VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP90/2016

CATCHWORDS

Property Law Act 1958 – Part IV – co-owned Property - co-purchase - agreement as to beneficial ownership - contributions to the cost of acquisition - payments made to discharge borrowings - whether made on behalf of the beneficial owners – evidence

FIRST APPLICANT	Lindsay James Muirhead (as trustee for the Ian Brooks family trust
SECOND APPLICANT	Dennis Richard Heslin (as trustee for the Dennis Heslin family trust)
THIRD APPLICANT	Lindsay James Muirhead
FOURTH APPLICANT	Pauline Joan Muirhead
FIRST RESPONDENT	James Edward Hazlett
SECOND RESPONDENT	Gray Friend & Long Services Pty Ltd (ACN 055 469 045)
THIRD RESPONDENT	Arching Pty Ltd (ACN 163 161 233)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	4 and 5 July 2017. Submissions received 14 July 2017
DATE OF ORDER	10 August 2017
CITATION	Muirhead v Hazlett (Building and Property) [2017] VCAT 1236

ORDERS

1. Declare that the funds held following the sale of the subject property belong to the parties in the following proportions:
   (a) one quarter to the First Applicant as trustee for the Ian Brook's family trust;
   (b) one quarter to the Second Applicant;
   (c) one quarter to the Third and Fourth Applicants jointly; and

(d) one quarter to the First Respondent.

2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr P.W. Lithgow of Counsel
For the First Respondent	Mr J. O'Bryan of Counsel
For the Second and Third Respondents	No appearance

REASONS

Background

1. Gray, Friend & Long ("the Firm") was an old-established firm of solicitors in Warragul in Gippsland. It was founded in 1887. At the end of its life it operated from an historic building at 70 Queen Street Warragul ("the Property").

2. The partnership comprising the Firm was dissolved on 30 June 2013 and by 14 October 2014 all of the partners had vacated the Property. Thereafter the Property was vacant.

3. On 2 February 2016 the Applicants brought this application seeking an order for the sale of the Property and a division of the proceeds between the Applicants and the First Respondent.

4. At a preliminary hearing held on 14 June last year, the Tribunal ordered that the Property be sold. The sale has now taken place and the net proceeds are held in a solicitor's trust account pending the resolution of a dispute between the parties as to how they are to be divided.

The hearing

5. The matter came before for hearing on 4 July 2017 with two days allocated. The Applicants were represented by Mr P.W. Lithgow of Counsel and the First Respondent was represented by Mr J. O'Bryan of Counsel. The second and third Respondents did not appear.

6. For the Applicants I heard evidence from the First Applicant, Mr Muirhead, the Second Applicant, Mr Heslin, and one of the four partners of the Firm, Mr Brooks. The First Respondent, Mr Hazlett, gave evidence on his own behalf.

7. The evidence finished on the second day of the hearing. Although I did not say that I required submissions, counsel informed me that they wished to file and serve written submissions but did not propose to make oral submissions unless I thought they were desirable. I directed that any written submissions be filed and served by 14 July 2017.

8. Submissions were received as directed. I have considered these and do not require any oral submissions.

The parties

9. Mr Muirhead joined the Firm as a law clerk in 1960 and worked there for the whole of his working life, retiring in 2005.

10. In 1969 the first Respondent, Mr Hazlett, became a partner. In 1986 Mr Brooks became a partner.

11. At that time, the members of the Firm were carrying on practice in rented premises at 64 Queen Street Warragul. They had a service company, being the Second Respondent, Gray Friend & Long (Services) Pty Ltd ("the Service Company"), which provided it with services such as stationery.

12. Mr Heslin became a partner of the Firm on 1 July 1990.

Purchase of the Property

13. In 1987 the Property became available for purchase and Mr Hazlett approached Mr Muirhead with the suggestion that it be purchased by Mr Hazlett, Mr Brook and Mr Muirhead for $200,000.00.

14. The proposal was to finance the purchase by means of a commercial bill for $135,000.00 through the ANZ bank, with the balance of the cost of acquisition to be met by contributions to be made by Mr Hazlett, Mr Brook and Mr Muirhead of $25,000.00 each. The title to the Property would be registered in the name of the Service Company as trustee of a unit trust and the three contributors would each be issued with one unit in the trust.

The trust

15. The three parties agreed to that arrangement and to that end, on October 21 a Unit Trust Deed was prepared by Mr Hazlett.

16. The trust deed provided that the trustee of the trust was to be the Service Company and that distributions could be made by the trustee from time to time in favour of the unit holders. There was provision made for people to apply for the issue of units and for units to be issued.

17. A bank account was opened in the name of the Service Company "as trustee for the 70 Queen Street Unit Trust" ("the Trust Bank Account").

