sale was refused where the parties had acquired real estate with a view to living in it and ultimately developing it. The trial judge accepted that, in the circumstances of the arrangement the parties had entered into, there was an implied duty to co-operate which carried with it an obligation not to frustrate the venture by making an application for a sale. The court refused an order for sale because the defendant had shown a contractual right which gave her a discretionary defence to the application. However, he said that an equity less than a proprietary, contractual or fiduciary right would, generally be insufficient.

74 Mr Redd also referred me to *Butt's Land Law* 7th ed. at paragraph 6.730 as authority for the proposition that the court may decline to make an order for sale or partition where contractual rights under an agreement bind the Applicant to deal with the property in a certain way; especially where the co-owners are partners in a business enterprise and the partnership agreement binds them to develop the property or otherwise deal with it in a way that is inconsistent with partition or sale.

75 I think the conclusion to be drawn from the authorities is that a co-owner of land is entitled as of right to an order for sale or partition unless the Respondent can show some proprietary right, or some contractual or fiduciary obligation with which an order for sale would be inconsistent.

76 That is reinforced by the requirement in Part IV to ensure that, if a sale or division occurs, it is "just and fair" or, if a physical partition or part sale and part partition is to be ordered, the Tribunal is satisfied that such an outcome would be "just and fair". It is the apparent intention of Parliament that any order made will be just and fair and it could not be just and fair to make an order that was not in accordance with the parties' existing contractual rights or that breached some fiduciary obligation or other equitable right or entitlement of the Respondent.

Partnership

77 Mr Redd submitted that the Land was partnership property and, according to well-established principles of partnership law, it is to be considered as personalty.

78 Mr Epstein said that there was no intention by the parties to enter into a partnership. He referred me to section 6 of the *Partnership Act* 1958 which provides (inter-alia):

> "(1) Joint tenancy tenancy in common joint property common property or part ownership does not of itself create a partnership as to anything so held or owned whether the tenants or owners do or do not share any profits made by the use thereof.
>
> (2)The sharing of gross returns does not of itself create a partnership whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived."

79 I was referred to *Jafari v 23 Developments Pty Ltd* [2018] VSC 404, a case in which parties had entered into a joint venture agreement to carry out a real estate development which did not proceed. An issue arose whether the relationship between the parties amounted to a partnership. As to that, the trial judge said (at para 413-4):

> "413 While a number of express terms were consistent with a partnership having been agreed to, … no aspect of the Terms Sheet definitively indicated a partnership was intended. Each of the 17 indicia relied upon was also consistent with a contractual profit share agreement if the Development ever eventuated.
>
> 414 It is trite to state that whether or not a partnership came into existence must be determined from the intention of the parties objectively ascertained from the whole of the contract, construed in light of the facts and circumstances relevant to the relationship of the parties. … In my view, the following objective facts are relevant to determining whether any of the terms can be construed in a manner consistent with a partnership having been intended:
>
> (1) Nowhere was the term "partner" or "partnership" used, in contrast to a much earlier proposal from Jafari.
>
> (2) The terms of both the Terms Sheet and the First Contract of Sale expressly provided that 23 Developments would purchase the Properties in its own right."

80 I do not believe that the principle referred to by Mr Redd applies to the present case. Although it is the opinion of Professor Sharkey that the joint-venture agreement created a partnership for taxation purposes, I do not believe that it is a partnership in the traditional sense. The parties are not carrying on a business in common with a view to profit. They entered into the Joint Venture Agreement to develop the Land in accordance with its terms. I cannot ascertain from the terms of the document any intention of the parties to enter into a partnership. It is clear from the tenor of those terms that the parties maintained their individual ownership and that the Land was not pooled so as to be held in common for the purpose of carrying on some business enterprise. They are tenants-in-common, but that does not of itself create a partnership.

81 The important point is that, as parties to a Joint Venture Agreement, they are bound to comply with its terms.

The orders sought

82 Mr Epstein said that the Land should be physically divided between the parties and compensation paid by the Respondent for any difference in value of the Land and for the Applicant's residual 12.3% ownership of each lot. He said that the Applicant wished to retain Lot 1 and for the other two Lots to be sold.

83 In the alternative, the Applicant seeks orders that a trustee be appointed to control, effect and finalise the sale of the Lots, including the distribution of any proceeds of such sale and that the Applicant be awarded compensation for the Respondent's actions in dealing with the Lots and for its alleged breaches of its obligations under the Joint Venture Agreement.

84 He said that the key objectives of the Joint Venture Agreement have all been reached, save for securing a buyer for the three Lots. He said that the relationship between the parties was not only unworkable but has broken down to such a fundamental level that without the Tribunal's intervention the parties shall continue to be in dispute and are likely to spend more time and resources in ongoing disagreement.

85 Mr Redd submitted that an order for sale of the three Lots would be inconsistent with the Joint Venture Agreement. He said that the parties had agreed upon a contractual mechanism to deal with disputes, that the Respondent has invoked that mechanism and the Agreed Arbiter's opinion has been furnished. He said that, but for the Joint Venture Agreement and the principles that it embodied, the Respondent would not have proceeded with the purchase and made substantial investments in time and money to progress the proposed development.