18. Despite initial denials by Mr Hazlett, it was acknowledged during the hearing, and it is clearly established by the evidence, that $25,000.00 was contributed by each of the three persons referred to.

19. Mr Muirhead has produced his banking records showing that he borrowed the sum of $25,000.00 for the purpose. Mr Hazlett's contributions comprised an initial deposit of $1,000.00 which he paid to the vendor of the Property and two further payments which are recorded in the Trust Bank Account. Mr Brooks' contribution is also recorded in the bank statement of the Trust Bank Account.

20. Mr Muirhead entered the names of the three proposed unit holders in a ledger that he prepared for use as a register of unit holders but he proceeded no further with the accounts because he did not know how Mr Hazlett and Mr Brooks wished to hold their units. It does not appear from the evidence why this issue was not pursued, but no units were ever issued, nor were any formal meetings conducted, either of unit holders or of the directors of the Service Company in relation to the administration of the trust.

21. At the time of purchase, the Property was occupied by tenants and the rent that they paid was received into the Trust Bank Account and then paid out to meet the cost of the borrowings and the outgoings on the Property. At that time, it appears that the rental received was sufficient for that purpose.

The purchase of the Vacant Land

22. In about 1989, Mr Hazlett suggested to Mr Muirhead and Mr Brooks that they should purchase a block of vacant land at 66 Queens Street, Warragul, which was next door to the Property ("the Vacant Land") for $60,000.00. The suggestion was that this would also be bought by the Service Company using borrowed money and that it would become an additional asset of the trust.

23. Mr Brooks said in evidence that he was reluctant to purchase the Vacant Land because it was low-lying and, being vacant, it was not earning any income. He was also concerned that interest rates were high at the time. However, despite these misgivings he agreed.

24. The Vacant Land was purchased and, on February 15, 1990, the Service Company was registered as proprietor. It was agreed that it would be held as an additional asset of the trust. All of the money for the purchase was borrowed from the ANZ Bank.

25. The rental from the tenants of the Property continued to be paid into the Trust Bank Account but, with the added borrowings for the acquisition of the Vacant Land, the earnings were not quite enough to meet the interest due to the bank and payments of outgoings on both properties. As a result, three or four calls were made on the three parties for additional funds to meet the shortfall and these were paid.

The refinance

26. In 1992, difficulties were experienced with the ANZ Bank and it became necessary to refinance the Firm's borrowings. In November of that year the mortgages that had been granted to the bank over the titles to both the Property and the Vacant Land were discharged using money borrowed from a financier ("the Financier"). These borrowings were on an interest-only basis and were secured by a first mortgage over the title to the Property. The title to the Vacant Land then became unencumbered.

27. In late 1993 one of the tenants of the Property moved out and it was decided that the Firm would move in. The Property at the time was in a state of considerable disrepair and extensive renovations costing $40,000.00 were required. This sum was initially provided by the parties in unequal proportions, with most being provided by Mr Muirhead, but they later borrowed $60,000.00 from the Financier in order to repay themselves.

28. At this time, the Second Applicant, Mr Heslin became a co-owner of the Property. It was agreed that, upon payment of a sum of money, he would acquire a one quarter interest. It appears that the parties were of the opinion

that Mr Heslin was acquiring a one quarter interest in the trust but it was expressly agreed that Mr Heslin had no interest in the Vacant Land and since the Vacant Land was considered by the other parties as an asset of the trust, the only way of giving effect to the agreement was to say that he would have a one quarter beneficial interest in the Property rather than the trust.

The Firm's occupancy

29. The Firm moved into the Property during Easter 1994. There was no formal lease but it paid the interest and outgoings on both the Property and the Vacant Land.

30. Some financial records of the Firm were produced during evidence and from these it appears that the payments made by the Firm are shown as "rental". Payment of rates is shown separately. These payments can only have been rental because, since Mr Heslin had no interest in the Vacant Land, payment of outgoings with respect to it from partnership funds would have been inappropriate. However rental was a partnership expense and so it was properly chargeable to the Firm.

31. According to Mr Hazlett's evidence, an amount of $10,000.00 was paid to the Financier as a capital repayment in November 1996 and $20,000.00 was paid in December 1999. Where this money came from and how these payments were accounted for does not appear from the evidence.

The lease

32. In about late 2000 or early 2001, the borrowings were refinanced with the Bendigo Bank. As part of this process a valuation of the Property was required by the bank and, apparently as part of that process, a lease was required to be entered into by the Firm with the Service Company.

33. This lease, which is in evidence, provided for a term of five years from a commencement date of 1 January 2002, with an option for a further term of five years at a rental of $40,000 per annum, payable monthly in advance. There were to be annual adjustments of rental in accordance with the consumer price index. The lease was executed by the Service Company as lessor, with its seal being attested by Mr Hazlett and Mr Heslin. The three partners signed it as tenants and the four beneficial owners of the Property signed as consenting parties.

34. Notwithstanding this lease, which Mr Hazlett prepared, the amounts paid to the Service Company were less than $40,000 per annum. The rent was also never adjusted according to the consumer price index.

35. Mr Hazlett suggested during cross-examination that the lease was not relevant to the question of ownership of the Property. I asked him if he was suggesting that the document was a sham and intended by the persons that executed it to have no legal effect. He did not suggest that it was a sham but he also did not explain why I should not consider it to be valid and binding.

Repayment of the borrowings

36. Whereas the previous financing had been on an interest only basis, the refinancing required repayments of principal as well as interest.

37. Following the refinance, the Firm continued to make monthly payments into the Trust Bank Account which were accounted for as rental and periodical payments were made by the Service Company from that account to the bank in payment of the principal and interest of the loan.

38. By 2009 the whole of the principal had been repaid and the title to the Property became unencumbered. On Mr Hazlett's instructions, no further payments were thereafter made to the Service Company by the Firm on account of its occupancy of the Property.

39. In the meantime, Mr Muirhead had retired in 2005. Both Mr Brooks and Mr Heslin asked Mr Hazlett why it was that rental was not being paid by the Firm, since one quarter of that rental would belong to Mr and Mrs Muirhead. They said that they did not get a clear answer from Mr Hazlett to these enquiries and that he refused to discuss the matter with them.

Sale of the Vacant Land

40. In 2007 the Vacant Land was sold at a substantial profit which was divided equally between Mr Hazlett, Mr Brooks and Mr Muirhead. Although the borrowings with respect to the acquisition of the Vacant Land appear to have been serviced in the meantime by the Firm of which he was a one quarter partner, Mr Heslin received no part of the proceeds of sale. The only justification for that situation was, as previously stated, that the payments that were made by the Service Company with respect to the interest and outgoings were rental for the Firm's occupancy of the Property and indeed, that is how they were accounted.

The arguments

41. Although the parties have described themselves in various documents and during the proceeding as unit holders, no units have ever been issued. However it is common ground that the Service Company did not own the Property beneficially but merely held it as a trustee.

42. Mr Lithgow submitted that the Property was to be held by the Service Company first, upon trust for Mr Hazlett as to one third, Mr Brooks as to one third and Mr and Mrs Muirhead as to one third, and then for those persons plus Mr Heslin as to one quarter each. He said that the payments that were made by the firm were for rental of the Property and so the borrowings were repaid, not by the Firm, but by the Service Company on behalf of the co-owners.

43. Mr Hazlett suggested in the witness box that, because the principal sum borrowed had been repaid entirely by the Firm, Mr and Mrs Muirhead's beneficial ownership was restricted to their initial contribution of $25,000.00.

44. He produced some calculations that he had made to the effect that the total payments made to the Bendigo Bank were approximately $260,000. When the two capital reductions to the Financier are added there was a total of $350,000 repaid, all of which, he said, was paid by the Firm. He said that when this sum is added to the $100,000 contributed by the four unit holders, the total contributions amount to $450,000. Accordingly, he said that the share of Mr and Mrs Muirhead in the net proceeds of sale is limited to 25/450 of the amount held, which he calculated at $55,556.00.

45. In his submissions, he said that although a trust deed was executed, there was no evidence of any steps taken afterwards to issue any units or establish any records of the trust. That is so. He said further that, insofar as Mr and Mrs Muirhead were entitled to any rent, they were entitled to it only according to the proportion that their contributions bear to the total payments made with respect to the Property, which was $450,000.00.

Conclusion

46. I do not accept Mr Hazlett submission. It is quite clear on the evidence that the Property was purchased by Mr Hazlett as to one third, Mr Brooks as to one third and Mr and Mrs Muirhead as to one third. It was held by the Service Company upon trust for those persons in those proportions. When Mr Heslin became a co-owner, one quarter of the Property was thereafter held on trust for him. The income derived from renting the Property, first to the original tenants and then to the Firm, also belong to them in those proportions, that is, one third each to the original owners and one quarter each to the subsequent owners.

47. Since the rental was applied to pay off the loans that were obtained to acquire the Property, the repayments were made by the co-owners according to their beneficial ownership. They were not capital repayments on the part of the Firm. The capital repayments were made by the Service Company on behalf of the beneficial owners.

Orders to be made

48. Accordingly, the Property is owned in the proportions contended for by the Applicants and an order for the distribution of the proceeds of sale will be made accordingly. Costs will be reserved.

SENIOR MEMBER R. WALKER