86 He said that the purpose of the joint venture was to enable the sale of the individual Lots for profit and it is not open to the Applicant to make application under the Act now to force a sale or division of the Lots at a time of its own choosing.

87 All of these points are well made, but I do not see why an order for sale could not be framed in a manner consistent with the provisions of the Joint Venture Agreement.

Should an order for sale be made?

88 It is clear that the relationship between the parties has broken down completely and that the intended sale of the Lots cannot occur without some outside intervention.

89 The authorities referred to, and the terms of the Act itself, require that, in determining whether or not to order a sale or division of land, the Tribunal must act consistently with the evidence and the legal entitlements of the

parties as disclosed by the evidence. It can never be just and fair to make an order contrary to the evidence or the legal rights of the parties.

90 The fact that the parties have chosen to enter into a Joint Venture Agreement does not prevent the Tribunal from exercising its powers under Part IV. Any co-owner may apply to the Tribunal for an order for sale or division. A joint venture agreement does not necessarily shut out such an application but its terms are highly relevant in deciding whether such an order should be made and if so, what form it should take.

The GST dispute

91 Both parties claimed to have obtained rulings from the Australian Tax Office supporting their respective positions as to whether or not a liability for Goods and Services Tax will be incurred in regard to the sale of the Applicant's 40% interest in the Land.

92 Quite obviously, this Tribunal does not have jurisdiction to determine as between a party and the Australian Tax Office, whether that party is liable to pay goods and services tax in regard to a particular transaction, either actual or anticipated.

93 My task is to determine whether any and what order should be made under Part IV of the Act with respect to the Land. Insofar as the Applicant's liability or otherwise for GST in regard to the proposed sale of these Lots is an issue to be determined, it is a factual one, to be determined as between the current parties on the balance of probabilities along with all the other facts that are in issue.

94 The Applicant said in his witness statement that he had always maintained that his interest in the Land was not to sell it at a profit and that, from his initial purchase with his then two co-purchasers, he had intended to retain one of the blocks "…for personal living purposes." There is support for that in an email that he sent to the estate agent when he bought the Land. However, although that might have been his original intention, it appears that he changed his mind more than once and ultimately, wished to sell all three blocks at a profit.

95 I think the Applicant is right in saying that his potential tax liability is a matter between him and the Australian Tax Office. However, that does not relieve him from the obligation to comply with the terms of the Joint Venture Agreement that he has signed.

96 More significantly, for the reasons already given, an order for sale by this Tribunal must be consistent with the rights and obligations of the parties, otherwise it would not be just and fair, nor would it be consistent with the authorities. If that complicates matters for the Applicant in his dealings with the Australian Tax Office, that is an incidental consequence of the order that he has sought. I have no power to adjust the contractual rights of the parties to suit the convenience of the Applicant.

97 Turning now to the issues in contention.

An order under s.230

98 The Applicant seeks an order to retain one of the Lots. He wishes to have Lot 1 transferred to him, plus an order for payment to make up the difference in value between that Lot and his 40% share in the other two Lots.

99 Although there is power under s.230 of the Act to order a division of the allotments between the parties and a payment for the difference in value in the way Mr Epstein has suggested, that is not what was agreed upon in the terms of the Joint Venture Agreement.

100 By the terms of the Joint Venture Agreement, the parties agreed to subdivide the Land into three separate titles and sell it. Clause 3.2 (b) required the parties to enter into contracts to sell all of the proposed Lots as soon as reasonably possible. There was no provision for either party to take a transfer of any of the Lots. They were all to be sold. I cannot make an order that is inconsistent with the parties' existing contractual rights and if I am to make an order consistent with the Joint Venture Agreement, it will have to be for the sale of all three Lots.

Separate contracts of sale

101 A further issue is the desire of the Applicant to enter into separate contracts with the proposed purchasers containing separate terms in regard to GST. In this regard, Clause 3.7 of the Joint Venture Agreement provided:

> "The parties shall jointly and severally enter into such contracts with third parties as are necessary or convenient to undertake the Project."

102 The term "jointly and severally" would suggest a single document was intended to be used in each case. Clearly, contracts for the sale of the Lots would fall within the description of "…such contracts with third parties as are necessary or convenient to undertake the Project".

103 Moreover, an order for sale under Part IV, is to be for the sale of the whole of the co-owned land. The individual shares of co-owners are not co-owned but are the sole property of the registered proprietor in each case. Consequently, I cannot make a separate order for the sale of either undivided individual share. I must make an order for the sale of the co-owned Land, which means both shares together. Otherwise, it would not be an order for the sale of co-owned property.

Receipt of the proceeds of sale

104 The Applicant wishes to have the purchase price attributable to his 40% share of each lot paid to him separately. The apparent purpose of this is to enable him to deal separately with the Australian Tax Office with respect to GST.

105 Clause 3.5(b) of the Joint Venture Agreement provides that the proceeds of sale of the Lots shall be paid into the project bank account. The purpose of that appears to be to enable project expenses to be paid and the surplus to be

distributed to the parties in accordance with the agreement. Whatever the purpose, that is what the parties agreed to.

106 If an order for sale is to be consistent with the terms of the Joint Venture Agreement, it must provide for the proceeds to be paid into the project bank account. That is particularly important since there appears to be a substantial dispute as to what expenses are properly payable from the account.

The terms of the contract

107 The Applicant wishes to provide in each contract of sale that the sale of his 40% interest is not subject to GST. The Respondent has refused to agree to the inclusion of such a term.

108 The parties were in dispute in that regard when the Applicant informed the Respondent's solicitors that he proposed to implement the dispute resolution procedure in the Joint Venture Agreement in order to resolve it. Although he did not do so, the Respondent's solicitors did. On 15 February 2019, they requested the President of the Law Institute to appoint an arbiter pursuant to Clause 3.4.

109 Pursuant to this request, Professor Sharkey was nominated and, after inviting submissions and considering what he received, expressed his opinion which is set out above.

110 It is apparent that the Applicant disagrees with Professor Sharkey's opinion but that is not to the point. Clause 3.4 of the Joint Venture Agreement provides that the parties shall be bound to adopt the opinion and proceed in accordance with it and that applies, whether they agree with it and or not.

111 The term concerning GST which is sought to be included in the contract of sale by the Applicant is inconsistent with the opinion of Professor Sharkey and so it cannot be included if the order is to be consistent with the Joint Venture Agreement and the rights that the parties have acquired under it.

Claim for damages and adjustment of rights

112 The Applicant claimed an award of damages against the Respondent with respect to a number of matters.

113 When the Supreme Court proceedings were settled the Applicant paid to the Respondent $200,000 for loss alleged to have been suffered by the Respondent by its inability to market and sell any of the Lots between November 2007, when the proceedings were commenced, and June 2018, when they were settled.

114 Mr Epstein said that I should find that, since June 2018 the Respondent has failed, neglected or refused to:

(a) actively market and attempt to sell all three properties;

(b) agree to a reserve price for the auction on 15 September 2018 based on the valuations obtained;

(c) accept two separate and genuine offers to purchase Lot 2;

(i) at the auction of 15 September 2018; and

(ii) shortly thereafter in early October 2018;

(d) appoint new selling agents after the expiry of the appointment of Jellis Craig;

(e) hear the Applicant's complaints regarding Jellis Craig when the Respondent was seeking to re-engage them in early 2019; and

(f) respond to correspondence from the Applicant proposing new agents in May and August 2019.

115 As a consequence, Mr Epstein says that, the Land is now being worth substantially less than the offers of $1,160,000 and $1,200,000 received in September and October 2018 and the Applicant has suffered loss for which it ought to be compensated.

116 Similar complaints are made by the Respondent about the Applicant's conduct and losses of similar magnitude are said to have been suffered.

117 There is no claim for damages in the original Points of Claim, but there was a claim for an accounting and compensation.

118 By a document entitled Amended Points of Claim filed on 6 May 2019, the Applicant included a claim pursuant to sections 230 and 233(1)(a) for losses said to arise from the failure of the auction, the amount claimed being the difference between what each Lot will sell for an $1,200,000.00. By the very nature of this claim, it cannot be quantified until such time as the Lots are sold.

119 Mr Redd object that no leave was obtained for the Applicant to file and serve Amended Points of Claim and that the Applicant has indicated that he would not be relying upon them.

120 Since it appears that both parties claim to have suffered substantial losses from alleged breaches by the other of the terms of the Joint Venture Agreement, the parties should elect whether they wish that to be determined in the Tribunal in connection with an application under s.233 or whether they would prefer to litigate the matter as a damages claim in the County Court. In this regard, I note that statements of contribution and receipts have been filed on both sides in this proceeding.

121 I will hear submissions in this regard at the forthcoming hearing on 4 February 2020.

Orders to be made

122 There will be an order made for the sale of all three Lots with terms consistent with the foregoing reasons. The orders will include the appointment of a solicitor independent of both parties to act for them on the sale and a licensed estate agent to conduct the sale. The identity of the

solicitor and the estate agent are to be agreed in writing but failing agreement, they will be appointed by the Principal Registrar.

123 The reserve price will be fixed by agreement in writing and, failing agreement, it will be fixed pursuant to the dispute resolution method in Clause 3.4 of the Joint Venture Agreement as will any dispute concerning any other matter, including the manner in which the sales are to be conducted or the nature and timing of the marketing program.

124 Upon settlement of each sale, the proceeds are to be paid into the joint venture bank account. No monies are to be paid out of the account except by agreement of both parties or order of the Tribunal.

125 The application for an adjustment of rights and any claim for damages will be adjourned to a date to be fixed.

126 The final wording of the order for sale will be determined following submissions at the hearing fixed for 4 February 2020.

127 Costs will be reserved.

R. Walker
Senior Member